MASSACHUSETTS PORT AUTHORITY VS. TURO INC. & OTHERS. [1]

Docket:	SJC-13012
Dates:	January 8, 2021 - April 21, 2021
Present:	Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.
County:	Suffolk
Keywords:	Massachusetts Port Authority. Airport. Motor Vehicle, Lease agreement. Injunction. Practice, Civil, Preliminary injunction. Immunity from Suit. Trespass.

Civil action commenced in the Superior Court Department on June 3, 2019.
A motion for a preliminary injunction was heard by Brian A. Davis, J.
The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Elizabeth B. Prelogar, of the District of Columbia, for Turo Inc.
David S. Mackey (Christina S. Marshall & Melissa C. Allison also present) for Massachusetts Port Authority.

The following submitted briefs for amici curiae:

Daniel Reimer, of Colorado, for Airports Council International -- North America.

Mason A. Kortz for Reporters Committee for Freedom of the Press.

Ryan Spear & Erin K. Earl, of Washington, & Thomas J. Tobin for Technology Network & others.

GEORGES, J. The plaintiff, the Massachusetts Port Authority (Massport), and the defendants, Turo Inc. (Turo), RMG Motors LLC (RMG), and John Doe Nos. 1 through 100 (John Doe defendants) (collectively, defendants), have been in a dispute regarding the unregulated pick up and drop off of passengers at Boston's Logan International Airport (Logan Airport). Massport eventually filed suit against the defendants. Turo appeals from a preliminary injunction granted by a judge in the Superior Court in favor of Massport that restricts Turo from conducting any commercial activity at Logan Airport without written authorization from Massport.

Turo contends that the judge erred in issuing the injunction for three reasons: first, because Turo is immune from liability under 47 U.S.C. § 230(c)(1), commonly known as § 230 of the Communications Decency Act (CDA); second, because Massport was unlikely to succeed on its claim that, by facilitating the motor vehicle rental transactions at Logan Airport, Turo aided and abetted the other defendants' acts of trespass; and third, by concluding that Massport need not demonstrate irreparable harm to succeed on its motion for a preliminary injunction. We disagree and therefore affirm the judge's order. Having carefully considered the record before us, however, a modification of the terms of the preliminary injunction is necessary to comply with the requirements of the CDA; the modification is detailed infra.[1]

Background. Massport is an independent public authority tasked with the control, operation, and maintenance of Logan Airport. See St. 1956, c. 465, § 5. Consonant with its authority, Massport has promulgated a set of regulations governing the operations of Logan Airport. One such regulation prohibits any person, "unless duly authorized by the Executive Director" of Massport, from "[c]arry[ing] on any commercial activity or conduct[ing] operations of a commercial nature" that occur "in or upon any area of the Airport." 740 Code Mass. Regs. § 21.04(1)(b) (2013).

Massport also has adopted several regulations and standard practices related to motor vehicle rentals that occur on airport grounds, including 740 Code Mass. Regs. § 23.08(1)(b) (2004), which states in relevant part: "No Operator or Driver shall solicit or transact car rental business at Logan Airport except as authorized pursuant to a current and valid agreement specifically permitting such activities." These agreements require rental car companies to conduct operations at Logan Airport only from a central location. To transport rental car users to and from the terminals to that location, Massport provides a shuttle system and concomitantly prohibits car rental pick-up and drop-off activity at the main airport buildings or the terminal curbsides to reduce traffic. These agreements also require all rental car companies to pay to Massport various fees, which collectively generate more than $80 million in annual revenue.

Turo describes itself as "an online platform that operates a peer-to-peer marketplace connecting [hosts] with [guests] seeking cars on a short-term basis." Turo has no office, rental counter, or other physical presence at Logan Airport. A guest seeking to rent a motor vehicle from a host would search Turo's website or available listings, select and book a particular vehicle, and then coordinate the pick-up location and time with the host. Turo does not require its hosts to deliver vehicles to their guests, nor does Turo determine the parties' particular rendezvous location.

Turo's hosts use its platform to list their privately owned vehicles for rent as well as to set their vehicles' availability, pricing, and pick-up and drop-off locations, including Logan Airport. The John Doe defendants represent a number of unknown individual hosts who have utilized Turo's

platform to list and deliver vehicles for rent at Logan Airport. Turo's hosts, however, include not only individual vehicle owners, but also commercial car rental companies like defendant RMG. Approximately once or twice per month, RMG uses Turo's platform to provide a number of luxury automobiles for rent by Turo's guests at Logan Airport.

Turo's website describes "three options for meeting [guests]": (1) delivery to a custom location; (2) delivery to nearby airports; or (3) pick up at the host's location. Turo highlights on its website that it offers curbside pickup at Logan Airport by way of a designated "button" that allows its guests to directly search for vehicles available at Logan Airport. Turo promotes both that it has more than 200 motor vehicles available to rent from Logan Airport and that its guests are able to meet their hosts at Logan Airport. Indeed, this is one of the conveniences Turo touts as a distinct advantage it offers to travelers over traditional car rental agencies.

Turo also extends an array of support services to its users. For example, it offers its hosts payment-processing assistance, access to significant liability insurance coverage for their motor vehicles, and guest screenings, as well as emergency support for its users -- including roadside service that is available twenty-four hours per day, seven days per week. Moreover, Turo imposes rigorous eligibility standards for any vehicles listed for rent through its platform. Turo also has adopted certain standardized policies applicable to all rentals, including policies regarding cancellations, cleaning, late returns, security deposits, smoking, pets, privacy, and terms of service.

Despite the fact that Turo has refused Massport's repeated requests to enter into an agreement and has not otherwise received affirmative authorization from Massport for its operations, Turo has facilitated its hosts' and guests' vehicle rental transactions at Logan Airport since 2016. Since then, Turo's volume of facilitated motor vehicle rentals at Logan Airport has increased steadily. In 2018, Turo facilitated 3,783 trips that involved vehicle "handoffs" at Logan Airport. In 2019, that number rose to 4,706, representing approximately one-half of Turo's business in Boston.

Prior to filing suit, Massport attempted unsuccessfully to enter into a written agreement with Turo to authorize and govern Turo's operations at Logan Airport; these efforts included cease and desist letters. Turo consistently responded that, because it is not a car rental business, it is not subject to Massport's rules and regulations.

Procedural history. In June 2019, Massport commenced a civil action in the Superior Court, alleging that the defendants were operating an unauthorized rental business at Logan Airport. In

its amended complaint, Massport asserts violations of its regulations prohibiting commercial activity without authorization, 740 Code Mass. Regs. §§ 21.04(1)(b) and 23.08(1)(b); common-law trespass; aiding and abetting trespass; unjust enrichment; and violations of G. L. c. 93A. The prayer for relief sought preliminary and permanent injunctions, as well as damages and attorney's fees.

Massport subsequently filed a motion for a preliminary injunction, seeking to enjoin the defendants' actions at Logan Airport. After a nonevidentiary hearing, a Superior Court judge granted Massport's motion for a preliminary injunction in January 2020. The judge ruled that Turo was not immune from suit under § 230, that Massport had demonstrated a strong likelihood of success on the claim against Turo of aiding and abetting an ongoing trespass by the other defendants, and that Massport was not required to demonstrate irreparable harm in order to obtain a preliminary injunction because its claim was based on a continuing trespass to land. In February of 2020, Turo filed a notice of appeal from the order granting the preliminary injunction. Thereafter, Turo sought a stay of the injunction pending appeal; that motion was denied, and Turo's appeal from the order allowing the preliminary injunction entered in the Appeals Court in June 2020. We transferred the matter to this court on our own motion.

Discussion. 1. Standard of review. We review a decision on a motion for a preliminary injunction to determine whether there was an error of law or whether the judge abused his or her discretion -- that is, whether the judge applied proper legal standards and whether there was reasonable support for the judge's evaluation of factual questions. See King v. Town Clerk of Townsend, 480 Mass. 7, 9 (2018). We consider the same factors as did the judge: whether the party seeking the preliminary injunction is likely to succeed on the merits; whether irreparable harm will result from a denial of the injunction; and whether, in light of the moving party's likelihood of success on the merits, the risk of irreparable harm to the moving party outweighs the potential harm to the nonmoving party in granting the injunction. See Garcia v. Department of Hous. & Community Dev., 480 Mass. 736, 747 (2018). "In conducting our review, we decide 'whether the judge applied proper legal standards and whether there was reasonable support for his evaluation of factual questions.'" Fordyce v. Hanover, 457 Mass. 248, 256 (2010), quoting Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733, 741 (2008). The judge's conclusions of law are "subject to broad review and will be reversed if incorrect" (citation omitted). Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616 (1980).

2. Immunity under § 230. Congress enacted § 230 of the CDA "to promote the continued development of the Internet and other interactive computer services," 47 U.S.C. § 230(b)(1), as well as "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation," 47 U.S.C.

§ 230(b)(2). To that end, § 230 of the CDA 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." 47 U.S.C. § 230(c)(1).

Given Congress's stated intent, courts have construed § 230 "to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service" (quotation and citation omitted). Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118 (9th Cir.), cert. denied, 552 U.S. 1062 (2007). Nevertheless, courts "consistently [have] eschewed an expansive reading of the [CDA] that would render unlawful conduct 'magically . . . lawful when [conducted] online,' and therefore 'giv[e] online businesses an unfair advantage over their real-world counterparts.'" HomeAway.com, Inc. v. Santa Monica, 918 F.3d 676, 683 (9th Cir. 2019) (HomeAway.com), quoting Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1164 & n.15 (9th Cir. 2008). Indeed, even with the broad protections provided by the CDA, "an interactive computer service provider remains liable for its own speech" and for its own unlawful conduct. Universal Communication Sys., Inc. v Lycos, Inc., 478 F.3d 413, 419 (1st Cir. 2007). See Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 139-140 (4th Cir. 2019) (denying § 230 immunity because underpinning of claims was that online retailer was seller of defective product, rather than that it was publisher of speech in webpage offering product for sale); Anthony v. Yahoo! Inc., 421 F. Supp. 2d 1257, 1262-1263 (N.D. Cal. 2006) (denying § 230 immunity based on claims that Internet service provider created fake profiles and sent actual but expired profiles).

Immunity under § 230 of the CDA applies when "the defendant (1) is a provider or user of an interactive computer service; (2) the claim is based on information provided by another information content provider; and (3) the claim would treat the defendant as the publisher or speaker of that information" (quotations, citation, and alteration omitted). Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 19 (1st Cir. 2016), cert. denied, 137 S. Ct. 622 (2017) (Backpage.com). Turo maintains that it is immune from suit because the claims in Massport's complaint are based on content created by hosts over which Turo has no control. Turo contends, therefore, that Massport seeks to do precisely what the CDA prohibits: to hold Turo liable for information furnished by another information content provider.

There is no dispute that Turo is a provider of an interactive computer service within the meaning of the first prong of the immunity provision of the CDA. Therefore, Turo is entitled to immunity if Massport's claims necessarily require that Turo be treated as the publisher or speaker of content provided by others. Because Massport's claims are not predicated on third-party content, and because they do not seek to treat Turo as the publisher or speaker of its hosts' content, we hold that Turo is not entitled to immunity under either the second or third prong.

The judge determined, and we agree, that Turo's immunity claims fail as to the second prong because Massport's claims against Turo regard the portion of the content on Turo's website advertising Logan Airport as a desirable pick-up or drop-off location, which was created by Turo itself. As indicated, in pages of its own on its website, Turo offers travelers three options for pick-up and drop-off locations that expressly reference airport pickup and drop off: "Owners deliver to nearby airports"; "Airport pickup [is] available -- Skip the rental counter"; and a dedicated search button for vehicles specifically available at Logan Airport.

Indeed, Turo's own content encouraging the use of Logan Airport as a desirable pick-up or drop-off location for its users is exactly the content Massport asserts is the basis for the claim of aiding and abetting. Cf. Federal Trade Comm'n v. Accusearch, Inc., 570 F.3d 1187, 1199 (10th Cir. 2009) (information service provider liable for "development of offensive content only if it in some way specifically encourages development of what is offensive about the content"). Because this specific content was created by Turo, it cannot be construed reasonably as "information provided by another," Backpage.com, 817 F.3d at 19, and Turo is not protected by § 230's shield of immunity on the basis of this prong.

As to the third prong, the judge ruled that immunity under § 230 is not available to Turo because, rather than seeking to hold Turo liable as the publisher or speaker for its users' content, Massport's claims sought to hold Turo liable for its own role in facilitating the online car rental transactions that resulted in its customers' continuing trespass. The record supports the judge's conclusion.

The "ultimate question" in determining whether an interactive computer service provider like Turo is entitled to § 230 immunity is whether "the cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another." Backpage.com, 817 F.3d at 19. "Features . . . [that] reflect choices about what content can appear on the website and in what form" are "editorial choices that fall within the purview of traditional publisher functions," id. at 21, but more concentrated involvement in the transaction may fall outside that purview, see Dyroff v. Ultimate Software Group, Inc., 934 F.3d 1093, 1098 (9th Cir. 2019), cert. denied, 140 S. Ct. 2761 (2020); HomeAway.com, 918 F.3d at 682, 684.

We find a recent decision of the United States District Court for the District of Massachusetts instructive on this point. In Airbnb, Inc. v. Boston, 386 F. Supp. 3d 113, 120 (D. Mass. 2019), the court considered whether Airbnb, Inc. (Airbnb), was shielded by § 230 from monetary fines for accepting booking fees for transactions posted by the website's users that involved booking apartment rentals that were prohibited by city ordinance. The court held that the monetary fines imposed by the city were "aimed at regulating Airbnb's own conduct, and not at punishing it for

content provided by a third party," and thus § 230 immunity did not apply. Id. The court went on to explain that "[t]he fine is neither expressly tied to the content of the underlying listing, nor explicitly aimed at penalizing the manner in which Airbnb has structured its booking and payment services. It is triggered based on Airbnb's own conduct as a participant in the rental transaction . . . ." Id. at 121. The claim was not directed at Airbnb's acts as a publisher of third-party rental listings, but rather at Airbnb's role "as an agent that books rental agreements between users and hosts and collects and distributes payments when such a deal is made." Id. at 120. Thus, the court concluded, the monetary fines "reache[d] Airbnb in its capacity as a booking agent and payment processor," and "impose[d] no liability, nor require[d] any action, that necessarily [arose] from Airbnb's publication of content provided by another." Id. at 122.

Here, as in the Airbnb case, the record reflects that Turo serves a dual role as both the publisher of its users' third-party listings and the facilitator of the rental transactions themselves, and in particular the rental transactions that occur on Massport's Logan Airport property. Rather than focusing on what Turo allows its hosts to publish in their listings, Massport's claims pointedly focus on Turo's role as the facilitator of the ensuing rental transactions at Logan Airport, which is far more than just offering a website to serve as a go-between among those seeking to rent their vehicles and those seeking rental vehicles. Indeed, as the judge observed, in addition to allowing hosts to list their vehicles for rent, Turo also provides substantial ancillary services to its hosts, such as collecting and remitting payments, offering (and mandating) liability insurance and roadside assistance that is available twenty-four hours per day and seven days per week, and screening guests before permitting them to rent a motor vehicle from a host.

Turo minimizes its involvement in the challenged rental transactions by maintaining that it serves solely or principally as the recipient and processor of the payments intrinsic to the third-party listings. Turo also suggests that courts repeatedly have rejected plaintiffs' attempts to avoid the immunity provisions of § 230 by asserting claims of aiding and abetting that seek to hold a website operator liable for others' content. See, e.g., Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009); Simmons vs. Danhauer & Assocs., LLC, U.S. Dist. Ct., No. 8:08–CV–03819–JMC (D.S.C. Oct. 21, 2010), aff'd, 477 Fed. Appx. 53 (2012); Goddard vs. Google, Inc., U.S. Dist. Ct., No. C 08-2738 JF (PVT) (N.D. Cal. Dec. 17, 2008). But Turo's reliance on these cases is misplaced because the immunity provisions of § 230 simply do not apply where Massport's complaint targets Turo's own conduct and the claims of aiding and abetting are not predicated on the publication of Turo's hosts' content. See HomeAway.com, 918 F.3d at 682, 684. See, e.g., Dart, supra.

Courts in other jurisdictions have reached similar conclusions. For example, a Federal District Court in Los Angeles recently addressed this issue. In that case, Turo sought declaratory relief

on several grounds, among them a declaration whether it could be classified as a rental car company under a city ordinance. Turo Inc. vs. Los Angeles, U.S. Dist. Ct., No. 2:18-CV-06055-CAS-GJSx (C.D. Cal. June 19, 2020), rev'd, U.S. Ct. App., Nos. 20-55729 & 20-55731 (9th Cir. Mar. 10, 2021) (reversing solely on basis that defendant failed to demonstrate likelihood of irreparable harm such that injunction was warranted). The defendant city counterclaimed, asserting that Turo had violated airport regulations, trespassed, and aided and abetted its users' trespass. Turo Inc., U.S. Dist. Ct., supra. As with Logan Airport, Los Angeles International Airport's regulations prohibit commercial activity on airport property without prior approval by the airport. Id.

The Federal District Court in California concluded that § 230 did not bar the city's claims because the claims, as here, sought to hold Turo liable for its role in facilitating online rental car transactions, and not as the publisher or speaker of its users' listings. See id. The court relied upon the reasoning in HomeAway.com and its progeny, holding that "[b]ecause 'the Platforms face no liability for the content of the bookings' but 'only from' facilitating 'unlicensed bookings,' [§] 230 does not immunize their claims." Id., quoting HomeAway.com, 918 F.3d at 684.

3. Claim of aiding and abetting trespass. The judge concluded that Massport likely would succeed on its claim alleging that Turo aided and abetted RMG and the John Doe defendants in trespassing at Logan Airport. To prevail on a claim of aiding and abetting, Massport must demonstrate "(1) that [RMG and the John Doe defendants] committed the relevant tort; (2) that [Turo] knew [RMG and the John Doe defendants were] committing the relevant tort; and (3) that [Turo] actively participated in or substantially assisted in [the] commission of the tort." Go-Best Assets, Ltd. v. Citizens Bank of Mass., 463 Mass. 50, 64 (2012). See Planned Parenthood League of Mass., Inc. v. Blake, 417 Mass. 467, 481, cert. denied, 513 U.S. 868 (1994), citing Kyte v. Philip Morris, Inc., 408 Mass. 162, 168-169 (1990) (charge of aiding and abetting requires proof that defendant knew of substantial, supporting role in unlawful enterprise); Brown v. Perkins, 1 Allen 89, 98 (1861) ("any person who is . . . encouraging or exciting [a trespass] . . . or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor"). Substantial assistance, in turn, may be established by demonstrating that the alleged abettor's actions were a "substantial factor" in the trespasser's "ability to perpetrate" the trespass. See Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1132, 1135 (C.D. Cal. 2003) (to prove claim of aiding and abetting, plaintiff must show defendant provided assistance that was substantial factor in causing harm suffered).

Turo denies having the requisite intent to be liable for aiding and abetting a trespass and that it substantially assisted any trespass. Massport claims that Turo knowingly has provided an avenue, along with substantial assistance, to its users to commit the ongoing trespass such that

Turo equally may be held liable. The judge agreed with Massport, and our own review of the record supports the judge's determination.

Concerning the first element of the claim of aiding and abetting, a trespasser "is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." Restatement (Second) of Torts § 329 (1965). The record makes clear that RMG and the John Doe defendants physically entered Logan Airport land to transact "car rental business" without obtaining Massport's authorization or consent. These actions constitute a trespass; the judge's determination was not error. Cf. New England Forestry Found., Inc. v. Assessors of Hawley, 468 Mass. 138, 157 (2014), and cases cited ("The right that is most central to the 'bundle' of rights enjoyed by a private property owner is not the freedom from an obligation to invite visitors, it is the affirmative right to exclude others from one's property").

Turning to the second element of aiding and abetting the tort of trespass, we similarly conclude that the record adequately supports the judge's determination that Turo knew of its users' ongoing trespass at Logan Airport. Turo certainly knew that its website heralded hundreds of host vehicles available at Logan Airport and that it featured a button on its website that allowed its guests to specifically search for vehicles available at Logan Airport.[2] Turo also acknowledges facilitating approximately ten rental transactions per day at Logan Airport in 2019 and attests that close to one-half of its business in Boston in 2019 came from Logan Airport listings.

Additionally, since at least April 2016, Turo knew that Massport regarded these rental transactions as unauthorized violations of its rules and regulations, culminating in Massport sending Turo several cease and desist letters after Turo refused to execute a vehicle rental agreement. Nonetheless, Turo persisted in facilitating the unauthorized transactions -- steadily growing its business in the ensuing years. Certainly, these interactions between Massport and Turo put the latter on notice that the other defendants were trespassing and continuing to do so. Accordingly, the judge's conclusion to this effect is supported by the record.[3]

Regarding the third element of aiding and abetting, the judge concluded that Massport demonstrated Turo's active participation in or substantial assistance of RMG's and the John Doe defendants' trespass at Logan Airport by providing the online platform that identifies Logan Airport as a pick-up or drop-off location, providing substantial liability insurance, and collecting payments from users for transactions occurring at Logan Airport. According to Turo, this is much ado about nothing, and the mere existence of its platform or the ancillary services it provides cannot rise to the level of active participation or substantial assistance in the ostensible ongoing trespass by its users. We disagree. Taken together, Turo's broadcasting of airport

handoffs along with its facilitation of these transactions when it knew or had reason to know that those actions offended Massport's rules and regulations more than supports the judge's conclusion that Turo actively participated in and substantially assisted the ongoing trespass of its hosts at Logan Airport.

4. Showing irreparable harm to obtain preliminary injunctive relief. Last, Turo takes issue with the judge's conclusion that Massport need not show irreparable harm for a preliminary injunction to issue. Turo argues that a plaintiff must demonstrate irreparable harm when pressing a motion for a preliminary injunction, in contrast to a litigant seeking a permanent injunction who has no such burden. Massport contends that the judge did not err because, as the property owner, it need not show irreparable harm in a trespass case. In any event, Massport argues that trespass to real property for any length of time is irreparable harm as a matter of law.

Typically, to obtain preliminary injunctive relief, the moving party must show that "(1) success is likely on the merits; (2) irreparable harm will result from the denial of the injunction; and (3) the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party." Cote-Whitacre v. Department of Pub. Health, 446 Mass. 350, 357 (2006). "A plaintiff experiences irreparable injury if there is no adequate remedy at final judgment." GTE Prods. Corp. v. Stewart, 414 Mass. 721, 724 (1993). This court previously has stated that damages are typically inadequate in trespass cases and that continuing trespasses should be enjoined. See Chesarone v. Pinewood Bldrs., Inc., 345 Mass. 236, 240 (1962); Ferrone v. Rossi, 311 Mass. 591, 593 (1942). Consistent with this court's long-standing precedent that real property is unique, and that continuing trespass should be enjoined, the judge did not err in concluding that Massport need not show irreparable harm to enjoin Turo's offending behavior.[4]

5. Scope of preliminary injunction. The judge's preliminary injunction order addressed the difficult considerations raised by § 230 well. Nevertheless, Turo contends that the order impermissibly requires it to remove its users' own content from its platform. As discussed, we conclude that the order establishing the preliminary injunction properly addresses the considerations raised by § 230, with one limitation. The order could be misread as requiring Turo to monitor and potentially to remove third-party content from its platform. See HomeAway.com, 918 F.3d at 682. Accordingly, the preliminary injunction order must be amended in one respect.

The first numbered paragraph of the order currently prohibits Turo from "[l]isting or permitting motor vehicles to be listed on Turo's website, or by means of any other Turo application, as available for pickup or drop-off at Logan Airport." On its face, the language "or permitting motor vehicles to be listed" could be understood to obligate Turo to monitor and potentially to remove its hosts' noncompliant content, an obligation that would appear to be

prohibited by the CDA. In order to preclude any possible confusion, the first numbered paragraph of the injunction must be modified to affirmatively restrain only Turo's conduct.

Conclusion. The first numbered paragraph of the order allowing the plaintiff's motion for a preliminary injunction is amended to state as follows:
"1. Listing motor vehicles on Turo's website, or by means of any other Turo application, as available for pickup or drop-off at Logan Airport."

In all other respects, the terms of the preliminary injunction shall stand as ordered by the judge, and are affirmed. The matter is remanded to the Superior Court, where any further proceedings concerning the preliminary injunction shall occur.

So ordered.

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[1] We acknowledge the amicus briefs submitted by Airports Council International -- North America; Technology Network, Electronic Frontier Foundation, Innovation Economy Alliance, Internet Association, NetChoice, Match Group, Inc., and Vimeo, Inc.; and Reporters Committee for Freedom of the Press.

[2] We emphasize that the utilization of search functionality by a provider does not categorically either secure or forfeit immunity under the CDA. The United States Court of Appeals for the First Circuit has held that § 230 protects a service provider from liability for traditional editorial functions as well as for the provider's website construction and operation. See Hiam v. HomeAway.com, Inc., 267 F. Supp. 3d 338, 346 (D. Mass. 2017), aff'd, 887 F.3d 542 (1st Cir. 2018). See also Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 21 (1st Cir. 2016), cert. denied, 137 S. Ct. 622 (2017) (describing lack of telephone number verification, rules about posting, and procedure for uploading photographs as "part and parcel of the overall design and operation of the website" and thus "editorial choices that fall within the purview of traditional publisher functions"); Universal Communication Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 422 (1st Cir. 2007) (Lycos) ("If the cause of action is one that would treat the service provider as the publisher of a particular posting, immunity applies not only for the service provider's decisions with respect to that posting, but also for its inherent decisions about how to treat postings generally"). However, such immunity is not limitless. An Internet service provider remains liable for its own speech, see Lycos, supra at 419, as Turo does here by creating

speech through the language of this search feature advocating for Logan Airport as a preferable location for its users to transact.

[3] Turo argues that this court's precedent suggests that Massport was required to demonstrate that Turo knew of the other defendants' intent to trespass and shared their intent. Compare Go-Best Assets, Ltd. v. Citizens Bank of Mass., 463 Mass. 50, 64 (2012) (Go-Best) (discussing three elements of claim of aiding and abetting without requiring finding of shared mental state), with Planned Parenthood League of Mass., Inc. v. Blake, 417 Mass. 467, 481, cert. denied, 513 U.S. 868 (1994) (violator of prohibition against aiding and abetting must share mental state of principal violator). The judge, relying on the Go-Best formulation of the elements of aiding and abetting, did not address the issue of shared mental state, but our own review of the record indicates that there was ample factual support for a determination that Turo shared the mental state of the trespassing defendants based on the communications between Turo and Massport and on Turo's clear knowledge of the continuing and increasing use of Logan Airport as a desirable pick-up and drop-off location by its users.

[4] Massport argues in the alternative that, if a showing of irreparable harm is generally required to obtain a preliminary injunction enjoining a continuing trespass to land, as a government entity seeking to enforce a statute, Massport need not make such a showing according to our decision in LeClair v. Norwell, 430 Mass. 328, 331 (1999) (in suit brought by government seeking to enforce statute or declared policy of Legislature, showing of irreparable harm is not required). Because we conclude that Massport was not required to demonstrate irreparable harm based on the ongoing trespass to land, we need not reach this issue.

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Turo contends that the judge erred in issuing the injunction for three reasons: first, because Turo is immune from liability under 47 U.S.C. § 230(c)(1), commonly known as § 230 of the Communications Decency Act (CDA); second, because Massport was unlikely to succeed on its claim that, by facilitating the motor vehicle rental transactions at Logan Airport, Turo aided and abetted the other defendants' acts of trespass; and third, by concluding that Massport need not demonstrate irreparable harm to succeed on its motion for a preliminary injunction. We disagree and therefore affirm the judge's order. Having carefully considered the record before us, however, a modification of the terms of the preliminary injunction is necessary to comply with the requirements of the CDA; the modification is detailed infra.

Background. Massport is an independent public authority tasked with the control, operation, and maintenance of Logan Airport. See St. 1956, c. 465, § 5. Consonant with its authority, Massport has promulgated a set of regulations governing the operations of Logan Airport. One such regulation prohibits any person, "unless duly authorized by the Executive Director" of Massport, from "[c]arry[ing] on any commercial activity or conduct[ing] operations of a commercial nature" that occur "in or upon any area of the Airport." 740 Code Mass. Regs. § 21.04(1)(b) (2013).

Massport also has adopted several regulations and standard practices related to motor vehicle rentals that occur on airport grounds, including 740 Code Mass. Regs. § 23.08(1)(b) (2004), which states in relevant part: "No Operator or Driver shall solicit or transact car rental business at Logan Airport except as authorized pursuant to a current and valid agreement specifically permitting such activities." These agreements require rental car companies to conduct operations at Logan Airport only from a central location. To transport rental car users to and from the terminals to that location, Massport provides a shuttle system and concomitantly prohibits car rental pick-up and drop-off activity at the main airport buildings or the terminal curbsides to reduce traffic. These agreements also require all rental car companies to pay to Massport various fees, which collectively generate more than $80 million in annual revenue.

Turo describes itself as "an online platform that operates a peer-to-peer marketplace connecting [hosts] with [guests] seeking cars on a short-term basis." Turo has no office, rental counter, or other physical presence at Logan Airport. A guest seeking to rent a motor vehicle from a host would search Turo's website or available listings, select and book a particular vehicle, and then coordinate the pick-up location and time with the host. Turo does not require its hosts to deliver vehicles to their guests, nor does Turo determine the parties' particular rendezvous location.

Turo's hosts use its platform to list their privately owned vehicles for rent as well as to set their vehicles' availability, pricing, and pick-up and drop-off locations, including Logan Airport. The John Doe defendants represent a number of unknown individual hosts who have utilized Turo's platform to list and deliver vehicles for rent at Logan Airport. Turo's hosts, however, include not only individual vehicle owners, but also commercial car rental companies like defendant RMG. Approximately once or twice per month, RMG uses Turo's platform to provide a number of luxury automobiles for rent by Turo's guests at Logan Airport.

Turo's website describes "three options for meeting [guests]": (1) delivery to a custom location;

(2) delivery to nearby airports; or (3) pick up at the host's location. Turo highlights on its website that it offers curbside pickup at Logan Airport by way of a designated "button" that allows its guests to directly search for vehicles available at Logan Airport. Turo promotes both that it has more than 200 motor vehicles available to rent from Logan Airport and that its guests are able to meet their hosts at Logan Airport. Indeed, this is one of the conveniences Turo touts as a distinct advantage it offers to travelers over traditional car rental agencies.

Turo also extends an array of support services to its users. For example, it offers its hosts payment-processing assistance, access to significant liability insurance coverage for their motor vehicles, and guest screenings, as well as emergency support for its users -- including roadside service that is available twenty-four hours per day, seven days per week. Moreover, Turo imposes rigorous eligibility standards for any vehicles listed for rent through its platform. Turo also has adopted certain standardized policies applicable to all rentals, including policies regarding cancellations, cleaning, late returns, security deposits, smoking, pets, privacy, and terms of service.

Despite the fact that Turo has refused Massport's repeated requests to enter into an agreement and has not otherwise received affirmative authorization from Massport for its operations, Turo has facilitated its hosts' and guests' vehicle rental transactions at Logan Airport since 2016. Since then, Turo's volume of facilitated motor vehicle rentals at Logan Airport has increased steadily. In 2018, Turo facilitated 3,783 trips that involved vehicle "handoffs" at Logan Airport. In 2019, that number rose to 4,706, representing approximately one-half of Turo's business in Boston.

Prior to filing suit, Massport attempted unsuccessfully to enter into a written agreement with Turo to authorize and govern Turo's operations at Logan Airport; these efforts included cease and desist letters. Turo consistently responded that, because it is not a car rental business, it is not subject to Massport's rules and regulations.

Procedural history. In June 2019, Massport commenced a civil action in the Superior Court, alleging that the defendants were operating an unauthorized rental business at Logan Airport. In its amended complaint, Massport asserts violations of its regulations prohibiting commercial activity without authorization, 740 Code Mass. Regs. §§ 21.04(1)(b) and 23.08(1)(b); common-law trespass; aiding and abetting trespass; unjust enrichment; and violations of G. L. c. 93A. The prayer for relief sought preliminary and permanent injunctions, as well as damages and attorney's fees.

Massport subsequently filed a motion for a preliminary injunction, seeking to enjoin the defendants' actions at Logan Airport. After a nonevidentiary hearing, a Superior Court judge granted Massport's motion for a preliminary injunction in January 2020. The judge ruled that Turo was not immune from suit under § 230, that Massport had demonstrated a strong likelihood of success on the claim against Turo of aiding and abetting an ongoing trespass by the other defendants, and that Massport was not required to demonstrate irreparable harm in order to obtain a preliminary injunction because its claim was based on a continuing trespass to land. In February of 2020, Turo filed a notice of appeal from the order granting the preliminary injunction. Thereafter, Turo sought a stay of the injunction pending appeal; that motion was

denied, and Turo's appeal from the order allowing the preliminary injunction entered in the Appeals Court in June 2020. We transferred the matter to this court on our own motion.

Discussion. 1. Standard of review. We review a decision on a motion for a preliminary injunction to determine whether there was an error of law or whether the judge abused his or her discretion -- that is, whether the judge applied proper legal standards and whether there was reasonable support for the judge's evaluation of factual questions.

See King v. Town Clerk of Townsend, 480 Mass. 7, 9 (2018). We consider the same factors as did the judge: whether the party seeking the preliminary injunction is likely to succeed on the merits; whether irreparable harm will result from a denial of the injunction; and whether, in light of the moving party's likelihood of success on the merits, the risk of irreparable harm to the moving party outweighs the potential harm to the nonmoving party in granting the injunction. See Garcia v. Department of Hous. & Community Dev., 480 Mass. 736, 747 (2018). "In conducting our review, we decide 'whether the judge applied proper legal standards and whether there was reasonable support for his evaluation of factual questions.'" Fordyce v. Hanover, 457 Mass. 248, 256 (2010), quoting Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733, 741 (2008). The judge's conclusions of law are "subject to broad review and will be reversed if incorrect" (citation omitted). Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616 (1980).

2. Immunity under § 230. Congress enacted § 230 of the CDA "to promote the continued development of the Internet and other interactive computer services," 47 U.S.C. § 230(b)(1), as well as "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2). To that end, § 230 of the CDA 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." 47 U.S.C. § 230(c)(1).

Given Congress's stated intent, courts have construed § 230 "to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service" (quotation and citation omitted). Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118 (9th Cir.), cert. denied, 552 U.S. 1062 (2007). Nevertheless, courts "consistently [have] eschewed an expansive reading of the [CDA] that would render unlawful conduct 'magically . . . lawful when [conducted] online,' and therefore 'giv[e] online businesses an unfair advantage over their real-world counterparts.'" HomeAway.com, Inc. v. Santa Monica, 918 F.3d 676, 683 (9th Cir. 2019) (HomeAway.com), quoting Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1164 & n.15 (9th Cir. 2008). Indeed, even with the broad protections provided by the CDA, "an interactive computer service provider remains liable for its own speech" and for its own unlawful conduct. Universal Communication Sys., Inc. v Lycos, Inc., 478 F.3d 413, 419 (1st Cir. 2007). See Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 139-140 (4th Cir. 2019) (denying § 230 immunity because underpinning of claims was that online retailer was seller of defective product, rather than that it was publisher of speech in webpage offering product for sale); Anthony v. Yahoo! Inc., 421 F. Supp. 2d 1257, 1262-1263 (N.D. Cal. 2006) (denying § 230 immunity based on claims that Internet service provider created fake profiles and sent actual but expired profiles).

Immunity under § 230 of the CDA applies when "the defendant (1) is a provider or user of an interactive computer service; (2) the claim is based on information provided by another information content provider; and (3) the claim would treat the defendant as the publisher or speaker of that information" (quotations, citation, and alteration omitted). Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 19 (1st Cir. 2016), cert. denied, 137 S. Ct. 622 (2017) (Backpage.com). Turo maintains that it is immune from suit because the claims in Massport's complaint are based on content created by hosts over which Turo has no control. Turo contends, therefore, that Massport seeks to do precisely what the CDA prohibits: to hold Turo liable for information furnished by another information content provider.

There is no dispute that Turo is a provider of an interactive computer service within the meaning of the first prong of the immunity provision of the CDA. Therefore, Turo is entitled to immunity if Massport's claims necessarily require that Turo be treated as the publisher or speaker of content provided by others. Because Massport's claims are not predicated on third-party content, and because they do not seek to treat Turo as the publisher or speaker of its hosts' content, we hold that Turo is not entitled to immunity under either the second or third prong.

The judge determined, and we agree, that Turo's immunity claims fail as to the second prong because Massport's claims against Turo regard the portion of the content on Turo's website advertising Logan Airport as a desirable pick-up or drop-off location, which was created by Turo itself. As indicated, in pages of its own on its website, Turo offers travelers three options for pick-up and drop-off locations that expressly reference airport pickup and drop off: "Owners deliver to nearby airports"; "Airport pickup [is] available -- Skip the rental counter"; and a dedicated search button for vehicles specifically available at Logan Airport.

Indeed, Turo's own content encouraging the use of Logan Airport as a desirable pick-up or drop-off location for its users is exactly the content Massport asserts is the basis for the claim of aiding and abetting. Cf. Federal Trade Comm'n v. Accusearch, Inc., 570 F.3d 1187, 1199 (10th Cir. 2009) (information service provider liable for "development of offensive content only if it in some way specifically encourages development of what is offensive about the content"). Because this specific content was created by Turo, it cannot be construed reasonably as "information provided by another," Backpage.com, 817 F.3d at 19, and Turo is not protected by § 230's shield of immunity on the basis of this prong.

As to the third prong, the judge ruled that immunity under § 230 is not available to Turo because, rather than seeking to hold Turo liable as the publisher or speaker for its users' content, Massport's claims sought to hold Turo liable for its own role in facilitating the online car rental transactions that resulted in its customers' continuing trespass. The record supports the judge's conclusion.

The "ultimate question" in determining whether an interactive computer service provider like Turo is entitled to § 230 immunity is whether "the cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another." Backpage.com, 817 F.3d at 19. "Features . . . [that] reflect choices about what content can appear on the website and in what form" are "editorial choices that fall within the purview of traditional publisher

functions," id. at 21, but more concentrated involvement in the transaction may fall outside that purview, see Dyroff v. Ultimate Software Group, Inc., 934 F.3d 1093, 1098 (9th Cir. 2019), cert. denied, 140 S. Ct. 2761 (2020); HomeAway.com, 918 F.3d at 682, 684.

We find a recent decision of the United States District Court for the District of Massachusetts instructive on this point. In Airbnb, Inc. v. Boston, 386 F. Supp. 3d 113, 120 (D. Mass. 2019), the court considered whether Airbnb, Inc. (Airbnb), was shielded by § 230 from monetary fines for accepting booking fees for transactions posted by the website's users that involved booking apartment rentals that were prohibited by city ordinance. The court held that the monetary fines imposed by the city were "aimed at regulating Airbnb's own conduct, and not at punishing it for content provided by a third party," and thus § 230 immunity did not apply. Id. The court went on to explain that "[t]he fine is neither expressly tied to the content of the underlying listing, nor explicitly aimed at penalizing the manner in which Airbnb has structured its booking and payment services. It is triggered based on Airbnb's own conduct as a participant in the rental transaction . . . ." Id. at 121. The claim was not directed at Airbnb's acts as a publisher of third-party rental listings, but rather at Airbnb's role "as an agent that books rental agreements between users and hosts and collects and distributes payments when such a deal is made." Id. at 120. Thus, the court concluded, the monetary fines "reache[d] Airbnb in its capacity as a booking agent and payment processor," and "impose[d] no liability, nor require[d] any action, that necessarily [arose] from Airbnb's publication of content provided by another." Id. at 122. Here, as in the Airbnb case, the record reflects that Turo serves a dual role as both the publisher of its users' third-party listings and the facilitator of the rental transactions themselves, and in particular the rental transactions that occur on Massport's Logan Airport property. Rather than focusing on what Turo allows its hosts to publish in their listings, Massport's claims pointedly focus on Turo's role as the facilitator of the ensuing rental transactions at Logan Airport, which is far more than just offering a website to serve as a go-between among those seeking to rent their vehicles and those seeking rental vehicles. Indeed, as the judge observed, in addition to allowing hosts to list their vehicles for rent, Turo also provides substantial ancillary services to its hosts, such as collecting and remitting payments, offering (and mandating) liability insurance and roadside assistance that is available twenty-four hours per day and seven days per week, and screening guests before permitting them to rent a motor vehicle from a host.
Turo minimizes its involvement in the challenged rental transactions by maintaining that it serves solely or principally as the recipient and processor of the payments intrinsic to the third-party listings. Turo also suggests that courts repeatedly have rejected plaintiffs' attempts to avoid the immunity provisions of § 230 by asserting claims of aiding and abetting that seek to hold a website operator liable for others' content. See, e.g., Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009); Simmons vs. Danhauer & Assocs., LLC, U.S. Dist. Ct., No. 8:08–CV–03819–JMC (D.S.C. Oct. 21, 2010), aff'd, 477 Fed. Appx. 53 (2012); Goddard vs. Google, Inc., U.S. Dist. Ct., No. C 08-2738 JF (PVT) (N.D. Cal. Dec. 17, 2008). But Turo's reliance on these cases is misplaced because the immunity provisions of § 230 simply do not apply where Massport's complaint targets Turo's own conduct and the claims of aiding and abetting are not predicated on the publication of Turo's hosts' content. See HomeAway.com, 918 F.3d at 682, 684. See, e.g., Dart, supra.

Courts in other jurisdictions have reached similar conclusions. For example, a Federal District Court in Los Angeles recently addressed this issue. In that case, Turo sought declaratory relief

on several grounds, among them a declaration whether it could be classified as a rental car company under a city ordinance. Turo Inc. vs. Los Angeles, U.S. Dist. Ct., No. 2:18-CV-06055-CAS-GJSx (C.D. Cal. June 19, 2020), rev'd, U.S. Ct. App., Nos. 20-55729 & 20-55731 (9th Cir. Mar. 10, 2021) (reversing solely on basis that defendant failed to demonstrate likelihood of irreparable harm such that injunction was warranted). The defendant city counterclaimed, asserting that Turo had violated airport regulations, trespassed, and aided and abetted its users' trespass. Turo Inc., U.S. Dist. Ct., supra. As with Logan Airport, Los Angeles International Airport's regulations prohibit commercial activity on airport property without prior approval by the airport. Id.

The Federal District Court in California concluded that § 230 did not bar the city's claims because the claims, as here, sought to hold Turo liable for its role in facilitating online rental car transactions, and not as the publisher or speaker of its users' listings. See id. The court relied upon the reasoning in HomeAway.com and its progeny, holding that "[b]ecause 'the Platforms face no liability for the content of the bookings' but 'only from' facilitating 'unlicensed bookings,' [§] 230 does not immunize their claims." Id., quoting HomeAway.com, 918 F.3d at 684.

3. Claim of aiding and abetting trespass. The judge concluded that Massport likely would succeed on its claim alleging that Turo aided and abetted RMG and the John Doe defendants in trespassing at Logan Airport. To prevail on a claim of aiding and abetting, Massport must demonstrate "(1) that [RMG and the John Doe defendants] committed the relevant tort; (2) that [Turo] knew [RMG and the John Doe defendants were] committing the relevant tort; and (3) that [Turo] actively participated in or substantially assisted in [the] commission of the tort." Go-Best Assets, Ltd. v. Citizens Bank of Mass., 463 Mass. 50, 64 (2012). See Planned Parenthood League of Mass., Inc. v. Blake, 417 Mass. 467, 481, cert. denied, 513 U.S. 868 (1994), citing Kyte v. Philip Morris, Inc., 408 Mass. 162, 168-169 (1990) (charge of aiding and abetting requires proof that defendant knew of substantial, supporting role in unlawful enterprise); Brown v. Perkins, 1 Allen 89, 98 (1861) ("any person who is . . . encouraging or exciting [a trespass] . . . or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor"). Substantial assistance, in turn, may be established by demonstrating that the alleged abettor's actions were a "substantial factor" in the trespasser's "ability to perpetrate" the trespass. See Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1132, 1135 (C.D. Cal. 2003) (to prove claim of aiding and abetting, plaintiff must show defendant provided assistance that was substantial factor in causing harm suffered).

Turo denies having the requisite intent to be liable for aiding and abetting a trespass and that it substantially assisted any trespass. Massport claims that Turo knowingly has provided an avenue, along with substantial assistance, to its users to commit the ongoing trespass such that Turo equally may be held liable. The judge agreed with Massport, and our own review of the record supports the judge's determination.

Concerning the first element of the claim of aiding and abetting, a trespasser "is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." Restatement (Second) of Torts § 329 (1965). The record makes clear that RMG and the John Doe defendants physically entered Logan Airport land to transact "car rental business" without obtaining Massport's authorization or consent. These actions constitute a trespass; the judge's determination was not error. Cf. New England Forestry Found., Inc. v. Assessors of Hawley, 468 Mass. 138, 157 (2014), and cases cited ("The right that

is most central to the 'bundle' of rights enjoyed by a private property owner is not the freedom from an obligation to invite visitors, it is the affirmative right to exclude others from one's property").

Turning to the second element of aiding and abetting the tort of trespass, we similarly conclude that the record adequately supports the judge's determination that Turo knew of its users' ongoing trespass at Logan Airport. Turo certainly knew that its website heralded hundreds of host vehicles available at Logan Airport and that it featured a button on its website that allowed its guests to specifically search for vehicles available at Logan Airport. Turo also acknowledges facilitating approximately ten rental transactions per day at Logan Airport in 2019 and attests that close to one-half of its business in Boston in 2019 came from Logan Airport listings. Additionally, since at least April 2016, Turo knew that Massport regarded these rental transactions as unauthorized violations of its rules and regulations, culminating in Massport sending Turo several cease and desist letters after Turo refused to execute a vehicle rental agreement. Nonetheless, Turo persisted in facilitating the unauthorized transactions -- steadily growing its business in the ensuing years. Certainly, these interactions between Massport and Turo put the latter on notice that the other defendants were trespassing and continuing to do so. Accordingly, the judge's conclusion to this effect is supported by the record.

Regarding the third element of aiding and abetting, the judge concluded that Massport demonstrated Turo's active participation in or substantial assistance of RMG's and the John Doe defendants' trespass at Logan Airport by providing the online platform that identifies Logan Airport as a pick-up or drop-off location, providing substantial liability insurance, and collecting payments from users for transactions occurring at Logan Airport. According to Turo, this is much ado about nothing, and the mere existence of its platform or the ancillary services it provides cannot rise to the level of active participation or substantial assistance in the ostensible ongoing trespass by its users. We disagree. Taken together, Turo's broadcasting of airport handoffs along with its facilitation of these transactions when it knew or had reason to know that those actions offended Massport's rules and regulations more than supports the judge's conclusion that Turo actively participated in and substantially assisted the ongoing trespass of its hosts at Logan Airport.

4. Showing irreparable harm to obtain preliminary injunctive relief. Last, Turo takes issue with the judge's conclusion that Massport need not show irreparable harm for a preliminary injunction to issue. Turo argues that a plaintiff must demonstrate irreparable harm when pressing a motion for a preliminary injunction, in contrast to a litigant seeking a permanent injunction who has no such burden. Massport contends that the judge did not err because, as the property owner, it need not show irreparable harm in a trespass case. In any event, Massport argues that trespass to real property for any length of time is irreparable harm as a matter of law.

Typically, to obtain preliminary injunctive relief, the moving party must show that "(1) success is likely on the merits; (2) irreparable harm will result from the denial of the injunction; and (3) the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party." Cote-Whitacre v. Department of Pub. Health, 446 Mass. 350, 357 (2006). "A plaintiff experiences irreparable injury if there is no adequate remedy at final judgment." GTE Prods. Corp. v. Stewart, 414 Mass. 721, 724 (1993). This court previously has stated that damages are typically inadequate in trespass cases and that continuing trespasses should be enjoined. See Chesarone v. Pinewood Bldrs., Inc., 345 Mass. 236, 240 (1962); Ferrone v. Rossi, 311 Mass. 591, 593 (1942).

Consistent with this court's long-standing precedent that real property is unique, and that continuing trespass should be enjoined, the judge did not err in concluding that Massport need not show irreparable harm to enjoin Turo's offending behavior.

5. Scope of preliminary injunction. The judge's preliminary injunction order addressed the difficult considerations raised by § 230 well. Nevertheless, Turo contends that the order impermissibly requires it to remove its users' own content from its platform. As discussed, we conclude that the order establishing the preliminary injunction properly addresses the considerations raised by § 230, with one limitation. The order could be misread as requiring Turo to monitor and potentially to remove third-party content from its platform. See HomeAway.com, 918 F.3d at 682. Accordingly, the preliminary injunction order must be amended in one respect.

The first numbered paragraph of the order currently prohibits Turo from "[l]isting or permitting motor vehicles to be listed on Turo's website, or by means of any other Turo application, as available for pickup or drop-off at Logan Airport." On its face, the language "or permitting motor vehicles to be listed" could be understood to obligate Turo to monitor and potentially to remove its hosts' noncompliant content, an obligation that would appear to be prohibited by the CDA. In order to preclude any possible confusion, the first numbered paragraph of the injunction must be modified to affirmatively restrain only Turo's conduct.

Conclusion. The first numbered paragraph of the order allowing the plaintiff's motion for a preliminary injunction is amended to state as follows:
"1. Listing motor vehicles on Turo's website, or by means of any other Turo application, as available for pickup or drop-off at Logan Airport."

In all other respects, the terms of the preliminary injunction shall stand as ordered by the judge, and are affirmed. The matter is remanded to the Superior Court, where any further proceedings concerning the preliminary injunction shall occur.

So ordered.

Footnotes

[1] RMG Motors LLC & John Doe Nos. 1 through 100.

[2] We acknowledge the amicus briefs submitted by Airports Council International -- North America; Technology Network, Electronic Frontier Foundation, Innovation Economy Alliance, Internet Association, NetChoice, Match Group, Inc., and Vimeo, Inc.; and Reporters Committee for Freedom of the Press.

[3] We emphasize that the utilization of search functionality by a provider does not categorically either secure or forfeit immunity under the CDA. The United States Court of Appeals for the

First Circuit has held that § 230 protects a service provider from liability for traditional editorial functions as well as for the provider's website construction and operation. See Hiam v. HomeAway.com, Inc., 267 F. Supp. 3d 338, 346 (D. Mass. 2017), aff'd, 887 F.3d 542 (1st Cir. 2018). See also Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 21 (1st Cir. 2016), cert. denied, 137 S. Ct. 622 (2017) (describing lack of telephone number verification, rules about posting, and procedure for uploading photographs as "part and parcel of the overall design and operation of the website" and thus "editorial choices that fall within the purview of traditional publisher functions"); Universal Communication Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 422 (1st Cir. 2007) (Lycos) ("If the cause of action is one that would treat the service provider as the publisher of a particular posting, immunity applies not only for the service provider's decisions with respect to that posting, but also for its inherent decisions about how to treat postings generally"). However, such immunity is not limitless. An Internet service provider remains liable for its own speech, see Lycos, supra at 419, as Turo does here by creating speech through the language of this search feature advocating for Logan Airport as a preferable location for its users to transact.

[4] Turo argues that this court's precedent suggests that Massport was required to demonstrate that Turo knew of the other defendants' intent to trespass and shared their intent. Compare Go-Best Assets, Ltd. v. Citizens Bank of Mass., 463 Mass. 50, 64 (2012) (Go-Best) (discussing three elements of claim of aiding and abetting without requiring finding of shared mental state), with Planned Parenthood League of Mass., Inc. v. Blake, 417 Mass. 467, 481, cert. denied, 513 U.S. 868 (1994) (violator of prohibition against aiding and abetting must share mental state of principal violator). The judge, relying on the Go-Best formulation of the elements of aiding and abetting, did not address the issue of shared mental state, but our own review of the record indicates that there was ample factual support for a determination that Turo shared the mental state of the trespassing defendants based on the communications between Turo and Massport and on Turo's clear knowledge of the continuing and increasing use of Logan Airport as a desirable pick-up and drop-off location by its users.

[5] Massport argues in the alternative that, if a showing of irreparable harm is generally required to obtain a preliminary injunction enjoining a continuing trespass to land, as a government entity seeking to enforce a statute, Massport need not make such a showing according to our decision in LeClair v. Norwell, 430 Mass. 328, 331 (1999) (in suit brought by government seeking to enforce statute or declared policy of Legislature, showing of irreparable harm is not required). Because we conclude that Massport was not required to demonstrate irreparable harm based on the ongoing trespass to land, we need not reach this issue.