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# Uber and the Communications Decency Act: Why the Ride-Hailing App Would Not Fare Well Under § 230

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**UBER AND THE COMMUNICATIONS DECENCY ACT:  
WHY THE RIDE-HAILING APP WOULD NOT FARE WELL UNDER  
§ 230**

*Adeline A. Allen* \*

**ABSTRACT**

*Uber, a company that offers ride-sharing arrangements through its smartphone app, has quickly grown in popularity. As Uber grows in widespread use, injuries involving rides arranged through Uber have been on the rise. Uber maintains that it is a technology platform that connects users on its app, not a transportation company. Such a characterization would render Uber immune from suits for injuries involving the ride arrangements under the Communications Decency Act, 47 U.S.C. § 230 (2012). The statute offers robust protection for web-based companies from liability for content provided by third parties. This article seeks to consider whether Uber's business model properly allows it to be under the protection of the Communications Decency Act. Given Uber's roles in setting the price for the ride and in heavily controlling the connection between passenger and driver, this article argues that more than a platform, Uber is a content provider in the ride-sharing arrangement and is thus disqualified from Communications Decency Act immunity.*

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### INTRODUCTION

It was New Year’s Eve in San Francisco.<sup>1</sup> A mother and her two young children were walking home through the city after a visit with the children’s grandmother.<sup>2</sup> The family stepped down the sidewalk, making their way to cross the street, when a driver in an SUV, making a right turn onto the street, hit them in the

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<sup>1</sup> This event occurred on December 31, 2013. *Ex-Uber Driver Charged with Manslaughter in Death of 6-Year-Old*, TIME (Dec. 9, 2014), <http://time.com/3625556/uber-manslaughter-charge-san-francisco/>.

<sup>2</sup> Patrick Hoge, *Dead Girl’s Family Steps into Legislator’s Insurance Fight over Uber, Lyft*, BIZJOURNALS: TECHFLASH (June 26, 2014, 3:05 PM), <http://www.bizjournals.com/sanfrancisco/blog/techflash/2014/06/uber-lyft-insurance-sofia-liu-susan-bonilla.html>.

crosswalk.<sup>3</sup> The mother and her four-year-old son were injured.<sup>4</sup> Six-year-old Sofia Liu died from her injuries.<sup>5</sup>

The driver was driving for Uber,<sup>6</sup> a ride-sharing company that connects passengers and drivers through an app on their phones.<sup>7</sup> He was driving around with the Uber app open on his smartphone while waiting to pick up a fare.<sup>8</sup> The driver was later charged with vehicular manslaughter,<sup>9</sup> but in the words of Sofia's mother, Huan Hua Kuang, "[W]hat about Uber?"<sup>10</sup>

This article seeks to explore Uber's liability when rides arranged through its app cause injury to bystanders, as in the case of Sofia Liu's family, or to its own passengers and drivers.<sup>11</sup>

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<sup>3</sup> See Josh Constine, *Uber's Denial of Liability in Girls' Death Raises Accident Accountability Questions*, TECHCRUNCH (Jan. 2, 2014), <http://techcrunch.com/2014/01/02/should-car-services-provide-insurance-when-ever-their-driver-app-is-open/>; TIME, *supra* note 1.

<sup>4</sup> Constine, *supra* note 3; TIME, *supra* note 1; Hoge, *supra* note 2.

<sup>5</sup> Jay Barmann, *Uber Reaches Wrongful Death Settlement with Family of Sofia Liu*, SFIST (July 15, 2015, 10:10 AM), [http://sfist.com/2015/07/15/uber\\_reaches\\_wrongful\\_death\\_settle.php](http://sfist.com/2015/07/15/uber_reaches_wrongful_death_settle.php); Constine, *supra* note 3; TIME, *supra* note 1; Hoge, *supra* note 2.

<sup>6</sup> Barmann, *supra* note 5; TIME, *supra* note 1; David Streitfeld, *Uber and a Child's Death*, N.Y. TIMES: BITS (Jan. 27, 2014), [http://bits.blogs.nytimes.com/2014/01/27/uber-and-a-childs-death/?\\_r=0](http://bits.blogs.nytimes.com/2014/01/27/uber-and-a-childs-death/?_r=0).

<sup>7</sup> *How Does Uber Work?*, UBER, <https://help.uber.com/h/738d1ff7-5fe0-4383-b34c-4a2480efd71e> (last visited Nov. 17, 2016).

<sup>8</sup> Barmann, *supra* note 5; TIME, *supra* note 1; Streitfeld, *supra* note 6.

<sup>9</sup> Barmann, *supra* note 5; Carolyn Tyler, *Mother of Girl Fatally Struck by Uber Driver Speaks Out*, ABC 7 NEWS (Dec. 9, 2015), <http://abc7news.com/business/mother-of-girl-fatally-struck-by-uber-driver-speaks-out/429535/>.

<sup>10</sup> Tyler, *supra* note 9; see also TIME, *supra* note 1.

<sup>11</sup> Sofia Liu's family filed suit against Uber. The parties reached a settlement for an undisclosed amount in 2015. Barmann, *supra* note 5; Tracey Lien, *Uber Settles Wrongful-Death Lawsuit in San Francisco*, L.A. TIMES (July 15, 2015, 5:53 AM), <http://www.latimes.com/business/technology/la-fi-tn-sofia-liu-uber-settlement-20150714-story.html>; Streitfeld, *supra* note 6. Other incidents include a driver in New York City allegedly crashing into a couple in a crosswalk, killing the man and injuring the woman; a driver in Los Angeles allegedly driving under the influence, causing the car to flip over with the passenger inside; a driver in San Francisco allegedly smashing a passenger's face with a hammer, resulting in severe eye injury; and a driver in Hawaii

Specifically, this article examines whether Uber would qualify for the protection of the Communications Decency Act, 47 U.S.C.

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allegedly raping a teenage passenger. Injuries are not limited to Uber passengers or bystanders on the street. Drivers, too, have been injured. For example, a driver in Los Angeles was allegedly hit by a passenger, breaking his jaw in two places; while another driver in San Francisco was allegedly attacked by a passenger, landing him in the hospital with facial injuries. Brad Aaron, *Crash Victim Lawsuit: App Use by Uber Drivers Is Negligent and Illegal*, STREETS BLOG NYC (Mar. 20, 2015), <http://www.streetsblog.org/2015/03/20/crash-victim-lawsuit-app-use-by-uber-drivers-is-negligent-and-illegal/>; Ellen Huet, *Uber Rider Might Lose an Eye from Driver's Hammer Attack. Could Uber Be Held Liable?*, FORBES (Sept. 30, 2014, 9:37 PM) [hereinafter *Uber Rider Might Lose an Eye*], <http://www.forbes.com/sites/ellenhuet/2014/09/30/uber-driver-hammer-attack-liability/#4acdc5455999>; Ellen Huet, *What Happens to Uber Drivers and Other Sharing Economy Workers Injured on the Job?*, FORBES (Jan. 6, 2015, 1:15 PM), <http://www.forbes.com/sites/ellenhuet/2015/01/06/workers-compensation-uber-drivers-sharing-economy/#62b6fa084c78>; Sage Lazzaro, *A Hawaii Uber Driver Has Been Charged with Raping a Teenage Passenger*, OBSERVER (Apr. 20, 2016, 2:26 PM), <http://observer.com/2016/04/a-hawaii-uber-driver-has-been-charged-with-raping-a-teenager/>; *San Francisco Uber Driver Attacked by Passenger, Suspect Under Arrest*, CBS SF BAY AREA (Nov. 28, 2014, 3:49 PM), <http://sanfrancisco.cbslocal.com/2014/11/28/san-francisco-uber-driver-attacked-by-passenger-suspect-under-arrest-anza-vista-aggravated-assault/>; *Uber Driver Arrested on Suspicion of DUI After New Year's Day Crash*, CBS LOS ANGELES (Jan. 4, 2016, 11:31 PM), <http://losangeles.cbslocal.com/2016/01/04/uber-driver-arrested-on-suspicion-of-dui-after-new-years-day-crash/>. Uber does maintain some insurance for its drivers, a two-tiered structure of coverage for (1) the time period between turning on the app and accepting a ride and (2) the time period between accepting a ride and dropping off the passenger at the conclusion of the ride. *Certificates of Insurance—U.S. Ridesharing*, UBER NEWSROOM (Jan. 11, 2015), <https://newsroom.uber.com/certificates-of-insurance-u-s-ridesharing/>. Additionally, Uber also requires drivers to carry personal auto insurance, many of which offer specific rideshare insurance policies. Harry Campbell, *Rideshare Insurance Options for Uber and Lyft Drivers*, THE RIDESHARE GUY (Apr. 6, 2016), <http://therideshareguy.com/rideshare-insurance-options-for-drivers/>; Ellen Huet, *New Laws Push Uber and Lyft To Bump Up Insurance Coverage, but a Collision Gap Remains*, FORBES (July 1, 2015, 2:30 PM), <http://www.forbes.com/sites/ellenhuet/2015/07/01/new-laws-push-uber-and-lyft-to-bump-up-insurance-coverage-but-a-collision-gap-remains/#5d242ceb107c>; *Driving Jobs vs. Driving with Uber*, UBER, <https://www.uber.com/driver-jobs> (last visited June 29, 2016).

§ 230 (2012).<sup>12</sup> The statute robustly protects interactive computer services from liability for content provided by a third party.<sup>13</sup> A legendary law in the development of the Internet, the statute has insulated a host of web companies,<sup>14</sup> from Internet service providers like Google,<sup>15</sup> retail sites like Amazon,<sup>16</sup> and social media sites like Facebook,<sup>17</sup> to sharing economy sites like StubHub,<sup>18</sup> from a whole host of civil liabilities.<sup>19</sup> Indeed, the statute's protection is oft invoked in Silicon Valley.<sup>20</sup>

Uber contends that it is a technology platform that connects passengers and drivers as users of its app, not a transportation company. This characterization is important, as it would usually invoke the protection of the Communications Decency Act, thus insulating Uber from suits by any passenger, driver, or bystander. But given Uber's practices of setting the price for the ride<sup>21</sup> and heavily controlling the connection between passenger and driver,<sup>22</sup> this article argues that Uber is more than a platform, but rather is a

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<sup>12</sup> Communications Decency Act, 47 U.S.C. § 230 (2012).

<sup>13</sup> See *infra* Part II.

<sup>14</sup> See Claire Cain Miller, *When Uber and Airbnb Meet the Real World*, N.Y. TIMES (Oct. 17, 2014), [http://www.nytimes.com/2014/10/19/upshot/when-uber-lyft-and-airbnb-meet-the-real-world.html?\\_r=0](http://www.nytimes.com/2014/10/19/upshot/when-uber-lyft-and-airbnb-meet-the-real-world.html?_r=0).

<sup>15</sup> *E.g.*, *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117, 1122–23 (E.D. Cal. 2010); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1197–99 (N.D. Cal. 2009); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500–01 (E.D. Pa. 2006).

<sup>16</sup> *E.g.*, *Joseph v. Amazon.com, Inc.*, 46 F. Supp. 3d 1095, 1105–07 (W.D. Wash. 2014); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 43 (Wash. Ct. App. 2001).

<sup>17</sup> *E.g.*, *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357–60 (D.C. Cir. 2014).

<sup>18</sup> *E.g.*, *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 564 (N.C. Ct. App. 2012).

<sup>19</sup> For example, “[t]hat is why Yelp avoids liability when people post inaccurate or abusive restaurant reviews, and why YouTube does not have to remove videos that some find offensive.” Miller, *supra* note 14; see also *infra* note 57.

<sup>20</sup> See *Uber Rider Might Lose an Eye*, *supra* note 11; Miller, *supra* note 14.

<sup>21</sup> See *infra* Part III(A).

<sup>22</sup> See *infra* Part III(B).

content provider in the ride-sharing arrangement and is thus disqualified from Communications Decency Act immunity.<sup>23</sup>

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<sup>23</sup> Uber has been involved in a high-profile class action lawsuit brought by its drivers in California and Massachusetts, in which the drivers argued that they had been misclassified as independent contractors working for Uber, while they should have been classified as employees instead. See Shannon Liss-Riordan & Adelaide Pagano, *Breaking News*, UBER LAWSUIT 1, 1 (2016), [http://uberlawsuit.com/Breaking%20news%20-%20Uber%20will%20pay%20\\$100%20million%20to%20settle%20independent%20contractor%20misclassification%20claims.pdf](http://uberlawsuit.com/Breaking%20news%20-%20Uber%20will%20pay%20$100%20million%20to%20settle%20independent%20contractor%20misclassification%20claims.pdf). Legal experts disagree as to the effect of the classification of these drivers on Uber's immunity under the Communications Decency Act. One view is that if drivers were to be classified as employees, Uber may very well be legally responsible under respondeat superior for the accidents and injuries caused by its drivers. See Venkat Balasubramani, *Court Says Uber and Lyft Drivers May Be Employees*, TECH. & MKTG. L. BLOG (Mar. 24, 2015), <http://blog.ericgoldman.org/archives/2015/03/court-says-uber-and-lyft-drivers-may-be-employees.htm>.

But Professor Eric Goldman, an Internet Law scholar, opines in his Technology & Marketing Law Blog that the Communications Decency Act may *still* immunize Uber from liability even if its drivers are classified as employees. See Eric Goldman, *Is Uber Liable When Drivers Sexually Abuse Passengers?*, TECH. & MKTG. L. BLOG (May 17, 2016), <http://blog.ericgoldman.org/archives/2016/05/is-uber-liable-when-drivers-sexually-abuse-passengers-forbes-cross-post.htm>. A proposed settlement of \$100 million in the Uber class action suit was rejected by the court in August 2016. See Order Denying Plaintiffs' Motion for Preliminary Approval at 34, O'Connor v. Uber Techs., Inc., No. 13-cv-03826-EMC (N.D. Cal. Aug. 18, 2016). But even if a new agreement were to be reached (possibly for a much smaller class due to a recent Ninth Circuit ruling that the drivers would be bound by arbitration), such a settlement would leave unresolved the legal issue of whether the drivers are independent contractors or employees. See Goldman, *supra*; Liss-Riordan & Pagano, *supra*. See generally Mohamed v. Uber Techs., Inc., 836 F.3d 1102 (9th Cir. 2016). It is worth noting that the California Labor Commissioner's Office, in considering the issue on a separate matter, ruled that Uber drivers are employees of the company. See Order, Decision or Award of the Labor Commissioner at 10, Berwick v. Uber Techs., Inc., No. 11-46739 EK (Labor Comm'r Cal. June 3, 2015); Mike Isaac & Natasha Singer, *California Says Uber Driver Is Employee, Not a Contractor*, N.Y. TIMES (June 17, 2015), [http://www.nytimes.com/2015/06/18/business/uber-contests-california-labor-ruling-that-says-drivers-should-be-employees.html?\\_r=0](http://www.nytimes.com/2015/06/18/business/uber-contests-california-labor-ruling-that-says-drivers-should-be-employees.html?_r=0)). On the heels of the aforementioned lawsuit, a new class action lawsuit on the same issue of driver status misclassification was recently filed in a federal district court in Illinois by

Part I of this article discusses the rise of Uber and the sharing economy. Part II discusses the Communications Decency Act and how courts have interpreted its provisions. Part III explores how the Communications Decency Act would be applied to Uber and why Uber would not be immune under the statute.

### I. UBER AND THE SHARING ECONOMY

Uber is a ride-sharing app company, self-described as “a technology platform . . . [that] connect[s] driver-partners and riders”<sup>24</sup> through a smartphone app. The company’s rapid rise in its short history is astounding. Since the company’s founding in 2009,<sup>25</sup> it has grown to expand operations in 540 cities around the world,<sup>26</sup> taking the taxi and rental car industries by storm<sup>27</sup> (or

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drivers outside of California and Massachusetts. See Megan Rose Dickey, *Uber Is Facing a Nationwide Class-Action Lawsuit*, TECHCRUNCH (May 2, 2016), <http://techcrunch.com/2016/05/02/uber-is-facing-a-nationwide-class-action-lawsuit/>; Erik Sherman, *Uber Faces New Class Action Suit by Drivers*, FORBES (May 4, 2016, 5:30 AM), <http://www.forbes.com/sites/eriksherman/2016/05/04/will-a-new-class-action-suit-change-uber-or-cause-drivers-to-permanently-lose/#6212eb71277a>.

<sup>24</sup> *How Does Uber Work?*, *supra* note 7; see also Stephanie Francis Ward, ‘App’ Me a Ride, 100 A.B.A. J., Jan. 2014, at 13–14, 17.

<sup>25</sup> See Travis Kalanick, *Uber’s Founding*, UBER NEWSROOM (Dec. 22, 2010), <https://newsroom.uber.com/ubers-founding/>.

<sup>26</sup> *Our Story*, UBER, <https://www.uber.com/our-story> (last visited Nov. 17, 2016).

<sup>27</sup> See, e.g., Andrew Bender, *Uber’s Astounding Rise: Overtaking Taxis in Key Markets*, FORBES (Apr. 10, 2015, 11:42 AM), <http://www.forbes.com/sites/andrewbender/2015/04/10/ubers-astounding-rise-overtaking-taxis-in-key-markets/#ac00acd22ef6>; Jon Liss, *Uber and the Taxi Industry’s Last Stand*, THE NATION (Jan. 27, 2015), <http://www.thenation.com/article/uber-and-taxi-industrys-last-stand/>; Dana Rubinstein, *Uber, Lyft, and the End of Taxi History*, POLITICO (Oct. 30, 2014, 5:27 AM), <http://www.politico.com/states/new-york/city-hall/story/2014/10/uber-lyft-and-the-end-of-taxi-history-017042>; Olivia Zaleski, *Uber Overtakes Rental Cars Among Business Travelers*, BLOOMBERG (Apr. 21, 2016, 3:44 PM), <http://www.bloomberg.com/news/articles/2016-04-21/uber-overtakes-rental-cars-among-business-travelers>.

“disrupting” the industries, as the tech lingo goes),<sup>28</sup> and has caused massive protests and demonstrations by taxi drivers the world over.<sup>29</sup> One of Silicon Valley’s biggest success stories<sup>30</sup> and

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<sup>28</sup> Compare Clayton M. Christensen et al., *What Is Disruptive Innovation?*, HARV. BUS. REV. (Dec. 2015), <https://hbr.org/2015/12/what-is-disruptive-innovation>, with Alex Moazed & Nicholas L. Johnson, *Why Clayton Christensen Is Wrong About Uber and Disruptive Innovation*, TECHCRUNCH (Feb. 27, 2016), <http://techcrunch.com/2016/02/27/why-clayton-christensen-is-wrong-about-uber-and-disruptive-innovation/>.

<sup>29</sup> See, e.g., *Anti-Uber Protests Around the Worlds, in Pictures*, THE TELEGRAPH, <http://www.telegraph.co.uk/technology/picture-galleries/11902080/Anti-Uber-protests-around-the-world-in-pictures.html> (last visited June 14, 2016); Lori Aratani, *Downtown D.C. Traffic Gridlocked as Taxi Drivers Protest Uber, Lyft, Sidecar*, WASH. POST (June 25, 2014), <https://www.washingtonpost.com/news/dr-gridlock/wp/2014/06/25/d-c-taxi-drivers-stage-caravan-to-protest-uber-lyft-sidecar/>; *Bogota Taxi Drivers Protest Against Uber*, EURONEWS (Mar. 15, 2016, 2:50 AM), <http://www.euronews.com/2016/03/15/bogota-taxi-drivers-protest-against-uber/>; *Traffic Chaos and Violence as Thousands of Taxi Drivers Protest Against Uber in Jakarta*, THE GUARDIAN (Mar. 22, 2016, 2:23 AM), <https://www.theguardian.com/world/2016/mar/22/traffic-chaos-and-violence-as-thousands-of-taxi-drivers-protest-uber-in-jakarta>; Gwyn Topham, *Black-Cab Drivers’ Uber Protest Brings London Traffic to a Standstill*, THE GUARDIAN (Feb. 10, 2016, 1:13 PM), <https://www.theguardian.com/technology/2016/feb/10/black-cab-drivers-uber-protest-london-traffic-standstill>.

<sup>30</sup> See Jason Cieslak, *What We Can Learn from Uber’s Logo Debacle*, FORBES (Feb. 4, 2016, 5:07 PM), <http://www.forbes.com/sites/groupthink/2016/02/04/what-we-can-learn-from-ubers-logo-debacle/#56e7576e2fa8>; Maya Kosoff, *Has Uber Finally Met Its Match?*, VANITY FAIR (Feb. 25, 2016, 2:54 PM), <http://www.vanityfair.com/news/2016/02/has-uber-finally-met-its-match>; Sarah McBride, *Ride Service Uber, Brash Darling of Silicon Valley, Stalks New Markets*, REUTERS (Jan. 2, 2014, 1:46 PM), <http://www.reuters.com/article/us-transport-uber-idUSBREA010SP20140102>.

one of the most powerful companies in the country,<sup>31</sup> Uber was valued at \$62.5 billion at the end of 2015.<sup>32</sup>

The app works as follows: A user, a would-be passenger, logs into the app when he needs a ride,<sup>33</sup> entering his destination into the app.<sup>34</sup> Another user interested in giving him a ride, a would-be driver, connects with him on the app and starts driving to the passenger's location to pick him up and drive him to his destination.<sup>35</sup> While Uber allows the driver to accept (or not accept) the passenger's ride request,<sup>36</sup> the passenger cannot choose

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<sup>31</sup> Dylan Roach & Alex Morrell, *The 50 Most Powerful Companies in America*, BUS. INSIDER (Oct. 22, 2015, 12:28 PM), <http://www.businessinsider.com/50-most-powerful-companies-in-america-2015-10>.

<sup>32</sup> Mike Isaac & Leslie Picker, *Uber Valuation Put at \$62.5 Billion After a New Investment Round*, N.Y. TIMES (Dec. 3, 2015), [http://www.nytimes.com/2015/12/04/business/dealbook/uber-nears-investment-at-a-62-5-billion-valuation.html?\\_r=1](http://www.nytimes.com/2015/12/04/business/dealbook/uber-nears-investment-at-a-62-5-billion-valuation.html?_r=1).

<sup>33</sup> See *Meyer v. Kalanick*, 15 Civ. 9796, 2016 U.S. Dist. LEXIS 43944, at \*4 (S.D.N.Y. Mar. 31, 2016); *How Does Uber Work?*, *supra* note 7. In most cities, the ride is booked on demand: when the passenger needs the ride and only then. Hence in those cities, the app does not allow for ride reservations. See *Can I Make a Reservation?*, UBER, <https://help.uber.com/h/63165ec1-0910-409e-972f-0b8d8df1a605> (last visited Nov. 17, 2016).

<sup>34</sup> *Requesting and Taking an Uber Ride*, UBER, <https://help.uber.com/h/2a9d2594-3aea-4f66-9724-32d0da1868d5>, (last visited Nov. 17, 2016).

<sup>35</sup> See *Meyer*, 2016 U.S. Dist. LEXIS 43944, at \*4; *Requesting and Taking an Uber Ride*, *supra* note 34.

<sup>36</sup> Uber sends the ride request from the passenger to the closest driver, and that driver has to accept the ride request before the ride between passenger and driver is arranged. The driver reportedly has fifteen seconds to accept the request before it is automatically sent to another driver nearby. See *Can I Request a Specific Driver?*, UBER, <https://help.uber.com/h/1aaf0913-484f-4695-9042-e61fc7613f24> (last visited Nov. 17, 2016); James Cook, *Uber's Internal Charts Show How Its Driver-Rating System Actually Works*, BUS. INSIDER (Feb. 11, 2015, 11:53 AM), <http://www.businessinsider.com/leaked-charts-show-how-ubers-driver-rating-system-works-2015-2#ixzz3gpV8n1sK>. Likely to promote the speed and efficiency of ride connections, and therefore of the app itself, it has been reported that Uber demands drivers maintain a ride request acceptance rate of at least eighty percent. Cook, *supra*. But see Rachel Emma Silverman & Lauren Weber, *Uber Reaches a Tipping Point with Its Drivers*, WALL STREET J.

his driver.<sup>37</sup> The only way for a passenger to get another driver is by aborting the ride request and starting over.<sup>38</sup>

Uber sets the price of the ride, which is determined by its algorithm based on supply and demand at the time the app user requests a ride.<sup>39</sup> At the end of the ride, the app automatically

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(Apr. 24, 2016, 10:30 PM), <http://www.wsj.com/articles/uber-reaches-a-tipping-point-with-its-drivers-1461490205> (reporting that Uber will soon relax its requirement for drivers to maintain a high ride request acceptance rate). Furthermore, the passenger's destination would not be disclosed to the driver until *after* the passenger is picked up, likely to ensure that passengers are reliably picked up when using the app (as opposed to allowing drivers to shop for passengers whose destinations are more convenient to them), thus promoting passengers' satisfaction with the app. See Harry Campbell, *Just How Far Is Your Uber Driver Willing To Take You?*, FORBES (Mar. 24, 2015, 12:33 PM), <http://www.forbes.com/sites/harrycampbell/2015/03/24/just-how-far-is-your-uber-driver-willing-to-take-you/#5a0e7075346e>; Jessica Hullinger, *16 Things You Might Not Know About Uber and Its Drivers*, MENTAL FLOSS (Jan. 19, 2016, 11:17 AM), <http://mentalfloss.com/article/67010/16-things-you-might-not-know-about-uber-and-its-drivers>; Jason Koebler, *Anatomy of a Seven-Hour, \$583 Uber Ride*, MOTHERBOARD (June 17, 2015, 10:24 AM), <http://motherboard.vice.com/read/anatomy-of-a-seven-hour-583-uber-ride>; Joe Strandell, *Can You Beat My Longest Uber Ride Ever?*, THE RIDESHARE GUY (Mar. 17, 2015), <http://therideshareguy.com/can-you-beat-my-longest-uber-ride-ever/>.

<sup>37</sup> *Can I Request a Specific Driver?*, *supra* note 36; see also *Can I Make a Reservation?*, *supra* note 33. United States Senator Ben Sasse made headlines recently when he decided to drive for Uber for a day to spend time with and listen to his constituents. One of his passengers, a college student named Adrian Silva, reported that he was pleasantly surprised upon seeing on the screen that he was being picked up by Senator Sasse himself. Silva initially thought that this was a joke, before realizing that it was not. Silva's reaction of surprise and initial disbelief makes sense in the context of the fact that Uber passengers do not choose their drivers. See Cora Lewis, *This Guy Got in an Uber and Discovered His Driver Was a U.S. Senator*, BUZZFEED NEWS (Nov. 13, 2016, 3:18 PM), [https://www.buzzfeed.com/coralewis/uber-senator?utm\\_term=.glKzvA15V#.ry4r5e9py](https://www.buzzfeed.com/coralewis/uber-senator?utm_term=.glKzvA15V#.ry4r5e9py).

<sup>38</sup> See *Can I Request a Specific Driver?*, *supra* note 36; *Cancelling an Uber Ride*, UBER, <https://help.uber.com/h/56270015-1d1d-4c08-a460-3b94a090de23> (last visited Nov. 17, 2016).

<sup>39</sup> Meyer, 2016 U.S. Dist. LEXIS 43944, at \*4; Johanna Interian, Note, *Up in the Air: Harmonizing the Sharing Economy Through Airbnb Regulations*, 39 B.C. INT'L & COMP. L. REV. 129, 152-53 (2016); see also *How Are Fares*

charges the passenger's credit card on file.<sup>40</sup> Uber then retains a percentage of the fare as a fee<sup>41</sup> and sends the remainder to the driver.<sup>42</sup> Thus, the system does not allow for negotiations on the fare between users.<sup>43</sup>

After the ride, the passenger and the driver rate each other on the app.<sup>44</sup> Drivers with poor ratings<sup>45</sup> may have their accounts deactivated by Uber.<sup>46</sup>

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*Calculated?*, UBER, <https://help.uber.com/h/33ed4293-383c-4d73-a610-d171d3aa5a78> (last visited Nov. 17, 2016); Dan Kedmey, *This Is How Uber's 'Surge Pricing' Works*, TIME (Dec. 15, 2014), <http://time.com/3633469/uber-surge-pricing/>; *What Is Dynamic Pricing?*, UBER, <https://help.uber.com/h/34212e8b-d69a-4d8a-a923-095d3075b487> (last visited Nov. 17, 2016).

<sup>40</sup> *Meyer*, 2016 U.S. Dist. LEXIS 43944, at \*4.

<sup>41</sup> The fee is typically between twenty to twenty-five percent of the fare. Silverman & Weber, *supra* note 36; *see also* Hullinger, *supra* note 36.

<sup>42</sup> *Meyer*, 2016 U.S. Dist. LEXIS 43944, at \*4.

<sup>43</sup> Tipping is not included in the fare, and the practice is not compulsory. In fact, the app was originally designed so that no cash would change hands between users. *See Can the Uber App Tip My Driver?*, UBER, <https://help.uber.com/h/f7385bf5-1748-4fd0-a57f-3d9b62facc45> (last visited Nov. 17, 2016) (clarifying that tipping is voluntary and emphasizing that “in most cities, Uber is a cashless experience”). Indeed, tipping is a relatively recent practice for Uber users as Uber has only recently allowed passengers to tip drivers, following its \$100 million settlement of a class action suit with its drivers in April 2016. Silverman & Weber, *supra* note 36. Even with the new practice of tipping, however, Uber has stated that it had no plans to incorporate tipping into its app, which would preserve the price-setting of the fare as being under the exclusive domain of Uber. *See id.*

<sup>44</sup> *Driver Deactivation Policy—US ONLY*, UBER, <https://www.uber.com/legal/deactivation-policy/us-multi-lingual/en/> (last visited June 15, 2016); *How Does Uber Work?*, *supra* note 7; *see also* Hullinger, *supra* note 36.

<sup>45</sup> A bad rating was once defined by Uber's San Francisco office, in an internal document leaked to the media, as less than a “4.6” on a scale of 1 to 5. Cook, *supra* note 36. A “4.6” also seems to be the rating required of drivers in Melbourne, Australia. *See How To Get 5-Star Rating?*, UBER MELBOURNE, <https://drive.uber.com/melbourne/how-can-we-help/how-to-uber/vicquality/> (last visited June 16, 2016). Uber does state on its website, however, that the required minimum average rating varies in different cities, allowing for cultural

Uber is part of the larger so-called sharing economy, sometimes called “gig”<sup>47</sup> or “on-demand” economy,<sup>48</sup> a marketplace that is increasingly characterized by users of a communications platform sharing their resources with each other—everything from homes to goods to transportation.<sup>49</sup> Airbnb, for example, is a popular website that connects travelers seeking a space to stay with hosts who list an available space, whether a private room, an entire house, “tree houses in the woods . . . or enchanted castles.”<sup>50</sup> Users (both hosts and guests) rate each other, allowing the community to build trust and to measure other users’ dependability.<sup>51</sup> StubHub, another popular website, is an online

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differences in how users rate each other in the different locales. *Driver Deactivation Policy—US ONLY*, *supra* note 44.

<sup>46</sup> *Driver Deactivation Policy—US ONLY*, *supra* note 44; see also Harry Campbell, *11 Things That Can Get You Deactivated as an Uber Driver*, THE RIDESHARE GUY (Oct. 19, 2015), <http://therideshareguy.com/10-things-that-can-get-you-deactivated-as-an-uber-driver/>; Cook, *supra* note 36.

<sup>47</sup> Eric Goldman, *Top 10 Internet Law Developments of 2015*, TECH. & MKTG. L. BLOG (Feb. 1, 2016), <http://blog.ericgoldman.org/archives/2016/02/top-10-internet-law-developments-of-2015-forbes-cross-post.htm>.

<sup>48</sup> Zalmi Duchman, *The On-Demand Economy Is Here To Stay, and Now Is the Time To Put It To Use for Your Business*, FORBES (July 14, 2015, 10:00 AM), <http://www.forbes.com/sites/zalmiduchman/2015/07/14/the-on-demand-economy-is-here-to-stay-and-now-is-the-time-to-put-it-to-use-for-your-business/#621c0c5143f8>.

<sup>49</sup> Brittany McNamara, Note, *Airbnb: A Not-So-Safe Resting Place*, 13 J. ON TELECOMM. & HIGH TECH. L. 149, 151 (2015); see Charles Green, *Trusting and Being Trusted in the Sharing Economy*, FORBES (May 2, 2012, 2:01 PM), <http://www.forbes.com/sites/trustedadvisor/2012/05/02/trusting-and-being-trusted-in-the-sharing-economy/#703be2e6608a>; Randy White, *The Sharing Economy: “Plan B” for Moving America Forward*, TEDXSOMA (June 28, 2011), <https://www.youtube.com/watch?v=p2yXFmcl7V8>.

<sup>50</sup> *Who Can Host on Airbnb?*, AIRBNB, <https://www.airbnb.com/help/article/18/who-can-host-on-airbnb> (last visited Feb. 07, 2017); see also McNamara, *supra* note 49, at 151–55; Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, FORBES (Jan. 23, 2013, 7:00 AM), <http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/#3ec449326790>.

<sup>51</sup> *How Do Reviews Work?*, AIRBNB, <https://www.airbnb.com/help/article/13/how-do-reviews-work> (last visited Nov. 17, 2016); see also *It All Starts with Our Standards*, AIRBNB,

ticket marketplace, connecting users who are selling tickets to sports games, concerts, or shows with other users seeking to buy the tickets.<sup>52</sup>

Uber and the web-based sharing economy have grown so rapidly that there is much uncertainty surrounding how different laws and regulations should be applied to them.<sup>53</sup> Of interest in this article is how the immunity under the Communications Decency Act would be applied to Uber.

## II. THE COMMUNICATIONS DECENCY ACT

The Communications Decency Act provides that “[n]o 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.”<sup>54</sup> Enacted by Congress in 1996, a key rationale is to promote the development of the then-nascent Internet<sup>55</sup> and to “encourage the development of technologies which maximize user control over what information is received by individuals . . . who use the Internet and other interactive computer services.”<sup>56</sup> Originally passed to protect interactive computer services from defamatory content provided by third-party users, the statute has been expansively applied beyond defamation suits to protect interactive computer services from fraud, negligence,

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<https://www.airbnb.com/trust> (last visited Nov. 17, 2016); McNamara, *supra* note 49, at 152.

<sup>52</sup> *About Us*, STUBHUB, <http://www.stubhub.com/about-us/> (last visited June 14, 2016); *see also* Matthew Feuerman, Note, *Court-Side Seats? The Communications Decency Act and the Potential Threat to StubHub and Peer-to-Peer Marketplaces*, 57 B.C. L. REV. 227, 228–29 (2016).

<sup>53</sup> *See* Virginia A. Fitt, *Electronic Commerce Law: Crowdsourcing the News: News Organization Liability for iReporters*, 37 WM. MITCHELL L. REV. 1839, 1858 (2011); Interian, *supra* note 39, at 151–53, 156. *See generally* McNamara, *supra* note 49, at 154–55, 159–70.

<sup>54</sup> 47 U.S.C. § 230(c)(1) (2012).

<sup>55</sup> *See id.* § (b)(1).

<sup>56</sup> *Id.* § (b)(3).

intentional infliction of emotional distress, misrepresentation, and invasion of privacy.<sup>57</sup>

Courts have employed a three-pronged test in assessing whether a defendant should receive immunity under the Communications Decency Act. A defendant is protected under the statute when (1) the defendant is a provider or user of an interactive computer service, (2) the information for which the plaintiff is suing is provided by another information content provider, and (3) the lawsuit seeks to treat the defendant as the publisher or speaker of that information.<sup>58</sup> A closer look at each prong follows.

#### *A. What Is a Provider of an Interactive Computer Service?*

An interactive computer service is defined by the statute as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . .”<sup>59</sup>

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<sup>57</sup> *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418–19 (5th Cir. 2008); *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007); *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 726–33 (N.D. Ohio 2007); *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at \*21 (E.D. Tex. Dec. 27, 2006); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 539 (E.D. Va. 2003); Matthew Altenberg, Note, *Playing the Mysterious Game of Online Love: Examining an Emerging Trend of Limiting § 230 Immunity of the Communications Decency Act and the Effects on E-Dating Websites*, 32 PACE L. REV. 922, 938–39 (2012); Feuerman, *supra* note 52, at 234 (“Originally applied predominantly to defamation cases, CDA immunity has been interpreted to apply to any civil suit claiming vicarious liability for websites.”); Dan Malachowski, Comment, *“Username Jacking” in Social Media: Should Celebrities and Brand Owners Recover from Social Networking Sites when Their Social Media Usernames Are Stolen?*, 60 DEPAUL L. REV. 223, 233–34 (2010).

<sup>58</sup> *Jones v. Dirty World Entm’t Recordings, L.L.C.*, 755 F.3d 398, 409 (6th Cir. 2014); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014); *Lycos, Inc.*, 478 F.3d at 418; *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 556 (N.C. Ct. App. 2012).

<sup>59</sup> § 230(f)(2).

Courts have adopted an “expansive definition” of a provider of an interactive computer service.<sup>60</sup> A website, not surprisingly, is a provider of an interactive computer service as it “functions as an intermediary by providing a forum for the exchange of information between third[-]party users.”<sup>61</sup> The designation has also included websites that host message boards<sup>62</sup> (even the employer’s e-mail system),<sup>63</sup> as well as websites that invite or encourage user comments.<sup>64</sup>

More specifically, the designation of a provider of an interactive computer service has been applied to Internet service providers and search engines such as Google,<sup>65</sup> Yahoo,<sup>66</sup> and AOL;<sup>67</sup> retail sites such as Amazon<sup>68</sup> and eBay,<sup>69</sup> in which users “conduct sales transactions” and “provide information (feedback) about other users of the service”;<sup>70</sup> Craigslist, an Internet bulletin

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<sup>60</sup> *Cornelius v. DeLuca*, 709 F. Supp. 2d 1003, 1021 (D. Idaho 2010); *see* *Optinrealbig.com, L.L.C. v. Ironport Sys.*, 323 F. Supp. 2d 1037, 1044 (N.D. Cal. 2004) (“Courts construing § 230(f)(2) have recognized that the definition includes a wide range of cyberspace services, not only internet service providers.”). This article focuses on the “provider” aspect of an interactive computer service, not the “user” aspect, as this article seeks to explore Uber’s liability under the Communications Decency Act, and Uber would be a provider, not a user of its own service. *See infra* Part III.

<sup>61</sup> *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 848 (W.D. Tex. 2007).

<sup>62</sup> *Universal Commc’n Sys., Inc.*, 478 F.3d at 419; *Dimeo v. Max*, 248 F. App’x. 280, 282 (3d Cir. 2007); *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

<sup>63</sup> *Delfino v. Agilent Tech., Inc.*, 52 Cal. Rptr. 3d 376, 389 (Ct. App. 2006).

<sup>64</sup> *Spreadbury v. Biterroot Pub. Library*, 856 F. Supp. 2d 1195, 1198 (D. Mont. 2012).

<sup>65</sup> *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117, 1122–23 (E.D. Cal. 2010); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1197–99 (N.D. Cal. 2009); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500–01 (E.D. Pa. 2006).

<sup>66</sup> *Stayart v. Yahoo!, Inc.*, 651 F. Supp. 2d 873, 885 (E.D. Wis. 2009).

<sup>67</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997).

<sup>68</sup> *Joseph v. Amazon.com, Inc.*, 46 F. Supp. 3d 1095, 1105–07 (W.D. Wash. 2014); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 43 (Wash. Ct. App. 2001).

<sup>69</sup> *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 714 n.7 (Ct. App. 2002).

<sup>70</sup> *Id.*

board site;<sup>71</sup> Yelp, an online review website;<sup>72</sup> an online dating website;<sup>73</sup> social media sites such as Facebook<sup>74</sup> and MySpace;<sup>75</sup> and sharing economy sites such as StubHub<sup>76</sup> and eBay.<sup>77</sup>

### *B. Who Provided the Content?*

There is no immunity under the Communications Decency Act if the online entity itself is the one providing the content, because the content must have originated from “another information content provider.”<sup>78</sup> An information content provider is defined by the statute as “any person or entity that is responsible, in whole or in part, for the *creation* or *development* of information provided through the Internet or any other interactive computer service.”<sup>79</sup>

Content “creation” is easier to define than content “development,”<sup>80</sup> both of which are subsumed under the Communications Decency Act’s definition of information content

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<sup>71</sup> Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671–72 (7th Cir. 2008); Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 965 (N.D. Ill. 2009); Gibson v. Craigslist, Inc., No. 08 Civ. 7735 (RMB), 2009 U.S. Dist. LEXIS 53246, at \*10 (S.D.N.Y. June 15, 2009).

<sup>72</sup> Kimzey v. Yelp!, Inc., 21 F. Supp. 3d 1120, 1123 (W.D. Wash. 2014); Reit v. Yelp!, Inc., 907 N.Y.S.2d 411, 413–14 (Sup. Ct. 2010).

<sup>73</sup> See Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123–24 (9th Cir. 2003).

<sup>74</sup> Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014).

<sup>75</sup> Doe v. MySpace, Inc., 528 F.3d 413, 422 (5th Cir. 2008).

<sup>76</sup> Hill v. StubHub, Inc., 727 S.E.2d 550, 557 (N.C. Ct. App. 2012).

<sup>77</sup> Gentry v. eBay, Inc., 121 Cal. Rptr. 2d 703, 714 n.7 (Ct. App. 2002).

<sup>78</sup> 47 U.S.C. § 230(c)(1) (2012); see Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 254 (4th Cir. 2009); *MySpace, Inc.*, 528 F.3d at 418–19; Green v. Am. Online, Inc., 318 F.3d 465, 471 (3d Cir. 2003); Batzel v. Smith, 333 F.3d 1018, 1030–31, 1031 n.19 (9th Cir. 2003); *Carafano*, 339 F.3d at 1123–24; Ben Ezra, Weinstein, & Co. v. Am. Online, Inc., 206 F.3d 980, 984–86 (10th Cir. 2000); Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (4th Cir. 1997).

<sup>79</sup> § 230(f)(3) (emphasis added).

<sup>80</sup> Feuerman, *supra* note 52, at 233; Eric Weslander, Comment, *Murky “Development”: How the Ninth Circuit Exposed Ambiguity Within the Communications Decency Act, and Why Internet Publishers Should Worry*, 48 WASHBURN L.J. 267, 291 (2008).

provider.<sup>81</sup> Certainly a third-party user of a social media site who posts on the site is the creator of that content (the content being the post), and the user would therefore be “another information content provider” under the statute.<sup>82</sup> In *Doe v. MySpace, Inc.*, for example, a minor misrepresented her age as eighteen years old on the social media website MySpace, which led to an adult contacting her through the site, subsequently meeting her in person and sexually assaulting her.<sup>83</sup> When the minor’s mother sued MySpace, the Fifth Circuit affirmed a lower court’s ruling that protected MySpace from liability under the statute because the minor was the creator of her own profile.<sup>84</sup>

As websites have become more interactive, however, as one commentator put it, “the line between the website and the users of the website blurs.”<sup>85</sup> This is evident in *Fair Housing Council of San Fernando Valley v. Roommates.com, L.L.C.*,<sup>86</sup> the seminal Ninth Circuit case that defines what it means to be an information content provider by way of *developing* content, rather than creating it.<sup>87</sup>

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<sup>81</sup> See § 230(f)(3).

<sup>82</sup> *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010); *Nemet Chevrolet, Ltd.*, 591 F.3d at 254–55.

<sup>83</sup> *MySpace, Inc.*, 528 F.3d at 416.

<sup>84</sup> *Id.* at 420, 422. The court rejected the plaintiff’s argument that MySpace shared the creation of the content with the minor user due to the site’s facilitating the creation of users’ profiles through a questionnaire and due to the site’s search feature, ultimately because the plaintiff had failed to present the argument to the lower court. *Id.* at 422. The court did, however, signal that the argument would not have been a winning one. See *id.* at 420.

<sup>85</sup> *Weslander*, *supra* note 80, at 293.

<sup>86</sup> 521 F.3d 1157 (9th Cir. 2008).

<sup>87</sup> *Id.* at 1162–63. *Roommates.com*, a website that connected renters with those looking for roommates, was held to be a content provider when the website created discriminatory questions and choice of answers, forcing users to participate in them by answering the questions as a requirement of using the website. *Id.* at 1161–62, 1163, 1167. The Ninth Circuit emphasized that the structure of the website was such that it did not merely provide a framework which users could then freely use for whatever purpose, be it illegal. *Id.* at 1172. The Ninth Circuit contrasted its holding in *Roommates* with its holding in

Of content development and immunity under the statute, the court in *Roommates* stated, “The message to website operators is clear: If you don’t *encourage* illegal content, or design your website to *require* users to input illegal content, you will be immune.”<sup>88</sup> In light of this rule, two different tests have been employed by other courts in determining whether a website’s content development precludes it from enjoying immunity under the Communications Decency Act.

Under the more relaxed “encouragement” test, merely *encouraging* or inducing the development of illegal content, as contrasted with providing a neutral framework for users, would result in the website being deemed a developer of that content and thus an information content provider.<sup>89</sup> Under the more stringent “requirement” test, a website must have materially contributed to the illegal content by *requiring* users to post the content for it to be deemed a developer of the content and an information content provider.<sup>90</sup>

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*Carafano v. Metrosplash.com, Inc.*, in which the defendant dating website was found *not* to be a content provider when the website had created the framework of site usage in the form of questions that users must fill out to use the service, but the offensive content at issue was created solely by the user. *Id.* at 1171–72; *cf.* *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122–24 (9th Cir. 2003). Although the facts of the case are similar to *Roommates*, the critical difference is that in *Carafano*, the website-created framework did not have to do with the offensive content at issue—the website played no part in encouraging or requiring the illegal act. *Roommates.com*, 521 F.3d at 1172.

<sup>88</sup> *Roommates.com*, 521 F.3d at 1175 (emphasis added).

<sup>89</sup> Jeffrey R. Doty, Note, *Inducement or Solicitation? Competing Interpretations of the “Underlying Illegality” Test in the Wake of Roommates.com*, 6 WASH. J.L. TECH. & ARTS 125, 126–27, 130–32, 136 (2010); Ryan J. P. Dyer, Comment, *The Communication[s] Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption*, 37 SEATTLE U. L. REV. 837, 845, 860 (2014); Feuerman, *supra* note 52, at 238; *see, e.g.*, *Jones v. Dirty World Entm’t Recordings, L.L.C.*, 755 F.3d 398, 414–15 (6th Cir. 2014).

<sup>90</sup> Doty, *supra* note 89, at 126–27, 130–32; Dyer, *supra* note 89; Feuerman, *supra* note 52, at 239; *see, e.g.*, *Jones*, 755 F.3d at 413–17. For example, Amazon was not a content provider when it provided tools through its zShops platform for third-party users to post information on its site and furthermore encouraged users to use these tools, because users ultimately made their own

The Ninth Circuit took a rather novel and expansive interpretation of the statute in *Roommates*,<sup>91</sup> and the case has been criticized for its “vague and varying articulations” with regard to the basis of liability, which has led to the two different tests above.<sup>92</sup>

The dissent in *Roommates* also criticizes the majority for adding the requirement that the content be *unlawful* for immunity to attach, when in fact the Communications Decency Act has no such requirement in its language.<sup>93</sup> The dissent points out that the statute examines only whether the content was provided by the website, which would be independent from the inquiry of whether the content was unlawful.<sup>94</sup> While the issue in *Roommates* has to do with the liability of an information content provider specifically by way of developing content,<sup>95</sup> this unlawfulness requirement has

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decision about what information to put on the site. *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004).

<sup>91</sup> Feuerman, *supra* note 52, at 237; Weslander, *supra* note 80, at 291.

<sup>92</sup> Doty, *supra* note 89, at 130; *see* Dyer, *supra* note 89, at 844; *see also* Weslander, *supra* note 80, at 290–94.

<sup>93</sup> *Roommates.com*, 521 F.3d at 1182–83 (McKeown, J., dissenting).

<sup>94</sup> *Id.*

[The majority’s] definition is original to say the least and springs forth untethered to anything in the statute.

The . . . definition of “development” epitomizes its consistent collapse of substantive liability with the issue of immunity. Where in the statute does Congress say anything about unlawfulness? Whether Roommate is entitled to immunity for publishing and sorting profiles is wholly distinct from whether Roommate may be liable for violations of the FHA. Immunity has meaning only when there is something to be immune *from*, whether a disease or the violation of a law. It would be nonsense to claim to be immune only from the innocuous. But the majority’s immunity analysis is built on substantive liability: to the majority, CDA immunity depends on whether a webhost materially contributed to the unlawfulness of the information. Whether the information at issue is unlawful and whether the webhost has contributed to its unlawfulness are issues analytically independent of the determination of immunity. *Id.*

<sup>95</sup> *Id.* at 1162–63 (majority opinion).

been picked up and attached to the broader definition of information content provider.<sup>96</sup>

It is noteworthy that websites are free to edit content provided by third-party users without incurring liability as information content provider.<sup>97</sup> This editing function includes choosing which content authored by third-party users would be published on the site,<sup>98</sup> making minor alterations to the content,<sup>99</sup> deleting errors found in the content,<sup>100</sup> and making selective content deletion.<sup>101</sup>

Additionally, courts have been clear that a website is not a content provider when it “provides a neutral means by which third parties can post information of their own independent choosing online.”<sup>102</sup> For example, sharing economy website StubHub<sup>103</sup> was not a content provider when its pricing tool on the website did nothing more than provide information on the prices of tickets to the same event that had been sold on the site previously.<sup>104</sup> The court said that StubHub’s pricing tool was the “prototypically ‘neutral tool’” because it provided information “without suggesting, much less requiring” users to set any particular price on the tickets.<sup>105</sup> Rather, third-party sellers as users set their *own* prices on the site.<sup>106</sup> Google went a step further than StubHub by providing *suggestions* of certain keywords to bidders in its AdWords program,<sup>107</sup> but it too was found not to have been a content

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<sup>96</sup> See, e.g., *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009); *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008).

<sup>97</sup> See *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

<sup>98</sup> *Barrett v. Fonorow*, 799 N.E.2d 916, 926–27 (Ill. App. Ct. 2003).

<sup>99</sup> *Batzel*, 333 F.3d at 1031.

<sup>100</sup> *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000).

<sup>101</sup> *Donato v. Moldow*, 865 A.2d 711, 726 (N.J. Super. Ct. App. Div. 2004).

<sup>102</sup> *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014); see also *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196 (N.D. Cal. 2009).

<sup>103</sup> See *About Us*, STUBHUB, *supra* note 52.

<sup>104</sup> *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 562 (N.C. Ct. App. 2012).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 561–62.

<sup>107</sup> *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010).

provider under the statute because the bidders could still “adopt or reject [the keywords] at their discretion.”<sup>108</sup> In so doing, the program merely helped bidders “refine their content,”<sup>109</sup> and so it was a “neutral tool” for bidders as users of the site.<sup>110</sup>

Lastly, it is noteworthy that the court in *StubHub* found the sharing economy website<sup>111</sup> immune when its business model was such that it was a “broker” in connecting users, who were buyers and sellers of tickets to various events, to conduct their own transactions (with the sellers setting the price, as discussed above).<sup>112</sup> Put another way, StubHub’s website was the meeting place for these users who were interested in buying and selling tickets, and users were free to make their own interactions and sales<sup>113</sup>—StubHub did not systematically require certain user connections or sales to occur, or, conversely, restrict connections or sales between any particular users.<sup>114</sup> This brokering function is apparent in Airbnb, for example, being another sharing economy website, which also neither systematically requires certain user connections or bookings to occur nor restricts them from occurring.<sup>115</sup>

### C. What Is a Publisher?

As the District of Columbia Circuit Court of Appeals explained, “Although the [Communications Decency Act] does not define ‘publisher,’ its ordinary meaning is ‘one that makes public,’ and ‘the reproducer of a work intended for public consumption.’ Indeed, the very essence of publishing is making the decision whether to print or retract a given piece of content . . . .”<sup>116</sup> Thus,

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See *About Us*, STUBHUB, *supra* note 52.

<sup>112</sup> Hill v. StubHub, Inc., 727 S.E.2d 550, 552, 563 (N.C. Ct. App. 2012).

<sup>113</sup> See *id.* at 552–53, 561–63.

<sup>114</sup> See *id.* at 561–63.

<sup>115</sup> See Interian, *supra* note 39, at 153.

<sup>116</sup> Klayman v. Zuckerberg, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (citation omitted).

the function of a publisher includes choosing what to publish among proffered material,<sup>117</sup> editing, archiving, caching, monitoring, screening, providing access to, postponing, and deleting content<sup>118</sup>—or conversely, deciding not to do anything to the content at all.<sup>119</sup>

The broad definition has, not surprisingly, yielded a designation of publisher to an array of types of websites, from Internet service providers and search engines such as Google,<sup>120</sup> Yahoo,<sup>121</sup> and AOL;<sup>122</sup> retail sites like Amazon<sup>123</sup> and eBay;<sup>124</sup> Craigslist, an Internet bulletin board site;<sup>125</sup> Yelp, an online review website;<sup>126</sup> an online dating website;<sup>127</sup> social media sites such as Facebook<sup>128</sup> and MySpace,<sup>129</sup> to sharing economy sites such as StubHub<sup>130</sup> and eBay.<sup>131</sup>

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<sup>117</sup> *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

<sup>118</sup> *See, e.g., Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009); *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008); *Green v. Am. Online, Inc.*, 318 F.3d 465, 471 (3d Cir. 2003); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500–01 (E.D. Pa. 2006).

<sup>119</sup> *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 706–09, 715 (Ct. App. 2002).

<sup>120</sup> *See Langdon*, 474 F. Supp. 2d at 631; *see also Parker*, 422 F. Supp. 2d at 500–01.

<sup>121</sup> *Barnes*, 570 F.3d at 1102.

<sup>122</sup> *Zeran*, 129 F.3d at 330.

<sup>123</sup> *See Joseph v. Amazon.com, Inc.*, 46 F. Supp. 3d 1095, 1106–07 (W.D. Wash. 2014); *see also Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 41–42 (Wash. Ct. App. 2001).

<sup>124</sup> *Gentry*, 121 Cal. Rptr. 2d at 706–09, 715.

<sup>125</sup> *See Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671–72 (7th Cir. 2008); *see also Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 965–66 (N.D. Ill. 2009); *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735 (RMB), 2009 U.S. Dist. LEXIS 53246 at \*11–12 (S.D.N.Y. June 15, 2009).

<sup>126</sup> *Reit v. Yelp!, Inc.*, 907 N.Y.S.2d 411, 414 (Sup. Ct. 2010).

<sup>127</sup> *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003).

<sup>128</sup> *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014).

<sup>129</sup> *Doe v. MySpace, Inc.*, 528 F.3d 413, 419–20 (5th Cir. 2008).

<sup>130</sup> *See Hill v. StubHub, Inc.*, 727 S.E.2d 550, 552, 557 (N.C. Ct. App. 2012).

<sup>131</sup> *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 706–09, 715 (Ct. App. 2002).

### III. WHY UBER WOULD NOT BE IMMUNE UNDER THE COMMUNICATIONS DECENCY ACT

How would Uber fare under the Communications Decency Act? Uber has been steadfast in its characterization that it is *not* a transportation company, but rather a technology company, one that provides a ride-sharing platform for users to connect by soliciting rides from and generate ratings for each other.<sup>132</sup> In other words, Uber would argue that it would qualify for immunity under the Communications Decency Act as a tech platform—that it is just like other tech platforms and websites that have found to be immune under the statute. As late as 2014, Uber’s in-house attorney likened getting a ride using the Uber app to arranging a ride with a friend on Facebook: “If you . . . got in an accident, . . . the social media site [Facebook] would not be liable.”<sup>133</sup>

It is telling that a federal district court in California (in an order denying Uber’s motion for summary judgment on the issue of whether Uber’s drivers should be categorized as employees, which took place before Uber’s ensuing settlement with its drivers)

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<sup>132</sup> See Order Denying Defendant Uber Techs., Inc.’s Motion for Summary Judgment at 10, *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. Mar. 11, 2015) (No. C-13-3826 EMC); Order, Decision or Award of the Labor Commissioner at 9, *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK (Labor Comm’r Cal. June 16, 2015); Ward, *supra* note 24, at 14; Huet, *supra* note 11; *Legal Terms and Conditions*, UBER, <https://www.uber.com/legal/other/US-terms-pre-Nov-2016/> (last visited June 29, 2016).

The Services constitute a technology platform that enables users of Uber’s mobile applications or websites provided as part of the Services (each, an “*Application*”) to arrange and schedule transportation and/or logistics services with third party providers of such services, including independent third party transportation providers and third party logistics providers under agreement with Uber or certain of Uber’s affiliates (“*Third Party Providers*”) . . . YOU ACKNOWLEDGE THAT UBER DOES NOT PROVIDE TRANSPORTATION OR LOGISTICS SERVICES OR FUNCTION AS A TRANSPORTATION CARRIER.

*Legal Terms and Conditions*, *supra*.

<sup>133</sup> Ward, *supra* note 24, at 14, 17.

rejected Uber's characterization of itself as merely a technology company as "fatally flawed."<sup>134</sup>

Uber's self-definition as a mere "technology company" focuses exclusively on the mechanics of its platform (i.e., the use of internet enabled smartphones and software applications) rather than on the substance of what Uber actually does (i.e., enable customers to book and receive rides). This is an unduly narrow frame. Uber engineered a software method to connect drivers with passengers, but this is merely one instrumentality used in the context of its larger business. Uber does not simply sell software; it sells rides. Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs, John Deere is a "technology company" because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a "technology company" because it uses modern irrigation techniques to grow its sugar cane. Indeed, very few (if any) firms are not technology companies if one focuses solely on how they create or distribute their products. If, however, the focus is on the substance of what the firm actually does (e.g., sells cab rides, lawn mowers, or sugar), it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one. In fact, as noted above, Uber's own marketing bears this out, referring to Uber as "Everyone's Private Driver," and describing Uber as a "transportation system" and the "best transportation service in San Francisco."<sup>135</sup>

Indeed, while some analysts have called for Communications Decency Act immunity to be extended to Uber, largely as a measure to protect the growth of the sharing economy industry,<sup>136</sup>

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<sup>134</sup> Order Denying Defendant Uber Techs., Inc.'s Motion for Summary Judgment, *O'Connor*, 82 F. Supp. 3d 1133 (No. C-13-3826 EMC).

<sup>135</sup> *Id.* at 10–11.

<sup>136</sup> See, e.g., Feuerman, *supra* note 52, at 242–43; McNamara, *supra* note 49, at 166, 169.

many have argued for a contraction of Communications Decency Act immunity as the Internet has grown immensely since the passage of the Act and argued for a limitation of how the immunity should be applied to sharing economy businesses in particular.<sup>137</sup>

Much is unsettled about how Communications Decency Act immunity would be fitted to sharing economy businesses,<sup>138</sup> but as will be shown below, Uber's particular business model would disqualify the company from enjoying immunity under the statute.

Uber would likely easily meet the first and third prongs of the test for immunity: whether the website is a provider of an interactive computer service<sup>139</sup> and whether the website is the publisher of the content, respectively.<sup>140</sup> With regard to the first prong, as courts have been expansive in their definition of a provider of an interactive computer service,<sup>141</sup> there has been consistency in finding websites of all types to be providers of an interactive computer service.<sup>142</sup> StubHub, for example, a sharing

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<sup>137</sup> Altenberg, *supra* note 57, at 948–53; Dyer, *supra* note 89, at 841–42, 855–58; Interian, *supra* note 39, at 160–61; *see also* Weslander, *supra* note 80, at 278, 284.

“[F]or websites, this [expectation against liability] is codified in law—they are not legally responsible for what their users publish, according to the Communications Decency Act, perhaps the most influential law in the development of the web. That is why Yelp avoids liability when people post inaccurate or abusive restaurant reviews, and why YouTube does not have to remove videos that some find offensive.

The law protects online speech, not actions people take in the offline world. Yet its ethos has permeated Silicon Valley so deeply that people invoke it even for things that happen offline.

‘These folks grew up in a world where platforms are not responsible, and then when they go do stuff in the real world, they expect that to be the case,’ said Ryan Calo, an assistant professor at the University of Washington law school who studies cyber law.”

Miller, *supra* note 14.

<sup>138</sup> *See* Fitt, *supra* note 53; Interian, *supra* note 39, at 151–53, 156. *See generally* McNamara, *supra* note 49, at 154–55, 159–70.

<sup>139</sup> *See supra* Part II(A).

<sup>140</sup> *See supra* Part II(C).

<sup>141</sup> *See supra* Part II(A).

<sup>142</sup> *See supra* Part II(A).

economy website like Uber, has been found to be a provider.<sup>143</sup> As Uber provides access to its Internet-based app for its users (passengers and drivers) and provides a forum through its app for users to exchange information for the purposes of arranging a ride,<sup>144</sup> Uber would be a provider of an interactive computer service under the statute, thus satisfying the first prong.

With regard to the third prong, courts have similarly been liberal in defining what a publisher is.<sup>145</sup> A generous range of activities by websites of all types has qualified under the function of a publisher.<sup>146</sup> Of note, StubHub, again, being a sharing economy website, has been found to be a publisher.<sup>147</sup> Uber's activity in connecting passengers and drivers for their ride on its app<sup>148</sup> would likely fall under the function of a publisher under the statute, thus satisfying the third prong.

But Uber would have difficulty meeting the second prong: whether a third party provided the content on the computer service.<sup>149</sup> While passengers and drivers do provide some content as third-party users of the app—first by signing up to use the Uber app, then by requesting a ride as a passenger and by responding to a ride request as a driver<sup>150</sup>—Uber *also* provides content by setting the price of the ride and by commanding heavy control over user ride connections.

#### *A. Price-Setting and Providing Content*

As Uber sets the price for the ride,<sup>151</sup> Uber creates *that* piece of information in the interaction between its third-party users. Passengers and drivers as users have no say or contribution to the

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<sup>143</sup> Hill v. StubHub, Inc., 727 S.E.2d 550, 557 (N.C. Ct. App. 2012).

<sup>144</sup> See *supra* Part I.

<sup>145</sup> See *supra* Part II(C).

<sup>146</sup> See *supra* Part II(C).

<sup>147</sup> See Hill, 727 S.E.2d at 552, 557.

<sup>148</sup> See *supra* Part I.

<sup>149</sup> See *supra* Part II(B).

<sup>150</sup> See *supra* Part I.

<sup>151</sup> See *supra* note 39.

price; this content is created solely by Uber.<sup>152</sup> Uber's role here as a content creator is more easily discernible than some other websites' role as a content developer to an extent that would trigger liability, as the *Roommates* court was concerned,<sup>153</sup> because Uber actually creates the content by setting the price outright.

Neither does Uber's price-setting mechanism function as a neutral tool for users, as would be required so as not to be a content provider.<sup>154</sup> Of the two websites whose mechanisms were found to be neutral tools discussed previously, StubHub and Google,<sup>155</sup> it is precisely because StubHub's pricing tool neither suggested nor required sellers to sell their event tickets at any particular price that it was found to be a "neutral tool" for users; sellers were free to choose whatever price at which to list their tickets.<sup>156</sup> Similarly, although Google's AdWords program provided suggestions of certain keywords, it did not require users to take up those keywords, and it was found to be a "neutral tool" for users.<sup>157</sup> Bidders could still "adopt or reject [the keywords] at their discretion."<sup>158</sup>

Uber's price-setting mechanism stands in stark contrast to these two tools: It *requires* users to agree to a price for the ride set by Uber through its algorithm without any input from users,<sup>159</sup> and thus is *not* a neutral tool for users. As such, this mechanism goes beyond being an editing function permitted for websites within the prong<sup>160</sup> (after all, there is no content *to* edit if users have no input whatsoever on the price of the ride)—it is providing the content itself.

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<sup>152</sup> See *supra* notes 39, 43.

<sup>153</sup> Fair Housing Council of San Fernando Valley v. Roommates.com, L.L.C., 521 F.3d 1157, 1162–63 (9th Cir. 2008).

<sup>154</sup> See *supra* Part II(B).

<sup>155</sup> See *supra* Part II(B).

<sup>156</sup> Hill v. StubHub, Inc., 727 S.E.2d 550, 561–62 (N.C. Ct. App. 2012).

<sup>157</sup> Jurin v. Google, Inc., 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010).

<sup>158</sup> *Id.*

<sup>159</sup> See Interian, *supra* note 39, at 153; see sources cited *supra* notes 39, 43.

<sup>160</sup> See *supra* Part II(B).

It is true that the context for Uber differs from many Communications Decency Act cases in that the reason Uber would be sued is likely not because the price being set by Uber is *per se* unlawful,<sup>161</sup> but because the ride connection made through Uber has caused some sort of an accident or injury due to negligence or intentional acts.<sup>162</sup> In this scenario, though, the event that would likely trigger the lawsuit would not happen without the ride connection having been made through Uber, and the price of the ride is a necessary part of that connection, with Uber being the entity that sets the price. The price of the ride being set by Uber is not severable from the injury-causing ride itself.

A better analysis of the scenario, however, would examine Uber's role as a content provider by setting the price against the plain language of the Communications Decency Act. There is nothing in the statute that requires the content at issue to be unlawful—the statute examines only whether the content was provided by a third-party for immunity to attach.<sup>163</sup> Indeed, it is revealing that in the aforementioned *Doe v. MySpace, Inc.*,<sup>164</sup> the court does not distinguish between the content that was *itself* unlawful in nature<sup>165</sup> and the content that *led to* the unlawful event.<sup>166</sup>

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<sup>161</sup> As opposed to, for example, a website being sued for a defamatory posting authored by a third-party user—the classic fact pattern for Communications Decency Act cases. *See supra* note 57.

<sup>162</sup> *See supra* note 11.

<sup>163</sup> *See supra* Part II(B).

<sup>164</sup> *Doe v. MySpace, Inc.*, 528 F.3d 413, 418–22 (5th Cir. 2008).

<sup>165</sup> *Id.*

<sup>166</sup> Which is the case in *Doe v. MySpace, Inc.*, as it was *not* the posting made by the minor that was the reason for the lawsuit, but rather the sexual assault that followed the posting by the minor. *Id.* at 415–17. Thus the posting made by the minor made a way for, or *led to*, the unlawful event against her—analogueous to the scenario likely facing Uber in lawsuit. *See supra* note 11. A critical difference here is MySpace was not a content provider (the third-party minor user was the content creator by setting up her profile), while Uber is taking on the role of content provider by setting the price for the ride between third-party users. *See sources cited supra* notes 39, 43.

Thus the analysis for Uber should be focused on the price as the content being set solely by Uber, independent of whether that content is unlawful. Uber creates the content that is the price of the ride for its users, and that role should suffice to render Uber as an information content provider.<sup>167</sup>

### *B. Controlling User Connections and Providing Content*

Additionally, Uber controls aspects of user connections by sending a passenger's ride request to a particular driver<sup>168</sup> and by not allowing passengers to pick their drivers.<sup>169</sup> As far as third-party users using the app are concerned, the app does not provide a neutral means for them to connect with other users freely.

To elaborate, while there is some freedom for a driver to accept or decline a ride request,<sup>170</sup> a driver is not given access on the app to see all ride requests being made on Uber (or to choose from that pool).<sup>171</sup> Rather, ride requests come to him one at a time, delegated by Uber.<sup>172</sup> For a passenger, there is much less freedom. The passenger has no choice in drivers.<sup>173</sup> Once the ride request has been accepted by a driver, the only way out of the now-already

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<sup>167</sup> See also Ward, *supra* note 24, at 14.

Timothy Alger, a litigation partner at the firm Perkins Coie, said of ride-sharing app companies like Uber, "If you are just an app that's collecting user-generated content on one side, and people are able to pick and choose if they want to hire a service, that to me would have immunity under the Communications Decency Act," but "[i]f a service is setting the price from Midtown to Wall Street at \$10, then under the law that might be considered something that is not just a publisher's role." *Id.* Other experts have voiced a similar view. Professor Eric Goldman, an Internet Law scholar, and Venkat Balasubramani, an attorney specializing in Internet litigation, have both expressed uncertainty over whether Uber would qualify for Communications Decency Act protection due to its business model of setting the price for the ride and for controlling some measure of user connections. Huet, *supra* note 11.

<sup>168</sup> See sources cited *supra* notes 35, 36.

<sup>169</sup> See sources cited *supra* note 37.

<sup>170</sup> See sources cited *supra* notes 35, 36.

<sup>171</sup> See sources cited *supra* note 36.

<sup>172</sup> See *id.*

<sup>173</sup> See sources cited *supra* note 37.

arranged ride is for the passenger to abort the ride and make a new request.<sup>174</sup> These systemic restrictions do not make for a “neutral tool” for users to make connections of their own “independent choosing,” as would be required of a website so as not to be a content provider.<sup>175</sup>

It is true that websites are afforded an editing function within the prong without incurring liability as a content provider.<sup>176</sup> But selecting which content would be published or making alterations to content—both permitted within the editing function<sup>177</sup>—is incongruous to channeling user connection systematically, as the latter is much more than editing. It is actively forming user connections and thus generating content.

It is helpful to consider how other sharing economy websites such as StubHub and Airbnb freely allow users to make their own connections with each other.<sup>178</sup> There are no restrictions for sellers and buyers of tickets to conduct a sale with each other on StubHub,<sup>179</sup> and there are no restrictions for travelers and hosts to book a space with each other on Airbnb.<sup>180</sup>

This “broker[ing]” function<sup>181</sup> in connecting users represents the free marketplace espoused by the requirement of a neutral tool for users,<sup>182</sup> and a platform that allows for open connections between users is important to the determination that a website was not a content provider.<sup>183</sup> Uber fails to provide a neutral tool for users by heavily controlling user connections and thus exposes itself to liability as an information content provider.

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<sup>174</sup> See *supra* note 38.

<sup>175</sup> See *supra* Part II(B).

<sup>176</sup> See *supra* Part II(B).

<sup>177</sup> *Barrett v. Fonorow*, 799 N.E.2d 916, 926–27 (Ill. App. Ct. 2003); *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

<sup>178</sup> See *supra* Part II(B).

<sup>179</sup> See *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 552, 563 (N.C. Ct. App. 2012).

<sup>180</sup> See *Interian*, *supra* note 39, at 153.

<sup>181</sup> *Hill*, 727 S.E.2d at 563.

<sup>182</sup> See *supra* Part II(B).

<sup>183</sup> See *supra* Part II(B).

### *C. Providing Content and Losing Immunity*

Given that Uber sets the price of the ride and heavily controls user connections, it is an information content provider under the Communications Decency Act. But the two practices are not dependent on each other in making Uber a content provider. As the analysis above shows, either practice is sufficient to render Uber a content provider.<sup>184</sup> Thus, it would be too narrow of a construction to classify Uber as a content provider only from the moment a driver accepts a ride request from a particular passenger to the conclusion of the ride (because that is the timeframe in which Uber's algorithm has set the price for the ride *and* the system has channeled the users to connect with each other).

A more appropriate construction would categorize Uber as a content provider from the time the app is turned on by a driver seeking to pick up a ride, because turning on the app engages the Uber app system, which, among other functions, starts to engineer the channeling of user connections, even if it has yet to set a price.<sup>185</sup> This position would render Uber a content provider in Sofia Liu's case, and thus unprotected by the Communications Decency Act, because the driver had turned on the app and was waiting for a ride request to come through when he struck the family with his car.<sup>186</sup>

Given that Uber is a content provider in the ride-sharing arrangement between users, immunity under the Communications Decency Act would not be properly conferred on the company when passengers, drivers, or bystanders sue Uber for an injury involving an Uber ride. Indeed, giving immunity under the statute when Uber sets the price for the ride would seem to be antithetical to the expressly stated Congressional policy behind the statute, to "encourage the development of technologies which maximize user control,"<sup>187</sup> because price-setting does not maximize user control. In the same manner, giving immunity when Uber commands so

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<sup>184</sup> See *supra* Part III(A), (B).

<sup>185</sup> See *supra* Part I.

<sup>186</sup> See sources cited *supra* note 8 and accompanying text.

<sup>187</sup> 47 U.S.C. § 230(b)(3) (2012).

much control over user connections does not maximize user control.

### CONCLUSION

As Uber's popularity increases and more people use its app to arrange ride-sharing, injuries to bystanders to the ride, as well as to passengers and drivers, have correspondingly increased. Uber asserts that it is a technology platform as opposed to a transportation company—a claim that would usually trigger the protection of the Communications Decency Act, which would insulate Uber from lawsuits for injuries involving those rides. The statute has robustly protected Web-based companies from liability based on content provided by third parties.

But Uber employs a distinctive business model to other Web-based companies that have been protected by the statute. First, Uber sets the price for the transactions between its users, creating that piece of information in the interaction between its third-party users. Uber's price-setting mechanism function does not offer its users a neutral tool in using the app. Second, Uber exercises heavy control in user connections by orchestrating much of the ride connection between passenger and driver. As far as third-party users using the app are concerned, the app does not provide a neutral tool for them to make connections of their own independent choosing.

These practices cause Uber to be more than just a technology platform—it is a content provider in the ride-sharing arrangement through its app. As a content provider, Uber would thus not qualify for immunity under the Communications Decency Act.