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INTERNET LAW — COMMUNICATIONS DECENCY ACT —  
FEDERAL DISTRICT COURT DENIES § 230 IMMUNITY TO  
WEBSITE THAT SOLICITS ILLICIT CONTENT. — *FTC v. Ac-  
cusearch, Inc.*, No. 06-CV-105, 2007 WL 4356786 (D. Wyo. Sept. 28,  
2007).

Section 230(c)(1) of the Communications Decency Act<sup>1</sup> (CDA) gives online publishers broad immunity from liability arising out of content they did not wholly or partially create.<sup>2</sup> The courts have interpreted this provision generously on a number of dimensions,<sup>3</sup> and as a result it has developed into a broad and powerful shield for online businesses. In the shelter of this comprehensive immunity, Internet commerce has grown and flourished.<sup>4</sup> Recently, in *FTC v. Accusearch, Inc.*,<sup>5</sup> the United States District Court for the District of Wyoming narrowed § 230 immunity, denying it to a website that deliberately solicited and advertised illicit content. Although it purported to analyze the question solely on the basis of what Accusearch *did*, in fact the court relied heavily upon tacit conclusions about what Accusearch *in-*

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<sup>1</sup> 47 U.S.C. § 230(c)(1) (2000) (“No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

<sup>2</sup> *See id.* § 230(f)(3) (defining “information content provider[s]” — who are not immunized by CDA § 230, *see id.* § 230(c)(1) — as “any person or entity that is responsible, in whole or in part, for the creation or development of information . . .”).

<sup>3</sup> *See* Paul Ehrlich, Note, *Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401, 402, 406–11 (2002) (discussing expansive judicial interpretations of CDA § 230). In particular, CDA § 230 gives courts three broad interpretative policy levers that they can use to control the scope of the immunity. They can control: first, which online entities qualify for immunity; second, what theories of liability are covered; and third, what constitutes creation. All three components have been interpreted generously. *Id.*

Protection has been found to run to a broad class of online entities in recent cases. *See, e.g.,* *Batzel v. Smith*, 333 F.3d 1018, 1030–31 (9th Cir. 2003) (listservs); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121, 1125 (9th Cir. 2003) (dating sites); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–34 (4th Cir. 1997) (bulletin boards); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 846, 849–50 (W.D. Tex. 2007) (social networking sites); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52–53 (D.D.C. 1998) (gossip sites).

Protection has been found to run to a broad class of theories of liability. Among the specific theories of liability that courts have found to be included are defamation, *Zeran*, 129 F.3d at 330; negligence, *id.* at 332; *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 983, 986 (10th Cir. 2000); intentional infliction of emotional distress, *Doe v. Bates*, No. 5:05-CV-91, 2006 WL 3813758, at \*1–2, \*12 (E.D. Tex. Dec. 27, 2006); and invasion of privacy, *id.*

Finally, creation has usually been defined narrowly. *See, e.g., Batzel*, 333 F.3d at 1031 (“[Content development] means something more substantial than merely editing . . . and selecting material . . .”); *see also Ben Ezra*, 206 F.3d at 985–86; *Blumenthal*, 992 F. Supp. at 49–53.

<sup>4</sup> Ironically, Congress may not have intended this, the most important law governing the Internet, to have any effect at all. *See, e.g., Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (suggesting that CDA § 230(c)(1) was intended merely as an inoperative “definitional clause,” a simple preamble to § 230(c)(2)).

<sup>5</sup> No. 06-CV-105, 2007 WL 4356786 (D. Wyo. Sept. 28, 2007).

*tended to do*. The court was right to look to the defendant's intent, but wrong to do so tacitly. It should explicitly have recognized a mens rea-based exception to § 230 immunity.

In May of 2006, the Federal Trade Commission filed a complaint against Accusearch alleging that the company's online service constituted an unfair business practice. Accusearch ran a website that (among other things) helped users obtain private phone records.<sup>6</sup> Federal law makes such records confidential.<sup>7</sup> Buyers would access the website, identify (by entering phone numbers) the records they wanted, and pay a fee.<sup>8</sup> The site would then forward the request to "outside sources," who would, in turn, obtain the records.<sup>9</sup> The website carried prominent notices advertising that "detailed" call records were available for "any phone number."<sup>10</sup> Results were "guaranteed."<sup>11</sup> Accusearch responded to the FTC's complaint by asserting immunity under § 230 of the CDA.<sup>12</sup> Both sides moved for summary judgment.<sup>13</sup> The court granted the FTC's motion, and denied Accusearch's.<sup>14</sup>

Judge Downes found that § 230 did not protect Accusearch. He began by dividing the § 230 analysis into three prongs: first, whether immunity ran to entities like Accusearch; second, whether it ran to the theories of liability in question; and third, whether it was negated by the defendant having wholly or partially created the content at issue.<sup>15</sup> The court began by finding that prior broad judicial constructions of the first ("type of entity") prong of the analysis compelled the conclusion that Accusearch qualified on that score.<sup>16</sup> It went on, however, to find that neither of the other two prongs was satisfied.<sup>17</sup>

Under the "theory of liability" prong of the analysis, the court found that § 230 immunity did not cover the unfair business practice claim before it. It noted that the statutory text extends immunity only

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<sup>6</sup> *Id.* Website users could also obtain other "information products," including GPS traces of cell phones, "Social Security Number verification, utility records, DMV records, and reverse email look-ups." *Accusearch*, 2007 WL 4356786, at \*1.

<sup>7</sup> *Id.* at \*2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*1.

<sup>11</sup> *Id.*

<sup>12</sup> Defendants' Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 1, *Accusearch*, 2007 WL 4356786, at \*1 (No. 06-CV-105).

<sup>13</sup> *Accusearch*, 2007 WL 4356786, at \*2.

<sup>14</sup> *Id.* at \*10.

<sup>15</sup> *See id.* at \*3.

<sup>16</sup> *Id.* at \*3-4 (noting that other courts had found that § 230 covers websites — including retail websites — and concluding that Accusearch therefore satisfied the first element of the immunity analysis).

<sup>17</sup> *Id.* at \*5-6.

to theories of liability that treat the defendant “as [a] publisher or speaker.”<sup>18</sup> It found that that requirement could be interpreted in more than one way with respect to the claim at issue. On one hand, a claim of “unfair business practice” seems to attach liability not to publication, but to the activities of trade — “buying and selling.”<sup>19</sup> But on the other hand, when it is *information* that is bought and sold, the upshot of this “trade” is the dissemination of information — and that could be said to constitute publication.<sup>20</sup> The court therefore concluded that the statute was ambiguous on this point.<sup>21</sup> To resolve this ambiguity, it turned to legislative intent. It found that Congress intended § 230 to, among other things, “encourage service providers to self-regulate the dissemination of offensive material.”<sup>22</sup> Because Accusearch had not only failed to regulate itself, but had intentionally sought out unlawful transactions — as indicated by its advertising, solicitation of orders, and processing of payments — the court found that Congress would not have intended § 230 to protect it.<sup>23</sup>

Turning to the “creatorship” prong of the § 230 analysis, the court found that the phone records at issue had been partially “creat[ed] or develop[ed]” by Accusearch itself.<sup>24</sup> The court found that Accusearch had participated in misappropriating the records from the phone companies by soliciting and helping sell them.<sup>25</sup>

Having found no immunity under § 230, the court considered the underlying substantive claim. Because Accusearch’s website caused substantial injury to customers, which they could not reasonably have avoided, and because those harms were not outweighed by any countervailing benefits,<sup>26</sup> the court found Accusearch liable for unfair business practice as a matter of law.<sup>27</sup>

Although the court purported to find immunity inapplicable solely on the basis of what Accusearch *did*, it relied upon implicit conclusions about what Accusearch *intended to do*. The court should have gone further; it should have forthrightly recognized a narrow mens rea-based exception to § 230 immunity. Specifically, it should have declared that an online entity gets no immunity when it creates an identifiable online space *intending* that it be overwhelmingly filled

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<sup>18</sup> 47 U.S.C. § 230(c)(1).

<sup>19</sup> *Accusearch*, 2007 WL 4356786, at \*4.

<sup>20</sup> *Id.* at \*4–5.

<sup>21</sup> *Id.* at \*5.

<sup>22</sup> *Id.* (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at \*6 (quoting *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 980 n.4 (10th Cir. 2000)).

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at \*7–8.

<sup>27</sup> *Id.* at \*10.

with some identifiable kind of illegal content. Such an exception is good policy; and while it is also something of a doctrinal stretch, some authorities do support it.

The *Accusearch* decision relies heavily upon an implicit conclusion that the defendant acted with bad intent. First, the court placed great emphasis upon the fact that Accusearch advertised and solicited the bad content.<sup>28</sup> Advertising and solicitation are, of course, traditional indicia of *intent* to abet illegality.<sup>29</sup> Second, it is not easy to distinguish Accusearch from other, obviously immune services, based only on what it did. Auction sites like eBay, for instance, match buyers with sellers, facilitate transactions, process payments, and so on. Similarly, services like Google Answers,<sup>30</sup> in which users post questions and pay others to answer them, perform many of the same actions as Accusearch. Yet when unlawful content is sold on eBay or on Google Answers, immunity almost certainly applies.<sup>31</sup> What sets Accusearch apart, therefore, must largely be the bad *intent* with which it acted, and which it plainly displayed by its advertising and solicitation.

The court should have formalized this implicit analysis into an intent-based exception to § 230 immunity. Such an exception is warranted on policy grounds by the very considerations that justify immunity in the first place. Courts<sup>32</sup> and scholars<sup>33</sup> have justified § 230 on the theory that liability would impose an “impossible burden” on online publishers and lead to chilling effects on online speech. What makes this burden undue, and what chills valuable speech, is that publishers can capture only a small fraction of the social benefit of online content, while liability would force them to bear much of its social cost. As to benefit, an online forum for the free exchange of ideas

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<sup>28</sup> *Id.* at \*5, \*6. It is true that the court also characterized Accusearch as “res[elling]” the records. *Id.* at \*5. However, there is nothing in the facts as the court describes them to indicate that Accusearch was more of a reseller than eBay or Google Answers. Thus, this characterization is best read as a conclusion arising out of the advertising and solicitation, rather than as a factor in reaching a conclusion.

<sup>29</sup> See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2779 (2005) (“The classic . . . direct evidence of unlawful purpose . . . [is] advertising.”).

<sup>30</sup> See Google Answers: Frequently Asked Questions, <http://answers.google.com/answers/faq.html> (last visited May 12, 2008). This service is now defunct.

<sup>31</sup> A California appeals court has found that eBay qualifies for § 230 immunity. *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 (2002). Google Answers has not explicitly been found to qualify, but its obvious lack of intent to facilitate illegality means that a court would almost certainly view it as just a conduit for information, and thus immune.

<sup>32</sup> See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) (“[T]he sheer number of postings on interactive computer services would create an impossible burden in the Internet context.”); *id.* (“[L]iability . . . has a chilling effect on the freedom of Internet speech.”).

<sup>33</sup> See, e.g., Assaf Hamdani, *Who’s Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901, 916–21 (2002) (arguing that strict liability would give service providers incentives to over-police content).

enriches society far more than it does its administrators,<sup>34</sup> for whom advertising is often the only means of extracting revenue. As to social cost, publication involves screening expenses and consequential harms. Screening expenses are those associated with distinguishing content that should be published from content that should not. Consequential harms are those resulting from whatever material is eventually published. Under a strict liability regime, online publishers bear both components of social cost; under negligence, they bear screening expenses and some consequential harms.<sup>35</sup> If we assume that both components are significant, therefore, either liability regime would require online publishers to internalize much of the cost of publication, while externalizing most of its benefit. This is a recipe for censorship and unduly chilled speech.<sup>36</sup> Section 230 addresses this problem. By shielding publishers from liability, it relieves them of the burden of consequential harms and screening expenses.

When an online publisher *intends* to facilitate specific illegal content, however, this justification ceases to apply. First, in this situation, screening expenses are very low even without § 230. The publisher is already involved with the illicit content, and so knows exactly where to look for it. The more involved it is with illicit transactions, the more cheaply it can monitor them. Accusearch is an extreme example. It knew that *every* phone record it distributed was illicit, because such records are made confidential by law, and so none could have been acquired except by “theft or deception.”<sup>37</sup> Since there was no licit content, it would have been trivial for it to identify the illicit material; its screening expenses were zero. Second, if the publisher chooses not to screen despite being able to do so cheaply, then it *should* be made to bear the consequential harms that result. Any content that goes un-

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<sup>34</sup> *Id.* at 917 (noting that intermediaries cannot capture the full value of the speech they carry); Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 28–29 (2006) (same).

<sup>35</sup> If publishers and courts had perfect information, perfect screening could be achieved, and publishers would bear only screening expenses. However, perfection is impossible, mistakes will be made, and publishers will pay for the consequential harms that result. What is more, rational publishers will be over-careful in this situation, *see* STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 93–97 (1987), and so even screening expenses will be higher than optimal.

<sup>36</sup> This argument does not also counsel immunity for *offline* publication. The economics of publication are different in the two spheres, and the same arguments do not apply. The fundamental difference is that the costs of obtaining and distributing content — “production costs” — are much higher in offline than in online publishing, whereas the costs of monitoring (per unit of content) are essentially identical in the two spheres. This means that the marginal chilling effect of screening expenses is *low* offline (screening expenses being dwarfed by production costs), but *high* online (because production costs are minimal). Therefore, Congress was right to give immunity only to online publishers.

<sup>37</sup> *Accusearch*, 2007 WL 4356786, at \*2. These requests were extremely unlikely to have been legitimate, because a legitimate customer could have obtained the records from her phone company for free and avoided Accusearch’s fee. *See id.* at \*2.

published as a result will likely be of small social benefit and large social cost, because a site that sets out to attract harmful and unlawful content will probably succeed. Accusearch, again, is a good example. The phone records it sold had no political, literary, or artistic merit; disseminating them only enabled stalking and harassment.<sup>38</sup> This sort of material *should* be “chilled.” An online publisher that intends to facilitate illegal content, therefore, is overprotected by immunity.

One possible response to this argument for a mens rea-based exception concerns the chilling effect, not from liability itself, but from the uncertainties of litigation.<sup>39</sup> Because juries are neither perfect nor consistent, the argument runs, liability would chill speech not merely in the zone of liability itself, but also in a zone of uncertainty surrounding it. This argument has some logical force, but it should be treated with caution. To begin with, mere ritual invocation of the chilling effects of uncertainty cannot suffice to justify immunity; that would counsel immunity for all publications, online and off. Nor does the argument have special talismanic force in the online context. There too it sweeps too broadly, counseling immunity for creators as well as publishers. Indeed, the economic analysis above suggests that, given a sufficiently narrow mens rea-based exception, there is no social cost to occasionally imposing liability in the surrounding zone of uncertainty. Even a mistaken jury would not impute *intent* to a defendant that did not have some very close connection with the illicit material. And if a defendant does have this connection, then the analysis suggests that imposing liability will likely have little social cost and much social benefit. The uncertainty argument, therefore, suggests only that a mens rea exception to § 230 should be narrowly and carefully drawn, not that it should not exist.

Thus, there are good policy reasons for creating a narrow mens rea-based exception to immunity. But the law does not live by policy alone. And in doctrinal terms, a newly-minted mens rea exception is admittedly something of a stretch. The text of the statute is most easily construed as ignoring mens rea,<sup>40</sup> and the majority of courts to con-

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<sup>38</sup> See Plaintiff’s Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 8–11, *Accusearch*, 2007 WL 4356786 (No. 06-CV-105) (alleging numerous instances of stalking and harassment resulting from Accusearch’s sale of phone records).

<sup>39</sup> See, e.g., Kreimer, *supra* note 34, at 28–29 (arguing that a “risk-averse [online] intermediary is likely to buy ‘insurance’ by dropping . . . risky customer[s] where the ultimate risk of sanctions is unclear”).

<sup>40</sup> The “theory of liability” prong of the § 230 analysis is grounded in the clause in 47 U.S.C. § 230(c)(1) that ties immunity to “publish[ing] or speak[ing]”; the “creatorship” prong is grounded in the clause of 47 U.S.C. § 230(f)(3) that excludes from immunity entities that “[are] responsible, in whole or in part, for . . . creation or development.” Neither, on its face, mentions mens rea.

sider the question have so construed it.<sup>41</sup> Two factors, however, mitigate this doctrinal difficulty. First, as a general matter, it is a standard jurisprudential move to read mens rea elements into statutes. Second, there is a small but significant body of authority supporting such an innovation specifically in the § 230 context.

There is a venerable tradition of reading mens rea components into statutes that seem to lack them. In the criminal law context, the Supreme Court has explicitly affirmed the principle, holding that a court is often right to read a state-of-mind component into an offense even when the statutory definition does not in its terms so provide.<sup>42</sup> Courts are less forthright about the principle in civil cases, but they apply it nonetheless. In copyright law, for instance, although the copyright statute makes infringement a strict liability offense,<sup>43</sup> the courts have created a contributory infringement doctrine that is keyed to the mens rea of the defendant.<sup>44</sup> Patent infringement is likewise a strict liability offense,<sup>45</sup> but once again, courts have read a mens rea requirement into the secondary infringement analysis.<sup>46</sup>

Turning now to the specific context of § 230, although most courts have found no mens rea component in the immunity analysis,<sup>47</sup> a small but significant minority has held otherwise. Federal district courts in Texas<sup>48</sup> and Arizona,<sup>49</sup> for instance, have found that a sufficient mens rea might negate immunity. The Ninth Circuit has also factored active

<sup>41</sup> See, e.g., *Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536 (D. Md. 2006) (“CDA immunity applies even where an ISP knew of its customers’ potentially illegal activity.”); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) (“Congress has made a . . . policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.”).

<sup>42</sup> See *Staples v. United States*, 511 U.S. 600, 605 (1994); see also, e.g., *United States v. Knight*, 490 F.3d 1268, 1270 (11th Cir. 2007) (reading such a component into a statute that “[did] not use the language typically associated with the creation of a specific or general intent offense”).

<sup>43</sup> ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS* 169 (2003) (“A defendant will be liable for [copyright] infringement even if that infringement was innocent.”).

<sup>44</sup> See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 125 S. Ct. 2764, 2776 (2005) (“One infringes contributorily by *intentionally* inducing . . . direct infringement . . . [This doctrine] . . . emerged from [the] common law . . .”) (emphasis added).

<sup>45</sup> SCHECHTER & THOMAS, *supra* note 43, at 461 (“A defendant’s intent is irrelevant to . . . [patent] infringement . . .”).

<sup>46</sup> See *Grokster*, 125 S. Ct. at 2777 (recognizing patent law’s judicially-created intent-based “staple article of commerce” doctrine, and explaining that it had later been codified by Congress).

<sup>47</sup> See, e.g., cases cited *supra* note 41.

<sup>48</sup> *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. 3:02-CV-2727-G, 2004 U.S. Dist. LEXIS 6678, at \*34 (N.D. Tex. Apr. 19, 2004) (“[D]efendants cannot [claim § 230 immunity] for disparaging material that they *actively solicit*.” (emphasis added)).

<sup>49</sup> *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142, 1149 (D. Ariz. 2005) (finding that defendants’ solicitation of illicit material “arguably could support a finding that [they] are responsible . . . for [its] creation”) (internal quotation mark omitted).

solicitation into its analysis of § 230, albeit with some caveats.<sup>50</sup> Thus, although such an exception would be a doctrinal leap, that leap is neither as large nor as unprecedented as it might at first appear.

If a court did create a mens rea-based exception, it would also have to define that exception's terms. The appropriate mens rea standard is a high one; the appropriate exception to immunity is narrow. There are two reasons for this. First, as described above, concerns about the chilling effects of litigation uncertainties argue for a narrow exception. Second, § 230 generally functions well, and we should be careful about changing it abruptly, especially on the basis of an argument from first principles. The economic argument above suggests that the high threshold of *intent* might be appropriate. But intent to do what? The argument further suggests that intent should negate immunity only when it both reduces screening expenses and attracts content that does much more harm than good. Thus, a good rule might be one that withholds immunity from defendants who create an identifiable online space with the intent that it be filled overwhelmingly with an identifiable kind of illegal content.<sup>51</sup> Accusearch would certainly meet this standard because at least one logically distinct part of its site was clearly intended to have, and did have, no significant purpose but to disseminate illegal phone records.

Section 230 is one of the most important and successful laws of cyberspace. Its broad grant of immunity has nurtured the early growth of the Internet. But § 230 is not perfect. It is too kind to the wily and the malicious. A narrowly tailored mens rea exception to immunity — one that is triggered by the creation of an identifiable online space with the intent that it be filled preponderantly with an identifiable kind of illegal content — would make it better still.

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<sup>50</sup> See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, No. 04-56916, slip op. at 3445, 3470-71 n.33 (9th Cir. Apr. 3, 2008) (en banc) (distinguishing prior cases on the grounds (among others) that defendants there did not “induce,” “solicit,” and “encourage” users to post illicit content). Elsewhere in the opinion, the court suggests that solicitation and other mens rea-related acts negate immunity only where they effectively “force[]” the user to create illicit content. *Id.* at 3459 n.19.

<sup>51</sup> One further question remains: where in the analysis should the exception be grounded? The court treated mens rea factors as relevant to both the “theory of liability” and the “creatorship” prongs. That was a mistake. The better approach, and the one taken by the few other courts to have found mens rea relevant, *see supra* notes 48-50, is to ground it in the “creatorship” prong only. Any defendant who satisfies the mens rea standard with respect to illegal content should be treated as having participated in creating it. The exception is evaluated separately with respect to each individual piece of content; thus, it is conceptually appropriate to ground it in the prong of the analysis that deals with individual pieces of content.