

Religious Discrimination Over the Internet: Protected or Prohibited?
A Comparison of Law in the United Kingdom and the United States in the
Recent Settlement between Google and the Christian Institute

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I. Introduction

Google, an internet search engine, recently settled with the Christian Institute, a United Kingdom charitable organization, and the settlement was hailed as a “victory for common sense.”² The Christian Institute brought suit against Google in April of 2008 in the United Kingdom because Google refused to display the Christian Institute’s anti-abortion advertisement.³ The advertisement read:

UK Abortion Law

Key views and news on abortion law from The Christian Institute

www.christian.org.uk⁴

Google refused to display the advertisement based on its “abortion and religion related content.”⁵ After Google’s refusal, the Christian Institute initiated a lawsuit against Google under the United Kingdom’s Equality Act 2006.⁶ Rather than face suit, Google settled the case in September of 2008.⁷

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² Sarah Cassidy, *Google Forced to Accept Anti-Abortion Advertising*, THE INDEPENDENT (London), September 18, 2008, <http://www.independent.co.uk/life-style/gadgets-and-tech/news/google-forced-to-accept-antiabortion-advertising-934241.html>.

³ *Id.*

⁴ Ki Mae Hussner, *Google OKs Religious Groups’ Abortion Ads*, ABC News, September 18, 2008, available at <http://abcnews.go.com/Technology/story?id=5827418>.

⁵ Sarah Cassidy, *Google Forced to Accept Anti-Abortion Advertising*, THE INDEPENDENT, September 18, 2008, <http://www.independent.co.uk/life-style/gadgets-and-tech/news/google-forced-to-accept-antiabortion-advertising-934241.html>.

⁶ *Id.*

⁷ *Id.*

In response to the lawsuit, Google also announced a change in its advertising policy worldwide and now allows religious organizations to advertise against abortion on Google. However, in announcing this policy change, the company was explicit that Google will only display advertisements that are meant to “educate and inform, not to shock” and that the advertisements must be displayed in a “factual” manner.⁸

American organizations took notice of the Christian Institute’s lawsuit and subsequent policy change by Google. Americans United For Life praised Google for “standing by freedom of speech” and said “it was really outrageous to censor the Christian Institute.”⁹ The director of the Christian Defense Coalition commented that the change in Google’s policy was a “victory for people of faith.”¹⁰ Even American organizations which support a woman’s right to choose, like the National Women’s Organization, applauded Google, specifically for requiring accuracy in advertisements about abortion.¹¹

The focus of most coverage on Google’s policy towards religious advertisements has been centered on the free speech of religious organizations. However, is the outcome of Google’s settlement really a “victory for common sense”¹²? If this suit had been brought by an American Christian organization under the laws of the United States, instead of a United Kingdom Christian organization under the Equality Act 2006, would it have been successful? What about Google’s right to free speech and Google’s right to decide what advertisements are published on its website?

⁸ Thomas Claburn, *Google Lifts Ban on Controversial Christian Institute Ads*, INFORMATIONWEEK, September 17, 2008, available at <http://www.informationweek.com/news/internet/google/showArticle.jhtml?articleID=210602191>

⁹ Ki Mae Hussner, *Google OKs Religious Groups’ Abortion Ads*, ABC News, September 18, 2008, <http://abcnews.go.com/Technology/story?id=5827418>.

¹⁰ *Id.*

¹¹ *Id.*

¹² Sarah Cassidy, *Google Forced to Accept Anti-Abortion Advertising*, THE INDEPENDENT, September 18, 2008, <http://www.independent.co.uk/life-style/gadgets-and-tech/news/google-forced-to-accept-antiabortion-advertising-934241.html>.

This article will analyze religious discrimination under the United Kingdom's Equality Act 2006 as compared with the prohibitions on religious discrimination in the United States. Specifically, this article will examine the scope of Google's right as a private, for profit, internet search engine to discriminate on the basis of religion in deciding whether to display an advertisement in both the United Kingdom and the United States. First, this article will look at the United Kingdom's Equality Act 2006 and its particular prohibitions regarding religious discrimination. Second, this article will explore the United States' prohibitions on religious discrimination by analyzing three laws: The First Amendment, Title II of the Civil Rights Act, and the Communications Decency Act. Finally, this article will examine whether Google's settlement was a common sense victory for free speech or rather, was a reflection of the internet as a global business complying with foreign law.

II. The United Kingdom's Equality Act 2006

The Equality Act 2006 was enacted in the United Kingdom in February, 2006, to unify the existing anti-discrimination legislation into a single equality statute.¹³ The Act fused the existing anti-discrimination commissions – the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission – into a single entity, The Commission for Equality and Human Rights.¹⁴ With this unification, the Act also created new equality grounds in addition to race, gender and disability. The Equality Act 2006 significantly expanded the scope of anti-discrimination legislation by including a provision making discrimination on the grounds of religion or belief unlawful.¹⁵

¹³ Colm O'Conneide, *The Commission for Equality and Human Rights: A New Institution for New and Uncertain Times*, 36 INDUS. L.J. 141, 142 (2007).

¹⁴ *Id.* at 141-42.

¹⁵ *Id.* at 141. The Equality Act also made discrimination based on age unlawful and created a provision enabling future legislation to be passed making discrimination on the grounds of sexual orientation unlawful. While this expansion is certainly noteworthy, since the focus of this article is on religious discrimination, the expansion of discrimination grounds for sexual orientation and age will not be examined in this discussion. *Id.*

This new equality ground presents challenges in enforcement and application.¹⁶ Part Two of the Equality Act 2006 establishes that discrimination based on religion or belief in provision of goods and services is unlawful.¹⁷ Religion and belief is broadly defined to include any religion, any religious or philosophical belief, a reference to a lack of religion and a reference to a lack of belief.¹⁸ Furthermore, the act does not distinguish between a private entity and a public entity. Rather, the act is enforceable against any “person” who discriminates against another based on religion or belief.¹⁹

The Christian Institute brought suit against Google under Section 46 of the Equality Act.²⁰ Section 46 states: “It is unlawful for a person (“A”) concerned with the provision to the public or a section of the public of goods, facilities or services to discriminate²¹ against a person (“B”) who seeks to obtain or use those goods, facilities or services.”²² The Christian Institute argued that Google, as a provider to the public or section of the public of advertising services, was subject to § 46 of the Equality Act. The Christian Institute further contended that Google discriminated against it by treating the Christian Institute less favorably than other organizations similarly situated solely because of the Christian Institute’s

¹⁶ *Id.* at 143, 159-60. O’Cinneide explains that “faith-based identities appear to be becoming more distinct and defined on all sides, just as anti-discrimination law attempts to regulate more and more aspects of social activity.” *Id.* at 160. As religion and belief become more diversified, regulation will become increasingly challenging. Furthermore, religious charitable organizations, faith-based schools and other organizations connected to a particular faith or belief often provide services to an individual based on the individual’s religious identity. Under the Equality Act, exceptions were made to deal with pressure from these organizations so they could continue providing their goods and services to individuals akin to their belief and control their membership based on religious affiliation. *Id.*

¹⁷ Equality Act 2006, 2006, c. 3.

¹⁸ Equality Act 2006, 2006, c. 3 § 44. The statute provides: In this Part – (a) “religion” means any religion, (b) belief means any religious or philosophical belief, (c) reference to religion includes a reference to lack of religion, and (d) a reference to belief includes a reference to lack of belief. *Id.*

¹⁹ Equality Act 2006, 2006, c. 3 § 45.

²⁰ Thomas Claburn, *Google Lifts Ban on Controversial Christian Institute Ads*, INFORMATIONWEEK, September 17, 2008, available at

<http://www.informationweek.com/news/internet/google/showArticle.jhtml?articleID=210602191>

²¹ “A person (“A”) discriminates against another (“B”) for the purposes of this Part if on grounds of the religion or belief of B or any other person except A (whether or not it is also A’s religion or belief) A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances).” Equality Act 2006, 2006, c. 3 § 45(1).

²² Equality Act 2006, 2006, c. 3 § 46(1).

religious affiliation. The Christian Institute pointed to examples of where Google allowed secular institutions to advertise about abortion and argued the only reason Google refused the Christian Institute's advertisement was because the Christian Institute was a religious organization.²³

Since the Equality Act 2006 is only recently enacted, the case law surrounding Section 46 is sparse.²⁴ There are no cases involving the applicability of the Equality Act 2006 to internet search engines, like Google. However, reading the statute on its face, it seems fairly probable that Google would have been found liable under the act. Google does provide the public with a service through its website, search engine and advertising ability. Google did allow non-religious organizations to display their abortion advertisements.²⁵ Google's justification for not allowing religious organizations to advertise about abortion was that its policy did not "permit the advertisement of Web sites that contain 'abortion and religion-related content.'"²⁶ This blanket policy excluding religious organizations from advertising about abortion is clearly in contravention to the Equality Act 2006

²³ Thomas Claburn, *Google Lifts Ban on Controversial Christian Institute Ads*, INFORMATIONWEEK, September 17, 2008, available at <http://www.informationweek.com/news/internet/google/showArticle.jhtml?articleID=210602191> In this article, Claburn provides a link to Aughton Ainsworth's letter, on behalf of the Christian Institute, to Google informing Google of its breach of the Equality Act 2006. This letter is accessible through the following hyperlink:

http://www.christian.org.uk/rel_liberties/google/letter_02apr08.pdf. The authenticity of this letter has been confirmed by Tom Ellis, Partner at Aughton Ainsworth, the international firm which represented the Christian Institute in this suit.

²⁴ The main case on the interpretation of Part 2 of the Equality Act 2006 is *R v. Aberdare Girls' High School*. In this case, the plaintiff, a 14 year old school girl, brought an action against her school for refusing to allow her to wear the Kara. The Kara is a Sikh religious wrist bangle. The Court found that the school's decision not to permit the plaintiff to wear the Kara constituted religious discrimination in violation of the Equality Act 2006. The Court found that the plaintiff suffered a detriment by the school's prohibition on her wearing the Kara and that the school's uniform policy did not justify its religiously discriminatory behavior. *R v. Aberdare Girls' High School*, [2008] EWHC 1865 (Admin).

²⁵ Sarah Cassidy, *Google Forced to Accept Anti-Abortion Advertising*, THE INDEPENDENT, September 18, 2008, <http://www.independent.co.uk/life-style/gadgets-and-tech/news/google-forced-to-accept-antiabortion-advertising-934241.html>.

²⁶ Thomas Claburn, *Google Lifts Ban on Controversial Christian Institute Ads*, INFORMATIONWEEK, September 17, 2008, available at <http://www.informationweek.com/news/internet/google/showArticle.jhtml?articleID=210602191>.

which makes unlawful discrimination where a person is treated less favorably in the provision of goods and services based solely on religion or belief.²⁷

If Google had not settled, it is highly probable it would have been found liable under the Equality Act 2006. However, Google is an American corporation with its principle place of business in California and its place of incorporation in Delaware.²⁸ If an American Christian organization had brought suit against Google, would Google have been afforded greater protection against liability in America than in the United Kingdom?

III. United States Law: The First Amendment, Title II and the Communications Decency Act

Three main laws affect Google's liability in the United States for refusing to publish the Christian Institute's abortion advertisement. First, religious discrimination is prohibited in the United States under two main provisions, the First Amendment and Title II of the Civil Rights Act. However, as an internet search engine, Google could be immune from liability under the Communications Decency Act for its editorial decisions. These three provisions will be analyzed separately to determine whether Google would be found liable for religious discrimination had the suit been brought in the United States.

A. First Amendment – *Langdon v. Google, Inc.*²⁹

In *Langdon v. Google, Inc.*, the plaintiff owned two websites and alleged that Google refused to run three of his advertisements³⁰ on his websites in violation of his First Amendment rights.³¹ The plaintiff sought damages as well as declaratory and injunctive relief from the court which would force Google to display

²⁷ Equality Act 2006, 2006, c. 3 §§ 45, 46.

²⁸ *Parker v. Google, Inc.*, 242 Fed. App'x 833, 834 (3d Cir. 2007). Google's Certificate of Incorporation is also viewable as a PDF online at <http://investor.google.com/charter.html>.

²⁹ 474 F. Supp. 2d 622 (D. Del. 2007).

³⁰ The plaintiff owned two websites. The first, NCJusticeFraud.com discussed fraud committed by North Carolina government officials and employees. The second, China is Evil.com, focused on the violence propagated by the Chinese government. The content of the plaintiff's advertisements was not specifically discussed in the opinion; however, two advertisements were linked to a North Carolina government official, Roy Cooper. *Id.* at 626.

³¹ *Id.* at 626.

plaintiff's advertisements.³² Google responded by arguing that the relief sought by the plaintiff was precluded by Google's First Amendment rights.³³ Specifically, if Google was forced to run plaintiff's advertisements, then Google would be prevented "from speaking in ways that Plaintiff dislikes."³⁴

In analyzing the plaintiff's First Amendment rights, the court focused on whether Google, as an internet search engine, was a state actor.³⁵ In his argument, the plaintiff analogized Google to a shopping center, asserting that since Google "dedicated its private property as a public forum," Google could therefore be considered a state actor.³⁶ The court rejected this argument and cited the Supreme Court's decision in *Lloyd Corp.*³⁷ which held that a private shopping center was not a public forum for speech purposes.³⁸ "Private property does not 'lose its private character merely because the public is generally invited to use it for designated purposes.'"³⁹

The court found that Google, as an internet search engine was a private, for profit corporation which used the internet as a mode of conducting business. Google's public function, the court held, did not transform Google from a private entity into a state actor. Therefore, the plaintiff's First Amendment claim was unenforceable against Google and was dismissed.⁴⁰

Google's First Amendment rights, however, were enforceable. Google argued that the court could not grant plaintiff's claim for relief because the court would then be forcing Google to speak in a way Google did not wish to speak.⁴¹ The

³² *Id.* at 627.

³³ *Id.* at 629.

³⁴ *Id.* at 629.

³⁵ The First Amendment protections only apply to state actors and are not enforceable against private entities. See *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976).

³⁶ *Langdon*, 474 F. Supp. 2d at 631.

³⁷ *Lloyd Corp, Ltd. v. Tanner*, 407 U.S. 551, 569 (1972).

³⁸ *Langdon*, 474 F. Supp. 2d at 631-32.

³⁹ *Id.* at 632 (quoting *Lloyd Corp*, 407 U.S. at 569 (1972)).

⁴⁰ *Id.* at 631-32.

⁴¹ *Id.* at 629.

court explained that “the First Amendment guarantees an individual the right to free speech, ‘a term necessarily comprising the decision of both what to say and what not to say.’”⁴² Analogizing Google to a newspaper publisher, the court cited several decisions where forcing a private entity, like a newspaper, to publish an advertisement contravened the newspaper’s protected right under the First Amendment to editorial discretion.⁴³ Therefore, even if the plaintiff had a valid First Amendment claim, the remedy would impermissibly burden Google’s own First Amendment rights.⁴⁴

Under the First Amendment, the Christian Institute’s claim would be unenforceable in the United States. Google is a private entity and even though it serves a public function, it is not considered a state actor under the law. Furthermore, Google’s own First Amendment rights preclude a court from controlling what Google will and will not publish. Google has the right under the United States Constitution to speak how it wishes to speak, and if the Christian Institute’s abortion advertisement goes against Google’s policy of staying neutral on the topic of religion and abortion, then Google, in the United States under the reasoning in *Langdon*, has the right to refuse to display the Christian Institute’s advertisement. Unlike the United Kingdom where equality legislation is enforceable on both private and public entities, the First Amendment is limited in its application and is not enforceable against private corporations. Therefore, in the United States, Google’s right to free speech, not the Christian Institute’s, is controlling. Had this law suit been brought in the United States under a First Amendment claim, the Christian Institute’s case would be dismissed.

⁴² *Id.* at 629-30 (quoting *Riley v. National Fed’n of the Blind of N. Carolina, Inc.*, 487 U.S. 781 (1988)).

⁴³ The court cites several cases including *Sinn v. The Daily Nebraskan*, 829 F.2d 622 (8th Cir. 1987), *Assocs. & Aldric Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971) and *Miami Herald Publ’g Co. v. Tornill*, 418 U.S. 241 (1974).

⁴⁴ *Langdon*, 474 F. Supp. 2d at 630.

B. Title II of the Civil Rights Act – *Noah v. AOL Time Warner*⁴⁵

Title II prohibits religious discrimination in places of public accommodation.⁴⁶

The main question then becomes whether Google, as an internet search engine, is considered a place of public accommodation under Title II. This question was directly addressed in *Noah v. AOL Time Warner, Inc.* by the Eastern District of Virginia.

In *Noah*, the plaintiff brought suit against America Online, Inc. (AOL), an internet service provider, under Title II of the Civil Rights Act. The plaintiff was a Muslim who often used AOL chat rooms to discuss the Islamic faith with other AOL users.⁴⁷ The plaintiff alleged that while using these chat rooms he was harassed by other AOL members due to his Muslim religious beliefs.⁴⁸ Though the plaintiff complained to AOL about the harassing statements, AOL did not intervene to stop the members who were accosting the plaintiff. The plaintiff subsequently brought suit against AOL under Title II of the Civil Rights Act claiming that AOL's failure to stop its members from making harassing

⁴⁵ 261 F. Supp. 2d 532 (E.D. Va. 2003).

⁴⁶ "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." Title II, 42 U.S.C. § 2000a(a) (2006). The statute further defines "place of public accommodation" in subsection (b): Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action: (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence; (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station; (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment. Title II, 42 U.S.C. § 2000a(b) (2006).

⁴⁷ *Noah*, 261 F. Supp. 2d at 534.

⁴⁸ *Id.* at 535. The harassment comprised of offensive comments such as "I HATE MUSLIMS," "SMELLY TOWEL HEADS," and "BYE STUPID MUSLIMS . . . ALL GO TO HELL." *Id.*

comments constituted religious discrimination in a place of public accommodation.⁴⁹

In addressing the plaintiff's Title II claim, the court considered whether AOL chat rooms and other online services could be considered a place of public accommodation under the statute.⁵⁰ The plaintiff argued internet chat rooms could be considered "places of . . . entertainment" and therefore would fit the statutory definition of a "place of public accommodation."⁵¹ The court ultimately rejected this argument and held that "AOL chat rooms and other online services do not constitute a place of 'public accommodation' under Title II."⁵²

In reaching its conclusion, the court turned to the language of the statute itself and specifically referred to subsection (b) where Congress defined which establishments constitute a place of public accommodation.⁵³ The court found that the list of establishments in subsection (b) "without exception, consists of actual physical structures" and reasoned that "the statute's consistent reference to actual physical structures points convincingly to the conclusion that the phrase does not include forums for entertainment that are not physical structures or locations."⁵⁴ Addressing the Supreme Court's holding in *Daniel v. Paul*⁵⁵ which found that subsection (b) in Title II should be given a broad reading, the court in *Noah* concluded that no matter how broadly read, Title II did not encompass

⁴⁹ *Id.* at 536. The plaintiff also raised a claim under the First Amendment. The plaintiff alleged that AOL temporarily terminated his user account to silence his pro-Islam speech. The claim was addressed by the court and was dismissed. "The First Amendment is of no avail to him in these circumstances; it does not protect against action taken by private entities." *Id.* at 546. Like the court in *Langdon*, discussed *supra*, this court reasoned that since AOL, as an internet service provider, was a private for profit company, it was not subject to First Amendment restrictions. *Id.*

⁵⁰ The court also addressed whether AOL, as an internet service provider, was immune from liability under Title II of the Civil Rights Act through the application of the Communications Decency Act. The court concluded that AOL was immune from suit under the Act. However, the court went on to alternatively discuss the applicability of Title II to an internet service provider which is the subject of this subsection. *Id.* at 537-40. The Communications Decency Act will be discussed *infra* p. 11.

⁵¹ *Id.* at 541.

⁵² *Id.* at 540.

⁵³ *Id.* at 541. See statute cited *supra* note 46.

⁵⁴ *Id.*

⁵⁵ 395 U.S. 298 (1969).

“places of public accommodation” that were not actual physical structures.⁵⁶

“Congress intended the statute to reach only the listed facilities and other similar physical structures, not to ‘regulate a wide spectrum of consensual human relationships.’”⁵⁷

The court next examined the precedent interpreting Title III of the Civil Rights Act which prohibits discrimination against people with disabilities in places of public accommodation.⁵⁸ The court acknowledged that the circuits are split with whether “a place of public accommodation” under Title III is limited to actual physical structures.⁵⁹ However, after an analysis of existing case law, the court concluded that the weight of authority supports that under Title III, a “place of public accommodation” supports the requirement of an “actual physical structure.”⁶⁰ Furthermore, the court explained that a recent Title III case involving whether an airline’s website was a “place of public accommodation” under the statute explained that a website was not a concrete place and therefore not within the purview of Title III.⁶¹

The court in *Noah*, after a careful reading of the statute and consideration of precedent, concluded that AOL’s chat rooms and similar online services were not “places of public accommodation” under Title II.⁶² Explaining that AOL’s chat rooms were “virtual forums”⁶³ with no actual physical structure, the court reasoned that AOL’s chat rooms could be accessed practically anywhere and

⁵⁶ *Noah*, 261 F. Supp. 2d at 542.

⁵⁷ *Id.* (quoting *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1270 (7th Cir. 1993)).

⁵⁸ *Id.* Title III is commonly known as the Americans with Disabilities Act (ADA). Title III is codified at 42 U.S.C. § 12182. “Places of public accommodation” under the ADA is defined by Congress at 42 U.S.C. § 12181(7).

⁵⁹ *Noah*, 261 F. Supp. 2d at 543.

⁶⁰ *Id.* The court addressed several decisions including *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Assoc. of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994), *Parker v. Metropolitan Life Insurance Co.*, 121 F.3d 1006 (6th Cir. 1997) and *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998) all of which addressed whether a place of public accommodation was limited to a physical place.

⁶¹ *Noah*, 261 F. Supp. 2d at 542. See *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1316 (S.D. Fla. 2002).

⁶² *Noah*, 261 F. Supp. 2d at 545, 540.

⁶³ *Id.* at 544.

“lacked the physical presence necessary to constitute a place of public accommodation” under the statute.⁶⁴ The plaintiff’s claim for religious discrimination was then dismissed.⁶⁵

Under this analysis, the Christian Institute’s claim alleging religious discrimination by Google would not be successful under Title II of the Civil Rights Act. Like AOL, Google’s search engine and website exist virtually, not physically. Since Google’s website has no connection to an actual facility and can be accessed practically anywhere, it cannot be considered a “place of public accommodation” under the statute. If the Christian Institute had brought its claim for religious discrimination in the United States under Title II, instead of the United Kingdom’s broader Equality Act 2006 which does not limit its protection to physical places, the Christian Institute’s claim would be dismissed.

C. The Communications Decency Act⁶⁶ – *Zeran v. America Online, Inc.*⁶⁷

The Communications Decency Act precludes lawsuits seeking to hold interactive computer service providers⁶⁸ liable for their editorial decisions. The significant sections of the Act state “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”⁶⁹ and:

No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent,

⁶⁴ *Id.*

⁶⁵ *Id.* at 545.

⁶⁶ 47 U.S.C. § 230 (2006).

⁶⁷ 129 F.3d 327 (4th Cir. 1997).

⁶⁸ The act defines an interactive computer service 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 and such systems operated or services offered by libraries or educational institutions.” Communications Decency Act, 47 U.S.C. § 230(f)(2) (2006).

⁶⁹ Communications Decency Act, 47 U.S.C. § 230(c)(1) (2006).

harassing, or otherwise objectionable, whether or not such material is constitutionally protected.⁷⁰

The seminal case on the Communications Decency Act is *Zeran v. America Online, Inc.* which held that “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions - - such as deciding whether to publish, withdraw, postpone or alter content - - are barred.”⁷¹ The suit was brought by a plaintiff seeking to hold AOL liable for the display of offensive speech by a third party.⁷² The *Zeran* court, however, refused to impose liability on AOL for content posted by a third party and granted AOL immunity under the Communications Decency Act. The court articulated two main purposes behind the act: to “maintain the robust nature of Internet communication”⁷³ and to “encourage service providers to self-regulate the dissemination of offensive material over their services.”⁷⁴

The court discussed these two policy objectives in light of the distinctive character of the internet. Because the internet is so widely used, if immunity was not granted, “the specter of tort liability would have an obvious chilling effect.”⁷⁵ Potential liability would make interactive computer service providers wary of what is displayed and could result in providers severely restricting access to the internet and limiting communication through the provider. Similarly, the imposition of publisher liability, which subjects a publisher to strict liability for the publication of defamatory statements, would deter interactive computer

⁷⁰ Communications Decency Act, 47 U.S.C. § 230(c)(2)(A) (2006).

⁷¹ *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

⁷² An unidentified individual posted a message advertising “Naughty Oklahoma T-Shirts” for sale, after the Oklahoma City bombing, and placed the plaintiff’s phone number, unbeknownst to the plaintiff, below the advertisement. *Id.* at 329. The plaintiff subsequently received several phone calls from people who left angry and threatening messages. The plaintiff complained to AOL and asked them to remove the post. AOL stated it would remove the post, but would not post a retraction. Phone calls continued and a radio announcer got a copy of the advertisement and urged people over the broadcast to call the number. The plaintiff then received death threats and more angry calls from Oklahoma City residents. The plaintiff called the police and eventually a newspaper published the story and announced that the advertisement was a hoax. *Id.*

⁷³ *Id.* at 330.

⁷⁴ *Id.* at 331.

⁷⁵ *Id.*

service providers from acting in an editorial capacity in fear they might be viewed by the court as a publisher and therefore subject to strict liability for anything posted through their interactive computer service. This would severely deter interactive computer service providers from self-regulating the content displayed on the internet. Congress sought to encourage service providers to regulate “the dissemination of offensive material on their services” and enacted the Communications Decency Act to ensure that interactive computer service providers would not be held strictly liable for their editorial decisions on what to display and what not to display.⁷⁶ In sum, the court concluded:

Section 230 [The Communications Decency Act] represents the approach of Congress to a problem of national and international dimension [T]he Internet allows “tens of millions of people to communicate with one another and to access vast amounts of information from around the world. [It] is a ‘unique and wholly new medium of worldwide human communication.’”⁷⁷

Applying the policy articulated in *Zeran*, the Christian Institute’s claim of religious discrimination against Google would have been dismissed had it been brought in the United States because Google would have been granted immunity under the Communications Decency Act. Google is an interactive computer service provider as defined in the Communications Decency Act.⁷⁸ Google was exercising its editorial discretion in deciding whether to publish advertisements that are both religion- and abortion- related. While the Christian Institute’s advertisement was not nearly as egregious as the advertisement at issue in *Zeran*,

⁷⁶ *Id.*

⁷⁷ *Id.* at 334 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 850 (1997)).

⁷⁸ Google, as an internet search engine, has been found to be an interactive computer service provider under the Communications Decency Act. The Third Circuit in *Green v. America Online* held that AOL was an interactive computer service provider because of “its international network of interconnected computers and services” and because AOL “provides or enables, inter alia, a number of online communications tools, such as e-mail, news groups, and chat rooms.” *Green v. America Online*, 318 F.3d 465, 469 (3d Cir. 2003). In *Parker v. Google, Inc.*, the Third Circuit reaffirmed *Green* and cited *Green* as authority to hold that Google was an interactive service provider under the Communications Decency Act. *Parker v. Google, Inc.*, 242 Fed. App’x 833, 838 (3d Cir. 2007).

a court could easily find that an advertisement containing both a religious reference and an abortion reference is “otherwise objectionable” content as defined in the Communications Decency Act. Therefore, Google would be shielded from liability under the Act had the suit been brought in the United States. In the United Kingdom, however, there is no analog to the Communications Decency Act and Google would not have blanket immunity for its editorial decisions.⁷⁹

IV. Is Google’s Settlement Really a Common Sense Victory for People of Faith?

American organizations characterized Google’s settlement with the Christian Institute as “a victory for people of faith.”⁸⁰ However, Americans failed to realize that the protections against religious discrimination were far broader under the United Kingdom’s Equality Act 2006 than their own protections under either the First Amendment or Title II of the Civil Rights Act. Furthermore, in the United States, interactive computer service providers are granted immunity from liability for their editorial decisions on what to display and what not to display under the Communications Decency Act. The likelihood of success if the Christian Institute had filed their claim for religious discrimination in the United States would have been minimal, indeed, practically nonexistent. Rather, American religious organizations benefited derivatively from the broad scope of protection against religious discrimination under the United Kingdom’s Equality Act 2006 and the international character of the internet.

The United Kingdom gives broad protection against religious discrimination through their recent enactment of the Equality Act 2006. Instead of limiting liability for religious discrimination to public entities, like the First Amendment

⁷⁹ See Michael L. Rustad & Thomas H. Koenig, *Harmonizing Internet Law: Lessons from Europe*, 9 No. 11 J. INTERNET L. 3, 5-7 (2006) (comparing internet service providers’ liability under the broad immunity provisions of the Communications Decency Act with imposition of liability under the United Kingdom’s Defamation Act).

⁸⁰ Ki Mae Hussner, *Google OKs Religious Groups’ Abortion Ads*, ABC News, September 18, 2008, <http://abcnews.go.com/Technology/story?id=5827418>.

does,⁸¹ or places of public accommodations under Title II,⁸² the Equality Act 2006 protects *persons* against religious discrimination by other *persons*.⁸³ This type of private liability is unknown in the United States. Moreover, internet search engines are not shielded from liability in the United Kingdom as they would be in the United States under the Communications Decency Act.⁸⁴

Far from being “common sense,”⁸⁵ Google’s settlement is a result of the international character of an internet search engine and its ability to be subject to foreign law. While religious organizations worldwide have benefited from Google’s change in its advertising policy, this benefit resulted not from an American sense of freedom of speech; rather, it was achieved through the United Kingdom’s expansive anti-discrimination legislation.

⁸¹ See *supra* pp. 5-7.

⁸² See *supra* pp. 7-11.

⁸³ See *supra* pp. 3-5.

⁸⁴ Rustad & Koenig, *supra* note 79.

⁸⁵ Sarah Cassidy, *Google Forced to Accept Anti-Abortion Advertising*, THE INDEPENDENT (London), September 18, 2008, <http://www.independent.co.uk/life-style/gadgets-and-tech/news/google-forced-to-accept-antiabortion-advertising-934241.html>.