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MEMORANDUM OF LAW ON THE COMMUNICATIONS DECENCY ACT (CDA)

The Communications Decency Act (CDA) was adopted in 1996, well before the effect of the law and the breadth of technological advances on the internet could have been anticipated. Today, courts have misinterpreted the CDA to immunize innumerable websites and mobile applications from discriminatory acts toward users, including not only censorship, but outright bans toward protected classes of people. This immunity permits discrimination that would be deemed unconscionable discriminatory conduct in any other business or consumer context.

Without overexaggerating the concern, an internet site can now be immune from liability even if it decided to ban all African American or Latino users, Christian or Muslim users, and Gay or Lesbian users, regardless of the discriminatory purpose behind the ban. A career-oriented site like LinkedIn could ban all female users even if its express purpose was to suppress equality in the workforce. We cannot imagine that sanctioning discrimination over the internet is what Congress intended with the passage of the CDA.

Summary of the CDA

In short, the CDA[1] was written to broadly apply to an "interactive computer service"[2] which would include a vast array of internet businesses like LinkedIn, Facebook,[3] and Twitter. The immunity for interactive computer services is not limited to social media services, but extends to include online sellers, service providers and other varieties of companies like Amazon[4], eBay[5], Vimeo[6], YouTube, AOL[7], Yelp[8], and more.

There are two relevant sections of the CDA: Section 230(c)(1) and section 230(c)(2). Section 230(c)(1) was intended to prevent chatrooms (the earliest of social media platforms) from being held liable for defamatory statements written on-line against one user by another third party user. In contrast, section 230(c)(2) was written for the purpose of providing immunity to covered

[1] 42 USCS § 230.
[2] 42 USCS § 230(f)(2).
[3] *Fraley v. Facebook, Inc*., 830 F. Supp. 2d 785, 801-02 (N.D. Cal. 2011).
[4] *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136 (2019)(en banc review pending).
[5] *Gentry v. eBay, Inc*., 99 Cal. App. 4th 816 (Cal. Ct. App. 2002).
[6] *Domen v. Vimeo*, 2020 U.S. Dist. LEXIS 7935 (2020)(appeal pending).
[7] *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).
[8] *Levitt v. Yelp!, Inc.*, Nos., 2011 U.S. Dist. LEXIS 124082, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011).

websites when filtering inappropriate content with a "good faith" reason for doing so.[9] Congress' stated purpose for section 230(c)(2) was to encourage websites to filter pornography and other objectionable content in order to protect children.

Misapplication of the CDA

However, at least four federal district courts have misapplied the CDA by ignoring the distinctions between sections 230(c)(1) and (2).[10] Under this misinterpretation, Facebook could have the right to tell all African-Americans that they are not welcome on its social media platform, and Amazon could have the right to ban all Muslims from registering an account to buy or sell on its platform. I cannot imagine that Congress ever intended to give YouTube the right to tell Rosa Parks to find another video platform on the basis that she is African American. But immunity for discrimination against protected classes of persons is the actual result of the courts' misinterpretation of Congress' original intent for the CDA.

Impact on Church United and Pastor Jim Domen

For example, our client Church United was an account holder with Vimeo. Vimeo is a social media platform that hosts videos from users, allows them to be shared, and allows other users to comment on those videos. Church United is a network of Christian pastors led by Pastor Jim Domen.[11] Church United seeks to engage pastors in the cultural and political environment. Church United posted 89 videos over the last few years through a subscription wherein Church United paid Vimeo a fee for use of the platform. Those videos contained a variety of content, from encouraging Pastors to serve their community, to encouraging them to build relationships with their local political leaders.

Vimeo's Ban on Church United

The Friday after Thanksgiving 2018, Vimeo gave Church United a written notice to remove videos it deemed objectionable within 24 hours or else Vimeo would cancel Church United's account. Jim Domen asked Vimeo to identify the objectionable videos. A Vimeo representative responded by identifying five videos that Vimeo deemed to contain harassing content in violation of Vimeo's terms and conditions of service. Vimeo considers harassing content to include any content promoting so called Sexual Orientation Change Efforts (SOCE). Two of the five videos addressed

[9] 42 USCS § 230(c)(2); 42 USCS § 230(b)(3)-(4).
[10] *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088 (N. Dist. Cal. 2011).
[11] *Jim Domen made a personal decision to change his sexual orientation from homosexual to heterosexual. After attending seminary, he married his wife and now has three children. Mr. Domen has experienced significant discrimination in his life, not as a homosexual, but because he now identifies as a former homosexual.*

the efforts by the California legislature to pass a ban on all SOCE, but neither those two videos nor any other video could be considered "harassing" by any normal sense of the word.

Lawsuit for Discrimination Based on Religion and Sexual Orientation

My law firm filed a lawsuit against Vimeo alleging that Vimeo's decision was discriminatory against Jim Domen and Church United. We believe that the rationale behind Vimeo's decision was based on testimonies from Mr. Domen and other individuals about their decision to change their sexual orientation, finding help and solace in professional counseling. We contend that Vimeo violated California's nondiscrimination laws which prohibit businesses operating in California from engaging sexual orientation and religious discrimination.

Vimeo contends that even if our allegations regarding discrimination were true, the CDA immunizes Vimeo. Unfortunately, Vimeo's argument is substantiated by some of the federal case law interpreting the CDA. That case law, in our opinion, misinterprets the original intent and creates the unanticipated consequence that a vast array of internet sites are unaccountable and allowed to discriminate with impunity.

Impetus for the CDA

Prior to the enactment of the CDA, the responsibility of social media platforms to remove defamatory content was in question. Two cases addressing this question ended in two different results. In *Stratton Oakmont, Inc. v. Prodigy Servs. Co.,*[12] the court held the interactive computer service liable for defamatory statements made by one platform user against another user. The interactive computer service was held liable to the plaintiff because it engaged in some filtering and editing of user content but did not remove the defamatory speech. Another case, *Cubby, Inc. v. CompuServe, Inc.,*[13] found no liability to the interactive computer service for defamatory statements made by one user against another.

In large part, Congress passed the CDA in 1996 in response to these two conflicting cases. The purpose for the original enactment of the CDA was twofold. First, the CDA was intended to prevent an "interactive computer service" from being liable for the defamatory statements of one user against another user. Congress recognized that if an interactive computer service could be held liable for a third party user's content that defamed another one of its users, internet companies could be held liable as if they were the publisher of a newspaper. But a newspaper publisher is different from many internet services because many interactive computer services allow persons to post statements on the platform without any prior filtering by the company. Unlike an interactive internet service, a newspaper has the ability to decide what to publish or not publish before it prints. If interactive computer services were to be held liable just as a publisher, the internet companies

[12] No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).
[13] 776 F. Supp. 135 (S.D.N.Y. 1991).

would likely severely filter far more content than necessary just to avoid liability. This would unnecessarily restrict free speech over this new and emerging technology. To address this concern, Congress included section 230(c)(1):

> **(1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.**

Section 230(c)(1) effectively prevents any lawsuit against an interactive computer service that seeks to hold the interactive computer service liable for defamation or any other cause of action that relies upon the concept that the interactive computer service is a publisher of content.

The second purpose of the CDA was to encourage interactive computer services to voluntary monitor and filter offensive or obscene material that would be considered harmful to children.

> **(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—**
>
> > **(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or**
> >
> > **(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].**

Therefore, section 230(c)(2) grants immunity to an interactive computer service for filtering content so long as the filtering is done in good faith. This allows a company to prevent obscene information from being posted by a user and allows a company to censor existing obscene information without fear of liability, so long as the company is acting in good faith. This scenario does not necessarily anticipate a third party being involved like the defamation-type claims prevented in section 230(c)(1).

Recent Cases Misinterpreting the CDA

In our current case, *Domen v. Vimeo*, a US District Court for the Southern District of New York relied on the CDA to dismiss the lawsuit brought against Vimeo for an alleged violation of California's Unruh Civil Rights Act. The lawsuit alleged discrimination based on religion and sexual orientation when Church United and Jim Domen were banned from Vimeo's video hosting

service. We contend that this opinion misinterpreted the CDA by applying section 230(c)(1) even though there was no third party serving as "another content provider."

In *Ebeid v. Facebook, Inc.*[14], the US District Court for the Northern District of California likewise dismissed the plaintiff's claims for discrimination based on California's Unruh Civil Rights Act. *Ebeid* relied on a 2017 Ninth Circuit case, *Sikhs for Justice Inc. v. Facebook, Inc. ("SFJ").*[15] In *SFJ*, the Ninth Circuit applied the CDA to a federal civil rights lawsuit in a two page opinion, without performing any statutory analysis, simply stating that "we have found no authority, and *SFJ* fails to cite any authority, holding that *Title II of the Civil Rights Act of 1964* provides an exception to the immunity afforded to Facebook under the CDA."[16] This errant interpretation of the CDA has been accepted without any serious statutory interpretation or analysis as to legislative intent since *Riggs v. MYSPACE*[17] was decided in 2011, wherein only one sentence was devoted to this questionable interpretation.[18] Each of these courts have simply relied upon this errant interpretation originating from *Riggs*, which is a case about negligence, not discrimination.

There are additional cases not involving nondiscrimination laws where courts have applied section 230(c)(1) and failed to limit its application to third party defamation lawsuits.[19] In sum, the only cases we have found where no third party was required for the application of section 230(c)(1) originated from the Northern District of California and the Central District of California (Two from the Ninth Circuit, five from the Northern District, and one from the Central District).

In contrast, a federal district court in Florida, in *E-Ventures Worldwide, LLC v. Google, Inc.*, properly analyzed the limitations of section 230(c)(1) and instead applied the good faith requirement in section 230(c)(2) where no third party conduct was involved. The plaintiff was the information content provider (as opposed to a third party) and the defendant was sued because it had deleted much of plaintiff's account content.[20]

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[14] No. 18-CV-07030-PJH, 2019 WL 2059662 (N.D. Cal. May 9, 2019).
[15] 697 F. App'x 526 (9th Cir. 2017).
[16] *Id.*
[17] *Riggs v. MySpace, Inc.*, 444 Fed. App'x 986, 987 (9th Cir. 2011)(applying the CDA to claims of negligence when the plaintiff's account was removed by the defendant).
[18] *See also, Fed. Agency of News v. Facebook, Inc*., 2020 U.S. Dist. LEXIS 6159 (N. Dist. Cal. 2020)(Section 230(c)(1) immunity is conflated with section 230(c)(2) to hold Facebook immune when it removed a Russian-based account and dismissed the case, inclusive of a race-based Unruh Civil Rights claim).
[19] *Riggs v. MySpace, Inc.*, 444 Fed. App'x 986, 987 (9th Cir. 2011)(applying the CDA to claims of negligence when the plaintiff's account was removed by the defendant); *Levitt v. Yelp! Inc*., 2011 U.S. Dist. LEXIS 124082 (N. Dist. Ct. Cal. 2011)("Plaintiffs' allegations of extortion based on Yelp's alleged manipulation of their review pages — by removing certain reviews and publishing others or changing their order of appearance —falls within the conduct immunized by § 230(c)(1)"); *Lancaster v. Alphabet, Inc.*, 2016 U.S. Dist. LEXIS 88908 (N. Dist. Cal. 2016); *Brittain v. Twitter*, 2019 U.S. Dist. LEXIS 97132 (N. Dist. Cal. 2019).
[20] *E-Ventures Worldwide, LLC v. Google, Inc*., 2017 WL 2210029 at 3 (M.D. Fla. 2017).

Free Speech Implications

Some have questioned why the cake baker case, *Masterpiece Cakeshop v. Colorado Civil Right Commission*,[21] is any different. Some wonder why Vimeo wouldn't have the same right to deny service just like the cake baker based on its own free speech rights. In short, we are not asking Vimeo to design a cake, produce a video, or say anything. Vimeo is similar to a mini-storage building in California where customers rent space to store their belongings. Vimeo provides storage space for the public to create an account and post their own videos. Vimeo charges for its service and collects advertising money. Vimeo should have no more of a right to tell Church United to find another platform to store its videos than a mini-storage business has a right to tell an Orthodox Jew to find another facility to store his religious materials. Likewise, a hotel has no right to deny service to an individual that wants to rent a room just because of her ethnicity or sexual orientation. Vimeo is just like any other business operating in California and should be obligated to comply with neutral and generally applicable nondiscrimination laws. All Americans, secular and religious, gay or straight, deserve to have equal access to public accommodations and to be free from unlawful discrimination.

CONCLUSION

Vimeo v. Domen is significant because this district court and a few other lower courts have interpreted the federal Communications Decency Act to give immunity to Big Tech whenever such a company commits unconscionable discrimination in their online filtering decisions against protected classes of individuals – for example, classifications based on race, religion, color, creed, or sexual orientation.

The effect of the court's interpretation of the CDA is that a company like Vimeo, YouTube, or even Amazon can decide that it will not allow someone to hold an account with their site just because they are of a particular race or religion. This type of discrimination is normally unlawful for businesses operating in California; but according to this court, the CDA exempts Big Tech from states' nondiscrimination laws when filtering content or deciding who is allowed to access the service they offer. This should concern everyone from left to right. This is a serious problem for the future if neither the courts nor Congress reverse this interpretation of the CDA, because the world wide web is now the public square of yesterday.

[21] 138 S. Ct. 1719 (2018).