

7-29-2019

When Policing Social Media Becomes a 'Hassell'

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Gold, Sara (2019) "When Policing Social Media Becomes a 'Hassell'," *California Western Law Review*. Vol. 55 : No. 2 , Article 6.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol55/iss2/6>

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NOTE

WHEN POLICING SOCIAL MEDIA BECOMES A ‘HASSELL’

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INTRODUCTION

In 1996, Congress passed the Communications Decency Act (“CDA”) to address the potential spread of tortious and illegal conduct online.¹ While the emergence of Internet discourse presented exciting new frontiers, it also created legal issues regarding accountability for online communications. Traditionally, when a publication publishes third-party content found to violate the law—*e.g.*, defamation or invasion of privacy—both the publisher and the third-party author can

1. Paul Ehrlich, *Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401, 401 (2002).

be held liable.² Fearing similar liability for interactive websites would expose these sites to unmanageable litigation, Congress passed CDA § 230.

CDA § 230 provides that interactive computer services, or “websites,” *cannot be liable* as the publisher or speaker of user-posted content, which means if a user uploads content that defames, invades privacy, or violates another civil law, only the user and not the website may be liable.³ But websites may still be held accountable for user-uploaded content that infringes on intellectual property or violates federal criminal laws.⁴ Further, a website cannot claim CDA immunity if it actively encourages users to cause civil wrongs or if it significantly edits user-submitted content so as to alter its meaning; however, basic editing, formatting, and content screening do not jeopardize CDA immunity.⁵

Although the statute may seem straightforward, its meaning has been debated by courts and commentators since the law was passed.⁶ As there is no U.S. Supreme Court decision on CDA § 230, interpretation of the statute has been left to state and federal courts.⁷ Because the CDA bars “liability” for interactive websites, one issue is

2. ART NEILL & TERI KAROBONIK, DON’T PANIC – A LEGAL GUIDE (IN PLAIN ENGLISH) FOR SMALL BUSINESSES AND CREATIVE PROFESSIONALS 70 (New Media Rights 2017).

3. Most circuits subscribe to this interpretation of CDA § 230 (there is no U.S. Supreme Court holding). Ryan French, *Picking Up the Pieces: Finding Unity After the Communications Decency Act Section 230 Jurisprudential Clash*, 72 LA. L. REV. 443, 445, 459 (2012). See, e.g., *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009); *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008); *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007).

4. 47 U.S.C. § 230(e)(1)-(2).

5. NEILL & KAROBONIK, *supra* note 2, at 71.

6. See generally French, *supra* note 3; David Lukmire, *Can the Courts Tame the Communications Decency Act?: The Reverberations of Zeran v. Am. Online*, 66 N.Y.U. ANN. SURV. AM. L. 371 (2010); Mark D. Quist, “*Plumbing the Depths*” of the CDA: *Weighing the Competing Fourth and Seventh Circuit Standards of ISP Immunity Under Section 230 of the Communications Decency Act*, 20 GEO. MASON L. REV. 275 (2012).

7. French, *supra* note 3, at 445. But see *Reno v. ACLU*, 521 U.S. 844 (1997), where the U.S. Supreme Court invalidated other CDA sections that broadly attempted to regulate the online transmission of “obscene or indecent” content.

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how to define what qualifies as “liability.” Most obviously, a website cannot be compelled to pay money damages to an aggrieved plaintiff.⁸ In the past, website operators have successfully been dismissed as defendants, even if the plaintiff requested only an injunction and no money.⁹ However, as a recent Yelp-related dispute highlights, a new issue is: after a successful defamation lawsuit against the user, and not the website, can the court simply direct the website to remove the defamatory content if the user refuses or is unable?

Part I summarizes the facts of *Hassell v. Bird*, a California case where Yelp objected to a court order directing it to remove allegedly defamatory reviews. Part II reviews the superior court and appellate court decisions, both of which required Yelp to comply with the court order. Part III discusses the California Supreme Court’s plurality and concurring opinions, which together mustered the four votes necessary to reverse the lower courts. Part IV discusses the two dissenting opinions. Part V weighs some of the interests and considerations behind the various opinions. Lastly, this Note presents a conclusion on the case’s overall merits and proposes a rule of law that could balance the objectives on both sides of the debate.

I. FACTS

In January 2013, Ava Bird, a disgruntled former client of San Francisco law firm Hassell Law Group, posted a one-star Yelp review claiming that the business “doesn’t even deserve one star” and urging potential clients to “STEER CLEAR OF THIS LAW FIRM!”¹⁰ When

8. *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 698 (2001).

9. *See Zango, Inc. v. Kaspersky Lab, Inc.* 568 F.3d 1169, 1170–72 (9th Cir. 2009) (denying injunctive relief against an online provider of protective software-screening technology); *Optinrealbig.com, LLC v. IronPort Sys., Inc.*, 323 F. Supp. 2d 1037, 1047 (N.D. Cal. 2004) (“ . . . [U]nder the CDA [defendant] is immune from liability. For this reason alone, the Court denies OptIn’s motion for a preliminary injunction”). *See also Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 147–48, 161 (E.D.N.Y. 2017) (holding that Israeli complainants, due in part to CDA § 230, could not obtain an injunction against Facebook to stop terrorist organizations from communicating via Facebook).

10. Punctuation and stylization from the original 2013 Yelp posting are retained here. *Hassell v. Bird*, 234 Cal. Rptr. 3d 867, 870–71 (2018) (plurality opinion). Hassell Law Group has its main office in San Francisco, with additional offices in

contacted by Hassell Law Group, she admitted via email to posting the inflammatory review and insisted the firm “accept the permanent, honest review [I] have given you.”¹¹ However, she denied posting a second one-star Yelp review under a different username, though the firm believed this second post was also hers.¹²

In April 2013, the law firm sued Bird for defamation in San Francisco Superior Court on account of both posts, but after multiple attempts at service, Bird did not file an answer to the complaint.¹³ Bird later claimed that she never received a complaint and that the court improperly relied on substitute service via an intermediary who had not seen Bird for months.¹⁴ However, Bird was aware of the lawsuit. In April 2013, she added an addendum to her first Yelp review, accusing the firm of suing her in order to “threaten, bully, intimidate, [and] harass” her into deleting the reviews.¹⁵ She filed a request with the San Francisco Bar Association to mediate the dispute, to which the law firm agreed.¹⁶ However, Bird did not respond to the assigned mediator’s scheduling requests. Hassell Law Group filed a request for a default judgment in July 2013.¹⁷ After a prove-up hearing in January 2014 (that Bird failed to attend), where a judge heard the testimony of managing attorney, Dawn Hassell, the Superior Court entered a default judgment in the law firm’s favor.¹⁸ In addition to awarding Hassell Law Group over \$550,000 in damages, the court ordered Bird to remove every

Santa Cruz and the East Bay. See HASSELL LAW GROUP, <https://www.hasselllawgroup.com/> (last visited May 1, 2019).

11. The review was posted under the pseudonym “Birdzeye B.” *Hassell*, 234 Cal. Rptr. at 871 (plurality opinion).

12. This review, which Bird denied posting, was published under the pseudonym “J.D.” *Id.* at 873 n.5.

13. *Id.* at 871–72.

14. Brief for Ava Bird, Defendant, as Amici Curiae Supporting Appellant at 3, *Hassell v. Bird*, 234 Cal. Rptr. 3d 867 (2018) (No. S235968).

15. This review, like the original January 2013 post, was posted under the “Birdzeye B.” pseudonym. *Hassell*, 234 Cal. Rptr. at 872 (plurality opinion).

16. *Id.* at 905 (Cuéllar, J., dissenting).

17. *Id.*

18. *Id.* at 872 (plurality opinion).

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defamatory online review about Dawn Hassell or Hassell Law Group within five days.¹⁹

Along with ordering Bird to remove her posts, the court also issued a second order against Yelp to remove the three controversial posts and all comments within seven days of the court order.²⁰ While Yelp received a standard notification letter that Yelp was mentioned in the law firm’s complaint, the letter did not indicate Yelp could be subject to a court order or other legal consequence from the litigation.²¹ Yelp felt it had no obligation to remove the reviews and, in May 2014, filed a motion to set aside and vacate the judgment as to both Yelp and Bird.²² In support of its motion, Yelp cited CDA § 230, under which interactive websites cannot be liable as the publisher or speaker of user-posted content.²³

II. LOWER COURT RULINGS AND RATIONALE

Although Yelp claimed that forcing the company to comply with an injunction constituted the type of liability barred by the CDA, the superior court disagreed.²⁴ The court denied Yelp’s motion on the basis that Yelp, by highlighting at least one of Bird’s posts as a “recommended review,” aided and abetted Bird in defamatory conduct.²⁵ Further, Yelp’s desire to set aside the judgment as to Bird, not just Yelp, showed that Yelp and Bird shared a “unity of interest,” *i.e.* that they were acting together.²⁶ The superior court held that, in light of the final judicial ruling that Bird’s reviews were defamatory, an injunction against Yelp was appropriate to prevent Yelp from further aiding and abetting unlawful conduct.²⁷

19. The court also enjoined Bird from posting defamatory reviews about Dawn Hassell or Hassell Law Group in the future. *Id.*

20. *Id.* at 873.

21. Oral Argument at 47:00, *Hassell v. Bird*, 234 Cal. Rptr. 3d 867 (2018) (No. S230213), jcc.granicus.com/MediaPlayer.php?view_id=12&clip_id=673.

22. *Hassell*, 234 Cal. Rptr. at 873 (plurality opinion).

23. *Id.*; *see also* 47 U.S.C. § 230.

24. Order Denying Yelp’s Motion to Set Aside and Vacate Judgment, 2014 WL 12577620 (Cal. Super. 2014).

25. *Id.*

26. *Id.*

27. *Id.*

Yelp, still refusing to remove the posts, appealed to the California Court of Appeal in San Francisco. Abandoning the request to set aside Bird's judgment, Yelp continued to assert that the CDA bars the courts from imposing an injunction on an interactive computer service that did not actively encourage or engage in defamation.²⁸ The court of appeal agreed with the lower court: CDA immunity did not apply to Yelp under these circumstances.²⁹ According to the court, the CDA does not prevent a court from "directing an Internet service provider to comply with a judgment which enjoins the *originator* of defamatory statements posted on the service provider's Web site."³⁰

Yelp argued that past cases automatically dismissed lawsuits against websites like Yelp due to the CDA; however, the court pointed out that Yelp was not a party to any lawsuit.³¹ The court emphasized, "Hassell did not allege any cause of action seeking to hold Yelp liable for Bird's tort. The removal order simply sought to control the perpetuation of judicially declared defamatory statements."³² Yelp also argued that a finding of liability necessarily precedes any injunction and that if Yelp were to violate an injunction, contempt sanctions would be a form of liability.³³ The court reasoned that the liability at the heart of the case was Bird's, not Yelp's, and that contempt sanctions are too far removed from the original defamation liability.³⁴

The court of appeal also noted that the CDA, by its language, is not designed to prevent the enforcement of state laws in a manner consistent with CDA immunity.³⁵ California law already permits injunctions preventing repetition of judicially declared defamatory statements, and California law also permits injunctions against third-parties through whom the enjoined party could act.³⁶ The court stated that even though the lower court's aiding and abetting theory was a bit extreme, absent a proper hearing on the issue, Bird nonetheless acted through Yelp to

28. Hassell v. Bird, 247 Cal. App. 4th 1336, 1361 (2016).

29. *Id.* at 1363 (emphasis added).

30. *Id.*

31. *Id.*

32. *Id.* at 1364–65.

33. *Id.*

34. *Id.*

35. *Id.* at 1363.

36. *Id.*

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keep the posts online. As a result, a court order could reach Yelp as a non-party.³⁷ Ultimately, the court held the application of these principles as to Yelp was consistent with the CDA because the injunction “[did] not impose any liability on Yelp, either as a speaker or a publisher of third-party speech.”³⁸

III. CALIFORNIA SUPREME COURT—PLURALITY AND CONCURRING OPINIONS

Yelp continued to refuse to take down the reviews and appealed the court of appeal’s decision. In July 2018, the Supreme Court of California reversed the court of appeal and ruled that CDA immunity applied to Yelp, preventing the courts from ordering Yelp to remove the controversial reviews.³⁹ Voting 4-3, the Court clearly split on the issue. The result was a three-justice plurality opinion, along with one concurring opinion and two dissenting opinions.⁴⁰ Justice Leandra Kruger, author of the sole concurring opinion, agreed with the plurality’s determination that the court order was invalid, garnering the final vote necessary to nullify the court order.⁴¹

A. *Plurality Opinion: CDA § 230 Immunizes Yelp from Liability*

The plurality opinion, written by Chief Justice Tani Cantil-Sakauye, found the lower courts interpreted the statute too narrowly; CDA § 230 has been “widely and consistently interpreted to confer

37. *Id.* at 1354, 1357.

38. *Id.* at 1363–64.

39. The plurality, finding the CDA issue dispositive, did not rule on the merits of Yelp’s due process argument. *Hassell v. Bird*, 234 Cal. Rptr. 3d 867 (2018). *But see* Justice Kruger’s concurring opinion centered on the due process inquiry. *Id.* at 888–98 (Kruger, J., concurring). The three contested Yelp reviews, all posted in 2013, are still listed on Hassell Law Group’s Yelp page as of this publication, though the firm retains an overall five-star rating. *See Birdzeye B.*, YELP (Apr. 29, 2013), <https://www.yelp.com/biz/hassell-law-group-san-francisco-2?start=20> (also includes the original Jan. 28, 2013 review); *J.D.*, YELP (Feb. 6, 2013), <https://www.yelp.com/biz/hassell-law-group-san-francisco-2?start=20> (listed under “other reviews that are not currently recommended” at the bottom of the page).

40. Hassell Law Firm petitioned for U.S. Supreme Court review, but certiorari was denied. *Hassell*, 234 Cal. Rptr. 3d 867, *cert. denied*, 139 S. Ct. 940 (2019).

41. *Id.* at 888 (Kruger, J., concurring).

broad immunity against defamation liability for those who use the Internet to publish information that originated from another source.”⁴² To support that proposition, the plurality relied chiefly on *Zeran v. America Online*, the seminal case on CDA § 230, and two California cases, *Kathleen R. v. City of Livermore* and *Barrett v. Rosenthal*.

Zeran, decided shortly after the CDA’s passage, was a Fourth Circuit decision that held a website’s knowledge of potentially offensive content does not destroy CDA immunity, as long as the website did not actively encourage or contribute to the content’s creation.⁴³ In *Kathleen R.*, the California Court of Appeal, First District, held an injunction against a named defendant counts as liability under CDA § 230.⁴⁴ The same court of appeal ruled differently in *Hassell v. Bird*, distinguishing it on the basis that Yelp was not named as a defendant,⁴⁵ but the California Supreme Court disagreed with that distinction.⁴⁶

The California Supreme Court itself ruled on CDA § 230 in *Barrett v. Rosenthal* in 2006. There, a unanimous Court adopted *Zeran* as the applicable law in California, emphasizing that “the provisions of section 230(c)(1), conferring broad immunity on Internet intermediaries, are themselves a strong demonstration of legislative commitment to the value of maintaining a free market for online expression.”⁴⁷ Although the Court in *Barrett* acknowledged the “disturbing implications” of granting such a powerful blanket immunity to websites that knowingly redistribute offensive content, the Court

42. *Id.* at 877 (plurality opinion) (quoting *Barrett v. Rosenthal*, 51 Cal. Rptr. 3d 55, 58 (2006)).

43. *Id.* at 877–78 (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997)). The controversy in *Zeran* arose when an AOL user posted advertisements for merchandise bearing offensive messages, and these advertisements instructed interested buyers to contact the plaintiff via telephone. The plaintiff had no connection to the AOL user or to the merchandise, but the plaintiff received angry calls and death threats as a result. *Id.*

44. *Id.* at 878–79 (citing *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 698 (2001)).

45. *Hassell v. Bird*, 247 Cal. App. 4th 1336, 1364 (2016).

46. *Hassell*, 234 Cal. Rptr. at 879 (plurality opinion).

47. *Id.* at 879–80 (quoting *Barrett v. Rosenthal*, 51 Cal. Rptr. 3d 55, 56 (2006)).

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confirmed the importance of strictly interpreting federal laws and protecting free speech online.⁴⁸

The *Hassell* plurality ultimately concluded that CDA immunity applied to Yelp, even though the plaintiff never attempted to assign tort liability to Yelp and no judgment was entered against it.⁴⁹ The plurality disagreed that the court order affecting Yelp was merely incidental to the judgment against Bird; rather, the justices found CDA § 230 squarely applied because Yelp was being forced to act when its only involvement with respect to the content was the mere act of publication.⁵⁰

The plurality provided two reasons why CDA § 230 applied to Yelp. First, the decision implied that "liability" under the CDA encompasses all legal obligations, including injunctions.⁵¹ Second, as the statute broadly proscribes "causes of action" or "liability" without limitation, the justices inferred that immunity is meant to apply equally to non-parties, noting: "[t]his inclusive language . . . conveys an intent to shield Internet intermediaries from the burdens associated with defending against state-law claims that treat them as the publisher or speaker of third party content, and from compelled compliance with demands for relief."⁵² Moreover, the opinion clarified that although non-parties may be subjected to court orders in other contexts, the CDA supersedes these common-law injunctive relief principles.⁵³ However, this did not leave the law firm without a remedy. The firm could choose

48. *Id.* at 881 (citing *Barrett*, 51 Cal. Rptr. 3d at 63).

49. *Id.* at 882–84.

50. *Id.* at 882.

51. To elucidate the CDA drafters' intent in 1996, the Court cited the 1990 edition of Black's Law Dictionary, which defines liability as "a broad legal term" that "has been referred to as of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely." *Id.* at 884.

52. *Id.* at 884–85.

53. *Id.* at 883 ("[I]t is also true that as a general rule, when an injunction has been obtained, certain nonparties may be required to comply with its terms. But this principle does not supplant the inquiry that section 230(c)(1) requires . . . [A]n order that treats an Internet intermediary 'as the publisher or speaker of any information provided by another information content provider' nevertheless falls within the parameters of section 230(c)(1)").

to enforce the already-existing injunction against Bird, who had been ordered to delete her reviews but had not yet done so.⁵⁴

B. Kruger's Concurrence: Due Process, Not the CDA, Shields Yelp

Justice Kruger argued that adjudication of the CDA § 230 issue was unnecessary because California law does not permit a court order against a non-party, unless the non-party is actively facilitating a named party's evasion of a court order.⁵⁵ Common-law principles only allow for an injunction against non-parties "through whom the enjoined party may act, such as agents, employees, aiders, abettors, etc."⁵⁶ Unlike the court of appeal, Kruger reasoned that Yelp was an independent actor because it did not do anything to discourage Bird from complying with the court order to remove the posts.⁵⁷ She wrote, "[The court could] forbid Yelp and others from acting in concert with Bird, or on Bird's behalf, to violate the court's injunction against Bird [b]ut [Yelp] could not . . . be enjoined 'from engaging in independent conduct with respect to the subject matter of th[e] suit.'"⁵⁸ Simply having the "practical ability to 'effectuate' an injunction entered against a party" is not enough of a justification to compel a non-party to act.⁵⁹ Because Yelp was not a facilitator through whom Bird was acting to evade a court order, imposing a legal directive without giving Yelp the prior opportunity to defend itself violated due process.⁶⁰

54. According to the decision, the court order issued in 2014 obligated Bird to "undertake, at minimum, reasonable efforts to secure the removal of her posts," or else face civil contempt. *Id.* at 887.

55. *Id.* at 888–90 (Kruger, J., concurring). Kruger also opined that even if the injunction against Yelp were not inherently invalid, CDA immunity would shield Yelp. *Id.* at 888.

56. *Id.* at 890 (quoting *Berger v. Super. Ct.*, 175 Cal. 719, 721 (1917)).

57. *Id.* at 895 ("The trial court in this case reasoned, among other things, that Yelp is aiding and abetting Bird's violation of the injunction simply by failing to remove Bird's reviews from the website. But this establishes only that Yelp has not stepped forward to act despite Bird's noncompliance. That is not aiding and abetting.").

58. *Id.*

59. *Id.* at 892.

60. *Id.* at 898.

IV. CALIFORNIA SUPREME COURT—DISSENTING OPINIONS

The two dissenting opinions agreed with the lower courts that Yelp should have been obligated to comply with a court order to remove judicially declared defamatory statements.⁶¹ Justice Goodwin Liu wrote a dissenting opinion, and Justice Mariano-Florentino Cuéllar wrote a dissent on behalf of himself and Justice James Stewart.

A. *Liu’s Dissent: No Due Process or CDA § 230 Violation*

Justice Liu primarily argued that the court order against Yelp did not violate due process. Like the court of appeal, he believed Yelp was a non-party through whom Bird acted, justifying a court order without notice to Yelp. “Even if Yelp was not Bird’s agent or servant, it is evident that Bird acted through Yelp in the most relevant sense: It was Bird’s defamation of Hassell, facilitated by Yelp’s willing and active participation, that the trial court sought to enjoin.”⁶² Rebutting Justice Kruger’s argument that an injunction cannot target a non-party’s “independent conduct,” Liu opined that independent conduct is conduct that would be unlawful *irrespective of* the judgment against the named defendant.⁶³ The only reason Yelp was being asked to remove the reviews was *because of* the judgment finding that Bird’s posts defamed Hassell Law Group. Therefore, Yelp’s conduct was inextricable from the subject matter of Bird’s injunction.⁶⁴ Liu additionally argued that CDA immunity did not apply because the court order did not impose liability on Yelp due to its role as speaker or publisher of third-party

61. *Id.* at 898-903 (Liu, J., dissenting); *id.* at 903-25 (Cuéllar, J., dissenting).

62. To support his assertion of Yelp’s “willing and active participation,” Liu noted that Yelp “formats the reviews, makes the reviews searchable, and aggregates reviews of each business into a rating from one to five stars.” Additionally, the site’s Terms of Service state that “[w]e may use Your Content in a number of different ways, including publicly displaying it, reformatting it, incorporating it into advertisements and other works, creating derivative works from it, promoting it, distributing it, and allowing others to do the same in connection with their own websites and media platforms.” *Id.* at 901 (Liu, J., dissenting).

63. *Id.* at 900.

64. *Id.* Liu cited cases suggesting that courts have the discretion to infer a non-party’s relationship to an enjoined defendant without a hearing on the issue. *Id.* at 901–02 (citing *Ross v. Super. Ct.*, 141 Cal. Rptr. 133, 139 (1977)).

content, for the court never questioned the legality of Yelp's decision to post the content.⁶⁵

B. Cuéllar's Dissent: CDA § 230 and Yelp Are Like 'Apples and Oreos'

Justice Cuéllar criticized the plurality's overbroad reading of CDA § 230, arguing the statute is not designed to be a "trump card letting providers of 'interactive computer service' such as Internet platforms evade responsibility for complying with any state court order involving defamation or libel."⁶⁶ Citing *Zeran* and *Barrett*, Cuéllar explained that "liability" under the CDA means "tortious liability," *i.e.* monetary damages.⁶⁷ Further, he noted all of the prior cases, including *Kathleen R.*, specifically barred injunctive relief against interactive websites who were defendants, and here there was no claim against Yelp.⁶⁸ Thus, Cuéllar likened the difference between suing Yelp for relief and simply asking Yelp to facilitate compliance with a valid court order to the difference between "apples and Oreos."⁶⁹

65. *Id.* at 899, 902. Liu noted that the intent of CDA § 230 is to ensure that website operators like Yelp do not have to incur the time or expense of litigation, and Yelp did not have these burdens here. A related legislative goal was to eliminate the pressure for website operators to decide in advance whether a statement may be "potentially defamatory," or else risk a court impeaching the website's negligent decision-making. This problem did not exist in *Hassell*, for the default judgment had already adjudged the reviews defamatory, and Yelp was not being blamed for failing to proactively delete the posts. *Id.* at 898–99.

66. *Id.* at 903 (Cuéllar, J., dissenting).

67. Cuéllar noted that § 230 does not confer immunity from all legal proceedings. *Id.* at 908. He also referred to the 1990 edition of Black's Law Dictionary, which states that "tortious liability" is "redressable by an action for compensatory, unliquidated damages." *Id.* at 909. *See also* *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 23 (1st Cir. 2016); *Doe v. Internet Brands*, 824 F.3d 846, 852 (9th Cir. 2016) (both cases referring to CDA § 230 as a bar on "tort liability").

68. *Hassell*, 234 Cal. Rptr. at 910 (Cuéllar, J., dissenting). Cuéllar also argued that in this case, Yelp, by asserting its own First Amendment interest in the contested speech, took itself outside the scope of CDA § 230, which provides immunity only with respect to others' content. *Id.* at 917.

69. *Id.* at 909.

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Cuéllar also emphasized the serious emotional consequences for victims of defamation, pornography, and other legal wrongs perpetrated via the Internet:

The plurality opinion endangers victims of torts committed online, impermissibly limits the remedies available to Californians who rely on our state courts for protection, and sanctions a rule bereft of justification under California or federal law, with troubling implications for an Internet-dependent society The Internet has the potential not only to enlighten but to spread lies, amplifying defamatory communications to an extent unmatched in our history. The resulting injuries to individuals’ reputational interests from defamation, revenge porn, and similar content can be grave and long-lasting.⁷⁰

The CDA is not meant to be a “reckless declaration of the independence of cyberspace.”⁷¹ In order to prevent unlawful content to remain perpetually on the web, CDA § 230 should not be interpreted as an absolute liability bar, and immunity should not necessarily have been extended to Yelp in this case.⁷²

V. DISCUSSION

Even before the final Supreme Court decision, this case received considerable media and scholarly attention, with famous attorneys such as renowned constitutional law scholar Erwin Chemerinsky and famous law blogger Eugene Volokh weighing in on opposite sides of the debate. Chemerinsky, dean of the University of California, Berkeley School of Law, believed that the lower courts got it right: CDA § 230 should not apply to Yelp because it was not a named defendant, and requiring websites’ cooperation is necessary to combat unlawful online activity.⁷³ Volokh, however, argued that CDA § 230 should apply, for enjoining websites under these circumstances offends due process, free

70. *Id.* at 903–04, 918.

71. *Id.* at 925.

72. Cuéllar would have remanded the case to the court of appeal to investigate whether Yelp was acting in concert with Bird in keeping the posts online. *Id.*

73. Brief for Erwin Chemerinsky et al., as Amici Curiae Supporting Respondent at 1-3, *Hassell v. Bird*, 234 Cal. Rptr. 3d 867 (2018) (No. S235968).

speech, and remedies principles.⁷⁴ Of the amicus briefs filed, the vast majority supported Yelp.⁷⁵ Journalists and bloggers likewise clamored to comment on the dispute, with much of the discussion favoring Yelp.⁷⁶

Ultimately, the Supreme Court decision's implications are uncertain given the patchwork of judicial opinions, none of which received a four-justice majority. Even though four justices agreed the court order against Yelp was invalid, without a majority opinion, there is no binding law to guide California courts on how to handle similar matters in the future.⁷⁷ Notably, the opinions did not address the First Amendment, despite the obvious free-speech implications of monitoring Internet discourse, and there was no clear conclusion on how to enjoin non-parties without violating due process.⁷⁸ While California courts probably will no longer issue court orders to non-party website publishers, some websites may still opt to voluntarily take down content adjudged to be unlawful. According to technology law expert Eric Goldman, this case more or less maintains the status quo, for "[p]laintiffs will still seek default judgments, services will still honor them most of the time, and plaintiffs are going to be reluctant to

74. Brief for Eugene Volokh as Amicus Curiae Supporting Appellant at 13–14, *Hassell v. Bird*, 234 Cal. Rptr. 3d 867 (2018) (No. S235968).

75. *Hassell*, 234 Cal. Rptr. at 868.

76. See, e.g., Eric Goldman, *The Internet Rallies Against A Terrible Section 230 Ruling—Hassell v. Bird*, TECH. & MKTG. LAW BLOG (Aug. 22, 2016), <https://blog.ericgoldman.org/archives/2016/08/hassell-v-bird.htm>; Mike Masnick, *Another Day, Another Horrible Ruling That Undermines the First Amendment and Section 230*, TECHDIRT (July 9, 2016, 11:44 PM), <https://www.techdirt.com/articles/20160608/17040434662/another-day-another-horrible-ruling-that-undermines-first-amendment-section-230.shtml>; Aaron Minc, *California Appellate Decision Forces Yelp to Remove Defamatory Review*, MINC (July 14, 2016), <https://www.minclaw.com/california-appellate-court-decision-forces-yelp-remove-defamatory-review/> (predicting that the lower courts' decisions would eventually be overturned).

77. As technology law expert Eric Goldman noted, "That's a good sign that courts citing this precedent will reach conflicting results. Something to look forward to." Eric Goldman, *The California Supreme Court Didn't Ruin Section 230 (Today)—Hassell v. Bird*, TECH. & MKTG. LAW BLOG (July 2, 2018), <https://blog.ericgoldman.org/archives/2018/07/the-california-supreme-court-didnt-ruin-section-230-today-hassell-v-bird.htm>.

78. *Id.*

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bring lawsuits in those situations where the services don't honor the judgments."⁷⁹

Although it does not expressly address the First Amendment, the *Hassell* decision favoring Yelp is important for protecting free speech on interactive websites. As the plurality points out, "[e]ven if it would be mechanically simple to implement such an order, compliance still could interfere with and undermine the viability of an online platform."⁸⁰ More specifically, users might no longer be able to fully trust websites like Yelp to be a platform for honest dialogue if wealthy plaintiffs could too easily censor website content via default judgments against speakers lacking the financial means to defend themselves in court.⁸¹ The Los Angeles Times wrote, "[g]iving complainants another tool to send ostensibly offending content to the memory hole would result in Web publishers publishing nothing even remotely negative. In the case of a review site like Yelp, only positive reviews would survive, destroying the site's usefulness."⁸²

Ordinarily, judicial suppression of speech is not tolerated without a fair proceeding and convincing evidence that said speech falls outside First Amendment protection. Defamation is a recognized exception to the right to free speech, but if the plaintiff cannot show beyond a preponderance of the evidence that the speech classifies as defamation, then the speech should remain undisturbed.⁸³ Yet the proceedings to suppress the Yelp reviews suffered key deficiencies undermining that burden of proof: Bird may not have been properly served with a complaint, one of the posts was not proven to be Bird's, and Yelp was

79. *Id.*

80. *Hassell v. Bird*, 234 Cal. Rptr. 3d 867, 885 (2018) (plurality opinion).

81. In her amicus curiae brief in support of Yelp, Bird asserted that legitimizing the law firm's strategy would authorize "elimination of online speech that offends anyone with enough money to hire a lawyer," as defending even the beginning stages of a defamation lawsuit can cost tens of thousands of dollars. See Brief for Ava Bird, Defendant, as Amicus Curiae Supporting Appellant at 8–9, *Hassell v. Bird*, 234 Cal. Rptr. 3d 867 (2018) (No. S235968).

82. Michael Hiltzik, *Yelp May Have Just Saved the Internet—But the Court Ruling In Its Favor is a Dangerous Muddle*, L.A. TIMES (July 3, 2018), www.latimes.com/business/hiltzik/la-fi-hiltzik-yelp-internet-20180703-story.html.

83. 50 Am. Jur. 2d *Libel and Slander* § 490 (Westlaw 2018).

not given a reasonable opportunity to defend the posts before being ordered to remove them.⁸⁴

Regarding authorship of the posts, Bird claimed that one of the three posts, authored by “J.D.,” was not even hers.⁸⁵ The two posts she claims she wrote were authored by “Birdzeye B.” from Los Angeles, California, an apparent play on the woman’s real name.⁸⁶ Both posts are long and wordy, and they contain no capitalization except for phrases in all-caps.⁸⁷ By contrast, the “J.D.” post attributed to Bird was only four sentences long, and the first letter of each sentence was capitalized.⁸⁸ “J.D.” is listed as being in Alameda, California, which is in the Bay Area.⁸⁹ Further, “J.D.” criticized the law firm’s supposed practice of charging clients for faxes and mailings, which seems unrelated to Birdzeye B.’s complaints about Hassell Law Group’s general incompetence without mention of expenses.⁹⁰ Not only the different usernames and cities, but also the stylistic differences suggest that “J.D.” is a different person who happened to complain about Hassell Law Group around the same time Bird did. Therefore, Yelp was especially justified in resisting a court order to take down all three posts, as the trial court did not deliver a defamation judgment against the true author of the “J.D.” post. Had CDA § 230 not shielded Yelp in this case, the Court may have been able to force Yelp to take down another user’s content, undermining Yelp users’ freedom from censorship absent a valid legal judgment against the author.

Hassell Law Group even admitted that it purposefully sued Bird and not Yelp because it was aware that CDA § 230 would prevent Yelp from being liable as a defendant.⁹¹ Bird alleged that the law firm was

84. Oral Argument at 55:00, *Hassell v. Bird*, 234 Cal. Rptr. 3d 867 (2018) (No. S230213), jcc.granicus.com/MediaPlayer.php?view_id=12&clip_id=673.

85. *Hassell v. Bird*, 234 Cal. Rptr. 3d 867, 873 n.5 (2018) (plurality opinion).

86. See Birdzeye B., YELP (Apr. 29, 2013), <https://www.yelp.com/biz/hassell-law-group-san-francisco-2?start=20> (also includes the original Jan. 28, 2013 review).

87. *Id.*

88. J.D., YELP (Feb. 6, 2013), <https://www.yelp.com/biz/hassell-law-group-san-francisco-2?start=20> (listed under “other reviews that are not currently recommended” at the bottom of the page).

89. *Id.*

90. *Id.*

91. Oral Argument at 55:00, *Hassell v. Bird*, 234 Cal. Rptr. 3d 867 (2018), jcc.granicus.com/MediaPlayer.php?view_id=12&clip_id=673.

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aware when it sued her that she was "judgment proof," *i.e.* that the chances of successfully collecting from her were slim.⁹² The suggestion is that the law firm anticipated that a lawsuit against Bird would result in a default judgment, and the firm was really aiming to circumvent CDA § 230 in order to compel Yelp to act:

If plaintiffs' approach were recognized as legitimate, in the future other plaintiffs could be expected to file lawsuits pressing a broad array of demands for injunctive relief against compliant or default-prone original sources of allegedly tortious online content. Injunctions entered incident to the entry of judgments in these cases then would be interposed against providers or users of interactive computer services who could not be sued directly, due to section 230 immunity.⁹³

In its blog post celebrating the ruling, Yelp proclaimed that websites should remain free to use their own standards to determine whether user-posted content violates terms of service, without the potential for abuses of the legal system.⁹⁴ The *Hassell* decision is significant because it sends a clear message that future plaintiffs cannot rely on procedural strategy to skirt the letter of the law and potentially quell free speech.

On the other hand, there are times when the law views speech as more harmful than helpful. As the dissent laments, a too-strict reading of CDA § 230 could embolden perpetrators to heedlessly post defamation, pornography, and other unlawful content. Yelp and other interactive websites have long faced the issue of combatting "weaponization" by people who misuse the websites.⁹⁵ As recently as

92. Brief for Ava Bird, Defendant, as Amici Curiae Supporting Appellant at 8, *Hassell v. Bird*, 234 Cal. Rptr. 3d 867 (2018) (No. S235968).

93. *Hassell v. Bird*, 234 Cal. Rptr. 3d 867, 887 (2018) (plurality opinion).

94. Aaron Schur, Yelp's deputy general counsel, wrote that while the website does not condone defamatory speech, the website's staff "studies court orders to ensure they are valid and actually make a showing that defamation has occurred, before Yelp removes reviewer content." Aaron Schur, *A Case for the Internet: Hassell v. Bird*, YELP OFFICIAL BLOG (July 2, 2018), <https://www.yelpblog.com/2018/07/a-case-for-the-internet-hassell-v-bird>.

95. "For years, crowd-sourced review sites like Yelp and TripAdvisor have been manipulated by trolls, paid reviewers, and politically enraged citizens." Louise Matsakis, *The Red Hen and the Weaponization of Yelp*, WIRED (June 26, 2018, 10:47 AM), <https://www.wired.com/story/red-hen-trump-and-weaponization-of-yelp/>.

June 2018, Yelp had to monitor politically motivated “reviews” sparked by a restaurant asking White House press secretary Sarah Sanders to leave the establishment.⁹⁶ The flood of inflammatory posts, including posts accusing the restaurant owner of pedophilia, spread like fire throughout Yelp, Facebook, and Twitter.⁹⁷ These hateful posts even spread to social media pages for unaffiliated restaurants with the same name in different parts of the country.⁹⁸ Although Yelp works to flag and remove fraudulent reviews, the foregoing examples show the difficulty interactive websites face in managing their own users.⁹⁹

Cuéllar noted in his dissent that if courts cannot direct websites to remove content when the user refuses or is unable, runaway defendants like Bird will wield the power to withhold relief from legitimate plaintiffs.¹⁰⁰ This consequence is especially concerning when it comes to websites designed so that users cannot remove content once it is posted, and the website is the only entity that can. Although Yelp users can delete their own posts,¹⁰¹ this is not necessarily true for all interactive computer services covered by CDA § 230. For example, on blog sites generated by WordPress, visitors cannot delete their own comments; only the website’s administrators can approve or delete

96. In 2012, Yelp faced a similar issue when users reacted after a pizzeria owner posted a photo of himself hugging then-president Barack Obama. *Id.* See also Tamar Auber, *Red Hen Yelp-Bombed with One and Five Star Reviews After Owner Boots Sarah Sanders*, MEDIAITE (June 23, 2018, 8:13 PM), <https://www.mediaite.com/online/red-hen-yelp-bombed-with-one-and-five-star-reviews-after-owner-boots-sarah-sanders/>; Kristen A. Lee, *Obama Hatemongers Trash Website Rating of Bear Hugging Pizzeria Owner with Negative Reviews*, N.Y. DAILY NEWS (Sept. 11, 2012, 10:04 AM), www.nydailynews.com/news/politics/obama-hatemongers-trash-website-rating-bear-hugging-pizzeria-owner-negative-reviews-article-1.1156590.

97. Matsakis, *supra* note 95; Aaron Mak, *The Mind-Numbing Social Media Outrage at Restaurants That Had Nothing To Do with Sarah Sanders*, SLATE (June 25, 2018, 1:32 PM), <https://slate.com/technology/2018/06/sarah-sanders-red-hen-unaffiliated-restaurants-social-media-outrage.html>.

98. Mak, *supra* note 97.

99. Matsakis, *supra* note 95.

100. *Hassell v. Bird*, 234 Cal. Rptr. 3d 867, 918 (2018) (Cuéllar, J., dissenting) (“Nothing in the legislative history supports the idea, implicit in the plurality opinion’s position, that Congress reasonably sought to deprive victims of defamation and other torts committed online of any effective remedy”).

101. *How Do I Remove A Review That I Posted?*, YELP SUPPORT CTR., https://www.yelp-support.com/article/How-do-I-remove-a-review-that-I-posted?l=en_US (last visited May 1, 2019).

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comments.¹⁰² Given the wide variety of websites protected under CDA § 230, there are likely multiple other platforms where users cannot delete content on their own, creating concern if courts cannot reach the website directly.¹⁰³

It was appropriate to shield Yelp in this case, where there were serious procedural and evidentiary insufficiencies, particularly with respect to the “J.D.” post that Bird probably did not write. But Yelp’s due process argument presents an interesting paradox: CDA § 230 normally shields websites from litigation, yet Yelp insisted in oral argument that it wanted the opportunity, pre-judgment, to defend the posts.¹⁰⁴

Websites realistically will not be able to defend every “Bird” in court. If website intervention in these types of cases were to become routine, websites would have to pick and choose which cases and which defendants to defend. Aid from corporate counsel could provide a significant advantage to certain defendants, many of whom lack the means to hire adequate counsel.¹⁰⁵ To avoid the new legal problem of “selective defense,” akin to selective prosecution, it makes sense that the California Supreme Court decided instead to uphold the spirit of CDA § 230 and wholly exclude websites from the ambit of such proceedings. Nonetheless, by shielding websites from all injunctions in situations like this, the implication is that websites’ judgment regarding user content supersedes that of the legal system.

102. Cf. Options, WORDPRESS.COM FORUMS (Dec. 4, 2006, 4:21 AM), <https://en.forums.wordpress.com/topic/can-i-delete-a-comment-i-made-to-another-blog/> (“[T]he comment you’ve posted on someone’s blog becomes property of the owner of this particular blog (who can modify it by any way she wants). In other words, the original comment left by you on someone’s blog is not yours anymore, now it belongs to the owner of the blog you have posted comment on”).

103. The CDA’s broad definition of “interactive computer services” can include any “website that allows users to post or display material . . . [including] blogs, message boards, or websites that allow users to add comments or upload photographs.” David L. Bea & Assocs., *Liability Protections for Online Service Providers Under the DMCA and CDA*, BEA & VANDENBERK ATTORNEYS AT LAW (Mar. 31, 2011), <https://www.beavandenberk.com/ip/copyright-tm/liability-protections-for-online-service-providers-under-the-dmca-and-cda/>.

104. Oral Argument at 55:00, *Hassell v. Bird*, 234 Cal. Rptr. 3d 867 (2018) (No. S230213), jcc.granicus.com/MediaPlayer.php?view_id=12&clip_id=673.

105. See *supra* note 81 and accompanying text.

CONCLUSION

The “J.D.” controversy exemplifies the danger of overbroad censorship if courts could so easily direct websites, instead of defendants, to delete content; although a website has the ability to delete any content, a defendant can only delete the content he or she actually uploaded. Thus, the majority of the California Supreme Court justices favored the autonomy of interactive websites so that plaintiffs cannot exploit the ability to remove content and the public continues to trust websites to be uncensored platforms for honest dialogue. Protecting free speech on the Internet is important, and shielding interactive websites from litigation and undue censorship ensures that these services are able to survive. The unfortunate consequence of the decision, however, is that Hassell Law Group will probably have defamatory reviews remain perpetually on the web. The law firm can try to enforce the court order against Bird, but it is unclear whether such a course of action will be effective. Especially in situations where website users cannot remove content on their own, California should create some mechanism to authorize a court order (but no other liability) against interactive websites, but only under select conditions where the website has notice and an opportunity to be heard.

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