

## 6.805 Class 3, Sept. 20: Intermediary Liability

## Class 3, Sept. 20, 2012 - Intermediary Liability and Free Expression

### 6.805: Foundations of Internet Policy - Semester Calendar

### Goals

This class session explores the role that intermediary liability limitations have played in the development of the Internet and considers whether changes in social, technical and business conditions in the United States and around the world call for increasing, decreasing, or leaving untouched these rules. The class will take the form of a mock congressional hearing on the proposed (fictional) *Internet Truth and Responsibility Act of 2013*. There is a lot of reading in preparation for the hearing, so give yourself adequate time to do it. *61*

For the class, about half of you will have an assigned role and you'll need to both perform in the hearing and prepare written statements and testimony in advance

*like balanced news requirements*

### Class Preparation

- Intermediary liability cases
  - Read one of the following
    - Zeran v. AOL (CA4, 1997)
    - Doe v. AOL (2001) Florida Supreme Court SC94355. Pay attention to Judge Lewis's dissent
  - Read US v. American Library Association. 539 US 193 (2003)
- Analysis of the impact of 48 USC 230:
  - D. Ardia, FREE SPEECH SAVIOR OR SHIELD FOR SCOUNDRELS: AN EMPIRICAL STUDY OF INTERMEDIARY IMMUNITY UNDER SECTION 230 OF THE COMMUNICATIONS DECENCY ACT *CDA*
- Role of Internet platforms in the modern Internet
  - Read OECD Internet Policymaking Principles
  - Watch Sen. Wyden and Brad Burnham on Internet liability limitations and innovation. Watch both Sen. Wyden (follow link in menu to Sen. Wyden's speech) and Brad Burnham
  - Read about Google's problem with intermediary liability in Italy: "Google Bosses Convicted in Italy", BBC, Feb. 24, 2010.
- For students with roles: Prepare assigned written materials for mock congressional hearing on the Internet Truth and Responsibility Act of 2013 (due Sept. 20 at noon). For students without roles: Prepare critique of the role you are observing (due Sunday, Sept. 23, 9 PM)

[Look here for background and role assignments](#)

6.805 Class3. Sept. 20: Congressional hearing

## Class 3, Sept. 20, 2012 - Intermediary Liability and Free Expression

6.805: Foundations of Internet Policy - Semester Calendar

### A Hearing on the Internet Truth and Responsibility Act of 2013 (ITRA) before the House Judiciary Committee

#### Overview

Frustrated with their failure to enact the Stop Online Piracy Act in 2012 and incredulous that both Presidential candidates criticized the committee's effort to hold Internet intermediaries responsible for their complicity in spreading harmful information and services online, Chairman Smith and several members of the House Judiciary Committee have introduced a bill to repeal the liability limitations for Internet intermediaries found in section 230 of the Communications Decency Act.

*make it worse*

#### Summary of the Internet Truth and Responsibility Act

The Internet Truth and Responsibility Act repeals Section 230 of the Communications Act (47 USC 230). It has no other effect on federal or state law.

*Safe harbor*

#### Roles

Students in Group A will each be assigned to one of roles listed below. Each of you must:

- Prepare written material as specified in the 'assignment' column. Different roles have different assignments and some are longer than others. All assignments are due on the Stellar site Thursday noon the day of class (Sept. 20), except for the Washington Post wrap-up, which is due on Sept. 23.
- Perform your assigned role in the hearing. Try to learn something about the of the person you are portraying. For fun, try to "get into" that role when you perform.

*here it says sun*

*me sun*

Students in Group B will be should to write a critique of one student in Group A, commenting both on the written work and on the oral performance. Group B critiques should be 2 pages long and answer the following questions:

- Did the student clearly define his/her role, history in the Internet policy debates, motivation and position on the legislation?
- Was the student's position well-researched? Give specific strengths and weaknesses.
- What points could have been improved on?

Group B assignments are due at 9 PM on Sunday following the class (Sept. 23).



Here are the role assignments.

If you do not have a role, then we do not think you are in 6.805. Contact [6.805-staff@mit.edu](mailto:6.805-staff@mit.edu) immediately!

Name; A and B students assigned		Assignment and due date	Notes on motivation
	<i>The Committee Members</i>	each committee member will deliver a 1-minute opening statement, and have three questions prepared. The written summary (2 pages) and the questions are due Thursday at noon.	
Rep. Lamar Smith (R-TX) A: Julian Gonzalez B(1): William Stueck B(2): Grace Abuhamad	Committee Chair	Opening statement and 3 questions (Thursday noon)	Chairman Smith was a lead sponsor of SOPA and expressed frustration that intermediaries are not shouldering their responsibilities
Rep. John Conyers (D-MI) A: Benjamin Deardorff B: Anthony Vanky	Ranking member	Opening statement and questions (Thursday noon)	As ranking Democrat on the committee, Rep. Conyers will make his own decisions about these matters but also want to support the Administration (assuming it is still Democratic).
Rep. Dan Lungren (R-CA) A: Alice Li B: Jeremy Sharpe	Committee member	Opening statement and 3 questions (Thursday noon)	Rep. Lungren has is technologically savvy, has many constituent companies in the Internet business.
Rep. Darrell Issa (R-CA) A: Michael Grinich B: David Campos	Committee member	Opening statement and 3 questions (Thursday noon)	Rep. Issa led the opposition to SOPA and a big proponent of the Internet as a force for government openness
Rep. Bob Goodlatte (R-VA) A: Victor Yarlott B: Daniel Ronde	Committee member	Opening statement and 3 questions (Thursday noon)	A co-chair of the Congressional Internet Caucus and very tech savvy. He has strong law enforcement views and was pro-SOPA, too.
Rep. John Chaffetz (R-UT)	Committee member	Opening statement and 3 questions	Leading young Republican on tech



A: Stephen Suen B: Ashwini Gokhale		(Thursday noon)	issues -- supported Issa and Wyden in their anti-SOPA efforts
Rep. Howard Berman (D-CA) A: Will Drevo B: Noel Morales	Committee member	Opening statement and 3 questions (Thursday noon)	Strong connections to Hollywood AND free speech supporter.
Rep. Zoe Lofgren (D-CA) A: Yi Wu B: Paul Quimby	Committee member	Opening statement and 3 questions (Thursday noon)	Strong supported of Internet issues, with many Internet companies in her district.
	<i>Witnesses</i>	Each witness will present a 3-minute oral summary, and then answer questions from the committee. Written testimony (2-3 pages) is due Thursday at noon.	
Sen. Ron Wyden A: Timothy Galvin B: Mari Miyachi	author, sec.230	Written testimony and oral summary. (Thursday noon)	Original author of 47 USC 230
Mary Alice McLarty, President A: Colleen Rock B: David Lawrence	<u>American Association for Justice</u>	Written testimony and oral summary. (Thursday noon)	Trial lawyers generally dislike any laws the immunize anyone from lawsuits
Tony Perkins, President A: Jacob Hurwitz B: Katherine Fang	<u>Family Research Council</u>	Written testimony and oral summary. (Thursday noon)	Anti-pornography activists worry that exempting Internet platforms from liability for illegal material makes it harder to control
Zahavah Levine, Chief Counsel A: Anna Wexler B: Ryan Lau	YouTube	Written testimony and oral summary. (Thursday noon)	YouTube and other sites based on user generated content would not be able to exist without sec.230 protections
Sheryl Sandberg, CEO A: Victoria Sun B: Andrew Dorne	Facebook	Written testimony and oral summary. (Thursday noon)	ditto
Leslie Harris, President and CEO A: Noor Al Sharif B: Ruby Tamberino	Center for Democracy and Technology	Written testimony and oral summary. (Thursday noon)	As a defender of Internet free speech, CDT takes a strong view in support of 230 - see their website.



Prof. Eric Goldman A: Benjamin Barenblat B: Jacob Bennett	University of San Jose Law School	Written testimony and oral summary. (Thursday noon)	Prof. Goldman is a leading legal scholar looking at 230 litigation.
A: Michael Plasmeier <i>Why no point of?</i>	Washington Post	Present oral hearing wrap-up and prepare <u>800-word story</u> for the <u>Post</u> , due Friday at noon	<i>at the hearing</i>

**In Class Timeline**

2:00 - 2:15	Introduction and review of the 230 law	
	HEARING BEGINS	
2:15 - 2:35	Chair and committee members offer opening statements	1 minute each, summarizing written statements
2:35 - 3:05	Oral testimony from each witness	3 minutes each, summarizing written statements
3:05 - 4pm	Committee members question witnesses	
4:00 - 4:15	Recess	
4:15 - 4:30	Questions continue	
4:30 - 4:40	<i>Washington Post</i> reporter recaps highlights of the hearing	<i>me</i>
4:45 - 5:00	Discuss 2013 project topics	

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*was they are giving me 10 min  
Should have preped more*

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97-1523

**KENNETH M. ZERAN,  
Plaintiff- Appellant,**

v.

**AMERICA ONLINE, INCORPORATED,  
Defendant- Appellee.**

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.  
T. S. Ellis, III, District Judge.  
(CA-96-1564-A)

Argued: October 2, 1997

Decided: November 12, 1997

Before WILKINSON, Chief Judge, RUSSELL, Circuit Judge, and BOYLE, Chief United States  
District Judge for the Eastern District of North Carolina, sitting by designation.

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Affirmed by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Russell and  
Chief Judge Boyle joined.

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**COUNSEL**

**ARGUED:** John Saul Edwards, LAW OFFICES OF JOHN S. EDWARDS, Roanoke, Virginia; Leo  
Kayser, III, KAYSER & REDFERN, New York, New York, for Appellant. Patrick Joseph Carome,  
WILMER, CUTLER & PICKERING, Washington, D.C., for Appellee. **ON BRIEF:** John Payton,  
Samir Jain, WILMER, CUTLER & PICKERING, Washington, D.C.; Randall J. Boe, AMERICA  
ONLINE, INC., Dulles, Virginia, for Appellee.

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**OPINION**

WILKINSON, Chief Judge:

Kenneth Zeran brought this action against America Online, Inc. ("AOL"), arguing that AOL  
unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused  
to post retractions of those messages, and failed to screen for similar postings thereafter. The district  
court granted judgment for AOL on the grounds that the Communications Decency Act of 1996  
("CDA") - - 47 U.S.C. § 230 - bars Zeran's claims. Zeran appeals, arguing that § 230 leaves intact  
liability for interactive computer service providers who possess notice of defamatory material posted  
through their services. He also contends that § 230 does not apply here because his claims arise from  
AOL's alleged negligence prior to the CDA's enactment. Section 230, however, plainly immunizes  
computer service providers like AOL from liability for information that originates with third parties.



Furthermore, Congress clearly expressed its intent that § 230 apply to lawsuits, like Zeran's, instituted after the CDA's enactment. Accordingly, we affirm the judgment of the district court.

## I.

"The Internet is an international network of interconnected computers," currently used by approximately 40 million people worldwide. Reno v. ACLU, 117 S. Ct. 2329, 2334 (1997). *One of the many means by which individuals access the Internet is through an interactive computer service.* These services offer not only a connection to the Internet as a whole, but also allow their subscribers to access information communicated and stored only on each computer service's individual proprietary network. Id. AOL is just such an interactive computer service. Much of the information transmitted over its network originates with the company's millions of subscribers. They may transmit information privately via electronic mail, or they may communicate publicly by posting messages on AOL bulletin boards, where the messages may be read by any AOL subscriber.

The instant case comes before us on a motion for judgment on the pleadings, see Fed. R. Civ. P. 12(c), so we accept the facts alleged in the complaint as true. Bruce v. Riddle, 631 F.2d 272, 273 (4th Cir. 1980). On April 25, 1995, an unidentified person posted a message on an AOL bulletin board advertising "Naughty Oklahoma T- Shirts." The posting described the sale of shirts featuring offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Those interested in purchasing the shirts were instructed to call "Ken" at Zeran's home phone number in Seattle, Washington. As a result of this anonymously perpetrated prank, Zeran received a high volume of calls, comprised primarily of angry and derogatory messages, but also including death threats. Zeran could not change his phone number because he relied on its availability to the public in running his business out of his home. Later that day, Zeran called AOL and informed a company representative of his predicament. The employee assured Zeran that the posting would be removed from AOL's bulletin board but explained that as a matter of policy AOL would not post a retraction. The parties dispute the date that AOL removed this original posting from its bulletin board.

On April 26, the next day, an unknown person posted another message advertising additional shirts with new tasteless slogans related to the Oklahoma City bombing. Again, interested buyers were told to call Zeran's phone number, to ask for "Ken," and to "please call back if busy" due to high demand. The angry, threatening phone calls intensified. Over the next four days, an unidentified party continued to post messages on AOL's bulletin board, advertising additional items including bumper stickers and key chains with still more offensive slogans. During this time period, Zeran called AOL repeatedly and was told by company representatives that the individual account from which the messages were posted would soon be closed. Zeran also reported his case to Seattle FBI agents. By April 30, Zeran was receiving an abusive phone call approximately every two minutes.

Meanwhile, an announcer for Oklahoma City radio station KRXO received a copy of the first AOL posting. On May 1, the announcer related the message's contents on the air, attributed them to "Ken" at Zeran's phone number, and urged the listening audience to call the number. After this radio broadcast, Zeran was inundated with death threats and other violent calls from Oklahoma City residents. Over the next few days, Zeran talked to both KRXO and AOL representatives. He also spoke to his local police, who subsequently surveilled his home to protect his safety. By May 14, after an Oklahoma City newspaper published a story exposing the shirt advertisements as a hoax and after KRXO made an on-air apology, the number of calls to Zeran's residence finally subsided to fifteen per day.

Zeran first filed suit on January 4, 1996, against radio station KRXO in the United States District



Court for the Western District of Oklahoma. On April 23, 1996, he filed this separate suit against AOL in the same court. Zeran did not bring any action against the party who posted the offensive messages.<sup>1</sup> After Zeran's suit against AOL was transferred to the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a), AOL answered Zeran's complaint and interposed 47 U.S.C. § 230 as an affirmative defense. AOL then moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). The district court granted AOL's motion, and Zeran filed this appeal.

II.

A.

*Should be then  
public libel: defamation*

Because § 230 was successfully advanced by AOL in the district court as a defense to Zeran's claims, we shall briefly examine its operation here. Zeran seeks to hold AOL liable for defamatory speech initiated by a third party. He argued to the district court that once he notified AOL of the unidentified third party's hoax, AOL had a duty to remove the defamatory posting promptly, to notify its subscribers of the message's false nature, and to effectively screen future defamatory material. Section 230 entered this litigation as an affirmative defense pled by AOL. The company claimed that Congress immunized interactive computer service providers from claims based on information posted by a third party.

*How do that?*

The relevant portion of § 230 states: "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." 47 U.S.C. § 230(c)(1).<sup>2</sup> By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, 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.

The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.* § 230(a)(3). It also found that the Internet and interactive computer services "have flourished, to the benefit of all Americans, with a minimum of government regulation." *Id.* § 230(a)(4) (emphasis added). Congress further stated that it is "the policy of the United States . . . 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." *Id.* § 230(b)(2) (emphasis added).

None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." *Id.* § 230(b)(5). Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.



Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. See Reno v. ACLU, 117 S. Ct. at 2334 (noting that at time of district court trial, "commercial online services had almost 12 million individual subscribers"). The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

*Still w/ video reviews in other countries*

Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. In this respect, § 230 responded to a New York state court decision, Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). There, the plaintiffs sued Prodigy - - an interactive computer service like AOL - - for defamatory comments made by an unidentified party on one of Prodigy's bulletin boards. The court held Prodigy to the strict liability standard normally applied to original publishers of defamatory statements, rejecting Prodigy's claims that it should be held only to the lower "knowledge" standard usually reserved for distributors. The court reasoned that Prodigy acted more like an original publisher than a distributor both because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.

Congress enacted § 230 to remove the disincentives to self-regulation created by the Stratton Oakmont decision. Under that court's holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4). In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.

## B.

Zeran argues, however, that the § 230 immunity eliminates only publisher liability, leaving distributor liability intact. Publishers can be held liable for defamatory statements contained in their works even absent proof that they had specific knowledge of the statement's inclusion. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 113, at 810 (5th ed. 1984). According to Zeran, interactive computer service providers like AOL are normally considered instead to be distributors, like traditional news vendors or book sellers. Distributors cannot be held liable for defamatory statements contained in the materials they distribute unless it is proven at a minimum that they have actual knowledge of the defamatory statements upon which liability is predicated. Id. at 811 (explaining that distributors are not liable "in the absence of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published"). Zeran contends that he provided AOL with sufficient notice of the defamatory statements appearing on the company's bulletin board. This notice is significant, says Zeran, because AOL could be held liable as a distributor only if it acquired knowledge of the defamatory statements' existence.

Because of the difference between these two forms of liability, Zeran contends that the term



Our view that Zeran's complaint treats AOL as a publisher is reinforced because AOL is cast in the same position as the party who originally posted the offensive messages. According to Zeran's logic, AOL is legally at fault because it communicated to third parties an allegedly defamatory statement. This is precisely the theory under which the original poster of the offensive messages would be found liable. If the original party is considered a publisher of the offensive messages, Zeran certainly cannot attach liability to AOL under the same theory without conceding that AOL too must be treated as a publisher of the statements.

Zeran next contends that interpreting § 230 to impose liability on service providers with knowledge of defamatory content on their services is consistent with the statutory purposes outlined in Part II.A.

Zeran fails, however, to understand the practical implications of notice liability in the interactive computer service context. Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA. Like the strict liability imposed by the Stratton Oakmont court, liability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation.

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement - - from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. Cf. Auvil v. CBS 60 Minutes, 800 F. Supp. 928, 931 (E.D. Wash. 1992) (recognizing that it is unrealistic for network affiliates to "monitor incoming transmissions and exercise on-the-spot discretionary calls"). Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) (recognizing that fears of unjustified liability produce a chilling effect antithetical to First Amendment's protection of speech). Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.

Similarly, notice-based liability would deter service providers from regulating the dissemination of offensive material over their own services. Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to further possible lawsuits, service providers would likely eschew any attempts at self-regulation.

More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits. Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply "notify" the relevant service provider, claiming the information to be legally defamatory. In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability. Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.

Zeran finally contends that the interpretive canon favoring retention of common law principles unless



"distributor" carries a legally distinct meaning from the term "publisher." Accordingly, he asserts that Congress' use of only the term "publisher" in § 230 indicates a purpose to immunize service providers only from publisher liability. He argues that distributors are left unprotected by § 230 and, therefore, his suit should be permitted to proceed against AOL. We disagree. Assuming arguendo that Zeran has satisfied the requirements for imposition of distributor liability, this theory of liability is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230.

The terms "publisher" and "distributor" derive their legal significance from the context of defamation law. Although Zeran attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action. Because the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of tort liability. Restatement (Second) of Torts § 558(b) (1977); Keeton et al., supra, § 113, at 802.

Publication does not only describe the choice by an author to include certain information. In addition, both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party - - each alleged by Zeran here under a negligence label - - constitute publication. Restatement (Second) of Torts § 577; see also Tacket v. General Motors Corp., 836 F.2d 1042, 1046- 47 (7th Cir. 1987). In fact, every repetition of a defamatory statement is considered a publication. Keeton et al., supra, § 113, at 799.

In this case, AOL is legally considered to be a publisher. "[E]very one who takes part in the publication . . . is charged with publication." Id. Even distributors are considered to be publishers for purposes of defamation law. Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the books, newspapers, magazines, and information available to others as to be regarded as publishers. They are intentionally making the contents available to others, sometimes without knowing all of the contents - - including the defamatory content - - and sometimes without any opportunity to ascertain, in advance, that any defamatory matter was to be included in the matter published. Id. at 803. AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity.

Zeran contends that decisions like Stratton Oakmont and Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991), recognize a legal distinction between publishers and distributors. He misapprehends, however, the significance of that distinction for the legal issue we consider here. It is undoubtedly true that mere conduits, or distributors, are subject to a different standard of liability. As explained above, distributors must at a minimum have knowledge of the existence of a defamatory statement as a prerequisite to liability. But this distinction signifies only that different standards of liability may be applied within the larger publisher category, depending on the specific type of publisher concerned. See Keeton et al., supra, § 113, at 799- 800 (explaining that every party involved is charged with publication, although degrees of legal responsibility differ). To the extent that decisions like Stratton and Cubby utilize the terms "publisher" and "distributor" separately, the decisions correctly describe two different standards of liability. Stratton and Cubby do not, however, suggest that distributors are not also a type of publisher for purposes of defamation law.

Zeran simply attaches too much importance to the presence of the distinct notice element in distributor liability. The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law. To the contrary, once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting. In this respect, Zeran seeks to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability - - the publisher role.

the claim



activities of interactive computer service providers like AOL. Instead, § 230 is addressed only to the bringing of a cause of action. Here, Zeran did not file his complaint until over two months after § 230's immunity became effective. Thus, the statute's application in this litigation is in fact prospective. See St. Louis v. Texas Worker's Compensation Comm'n, 65 F.3d 43, 46 (5th Cir. 1995) (holding "issue is not technically one of retroactivity" when statute applies to "filing of the complaint"), cert. denied, 116 S. Ct. 2563 (1996); Vernon v. Cassadega Valley Central Sch. Dist., 49 F.3d 886, 889 (2d Cir. 1995) (same).

Even if this were a case implicating the application of a federal statute to pre-enactment events, the Supreme Court's Landgraf framework would nevertheless require § 230's application to Zeran's claims. Landgraf instructs us first "to determine whether Congress has expressly prescribed the statute's proper reach." Landgraf v. USIFilm Prods., 511 U.S. 244, 280 (1994). This case can be resolved at this first step. In § 230(d)(3), Congress clearly expressed its intent that the statute apply to any complaint instituted after its effective date, regardless of when the relevant conduct giving rise to the claims occurred. Other circuits have interpreted similar statutory language to clearly express Congress' intent that the relevant statutes apply to bar new actions under statutorily specified conditions. See Wright v. Morris, 111 F.3d 414, 418 (6th Cir. 1997) (holding language "No action shall be brought . . .," 42 U.S.C. § 1997e(a), to "expressly govern[ ] the bringing of new actions"), cert. denied, 1997 WL 275340 (U.S. Oct. 6, 1997); Abdul-Wadood v. Nathan, 91 F.3d 1023, 1025 (7th Cir. 1996) (holding language "In no event shall a prisoner bring a civil action or appeal a judgment . . .," 28 U.S.C. § 1915(g), to govern the bringing of new actions or filing of new appeals).

not very clear but OK

If we were to find a directive as plain as § 230(d)(3) to be ambiguous as to Congress' intent, we would be announcing a new superclear-statement condition for the retroactive operation of statutes. Such a jurisprudential shift would be both unwise and contrary to the Court's admonitions in Landgraf: "Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary." 511 U.S. at 267- 68. Here, Congress decided that free speech on the Internet and self-regulation of offensive speech were so important that § 230 should be given immediate, comprehensive effect.

keep more

There finally is a significant contrast between statutes that impose new liabilities for already-completed conduct and statutes that govern litigants' access to courts. For example, courts often apply intervening statutes that restrict a court's jurisdiction. See Landgraf, 511 U.S. at 274. Section 230 neither imposes any new liability on Zeran nor takes away any rights acquired under prior law. No person has a vested right in a nonfinal tort judgment, much less an unfiled tort claim. Hammond v. United States, 786 F.2d 8, 12 (1st Cir. 1986). Furthermore, Zeran cannot point to any action he took in reliance on the law prior to § 230's enactment. Because § 230 has no untoward retroactive effect, even the presumption against statutory retroactivity absent an express directive from Congress is of no help to Zeran here.

IV.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

1 Zeran maintains that AOL made it impossible to identify the original party by failing to maintain



Congress speaks directly to the issue, counsels a restrictive reading of the § 230 immunity here. See United States v. Texas, 507 U.S. 529, 534 (1993). This interpretive canon does not persuade us to reach a different result. Here, Congress has indeed spoken directly to the issue by employing the legally significant term "publisher," which has traditionally encompassed distributors and original publishers alike.

The decision cited by Zeran, United States v. Texas, also recognized that abrogation of common law principles is appropriate when a contrary statutory purpose is evident. Id. This is consistent with the Court's earlier cautions against courts' application of the canon with excessive zeal: "'The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure.'" Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) (quoting Jamison v. Encarnacion, 281 U.S. 635, 640 (1930)); cf. Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 110-11 (1991) (statute need not expressly delimit manner in which common law principle is abrogated). Zeran's argument flies in the face of this warning. As explained above, interpreting § 230 to leave distributor liability in effect would defeat the two primary purposes of the statute and would certainly "lessen the scope plainly intended" by Congress' use of the term "publisher."

Section 230 represents the approach of Congress to a problem of national and international dimension. The Supreme Court underscored this point in ACLU v. Reno, finding that the 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.'" 117 S. Ct. at 2334 (citation omitted). Application of the canon invoked by Zeran here would significantly lessen Congress' power, derived from the Commerce Clause, to act in a field whose international character is apparent. While Congress allowed for the enforcement of "any State law that is consistent with [§ 230]," 47 U.S.C. § 230(d)(3), it is equally plain that Congress' desire to promote unfettered speech on the Internet must supersede conflicting common law causes of action. Section 230(d)(3) continues: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." With respect to federal-state preemption, the Court has advised: "[W]hen Congress has 'unmistakably . . . ordained,' that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. The result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (citations omitted). Here, Congress' command is explicitly stated. Its exercise of its commerce power is clear and counteracts the caution counseled by the interpretive canon favoring retention of common law principles.

### III.

The CDA was signed into law and became effective on February 8, 1996. Zeran did not file his complaint until April 23, 1996. Zeran contends that even if § 230 does bar the type of claim he brings here, it cannot be applied retroactively to bar an action arising from AOL's alleged misconduct prior to the CDA's enactment. We disagree. Section 230 applies by its plain terms to complaints brought after the CDA became effective. As noted in Part IIB, the statute provides, in part: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(d)(3).

Initially, it is doubtful that a retroactivity issue is even presented here. Retroactivity concerns arise when a statute applies to conduct predating its enactment. Section 230 does not directly regulate the



adequate records of its users. The issue of AOL's record keeping practices, however, is not presented by this appeal.

2 Section 230 defines "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." 47 U.S.C. § 230(e)(2). The term "information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(e)(3). The parties do not dispute that AOL falls within the CDA's "interactive computer service" definition and that the unidentified third party who posted the offensive messages here fits the definition of an "information content provider."



# Supreme Court of Florida

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No. SC94355

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**JANE DOE, mother and legal guardian  
of JOHN DOE, a minor,  
Petitioner,**

vs.

**AMERICA ONLINE, INC.,  
Respondent.**

[March 8, 2001]

WELLS, C.J.

We have for review Doe v. America Online, Inc., 718 So. 2d 385 (Fla. 4th DCA 1998), in which the Fourth District Court of Appeal certified the following questions to be of great public importance:

[1] Whether section 230 of the Communications Decency Act [CDA] applies to complaints filed after its effective date where the complaint alleges a cause of action based upon acts occurring prior to its effective date?

[2] If the answer [to question 1] is in the affirmative, whether section 230 of the Communications Decency Act preempts Florida law?

[3] Whether a computer service provider with notice of a defamatory



third party posting is entitled to immunity under section 230 of the Communications Decency Act?

718 So.2d at 390. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

#### FACTS AND PROCEDURAL HISTORY

Doe filed a complaint in 1997 against Richard Lee Russell and America Online (AOL), an Internet service provider (ISP), to recover for alleged emotional injuries suffered by her son, John Doe. Doe claimed that in 1994 Russell lured John Doe, who was then eleven years old, and two other minor males to engage in sexual activity with each other and with Russell. She asserted that Russell photographed and videotaped these acts and used AOL's "chat rooms" to market the photographs and videotapes and to sell a videotape. Doe did not allege that Russell transmitted photographs or images of her son via the AOL service. In her six-count complaint, Doe claimed that AOL violated criminal statutes, section 847.011<sup>1</sup> and section 847.0135(2), Florida Statutes (1993).<sup>2</sup> She alleged that AOL

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<sup>1</sup>Section 847.011(1)(a), Florida Statutes (1993), provides in relevant part:

Any person who knowingly . . . distributes . . . or offers to sell . . . any obscene . . . photograph . . . [or] image . . . is guilty of a misdemeanor of the first degree . . . .

<sup>2</sup>Section 847.0135(2), Florida Statutes (1993) (Computer Pornography and Child Exploitation Prevention Act of 1986), provides in relevant part:

COMPUTER PORNOGRAPHY.--A person is guilty of a



was negligent per se in violating section 847.0135, Florida Statutes, by allowing Russell to distribute an advertisement offering "a visual depiction of sexual conduct involving [John Doe]" and by allowing Russell to sell or arrange to sell child pornography, thus aiding in the sale and distribution of child pornography, including obscene images of John Doe. Doe asserted a separate claim for negligence based on the allegation that AOL knew or should have known that Russell and others like him used the service to market and distribute child pornography; that it should have used reasonable care in its operation; that it breached its duty; and that the damages to John Doe were reasonably foreseeable as a result of AOL's breach. Doe further claimed that complaints had been communicated to AOL as to Russell's transmitting obscene and unlawful photographs or images and that although AOL reserved the right to terminate without notice the service of any member who did not abide by its "Terms of Service and Rules of the Road," AOL neither warned Russell to stop nor

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violation of this section if he knowingly . . . transmits by means of computer, or makes, prints, publishes, or reproduces by other computerized means, or knowingly causes or allows to be entered into or transmitted by means of computer, or buys, sells, receives, exchanges, or disseminates any notice, statement, or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any minor, or the visual depiction of such conduct.



suspended his service. Two of the counts in Doe's complaint were directed at Russell.<sup>3</sup>

AOL moved to dismiss Doe's complaint and argued, inter alia, that Doe's claims were barred by 47 U.S.C. § 230 (Supp. II 1996),<sup>4</sup> in that section 230

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<sup>3</sup>The record reflects that Russell is presently serving lengthy federal and state prison sentences arising out of events relating to those alleged in the complaint. Russell pled guilty and was convicted on federal criminal charges of sexual exploitation of children and transportation of sexually explicit material involving a minor and state criminal charges of attempted sexual battery.

<sup>4</sup>47 U.S.C. § 230 provides in relevant part:

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the



prohibits civil actions that treat an interactive computer service as the "publisher or speaker" of messages transmitted over its service by third parties.<sup>5</sup> The trial court granted AOL's motion to dismiss with prejudice, finding that the immunity Congress provided for interactive computer services in section 230 applied to

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enforcement of section 223 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

<sup>5</sup>Section 230 defines "interactive computer service" as:

[A]ny 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.

47 U.S.C. § 230(e)(2).

The statute defines "information content provider" as:

[A]ny person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

47 U.S.C. § 230(e)(3).



Doe's claims. The Fourth District Court of Appeal affirmed and held that the trial court's conclusion was consistent with Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997), in which the federal circuit court held that "Congress' desire [in enacting 47 U.S.C. § 230] to promote unfettered speech must supersede conflicting common law causes of action." Id. at 334. The Fourth District certified the questions of great public importance to this Court.

### SECOND AND THIRD CERTIFIED QUESTIONS

The certified questions in this case focus upon the application of 47 U.S.C. § 230 to Florida tort actions that are based upon alleged "distributor" liability of ISPs. We first address the Fourth District's second and third certified questions and rephrase them into this combined question:

Whether section 230 preempts Florida law as to causes of action based in negligence against an Internet Service Provider (ISP) as a distributor of information allegedly in violation of Florida criminal statutes prohibiting the distribution of obscene literature and computer pornography?

For the purpose of answering the certified question, but without deciding, we accept that the complaint in this case states a cause of action under Florida law<sup>6</sup> for

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<sup>6</sup>We accept that the allegations are based upon information distributor liability in accord with section 581 of the Second Restatement of Torts (1977) and as impliedly recognized in Cardozo v. True, 342 So. 2d 1053, 1056 (Fla. 2d DCA 1977), and based upon a statutory violation under DeJesus v. Seaboard Coast Line Railroad Co., 281 So. 2d 198, 201 (Fla. 1973).



liability in negligence against AOL as a distributor of information. We answer the rephrased certified question in the affirmative and find that section 230 does preempt Florida law as to such a cause of action based upon alleged negligence. We find persuasive the reasoning of the United States District Court in Zeran v. America Online, Inc., 958 F. Supp. 1124, 1131-37 (E.D. Va. 1997), and the Fourth Circuit in Zeran, 129 F.3d at 331-32.

The importance of this certified question is obvious in light of the current explosive growth in worldwide use of the Internet. The fundamental issue here is whether companies that provide access to the Internet are subject to common-law civil tort causes of action based upon the laws of each of the fifty states or whether Congress has acted to make ISPs immune from such common-law civil actions.

In reaching our conclusion, we find instructive the analysis of the congressional adoption of section 230 that was provided in the Zeran decisions and in commentaries concerning the Zeran decisions.<sup>7</sup> These sources indicate that two reported judicial decisions from courts in the State of New York were significant in

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<sup>7</sup>Steven M. Cordero, Comment, Damnum Absque Injuria: Zeran v. AOL and Cyberspace Defamation Law, 9 Fordham Intell. Prop. Media & Ent. L.J. 775 (1999); Annemarie Pantazis, Zeran v. America Online, Inc.: Insulating Internet Service Providers from Defamation Liability, 34 Wake Forest L. Rev. 531 (1999). See also Ben Ezra, Weinstein, & Co. v. American Online Inc., 206 F.3d 980, 985-86 (10th Cir. 2000); Does v. Franco Productions, No. 99C7885, 2000 WL 816779 (N.D. Ill. June 22, 2000).



congressional passage of 47 U.S.C. § 230, the Communications Decency Act (CDA), and thus provide assistance in understanding the intent of the Act. The cases are Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991), and Stratton Oakmont, Inc. v. Prodigy Services Co., 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995). In Cubby, the federal district court held in a defamation action that CompuServe, a service provider that offered its subscribers access to an electronic library of news publications, was a mere distributor of information and could not be held liable for libelous statements made in news publications without a showing of actual knowledge. See 776 F. Supp. at 140-41.

Subsequent to the federal Cubby decision, a New York state court decided Stratton Oakmont and concluded that an ISP could be held liable as a publisher of defamatory statements if the ISP retained editorial control over the postings contained on its site. See 23 Media L. Rep. at 1798. According to one commentator, this created a paradox in that those ISPs who tried to control what was placed on the Internet so as to limit access “to provide decent, family-oriented content [would be] subject to defamation lawsuits and liability on account of their efforts, while [ISPs] who made no efforts to control content would be free of liability.”<sup>8</sup>

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<sup>8</sup>Cordero, supra note 7, at 792.



In 1996, Congress enacted 47 U.S.C. § 230, which was adopted as Title V of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 15 and 47 U.S.C.). See Reno v. ACLU, 521 U.S. 844, 859 n.24 (1997). The Congressional Conference Report on section 230 specifically states:

[T]his section provides “Good Samaritan” protections from civil liability for providers or users of an interactive computer service for actions to restrict or enable restriction of access to objectionable online material . . . . [O]ne of the specific purposes of [section 230] is to overrule Stratton-Oakmont v. Prodigy and any other similar decisions which have treated such providers and users as Publishers or speakers of content that is not their own because they have restricted access to objectionable material.

Cordero, supra note 7, at 795 (quoting S. Conf. Rep. No. 104-230, at 435 (1996)).

In Zeran, the Fourth Circuit described this history of section 230:

Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. In this respect, § 230 responded to a New York state court decision, Stratton Oakmont, Inc. v. Prodigy Servs. Co. There, the plaintiffs sued Prodigy--an interactive computer service like AOL--for defamatory comments made by an unidentified party on one of Prodigy's bulletin boards. The court held Prodigy to the strict liability standard normally applied to original publishers of defamatory statements, rejecting Prodigy's claims that it should be held only to the lower "knowledge" standard usually reserved for distributors. The court reasoned that Prodigy acted more like an original publisher than a distributor both because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.



Congress enacted § 230 to remove the disincentives to selfregulation created by the Stratton Oakmont decision. Under that court's holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." § 47 U.S.C. § 230(b)(4). In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.

Zeran, 129 F.3d at 331 (citation omitted).

Using this history as a basis for our reading of section 230, we turn to the issue of preemption of Florida law. The reasoning of the United States District Court in Zeran is incisive and directly on point on this issue:

## 2. Conflict with the Language of the CDA

Preemption is also required where state law conflicts with the express language of a federal statute. In this case, Zeran seeks to hold AOL liable for its alleged negligence in allowing the bogus notices to remain and reappear after learning of their fraudulent nature from Zeran. This theory of liability derives chiefly from Cubby, a case decided over four years before the passage of the CDA. In Cubby, the district court concluded that the defendant interactive computer service, CompuServe, was a distributor for the purposes of defamation liability, and thus was liable only if it "knew or had reason to know of the alleged defamatory . . . statements." This "reason to know" standard is consistent with the standard of liability for entities such as news vendors, book stores, and libraries who, while not charged with a duty to review the materials they distribute, are liable if



they distribute materials they know or have reason to know contain defamatory statements. Thus, Zeran contends that on learning of the fake notice on the AOL bulletin board advertising the tasteless T-shirts, AOL had a duty to take reasonable steps to prevent the distribution of this posting. Zeran further contends that the scope of this reasonable duty, and whether AOL complied with it, are questions for a jury.

AOL responds by contending that a state cause of action for distributor liability is preempted because it directly conflicts with the language of § 230 of the CDA. Specifically, AOL points to § 230(c)(1), which states 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.

Zeran does not contest that AOL is an interactive computer service as defined by the CDA and it is clear that AOL meets the statutory definition of such a service. Nor does Zeran claim that the bogus notices were anything but “information provided by another information content provider.” Thus, the preemption issue reduces to the question whether a state cause of action for negligent distribution of defamatory material directly conflicts with the CDA's prohibition against treating an Internet provider as a "publisher or speaker." Put another way, the question is whether imposing common law distributor liability on AOL amounts to treating it as a publisher or speaker. If so, the state claim is preempted.

The key to answering this question lies in understanding the true nature of so-called distributor liability and its relationship to publisher liability. At the heart of Zeran's argument is the premise that distributor liability is a common law tort concept different from, and unrelated to, publisher liability. This is not so; distributor liability, or more precisely, liability for knowingly or negligently distributing defamatory material, is merely a species or type of liability for publishing defamatory material. This relationship is apparent from the Restatement (Second) of Tort § 577 definition of “publication” of



defamatory material, which states,

- (1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.
- (2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.

Thus, a publisher is not merely one who intentionally communicates defamatory information. Instead, the law also treats as a publisher or speaker one who fails to take reasonable steps to remove defamatory statements from property under her control.

....

### 3. Conflict with the Purposes and Objectives of the CDA

An alternative basis for preemption exists if subjecting AOL to state law distributor liability would stand "as an obstacle to the accomplishment of the full purposes and objectives of Congress" in passing § 230 of the CDA. Section 230 itself provides some insight into Congress' purposes and objectives in passing that provision, stating, in part, that

It is the policy of the United States:

....

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; [and]

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material . . . .

47 U.S.C. § 230(b). The scant legislative history reflects that the "disincentive" Congress specifically had in mind was liability of the



sort described in Stratton Oakmont. There, Prodigy, an interactive computer service provider, was held to have published the defamatory statements of a third party in part because Prodigy had voluntarily engaged in some content screening and editing and therefore knew or should have known of the statements. Congress, concerned that such rulings would induce interactive computer services to refrain from editing or blocking content, chose to grant immunity to interactive computer service providers from suits arising from efforts by those providers to screen or block content. Thus, Congress' clear objective in passing § 230 of the CDA was to encourage the development of technologies, procedures and techniques by which objectionable material could be blocked or deleted either by the interactive computer service provider itself or by the families and schools receiving information via the Internet. If this objective is frustrated by the imposition of distributor liability on Internet providers, then preemption is warranted. Closely examined, distributor liability has just this effect.

Zeran, 958 F. Supp. at 1132-35 (citations and footnotes omitted) (emphasis added).

This view was confirmed by the analysis of the Fourth Circuit Court of

Appeal in Zeran:

Because of the difference between these two forms of liability, Zeran contends that the term "distributor" carries a legally distinct meaning from the term "publisher." Accordingly, he asserts that Congress' use of only the term "publisher" in § 230 indicates a purpose to immunize service providers only from publisher liability. He argues that distributors are left unprotected by § 230 and, therefore, his suit should be permitted to proceed against AOL. We disagree. Assuming arguendo that Zeran has satisfied the requirements for imposition of distributor liability, this theory of liability is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230.

The terms "publisher" and "distributor" derive their legal significance from the context of defamation law. Although Zeran attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action. Because the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of tort liability. Restatement (Second) of Torts § 558(b) (1977); Keeton et al., supra, § 113, at 802. Publication does not only describe the choice by an author to include certain information. In addition, both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party--each alleged by Zeran here under a negligence label--constitute publication. Restatement (Second) of Torts § 577; see also Tacket v. General Motors Corp., 836 F.2d 1042, 1046-47 (7th Cir.1987). In fact, every repetition of a defamatory statement is considered a publication. Keeton et al., supra, § 113, at 799.

In this case, AOL is legally considered to be a publisher. "[E]very one who takes part in the publication . . . is charged with publication." Id. Even distributors are considered to be publishers for purposes of defamation law:

Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the books, newspapers, magazines, and information available to others as to be regarded as publishers. They are intentionally making the contents available to others, sometimes without knowing all of the contents--including the defamatory content--and sometimes without any opportunity to ascertain, in advance, that any defamatory matter was to be included in the matter published.

Id. at 803. AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity.



Zeran, 129 F.3d at 331-32 (emphasis added). It is precisely the liability based upon negligent failure to control the content of users' publishing of allegedly illegal postings on the Internet that is the gravamen of Doe's alleged cause of action. Such publication of obscene literature or computer pornography is analogous to the defamatory publication at issue in the Zeran decisions. Therefore, our agreement with the reasoning of the federal district court answers the certified question as to preemption. Accordingly, we answer the combined and rephrased certified question in the affirmative.

#### FIRST CERTIFIED QUESTION

We next turn to the first certified question, which is whether section 230 applies to complaints filed after its effective date where the complaint alleges a cause of action based upon acts occurring prior to its effective date. Again, we find to be correct the reasoning of the United States District Court in Zeran:

Zeran contends that even if the CDA preempts a state law cause of action for negligent distribution of defamatory statements, it cannot have that effect here without violating the stricture against retroactive application of statutes. The CDA was signed into law and became immediately effective on February 8, 1996, over nine months after the posting of the bogus notices that form the basis of Zeran's claims against AOL. Yet, Zeran did not file this complaint until April 1996, two months after the CDA went into effect. This, then, is a case brought after a statute's enactment but based on facts that occurred prior to its enactment. In these circumstances, a statute may not have a "retroactive effect" absent a clear expression of congressional intent

with respect to such retroactivity. See Landgraf v. USI Film Products, 511 U.S. 244, 280-81 (1994). Thus, a court must first determine whether Congress has clearly expressed the statute's intended temporal reach. If so, the judicial inquiry is complete and Congress' clear intent must be implemented. Id. If, on the other hand, the statute has no express Congressional command with respect to its temporal application, courts must undertake a second inquiry to determine whether the application of the statute will result in a prohibited "retroactive effect." Id. In this case, the first step is dispositive, Congress has made its intent manifest.

Section 230 clearly reflects Congress' intent to apply the CDA to all suits filed after its enactment, notwithstanding when the operative facts arose. Thus, in § 230(d)(3), the CDA provides, in pertinent part, that

[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

This subsection does not generally refer to conflicting state laws having "no effect" or being "preempted." To the contrary, it specifically provides that "[n]o causes of action may be brought." And such clear statutory language cannot reasonably be construed to mean that only some causes of action may be brought, namely those concerning events arising before the enactment of the CDA.

Zeran, 958 F. Supp. at 1135-37 (citations and footnotes omitted) (emphasis added).

We specifically concur that section 230 expressly bars "any actions" and we are compelled to give the language of this preemptive law its plain meaning. We therefore concur with the Fourth District Court of Appeal in its holding that Doe's cause of action against AOL is barred by the plain language of section 230(d)(3).



Accordingly, for the reasons expressed, we answer in the affirmative the first certified question and the rephrased question, which combines the second and third certified questions, and approve the decision of the Fourth District below.

It is so ordered.

SHAW, HARDING and ANSTEAD, JJ., concur.

LEWIS, J., dissents with an opinion, in which PARIENTE and QUINCE, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

LEWIS, J., dissenting.

I understand that it may be somewhat attractive for the majority to follow an existing published opinion from a different jurisdiction; however, I conclude that, because the analysis upon which it is based is faulty and leads to a totally unacceptable interpretation, it should not be followed.<sup>9</sup> Therefore, I dissent.

It is clear that Congress, through the Communications Decency Act, 47

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<sup>9</sup>See generally Gross v. State, 765 So. 2d 39 (Fla. 2000) (observing that, where there is no uniform interpretation by the various federal circuits regarding the interpretation of a federal statute, the approach used by any particular federal circuit is merely persuasive and not binding); Corporate Securities Group v. Lind, 753 So. 2d 151, 152 (Fla. 4th DCA 2000) (explaining that, where a state appellate court is asked to decide a federal question as to which there is no Supreme Court authority directly on point, and no unified position has been established in the Circuit Courts of Appeal, the state court is obligated to decide the issue by projecting “what the [United States] Supreme Court would do if and when it ultimately confront[s] the question”).

U.S.C. § 230 (the “CDA”), intended to shield an Internet Service Provider (an “ISP”) from liability due solely to implementation of a good-faith monitoring program whose goal is to preclude dissemination of illicit and improper materials through the ISP’s electronic medium. Contrary to the majority’s view, however, the carefully crafted statute at issue, undergirded by a clear legislative history, does not reflect an intent to totally exonerate and insulate an ISP from responsibility where, as here, it is alleged that an ISP has acted as a knowing distributor of material leading to the purchase, sale, expansion and advancement of child pornography, after having been given actual notice of the particular activity, by taking absolutely no steps to curtail continued dissemination of the information by its specifically identified customer, when it had the right and power to do so. In my view, the result obtained by this Court’s interpretation of congressional intent in this area frustrates the core concepts explicitly furthered by the Act and contravenes its express purposes. Through the majority’s interpretation, the so-called “Decency Act” has, contrary to well-established legal principles, been transformed from an appropriate shield into a sword of harm and extreme danger which places technology buzz words and economic considerations above the safety and general welfare of our people.

I suggest that by interpreting the statute to provide this carte blanche



immunity for wrongful conduct plainly not intended by Congress, the majority view ignores the common law underpinnings of the present controversy; fails to accommodate the traditional distinction between publishers and distributors consistently recognized in American jurisprudence; overlooks the historical timing of the subject legislation in the context of developing case law; excludes proper analysis of the careful wording of the subject legislation; and does not consider the obvious intent additionally underscored by Congress both in the stated policies underlying the statute, and in the statute's legislative history. These grounds, collectively--coupled with the rationale of the very case which the majority deems controlling--warrant a far different result.

In Zeran (as quoted in the majority opinion), the Fourth Circuit began by explaining what Congress had intended when it enacted the Communications Decency Act, 47 U.S.C. § 230. The legislation was aimed at removing “disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.” 47 U.S.C. § 230(b)(4). Specifically, Congress enacted the CDA as a measure to “overrule Stratton Oakmont v. Prodigy and other similar decisions which have treated such providers and users as Publishers or speakers of content that is not their own because they

have restricted access to objectionable material.” S. Conf. Rep. No. 104-230 at 435 (1996).

I submit that, with this predicate, a correct understanding of the Stratton Oakmont decision is thus key to a proper analysis here. In Stratton Oakmont, the court had held Prodigy, an interactive computer service like AOL, “to the strict liability standard normally applied to original publishers of defamatory statements, rejecting Prodigy’s claims that it should be held only to the lower ‘knowledge’ standard usually reserved for distributors. The court reasoned that Prodigy acted more like an original publisher than a distributor both because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.” Zeran v. America Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) (emphasis quoted) quoted in majority op. supra p. 10) (emphasis supplied). While the initial foray into Zeran’s analysis is thus promising, its eventual conclusion--and thus, the majority’s corresponding conclusion in this case, patterned on the analyses contained in the two Zeran decisions--is, in my view, a startling non sequitur. Contrary to case law<sup>10</sup> which has

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<sup>10</sup>Although the conduct and wrong alleged here may be far more egregious than defamation and involve other considerations, such is probably the most appropriate analogy found in our common law as to the status of the participants. Compare Miami Herald Pub. Co. v. Ane, 458 So. 2d 239 (Fla. 1984) (holding that, under Florida law, it is sufficient for a non-public figure plaintiff to establish, in a



traditionally recognized an important difference between distributor and publisher liability, the majority opinion rejects any such distinction, relying on the Restatement (Second) of Torts § 577--a venerable treatise published in 1977<sup>11</sup>--for

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defamation action, that the defendant newspaper published the alleged false and defamatory statements with negligence, *i.e.*, without reasonable care as to whether the alleged false and defamatory statements were actually true or false) with *Sexton v. American News Co.*, 133 F. Supp. 591, 593 (N.D. Fla. 1955) (recognizing that a newspaper vendor may avoid liability by showing that “he neither knew nor ought to have known that the paper he was selling contained libelous matter”), cited in *Cardozo v. True*, 342 So. 2d 1053, 1056 (Fla. 2d DCA 1977) (examining, in the context of a tort action against the distributor of a cook book for personal injuries allegedly suffered as a result of inadequate warnings contained therein, the “closely analogous” principle that “distributors of newspapers and periodicals cannot be even held legally responsible for defamatory material contained therein where the dealer did not know and reasonably could not have known that the publication contained defamatory material”); see generally R. James George, Jr. & James A. Hemphill, *Defamation Liability and the Internet*, 507 Prac. L. Inst. 691, 694 (1998) (“The ‘publisher/distributor’ distinction has existed for years in the common law of libel.”).

<sup>11</sup>While the general common law tort principles contained in the Restatement are, of course, still viable, the treatise has yet to incorporate the realities of the World Wide Web. As observed by the author of a 1996 law review article who attempted to reconcile *Cubby* with *Oakmont*, “Megabyte. Mouse. E-mail. CD-ROM. Hard drive. Multimedia. World Wide Web. Five years ago, these were words that few in the population understood, let alone used in conversation.” Matthew C. Siderits, Comment, *Defamation in Cyberspace: Reconciling *Cubby, Inc. v. Compuserve, Inc.* and *Stratton Oakmont v. Prodigy Services Co.**, 79 Marq. L. Rev. 1065, 1081 (1996) (concluding that, “[a]lthough some may argue that on-line services act as publishers, the proper standard to apply to on-line services is the distributor framework”); see also Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. Colo. L. Rev. 1203, 1205 (observing that “[t]he concept of regulating the Net--in the lawmaking or regulatory sense, rather than engineering sense--did not exist prior to the 1990s because ‘the Net’ did not yet



the proposition that “the law treats as a publisher or speaker one who fails to take reasonable steps to remove defamatory statements from property under her control.” Majority op. at 12 (quoting Zeran v. America Online Inc., 958 F. Supp. 1124, 1133 (E.D. Va. 1997)). However, close examination of the Restatement (Second) itself reflects that this reliance is misplaced, both because it is not clear, from a reading of chapter 24 of the Restatement in its entirety, that section 577(2)<sup>12</sup>

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exist as a society-wide communications medium”). Although the treatment of defamation in the 1977 edition of the Restatement of Torts encompasses radio and television, see § 581, Restatement (Second) of Torts (1977), it has yet to address the role of Internet presences. This would appear to be particularly apt in light of the multiple functions which the Internet now serves, including, for example, the recent publication of a Stephen King book directly on the Internet. See [http://www.stephenking.com/sk\\_120400\\_2.html](http://www.stephenking.com/sk_120400_2.html) (reflecting Stephen King’s commentary regarding his recent on-line publication of The Plant, which King described as “an epistolary novel set in the early 1980s (before e-mail, in other words, and when even the fax was a fringe technology),” and regarding which, King had advised internet users: “My friends, we have a chance to become Big Publishing’s worst nightmare. Not only are we going glueless, look Ma, no e-Book!”). In fact, a search of the Westlaw database of Florida decisions reveals that the word “Internet” did not even appear in Florida case law until 1996. And it was only in 1999 Amendments to the Advertising Rules in the Rules Regulating the Florida Bar that “Internet presences such as home pages or World Wide Web sites, unsolicited electronic mail communications, and information concerning a lawyer’s or law firm’s services that appears on World Wide Web search engine screens and elsewhere” were first regulated by this Court. See Amendments to Rules Regulating Florida Bar-Advertising Rules, 762 So. 2d 392, 425 (Fla. 1999).

<sup>12</sup>Section 577(2) does not appear to have been cited as persuasive authority in many cases. Compare Dillon v. Waller, No. 95APEO5-622, 1995 WL 765224 (Ohio Ct. App. 1995) (citing § 577(2) as persuasive authority in a defamation case involving lewd language painted on a bus parked on the defendant’s property) and



is the section which most properly applies to this controversy, and, I suggest, because--even if it were--section 577 does not support the proposition for which it is cited. The fatal flaw in Zeran's logic--and thus, in the majority view--is its erroneous conclusion that, under section 577 of the Restatement of Torts (Second), distributors are merely an internal category of publishers.<sup>13</sup>

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Southern Bell Tel. and Tel. Co. v. Coastal Transmission Service, Inc., 307 S.E.2d 83, 85 (Ga. Ct. App. 1983) (citing § 577(2) in a case involving alleged libel which appeared in a display advertisement in the Southern Bell yellow pages telephone directory which misprinted the plaintiff's slogan, "Get it in gear," as "Get it in rear") with Dominick v. Sears, Roebuck & Co., 741 S.W.2d 290, 294 (Mo. Ct. App. E.D. 1987) (refusing to extend liability to the situation before it, which involved a suit for defamation against a department store based upon a credit report issued by a third party which the store maintained, and which contained a defamatory statement made by the third party, observing that "[t]he classic illustration of this rule is the situation of the tavern owner who fails to remove, after knowledge thereof, a libelous statement about plaintiff written by another on a wall in the restroom of his establishment") (citing § 577(2), Illustration 15). Is the function served by the provider of an Internet service "bulletin board" more like that of a physical establishment which maintains a cork bulletin board (which would be covered by § 577(2)), or more like a telephone, ticker, teletype or telegraph company (covered by §581(1)) which transmits third-party messages for a fee? Since the subject activity involves the transmission of messages through an electronic medium, which can only be sent or received through a telecommunications interconnection for which the customer pays a fee, the latter analogy appears more appropriate.

<sup>13</sup>As one legal commentator has observed, the Zeran court "based its holding on a questionable interpretation of the word 'publisher,' stating that 'distributor' was merely a subset of the word 'publisher.'" Developments in the Law--The Law of Cyberspace, III The Long Arm of Cyber-Reach, 112 Harv. L. Rev. 1574, 1613 & n. 23 (1999) (citing Zeran, 129 F.3d at 330-33, and indicating that "a more detailed criticism of the Zeran court's verbal gymnastics" can be found in David R.

My analysis leads to the conclusion that this is not at all what the Restatement reflects. First, distributor liability, which we must address, is defined not in section 577, but in section 581(1) (which appears to apply here). However, assuming arguendo that section 577(2) did define “distributors,” it does not reflect that they are a “subset” of primary publishers. Rather, they belong to a set of entities who perform a “secondary role in disseminating defamatory matter authored and published by others.” W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 113, at 810 (5th ed.1984). In defining publication, the Restatement (Second) provides, in section 577(1), that “[p]ublication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.” In section 577(2), it provides further that one who “intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control,” although not a publisher (as defined in subsection (1), “is subject to liability for its continued publication.” Restatement (Second) of Torts § 577. This is a far different statement than that contained in other parts of chapter 24, which identify different categories of actors as being “subject to liability as if [they] had originally

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Sheridan, Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet, 61 Alb. L. Rev. 147, 168-72 (1997)).



published” the defamatory matter (§ 578), or “subject to the same liability as an original publisher” (§ 581(2)). While a proprietor who fails to remove known defamatory material exhibited on his property may be subject to tort liability,<sup>14</sup> such liability is not that of an original “publisher.”

However, it is section 581(1)--involving those who “only deliver or transmit defamation published by a third person”--which more properly defines distributor liability, and which appears most applicable to AOL’s activities here. In its entirety, section 581 provides:

§ 581. TRANSMISSION OF DEFAMATION PUBLISHED BY  
THIRD PERSON

(1) Except as stated in subsection (2), one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.

(2) One who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher.

Thus, under the more appropriate section of the Restatement (Second) of Torts, AOL--not as a publisher, but as a distributor (“one who only delivers or transmits

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<sup>14</sup>Section 577(2) of the Restatement recognizes potential liability for a proprietor’s failure to remove defamatory material on his land or chattels of which he or she is aware: “when, by measures not unduly difficult or onerous, he may easily remove the defamation, he may be found liable if he intentionally fails to remove it.” Dominick v. Sears, Roebuck & Co., 741 S.W.2d 290, 294 (Mo. Ct. App. 1987) (citing Restatement of Torts (Second) §577(2) (1977)).

defamatory matter published by a third person”)--would have potential liability where, as here, it is alleged that AOL actually knew of the illicit character of the material which it was transmitting over its Internet service. Accord, W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 113, at 810-11 (5th ed.1984). (“It would appear quite clearly that those who perform a secondary role in disseminating defamatory matter authored and published by others in the form of books, magazines and the like--as in the case of libraries, news vendors, distributors, and carriers--would not be subject to liability to anyone in the absence of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published.”).

In my view, my colleagues in the majority overlook and fail to consider this distinction between publishers and distributors, which is key to an understanding of what Congress, in 1996, intended to accomplish by enacting the CDA. Five years earlier, in 1991, a federal district court had held, in Cubby, that the defendant Internet service provider, CompuServe, was the equivalent of “an electronic, for profit library.” 776 F. Supp. at 140. The Cubby court had held, therefore, that CompuServe was entitled to the same first amendment protection as a “distributor,” subject to liability only if it knew or had reason to know of the allegedly defamatory statements. The court stated that “CompuServe has no more



editorial control over such a publication than does a public library, bookstore, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potential defamatory statements than it would be for any other distributor to do so.” Cubby, 776 F. Supp. at 140. This finding was both consistent with the function served by the ISP in that case, and with the distinction which, historically, had consistently been made between publishers and distributors. It is not surprising, then, that Congress did not enact the CDA fast on the heels of Cubby, nor mention an intent to overrule Cubby in the legislative history of the CDA.

However, only shortly before enactment of the CDA, the court in Stratton Oakmont, faced with a similar question, reached a far different result. There, the court held that the ISP, Prodigy, would be treated as a “publisher,” subject to liability regardless of its actual or imputed knowledge. See Stratton Oakmont Inc. v. Prodigy Services Co., No. 94-31063, 1995 WL 805178, 1 (N.Y. Sup. Ct. May 24, 1995). The Stratton Oakmont court distinguished Cubby because, unlike Prodigy, CompuServe had no opportunity to review the contents of any publication before it was uploaded. The Stratton Oakmont court concluded that, because Prodigy exercised general editorial control over its services, it should be held to the liability of a “publisher” instead of the liability of a “distributor.” See id. Thus,

even though the courts in Cubby and Stratton Oakmont both recognized the distinction between publisher liability and distributor liability, in characterizing the ISP's function, they reached very different results. The ISP in Stratton Oakmont, merely by virtue of its "Good Samaritan" editorial policies, was held liable for matter published on its service by third parties, even though it was not alleged to have had actual knowledge of the content of the publication.

This was obviously the legal conclusion which Congress, in enacting the CDA promptly thereafter, sought to change.<sup>15</sup> It reflected this intent in two ways.

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<sup>15</sup>This conclusion is further bolstered by the fact that Congressman Cox, the coauthor of section 230, during floor debate on the measure, spoke not only about the Stratton Oakmont decision, but also about the result reached in Cubby, stating:

A Federal court in New York, in a case involving CompuServe, one of our online service providers, held that CompuServe would not be liable in a defamation case because it was not the publisher or editor of the material. It just let everything come onto your computer without, in any way, trying to screen it or control it.

141 Cong. Rec. H8460-01 (daily ed. Aug. 4, 1995) (statement of Mr. Cox). This statement by Representative Cox underscored the dilemma posed by the Cubby/Stratton Oakmont analytical schism. As observed by one legal commentator:

In the wake of [Stratton Oakmont], it is likely that most major commercial on-line services will be faced with difficult choices. A service might choose to institute very strict standards to prevent any such defamatory language from reaching the bulletin boards. Alternatively, it might choose to take a totally hands-off approach in order that it appear to have no editorial control whatsoever, so as to



First, the language of the statute itself could not be more explicit. It provides, in § 230(c)(“Protection for ‘Good Samaritan’ blocking and screening of offensive material”) 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.” In Zeran and the majority view here, however, this

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fall under the auspices of a distributor rather than a publisher.

Siderits, supra note 11, at 1080. While the legislative history reflects Congress’s intent to “overrule” Stratton Oakmont, there is no similar mention of a desire to “overrule” Cubby (despite the fact that Congress was not only presumed to be aware of that decision, but was actually reminded of it during legislative debate). Thus, as one legal commentator observed:

The result of the CDA was the re-emergence of the holding in Cubby. This distinction once made by the district court in Cubby, resurrected by Congress’ CDA, seemingly destroyed any other interpretation of provider/distributor liability for ISPs. The CDA reduced the field to only distributor-type liability. Hence, individuals pursuing providers for defamatory messages posted via their servers can only prevail if the provider knew or had reason to know of the defamatory messages. Accordingly, an ISP would be akin to a bookseller, vendor, or distributor. In this manner, Congress maintained an ISP’s ability to exercise editorial control without being subject to a publisher’s strict liability. This pendulum, which was finally set by Congress through the CDA legislation, was then pushed in another direction with the emergence of Zeran v. America Online, Inc.

Michael H. Spencer, Defamatory E-Mail and Employer Liability: Why Razing Zeran v. America Online is a Good Thing, 6 Rich. J.L. & Tech. 25, 9 (2000) (footnotes omitted) (criticizing as erroneous Zeran’s interpretation of the CDA as eliminating ISP distributor liability).

statement that an ISP shall not be treated as a “publisher or speaker” of third-party information has been interpreted to mean not only that an ISP can never be subject to liability for negligence as a “publisher” of third-party information appearing on its service, but also that an ISP can never be subject to liability based upon its own patently irresponsible role as a distributor who has allegedly been given actual notice of materials published on its service by a specified customer (in furtherance of criminal conduct as defined by Florida law<sup>16</sup>) by soliciting the purchase and sale of explicit child pornography, yet has done absolutely nothing about it.

This flies in the face of the very purpose of the Communications Decency Act. At least one goal of the CDA is, as its title suggests, to promote “decency” on the Internet.<sup>17</sup> What conceivable good could a statute purporting to promote

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<sup>16</sup>See § 827.071(4), Fla. Stat. (1995) (making it illegal for any person “to possess with the intent to promote any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes any sexual conduct by a child”).

<sup>17</sup>See generally John Schwartz, Coalition to File Suit Over Internet Rules: Action Targets New Law as Unconstitutional, Wash. Post, Feb. 26, 1996, at A4 (explaining that President Clinton signed the CDA into law “to prevent the display of ‘patently offensive’ materials via computer in a way that minors might see them”), cited in Robert T. Langdon, Note, The Communications Decency Act § 230: Make Sense? Or Nonsense?-- A Private Person’s Inability to Recover if Defamed in Cyberspace, 73 St. John's L. Rev. 829, 842 n. 67 (1999). Langdon criticizes the CDA as interpreted to preclude distributor liability, concluding: “There can be no doubt that Internet providers need to assume some responsibility for the materials that pass through their services. The distributor framework appears to be



ISP self-policing efforts do if, by virtue of the courts' interpretation of that statute, an ISP which is specifically made aware of child pornography being distributed by an identified customer through solicitation occurring on its service, may, with impunity, do absolutely nothing, and reap the economic benefits flowing from the activity?

Such an absurd interpretation is totally unwarranted. If Congress had intended absolute immunity, why would it state only that no ISP "shall be treated as a publisher or speaker of any information provided by another information content provider?" As one legal commentator has observed, "[n]otably, the legislation did not explicitly exempt ISPs from distributor liability, and its specific reference to 'publisher or speaker' is evidence that Congress intended to leave distributor liability intact." Developments in the Law--The Law of Cyberspace, III The Long Arm of Cyber-Reach, 112 Harv. L. Rev. 1610, 1613 (1999); see also David R. Sheridan, Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet, 61 Alb. L. Rev. 147, 168 (1997) ("[B]oth the text of the CDA and its meager legislative history support the conclusion that when Congress said 'publisher,' it meant 'publisher,' and not

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the most logical solution. An Internet provider ought to be liable when it is placed on notice that it is distributing defamatory material. Anything less is simply irrational and illogical." Id. at 855.

‘distributor.’ The publisher and distributor terminology have been used in cases and commentary on the subject of defamation in interactive networks. It would be reasonable to surmise that Congress would say ‘distributor’ in addition to ‘publisher’ if it meant ‘distributor’ in addition to ‘publisher.’ ) (footnotes omitted). If blanket immunity were intended, why not state more broadly that no ISP “shall be held liable” for any information provided on its service by another information content provider?<sup>18</sup> In fact, that very phrase was used in the subsection immediately following § 230(c)(1), which provides:

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the

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<sup>18</sup>Moreover, the statute explicitly recognizes that state causes of action which are consistent with the CDA are not precluded by it. It provides, in § 230(e)(3), that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section . . .” (Emphasis supplied.) It also provides: “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.”



technical means to restrict access to material described in paragraph (1).

(Emphasis supplied.)

The reason, pointedly, is that Congress never intended for such a broad immunity to apply. In cutting a wide swath of immunity from the cloth of this purposefully narrow language, the analysis contained in Zeran<sup>19</sup> (and approved by

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<sup>19</sup>While ostensibly following Zeran, the decision in Ben Ezra, Weinstein & Co. v. America Online, Inc., 206 F.3d 980 (10th Cir. 2000), also cited by the majority here, is factually distinguishable. In Ben Ezra, the plaintiff argued that AOL was not immune from suit under 47 U.S.C. § 230 because AOL had acted both as an interactive computer service and as an information content provider by participating in the creation and development of the stock quotation information which was allegedly defamatory. The federal trial court concluded that AOL qualified for statutory immunity pursuant to § 230, finding no record evidence that AOL had provided any of the stock quote information at issue. On appeal, the plaintiff argued that AOL should be held liable both because it had “worked so closely with ComStock and Townsend in the creation and development of the stock quotation information that it also operated as an ‘information content provider,’” and because AOL had “deleted some stock symbols or other

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information from the data base in an effort to correct the errors.” 206 F.3d at 985. The appellate court first stated its belief that the plaintiff had “not demonstrated [AOL] worked so closely with ComStock and Townsend regarding the allegedly inaccurate stock information that [it] became an information content provider.” *Id.* The appellate court then observed that, by deleting the symbols, AOL, which “simply made the data unavailable and did not develop or create the stock quotation information displayed,” was merely “engaging in the editorial functions Congress sought to protect.” *Id.* at 986. Thus, the plaintiff in Ben Ezra unsuccessfully sought to hold AOL liable as an original publisher based both upon unproven allegations that AOL had become an information content provider by working closely in the development of inaccurate information posted on its Internet site, and upon an erroneous legal theory that AOL’s editorial efforts to remove such information after it was posted also rendered AOL liable as an original publisher. *Cf. also Doe v. Franco Productions*, No. 99 C 7885, 2000 WL 816779 (N.D.Ill., Jun. 22, 2000) (similarly rejecting, on the basis of immunity, the claim of thirty university football players that the defendant Internet service provider--not shown to be an information content provider, nor alleged to have been given actual notice of any illegal activity--had liability as a publisher based upon the posting, sale and dissemination by third-party users of the ISP’s web page of certain images of the athletes in various states of undress which, without the athletes’ knowledge or consent, had been obtained by use of hidden videotape cameras in restrooms, locker rooms, or showers).

While, therefore, application of Zeran’s faulty logic was not dispositive based upon the allegations and theories of liability asserted in Ben Ezra and Franco Productions, nonetheless, the Pied Piper effect of Zeran’s initial analysis does appear to have diverted some other authors of its progeny from more closely examining the difference between distributor and original publisher liability where such distinction might arguably apply. In Green v. America Online, Inc., No. 00-3367 (D. N. J. Dec. 20, 2000), for example, the federal district court found that, pursuant to 47 U.S.C. § 230, AOL was immune from suit based upon certain tort claims based upon allegations “that AOL negligently failed to live up to its contractual obligations to Green, by refusing to take the necessary action against [users of an AOL “chat room” in which Green participated] that would prevent them from further harming and defaming [Green]” by impersonating him in sending messages to other men in the chat room asking them for homosexual sex, and in sending messages to women in the chat room telling them that Green was bisexual.



the majority here) turns on its head the very goal of the Communications Decency Act.<sup>20</sup> While Congress has recognized that the Internet presents a "forum for true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," 47 U.S.C. § 230(a)(3), the purpose of the

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The court, in dismissing the plaintiff's tort claims, briefly stated its reliance upon Ben Ezra and Zeran, wholly failing to address any potential distinction between original publisher liability and distributor liability.

<sup>20</sup>Legal commentaries reflect a variety of views regarding Zeran; many of these are critical of Zeran's analysis. See, e.g., Ian Ballon, Zeran v. AOL: Why the Fourth Circuit Is Wrong, J. Internet L., Mar. 1998, at 6; Steven M. Cordero, Comment, Damnum Absque Injuria: Zeran v. AOL and Cyberspace Defamation Law, 9 Fordham Intell. Prop. Media & Ent. L.J. 775 (1999) (criticizing the Fourth Circuit's decision in Zeran, arguing that the court overextended protection to ISPs); R. Hayes Johnson, Jr., Defamation in Cyberspace: A Court Takes a Wrong Turn on the Information Superhighway in Stratton Oakmont, Inc. v. Prodigy Services Co., 49 Ark. L. Rev. 589, 595 (1996) (examining the problems that could result from the Stratton Oakmont approach); David R. Sheridan, Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet, 61 Alb. L. Rev. 147 (1997); Michael H. Spencer, Defamatory E-Mail and Employer Liability: Why Razing Zeran v. America Online is a Good Thing, 6 Rich. J.L. & Tech. 25 (2000); David Wiener, Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran?, 39 Santa Clara L. Rev. 905 (1999). Most particularly where, as here, there is no consensus of opinion expressed by the federal appellate courts to provide guidance regarding the correct interpretation of the federal statute at issue, the opinion expressed in Zeran is merely persuasive, and not controlling. Cf. Gross v. State, 765 So. 2d 39 (Fla. 2000) (observing that, where "the various federal circuits are in disagreement on the appropriate definition" of an applicable term under a subject federal statute, this Court is free to adopt either the narrow view or the broad view of the statute, "because the approach used by any particular federal circuit is merely persuasive and not binding").

CDA is not, as the Zeran court espoused, “to promote unfettered speech,” Zeran, 129 F.3d at 334--most particularly where such alleged speech is an invitation to purchase child pornography. To the contrary, even where objectionable material may be constitutionally protected, the CDA, which was added to "extend the standards of decency which have protected telephone users to new telecommunications devices" and to "protect the sanctuary of the home from uninvited indecencies," 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon), sanctions an ISP's good-faith efforts to block its dissemination.<sup>21</sup> Here, moreover, where the communications allegedly pertain to graphic sex acts involving eleven-year-old victims, First Amendment rights are not even implicated.

What is implicated is Congress's intent to shield ISPs from liability based solely on self-policing efforts to intercept the very type of material at issue here--conduct defined by society as criminal involving material which is invidiously and perniciously harmful to children. This is reflected in the second hallmark of Congress's intent in enacting the CDA-- the statute's legislative history. As

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<sup>21</sup>Although the Supreme Court later deemed unconstitutional those portions of the CDA which prohibited the transmission of indecent material, see Reno v. ACLU, 521 U. S. 844 (1997) (approving district court's judgment enjoining the Government from enforcing § 223(a)(1)(B)'s prohibitions insofar as they relate to "indecent" communications and from enforcing § 223(d)), § 230, providing protection for "Good Samaritan" blocking and screening of offensive material, has not been invalidated.



expressed in 47 U.S. C. § 230(b), “the stated policy of the United States” is “to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.” While the majority view recognizes that, as reflected in the legislative history of the CDA referenced in Zeran, “the ‘disincentive’ Congress specifically had in mind was liability of the sort described in Stratton Oakmont,” majority at 12 (quoting Zeran, 958 F. Supp. at 1134), what it inexplicably fails to recognize is that this is not the distributor liability recognized in Cubby. Rather, it is the far stricter standard of publisher liability which was imposed in Stratton Oakmont, based solely on the ISP’s implementation of laudable, self-regulating efforts to screen inappropriate material prior to its publication,<sup>22</sup> which efforts the CDA--as expressed in the policies set forth as a

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<sup>22</sup>In light of the various roles which ISPs are now assuming in transmitting information on the Internet, a function-based analysis of potential ISP liability under the CDA would appear to be most appropriate. See generally Joshua M. Masur, A Most Uncommon Carrier: Online Service Provider Immunity Against Defamation Claims in Blumenthal v. Drudge, 40 *Jurimetrics J.* 217, 227 (2000) (advocating an approach which reconciles the CDA with the common law by looking to the role played by the ISP in each case: “Functional line-drawing appears to be the only fair, effective, and accurate manner to interpret the statute. Differentiating a common carrier acting as such from one that acts as a republisher provides immunity where appropriate, yet maintains liability where immunity is inappropriate. Such an interpretation would maintain the clear common law standards for republication liability where it remains unchallenged, yet negate the dubious precedent--Stratton Oakmont--at which section 230 was squarely directed.”); see

preamble to the statute---unabashedly encourages.

Given the precise, limiting language of the statute, the stated policy underlying the CDA, and the CDA's explicit legislative history, it is inconceivable that Congress intended the CDA to shield from potential liability an ISP alleged to have taken absolutely no actions to curtail illicit activities in furtherance of conduct defined as criminal, despite actual knowledge that a source of child pornography was being advertised and delivered through contact information provided on its service by an identified customer, while profiting from its customer's continued use of the service. Such an interpretation transforms a statute intended to further and support responsible ISP efforts to protect children and the public from even questionably harmful and illegal materials into a statute which both condones and exonerates a flagrant and reprehensible failure to act by an ISP in the face of allegedly specific, known dissemination of material unquestionably harmful to children.<sup>23</sup> In my view, the interpretation adopted today provides a foundation for

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also Sheri Hunter, Defamation and Privacy Laws Face the Internet, 17-FALL Comm. Law. 16, 17 (interpreting section 230 of the CDA as granting a "distributor" status to ISPs, and arguing that, when an ISP knowingly distributes defamatory messages, it should not be afforded such a status).

<sup>23</sup>The absurd implications of Zeran are contrary to the very core of the Communications Decency Act, which, through section 509 of the Telecommunications Act of 1996 (entitled "On-line Family Empowerment") added § 230 (entitled "Protection for private blocking and screening of offensive



far-ranging forms of illegal conduct (possibly harmful to society in far different ways) which ISPs can, very profitably and with total immunity, knowingly allow their customers to operate through their Internet services. I fear that the blanket immunity interpretation adopted by the majority today thrusts Congress into the unlikely position of having enacted legislation that encourages and protects the involvement of ISPs as silent partners in criminal enterprises for profit. Confident that Congress did not intend such an incongruous result, I respectfully dissent.

PARIENTE and QUINCE, JJ., concur.

Application for Review of the Decision of the District Court of Appeal -  
Certified Great Public Importance

Fourth District - Case No. 4D97-2587

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material"). As stated in one legal commentary:

The result [in Zeran] gives an ironic twist to Congress' response to Stratton Oakmont: information service providers can not incur liability for their failure to monitor content, because to hold otherwise would provide them with an incentive to fail to monitor content! The CDA's protective umbrella, intended for "good Samaritan" monitors, turns out also to shield those who can not or will not provide such a service.

Stephen J. Davidson et al., The Law of Cyberspace Liability of Information Service Providers, 574 Prac. L. Inst. 143, 155 (2000) (emphasis supplied).

(Palm Beach County)

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for Petitioner

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Patrick J. Carome and Samir Chandra Jain of Wilmer, Cutler & Pickering,  
Washington, D.C.,

for Respondent



Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES ET AL. v. AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 02-361. Argued March 5, 2003—Decided June 23, 2003

Two forms of federal assistance help public libraries provide patrons with Internet access: discounted rates under the E-rate program and grants under the Library Services and Technology Act (LSTA). Upon discovering that library patrons, including minors, regularly search the Internet for pornography and expose others to pornographic images by leaving them displayed on Internet terminals or printed at library printers, Congress enacted the Children's Internet Protection Act (CIPA), which forbids public libraries to receive federal assistance for Internet access unless they install software to block obscene or pornographic images and to prevent minors from accessing material harmful to them. Appellees, a group of libraries, patrons, Web site publishers, and related parties, sued the Government, challenging the constitutionality of CIPA's filtering provisions. Ruling that CIPA is facially unconstitutional and enjoining the Government from withholding federal assistance for failure to comply with CIPA, the District Court held, *inter alia*, that Congress had exceeded its authority under the Spending Clause because any public library that complies with CIPA's conditions will necessarily violate the First Amendment; that the CIPA filtering software constitutes a content-based restriction on access to a public forum that is subject to strict scrutiny; and that, although the Government has a compelling interest in preventing the dissemination of obscenity, child pornography, or material harmful to minors, the use of software filters is not narrowly tailored to further that interest.

Held: The judgment is reversed. 201 F. Supp. 2d 401, reversed.

Read 9/20



before was narrowly tailored



but!

who argued this? On this is District Ct

I think its prob ok  
L was found legal

Syllabus

CHIEF JUSTICE REHNQUIST, joined by JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE THOMAS, concluded:

1. Because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power. Congress has wide latitude to attach conditions to the receipt of federal assistance to further its policy objectives, *South Dakota v. Dole*, 483 U. S. 203, 206, but may not "induce" the recipient "to engage in activities that would themselves be unconstitutional," *id.*, at 210. To determine whether libraries would violate the First Amendment by employing the CIPA filtering software, the Court first examines their societal role. To fulfill their traditional missions of facilitating learning and cultural enrichment, public libraries must have broad discretion to decide what material to provide to their patrons. This Court has held in two analogous contexts that the Government has broad discretion to make content-based judgments in deciding what private speech to make available to the public. *Arkansas Ed. Television Comm'n v. Forbes*, 523 U. S. 666, 672-674; *National Endowment for Arts v. Finley*, 524 U. S. 569, 585-586. Just as forum analysis and heightened judicial scrutiny were incompatible with the role of public television stations in the former case and the role of the National Endowment for the Arts in the latter, so are they incompatible with the broad discretion that public libraries must have to consider content in making collection decisions. Thus, the public forum principles on which the District Court relied are out of place in the context of this case. Internet access in public libraries is neither a "traditional" nor a "designated" public forum. See, e.g., *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 802-803. Unlike the "Student Activity Fund" at issue in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 834, Internet terminals are not acquired by a library in order to create a public forum for Web publishers to express themselves. Rather, a library provides such access for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality. The fact that a library reviews and affirmatively chooses to acquire every book in its collection, but does not review every Web site that it makes available, is not a constitutionally relevant distinction. The decisions by most libraries to exclude pornography from their print collections are not subjected to heightened scrutiny; it would make little sense to treat libraries' judgments to block online pornography any differently. Moreover, because of the vast quantity of material on the Internet and the rapid pace at which it changes, libraries cannot possibly segregate, item by item, all the Internet material that is appropriate for

*dissent*

*those would prob be interesting*

*how do those become*

*narrow ruling*



## Syllabus

inclusion from all that is not. While a library could limit its Internet collection to just those sites it found worthwhile, it could do so only at the cost of excluding an enormous amount of valuable information that it lacks the capacity to review. Given that tradeoff, it is entirely reasonable for public libraries to reject that approach and instead exclude certain categories of content, without making individualized judgments that everything made available has requisite and appropriate quality. Concerns over filtering software's tendency to erroneously "overblock" access to constitutionally protected speech that falls outside the categories software users intend to block are dispelled by the ease with which patrons may have the filtering software disabled. Pp. 6–13.

2. CIPA does not impose an unconstitutional condition on libraries that receive E-rate and LSTA subsidies by requiring them, as a condition on that receipt, to surrender their First Amendment right to provide the public with access to constitutionally protected speech. Assuming that appellees may assert an "unconstitutional conditions" claim, that claim would fail on the merits. When the Government appropriates public funds to establish a program, it is entitled to broadly define that program's limits. *Rust v. Sullivan*, 500 U. S. 173, 194. As in *Rust*, the Government here is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purpose for which they are authorized: helping public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes. Especially because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance programs. As the use of filtering software helps to carry out these programs, it is a permissible condition under *Rust*. Appellees mistakenly contend, in reliance on *Legal Services Corporation v. Velazquez*, 531 U. S. 533, 542–543, that CIPA's filtering conditions distort the usual functioning of public libraries. In contrast to the lawyers who furnished legal aid to the indigent under the program at issue in *Velazquez*, public libraries have no role that pits them against the Government, and there is no assumption, as there was in that case, that they must be free of any conditions that their benefactors might attach to the use of donated funds. Pp. 13–17.

→ JUSTICE KENNEDY concluded that if, as the Government represents, a librarian will unblock filtered material or disable the Internet software filter without significant delay on an adult user's request, there is little to this case. There are substantial Government interests at stake here: The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as

Only that  
review  
subsidies

ignores new role  
of internet cafe

though awkward to do so

Unless part of normal setup process

## Syllabus

all Members of the Court appear to agree. Given this interest, and the failure to show that adult library users' access to the material is burdened in any significant degree, the statute is not unconstitutional on its face. If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not this facial challenge. Pp. 1–2.

→ JUSTICE BREYER agreed that the "public forum" doctrine is inapplicable here and that the statute's filtering software provisions do not violate the First Amendment, but would reach that ultimate conclusion through a different approach. Because the statute raises special First Amendment concerns, he would not require only a "rational basis" for the statute's restrictions. At the same time, "strict scrutiny" is not warranted, for such a limiting and rigid test would unreasonably interfere with the discretion inherent in the "selection" of a library's collection. Rather, he would examine the constitutionality of the statute's restrictions as the Court has examined speech-related restrictions in other contexts where circumstances call for heightened, but not "strict," scrutiny—where, for example, complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental interests. The key question in such instances is one of proper fit. The Court has asked whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives. It has considered the legitimacy of the statute's objective, the extent to which the statute will tend to achieve that objective, whether there are other, less restrictive ways of achieving that objective, and ultimately whether the statute works speech-related harm that is out of proportion to that objective. The statute's restrictions satisfy these constitutional demands. Its objectives—of restricting access to obscenity, child pornography, and material that is comparably harmful to minors—are "legitimate," and indeed often "compelling." No clearly superior or better fitting alternative to Internet software filters has been presented. Moreover, the statute contains an important exception that limits the speech-related harm: It allows libraries to permit any adult patron access to an "overblocked" Web site or to disable the software filter entirely upon request. Given the comparatively small burden imposed upon library patrons seeking legitimate Internet materials, it cannot be said that any speech-related harm that the statute may cause is disproportionate when considered in relation to the statute's legitimate objectives. Pp. 1–6.

should  
need to know  
the tests

← will the librarians be able to unblock?



Syllabus

REHNQUIST, C. J., announced the judgment of the Court and delivered an opinion, in which O'CONNOR, SCALIA, and THOMAS, JJ., joined. KENNEDY, J., and BREYER, J., filed opinions concurring in the judgment. STEVENS, J., filed a dissenting opinion. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined.

*Where was this?*

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**FREE SPEECH SAVIOR OR SHIELD  
FOR SCOUNDRELS: AN EMPIRICAL  
STUDY OF INTERMEDIARY IMMUNITY  
UNDER SECTION 230 OF THE  
COMMUNICATIONS DECENCY ACT**

David S. Ardia\*

*In the thirteen years since its enactment, section 230 of the Communications Decency Act has become one of the most important statutes impacting online speech, as well as one of the most intensely criticized. In deceptively simple language, its provisions sweep away the common law's distinction between publisher and distributor liability, granting operators of Web sites and other interactive computer services broad protection from claims based on the speech of third parties. Section 230 is of critical importance because virtually all speech that occurs on the Internet is facilitated by private intermediaries that have a fragile commitment to the speech they facilitate.*

*This Article presents the first empirical study of the section 230 case law. It begins by providing a doctrinal overview of common law liability for intermediaries, both online and offline, and describes how section 230 modifies these doctrinal approaches. It then systematically analyzes the 184 decisions courts have issued since the statute's enactment. The Article also examines how courts have applied section 230, finding that judges have been haphazard in their approach to its application.*

*The Article closes by discussing the study's findings and by offering some insights into how plaintiffs and defendants have fared under section 230. While section 230 has largely protected*

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\* Resident Fellow, Berkman Center for Internet & Society at Harvard Law School. As with any project that stretches over several years, a number of people provided invaluable assistance and feedback, including Sam Bayard, Rob Faris, Eric Goldman, Eszter Hargittai, Lewis Hyde, Phil Malone, John Palfrey, Mary-Rose Papandrea, Carolina Rossini, Wendy Seltzer, Jonathan Zittrain, and members of the Yale-Harvard-MIT Cyberscholars Working Group. I also received help from an exceptional group of research assistants: Lee Baker, Reed Bienvenu, Courtney French, Olivia Jennings, Rachel Miller-Ziegler, David O'Brien, Amanda Rice, Natalie Senst, and Stefani Wittenauer. Funding for the initial collection of cases was provided by a grant from the John S. and James L. Knight Foundation.

Read 9/20

What are they?

I thought that was weird

Self hosting? Ten year Esp?

Oh



*intermediaries from liability for third-party speech, it has not been the free pass many of its proponents claim and its critics lament. More than a third of the claims at issue in the cases survived a section 230 defense. Even in cases where the court dismissed the claims, intermediaries bore liability in the form of litigation costs, and it took courts, on average, nearly a year to issue decisions addressing an intermediary's defense under section 230.*

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INTRODUCTION

What many consider the largest public space in human history is not public at all. Paradoxically, the Internet—a content-agnostic communication network available to anyone with access to a computer—contains no true “public forum.”<sup>1</sup> It embraces no public commons upon which a citizen is free to stand on his or her virtual soapbox and regale the public.<sup>2</sup> It is layered on privately owned Web sites, privately owned servers, privately owned routers, and privately owned backbones. Without the acquiescence of these intermediaries, the public would have no access to speak or to be heard.

Largely free of the limitations imposed by the First Amendment, private intermediaries transport, host, and index tens of billions of pages of content online. This is not to say, however, that these intermediaries are free of all constraints; civil and criminal liability may attach to the content they intermediate. It is indisputable that some of this content is injurious and even illegal. It defames others, violates privacy rights, discloses confidential information, infringes copyrights, and is implicated in a number of other torts or crimes. Not unlike intermediaries in the offline world, such as mail carriers, libraries, and book stores, online intermediaries would be hard-pressed to screen the deluge of online speech, and the imposition of liability for facilitating the publication or distribution of third-party content would likely constrain their willingness to facilitate

people can own these  
+ rent content-agnostic services  
still must get to sidewalk

new  
I think this is also an evolution of thinking

1. In the First Amendment context, a “public forum” includes streets, sidewalks, and parks, which “have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. CIO*, 307 U.S. 496, 515 (1939). Because this Article’s focus is on private intermediaries, the limitations imposed on state actors by the First Amendment are of only passing relevance. For a discussion of the First Amendment’s relevance to private-party ordering, see *infra* Part II.B.

2. One of the best-known locations for public speech in the offline world is Speakers’ Corner in Hyde Park, London, which has become synonymous with free speech in a public forum. “Officially sanctioned in 1872 by the Royal Parks and Gardens Regulation Act, Speakers’ Corner is a site for people to exercise their right of free speech. You can turn up, stand on a makeshift platform (the simplest being a milk crate), and speak about any topic you like, provided that your utterances do not contravene the Regulations.” John Michael Roberts, *The Enigma of Free Speech: Speakers’ Corner, The Geography of Governance and a Crisis of Rationality*, 9 SOC. & LEGAL STUD. 271, 272 (2000). Indeed, “[s]uch is the power of this symbol that the very name, ‘Speakers’ Corner’, resonates a populist, democratic image which today goes beyond any immediate physical location.” *Id.*

perhaps too traditional

this author seems conservative -> but he's from the Berkman Ctr



continued public use.<sup>3</sup> Moreover, any such constraints would have profound implications for the availability of speech online, particularly speech espousing controversial viewpoints and disfavored subjects.<sup>4</sup>

While the Internet has vastly expanded individuals' ability to engage in speech and has enhanced the public's capacity to hear and to understand that speech, choke points remain. This is not a new problem, of course.<sup>5</sup> Private-party structuring has long had an influence on what speech can be communicated, but the Internet's extensive reliance on private intermediaries makes this influence more extensive and apparent.

Private intermediaries' pervasiveness, combined with the extraordinary power they wield over speech, make them attractive targets for regulators and litigants.<sup>6</sup> Given their essential role in facilitating online communication, intermediaries often are capable of exercising authority over wrongdoers who are otherwise unreachable because these wrongdoers are not capable of being

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3. See Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901, 916 (2002) (noting the link between intermediary liability and censorship by intermediaries); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 892 (1984) (observing that in response to increased liability, intermediaries "will charge high risk premiums . . . [and] may even withdraw their services entirely from small or risky firms"); Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 273 (2005) ("It is well recognized that imposing liability on intermediaries will affect the services and prices they present to their customers."); cf. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 278–79 (1964) ("[I]f the bookseller is criminally liable without knowledge of the contents, . . . he will tend to restrict the books he sells to those he has inspected . . . . And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted.") (quoting *Smith v. California*, 361 U.S. 147, 153–54 (1959)).

4. Jerome Barron, in his seminal article on the power of "the press," cautioned that because media intermediaries are primarily concerned with profitability, they shy away from unorthodox and unpopular speech, and the "vacuum is filled with the least controversial and bland ideas." Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1646–47 (1967).

5. As Professor Barron observed with regard to the limits intermediaries placed on speech in the mid-sixties, "[o]ur constitutional theory is in the grip of a romantic conception of free expression, a belief that the 'marketplace of ideas' is freely accessible." *Id.* at 1641; cf. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 656–57 (1994) (noting the threat of censorship by cable providers who control speech bottlenecks).

6. See Seth Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 16 (2006). Kreimer calls Internet intermediaries the "weak link" in the free speech chain, observing that "[e]ach intermediary may interdict communications, or identify speakers, listeners, or other intermediaries against whom sanctions may be directed." *Id.*

identified, are beyond the jurisdiction of the state, or are simply not amenable to legal pressure.<sup>7</sup>

But the targeting of intermediaries comes with substantial risks both for the intermediary and for our system of free expression. Many of these risks stem from the fact that intermediaries have a "fragile commitment to the speech that they facilitate."<sup>8</sup> As others have noted, intermediaries are more susceptible to legal threats than are primary speakers because the interests of the two groups, both economic and instrumental, frequently diverge.<sup>9</sup> As a result, intermediaries do not always share society's interest in ensuring a vibrant landscape for speech and often are unwilling to act as champions for the speech of third parties.

Mindful of the roles that intermediaries play online, Congress acted decisively when it enacted section 230 of the Communications Decency Act.<sup>10</sup> In deceptively simple language, section 230 states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,"<sup>11</sup> thereby granting operators of Web sites and other interactive computer services broad protection from claims based on the speech of third parties.<sup>12</sup>

In the thirteen years since its enactment, section 230 has been described both as the savior of free speech in the digital age and as

7. See Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653, 661-63 (2003). Moreover, intermediaries make attractive targets because they often are the parties with a "deep pocket," capable of paying a legal judgment if one is rendered. See Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383, 1476 (2009).

8. Kreimer, *supra* note 6, at 28. Because revenue from each marginal customer is small and the cost of a legal defense, not to mention potential monetary sanctions, is high, it is almost always cheaper for the intermediary to remove speech than to expend time or resources contesting even meritless claims. See *id.*; see also LAWRENCE LESSIG, *FREE CULTURE* 187-88, 192-93 (2004) (concluding that the threat of lawsuits discourages the distribution of copyrighted material even when doing so would be fair use).

9. See, e.g., Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 435-36 (2009) ("The problem with the strategy of collateral censorship in the Internet context is that it simultaneously leads to too much censorship and too little innovation. Book publishers have a vested interest in the work of their authors, and newspapers have a vested interest in the work of their journalists. But if A is not affiliated with B, A lacks strong incentives to defend B's speech and every incentive to prevent lawsuits."); Kreimer, *supra* note 6, at 29 ("Intermediaries are peculiarly susceptible to chill, for they often face cost and revenue structures quite different from those of first-party speakers.").

10. 47 U.S.C. § 230 (2006).

11. *Id.* § 230(c)(1).

12. See *id.*; *infra* Part II.D. Section 230 has been held to preempt causes of action ranging from discrimination under the Fair Housing Act to unfair competition. See *infra* Part III.B.3.

Rich  
More so than  
other countries  
How much should  
sites filter?

Yes

FB, Google, Twitter  
? likes their role  
perhaps a key  
factor many big  
cos don't realize



an ill-conceived shield for scoundrels. Yet no one suggests that this seminal piece of legislation is inconsequential. But what kind of an impact has section 230 had on intermediaries, on those who have been harmed by third parties online, and on speech more generally? Not surprisingly, section 230 has attracted a great deal of attention from scholars,<sup>13</sup> and has engendered considerable commentary in the popular press.<sup>14</sup> Few scholars, however, have undertaken a comprehensive study of the case law involving section 230, and none have done so from a systematic, empirical perspective.<sup>15</sup>

Instead, the primary mode of study within the legal academy has been to focus on a few high-profile cases.<sup>16</sup> This has led to polarizing debates, as commentators typically choose one set of cases to support

Criticizing them

13. See, e.g., Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137 (2008); Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569 (2001); H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369 (2008); Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101 (2007); Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 163 (2006); Matt C. Sanchez, *The Web Difference: A Legal and Normative Rationale Against Liability for Online Reproduction of Third-Party Defamatory Content*, 22 HARV. J.L. & TECH. 301 (2008); Matthew Schruers, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205 (2002); Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986 (2008).

14. See, e.g., Brian Baxter, *Tormented by Cyber-Stalker, Ropes Partner Drafts New Legislation*, AMLAW DAILY, Apr. 17, 2009, <http://amlawdaily.typepad.com/amlawdaily/2009/04/ropes-gray-partner-fights-cyberstalker.html>; Leslie Harris, *Painting a Bulls-Eye on the First Amendment*, HUFFINGTON POST, June 12, 2009, [http://www.huffingtonpost.com/leslie-harris/painting-a-bulls-eye-on-t\\_b\\_214713.html](http://www.huffingtonpost.com/leslie-harris/painting-a-bulls-eye-on-t_b_214713.html); Adam Thierer & John Palfrey, *Dialogue: The Future of Online Obscenity and Social Networks*, ARS TECHNICA, Mar. 5, 2009, <http://arstechnica.com/tech-policy/news/2009/03/a-friendly-exchange-about-the-future-of-online-liability.ars>.

15. The only author to have published a comprehensive summary of section 230 cases is Ken Myers. His insightful article on section 230's application to Wikipedia includes a table listing forty-seven cases, along with the medium of publication, the prevailing party, and, where the plaintiff prevailed, the court's reasoning. Myers, *supra* note 13, at 205–08. This is not to say, however, that non-empirical approaches are without value. Many of the articles cited herein “pursue[] doctrinal, interpretative, and normative purposes rather than empirical ones.” Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 153 (2002).

16. Barton Beebe calls this mode of study the “leading cases” or “usual suspects” approach: “This anecdotal method, one essentially of connoisseurship, derives conventional wisdom about our case law from a limited aristocracy of hand-picked opinions appearing primarily in the U.S. Reports—or in the student casebooks.” Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 553 (2008). Whether these decisions are representative of the broad sweep of section 230 cases is not a question such an approach can reliably answer. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 41–42 (2002) (arguing that selection bias, among other problems, makes drawing inferences about a population of cases unreliable).

their normative view that section 230 goes too far in privileging intermediaries, and another set of cases to argue that section 230 strikes the proper balance between competing interests.<sup>17</sup>

Today in class!

This Article aims to ground the debate by presenting an empirical study of section 230 cases. Part I begins by describing the central role intermediaries play online. Part II then presents a doctrinal overview of common law liability for intermediaries, both online and offline, and describes how section 230 modifies these doctrinal approaches.

Part III outlines the methodology employed in this study and sets forth summary statistics on the judicial decisions examined, including their distribution along the dimensions of time, venue, legal claim, medium of publication, and intermediary role. Part III also reports that although the number of decisions has been trending upwards, with an especially sharp increase after 2003, the proportion of unreversed decisions that found claim preemption under section 230 has largely held steady at 60 percent.

Part IV focuses on how judges approached the application of section 230, identifying six areas of judicial inquiry that run throughout the cases. Using correlation and regression analyses, Part IV also examines how these areas of inquiry interact with each other and with the court's ultimate determination of preemption under section 230. Finding that most courts have coalesced around a three-pronged test for determining whether section 230 applies, the data nevertheless suggest that judges have been haphazard in their approach to section 230, often ignoring important threshold questions or assuming that certain requirements are met.

Finally, Part V discusses the study's findings and offers some insights into how plaintiffs and defendants have fared under section 230, including an assessment of each case's viability under common law principles in order to gain insight into how section 230 changed the liability landscape for intermediaries. While section 230 has largely protected intermediaries from liability for third-party speech, it has not been the free pass many of its proponents claim and its critics lament it to be. First, intermediaries continue to face legal claims arising from the speech of third parties. Indeed, the data show

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17. There is, of course, gradation between these poles, but much of the scholarship on section 230 gravitates towards one position or the other.



that plaintiffs have filed an increasing number of such cases each year. Second, even in cases where the court dismissed the claims, intermediaries bore their own legal costs, and it took courts nearly a year, on average, to issue a decision addressing the intermediary's defense under section 230.

Although section 230 set a high bar for plaintiffs to overcome, more than a third of their claims survived preemption. Moreover, the data showed that most plaintiffs in the cases analyzed were able to identify and sue the original source of the content that caused them harm. While their success rate in those suits was quite low, it was not out of line with other studies examining defamation and tort litigation.

really - was

### I. BACKGROUND

Human societies have a long history of utilizing intermediaries to handle communication tasks.<sup>18</sup> This intermediation involves activities ranging from transcription to transportation. Some of the earliest intermediaries were friends and neighbors who passed information via word of mouth.<sup>19</sup> With the advent of writing and papyrus, intermediaries began facilitating the distribution of information through courier systems.<sup>20</sup> The operation of modern communication intermediaries can be traced to the late eighteenth century, when optical telegraphs began passing messages across Europe.<sup>21</sup> The electric telegraph soon followed, revolutionizing the way humans communicated and leading to what one historian has termed the "Victorian Internet."<sup>22</sup>

I read

18. Black's Law Dictionary defines an "intermediary" as "[a] mediator or go-between; a third-party negotiator." BLACK'S LAW DICTIONARY 712 (8th ed. 2004). For the purposes of this analysis, an intermediary is any entity that enables the communication of information from one party to another.

19. See generally ROBIN DUNBAR, GROOMING, GOSSIP, AND THE EVOLUTION OF LANGUAGE (1996) (describing the importance of "gossip" in the evolution of language and human social systems).

20. In ancient Egypt, pharaohs are believed to have used couriers to transport their decrees to the far reaches of their territory. See IRVING FANG, A HISTORY OF MASS COMMUNICATION: SIX INFORMATION REVOLUTIONS 14 (1997).

21. See TOM STANDAGE, THE VICTORIAN INTERNET: THE REMARKABLE STORY OF THE TELEGRAPH AND THE NINETEENTH CENTURY'S ON-LINE PIONEERS 11-12 (1998) (noting that the first use of a Chappe-style optical telegraph occurred in France in 1793).

22. *Id.* at VII-IX. Indeed, much of the common law related to intermediary liability discussed in Part II was developed in response to the use of the electric telegraph.

The Internet we know today is a network of networks, consisting of privately owned servers, routers, and backbones that communicate using a suite of common languages.<sup>23</sup> These interconnected networks facilitate a diverse array of platforms for speech, including blogs, social networks, discussion forums, video- and photo-hosting services, and collaboratively edited wikis.<sup>24</sup> Together, they have fundamentally altered the capacity of individuals to speak and to be heard by others.<sup>25</sup>

This has led some observers to predict that the Internet will inexorably bring about widespread “disintermediation,” as individuals gain the ability to communicate directly with each other.<sup>26</sup> This has not been borne out. To the contrary, while the Internet has had a profound effect on the “industrial information economy,”<sup>27</sup> we have simply exchanged one set of intermediaries (e.g., newspaper publishers and broadcast stations) for another set of intermediaries (e.g., Internet service providers, content hosts, and

though to public  
everything - same  
content  
unlike traditional  
newspapers

23. See Jay P. Kesan & Rajiv C. Shah, *Fool Us Once Shame on You—Fool Us Twice Shame on Us: What We Can Learn from the Privatizations of the Internet Backbone Network and the Domain Name System*, 79 WASH. U. L.Q. 89, 131–32 (2001); Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1116 (2005). These private intermediaries communicate via a suite of languages called Transfer Control Protocol/Internet Protocol (TCP/IP). See W. RICHARD STEVENS, *TCP/IP ILLUSTRATED: THE PROTOCOLS 1* (1994) (“The TCP/IP protocol suite allows computers of all sizes, from many different computer vendors, running totally different operating systems, to communicate with each other.”).

24. See generally DAN GILLMOR, *WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE* 23–43 (2004) (discussing how the Internet has changed journalism).

25. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 32 (2006) (observing that, in part because of the Internet, “[b]oth the capacity to make meaning—to encode and decode humanly meaningful statements—and the capacity to communicate one’s meaning around the world, are held by, or readily available to, at least many hundreds of millions of users around the globe”).

26. See MARK S. BONCHEK, *FROM BROADCAST TO NETCAST: THE INTERNET AND THE FLOW OF POLITICAL INFORMATION* 58 (1997) (opining that “political actors are using the Internet to connect directly with each other and bypass traditional intermediaries”); ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* 55 (1999) (“Disintermediation is the somewhat ungainly word that is used to describe this circumventing of middlemen . . . . The control revolution allows us to take power from these intermediaries and put it in our own hands.”); Robert Gellman, *Disintermediation and the Internet*, 13 GOV’T INFO. Q. 1, 2–3 (1996) (“Because of the capabilities of computer networks, the functions of central repository and archive are highly vulnerable to disintermediation.”).

27. BENKLER, *supra* note 25, at 32 (“[C]ore functionalities of processing, storage, and communications are widely owned throughout the population of users. Together, these changes destabilize the industrial stage of the information economy.”).



search providers).<sup>28</sup> In practical terms, the Internet has made the network itself an indispensable intermediary for speech.<sup>29</sup>

Yet the Internet has no central authority that determines what content can transect the network, or even who can connect to the network.<sup>30</sup> This decentralized structure is intentional,<sup>31</sup> and many believe it has been instrumental to the Internet's widespread adoption as a communication tool and to the rapid pace of third-party innovation online.<sup>32</sup> This lack of a central point of control also has made it possible for private intermediaries to take on a range of communication tasks and, not unexpectedly, they have proliferated.<sup>33</sup>

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28. See Jack M. Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933, 936–38 (2008).

29. See JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 70 (2006). The importance of intermediaries will undoubtedly increase as “cloud computing” becomes more prevalent. See generally Luis M. Vaquero et al., *A Break in the Clouds: Towards a Cloud Definition*, 39 ACM SIGCOMM COMPUTER COMM. REV. 50 (2009). “Cloud computing” is associated with a new paradigm for the provision of computing infrastructure. This paradigm shifts the location of this infrastructure to the network to reduce the costs associated with the management of hardware and software resources.” *Id.* at 50.

30. See INTERNET ARCHITECTURE BOARD, ARCHITECTURAL PRINCIPLES OF THE INTERNET 2–4 (Brian Carpenter ed., 1996), <http://www.ietf.org/rfc/rfc1958.txt>. Larry Lessig and Jonathan Zittrain describe the architecture of the Internet as embodying an end-to-end principle that places the intelligence of the network at the end of unintelligent conduits. See LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 34–35 (2001); JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 105–06 (2008). The genius of this open structure is that components in the system can be agnostic as to what they transport and, in fact, operate with the assumption that the network infrastructure is unreliable and changing. The assignment of Internet Protocol (IP) addresses and operation of the Domain Name System (DNS), however, are centrally managed by the Internet Corporation for Assigned Names and Numbers (ICANN), a nonprofit chartered to administer top-level domain name policy. See INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, PROGRESS REPORT ON PERFORMANCE OF IANA FUNCTIONS (2000), <http://www.iana.org/periodic-reports/progress-report-may-jul00.html>.

31. See TIM BERNERS-LEE, WEAVING THE WEB: THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB BY ITS INVENTOR 16 (1999) (“The system . . . had to be completely decentralized. That would be the only way a new person somewhere could start to use it without asking for access from someone else. And that would be the only way the system could scale, so that as more people used it, it wouldn’t get bogged down.”).

32. See, e.g., Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815, 847 (2004); Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 1980 (2006). Jonathan Zittrain coined the term “generativity” to describe these attributes of the Internet. *Id.* “Generativity denotes a technology’s overall capacity to produce unprompted change driven by large, varied, and uncoordinated audiences.” *Id.*

33. See Mann & Belzley, *supra* note 3, at 252.

*A. The Pervasiveness of Private Intermediaries*

Given the Internet's decentralized architecture, intermediaries play many different roles. It would hardly be an exaggeration to say that there are as many ways to categorize intermediaries as there are intermediaries.<sup>34</sup> Fortunately, section 230 does not distinguish between types of intermediaries,<sup>35</sup> so we need not set out a comprehensive taxonomy. Instead, this part of the Article will focus on the functions intermediaries perform when facilitating expressive communication in order to develop a conceptual vocabulary that permits comparison between online and offline intermediaries.

To illustrate the functions intermediaries perform, let us take as an example an individual who wishes to upload a video she created to YouTube. When she "publishes" her video online, a number of steps occur, likely involving dozens of intermediaries. First, she goes to YouTube.com to begin the upload process. Even this simple task, however, involves a number of intermediaries. All Internet communication is accomplished by splitting the communication into data packets that are directed by specialized hardware known as routers, which are operated by intermediaries throughout the network.<sup>36</sup> These routers identify computers on the Internet by their Internet Protocol (IP) addresses, which typically look something like 192.0.1.123. Because human beings cannot easily remember this

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34. There is no accepted taxonomy of Internet intermediaries. Although economists and computer scientists, among others, have developed various approaches to categorizing intermediaries, these approaches tend to group intermediaries according to categories relevant to the researcher's narrow question of interest rather than devising a comprehensive taxonomy of roles played by online intermediaries. See, e.g., Mitra Barun Sarkar et al., *Intermediaries and Cybermediaries: A Continuing Role for Mediating Players in the Electronic Marketplace*, J. COMPUTER MEDIATED COMM., Dec. 1995, <http://jcmc.indiana.edu/vol1/issue3/sarkar.html> (noting the challenge of categorizing intermediaries by function in the context of electronic commerce).

35. See *infra* notes 249–251 and accompanying text. Unlike the Digital Millennium Copyright Act (DMCA), which does not protect all Internet intermediaries and provides different levels of immunity based on intermediary classification, see 17 U.S.C. § 512(a)–(d) (2006) (defining four classes of intermediaries: conduit providers; service providers that store or cache content hosted by another party; providers who host content posted by another party; and search engines), section 230 extends its protections, at least as an initial matter, to any "provider or user of an interactive computer service." 47 U.S.C. § 230(c)(1) (2006).

36. In technical terms, the Internet comprises multiple operating layers, arranged in a vertical hierarchy, that dictate how data is formatted, transmitted, manipulated, and displayed. See Solum & Chung, *supra* note 32, at 816. When speech is communicated via the Internet, it flows, in digital form, down from the content layer through the other layers to the physical layer, across the physical layer in packets, and then back up through the same layers in reverse order. *Id.* at 816–17.



string of numbers, the domain name system (DNS) allows mnemonic names to be associated with IP addresses. When an Internet user enters one of these domain names into her web browser, for example YouTube.com, her computer sends a request to a DNS server, typically operated by her Internet Service Provider (ISP) or another intermediary that maintains a lookup table associating the name with a specific IP address.<sup>37</sup>

Once her request to sign on has been routed to YouTube, she is ready to begin the upload process. Her video does not go directly to YouTube, however. Instead, the video is sent from her computer to the network run by her ISP. The ISP then sends the data constituting the video, via multiple intermediaries that provide "peering connections,"<sup>38</sup> to the network owned by the ISP that services YouTube. From there the data are sent to YouTube's servers, which host the video for her, assuming it does not violate any of YouTube's terms of service. The entire sequence of steps is reversed, with a slightly different set of intermediaries, when her friend visits YouTube to view the video.

From this simple example we can begin to group the various intermediaries into three general classifications: (1) communication conduits; (2) content hosts; and (3) search/application providers.<sup>39</sup> The first category includes intermediaries that facilitate the physical transport of data across the network. Every person who accesses the Internet does so through an ISP, typically a telephone company, cable company, or satellite provider.<sup>40</sup> From the user's point of view, her ISP is the sole entity responsible for making access to content on the Internet possible, but many other intermediaries are involved in transporting that content and ensuring that it arrives at the right

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37. This address system also relies on a number of other intermediaries to function, including domain name registrars (DNR) that are responsible for assigning IP addresses and associating those addresses with domain names.

38. Most large ISPs do not exchange payment for the data traffic they swap; instead, they regard the other ISP in the transaction as a "peer." See, e.g., ZITTRAIN, *supra* note 30, at 33 n.50; Paul Milgrom et al., *Competitive Effects of Internet Peering Policies*, in *THE INTERNET UPHEAVAL*, 175-95 (Ingo Vogelsang & Benjamin M. Compaine eds., 2000).

39. There are, of course, other ways to categorize online intermediaries and many intermediaries play more than one role. It is beyond the scope of this Article to describe all of the intermediaries that facilitate communication on the Internet. For example, financial intermediaries (e.g., banks and credit card processors) play a critical role in the functioning of the Internet, but are not the focus for this Article.

40. Zittrain, *supra* note 32, at 1993; Zittrain, *supra* note 7, at 664.

place. Some of the least visible intermediaries in this category are backbone providers that operate solely at the transmission level and have no direct relationship with the actors at either endpoint.<sup>41</sup> Source and destination ISPs, on the other hand, serve—and usually have a contractual relationship with—the end users who seek to access content and the entities responsible for hosting it.<sup>42</sup>

Because the Internet operates without a single authority directing traffic across the network, the various intermediaries responsible for transporting data are left to do so in whatever manner they see fit. Jonathan Zittrain colorfully describes the process as a “bucket-brigade partnership in which network neighbors pass along each other’s packets for perhaps ten, twenty, or even thirty hops between two points.”<sup>43</sup> Each of these “hops” could involve a university server, an Internet retailer, or a backbone provider, all of whom pass the relevant data packets along to the next stop based on the information contained in the packet header.<sup>44</sup>

In the offline world, examples of “conduits,” the first category of intermediaries, include telephone companies with regard to voice traffic, newspaper delivery persons, and mail carriers. Generally speaking, the defining characteristic of conduits is that they have no knowledge of and limited control over the contents of the speech they intermediate.<sup>45</sup>

The second category of intermediaries comprises content hosts. These are intermediaries that store, cache, or otherwise provide access to third-party content.<sup>46</sup> While anyone can set up a blog or Web site on a home server, few people do. Instead, the majority of the speech that occurs online is stored on or made available from servers owned by private intermediaries, the largest of which are

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41. While invisible to users, they are not invisible to plaintiffs. See Daniel W. Kopko, *Looking for a Crack to Break the Internet's Back: The Listen4ever Case and Backbone Provider Liability Under the Copyright Act and the DMCA*, 8 COMP. L. REV. & TECH. J. 83, 85 (2003) (discussing a lawsuit by record labels against the four major companies that provide the “backbone” infrastructure of the Internet).

42. Mann & Belzley, *supra* note 3, at 255–56.

43. ZITTRAIN, *supra* note 30, at 33.

44. See John Palfrey, *The Public and the Private at the United States Border with Cyberspace*, 78 MISS. L.J. 241, 253 (2008)

45. See *Anderson v. New York Tel. Co.*, 320 N.E.2d 647, 649 (N.Y. 1974); ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER & RELATED PROBLEMS* § 7.3.1 (3d ed. 2007).

46. See Balkin, *supra* note 28, at 936–37.



operated by well-known brand names like Google and Yahoo!.<sup>47</sup> As a result, when an anonymous blogger covering police corruption speaks to the world, he likely does so via a blog-hosting service such as Blogger.<sup>48</sup> Groups espousing unpopular views assemble on social networking sites such as Facebook.<sup>49</sup> Citizen journalists publish photos and videos via hosting sites such as Flickr and YouTube.<sup>50</sup> Activists organize protests using microblogs such as Twitter.<sup>51</sup> And artists perform music and poetry in virtual worlds such as Second Life.<sup>52</sup> In each of these instances, their speech is hosted by a private intermediary that decides—subject only to the voluntary limitations it takes on through its terms of use—when, how, and whether to make that speech available to others.<sup>53</sup>

In the offline world, examples of content hosts include book stores and libraries. These intermediaries are also known as “distributors” because they operate between primary publishers and

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47. The largest Web site hosting providers in 2008 were GoDaddy Inc. and 1&1 Internet AG with 15,086,689 and 9,616,022 hosted sites, respectively, according to a November 2008 study by Netcraft. See Netcraft.com, *Hosting Provider Switching Analysis*, Nov. 5, 2008, <http://news.netcraft.com/hosting-provider-switching-dataset>.

48. See Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”?* *Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 645 (2006) (noting that “Google-provided hosting services—including Blogger, UseNet and Google Groups archives—account for about a third of Google’s total [DMCA takedown] notices”).

49. See Posting of Robert Mackey, Holocaust Deniers Gather on Facebook, to The New York Times News Blog, (May 13, 2009), <http://thelede.blogs.nytimes.com/2009/05/13/holocaust-deniers-gather-on-facebook/>.

50. Not surprisingly, these hosting sites have been the subject of frequent takedown requests for allowing users to post material. See, e.g., David Ardia, *Fox Television WFLD-TV v. Progress Illinois*, CITIZEN MEDIA LAW PROJECT, Jan. 6, 2009, <http://www.citimedialaw.org/threats/fox-television-wfld-tv-v-progress-illinois> (describing takedown notice from Fox Television directed at video posted by online news organization that embedded a television news clip).

51. See Brad Stone & Noam Cohen, *Social Networks Spread Defiance Online*, N.Y. TIMES, Jun. 16, 2009, at A11 (reporting that “Iranians are blogging, posting to Facebook and, most visibly, coordinating their protests on Twitter, the messaging service”).

52. See John D. Sutter, *Artists Visit Virtual Second Life for Real-World Cash*, CNN, Apr. 7 2009, <http://www.cnn.com/2009/TECH/04/07/second.life.singer/index.html> (“With the recording industry in near-shambles and the recession taking a hit on art of all kinds, some musicians, visual artists and fashion designers have turned to another virtual frontier—Second Life—to sell CDs, earn tips, move paintings and grow international followings.”).

53. See Hannibal Travis, *Of Blogs, Ebooks, and Broadband: Access to Digital Media as a First Amendment Right*, 35 HOFSTRA L. REV. 1519, 1564 (2007); Tushnet, *supra* note 13, at 994. I’ll leave for others whether intermediaries should have an affirmative obligation to provide access to certain types of speech. See, e.g., Balkin, *supra* note 28, at 939; Barron, *supra* note 4, at 1641. My concern is the impact that civil liability rules have on the discretion intermediaries exercise over the speech of third parties.

readers.<sup>54</sup> Like conduits, content hosts play an essential role in the distribution of speech, facilitating a speaker's broad reach and a listener's varied choices.

The third category of intermediaries includes application service providers and search engines. These intermediaries facilitate access to content by, among other things, indexing it, filtering it, or formatting it, but do not necessarily host the content themselves.<sup>55</sup> Online examples include Google Search and spam-filtering software. These intermediaries are of vital importance because they allow others to find and make sense of the vast amount of information available on the Internet and to direct their limited attention to information that is of interest to them.<sup>56</sup>

Search and application intermediaries have few analogs in the offline world. Some of the closest examples include the providers of telephone directories, stock prices, and bond ratings. Because they lack precise real-world analogs, application service providers and search engines do not fit neatly into the existing liability categories that have developed under the common law.<sup>57</sup>

#### *B. Intermediary Control over Third-Party Speech*

Because speech on the Internet transects the network as standardized electronic bits, the technologies that make the network function also present intermediaries with a powerful set of tools they can use to filter and curtail speech.<sup>58</sup> Indeed, this is the Internet's Achilles' heel, so to speak. For example, it would be a relatively easy matter for content hosts to identify and remove material on their servers because they already run software that directly interacts with

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54. RESTATEMENT (SECOND) OF TORTS § 581(1) cmts. d & e (1977).

55. Although they often make transient copies, called "caching," in order to perform these functions. See Viva R. Moffat, *Regulating Search*, 22 HARV. J.L. & TECH. 475, 482 (2009).

56. See James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 3 (2007) (concluding that "[s]earch engines are the new linchpins of the Internet"); Kreimer, *supra* note 6, at 40 (observing that "[t]he salience of Internet communication is famously sensitive to marginal changes in availability").

57. See Grimmelmann, *supra* note 56, at 15 ("The set of laws potentially applicable to search may seem bewilderingly large.").

58. See Kreimer, *supra* note 6, at 16 ("[T]he networks of the Internet involve a series of electronic links; at each link, from user to originating computer to server to ISP to Internet backbone and back down the chain to the end user, the state may find a potential proxy censor. Each intermediary may interdict communications, or identify speakers, listeners, or other intermediaries against whom sanctions may be directed."); Zittrain, *supra* note 7, at 656-73 (describing the control mechanism available to online intermediaries).



the content at issue.<sup>59</sup> Conduit intermediaries face a slightly more challenging task because their interaction with Internet communications occurs below the content layer.<sup>60</sup> However, hardware and software tools currently exist that would permit these intermediaries to filter or block material based on, among other things, the identity of sender or recipient and the substance of the communications themselves.<sup>61</sup> Search and application providers, which have become central to how people find and make sense of information online, can simply modify the criteria they use when indexing information to exclude content that contains a certain word, image, or sound, effectively rendering speakers silent and invisible to others.<sup>62</sup>

Albeit functional, these are blunt tools and approaches. They are blunt in the sense that they invariably block more content than the intermediary intended,<sup>63</sup> and they are blunt in the sense that they are incapable of exercising judgment. While software can identify certain words or phrases, it cannot determine whether the speech in fact defames others or invades their privacy, as such determinations require contextual analysis and, in many instances, additional fact gathering.<sup>64</sup> As a result, the process of assessing legal liability cannot

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59. Zittrain, *supra* note 7, at 657; Rebecca MacKinnon, Studying Chinese Blog Censorship, RConversation, <http://rconversation.blogs.com/rconversation/2008/11/studying-chines.html> (Nov. 28, 2008).

60. Conduit intermediaries handle the flow of communications across their networks by interacting with data at the transport, IP, link, and physical layers. See Solum & Chung, *supra* note 32, at 816.

61. See generally Steven J. Murdoch & Ross Anderson, *Tools and Technology of Internet Filtering*, in ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING 57 (Ronald Deibert et al. eds., 2008).

62. Google's efforts to placate Chinese authorities demonstrate this capability. See Edward Wong, *China Disables Some Google Functions*, N.Y. TIMES, June 20, 2009, at A6. A court in Argentina recently ordered Google and Yahoo! to stop linking to Web sites containing photographs of the plaintiff, remarking that "[s]earch engines are responsible due to their activities as Web site access facilitators." David Haskel, *Computer Crime: Argentine Judge Holds Google, Yahoo! Liable for Posting of Third Party Content*, 14 BNA'S ELECTRONIC COM. & L. REP. 1094, 1094 (Aug. 5, 2009).

63. Even if the intermediary accurately excises the speech it intends to target, it may still make errors. See Kreimer, *supra* note 6, at 27 ("An ISP or search engine may mistake a family photo album for child pornography, an AIDS prevention site for obscenity, a political commentary for a 'true threat,' or a parody for a copyright violation.")

64. For example, speech that is substantially true cannot be defamatory, even when that speech is highly offensive or injurious. See, e.g., *Fisher v. Detroit Free Press, Inc.*, 404 N.W.2d 765, 767-68 (Mich. Ct. App. 1987). But see *Noonan v. Staples Inc.*, 556 F.3d 20, 26 (1st Cir. 2009) (finding that truthful speech on a matter of private concern can create liability if published with actual malice). And it is not just U.S. liability standards that intermediaries need to consider.

be effectively automated. While some intermediaries, particularly those who can pass along to others the cost of the additional staff and resources needed to manually review content, will continue to facilitate the publication of potentially tortious or injurious speech, many others will not be in a position to do so and will therefore block or filter any speech that could arguably result in liability.<sup>65</sup>

Furthermore, when intermediaries remove potentially injurious speech, they often do so without providing an opportunity for the speaker to contest the removal or blocking.<sup>66</sup> It is costly for intermediaries to offer dispute resolution procedures to their users. It is far less costly to simply remove speech at the first sign of trouble or to decline to carry controversial speech in the first place. In fact, any increase in the baseline liability for intermediaries will impact their willingness to facilitate potentially injurious speech.<sup>67</sup> A “profit-maximizing intermediary likely will choose the mechanism that is least costly, rather than the one that preserves the most speech.”<sup>68</sup>

Moreover, even if intermediaries were capable of determining what speech is tortious or unlawful, it is unlikely that they would be able to adequately weigh or capture the full social value of the speech they are poised to interdict.<sup>69</sup> Accordingly, “[i]f we impose

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The often inconsistent legal rules of other countries make the task of determining whether speech is tortious or illegal even more difficult. See, e.g., *Pakistan: Blasphemy Case over Cartoons Registered*, ASIA MEDIA, Apr. 26, 2006, <http://www.asiamedia.ucla.edu/article-south-asia.asp?parentid=44274> (reporting on criminal action lodged against Hotmail, Yahoo!, and Google over cartoons caricaturing the Prophet Muhammad).

65. See Kraakman, *supra* note 3, at 891–92 (“[F]irms will . . . pay for the risk of additional liability in the familiar ways. If outside gatekeepers cannot shift their liability risks, they will charge high risk premiums.”). Intermediaries that cannot pass these costs along to others will either go out of business or impose tight restrictions on the content they intermediate, “effectively lock[ing] down the Internet.” Lemley, *supra* note 13, at 111.

66. See Kreimer, *supra* note 6, at 28; Malla Pollack, *The Right to Know? Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 109 (1999). In the context of copyright infringement claims, however, the DMCA provides an incentive for hosting services to give notice to their subscribers when they remove content by providing a safe harbor against claims by the user if the content host improperly removes the content or disables access. See 17 U.S.C. § 512(g) (2006).

67. See Kraakman, *supra* note 3, at 892; Mann & Belzley, *supra* note 3, at 273.

68. Kreimer, *supra* note 6, at 31.

69. See, e.g., Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 988–89 (2005); Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 279–80 (2007); Assaf Hamdani, *Gatekeeper Liability*, 77 S.



the full social costs of harm from third-party postings on intermediaries, but they cannot capture the full social benefits of those postings, they will respond by inefficiently restricting the uses that third parties can make of the Internet.<sup>70</sup> We would therefore expect to see excessive curtailment of speech, as risk-averse intermediaries filter and block all but the most banal speech.<sup>71</sup> This likely would leave us with something akin to what cable television provides: content from a short list of preapproved providers.<sup>72</sup>

## II. DOCTRINAL OVERVIEW

Although intermediaries, by definition, are not primary malfeasors,<sup>73</sup> they are not invisible to the law. Civil and criminal rules impose limited forms of secondary liability on all intermediaries.<sup>74</sup> While the distinction between primary and

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CAL. L. REV. 53, 73 (2003); Sonia K. Katyal, *Privacy vs. Piracy*, 7 YALE J.L. & TECH. 222, 281-90 (2004); Mann & Belzley, *supra* note 3, at 273-74.

70. Lemley, *supra* note 13, at 112.

71. See Hamdani, *supra* note 3, at 76 ("The increase in fees associated with gatekeeper liability first drives out law-abiding clients for whom the value of the relevant market is relatively low."); Mann & Belzley, *supra* note 3, at 274 ("[A] risk always exists that imposing additional burdens on intermediaries will chill the provision of valuable goods and services. That will be especially problematic in cases where considerable risk of chilling legal conduct that is adjacent to the targeted conduct exists."). One counterargument is that customer departure provides a hedge against censorship and an incentive for intermediaries to position themselves as more protective of speech. Such claims should be tempered by the fact that switching ISPs, hosting providers, and e-mail services is often difficult, and many Americans do not have a choice when it comes to their ISP, especially with regard to broadband providers. See Kreimer, *supra* note 6, at 34-36.

72. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 656-57 (1994). Recognizing the threat of censorship by cable providers, the Court cautioned:

[S]imply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.

The potential for abuse of this private power over a central avenue of communication cannot be overlooked.

*Id.*

73. See Kraakman, *supra* note 3, at 889.

74. Secondary liability encompasses two distinct concepts: vicarious and contributory liability. Vicarious liability, also called respondeat superior, arises under the common law doctrine of agency and places responsibility on a superior for the acts of subordinates. See RESTATEMENT (SECOND) OF AGENCY § 220 (1958). Contributory liability, a concept that arose in the intellectual property context, applies when a party "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." *Gershwin Publ'g v. Columbia Artists Mgmt.*, 443 F.2d 1159, 1162 (2d Cir. 1971). In the criminal context, aiding-and-abetting and conspiracy may also create secondary liability for intermediaries. Under secondary liability doctrines, intermediaries generally do not take on an affirmative duty to act or

secondary liability can often be fluid, primary liability in the speech context typically attaches to those who are the primary speakers or actors;<sup>75</sup> others who may have had some nexus to the wrongful acts, but who are not the actual speakers or actors, are governed by secondary liability principles. Intermediaries may fulfill this nexus by providing access to the content, facilitating its transport or receipt, or providing the instrumentalities that enable others to speak or act.

This part of the Article outlines the most common forms of speech-based liability that intermediaries face and describes how section 230 modifies these doctrinal approaches.

*A. Overview of Common Law  
Liability for Intermediaries*

Internet intermediaries face an array of potential legal claims, both civil and criminal, arising from the content and actions of third parties. This may include liability under intellectual property laws, anti-discrimination laws, and state tort laws. At the same time, they also benefit from various statutory protections that create what could best be described as a patchwork of liability.<sup>76</sup> Not surprisingly, determining the liability intermediaries may face with regard to the online content and actions of third parties can be a daunting proposition.

Fortunately, we can short-circuit some of this difficulty because section 230 expressly excludes intellectual property law, federal criminal law, and communications privacy law from its coverage.<sup>77</sup> As a result, and in keeping with this Article's focus on section 230's impact on speech, the present discussion will primarily address the liability that intermediaries face with regard to speech-based torts, such as defamation, invasion of privacy, misrepresentation, and negligence.

Developing an understanding of these common law torts will allow us to establish a baseline of liability from which section 230's

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to prevent tortious or illegal conduct, but only a duty not to facilitate known wrongdoing. See Kraakman, *supra* note 3, at 889.

75. See Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 389–90 (2008).

76. See, e.g., Lanham Act, 15 U.S.C. § 1114 (2)(B)–(C) (2006); Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125 (d)(2)(D)(ii) (2006); Digital Millennium Copyright Act, 17 U.S.C. § 512 (2006).

77. See 47 U.S.C. § 230(e) (2006).



changes can be measured. Indeed, apart from section 230's protections and the constitutional limitations imposed by the Supreme Court in *New York Times Co. v. Sullivan*<sup>78</sup> and its progeny, liability for defamation and other speech-based harms is still dictated largely by the common law doctrines discussed in this section of the Article. While a number of states have created statutory causes of action mirroring the common law,<sup>79</sup> and others have passed retraction statutes<sup>80</sup> and statutes to protect against strategic lawsuits against public participation ("SLAPP suits"),<sup>81</sup> these legislative efforts have not significantly altered the standard of liability primary speakers and intermediaries face.

### 1. Primary Speaker Liability

Speech-based harms invariably involve a speaker, the original source of the injurious information, who bears direct liability as the "primary speaker."<sup>82</sup> This liability can arise under a number of different legal theories. The most frequently occurring cause of action in the section 230 case law is defamation, including its siblings: libel, slander, and disparagement.<sup>83</sup> As a product of state law, the precise contours of these reputational torts vary from state to state. Generally speaking, however, persons or entities will face liability for defamation if (1) they make a false and defamatory statement concerning another; (2) they communicate that statement to a third party; (3) they evidence fault amounting to at least negligence; and (4) the statement is either actionable irrespective of special harm (*per se*) or there is proof of special harm caused by the publication (*per quod*).<sup>84</sup> This summary of the elements of a claim

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78. 376 U.S. 254 (1964).

79. See, e.g., CAL. CIV. CODE §§ 44–46 (West 2009) (defining libel and slander).

80. See, e.g., MASS. GEN. LAWS ch. 231, § 93 (West 2009).

81. Strategic lawsuits against public participation ("SLAPP suits") are lawsuits "without substantial merit brought against individuals or groups with the intention of 'silencing [the] opponents, or at least . . . diverting their resources.'" Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 802 (2000). More than 26 states have passed laws that allow a defendant to dismiss these lawsuits at an early stage in the litigation. See, e.g., CAL. CIV. PROC. CODE § 425.16(a) (West 2009); 735 ILL. COMP. STAT. 110/15 (2009).

82. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

83. Defamation claims, including libel, slander, trade libel, and disparagement, occurred in 50.5% of the decisions. See *infra* Part III.B.3.

84. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

for defamation is deceptively simple; entire treatises have been devoted to debating the intricacies of each requirement.<sup>85</sup>

The *sin qua non* of defamation is a false statement of fact. Accordingly, statements of opinion typically cannot support a cause of action for defamation, even if they are outrageous or widely off the mark.<sup>86</sup> A number of other common law privileges have also developed over the years to provide speakers and publishers with additional breathing room, including the fair report privilege, the wire service defense, and the neutral reportage privilege, each of which protects the republication of certain unverified statements.<sup>87</sup>

Defamation law also does not permit recovery for the exposure of private but truthful information,<sup>88</sup> or for false communications that may hurt an individual's feelings but do not cause reputational harm. The four privacy torts—false light, intrusion into seclusion, publication of private facts, and misappropriation of one's name or likeness—developed to provide a remedy in such situations.<sup>89</sup> One of the elements distinguishing a publication of private facts claim from a defamation claim is that truth is not a defense; instead, truth is an essential element of the tort.<sup>90</sup> An individual has no claim for publication of private facts if the publication is false.<sup>91</sup> In addition, the disclosed information must be private.<sup>92</sup> Anything that occurs in

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85. One such debated element is what constitutes a "defamatory statement." The gravamen of defamation is injury to reputation. Although states have different definitions for what is defamatory, there is universal agreement that speech that is merely unflattering, annoying, irksome, embarrassing, or simply hurts the plaintiff's feelings is not actionable. SACK, *supra* note 45, § 2.4.1. For example, New York defines a defamatory publication as one that "tends to 'expose the plaintiff to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'" *Foster v. Churchill*, 665 N.E.2d 153, 157 (N.Y. 1996) (citation omitted).

86. *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20–21 (1990); *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 894 (9th Cir. 1988).

87. For an excellent summary of these defenses and their potential application to online intermediaries, see *Sanchez, supra* note 13, at 305–08.

88. *See, e.g., Campanelli v. Regents of Univ. of Cal.*, 51 Cal. Rptr. 2d 891, 896 (Ct. App. 1996); RESTATEMENT (SECOND) OF TORTS § 581A (1977). *But see Noonan v. Staples, Inc.*, 556 F.3d 20, 26 (1st Cir. 2009) (finding that truthful speech on a matter of private concern can create liability under Massachusetts law if published with actual malice).

89. *See* RESTATEMENT (SECOND) OF TORTS § 652A (1977).

90. *See id.* § 652D.

91. *See, e.g., Fellows v. Nat'l Enquirer, Inc.*, 42 Cal. 3d 234, 242 (1986).

92. *See, e.g., Forsher v. Bugliosi*, 26 Cal. 3d 792, 808 (1998).



a public place is by definition not private and cannot be the subject of a publication of private facts claim.<sup>93</sup>

As to other claims such as tortious interference,<sup>94</sup> intentional infliction of emotional distress,<sup>95</sup> and negligence, courts generally require that when these claims are based on injurious speech, the plaintiff must surmount the same constitutional and common law protections applicable to defamation claims,<sup>96</sup> regardless of the label selected by the plaintiff for his or her claim.<sup>97</sup>

As this brief overview demonstrates, an essential element of each tort is publication,<sup>98</sup> typically defined as communication to a third party other than the plaintiff.<sup>99</sup> Publication need not involve the help of others, but if it does, those who serve as intermediaries face three potential types of liability for facilitating the speech: (1) publisher liability; (2) distributor liability; and (3) conduit liability.

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93. Rare exceptions to this rule have been made in situations where a private person has been caught in a very embarrassing event outside of her control. *See* *Daily Times Democrat v. Graham*, 162 So. 2d 474 (Ala. 1964) (allowing a woman to recover for a published picture of her emerging from a fun house where a fan had blown up her skirt without her knowledge). But many courts have refused to recognize an exception in similar contexts. *See, e.g.,* *Neff v. Time*, 406 F. Supp. 858 (W.D. Pa. 1976); *McNamara v. Freedom Newspapers, Inc.*, 802 S.W.2d 901 (Tex. App. 1991).

94. Tortious interference, sometimes described as tortious interference with contract or tortious interference with prospective economic advantage, is not recognized in every state. For those states that do recognize such claims, the elements generally entail (1) the existence of contractual or business relations with a third party; (2) defendant's knowledge of such relations; (3) defendant's intentional procurement of breach or interference; and (4) damages caused by the breach or interference. *See, e.g.,* *Int'l Minerals & Res., S.A. v. Pappas*, 96 F.3d 586, 595 (2d Cir. 1996) (citing *Jews for Jesus Inc. v. Jewish Cmty. Relations Council*, 968 F.2d 286, 292 (2d Cir. 1992)).

95. To make out a claim for intentional infliction of emotional distress, a plaintiff generally must prove: "(1) that the defendant engaged in extreme and outrageous conduct (2) that intentionally or recklessly (3) caused severe emotional distress to the plaintiff." *Cunningham v. United Nat'l Bank of Wash.*, 710 F. Supp. 861, 863 (D.D.C. 1989) (citing *Ridgewells Caterer, Inc. v. Nelson*, 688 F. Supp 760, 764 (D.D.C. 1988)).

96. *See, e.g.,* *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 695 (9th Cir. 1998) (negligence); *Idema v. Wager*, 120 F. Supp. 2d 361, 370 (S.D.N.Y. 2000) (intentional infliction claim); *Sorenson v. Chevrolet Motor Co.*, 214 N.W. 754, 756-57 (Minn. 1927) (Stone, J., dissenting) (tortious interference).

97. *See, e.g.,* *Sony Computer Entm't Am., Inc. v. Am. Home Assurance Co.*, 532 F.3d 1007, 1015 (9th Cir. 2008) (noting that "creative pleading does not change the analysis of a defamation-based claim or applicable privileges").

98. The tort of intrusion upon seclusion, which is not discussed in the main text but is nevertheless one of the privacy torts, does not require publication in order to be actionable. *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 580 F.3d 543, 550-51 (7th Cir. 2009).

99. The Restatement (Second) of Torts defines publication for purposes of defamation law as "communication intentionally or by a negligent act to one other than the person defamed." RESTATEMENT (SECOND) OF TORTS § 577(1) (1977).

## 2. Publisher Liability

Under standard common law principles, a person who publishes a statement by another bears the same liability for the statement as if he or she had initially created it.<sup>100</sup> Because they cooperate actively in the publication, “primary publishers,” as they are sometimes called, are held to a standard of liability comparable to that of primary speakers.<sup>101</sup> Thus, a book publisher or a newspaper publisher can be held liable for anything that appears within the pages of its publications. Publisher liability attaches even if the publisher attributes the statement at issue to the original author. The theory behind this liability is that a publisher has the knowledge, opportunity, and ability to exercise editorial control over the content of its publications.<sup>102</sup>

Whether they in fact have this knowledge and ability to exercise editorial control over the contents of their publications is irrelevant under common law principles. Publishers are held liable for injurious statements contained in their works even absent proof that they had specific knowledge of the statements at issue because of an assumed duty to be aware of what they publish.<sup>103</sup> As a result, publisher liability is, in practical terms, coterminous with primary speaker liability.

## 3. Distributor Liability

Distributor liability is far more limited. Newsstands, bookstores, and libraries are generally not held liable for the content they

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100. *Id.* § 578; *see also* *Harris v. Minvielle*, 19 So. 925, 928 (La. 1896) (stating that “talebearers are as bad as talemakers”). In fact, each time a defamatory statement is communicated by a new person or entity, a new publication occurs, creating a separate basis of tort liability. RESTATEMENT (SECOND) OF TORTS § 578 cmt. b (1977); *see also* *Dixon v. Newsweek, Inc.*, 562 F.2d 626, 631 (10th Cir. 1977) (stating that a “republication of false defamatory statements is as much a tort as the original publication”).

101. RESTATEMENT (SECOND) OF TORTS § 581 cmt. g (1977).

102. *See id.* § 581 cmt. c (1977); W. PAGE KEETON, ET AL., PROSSER & KEETON, *THE LAW OF TORTS* § 113, at 810 (5th ed. 1984); Loftus E. Becker Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 CONN. L. REV. 203, 222 (1989).

103. *See, e.g.*, *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1119 (11th Cir. 1992) (holding magazine liable for negligently publishing an advertisement that created an unreasonable risk of violent criminal activity); *Blinick v. Long Island Daily Press Publ'g Co.*, 323 N.Y.S.2d 853, 854–55 (1971) (finding newspaper liable for negligence for publishing advertisement containing erroneous telephone number resulting in plaintiff being deluged with sexually oriented calls). Since the Supreme Court’s decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), some proof of fault must be shown to establish liability. *See infra* notes 142–56 and accompanying text.



distribute unless they know or have reason to know of its tortious or illegal nature.<sup>104</sup> Moreover, a distributor, such as a bookseller,

is under no duty to examine the various publications that he offers for sale to ascertain whether they contain any defamatory items. Unless there are special circumstances that should warn the dealer that a particular publication is defamatory, he is under no duty to ascertain its innocent or defamatory character.<sup>105</sup>

However, once a distributor has knowledge of the tortious nature of the material or communications within its possession or control, it must stop making the material available to others or face liability for its continued publication.<sup>106</sup> This knowledge can be actual, as in the case of material that is defamatory on its face, or inferred, as may be the case when "a particular author or a particular publisher has frequently published notoriously sensational or scandalous" material in the past.<sup>107</sup>

The key distinction in the common law between a publisher and distributor is that a publisher inherently has knowledge of the content it is publishing, while a distributor does not. As a result, the law does not impose liability on distributors unless they have knowledge or reason to know that information they are distributing is tortious or unlawful.

#### 4. Conduit Liability

In important respects, conduit liability mirrors distributor liability. That is, there can be no liability imposed on conduits in the absence of knowledge and fault.<sup>108</sup> However, intermediaries that are

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104. See *Tacket v. General Motors Corp.*, 836 F.2d 1042, 1046-47 (7th Cir. 1987); RESTATEMENT (SECOND) OF TORTS § 581(1) (1977). Cases against bookstores and libraries are exceedingly rare; indeed, "no one seems to have sued a library for defamation in this century." Becker Jr., *supra* note 102, at 227 (noting that "no American appears ever to have recovered for defamation from a bookseller or distributor not controlled by the primary publisher").

105. RESTATEMENT (SECOND) OF TORTS § 581(1) cmt. d (1977); see also *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 139 (2d Cir. 1984) (stating that a distributor cannot be held liable "for false and defamatory matter" without "adequate proof of fault").

106. See RESTATEMENT (SECOND) OF TORTS § 577(2) (1977) ("One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.").

107. *Id.* § 581 cmt. e.

108. See, e.g., *Dworkin v. Hustler Magazine, Inc.*, 634 F. Supp. 727, 729 (D. Wyo. 1986) (quoting RESTATEMENT (SECOND) OF TORTS "[O]ne who only delivers or transmits defamatory

“under a duty to the public to accept and transmit messages, stand[] on a different footing from the other persons providing [the] means of publication.”<sup>109</sup> For those intermediaries, knowledge alone is insufficient to establish liability.<sup>110</sup> As described in the comments to the Restatement (Second) of Torts, a conduit intermediary

is not required to make inquiry or investigation as to the circumstances and the reasons or purposes for which its service is demanded. The necessity of prompt transmission of messages precludes the inquiry. Therefore, the public utility is privileged to accept and transmit an obviously defamatory message . . . . The telegraph company may assume that the sender is privileged until it has some sufficient affirmative reason to know the contrary.<sup>111</sup>

*O'Brien v. Western Union Telegraph Co.*<sup>112</sup> illustrates the policies animating the common law's special treatment of conduits.<sup>113</sup> In *O'Brien*, the First Circuit stated that the immunity provided to telegraph companies “must be broad enough to enable the company to render its public service efficiently and with dispatch. Speed is the essence of the service.”<sup>114</sup> Noting that the defendant had handled more than 70,000 messages on the day in question, the court reasoned:

If the telegraph companies are to handle such a volume of business expeditiously, it is obvious that their agents cannot spend much time pondering the contents of the messages

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material published by a third person is subject to liability if, but only if, he knows or had reason to know of its defamatory character.”)).

109. RESTATEMENT (SECOND) OF TORTS § 612 cmt. g (1977). According to the Restatement:

A public utility under a duty to transmit messages is privileged to do so, even though it knows the message to be false and defamatory, unless

- (a) the sender of the message is not privileged to send it, and
- (b) the agent who transmits the message knows or has reason to know that the sender is not privileged to publish it.

*Id.* § 612 (2).

110. The protection for a “public utility under a duty to transmit messages,” *id.* § 612(2), is expressly applicable to “common carriers,” which include “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio,” 47 U.S.C. § 153(10) (2006); see also Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) (defining common carriers based on function).

111. RESTATEMENT (SECOND) OF TORTS § 612 cmt. g (1977).

112. 113 F.2d 539 (1st Cir. 1940).

113. *Id.*

114. *Id.* at 541.



with a view to determining whether they bear a defamatory meaning, and if so, whether the sender might nevertheless be privileged.<sup>115</sup>

The rationale behind this special treatment is that it would be impractical, if not impossible, for intermediaries serving as conduits to review everything they transmit; as a result, imposition of liability would lead them to engage in excessive self-censorship.<sup>116</sup> This protection enshrines the hoary principle that the law does not hold the messenger responsible for the contents of the message. In practical terms, conduits almost never face liability for third-party speech.<sup>117</sup>

This is not to say that it is easy to recognize which intermediaries should be treated as conduits and which should be treated as distributors. The courts struggled for years over what standard of liability to apply to telegraph companies that transmitted defamatory messages, eventually settling on the standard codified in the *Restatement (Second) of Torts* quoted above.<sup>118</sup> Examples of intermediaries that enjoy the protection afforded to conduits include telegraph companies and telephone companies carrying voice traffic.<sup>119</sup> Intermediaries that transmit the communications of others but are not classified as “public utilit[ies] under a duty to transmit,”<sup>120</sup> are not entitled to this additional level of protection.

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115. *Id.* at 542.

116. See *W. Union Tel. Co. v. Lesesne*, 182 F.2d 135, 137 (4th Cir. 1950); *Auvil v. CBS 60 Minutes*, 800 F. Supp. 928, 932 (E.D. Wash. 1992).

117. See *Anderson v. New York Tel. Co.*, 320 N.E.2d 647, 649 (N.Y. 1974) (finding telephone company not liable for a user’s defamatory answering machine message even when the telephone company knew about the defamatory statements); Sack, *supra* note 45, § 7.3.1.

118. See Finley P. Maxson, *A Pothole on the Information Superhighway: BBS Operator Liability for Defamatory Statements*, 75 WASH. U. L.Q. 673, 676 & n.12 (1997) (noting that it was not until 1950, in *W. Union Tel. Co. v. Lesesne*, 182 F.2d 135, that the courts settled on a liability standard for telegraph services).

119. For the most part, ISPs have not been classified as common carriers. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 993–96 (2005); *In re Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 F.C.C.R. 5901, 5914 (2007) (declaratory ruling); Anthony E. Verona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L.J. 1, 91 (2009). *But see* Jonathan E. Nuechterlein, *Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. TELECOMM. & HIGH TECH. L. 19, 46–49 (suggesting that the FCC has authority to impose common carrier-type non-discrimination requirements on ISPs under its Title I authority).

120. RESTATEMENT (SECOND) OF TORTS § 612(2) (1977).

Instead, their liability rests on the “know or have reason to know” standard applicable to distributors.<sup>121</sup>

Before we examine how section 230 modifies these common law approaches to intermediary liability, one final set of concepts must be added to the mix: the constitutional limitations imposed by the First Amendment.

*B. First Amendment Limitations  
on Intermediary Liability*

The Supreme Court has not been silent with regard to the impact civil and criminal sanctions directed at intermediaries can have on First Amendment rights. In a series of cases decided in the 1950s and 1960s, the Court laid out the constitutional framework for evaluating the censorial impact legal sanctions could have on intermediaries.<sup>122</sup> As Seth Kreimer observes about the Court’s evolving view of intermediaries, “[t]hese doctrines continue to frame the rights of litigants in modern litigation over efforts to chill weak links in the chain of Internet communications.”<sup>123</sup>

In two cases involving booksellers, the Court made clear that the First Amendment does not countenance strict liability imposed on intermediaries and that First Amendment protections embrace the *distribution of speech* as well as its initial publication. In *Smith v. California*,<sup>124</sup> the Court was faced with a statute that made it illegal for the operators of bookstores to have an obscene book on their shelves, whether they knew the book was obscene or not.<sup>125</sup> In

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121. See *supra* Part II.A.3.

122. Rejecting the claim that the First Amendment is implicated only when the state itself imposes criminal sanctions, the Court stated in *Bates v. City of Little Rock* that the Constitution’s protections for speech and association “are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.” 361 U.S. 516, 523 (1960) (invalidating demand for NAACP’s membership list). By the middle of the decade, the Court also allowed speakers to challenge the impact of restrictions on intermediaries, see *Bantam Books v. Sullivan*, 372 U.S. 58, 65 n.6 (1963), and acknowledged that the First Amendment extended to listeners as well, see *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (indicating that “the protection afforded is to the communication, to its source and to its recipients both”); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 306–07 (1965) (“The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. . . . This amounts in our judgment to an unconstitutional abridgment of the addressee’s First Amendment rights.”).

123. Kreimer, *supra* note 6, at 51.

124. 361 U.S. 147 (1959).

125. *Id.* at 149.



invalidating the statute on First Amendment grounds, the Court held that an obscenity statute that did not require scienter on the part of those who distributed such material had the "collateral effect of inhibiting the freedom of expression" by placing the burden on such distributors to continually inspect the contents of their inventory.<sup>126</sup> Justice William J. Brennan, writing for the Court, noted the pernicious effect that such a law would have when applied to intermediaries: "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered."<sup>127</sup>

In a second bookseller case, *Bantam Books, Inc. v. Sullivan*,<sup>128</sup> the Court invalidated the McCarthy-esque practices of the Rhode Island Commission to Encourage Morality in Youth, which notified distributors that certain books and magazines had been found by the Commission to be objectionable for sale or display to minors.<sup>129</sup> While the Commission had no enforcement powers, the Court noted that "[t]hese acts and practices directly and designedly stopped the circulation of publications in many parts of Rhode Island,"<sup>130</sup> which had the effect of suppressing speech by condemning intermediaries that distributed the targeted books.<sup>131</sup> Recognizing that the First Amendment's protections would be meaningless if speech could not be heard by others, Justice Brennan instructed that "[t]he constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication."<sup>132</sup>

One of the most important and widely cited cases involving the First Amendment's protections for speech, *New York Times Co. v. Sullivan*,<sup>133</sup> shortly followed the bookseller cases. In *Sullivan*, the Court again addressed the danger of censorship imposed by

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126. *Id.* at 151-53; *see also* *New York v. Ferber*, 458 U.S. 747, 765 (1982) ("As with obscenity laws, criminal responsibility [for child pornography] may not be imposed without some element of scienter on the part of the defendant."); *Manual Enters., Inc. v. Day*, 370 U.S. 478, 492 (1962) (rejecting "the power of the Post Office to bar a magazine from the mails, if exercised without proof of the publisher's knowledge of the character of the advertisements included in the magazine").

127. *Smith*, 361 U.S. at 153-54.

128. 372 U.S. 58, 72 (1963).

129. *See id.*

130. *Id.* at 68.

131. *Id.* at 68-69.

132. *See id.* at 65 n.6.

133. 376 U.S. 254 (1964).

intermediaries.<sup>134</sup> Although the factual setting of the case is often overlooked by commentators,<sup>135</sup> *Sullivan* involved The New York Times Company acting as an intermediary with regard to a paid editorial advertisement submitted by the “Committee to Defend Martin Luther King and the Struggle for Freedom in the South.”<sup>136</sup> Not unlike present-day intermediaries, the *New York Times* republished the advertorial after conducting only minimal fact-checking.<sup>137</sup>

Citing his prior opinions in *Smith* and *Bantam Books*, Justice Brennan reiterated that the First Amendment’s protections extend to intermediaries:

Any other conclusion would discourage newspapers from carrying “editorial advertisements” of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.<sup>138</sup>

To hold otherwise, he reasoned, would result in “self-censorship” by intermediaries and would “shackle the *First Amendment* in its attempt to secure ‘the widest possible dissemination of information from diverse and antagonistic sources.’”<sup>139</sup>

The Supreme Court’s decision in *Sullivan* also addressed the question of whether a party, acting as either a primary speaker or an intermediary, could be found liable for defamation without proof of

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134. *Id.* at 295.

135. See Tushnet, *supra* note 13, at 1007 (observing that “*Sullivan* has not generally been understood as a case about intermediary liability”).

136. See *Sullivan*, 376 U.S. at 257.

137. See *id.* at 260–61 (“The manager of the Advertising Acceptability Department testified that . . . [n]either he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.”).

138. *Id.* at 266.

139. *Id.* (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)). The majority also rejected the claim that, because the case involved a civil lawsuit, there was no state action. See *id.* at 265 (“It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.”).



fault.<sup>140</sup> The Court held that the First Amendment required that a public official seeking damages for defamatory speech must prove by clear and convincing evidence that the defendant published the challenged statements with "actual malice."<sup>141</sup> Distinguishing common law malice, the Court stated that a defendant publishes with actual malice when it publishes a defamatory statement knowing that it is false, or with reckless disregard as to its truth or falsity.<sup>142</sup> In making this determination, the Court analyzed what The New York Times Company knew about the truth of the statements at issue, not what the individual author of the advertisement knew.<sup>143</sup>

Courts have applied the heightened liability standards imposed in defamation claims to other speech-based torts as well. For example, given the similarity between defamation and false light claims, courts concerned with plaintiffs doing an end-run around the fault requirements of *Sullivan* require the same level of fault in a false light claim as would be required for a defamation claim.<sup>144</sup> The same holds true for intentional infliction of emotional distress claims and tortious interference claims when such claims involve speech directed to others.<sup>145</sup>

Intermediaries also enjoy a First Amendment privilege to publish and distribute truthful speech on matters of public concern. In *Bartnicki v. Vopper*,<sup>146</sup> the Supreme Court rejected the imposition of civil liability on a radio commentator who had broadcast portions of an illegally intercepted cell phone conversation between union

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140. See *id.* at 285–88. At the time, a defendant could be held strictly liable for any false defamatory statement under the common law. See *Herbert v. Lando*, 441 U.S. 153, 159 n.4 (1979).

141. See *Sullivan*, 376 U.S. at 279–80.

142. *Id.* The actual malice inquiry is a subjective one; there must be sufficient evidence that the defendant "in fact" entertained serious doubts about the veracity of the publication. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The Supreme Court has made clear that this is not measured by what a reasonably prudent man would have published or would have investigated before publishing; even an "extreme departure" from professional publishing standards does not establish actual malice. *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 665 (1989).

143. See Tushnet, *supra* note 13, at 1007. The Court's reasoning in *Sullivan* has consistently served as the basis for rejecting liability for defamation without proof of fault. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *Time, Inc. v. Firestone*, 424 U.S. 448, 463 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

144. See *Time, Inc. v. Hill*, 385 U.S. 374, 387 (1967); SACK, *supra* note 45, § 12.3.

145. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (intentional infliction of emotional distress claim); *Blatty v. N. Y. Times Co.*, 42 Cal. 3d 1033, 1044–45 (1986) (tortious interference claim).

146. 532 U.S. 514 (2001).

leaders discussing the need to “blow off [the] front porches” of public officials negotiating with the union.<sup>147</sup> The statute at issue imposed liability on any person who disclosed information they knew or had reason to know was the result of illegal interception.<sup>148</sup> Noting that “[a]s a general matter, ‘state action to punish the publication of truthful information seldom can satisfy constitutional standards,’”<sup>149</sup> the Court held that the act of publishing information provided by an anonymous third party was constitutionally privileged, instructing legislatures and courts that “[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.”<sup>150</sup>

The Court in *Bartnicki*, however, was careful to limit its holding to truthful speech on matters of public concern.<sup>151</sup> The Court has not yet addressed whether the publication of truthful information on matters of purely private concern enjoys the same protection. Nevertheless, the Court has recognized that the First Amendment plays a role in limiting the scope of claims seeking recovery for the publication of private facts.<sup>152</sup> In addition, the Court has expressed concern that it is improper for any court to determine what is newsworthy,<sup>153</sup> particularly when the media has made a contrary determination.<sup>154</sup>

The requirement that plaintiffs prove falsity to recover for reputational injuries and that defendants must evidence fault before either civil or criminal liability may be imposed, make it feasible for

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147. *Id.* at 519.

148. *Id.* at 523–24.

149. *Id.* at 527; *see also Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (“[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . .”); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*) (refusing to enjoin publication of Pentagon Papers).

150. *Bartnicki*, 532 U.S. at 529.

151. *Id.* at 533–34 (leaving open “disclosures of . . . information of purely private concern”); *id.* at 535–36 (Breyer, J., concurring) (emphasizing the narrowness of the Court’s holding, the “unusual public concern” of the speech at issue, and the need to balance “speech-restricting and speech-enhancing consequences”).

152. For example, information that is a matter of public record cannot be the basis for a claim under this tort. *See, e.g., Fla. Star*, 491 U.S. at 524 (holding that the accurate identification of a rape victim’s name that was inadvertently revealed in a sheriff’s press office was protected under the First Amendment).

153. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

154. *See Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 484–85 (Cal. 1998).



intermediaries to rely in good faith on the publication decisions of others. But it may even be the case that the First Amendment requires a higher standard than “know or have reason to know” for online intermediaries that facilitate the speech of others.<sup>155</sup> However, because Congress stepped in and said in section 230 that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,”<sup>156</sup> the Supreme Court has not yet had occasion to answer this question.

### C. *The Early Internet Speech Cases*

Not surprisingly, the first Internet intermediaries to be sued based on the speech of third parties argued that they were merely distributors, and not publishers, of the content on their Web sites. The first of these cases was *Cubby, Inc. v. CompuServe, Inc.*<sup>157</sup> A subsidiary of H&R Block, CompuServe, Inc. (“CompuServe”) was one of the first national online service providers, with more than 800,000 subscribers at the time of the lawsuit.<sup>158</sup> CompuServe developed CompuServe Information Service, which provided subscribers with access to over 150 specialty electronic “forums,” consisting of electronic bulletin boards, interactive online conferences, and topical databases.<sup>159</sup> Many of these forums were provided by third parties who agreed to editorial and technical standards set by CompuServe.<sup>160</sup>

One such forum run by a third party regularly published a newsletter called “Rumorville, U.S.A.,” which included reports about broadcast journalism and journalists.<sup>161</sup> The court noted that on several occasions in April 1990, Rumorville carried items about the

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155. See Floyd Abrams, *First Amendment Postcards from the Edge of Cyberspace*, 11 ST. JOHN'S J. LEGAL COMMENT. 693, 704 (1996) (“It seems to me that a far more protective standard is needed than ‘reason to know;’ something like ‘knowing,’ more like ‘actual knowledge.’ It does not now exist as a matter of common law.”).

156. 47 U.S.C. § 230(c)(1) (2006). Section 230 further provides that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3).

157. 776 F. Supp. 135 (S.D.N.Y. 1991).

158. See Terri A. Cutrera, *Computer Networks, Libel, and the First Amendment*, 11 COMP. L.J. 555, 577 (1992).

159. See *id.*

160. See *id.*

161. See *CompuServe*, 776 F. Supp. at 137.

plaintiffs, Cubby, Inc., and Robert Blanchard, that were published in the CompuServe forum.<sup>162</sup>

CompuServe did not dispute that the statements were defamatory.<sup>163</sup> Instead, it argued that it should be treated like a distributor because it did not review the contents of the forum before it appeared on the site.<sup>164</sup> The court agreed. Relying in large part on the reasoning in *Smith v. California*, Judge Peter Leisure held that CompuServe was a distributor and could not be held liable for defamatory statements in its forum unless the plaintiff could prove that CompuServe knew or had reason to know of the defamatory content at the time it distributed the information to its subscribers.<sup>165</sup>

The Court seemed to take two factors into account in finding that CompuServe was a distributor: (1) CompuServe's contract with the third-party forum manager gave CompuServe no editorial control over the contents of the forum at issue;<sup>166</sup> and (2) CompuServe had a "short time frame within which [it] was obliged to load the presented forum onto its service."<sup>167</sup> Judge Leisure explained:

A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, bookstore or newsstand would impose an undue burden on the free flow of information.<sup>168</sup>

Four years later, a New York state court came to the opposite conclusion when faced with an online service provider that held itself out as a family-friendly computer network. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*,<sup>169</sup> an investment banking firm sued Prodigy

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162. See *id.* at 138. Rumorville included a statement saying that a competing news service run by the plaintiffs had "gained access to information first published by Rumorville 'through some back door'; a statement that Blanchard was 'bounced' from his previous employer, WABC; and a description of [the competing business] as a 'new startup scam.'" *Id.*

163. See *id.*

164. See *id.*

165. See *id.*

166. See *id.* at 139–41.

167. Cutrera, *supra* note 158, at 578. Jonathan Zittrain opines that "the court credited—wrongly, as a factual matter—that no pre-screening of uploaded materials was possible within CompuServe's forums, making the service a passive conduit." Jonathan Zittrain, *A History Of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 258 (2006).

168. *CompuServe*, 776 F. Supp. at 140.

169. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).



Services Co. ("Prodigy"), another large national online service provider with thousands of users, for allegedly defamatory anonymous postings on its "Money Talk" bulletin board, a forum for the discussion of investments and financial information.<sup>170</sup>

In their motion for partial summary judgment, the plaintiffs argued that the moderator of "Money Talk," although an independent third party, was an agent of Prodigy for the purposes of imputing the moderator's knowledge of the statements at issue to Prodigy.<sup>171</sup> While the court stated that it agreed with the reasoning in *CompuServe*, it held that, because Prodigy was exercising editorial control over the moderator and was using a software screening program to filter content, Prodigy was acting more like a publisher than a distributor and therefore was responsible for all of the content in the forum.<sup>172</sup>

Judge Stuart Ain seems to have "anticipated the firestorm" that would follow the *Stratton Oakmont* decision.<sup>173</sup> In an effort to stave off criticism, Judge Ain wrote that those who claim that imposing liability will compel all computer networks to abdicate control of their bulletin boards "incorrectly presume[] that the market will refuse to compensate a network for its increased control and the resulting increased exposure."<sup>174</sup> Offering a bit of unsolicited advice to the operators of Prodigy, he nevertheless suggested that they might want to structure their operations to become more passive in order to avoid liability in the future.<sup>175</sup>

The perverse upshot of the *Stratton Oakmont* decision was that any online service provider who made an effort to restrict or edit user-submitted content, even for purposes of ensuring a family-

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170. *See id.* at \*1.

171. *Id.*

172. *Id.* at \*3-5 (citing RESTATEMENT (SECOND) OF TORTS § 578 (1977), which states, *inter alia*, that "one who repeats or otherwise republishes a libel is subject to liability as if he had originally published it").

173. Schruers, *supra* note 13, at 211.

174. *Stratton Oakmont*, 1995 WL 323710, at \*5. "In fact, *Stratton Oakmont* itself may have ultimately doubted the wisdom of construing ISPs as publishers of third party content." Schruers, *supra* note 13, at 211. The plaintiff dropped its \$200 million claim against Prodigy in exchange for an apology, "[c]iting the 'best interests of the parties as well as the on-line and interactive services industries.'" Peter H. Lewis, *After Apology From Prodigy, Firm Drops Suit*, N.Y. TIMES, Oct. 25, 1995, at D1.

175. *Stratton Oakmont*, 1995 WL 323710, at \*5 ("Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice.").

friendly environment, faced a much higher risk of liability if it failed to eliminate all tortious material than if it simply did not try to control or edit the content of third parties at all. As Judge Ain anticipated, the decision in *Stratton Oakmont* created quite an uproar.

#### D. *The Communications Decency Act of 1996*

Some scholars have suggested that the protections for intermediaries contained in section 230 slipped in unnoticed, much like a thief in the night.<sup>176</sup> This is not entirely true. While Congress's clear intent in passing the Communications Decency Act of 1996 (CDA)<sup>177</sup> was to protect children from harmful material on the Internet, the legislative history associated with the amendment that ultimately became section 230 demonstrates that Congress was also responding to Internet service providers who were voicing growing concern about the liability they faced for third-party speech on their services.

##### 1. Legislative History of Section 230

A detailed account of the legislative history of the CDA is beyond the scope of this Article and is available elsewhere.<sup>178</sup> Instead, this section of the Article focuses on the surprisingly short legislative path traveled by the provisions that became section 230.

On February 1, 1995, Senator James Exon, whose earlier attempt to legislate obscenity on the Internet had failed,<sup>179</sup> proposed legislation that would become part of the Telecommunications Act of 1996,<sup>180</sup> the most extensive overhaul of the venerable telecommunications law since it was first enacted in 1934. Senator Exon sought to achieve his purpose by vesting increased authority in the Federal Communications Commission (FCC) and proclaimed at the time: “[T]he information superhighway should not become a red

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176. See, e.g., Lemley, *supra* note 13, at 102 (stating that section 230 “arose largely by accident”).

177. Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 133 (1996).

178. For a thorough review of the CDA's legislative history, see Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51 (1996).

179. In July 1994, Senator Exon had proposed a stand-alone law intended to “modernize” obscenity regulation “for the digital world.” 140 CONG. REC. S9746 (daily ed. July 26, 1994) (statement of Sen. Exon).

180. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).



light district. This legislation will keep that from happening and extend the standards of decency which have protected telephone users to new telecommunications devices.”<sup>181</sup>

Neither Senator Exon’s first bill nor his second bill contained any language resembling section 230. In fact, the provisions that ultimately became section 230 were introduced as part of a competing piece of legislation sponsored by Representatives Christopher Cox and Ron Wyden, and called the Online Family Empowerment Amendment (the “Cox/Wyden Amendment”).<sup>182</sup> The Cox/Wyden Amendment had the dual purpose of overruling the *Stratton Oakmont* decision and encouraging private efforts to deal with Internet indecency.<sup>183</sup> Cox and Wyden made their policy goals clear, adding language to the legislation that stated, *inter alia*, that it

is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media [and] 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.<sup>184</sup>

As others have observed, the *Stratton Oakmont* decision appeared to have galvanized congressional support for the Cox/Wyden Amendment because the Amendment sought to enlist online service providers in the battle against indecency and to protect them from liability when they did so.<sup>185</sup> Somewhat surprising in light of the debate about section 230 today, the Cox/Wyden Amendment provoked minimal discussion at the time it was incorporated in the CDA.<sup>186</sup>

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181. 141 CONG. REC. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon).

182. 141 CONG. REC. 22,044 (1995).

183. See H.R. REP. NO. 104-458, at 193-94 (1996) (Conf. Rep.); 141 CONG. REC. H8469-70 (daily ed. Aug. 4, 1995) (Statement of Rep. Cox) (“[O]ur amendment will . . . protect [online service providers] from taking on liability such as occurred in the Prodigy case in New York.”).

184. 47 U.S.C. § 230(b) (2006).

185. As Professor Zittrain recounts, after the *Stratton Oakmont* decision “the U.S. Congress was seized with a seemingly distinct cyberlaw issue: the ready availability of online pornography to children—much greater than that of its physical-world counterpart. Limits on the availability of *offline* indecent materials to children had already been effected primarily through gatekeeper liability.” Zittrain, *supra* note 167, at 261.

186. Schruers, *supra* note 13, at 213; see also Cannon, *supra* note 178, at 61-63 (explaining the relationship between *Stratton Oakmont* and section 230).

The Senate and House passed the CDA as Title V of the broader Telecommunications Act of 1996, and President Clinton signed it into law one week later on February 8, 1996.<sup>187</sup> Before the CDA even went into effect, however, a federal court struck down the majority of the CDA as unconstitutional, and the Supreme Court affirmed this decision in *Reno v. ACLU*.<sup>188</sup> But section 230 survived. Indeed, many would say that “it flourished.”<sup>189</sup>

## 2. Judicial Application of Section 230

Section 230 belies its significance with rather modest-sounding provisions.<sup>190</sup> Yet it upended a set of principles enshrined in common law doctrines that had been developed over decades, if not centuries, in cases involving *offline* intermediaries. While the passage of section 230 in 1996, during the Internet’s infancy, provided much needed clarity for intermediaries, it halted judicial attempts to adapt the common law to the changing technology.<sup>191</sup> This break from common law doctrine has led some judges to express reluctance when applying section 230’s protections,<sup>192</sup> and presumably these **misgivings have influenced their interpretations of section 230**, which is a proposition examined in more detail in Part IV.

Although section 230 is far from a model of statutory draftsmanship, a review of the cases interpreting this provision reveals that courts largely have coalesced around a three-pronged approach to determine whether a party is entitled to protection under section 230.<sup>193</sup> Based on this approach, a defendant is entitled to

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187. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133.

188. 521 U.S. 844, 849 (1997).

189. Lemley, *supra* note 13, at 103.

190. Section 230 states 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,” and “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. §§ 230(c)(1), (e)(3) (2006).

191. See Zittrain, *supra* note 167, at 262 (noting that section 230 “ended the percolation of common law cases regarding the proper level of gatekeeping liability”).

192. See *Batzel v. Smith*, 333 F.3d 1018, 1031 n.19 (9th Cir. 2003) (opining that “the broad immunity created by § 230 can sometimes lead to troubling results”); *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003); *Blumenthal v. Drudge*, 992 F. Supp. 44, 51–52 (D.D.C. 1998).

193. While many judges have characterized section 230 as providing immunity from claims relating to content provided by third parties, *see, e.g.*, *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006), the subsection they cite, § 230(c), does not include the term “immunity.” The only mention of immunity-like protection occurs in subsection (c)(2), which states that “[n]o 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 . . . obscene, lewd, . . . or



have a claim against it dismissed if each of the following three conditions are satisfied:

1. The defendant is “a provider or user of an interactive computer service.”
2. The defendant is being “treated as the publisher or speaker” of information for purposes of liability.
3. The challenged information is “information provided by another information content provider.”<sup>194</sup>

A potential fourth prong, stemming from the Ninth Circuit’s recent decision in *Barnes v. Yahoo!*,<sup>195</sup> asks whether the defendant made a specific promise to remove content and failed to do so. This new requirement is discussed in Part IV.

### III. SUMMARY STATISTICS

The next two parts of the Article move from doctrine to empirical results. Part III.A begins by outlining the methodology employed in the collection and analysis of judicial decisions involving section 230 that form the basis for the study. Part III.B then presents a statistical summary of the decisions that form the corpus of the data. Part IV, which follows, applies a number of statistical tools, including correlation and regression analyses, to examine in more detail how judges actually applied section 230.

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otherwise objectionable” materials. 47 U.S.C. § 230(c)(2) (2006). Although § 230(c)(1) does not grant immunity per se, in practical terms courts have applied it to that effect.

194. 47 U.S.C. § 230(c). Section 230 also prohibits liability directed at intermediaries that facilitate access restrictions to objectionable material. *See id.* § 230(c)(2)(A). While a number of decisions in the study set involve the application of section 230(c)(2), the list of these cases is surprisingly short. *See Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009); *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003); *Green v. AOL*, 318 F.3d 465 (3d Cir. 2003); *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008); *Quinstreet, Inc. v. Ferguson*, No. C08-5525RJB, 2008 WL 5102378 (W.D. Wash. Nov. 25, 2008); *Nat’l Numismatic Cert., LLC v. eBay, Inc.*, No. 6:08-cv-42-Orl-19GJK, 2008 WL 2704404 (M.D. Fla. July 8, 2008); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843 (W.D. Tex. 2007); *Doe v. Franco Prods.*, No. 99 C 7885, 2000 U.S. Dist. LEXIS 8645 (N.D. Ill. June 21, 2000); *Mainstream Loudoun v. Bd. of Tr.*, 24 F. Supp. 2d 552 (E.D. Va. 1998); *Pallorium, Inc. v. Jared*, No. G036124, 2007 WL 80955 (Cal. Ct. App. Jan. 11, 2007); *Mail Abuse Prevention Sys. LLC v. Black Ice Software, Inc.*, No. CV 788630, 2000 WL 34016435 (Cal. Super. Ct. Oct. 13, 2000). However, this Article’s primary focus is on § 230(c)(1) because this provision is invoked most often in cases dealing with third-party speech.

195. 570 F.3d 1096, 1108–09 (9th Cir. 2009) (refusing to dismiss claims pursuant to section 230 because plaintiff established a prima facie case of promissory estoppel). It is too soon to tell whether the reasoning in *Barnes* will influence other courts.

*A. Study Methodology*<sup>196</sup>

This study attempts to bring the methodological rigor of social science research to our understanding of the section 230 case law by collecting all judicial decisions involving the application of section 230 and applying “content analysis,” a methodology that seeks to “generat[e] objective, falsifiable, and reproducible knowledge about what courts do and how and why they do it.”<sup>197</sup> The population of interest is all decisions from February 8, 1996, the effective date of section 230, through September 30, 2009, in which a party or the court interposed section 230 as a defense to liability for online content or acts. In drawing conclusions from these decisions, however, readers should be aware that the analysis in this Article is constrained by the recognition that the factual descriptions contained in the opinions are likely to be incomplete.<sup>198</sup> Accordingly, readers should not assume that the facts discussed in this study necessarily correspond to the entirety of the facts on the ground in each case.<sup>199</sup>

To collect the relevant decisions, I ran searches for decisions citing section 230 on Westlaw and LEXIS,<sup>200</sup> the two primary legal research services, and in the online Legal Threats Database maintained by the Citizen Media Law Project at the Berkman Center for Internet and Society at Harvard University (the “CMLP

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196. A more detailed description of the methodology is included in the Appendix.

197. Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63, 64 (2008); see also Beebe, *supra* note 16, at 554 n.13; Reed C. Lawlor, *Fact Content Analysis of Judicial Opinions*, 8 JURIMETRICS J. 107, 110 (1968).

198. See Hall & Wright, *supra* note 197, at 95. Incompleteness stems from the fact that judges typically limit their discussion only to those facts that are necessary to explain the case and to justify their outcome. See *id.* at 96; Lawlor, *supra* note 197, at 109–10. Bias may also come into play because judges sometimes distort the facts they report to justify the legal results they reach. See Hall & Wright, *supra*, at 197. As Mark Hall and Ronald Wright explain, “[w]hile this is a highly contentious charge, distortion does not have to amount to an outright misrepresentation of facts. Instead, distortion results simply when judges emphasize opposing facts less than supporting facts.” *Id.* Indeed, this limitation exists in traditional doctrinal analysis no less than in empirical content analysis. In the end, while judge-reported facts may not “purport to be the real facts,” they are “near enough so that the savings in labor justifies the approximation.” Alan L. Tyree, *Fact Content Analysis of Case Law: Methods and Limitations*, 22 JURIMETRICS J. 1, 32 (1981).

199. Nevertheless, the facts and reasons judges select and espouse make up the substantive content of the law and determine the normative legitimacy of their decisions. See Hall & Wright, *supra* note 197, at 96–97; Jack Knight, *Are Empiricists Asking the Right Questions About Judicial Decisionmaking?*, 58 DUKE L.J. 1531, 1544 (2009).

200. Descriptions of the databases searched and search terms used is available in the Appendix.



Database").<sup>201</sup> To have been counted as a judicial decision, the decision must have announced a disposition of the case or motion under consideration (e.g., denied, granted, dismissed, affirmed) and must have stated at least one reason for the decision. If a decision met these criteria, it was included in the universe of cases to be coded, regardless of the form of the decision.<sup>202</sup>

A research assistant reviewed the results to identify any decisions reported uniquely in either LEXIS or Westlaw. This review yielded a total of 249 decisions within the target date range from the two databases. In order to find unreported decisions, I also ran a search for lawsuit entries in the CMLP Database. This yielded 12 additional decisions that had not been reported on LEXIS or Westlaw. I then reviewed all of the decisions to exclude those that mentioned section 230 only in passing or otherwise had tangential relevance to its use as a defense to liability for online content or acts. I excluded 77 decisions on this basis.<sup>203</sup> This left 184 judicial decisions in the sample set.<sup>204</sup>

These decisions were then coded in order to capture general data about each decision (e.g., date, caption, venue, posture); data about the Web site or publication medium involved; data related to section 230 and specific data about the decision (e.g., the disposition of the defense, appeal status); data about specific areas of judicial focus in

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201. The Citizen Media Law Project, which the author directs, maintains a publicly accessible database of lawsuits, cease and desist letters, subpoenas, and other legal threats directed at those who engage in online speech. See Citizen Media Law Project, Legal Threats Database, <http://www.citmedialaw.org/database> (last visited Jan. 4, 2010). The database contains decisions from, among other sources, Westlaw, LEXIS, Bureau of National Affairs (BNA), legal blogs, and reader tips.

202. This definition mirrors the approach taken in the U.S. Court of Appeals Database, an interdisciplinary research effort to study judicial decision making. See DONALD R. SONGER, THE UNITED STATES COURT OF APPEALS DATABASE: DOCUMENTATION FOR PHASE 1, at 8.

203. A plurality of the decisions ( $n = 33$ ) were removed from the sample set because the reference to section 230 was merely definitional (e.g., used to provide a definition for an interactive computer service in another context or to define the Internet generally).

204. It is important to note that this study relies on a sample of the relevant decisions. Although I sought to study the entire population of judicial decisions in which a party or the court interposed section 230 as a defense to liability for content online, I cannot be sure that I collected every decision. It is likely that some decisions, especially in state courts, escaped my notice. Like other studies attempting to empirically examine case law, the exclusion of some unpublished decisions may bias the results to the extent that there is a systematic difference between available and unavailable decisions. See Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795, 1884-87 (2005). Table A-1 summarizes the search results and is available in the Appendix and on the author's Web site at <http://www.citmedialaw.org/section-230-empirical-study>.

the decision (e.g., whether the court analyzed the scope of the parties covered by section 230, the nature of the defendant's relationship to the source of the content); and various miscellaneous data about the case (e.g., whether the plaintiff sued the third-party source of the content, whether the information was submitted anonymously, whether the court awarded sanctions or fees).<sup>205</sup> To check the reliability of the coding process, I selected a random sample of 18 decisions from the 184 decisions in the study set. A second coder independently coded this sample of 18 cases, and the results of the two coded listings were compared in order to assess the degree of inter-coder reliability.<sup>206</sup>

### *B. Distribution of Decisions*

In the more than thirteen years from the February 8, 1996 effective date of section 230 through the conclusion of this study on September 30, 2009, state and federal courts in the United States produced a total of 184 decisions from 140 cases in which a party or the court interposed section 230 as a defense to liability for online content or acts.<sup>207</sup> This is an average of 13.5 decisions per year during the thirteen-year period, with an average of 8.1 decisions each year (59.8%) holding that section 230 preempted at least one claim in the cases studied.

#### 1. Distribution by Year and Jurisdiction

Since section 230 went into effect in early 1996, the number of decisions issued each year has generally increased, with a particularly sharp increase after 2003. Table 1 sets out the yearly distribution of the federal and state court decisions studied.

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205. The coding instrument is available on the author's Web site at <http://www.citmedialaw.org/section-230-empirical-study>.

206. The percentage rate of agreement and "Krippendorff's alpha" for each of the data fields is listed on the coding form, which is available on the author's Web site at <http://www.citmedialaw.org/section-230-empirical-study>. See KLAUS KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* 221-30 (2d ed. 2004).

207. Because a case was capable of producing more than one decision, the number of decisions exceeded the number of cases.



TABLE 1

## DISTRIBUTION OF DECISIONS BY YEAR

Year	Number of Decisions	Jurisdiction		Preemption Found <sup>208</sup>	
		Federal	State	Number of Decisions	Percentage of Total
1997	4	2	2	4	100%
1998	6	4	2	2	33.3%
1999	4	2	2	1	25.0%
2000	6	2	4	4	66.7%
2001	11	6	5	6	54.5%
2002	4	2	2	3	75.0%
2003	9	7	2	5	55.6%
2004	15	9	6	9	60.0%
2005	16	11	5	11	68.8%
2006	21	14	7	11	52.4%
2007	27	23	4	17	63.0%
2008	40	27	13	23	57.5%
2009	21	14	7	14	66.7%
<b>Total</b>	<b>184</b>	<b>123</b>	<b>61</b>	<b>110</b>	<b>59.8%</b>

In all but one year—2000—the number of decisions issued by federal courts equaled or exceeded the number of decisions in state courts. Overall, the study set included more than twice as many decisions from federal courts as compared to those from state courts.

208. "Preemption Found" includes decisions in which the court found preemption as to at least one claim. It does not include decisions in which the court found no preemption or did not reach the issue. The latter category accounts for situations where the court dismissed the claims on other grounds, such as statute of limitations.

This imbalance is somewhat surprising, given that federal courts are courts of limited jurisdiction and that most of the claims involving section 230 are state law torts.<sup>209</sup> As the next section in this Article notes, some of this imbalance may be due to the fact that approximately 18.5% of the federal court cases studied were removed from state courts.<sup>210</sup> However, this does not account for all of the disparity which is likely attributable to the fact that fewer state court decisions were reported and available on Westlaw and LEXIS.<sup>211</sup>

Figure A graphs these totals by year and provides a two-year moving average of the number of decisions issued by federal and state courts. As figure A reveals, the moving average of federal court decisions shows a slight dip from 1999 to 2000 and a flattening from 2001 to 2002, followed by a steady and marked increase after 2003. This upward trend largely holds true for state court decisions as well, although there is more volatility in the yearly totals. The sharp decline in decisions issued in 2002—less than half as many were issued in both federal and state courts in 2002 as were issued in 2001—appears to mirror similar declines in other databases that track legal decisions and filings over this time period.<sup>212</sup>

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209. On the other hand, the fact that speech on the Internet crosses state lines makes it likely that federal courts had diversity jurisdiction over the defendants in many of the cases. For a detailed breakdown of each claim, see *infra* Part III.B.3.

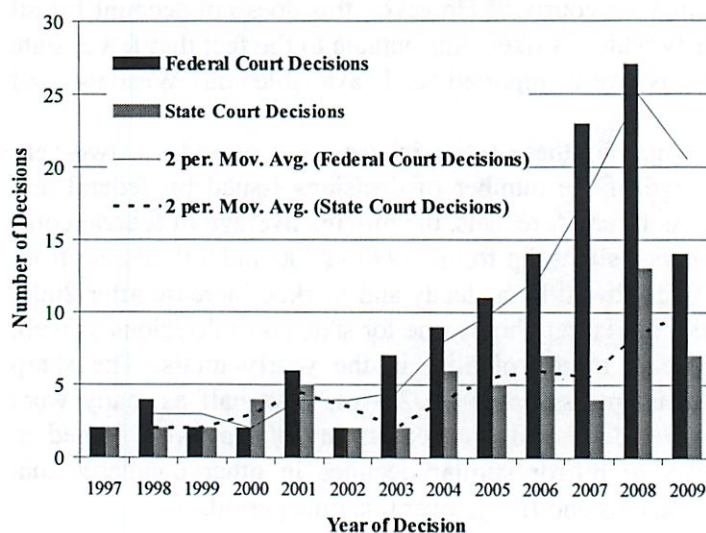
210. See *infra* Part III.B.2.

211. For a discussion of how sampling bias may influence the results, see Krawiec & Zeiler, *supra* note 204.

212. See Beebe, *supra* note 16, at 567 (tracking cases raising copyright fair use); David Ardia, *Bloggers and Other Online Publishers Face Increasing Legal Threats*, POYNTER ONLINE, Sept. 22, 2008, <http://www.poynter.org/column.asp?id=101&aid=150968> (tracking civil lawsuits filed against online publishers).



FIGURE A

DISTRIBUTION OF FEDERAL AND STATE COURT DECISIONS BY YEAR <sup>213</sup>

Thirty-five states are represented in the study set, including a few unexpected states, such as South Dakota and Wyoming, given their relatively small population sizes. The four most populous states, California, Texas, New York, and Florida, had the largest proportions of the decisions at 23%, 5%, 10%, and 7%, respectively.<sup>214</sup> Listing these states in order of their population sizes reveals, however, that the number of decisions in each state is out of sync with the states' relative population sizes. For example, Texas is the second most populous state, but it does not rank second in decisions issued. Figure B shows how each state's proportion of the decisions deviates from what would be expected based on the state's relative population as determined in the 2000 U.S. Census.<sup>215</sup>

213. Totals for 2009 reflect decisions issued through September 30, 2009.

214. See *infra* Table A-2 in the Appendix for a distribution of decisions by state.

215. Because the number of decisions in many states is relatively small, the deviations shown in figure B are not amenable to statistical analysis for significance.

Relative to its population size, the proportion of decisions in California was nearly double the number that would be expected based on the state's relative population alone.<sup>216</sup> New York and Florida also had higher than expected totals, albeit less dramatic than the difference in California.<sup>217</sup> For Texas, the deviation ran in the opposite direction, as it had 1.98% fewer cases than expected based on its relative population size.<sup>218</sup> These deviations may be due to a number of factors, including the extent to which Internet and technology companies are located in each state, whether the state is considered to be a favorable or unfavorable jurisdiction for plaintiffs, the reduced likelihood of publication of state court decisions, and whether there was a disproportionate number of appeals from trial court decisions in the state.<sup>219</sup>

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216. According to the U.S. Census Bureau, California had 12.04% of the U.S. population in 2000. U.S. CENSUS BUREAU, CENSUS 2000 SUMMARY FILE 1 (2000), available at [http://factfinder.census.gov/servlet/DownloadDatasetServlet?\\_lang=en](http://factfinder.census.gov/servlet/DownloadDatasetServlet?_lang=en). However, 23.37% of the decisions in this study set arose in California.

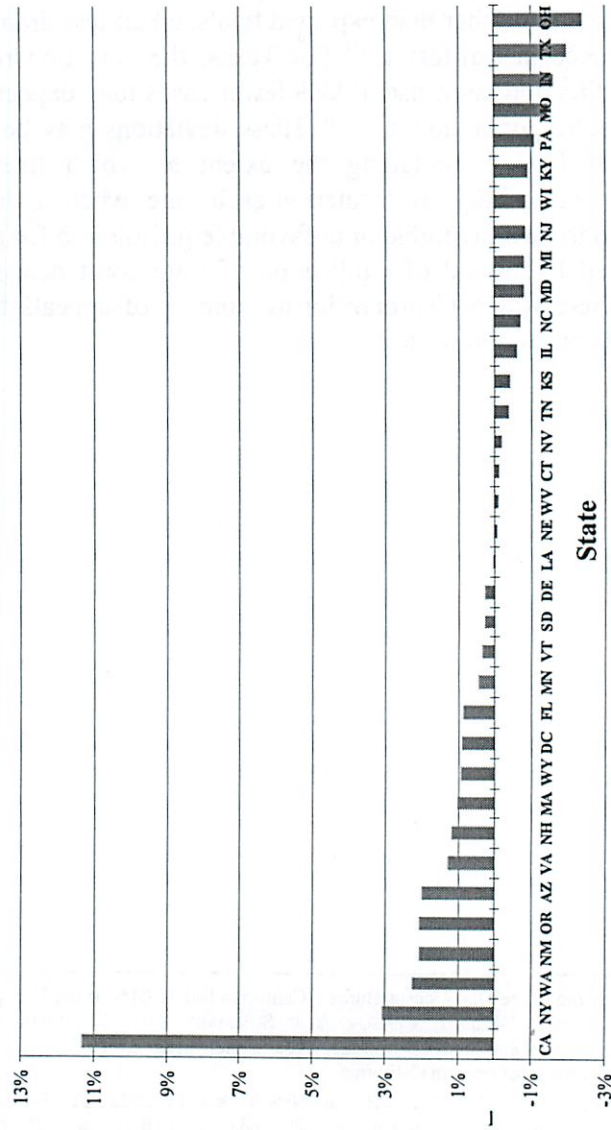
217. According to the U.S. Census Bureau, New York and Florida had 6.74% and 5.98% of the U.S. population in 2000, respectively, but 9.78% and 6.52% of the section 230 decisions. *Id.*

218. According to the U.S. Census Bureau, Texas had 7.41% of the U.S. population in 2000. *Id.*

219. An analysis of the first three factors is outside the scope of the present study, but the fourth factor—the appeal rate in each state—is not. The mean appeal rate for trial court decisions (both state and federal) for all states was 33.7%. The appeal rate for trial court decisions in California (41.9%) was nearly 10 points above the mean.



**FIGURE B**  
DEVIATION OF PROPORTION OF DECISIONS  
RELATIVE TO STATE'S PERCENTAGE OF U.S. POPULATION



Source for population data: U.S. Census Bureau, Census 2000 Summary File 1 (SF 1) 100-Percent Data

## 2. Distribution by Venue

As previously noted, the study set included more than twice as many decisions from federal courts as compared to those from state courts. Table 2 breaks down these federal court decisions by circuit and district. Just as with the composite state data, California courts held disproportionate sway in the totals, with the circuit and district courts of the Ninth Circuit dominating the decisions. Indeed, table 2 reports that the Court of Appeals for the Ninth Circuit was responsible for 37.5% of the circuit court decisions, while district courts in the Ninth Circuit issued 27.3% of all district court decisions. Other than the Third Circuit, which issued 12.5% of the circuit court opinions, no other circuit broke into double digits. Among the various district courts, the Northern District of California and Southern District of New York were each responsible for 7.1% of the district court opinions.



TABLE 2  
DISTRIBUTION OF FEDERAL DECISIONS BY CIRCUIT AND DISTRICT COURT

Circuit	Circuit Court Decisions			District Court Decisions			
	Number of Decisions	Percentage of Total	Number of Decisions	Percentage of Total	Number of Decisions by District Court	Percentage of Total	
First	1	4.2%	5	5.1%	D. Mass. D.N.H.	2 3	2.0% 3.0%
Second	-	-	10	10.1%	D. Conn. E.D.N.Y. S.D.N.Y.	1 2 7	1.0% 2.0% 7.0%
Third	3	12.5%	5	5.1%	D. Del. D.N.J. E.D. Pa.	1 1 3	1.0% 1.0% 3.0%
Fourth	2	8.3%	10	10.1%	D. Md. E.D. Va. M.D.N.C. S.D. W.Va.	1 6 2 1	1.0% 6.1% 2.0% 1.0%

TABLE 2 (continued)

DISTRIBUTION OF FEDERAL DECISIONS BY CIRCUIT AND DISTRICT COURT

Circuit	Circuit Court Decisions			District Court Decisions			
	Number of Decisions	Percentage of Total	Number of Decisions	Percentage of Total	District Court	Number of Decisions by District Court	Percentage of Total
Fifth	1	4.2%	12	12.1%	E.D. La.	1	1.0%
					E.D. Tex.	3	3.0%
					N.D. Tex.	3	3.0%
					S.D. Tex.	1	1.0%
					W.D. La.	2	2.0%
				W.D. Tex.	2	2.0%	
Sixth	2	8.3%	7	7.1%	E.D. Mich.	2	2.0%
					E.D. Tenn.	1	1.0%
					M.D. Tenn.	1	1.0%
					N.D. Ohio	1	1.0%
					W.D. Ky.	1	1.0%
				W.D. Mich.	1	1.0%	



TABLE 2 (continued)

## DISTRIBUTION OF FEDERAL DECISIONS BY CIRCUIT AND DISTRICT COURT

Circuit	Circuit Court Decisions			District Court Decisions			
	Number of Decisions	Percentage of Total	Number of Decisions	Percentage of Total	District Court	Number of Decisions by District Court	Percentage of Total
Seventh	2	8.3%	6	6.1%	N.D. Ill.	3	3.0%
					N.D. Ind.	1	1.0%
					E.D. Wis.	1	1.0%
					W.D. Wis.	1	1.0%
Eighth	-	-	5	5.1%	D. Minn.	3	3.0%
					D.S.D.	1	3.0%
					E.D. Mo.	1	3.0%
Ninth	9	37.5%	27	27.3%	C.D. Cal.	6	6.1%
					D. Ariz.	5	5.1%
					D. Nev.	1	1.0%
					D. Or.	3	3.0%
					N.D. Cal.	7	7.1%
					W.D. Wash.	5	5.1%

TABLE 2 (continued)

DISTRIBUTION OF FEDERAL DECISIONS BY CIRCUIT AND DISTRICT COURT

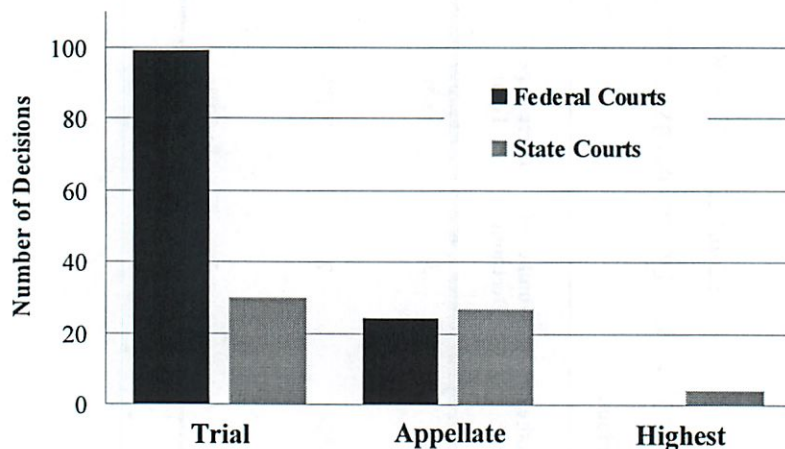
Circuit	Circuit Court Decisions			District Court Decisions			Percentage of Total
	Number of Decisions	Percentage of Total	Number of Decisions	Percentage of Total	District Court	Number of Decisions by District Court	
Tenth	2	8.3%	3	3.0%	D. Wyo.	1	1.0%
					D.N.M.	2	2.0%
Eleventh	2	8.3%	7	7.1%	M.D. Fla.	5	5.1%
					S.D. Fla.	2	2.0%
D.C.	-	-	2	2.0%	D.D.C.	2	2.0%
Total	24		99			99	



Not surprisingly, the number of federal district court decisions exceeded the number of circuit court decisions by a wide margin of 4.13 to 1. This disparity did not hold true for the state court data; the number of state appellate court decisions was nearly identical to the number of state trial court decisions. Unlike in the federal courts, where the U.S. Supreme Court has yet to hear a case involving section 230, a total of four decisions arose from the highest courts in California, Florida, Massachusetts, and New York.<sup>220</sup> Figure C illustrates the relationship between the three court levels studied.

FIGURE C

DISTRIBUTION OF FEDERAL AND  
STATE COURT DECISIONS BY COURT LEVEL



220. See *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006); *Doe v. Am. Online, Inc.*, 783 So. 2d 1010 (Fla. 2001); *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746 (Mass. 2007); *Lunney v. Prodigy Servs. Co.*, 723 N.E.2d 539 (N.Y. 1999).

Figure C also reveals a significant disparity in the number of trial court decisions issued from federal courts as compared to state courts, ninety-nine to thirty, respectively. Given the parity in the number of decisions at the appellate level and relative similarity in appeal rates between the two jurisdictions,<sup>221</sup> the disparity would appear to be due to either a high rate of removal from state courts to federal courts or a lower publication rate of state trial court opinions. Given that only 18.5% of the federal district court decisions arose in cases that were removed from state court, the disparity between the number of federal and state court decisions at the trial court level is likely attributable in part to the fact that fewer state trial court decisions were reported and available on Westlaw and LEXIS.<sup>222</sup>

### 3. Distribution by Legal Claim

Fifty-seven different legal claims arose in the 184 decisions studied, ranging from aiding and abetting the distribution of obscene material to unfair and deceptive trade practices. Because plaintiffs typically asserted more than one claim, the overall number of legal claims exceeded the number of cases and decisions studied. In total, courts considered 254 claims (an average of 3.2 claims per case) while addressing the application of section 230.<sup>223</sup> Figure D provides a breakdown of the incidence of each claim in both state courts and federal courts and includes several oddball claims that demonstrate the creativity some plaintiffs exhibited in these cases.

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221. In fact, the appeal rate in state courts was higher than in federal courts—44.2% of state trial court decisions were appealed and 28.5% of federal district court decisions were appealed.

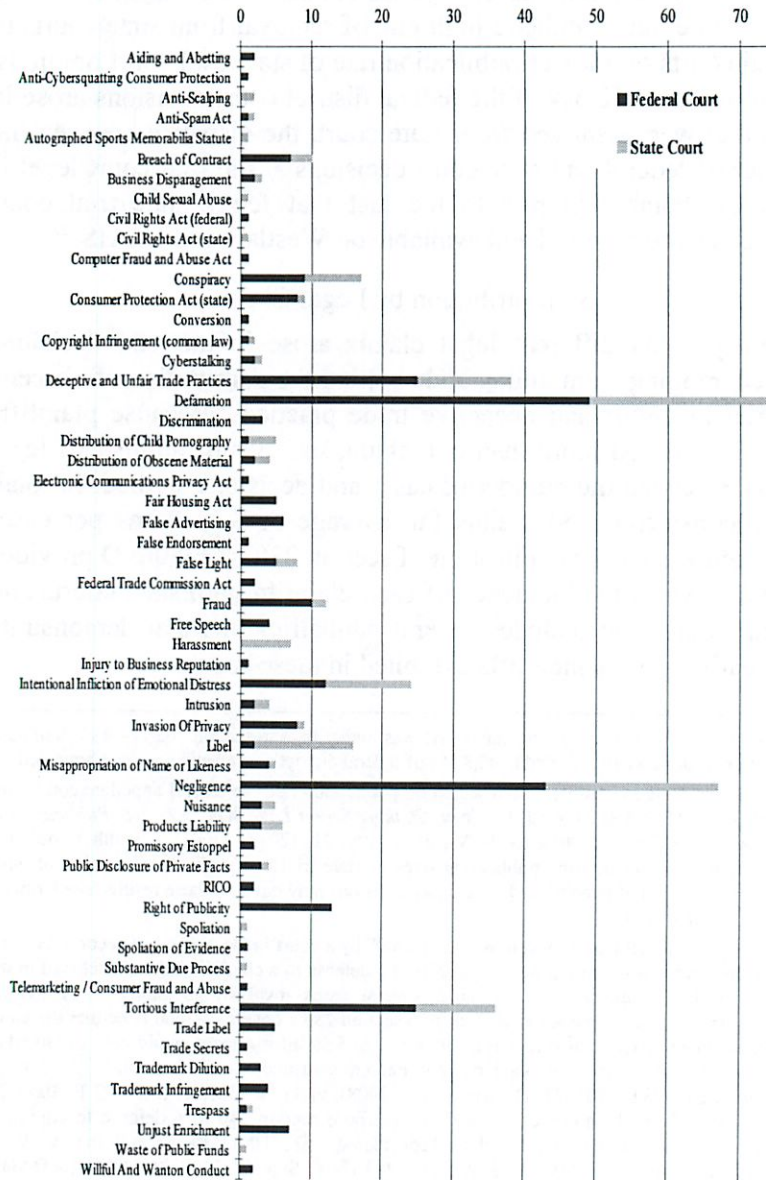
222. While there is considerable research on publication rates in federal appellate courts, see Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 120–21 (2001), the author could not find any studies estimating the publication rates in state trial courts. For a discussion of what impact the exclusion of unpublished state court decisions may have on these results, see Krawiec & Zeiler, *supra* note 204.

223. This total includes only claims “considered” by a court in the context of section 230. If a party or the court did not interpose section 230 as a defense to a claim, it was not included in the claims considered category. For example, several cases involved allegations of copyright infringement—a claim expressly excluded from section 230’s coverage—and if neither the court nor the defendant raised section 230 as a defense, copyright infringement would not be marked as a claim considered in that case. See *Kruska v. Perverted Justice Found., Inc.*, No. CV-08-0054-PHX-SMM, 2008 WL 2705377 (D. Ariz. July 9, 2008); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492 (E.D. Pa. 2006). If, however, a party did interpose section 230 as a defense to copyright infringement, that claim was marked as “considered.” See *UMG Recording, Inc. v. Veoh Networks, Inc.*, No. 600558/08, 2008 WL 5027243 (N.Y. Sup. Ct. Nov. 24, 2008) (defendant asserted section 230 as defense to copyright infringement but court dismissed on *forum non conveniens* grounds).



FIGURE D

FREQUENCY OF LEGAL CLAIMS IN STATE AND FEDERAL COURTS



Predictably, defamation claims topped the list, making up 17.2% of all claims considered by courts in the context of a section 230 defense. The next most frequent claim was negligence, followed by tortious interference. These findings roughly track other studies examining “cybertort” causes of action, which found that defamation and business torts predominated.<sup>224</sup> Given that states vary in how they title similar causes of action, table 3 summarizes the six most frequently occurring legal claim types.<sup>225</sup> Grouped with its sibling claims, defamation, libel, slander, and disparagement arose in more than half (50.5%) of the decisions under study. Deceptive trade practices, unfair competition, and false advertising also appeared in a significant proportion (20.7%) of the decisions. A large number of these claims arose in cases involving content on search engines and marketplace/auction sites, locations where consumers search for products and post reviews. When these claims, which are not defamation claims but rather are claims asserting that the defendant engaged in some form of unfair business practice, are combined with tortious interference claims, the category of business torts made up the second highest proportion of the claims, arising in 37% of the decisions.

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224. See Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 92 (2003) (reporting that business torts made up 35% of claims studied and defamation made up 27%).

225. Given that Congress’s express intent in passing the CDA was to remove obscene material from the Internet, it is notable that there were only five cases involving the alleged distribution of obscene materials or child pornography and these claims were not among the most frequently occurring claim types. See *People v. Gourlay*, No. 278214, 2009 WL 529216 (Mich. Ct. App. 2009); *Voicenet Commc’ns, Inc. v. Corbett*, No. 04-cv-1318, 2006 WL 2506318 (E.D. Pa. Aug. 30, 2006); *Landry-Bell v. Various, Inc.*, No. 05-cv-1526, 2006 WL 273599 (W.D. La. Feb. 1, 2006); *Doe v. America Online, Inc.*, 718 So. 2d 385 (Fla. App. 1998). In several other cases, however, plaintiffs brought negligence claims premised on the intermediary’s failure to prevent harmful contact with minors or the distribution of obscene material. See, e.g., *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008); *Doe IX v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. May 22, 2009); *Doe v. Bates*, No. 05-cv-91, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006); *Doe II v. MySpace, Inc.*, 175 Cal. App. 4th 561 (Ct. App. 2009); *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684 (Ct. App. 2001).



TABLE 3

## MOST COMMON LEGAL CLAIM TYPES

Claims	Decisions	
	Number	Percentage of Total
Defamation (libel, slander) and disparagement	93	50.5%
Negligence	54	29.4%
Deceptive trade practices, unfair competition, false advertising	38	20.7%
Privacy torts (intrusion, false light, publication of private facts, misappropriation/right of publicity)	35	19.0%
Tortious interference with contract or business relations	30	16.3%
Intentional infliction of emotional distress	24	13.0%

## 4. Distribution by Medium of Publication and Content Type

This section of the Article examines where on the Internet all of this allegedly tortious and illegal content is being published and in what form. The largest proportion (21.3%) of the decisions involved speech that occurred on discussion forums, such as Yahoo! Finance, Craigslist, and Usenet.<sup>226</sup> Other common publication media included online matching services, such as apartment matching and dating sites, as well as e-mail, search engines, retail Web sites, and consumer review sites. None of these other publication media, however, appeared in the decisions more than 10% of the time. Table

226. A list of the publication medium categories is included *infra* in table 4 and a description of each category is included in the Appendix.

4 reports the frequency and relative percentages among the various publication media.<sup>227</sup>

**TABLE 4**  
**PUBLICATION MEDIUM AND PROPORTION**  
**OF ANONYMOUS CONTENT**

Publication Medium	Frequency		Anonymous Content	
	Number	Percentage of Total	Number	Percentage of Total
Blog	11	5.2%	3	27.3%
Chat Room	9	4.3%	3	33.3%
Consumer Reviews	15	7.1%	11	73.3%
Content Hosting	4	1.9%	2	50.0%
E-mail	18	8.5%	5	27.8%
Forum	45	21.3%	31	68.9%
Gripe Site	4	1.9%	1	25.0%
Internet Services or Access	11	4.7%	1	10.0%
Marketplace	15	7.1%	5	33.3%
Dating and Matchmaking Services	15	7.1%	10	66.7%
News	7	3.3%	0	0%
Organization	9	4.3%	3	33.3%
Other	1	0.5%	0	0%
Portal/Directory	2	0.9%	1	50.0%
Retail Site	18	8.5%	5	27.8%
Search Engine	16	7.6%	5	31.3%
Social Network	7	3.3%	1	14.3%
Web site – General Information	4	1.9%	0	0%
Wiki – General Information	1	0.5%	0	0%
<b>Total</b>	<b>211</b>			<b>41.2%</b>

227. Because a case could involve more than one publication medium, the total listed in table 4 exceeds the number of decisions studied.



The conventional wisdom seems to be that the Internet is awash in anonymous content.<sup>228</sup> While this may be true in some online contexts, in more than half of the section 230 decisions (58.8%), the speech at issue was not published anonymously. Because the degree of anonymity a user can maintain varies depending on the nature of the communication, the systems used, and other circumstances, for the purposes of this analysis a decision was tagged as involving anonymous speech if the court noted that the speech was anonymous or the parties stated that the source was unknown.<sup>229</sup> In several online contexts, such as news sites, anonymous speech was not at issue in any of the decisions.

This is not to say, however, that anonymous speech is insignificant or unimportant. In several common media of communication, discussion forums, consumer reviews, and online matching/dating services, more than two-thirds of the speech at issue was anonymous. Moreover, as discussed in Part V, anonymity can pose a significant hurdle for plaintiffs seeking to hold a culpable third party liable for injuries he or she has caused.

##### 5. Distribution by Intermediary Role

Intermediaries play many different roles online, and this diversity is reflected in the section 230 case law. In Part I, intermediaries were grouped into three broad classifications based on the functional role they play in facilitating the publication of content online: communication conduits, content hosts, and search/application providers.<sup>230</sup> To these three categories a fourth

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228. See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 64 (2009); KrisAnn Norby-Jahner, "Minor" Online Sexual Harassment and the CDA § 230 Defense: New Directions for Internet Service Provider Liability, 32 HAMLINE L. REV. 207, 245 (2009); Richard Bernstein, *The Growing Cowardice of Online Anonymity*, N.Y. TIMES, Aug. 27, 2008, <http://www.nytimes.com/2008/08/27/world/americas/27iht-letter.1.15670185.html>.

229. Anonymity involves two related concepts: anonymity and pseudonymity. The use of identity abstractions, such as Social Security numbers, school IDs, and even nicknames, is pervasive in society. These identifiers are typically referred to as pseudonyms. Unlike pseudonymity, anonymity generally refers to a situation where the individual or entity discloses no identifying characteristics. JOHN HENRY CLIPPINGER, A CROWD OF ONE: THE FUTURE OF INDIVIDUAL IDENTITY 148-49 (2007). Simply because someone uses a pseudonym, does not mean they are anonymous. Traceable details always exist; it is just a matter of how hard one looks. This is especially true on the Internet, where every computer that connects to the network must have a unique IP address and where servers and routers within the network routinely log communications. See *supra* note 37 and accompanying text.

230. See *supra* Part I.

must be added: the actual users of Web sites and other interactive computer services.

Table 5 reports the intermediary role that most closely matches the functions performed by the party claiming protection under section 230.<sup>231</sup> As table 5 shows, the most common role of defendants claiming a section 230 defense was that of content host, with 68% of the total. The number of conduit providers and the number of search/application providers were relatively similar, but well below the total for content hosts. The user category, denoting a defendant who claims immunity under section 230 as a user of an interactive computer service,<sup>232</sup> was the least common role represented in the 184 decisions studied. This is not surprising given that few users are in a position to assert section 230 as a defense to liability because they are typically the source of the information at issue.

TABLE 5  
INTERMEDIARY TYPE AND SOURCE STATUS

Intermediary Type	Decisions		Party Found to Be Source	
	Number	Percentage of Total	Number	Percentage of Total
Conduit	21	10.7%	0	0%
Content Host	134	68.0%	13	9.7%
Search or Application Provider	28	14.2%	3	10.7%
User	14	7.1%	3	21.4%
Total	197		19	9.6%

231. Because more than one defendant may be involved in a case or decision, the number of defendant types exceeds the total number of decisions studied. For example, if the plaintiff sued YouTube for hosting a defamatory video and her ISP for facilitating its transmission, and both defendants asserted a section 230 defense, the decision would be tagged with two defendant role labels: content host and conduit. If the plaintiff sued two content hosts, the decision would be tagged with one role label: content host.

232. See *infra* Part IV.A.1.



Table 5 also reports how often courts found that the party asserting a section 230 defense was the original source of at least some of the content at issue in the case. This determination needs to be distinguished from the situation in which a court found that the defendant was *responsible* for the content at issue. This is a subtle but important distinction. In making the determination whether the defendant is responsible for the content, courts look both to the defendant's relationship with the third-party source and the defendant's interaction with the content itself.<sup>233</sup> Both of these inquiries presume that a third party—the original source of the content—exists.<sup>234</sup>

But what about the situation where the defendant created the content on its own? A defendant who is the original source of the content is not entitled to protection under section 230 regardless of whether the defendant is a provider or user of an interactive computer service.<sup>235</sup> The rightmost columns in table 5 are meant to capture this relatively rare situation and reveal how often defendants who claimed protection under section 230 were found to be the original source of the content at issue in the case. As table 5 reports, defendants across all role types were found to be the source of some of the content at issue 9.6% of the time. Not surprisingly, users were more likely to claim protection under section 230 in situations where they were the source of the content, while conduits and content hosts fell at the other end of the spectrum.

### C. Win Rates

This section of the Article and the next examine the proportion of unreversed decisions that found claim preemption under section 230, as well as the appeal, affirmance, and reversal rates in the section 230 case law. The term “unreversed decisions” is used throughout this Article to indicate preemption findings that were not subsequently reversed on appeal. While it is useful to know the proportion of claims that were held preempted, only a decision that remains good law can truly be considered a “win” for the party asserting section 230 as a defense.

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233. See *infra* Part IV.A.4.

234. See *infra* Part IV.A.4.

235. See *infra* Part IV.A.5.

Overall, courts found preemption under section 230 for at least one claim in 59.8% of the decisions. When reversed decisions are excluded from the calculations, the overall preemption rate rises to 60.3%.<sup>236</sup> As table 1<sup>237</sup> shows, the preemption rate year-to-year showed no discernable trend. It varied from a high of 100% in 1997 to a low of 25% in 1999. There was little difference between the unreversed preemption rates in state courts and those in federal courts. Federal courts preempted at least one claim in 59.7% of the decisions. In state courts, the proportion was 61.8%.

More interesting results can be found by examining the unreversed preemption rates in federal district and circuit courts broken down by federal circuit, as shown in table 6. Federal courts in the Second Circuit and the Sixth Circuit had the lowest preemption rates, finding preemption in only 30% and 33.3% of their decisions, respectively, which is more than 26% below the overall preemption rate for federal court decisions. Courts in two other circuits, the Tenth Circuit and the Eleventh Circuit, also had preemption rates substantially below the overall rate of 59.7% for federal courts.

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236. These percentages only address preemption under section 230 and do not indicate that in 39.7% of the decisions the court ultimately found for the plaintiff on the merits of her claims.

237. See *supra* Part III.B.1.



TABLE 6  
 PREEMPTION STATUS OF UNREVERSED DECISIONS  
 BY FEDERAL CIRCUIT AND CASE POSTURE

Circuit	Distribution by Circuit		Preliminary Injunction		Judgment on the Pleadings	
	Number	Preemption Rate	Number	Preemption Rate	Number	Preemption Rate
First	6	66.7%	-	-	-	-
Second	10	30.0%	-	-	1	0%
Third	8	75.0%	-	-	-	-
Fourth	12	58.3%	-	-	2	100%
Fifth	12	66.7%	-	-	1	100%
Sixth	9	33.3%	-	-	-	-

TABLE 6 (continued)

PREEMPTION STATUS OF UNREVERSED DECISIONS  
BY FEDERAL CIRCUIT AND CASE POSTURE

Circuit	Distribution by Circuit		Preliminary Injunction		Judgment on the Pleadings	
	Number	Preemption Rate	Number	Preemption Rate	Number	Preemption Rate
Seventh	8	75.0%	-	-	3	100%
Eighth	5	80.0%	-	-	-	-
Ninth	34	67.7%	2	50.0%	1	0%
Tenth	5	40.0%	-	-	-	-
Eleventh	8	37.5%	-	-	-	-
D.C.	2	100%	-	-	-	-
Total	119	59.7%	2	50.0%	8	75.0%



TABLE 6 (continued)

PREEMPTION STATUS OF UNREVERSED DECISIONS  
BY FEDERAL CIRCUIT AND CASE POSTURE

Circuit	Motion to Dismiss/Strike		Summary Judgment		Bench Trial	
	Number	Preemption Rate	Number	Preemption Rate	Number	Preemption Rate
First	4	75.0%	1	0%	-	-
Second	8	37.5%	1	0%	-	-
Third	7	85.7%	1	0%	-	-
Fourth	8	62.5%	1	0%	-	-
Fifth	6	50.0%	3	100%	-	-
Sixth	8	37.5%	1	0%	-	-

**TABLE 6 (continued)**  
**PREEMPTION STATUS OF UNREVERSED DECISIONS**  
**BY FEDERAL CIRCUIT AND CASE POSTURE**

Circuit	Motion to Dismiss/Strike		Summary Judgment		Bench Trial	
	Number	Preemption Rate	Number	Preemption Rate	Number	Preemption Rate
Seventh	4	50.0%	1	100%	-	-
Eighth	2	100%	1	0%	1	100%
Ninth	16	62.5%	13	92.3%	-	-
Tenth	-	-	4	50.0%	-	-
Eleventh	4	0%	4	75.0%	-	-
D.C.	-	-	2	100%	-	-
Total	67	55.6%	33	69.7%	1	100%



Preemption rates in the federal courts varied considerably based on the case posture as well.<sup>238</sup> Overall, 69.7% of unreversed federal court decisions addressing the application of section 230 in a motion for summary judgment found preemption, while 55.6% of the decisions involving a motion to dismiss or motion to strike did so. Courts in the Ninth Circuit, which generally had higher preemption percentages, found preemption in 62.5% of the cases involving a motion to dismiss. That proportion jumped to 92.3% for summary judgment motions.<sup>239</sup> Courts in several other circuits, including the Fifth Circuit and the Eleventh Circuit, also showed increases in their preemption rates for cases involving summary judgment as compared to motions to dismiss.

As previously noted, the most frequently occurring claims in the section 230 cases were defamation-type claims. As figure E shows, there was a marked disparity in the preemption rates for these claims among federal and state courts. In federal courts, only 44.4% of deceptive trade practices and unfair competition claims were preempted. In state courts, the preemption rate was nearly twenty points higher, coming in at 63.6%. An even larger disparity exists among intentional infliction of emotional distress claims, for which federal courts had an 81.8% preemption rate and state courts were almost thirty-two points lower, at 50%. For the remaining claim categories, the state court preemption rate was within ten points of the preemption rate in federal court.

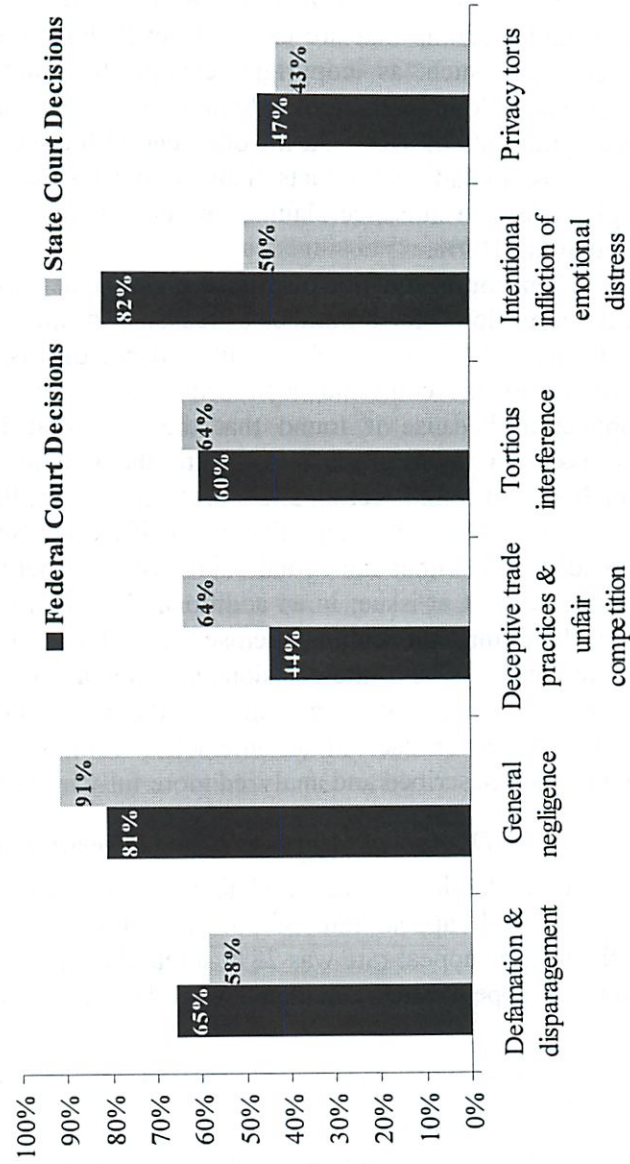
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238. The posture categories indicate the posture of the case at the time when the court addressed the application of section 230. In other words, if the section 230 issue arose in a motion to dismiss, the decision was tagged with "motion to dismiss." If the losing party filed a motion for reconsideration or appealed the first decision to another court, the subsequent decisions were also tagged with "motion to dismiss." Only five of the eleven possible posture categories are listed in table 6. Posture categories with the fewest unreversed decisions are not included. Accordingly, the distribution totals for each row may not equal 100%. For a listing of all posture categories, see *infra* table A-3 in the Appendix.

239. As discussed *infra* Part V.B.1, a number of judges have expressed reluctance in applying section 230 at the motion to dismiss stage, finding that as an affirmative defense it is more appropriately raised after the completion of discovery. *See, e.g., Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003) (instructing that section 230(c)(1) does not constitute grounds for dismissal for failure to state a claim, and should be analyzed as an affirmative defense to plaintiff's claims); *Novak v. Overture Services*, 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004) ("As an initial matter, the Court notes that invocation of section 230(c) immunity constitutes an affirmative defense. As the parties are not required to plead around affirmative defenses, such an affirmative defense is generally not fodder for a Rule 12(b)(6) motion.").

**FIGURE E**

**UNREVERSED PREEMPTION RATES FOR FREQUENTLY OCCURRING LEGAL CLAIMS IN STATE AND FEDERAL COURTS**





To put these claim groupings into context, table A-4 in the Appendix lists the unreversed preemption rates for all legal claims that were considered by a court in the context of section 230. Predictably, claims that are expressly excluded from section 230's coverage,<sup>240</sup> such as copyright claims, trademark claims, and Electronic Communications Privacy Act claims,<sup>241</sup> showed a preemption rate of 0%.<sup>242</sup> At the other end of the spectrum, a number of claims, including products liability, disclosure of trade secrets, negligence, and nuisance claims, saw preemption rates approaching or equaling 100%.

When courts did not dismiss a claim under section 230, they declined to do so for a number of reasons. In more than half of the decisions (59.4%) in which a court did not dismiss a claim under section 230, the court did not reach the question of section 230's application because it found that the claims at issue warranted dismissal on other grounds.<sup>243</sup> As to the remaining decisions in which a court found section 230's protections inapplicable as to at least one claim, the court found that in 56.4% of those decisions, the defendant was either the actual source of, or otherwise responsible for, the content at issue; in an additional 35.9% of the decisions the court held that the claims themselves fell outside section 230's protection. In 7.7% of the decisions in which a court did not dismiss at least one claim, the court found that the defendant did not qualify as a provider or user of an interactive computer service. These findings are described and analyzed more fully in Part IV below.

#### *D. Appeal, Affirmance, and Reversal Rates*

Of the 184 decisions studied, 62 were appealed to a higher court, for an overall appeal rate of 33.7%.<sup>244</sup> For federal district court decisions, the appeal rate was 28%, a rate that is substantially higher than the appeal rates calculated by other researchers for federal

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240. 47 U.S.C. § 230(e) (2006).

241. 18 U.S.C. § 2510 (2006).

242. For a discussion of how courts have defined and applied these exemptions, see *infra* notes 281-87 and accompanying text.

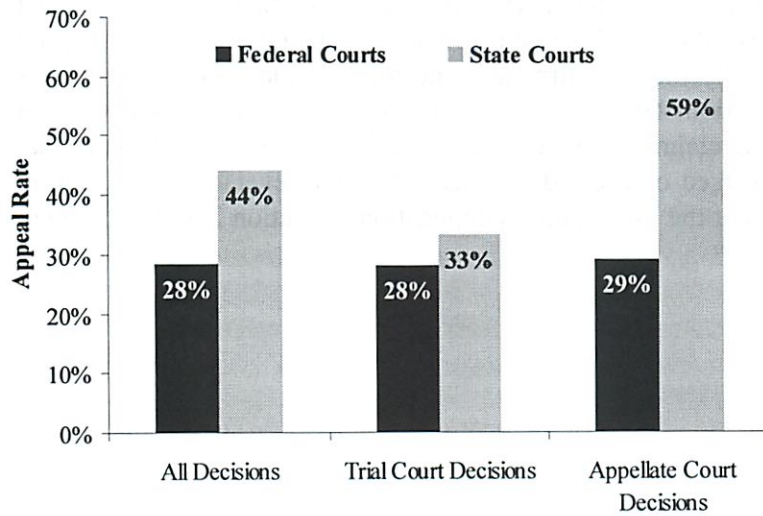
243. If these claims are removed from the calculations, the unreversed preemption rate rises to 76.9%.

244. In 19 of the 184 decisions, the time to appeal had not yet expired when this study was completed. These decisions were excluded from the appeal rate calculations.

district courts in other subject areas.<sup>245</sup> Trial court decisions in state courts evidenced an even higher appeal rate: 33.3%. Figure F charts the appeal rates for decisions from trial and appellate courts, revealing that at all court levels, the appeal rate for state courts exceeded the rate for federal courts.

**FIGURE F**

**APPEAL RATES IN FEDERAL AND STATE COURTS**



245. Beebe, *supra* note 16, at 575 (calculating a 25.1% appeal rate from federal district courts in copyright fair use cases for the period 1978–2005); Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 664 & tbl.1 (2004) (calculating a 10.9% appeal rate for all district court cases and a 21% appeal rate for district court cases with a judgment for one party from 1987 to 1996).



However, appeal rates tell only part of the story. While the majority of decisions were not appealed to a higher court, those that were appealed evidenced a relatively low overall reversal rate of 16.4%. The reversal rate for federal court decisions was 11.4%, well below the reversal rates found in other empirical studies.<sup>246</sup> The reversal rate was somewhat higher in state courts: 23.1%. Table 7 reports in detail the affirmance and reversal rates for decisions that were appealed in federal and state court. References to affirmed or reversed “on other grounds” indicate the court’s specific treatment of the section 230 issue raised on appeal. As table 7 shows, most appeals resulted in either an affirmance or denial of certiorari, with a substantially higher affirmance rate for decisions dismissing claims under section 230 (45.5%) as compared to decisions that did not dismiss a claim under section 230 (17.7%). Of the decisions that were reversed or vacated, the majority were reversed or vacated on the basis of the lower court’s application of section 230, not on other grounds.

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246. See Beebe, *supra* note 16, at 574 (calculating a 33.8% reversal rate for federal circuit courts in cases involving copyright fair use for the period 1978–2005); Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC’Y REV. 163, 177 tbl.1 (2006) (calculating a 32% reversal rate for all federal circuits during the period 1980–2002).





Lastly, relatively few of the appellate decisions involved a concurrence or dissent. Of the fifty-five decisions arising in appellate courts or higher, only eight (14.5%) included a concurrence or dissent with regard to the majority's holding concerning section 230.<sup>247</sup> Unsurprisingly, three of the eight decisions came from the Court of Appeals for the Ninth Circuit, which generated several concurrences and dissents associated with the circuit's panel and en banc decisions in *Fair Housing Council of San Fernando Valley v. Roommates.com*.<sup>248</sup> Of the remaining forty-seven appellate decisions without a concurrence or dissent, eight (17%) were issued as per curiam decisions.

#### IV. CONTENT ANALYSIS

This part of the Article seeks to identify what factors led judges to grant or deny dismissal under section 230 and how strongly those factors influenced each other and the outcome in the case. It begins by describing six areas of judicial inquiry and reporting their frequency within the section 230 case law. Part IV.B then applies correlation and regression analyses to examine how these areas of inquiry relate to each other and to a court's ultimate finding on the question of preemption.

##### A. Areas of Judicial Inquiry

While section 230 does not lay out a stepwise approach for judges to follow when applying its provisions, courts largely have coalesced around a three-pronged test to determine whether a party is entitled to dismissal, which asks (1) whether the party claiming section 230 protection is "a provider or user of an interactive

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247. See *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1204–06 (10th Cir. 2009) (concurrence by Judge Tymkovich); *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1178–80 (9th Cir. 2009) (concurrence by Judge Fisher); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1176–89 (9th Cir. 2008) (concurrence in part and dissent in part by Judge McKeown); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 489 F.3d 921, 930–35 (9th Cir. 2007) (concurrence in part and dissent in part by Judge Reinhardt and concurrence in part by Judge Ikuta); *Batzel v. Smith*, 333 F.3d 1018, 1036–41 (9th Cir. 2003) (concurrence in part and dissent in part by Judge Gould); *Barrett v. Rosenthal*, 146 P.3d 510, 529–31 (Cal. 2006) (concurrence by Justice Moreno); *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1018–28 (Fla. 2001) (dissent by Justice Lewis); *Maughan v. Google Tech., Inc.*, 49 Cal. Rptr. 3d 861, 870–79 (Ct. App. 2006) (concurrence in part and dissent in part by Judge Vogel, and concurrence by Judge Rosenthal).

248. 489 F.3d 921 (9th Cir. 2007), *rev'd, aff'd, & vacated in part en banc*, 521 F.3d 1157 (9th Cir. 2008).

computer service”; (2) whether the party claiming protection is being “treated as the publisher or speaker” of information for purposes of liability; and (3) whether the information at issue is “information provided by another information content provider.”<sup>249</sup> Although these prongs provide a handy roadmap for judges, they merely provide a starting point for analyzing the section 230 cases. Indeed, to simply say that the court answered yes as to the first and second prongs, but answered no as to the third prong, masks the subtle distinctions in how judges actually decided these cases.

This section of the Article seeks to qualitatively examine the arguments and justifications judges articulated when deciding whether an Internet intermediary should or should not be held liable for facilitating the speech of others.<sup>250</sup> It does so by identifying six areas of judicial inquiry within the cases and categorizing the decisions according to how the court treated each inquiry.<sup>251</sup> The first three areas of inquiry hew closely to the prongs identified above. The latter three areas, which examine the nature of the intermediary’s relationship with the source, its interaction with the content, and its relationship with the plaintiff or public, add more nuance.

### 1. Interactive Computer Services Covered

Courts typically start their analysis by addressing whether the defendant is entitled to invoke section 230 in the first place. Unlike other statutory safe harbors,<sup>252</sup> section 230 does not differentiate between categories of intermediaries. Instead, it applies to any “provider or user of an interactive computer service,”<sup>253</sup> a phrase

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249. 47 U.S.C. § 230(c)(1) (2006).

250. An empirical study such as this has its roots in American Legal Realism, which seeks to understand law by focusing on what judges actually do. *See, e.g.*, Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 71–76, 107 (1928) (exhorting law professors to employ social science tools in the study of what courts do). Indeed, as Oliver Wendell Holmes famously proclaimed: “[P]rophetries of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.” Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

251. Because some decisions were placed in more than one category, the total number of category tags may not equal the total number of decisions. In addition, in roughly a quarter of the decisions (23.8%), the court did not reach the question of section 230’s application, typically because it dismissed the case on other grounds. Those decisions are not included in these category summaries.

252. *See* 17 U.S.C. § 512(a)–(d) (2006) (defining four classes of intermediaries under the Digital Millennium Copyright Act).

253. 47 U.S.C. § 230(c)(1) (2006).



courts have construed broadly.<sup>254</sup> In fact, in many of the decisions studied, either the plaintiff conceded that the defendant was a provider of an interactive computer service (ICS),<sup>255</sup> the court assumed this to be the case based on the plaintiff's own description of the defendant,<sup>256</sup> or the court simply did not address the issue at all.

TABLE 8

## INTERACTIVE COMPUTER SERVICES (ICS) COVERED

Finding	Number of Decisions	Percentage of Total
Defendant found not to be provider or user of an ICS	3	2.0%
Defendant found to be an ICS without differentiation	48	32.7%
Defendant found to be provider of an ICS	35	23.8%
Defendant found to be user of an ICS	10	6.8%
Court decision did not address the ICS issue	51	34.7%
Total	147	

254. See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1030 n.15 (9th Cir. 2003) (noting that the term "includes a wide range of cyberspace services, not only internet service providers").

255. See, e.g., *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980, 984 (10th Cir. 2000) (plaintiff conceded issue); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 846 (W.D. Tex. 2007) (conceded); *Prickett v. InfoUSA, Inc.*, 561 F. Supp. 2d 646, 651 (E.D. Tex. 2006) (conceded); *Noah v. AOL Time Warner Inc.*, 261 F. Supp. 2d 532, 538 (E.D. Va. 2003) (conceded); *Patentwizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001) (conceded).

256. See, e.g., *Mayhew v. Dunn*, No. 580-11-07, 2008 WL 4281984 (Vt. Super. Ct. Mar. 18, 2008) (assumed); *Landry-Bell v. Various, Inc.*, No. 05-cv-1526, 2005 U.S. Dist. LEXIS 38471, at \*6 (W.D. La. Dec. 27, 2005) (court assumed based on plaintiff's description); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40 (Wash. Ct. App. 2001) (assumed).

To aid the analysis that follows, each decision was categorized according to how the court treated the question of whether the party asserting section 230 qualified as a provider or user of an ICS. The five tags used in the coding are listed along with their relative frequencies in table 8. Decisions falling in the first category, indicating that the judge found that the defendant was not a provider or user of an ICS, invariably went on to state that the defendant was not entitled to protection under section 230.<sup>257</sup> The remaining categories represent findings in the defendants' favor.

As table 8 reports, more than one-third (34.7%) of the decisions lacked any discussion regarding whether the defendant was a provider or user of an ICS. When judges did address this question, however, they overwhelmingly found that the defendant qualified under this prong. As a result, nearly all defendants that provide access to online content have been held to be providers or users of an ICS.<sup>258</sup> Examples include online auction Web sites,<sup>259</sup> libraries that provide Internet access to the public,<sup>260</sup> online dating sites,<sup>261</sup> online classifieds,<sup>262</sup> search engines,<sup>263</sup> providers of Internet access through computer rentals,<sup>264</sup> retail Web sites,<sup>265</sup> and employers that provide Internet access to their employees.<sup>266</sup>

257. See regression analysis *infra* section B. The three decisions that stated that a defendant did not qualify as a provider or user of an ICS were *800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F. Supp. 2d 273, 295 (D.N.J. 2006); *MCW, Inc. v. Badbusinessbureau.com, LLC*, No. 3:02-CV-2727-G, 2004 U.S. Dist. LEXIS 6678, at \*30-31 (N.D. Tex. Apr. 19, 2004); and *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA*, 143 Cal. App. 4th 1284, 1301 (Ct. App. 2006). Cf. *Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty USA*, 129 Cal. App. 4th 1228, 1258 n.9 (Ct. App. 2005) (declining to reach section 230 issue, but expressing doubt that defendant qualifies as a provider or user of an ICS).

258. Courts have been quick to reject the argument that section 230 applies only to ISPs and intermediaries that provide Internet access. See, e.g., *Barrett v. Fonorow*, 799 N.E.2d 916, 922 (Ill. App. Ct. 2003). But see *800-JR Cigar*, 437 F. Supp. 2d at 295 (holding that defendant's search engine was not an ICS because "as far as th[e] Court can tell, GoTo does not provide access to the Internet like service providers such as AOL").

259. See, e.g., *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 714 (Ct. App. 2002).

260. See *Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772, 776-77 (Ct. App. 2001).

261. See, e.g., *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 294 (D.N.H. 2008).

262. See, e.g., *Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 698 (N.D. Ill. 2006).

263. See, e.g., *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006).

264. See, e.g., *Patentwizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001).

265. See, e.g., *Schneider v. Amazon, Inc.*, 31 P.3d 37, 41 (Wash. Ct. App. 2001).

266. See, e.g., *Delfino v. Agilent Tech., Inc.*, 52 Cal. Rptr. 3d 376 (Ct. App. 2006).



In addition, while it is often overlooked, Congress did not limit section 230's protections only to *providers* of interactive computer services. Users also are covered,<sup>267</sup> although the term "user" is not defined in the statute and the limited legislative record does not indicate why Congress included users under section 230's umbrella.<sup>268</sup> In the few cases that have addressed the definition of "user," the courts have concluded that individual Internet users, including those who "actively select[] and post[] material based on its content" are entitled to the same protections providers receive under section 230.<sup>269</sup>

## 2. Legal Claims Covered

In order for a claim to be preempted under section 230(c)(1), the cause of action must treat the defendant as a "*publisher or speaker* of information provided by another information content provider."<sup>270</sup> When applying this standard, courts typically evaluate the substance of the plaintiff's claims to determine whether liability is predicated upon the defendant's status as a publisher of the content at issue.

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267. 47 U.S.C. § 230(c) (2006).

268. *See id.*; H.R. CONF. REP. NO. 104-458 (1996) (Conf. Rep.).

269. *Barrett v. Rosenthal*, 146 P.3d 510, 526, 528 (Cal. 2006); *see also* *Grace v. eBay, Inc.*, 16 Cal. Rptr. 3d 192, 198 (Ct. App. 2004) ("We conclude based on the plain meaning of the statutory language that the term 'user' as used in the statute encompasses all persons who gain access to the Internet through an ISP or other service or system . . .").

270. 47 U.S.C. § 230(c)(1) (emphasis added).

TABLE 9  
SCOPE OF CLAIMS COVERED

Finding	Number of Decisions	Percentage of Total
Claim qualifies for preemption defense under section 230	69	46.6%
Claim does not qualify for preemption defense because claim is based on distributor liability	1	0.7%
Claim does not qualify for preemption defense because claim is not based on publisher liability	5	3.4%
Claim does not qualify for preemption defense because claim is a federal IP claim	3	2.0%
Claim does not qualify for preemption defense because claim is a state IP claim	5	3.4%
Claim does not qualify for preemption defense because claimant seeks equitable relief	2	1.4%
Court decision did not address scope of claims covered by section 230	63	42.6%
Total	148	

Table 9 lists the seven tags used to code how each decision addressed this issue. Decisions falling in the first and last categories involved findings—or assumed findings—in the defendants' favor. Decisions in the remaining categories indicate that the court found that at least one claim at issue in the case fell outside section 230's protection.<sup>271</sup>

271. See, e.g., *Atlantic Recording Corp. v. Project Playlist*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009) (finding claim based on state IP law); *Gucci Am., Inc. v. Hall & Assocs.*, 135 F.



As table 9 reports, judges exhibited a surprising tendency to ignore this inquiry. In nearly half (42.6%) of the decisions, the judge did not specifically address whether the claims at issue qualified for preemption under section 230, apparently assuming without discussion that the plaintiff sought to hold the intermediary liable as a publisher or speaker. A small number of decisions (10.9%) found a claim not covered for the reasons described in table 9, while almost half of the decisions (46.6%) expressly found the claims at issue were encompassed by section 230.

Defamation-type claims were far and away the most numerous claims in the section 230 case law,<sup>272</sup> and the courts consistently held that these claims fell within section 230's protections.<sup>273</sup> But section 230 is not limited solely to defamation claims. A wide range of claims fall within its ambit. For example, courts held that section 230 applied to claims such as invasion of privacy,<sup>274</sup> misappropriation,<sup>275</sup> tortious interference,<sup>276</sup> civil liability for criminal law violations,<sup>277</sup> general negligence,<sup>278</sup> and negligent failure to remove information after notification.<sup>279</sup>

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Supp. 2d 409, 415 (S.D.N.Y. 2001) (finding no preemption because claim based on federal IP law).

272. See *supra* Part III.B.3.

273. See, e.g., *Whitney Info. Network, Inc. v. Verio, Inc.*, No. 04-cv-462, 2006 U.S. Dist. LEXIS 1424, at \*7 (M.D. Fla. Jan. 11, 2006); *Patentwizard, Inc. v. Kinko's Inc.*, 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998).

274. See, e.g., *Parker v. Google, Inc.*, 242 Fed. Appx. 833, 833 (3d Cir. 2007); *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348, at \*3 (E.D. Tex. Dec. 27, 2006); *Landry-Bell v. Various, Inc.*, No. 05-1526, 2005 U.S. Dist. LEXIS 38471, at \*3 (W.D. La. Dec. 27, 2005). *But see Doe v. Friendfinder Network*, 540 F. Supp. 2d 288, 288, 302 (D.N.H. 2008) (refusing to dismiss invasion of privacy claim insofar as it was based on a right of publicity theory, which the court considered a state IP claim under section 230(e)(2)).

275. See, e.g., *Gregerson v. Vilana Fin., Inc.*, No. 06-1164 ADM/AJB, 2008 U.S. Dist. LEXIS 11727, at \*28-29 (D. Minn. Feb. 15, 2008); *Chelsea Fine Custom Kitchens, Inc. v. Apartment Therapy LLC*, No. 0603554/2007, 2008 WL 2693129, at \*2 (N.Y. Sup. Ct. Feb. 8, 2008).

276. See, e.g., *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1117-18 (W.D. Wash. 2004).

277. See, e.g., *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at \*4 (E.D. Tex. Dec. 27, 2006).

278. See, e.g., *Doe v. MySpace*, 474 F. Supp. 2d 843, 852 (W.D. Tex. 2007) (dismissing claim asserting that MySpace was negligent for failing to implement age verification procedures and to protect a fourteen-year old from sexual predators), *aff'd*, 528 F.3d 413, 422 (5th Cir. 2008).

279. See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1096 (9th Cir. 2009); *Green v. Am. Online*, 318 F.3d 465, 465 (3d Cir. 2003); *Global Royalties v. Xcentric Ventures*, 544 F. Supp. 2d 929, 931-32 (D. Ariz. 2008); *Doe v. Am. Online, Inc.*, No. CIV. CL 97-631 AE, 1997 WL 374223, at \*1 (Fla. Cir. Ct. June 26, 1997).

This last claim is especially significant. Recall that under the common law, distributors face liability if they know or have reason to know of the tortious or illegal materials they are distributing.<sup>280</sup> Plaintiffs have long argued that the distinct meanings attributed to these terms under the common law, and Congress's explicit inclusion of the term "publisher" without mention of distributor liability in section 230(c)(1), demonstrate that section 230 limits only publisher liability, while leaving distributor liability intact. Although courts generally have rejected this argument,<sup>281</sup> as discussed in Part IV.A.6, the dispute is not entirely moribund.

While Congress did not expressly list the claims it intended to preclude, it did list the areas of law to which section 230 immunity does not extend: federal criminal law, communications privacy law, and intellectual property (IP) law.<sup>282</sup> The first two categories are relatively straightforward. The last category has been the subject of some disagreement, as courts have grappled with whether state law IP claims—or state claims that could be classified as IP claims, such as the right of publicity—are outside section 230's protections. Mark Lemley has noted: "We can be quite confident that [the section 230 IP exception] applies to patents, copyrights, and trademarks, somewhat less confident that trade secrets and the right of publicity are also IP claims, and even less confident for the penumbra of quasi-IP claims."<sup>283</sup>

An examination of the decisions reveals that only the Ninth Circuit has held that state IP claims qualify for preemption under section 230. The court reasoned that "permitting the reach of any particular state's definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress's expressed goal of insulating the development of the Internet from the various state-law regimes."<sup>284</sup> District courts in other circuits have

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280. See *supra* Part II.A.3.

281. See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1027 n.10 (9th Cir. 2003); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997). But see *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (musing in dicta that section 230 does not extend to distributor liability).

282. 47 U.S.C. § 230(e) (2006).

283. Lemley, *supra* note 13, at 108 (footnote omitted).

284. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (finding plaintiff's right of publicity/misappropriation claim preempted under section 230).



roundly rejected this interpretation of section 230,<sup>285</sup> although no other circuit court of appeals has squarely addressed the issue yet.

A second disagreement evident in the decisions stems from the fact that IP claims are not self-defining. For example, misappropriation and right of publicity claims, which arose eighteen times in the decisions studied, exhibit characteristics of both tort law and intellectual property law, generally subjecting to liability anyone “who appropriates to his own use or benefit the name or likeness of another.”<sup>286</sup> Although the Eleventh Circuit has suggested in dicta that section 230 does not cover such claims,<sup>287</sup> only one court to date has held that section 230 does not foreclose right of publicity claims.<sup>288</sup>

### 3. Information Content Providers Covered

In order to be covered by section 230, the information at issue must be “provided by another information content provider.”<sup>289</sup> While seemingly straightforward, this short phrase has been the genesis of most of the disagreements within the section 230 case law.

Section 230 defines an information content provider (ICP) in section 230(f)(3) as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>290</sup> Under section 230, a defendant can be both an ICP and a

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285. See, e.g., *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 703–04 (S.D.N.Y. 2009); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302 (D.N.H. 2008); *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007); *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 415 (S.D.N.Y. 2001).

286. RESTATEMENT (SECOND) OF TORTS § 652C (1977). Misappropriation arose from Samuel Warren and Louis Brandeis’s 1890 article on privacy torts, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). In their highly influential article, Warren and Brandeis expressed concern over the increasingly sensationalist press that was “overstepping in every direction the obvious bounds of propriety and . . . decency[.]” and cautioned that various technological developments—particularly “instantaneous photograph[y]”—posed a grave threat to privacy. *Id.* at 195–96. While misappropriation and its sister claim, the right of publicity, vary widely from state to state, both have their roots in Warren and Brandeis’s article. See Russell J. Frackman & Tammy C. Bloomfield, *The Right of Publicity: Going to the Dogs?*, L.A. DAILY JOURNAL, Sept. 1996, available at <http://www.gseis.ucla.edu/iclp/rftb.html> (providing an overview of the history, policy, and evolution of the right of privacy among the circuits).

287. See *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1323–24 (11th Cir. 2006) (noting in dicta that “there appears to be no dispute that the right of publicity is a type of intellectual property right,” but dismissing plaintiff’s right of publicity claim on the merits without reaching the question of whether section 230 applied).

288. *Friendfinder*, 540 F. Supp. 2d at 302.

289. 47 U.S.C. § 230(c)(1) (2006).

290. *Id.* § 230(f)(3).

provider or user of an interactive computer service. When a defendant is both an ICP and a provider or user of an interactive computer service, protection under section 230 would extend only to information provided by *another* person or entity that qualifies as an ICP.<sup>291</sup> Accordingly, a defendant will lose out on section 230's protections if either the third-party source of the information fails to qualify as an ICP or the defendant is found to be the source of the content at issue in the case.

TABLE 10

INFORMATION CONTENT PROVIDERS (ICP) COVERED

<b>Finding</b>	<b>Number of Decisions</b>	<b>Percentage of Total</b>
Defendant found not to be the ICP with regard to the content at issue	37	24.3%
Source found to be the ICP with regard to the content at issue	39	25.7%
Source found not to qualify as an ICP	1	0.7%
Defendant found to be the ICP with regard to the content at issue	15	9.9%
Court decision did not address the ICP issue	60	39.5%
Total	152	

Table 10 lists the five tags used to code for this issue, along with their relative frequencies. Decisions falling in the first two categories (which make up 50% of the decisions) represent findings in the defendant's favor. In other words, the court found that an actual third party existed and qualified as an ICP. In the decisions in the next two categories (10.6% of the decisions), the court concluded that the defendant was not entitled to protection under section 230 because

291. See *id.* § 230(c)(1), (d), (f)(3).



either the source did not qualify as an ICP<sup>292</sup> or the defendant was the source of the content at issue.<sup>293</sup>

As with the previous areas of inquiry, judges often (in 39.5 % of the decisions) ignored this inquiry, apparently assuming without discussion that the information was provided by another ICP. Two courts, however, have questioned whether section 230's requirement that the content at issue be provided "through the Internet" means that the original source must be the one that provided the content through the Internet or that the information need only end up on the Internet eventually.

In *Batzel v. Smith*,<sup>294</sup> the Ninth Circuit concluded that this question turned on whether a reasonable person would believe that the original source intended that the content be published on the Internet, noting that "[t]he structure and purpose of § 230(c)(1) indicate that the immunity applies only with regard to third-party information provided *for use on the Internet*."<sup>295</sup> Policy concerns clearly motivated the court to cabin in section 230's protections: "immunizing a publisher or distributor for including content not intended for Internet publication increases the likelihood that obscene and defamatory material will be widely available."<sup>296</sup>

As table 10 reports, only one decision concluded that a third-party source was not an information content provider. That decision,

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292. Only one decision fell in this category. See *Brandewyne v. Author Solutions, Inc.*, No. 2004-CV-4363-TT, 2006 WL 4005011 (D. Kan. Jan. 31, 2006), which is discussed *infra* note 298 and accompanying text.

293. See, e.g., *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009); *Mazur v. Ebay, Inc.*, No. C 07-03967 MHP, 2008 WL 618988 (N.D. Cal. Mar. 4, 2008); *MCW, Inc. v. Badbusinessbureau.com, LLC*, No. 02-CV-2727-G, 2004 WL 833595 (N.D. Tex. April 19, 2004).

294. 333 F.3d 1018 (9th Cir. 2003).

295. *Id.* at 1033.

296. *Id.* at 1034. The Ninth Circuit also focused on whether the defendant received the information in his capacity "as a provider or user of interactive computer services," suggesting that if he received the information in a "snail mail" letter it would be unlikely that the letter was sent to him in his "capacity as [provider of] a Web site service." *Id.* at 1033. The court offered the example of a hard-copy magazine article or book that an online publisher decides to publish to the Internet. "One would not say," the court reasoned, "that the author of [such content] 'provided' it to an interactive computer service provider or user by allowing the article to be published in hard copy off-line. Although such an article is available to anyone with access to a library or a newsstand, it is not 'provided' for use on the Internet." *Id.* at 1032-33. This distinction is not of idle concern given Google's efforts to digitize the world's libraries and make the books—written by authors who never anticipated their publication online—available through its Google Book Search. See Google Book Search News, *The New York Times*, [http://topics.nytimes.com/top/news/business/companies/google\\_inc/google\\_book\\_search/index.html](http://topics.nytimes.com/top/news/business/companies/google_inc/google_book_search/index.html) (last visited Nov. 14, 2009).

from a state court in Kansas, applied the Ninth Circuit's reasoning in *Batzel* and held that a print-on-demand book publisher was not entitled to protection under section 230 because the information was provided for publication in a hard-copy book, not "on the Internet."<sup>297</sup>

#### 4. Nature of the Intermediary's Relationship with the Content's Source

The analysis now moves to more challenging ground as it seeks to identify the subfactors that may have influenced a court to conclude that the defendant was *responsible* for the creation or development of the content at issue in the case. In making this determination, courts have focused on both the defendant's relationship with the third-party source and the defendant's interaction with the content itself. This first inquiry, which attempts to determine whether the source is truly independent from the defendant, is the subject of this subsection.

Section 230 provides little guidance for courts grappling with this issue, other than to state that the information must be "provided by *another* information content provider."<sup>298</sup> It might seem logical to assume that courts would look to state agency law to assist in this assessment, but only one court has explicitly done this.<sup>299</sup> Because of the proliferation of peer-produced, jointly authored content online, the question of who qualifies as *another* information content provider is likely to take on increasing significance.<sup>300</sup> While no

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297. *Brandewyne*, 2006 WL 4005011, at \*6-7. *Contra Almeida v. Amazon, Inc.*, 456 F.3d 1316, 1326 (11th Cir. 2006) (dismissing claims against Amazon.com based on Internet sales of book); *Curran v. Amazon.com, Inc.*, No. 2:07-0354, 2008 U.S. Dist. LEXIS 12479, at \*41-43 (S.D. W. Va. Feb. 19, 2008) (same).

298. 47 U.S.C. § 230(c)(1) (2006) (emphasis added).

299. *See Raggi v. Las Vegas Metro. Police Dep't*, No. 08-cv-943, 2009 WL 653000 (D. Nev. Mar 10, 2009) (finding no principal-agent relationship existed between police department and police officers who allegedly posted defamatory content on union Web site); *Myers*, *supra* note 13, at 190-92 (examining whether a court might hold Wikipedia responsible for the acts of its moderators, administrators, and sysops); Note, *Badging: Section 230 Immunity in a Web 2.0 World*, 123 HARV. L. REV. 981, 997-1000 (2010) (discussing application of agency principles to interactive Web sites); *cf. Whitney Info. Network, Inc. v. Xcentric Ventures, LLC*, 199 Fed. Appx. 738, 743-44 (11th Cir. 2006) (implying that Xcentric Ventures would be responsible for the actions of its agents in editing third-party reports to include defamatory content).

300. *See Eric Goldman, Co-Blogging Law*, 84 WASH. U. L. REV. 1169, 1178 (2006) ("One can expect plaintiffs will allege that co-bloggers are partners or employers to avoid the otherwise terminal effect of § 230 on their lawsuits."). Wikipedia is the best known example of this type of



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court has addressed this particularly thorny issue in the context of interactive online services, we can glean some guidance by looking at the handful of decisions that mention facts germane to assessing an intermediary's relationship with the source.

First, courts have held that payment alone does not make a defendant responsible for the third party's actions.<sup>301</sup> Second, independent contractors have been deemed to be sufficiently independent from the defendant so as not to obviate section 230's protections.<sup>302</sup> Third, the fact that the source of the information was the defendant's employee did not lead a court to conclude that the defendant was responsible for the source, presumably because sending threatening e-mail messages and posting on online forums was not part of the employee's official duties.<sup>303</sup>

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interactive online service, *see* Myers, *supra* note 13, at 190, but other examples exist, including the free/open-source software development community, *see* BENKLER, *supra* note 25, at 63–68.

301. *See* Blumenthal v. Drudge, 992 F. Supp. 44, 51 (D.D.C. 1998) (noting that Drudge was "paid \$3,000 a month—\$36,000 a year, Drudge's sole, consistent source of income"). *But see* FTC v. Accusearch, Inc., 570 F.3d 1187, 1201 (10th Cir. 2009) (finding defendant responsible for acts of third party because defendant made payments to third-party purchaser of confidential phone records).

302. *See* Blumenthal, 992 F. Supp. at 51–52.

303. *See* Delfino v. Agilent Tech., Inc., 145 Cal. App. 4th at 790, 806–08 (Ct. App. 2006).

TABLE 11

## INTERMEDIARY'S RELATIONSHIP TO SOURCE

<b>Finding</b>	<b>Number of Decisions</b>	<b>Percentage of Total</b>
Not addressed in decision	113	76.4%
No relationship between defendant and source	6	4.1%
Provided computer access	6	4.1%
Encouragement	8	5.4%
Support services	4	2.7%
Independent contractor	2	1.4%
Payment for content	3	2.0%
Editorial control	2	1.4%
Master-agent	1	0.7%
Employer-employee	2	1.4%
Joint venture	1	0.7%
Total	148	

Table 11 lists the eleven tags used to code for this issue along with their relative frequencies. Decisions falling in the first four categories (which make up 90% of the decisions) represent the defendant's minimal control over the source. Decisions in the next three categories (6.1% of the decisions) imply the defendant had some control over the source, and the decisions in the final four categories (4.2% of the decisions) indicate the defendant's high degree of control over the source. Even as to these latter categories, however, courts generally have not held that the defendant was



responsible for the content simply because it had the ability to exercise control over the third-party source.<sup>304</sup>

##### 5. Nature of the Intermediary's Interaction with the Content

This inquiry focuses on the role the defendant played in the creation of the content and seeks to assess whether the defendant was “responsible, in whole or in part, for the creation or development” of the information at issue in the case.<sup>305</sup> When assessing a defendant’s level of responsibility, courts have tended to focus on several factors, including the degree to which the defendant exercised editorial control over the content, encouraged the submission of tortious or illegal content, or facilitated the creation or publication of the content.

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304. See, e.g., *Blumenthal*, 992 F. Supp. at 51–52; *Delfino*, 145 Cal. App. 4th at 795; *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 42–43 (Wash. Ct. App. 2001).

305. 47 U.S.C. § 230(f)(3) (2006).

TABLE 12

## INTERMEDIARY'S INTERACTION WITH CONTENT

<b>Finding</b>	<b>Number of Decisions</b>	<b>Percentage of Total</b>
Not addressed in decision	48	28.1%
No interaction found	13	7.6%
Passive host	26	15.2%
Linking	4	2.3%
Open submission form	7	4.1%
Profiting from content	9	5.3%
Editorial (moderation)	15	8.8%
Redistribution	10	5.8%
Knowing publication	10	5.8%
Manipulation	4	2.3%
Pre-populated submission form	10	5.8%
Co-Creation	5	2.9%
Self-Creation	10	5.8%
<b>Total</b>	<b>171</b>	

Table 12 lists the categories that capture how courts addressed this issue. The categories are listed roughly in increasing order of interaction, from no interaction to self-creation. Decisions in the first three categories (which make up 50.9% of the decisions) indicate that the defendant had no discernable interaction with the content at



issue. Decisions in the middle categories (32.2% of the decisions) indicate moderate interaction with the content. Decisions falling in the bottom three categories (14.6% of the decisions) denote substantial interaction with the content at issue. Of course, if a court finds that the defendant created the information itself, the defendant is not entitled to protection under section 230.<sup>306</sup>

A review of the decisions reveals that courts have consistently held that the mere exercise of traditional editorial functions, such as deciding what content to publish or remove, does not make an intermediary responsible for the content it publishes.<sup>307</sup> These traditional editorial functions include screening objectionable content prior to publication, as well as correcting, editing, or removing content.<sup>308</sup> Even intermediaries that took an active role in editing content have been found to be entitled to invoke section 230.<sup>309</sup>

Encouraging or soliciting others to submit content also generally has not been found to deprive a defendant of section 230's protections.<sup>310</sup> One recurring defendant that operates a Web site called the "Bad Business Bureau" has provoked several decisions on this point.<sup>311</sup> Although the defendant, Xcentric Ventures, allegedly

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306. See, e.g., *Whitney Info. Network, Inc. v. Xcentric Ventures, LLC*, 199 Fed. Appx. 738, 744 (11th Cir. 2006); *Anthony v. Yahoo!, Inc.*, 421 F. Supp. 2d 1257, 1262 (N.D. Cal. 2006); *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142, 1148-49 (D. Ariz. 2005); *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at \*9 (N.D. Tex. 2004).

307. See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) ("[T]he exclusion of 'publisher' liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message.").

308. See, e.g., *id.* at 1031; *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997); *GW Equity LLC v. Xcentric Ventures LLC*, No. 3:07-CV-976-O, 2009 U.S. Dist. LEXIS 1445, at \*18; *Blumenthal*, 992 F. Supp. at 51; *Landry-Bell v. Various, Inc.*, No. 05-CV-1526, 2005 U.S. Dist. LEXIS 38471, at \*6-7 (W.D. La. Dec. 27, 2005); *Schneider*, 31 P.3d at 41.

309. See, e.g., *Donato v. Moldow*, 865 A.2d 711, 725-26 (N.J. Super. Ct. App. Div. 2005) (holding that forum operator who regularly deleted offensive user postings, gave guidelines for posting, and edited and re-posted messages to remove obscenities was protected under section 230).

310. See, e.g., *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004).

311. See *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 932-33 (D. Ariz. 2008); *Whitney Info. Network, Inc. v. Xcentric Ventures, LLC*, No. 2:04-CV-47-FtM-34SPC, 2008 U.S. Dist. LEXIS 11632, at \*40 (M.D. Fla. Feb. 15, 2008); *GW Equity LLC*, 2009 U.S. Dist. LEXIS 1445, at \*12-15; *Hy Cite Corp.*, 418 F. Supp. 2d at 1149; *MCW, Inc. v. Badbusinessbureau.com, LLC*, No. 02-cv-2727, 2004 U.S. Dist. LEXIS 6678, at \*33-36 (N.D. Tex. Apr. 19, 2004).

encouraged vituperous postings that it then promoted on its site and in its marketing materials, courts in Arizona, Florida, and Texas held that these activities, without more, did not make Xcentric responsible for the allegedly defamatory content submitted by third parties.<sup>312</sup>

Intermediaries, by dint of their position as middlemen, invariably play some role in facilitating the publication or distribution of content. Nevertheless, courts have not found that an intermediary was responsible for third-party content simply because it provided a platform for others to create content, even when that facilitation involved providing submission forms and drop-down selections.<sup>313</sup> This is so even if the intermediary knows that third parties are using its platform to create tortious or illegal content.<sup>314</sup>

However, the Ninth Circuit Court of Appeals sitting en banc recently held that Roommates.com, an apartment matching service, was not shielded from claims under the Fair Housing Act<sup>315</sup> (FHA) and related state laws because it “created or developed” the forms and answer choices that those seeking to use the service had to fill

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312. See *Global Royalties*, 544 F. Supp. 2d at 933 (“It is obvious that a Web site entitled Ripoff Report encourages the publication of defamatory content. However, there is no authority for the proposition that this makes the Web site operator responsible, in whole or in part, for the ‘creation or development’ of every post on the site.”); *Whitney Info. Network, Inc.*, 2008 U.S. Dist. LEXIS 11632, at \*42. But see *MCW, Inc.*, 2004 U.S. Dist. LEXIS 6678, at \*33–34 (finding defendant was itself an ICP because it “directed” consumers to “take photos of (1) the owner, (2) the owner’s car with license plate, (3) the owner handing out Rip-off Reports in front of [the plaintiff’s] offices, and (4) the [plaintiff’s] sign in the background with the Rip-off Reports in hand”).

313. See, e.g., *Carafano*, 339 F.3d at 1124 (“Doubtless, the questionnaire facilitated the expression of information by individual users. However, the selection of the content was left exclusively to the user. . . . Matchmaker cannot be considered an ‘information content provider’ under the statute because no profile has any content until a user actively creates it.”); *Whitney Info. Network, Inc.*, 2008 U.S. Dist. LEXIS 11632, at \*36 (holding “that the mere fact that Xcentric provides categories from which a poster must make a selection in order to submit a report on the ROR Web site is not sufficient to treat Defendants as information content providers of the reports,” even if some of those categories were defamatory); *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 725–26 (N.D. Ohio 2007) (noting “the mere fact SexSearch provided the questionnaire Jane Doe answered falsely is not enough to consider SexSearch the developer of the false profile”); *Prickett v. InfoUSA, Inc.*, 561 F. Supp. 2d 646, 651 (E.D. Tex. 2006) (rejecting contention that defendant became an ICP “because the anonymous third party was prompted to select subcategories through the Defendant’s database gathering system,” thereby “direct[ing] the third party’s selections”).

314. See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1169 n.24 (9th Cir. 2008); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1198–99 (N.D. Cal. 2009).

315. 42 U.S.C. §§ 3601–3619 (2006).



out.<sup>316</sup> The court reasoned that by *requiring* members to answer questions about their gender and sexual-orientation preferences, Roommates.com was essentially causing the third parties to make discriminatory statements, and as such, it was liable as a co-creator of the content.<sup>317</sup> The court also held that Roommates.com was responsible for its users' violations of the FHA because it permitted users to search the profiles of other members by selecting the same discriminatory preferences.<sup>318</sup>

While the Ninth Circuit's en banc decision in *Roommates.com* has been cited in a dozen decisions so far, only two decisions in the study set relied on its definition of "development" to hold that a defendant was not entitled to section 230's protections.<sup>319</sup> The remaining decisions confined the reasoning in *Roommates.com* to that case's rather unique set of facts: a provider of an interactive computer service that *required* the submission of unlawful content.<sup>320</sup>

#### 6. Nature of the Intermediary's Relationship with the Plaintiff or Public

This section of the Article addresses whether an intermediary's relationship with the plaintiff or the public has any bearing on the application of section 230, and touches on one of the oldest and most persistent arguments for liability in the section 230 case law, as well as the newest theory of liability which came out of the Ninth Circuit's recent decision in *Barnes v. Yahoo!, Inc.*<sup>321</sup>

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316. *Roommates.com*, 521 F.3d at 1157–58. For example, all prospective users had to choose from a drop-down menu to indicate whether they were willing to live with "[s]traight or gay" males, only "[s]traight" males, only "[g]ay" males, or "[n]o males" and had to make comparable selections pertaining to females. *Id.* at 1165.

317. *Id.* at 1166.

318. *Id.* at 1167.

319. *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1200 (10th Cir. 2009) (holding that provider was responsible for developing the content because it paid its researchers to acquire telephone records it knew to be protected by confidentiality laws and therefore "it contributed mightily to the unlawful conduct of its researchers"); *NPS LLC v. StubHub, Inc.*, 2009 WL 995483, at \*12 (Mass. Super. Ct. Jan. 26, 2009) (refusing to dismiss anti-scalping claims against ticket broker because broker "materially contributed" to violations).

320. *See, e.g.,* *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1198 (N.D. Cal. 2009); *Doe IX v. MySpace, Inc.*, 629 F. Supp. 2d 663, 665 (E.D. Tex. 2009); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 701 (S.D.N.Y. 2009); *Dart v. Craigslist, Inc.*, No. 09-CV-1385, 2009 WL 3416106, at \*6 (N.D. Ill. Oct. 20, 2009).

321. 570 F.3d 1096 (9th Cir. 2009).

From the earliest section 230 cases onward, plaintiffs have argued that once they put a defendant on notice that it is distributing tortious or illegal material, the defendant is under an obligation to remove the content; if it fails to do so within a reasonable time, it is not entitled to protection under section 230. The first reported decision by an appellate court to address—and ultimately reject—this argument, *Zeran v. America Online, Inc.*,<sup>322</sup> turned out to be tremendously influential, as the Fourth Circuit’s lengthy analysis of the issue has served as a guide for other courts facing this theory of liability.<sup>323</sup> In rejecting the plaintiff’s assertion that America Online, Inc. (AOL) became liable as a “distributor” once it had notice that it was hosting defamatory information on its bulletin board, the Fourth Circuit reasoned that the distinction between publisher liability and distributor liability was meaningless for purposes of section 230.

[O]nce a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting. In this respect, *Zeran* seeks to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability—the publisher role.<sup>324</sup>

Although a few decisions after *Zeran* cast doubt on whether distributor liability was subsumed by section 230’s prohibition of publisher liability,<sup>325</sup> the case law is now consistent in holding that an intermediary’s refusal to remove content after notification is protected by section 230, and even if the intermediary has actual knowledge of falsity, it will not be liable for the speech of third parties.<sup>326</sup> In fact, courts have held that an intermediary can continue

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322. 129 F.3d 327 (4th Cir. 1997).

323. *Id.* The Fourth Circuit’s decision in *Zeran* has been cited by courts 137 times as of September 30, 2009.

324. *Id.* at 332–33.

325. See, e.g., *Grace v. Ebay, Inc.*, 120 Cal. App. 4th 984, 996 (Ct. App. 2004); *Barrett v. Rosenthal*, 5 Cal. Rptr. 3d 416, 430 (Ct. App. 2003), *rev’d*, 146 P.3d 510 (Cal. 2006); *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1020–21 (Fla. 2001) (Lewis, J. dissenting).

326. See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103 (9th Cir. 2009); *Barrett*, 146 P.3d at 521.



to host tortious content after the original author has asked to have it removed.<sup>327</sup>

Until very recently, there was nothing in the case law to suggest that a plaintiff could impose on an intermediary an obligation to remove content or prevent its publication. That changed when the Ninth Circuit issued its decision in *Barnes v. Yahoo!, Inc.*,<sup>328</sup> the latest in a long line of cases involving fake profiles on online dating services. In *Barnes*, the court held that section 230 did not preempt a claim for promissory estoppel that was based on a specific promise made by a Yahoo! employee that she would “personally walk the [plaintiff’s complaint] over to the division responsible for stopping unauthorized profiles and they would take care of it.”<sup>329</sup> The Ninth Circuit was careful, however, to cabin its holding, stating that section 230 did require dismissal of the plaintiff’s negligent undertaking claim, which was predicated upon Yahoo!’s failure to remove the profile after she notified the company that it was fake.<sup>330</sup> The court let the promissory estoppel claim go forward only because a Yahoo! employee made a specific promise to the plaintiff.<sup>331</sup>

The *Barnes* court also cautioned that promises made in a Web site’s terms of service—for example, a promise to remove all defamatory content—or in marketing materials do not create an obligation to remove content; “a general monitoring policy, or even an attempt to help a particular person, on the part of an interactive computer service such as Yahoo! does not suffice for contract liability.”<sup>332</sup> Even as to her promissory estoppel claim, the court

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327. See *Global Royalties, Ltd. v. XCentric Ventures, LLC*, 544 F. Supp. 2d 929, 931–32 (D. Ariz. 2008) (rejecting argument that a Web site operator, by declining to remove material at author’s request, had itself become the creator or developer of the content); *Sturm v. eBay, Inc.*, No. 1-06-CV-057926 (Cal. Super. Ct. filed July 27, 2006) (holding that eBay was not required to remove user feedback, even after parties entered into settlement stipulating that feedback was defamatory and both had written eBay asking that it be removed).

328. 570 F.3d 1096 (9th Cir. 2009).

329. *Barnes*, 570 F.3d at 1099, 1109. The fake profile at issue had been created by plaintiff’s ex-boyfriend and contained nude photos of the plaintiff, her personal and work contact information, and statements that she was interested in sex. *Id.* at 1098.

330. *Id.* at 1103 (noting that “removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove”).

331. *Id.* at 1107 (clarifying that “*Barnes* does not seek to hold Yahoo! liable as a publisher or speaker of third-party content, but rather as the counter-party to a contract, as a promisor who has breached”).

332. *Id.* at 1108.

noted that the plaintiff had merely made out a prima facie claim and sent the case back to the district court to determine whether she could in fact produce sufficient evidence to proceed on the claim.<sup>333</sup> It is too soon to tell whether the reasoning in *Barnes* will influence other courts, but the court’s clear statement that general promises do not create enforceable obligations seems to undercut a potential theory of liability that, according to Eric Goldman, had been “festering” as a result of ambiguous language in earlier cases.<sup>334</sup>

TABLE 13

INTERMEDIARY’S RELATIONSHIP WITH PLAINTIFF OR PUBLIC

<b>Finding</b>	<b>Number of Decisions</b>	<b>Percentage of Total</b>
Not addressed in decision	97	65.1%
Received notice of problematic content	37	24.8%
Promise to plaintiff to take action	4	2.7%
Promise to public in marketing materials	1	0.7%
Promise to public in ICS terms of service	10	6.7%
<b>Total</b>	<b>149</b>	

Table 13 reports how often courts addressed whether the defendant made a specific promise to the plaintiff or a general promise to remove content through its marketing materials or terms of service. Not surprisingly, most decisions (65.1%) did not discuss the nature of the defendant’s relationship with the plaintiff or the public. In the few decisions that addressed this issue, a plurality (24.8%) simply mentioned that those defendants had received notice of the tortious or illegal content they were distributing. Relatively

333. *Id.* at 1109.

334. Eric Goldman, Ninth Circuit Mucks Up 47 USC 230 Jurisprudence . . . Again!?!—*Barnes v. Yahoo!*, Tech. & Marketing Law Blog, [http://blog.ericgoldman.org/archives/2009/05/ninth\\_circuit\\_m.htm](http://blog.ericgoldman.org/archives/2009/05/ninth_circuit_m.htm) (May 13, 2009, 08:04 PM PST).



few decisions focused on whether the defendants had made promises through their marketing materials or terms of service to moderate or remove harmful content, and only one decision found such a promise to be determinative on the question of section 230's applicability.<sup>335</sup>

### *B. Correlation and Regression Analyses*

This section of the Article examines whether the areas of inquiry described above have any relationship to how courts actually decided section 230 cases. It would seem fairly obvious that if the court concludes that the defendant is not a provider or a user of an interactive computer service, the defendant is not going to find protection under section 230. Similarly, if the court concludes that the third-party source of the content at issue does not qualify as another information content provider or the claims under consideration do not qualify for preemption, then section 230 will not preclude liability.

Correlation analysis provides a quantitative way to test these assumptions by examining the interrelationship among these variables. In other words, it can reveal whether the different areas of judicial inquiry described in section A were associated with a finding of preemption and whether a finding as to one area is associated with a finding as to another area. Table 14 presents a contingency table that lists the correlation coefficients for each pairwise comparison of areas of inquiry. A higher correlation coefficient indicates a stronger association with an eventual determination that section 230 preempted the claim, and a stronger relationship between that area and the corresponding area of inquiry in the table.<sup>336</sup> As expected, a

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335. *Mazur v. eBay Inc.*, No. C 07-03967 MHP, 2008 WL 618988, at \*12 (N.D. Cal. Mar. 4, 2008) (declining to dismiss fraud claim because "eBay's statement regarding safety affects and creates an expectation regarding the procedures and manner in which the auction is conducted and consequently goes beyond traditional editorial discretion"). *But see Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 729-30 (N.D. Ohio 2007) (holding that "[p]laintiff cannot claim he was misled or he reasonably relied on the representation that 'all members are 18+' when the Terms and Conditions clearly state the Web site did not guarantee (and took no responsibility for verifying) members' ages"); *Prickett v. InfoUSA, Inc.*, 561 F. Supp. 2d 646, 650 (E.D. Tex. 2006) (finding that defendant's claim to "call every business to verify the information, so you can be assured of the most current and accurate listings" did not create additional liability).

336. The sum of the absolute values for the pair of correlation coefficients reported for each area of inquiry does not equal zero because the decisions may not have addressed all of the inquiries in equal measure. Each of the six areas was assigned two binary variables (0 = no, 1 = yes) that reflected whether a court's finding favored the defendant or the plaintiff. For example, if the court stated that the defendant qualified as a provider or user of an interactive computer service, the "Defendant is an ICS" finding would be coded with a 1 and the corresponding finding

finding that a claim is covered by section 230 and that the information at issue was provided by another information content provider was statistically correlated (significant at both the  $\sigma = 0.05$  and  $\sigma = 0.01$  levels) with an eventual finding of preemption. Similarly, a finding that the defendant failed to qualify as a provider or user of an interactive computer service was significantly correlated with a finding of no preemption under section 230.

The remaining three areas of inquiry also present some interesting results, albeit more nuanced. A defendant's level of interaction with the content showed a moderate, but statistically significant, association with a finding of preemption, suggesting that if the court found that the defendant had no interaction with the content at issue, this finding would likely coincide with a conclusion that section 230 preempted the claim. Alternatively, if the court found that the defendant had substantial interaction with the content—for example, through the use of pre-populated submission forms—such a finding would likely coincide with the conclusion that section 230 did not preempt the claim at issue.<sup>337</sup>

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for the plaintiff, "Defendant is not an ICS," would receive a 0. If the court instead found that the defendant did not qualify as a provider or user of an ICS, this finding would be in favor of the plaintiff, so the "Defendant is not an ICS" would be coded with a 1 and the corresponding finding for the defendant, "Defendant is an ICS," would be coded with a 0. But if the court did not address this inquiry, as was often the case, or issued a neutral finding, both variables would be coded with a 0. The specific findings that inure to the benefit or detriment of the parties are described in Part IV.A.

337. The fact that the strength of these associations was relatively modest is likely due, in part, to the fact that courts frequently did not explicitly address all of the areas of inquiry in every decision.



TABLE 14  
 PAIRWISE CORRELATIONS BETWEEN A FINDING OF PREEMPTION  
 AND SIX JUDICIAL AREAS OF INQUIRY

Area of Inquiry	Finding	Preemption		Interactive Computer Service (ICS)		Scope of Claims Covered		Information Content Provider (ICP)	
		Defendant	Plaintiff	Defendant	Plaintiff	Defendant	Plaintiff	Defendant	Plaintiff
	Claim Preempted	1							
Interactive Computer Service (ICS)	Defendant is an ICS	0.130		1					
	Defendant is not an ICS	-0.267 †		-0.090		1			
Scope of Claims Covered	Claim Qualifies	0.529 †		0.191 *		-0.141		1	
	Claim Does Not Qualify	-0.354 †		-0.021		-0.050		-0.148	
Information Content Provider (ICP)	Source is an ICP	0.378 †		0.415 †		-0.145		0.385 †	
	Source is not an ICP	-0.437 †		0.043		0.103		-0.254 †	
								-0.175 *	1

\* Denotes that the correlation coefficient is statistically significant at the 0.05 level.

† Denotes significance at the 0.01 level.

"Defendant" and "Plaintiff" columns indicate which party a finding on that specific factor benefits.

**TABLE 14 (continued)**  
**PAIRWISE CORRELATIONS BETWEEN A FINDING OF PREEMPTION**  
**AND SIX JUDICIAL AREAS OF INQUIRY**

Area of Inquiry	Finding	Preemption	Interactive Computer Service (ICS)		Scope of Claims Covered		Information Content Provider (ICP)	
			Defendant	Plaintiff	Defendant	Plaintiff	Defendant	Plaintiff
Relationship to Source	No Relationship	0.010	0.074	0.054	0.214 *	0.010	0.129	-0.001
	Full Control	-0.209 *	-0.045	-0.025	-0.079	0.080	0.001	0.209 *
Interaction with Content	No Interaction	0.258 †	0.322 †	0.030	0.111	-0.069	0.276 †	-0.092
	Substantial	-0.257 †	-0.058	0.069	-0.194 *	-0.026	0.022	0.388 †
Relationship with Others	No Promise	0.172 *	0.123	-0.087	0.196 *	0.058	0.148	-0.159
	Promise Made	0.133	0.026	-0.050	0.172 *	-0.043	0.071	0.023

\* Denotes that the correlation coefficient is statistically significant at the 0.05 level.

† Denotes significance at the 0.01 level.

“Defendant” and “Plaintiff” columns indicate which party a finding on that specific factor benefits.



TABLE 14 (continued)  
 PAIRWISE CORRELATIONS BETWEEN A FINDING OF PREEMPTION  
 AND SIX JUDICIAL AREAS OF INQUIRY

Area of Inquiry	Finding	Preemption	Relationship to Source		Interaction with Content		Relationship with Others	
			Defendant	Plaintiff	Defendant	Plaintiff	Defendant	Plaintiff
Relationship to Source	No Relationship	0.010		1				
	Full Control	-0.209*		0.027		1		
Interaction with Content	No Interaction	0.258†		0.170*		-0.108		1
	Substantial	-0.257†		0.032		.041		-0.155
Relationship with Others	No Promise	0.172*		0.001		-0.100		0.001
	Promise Made	0.133		-0.107		-0.058		-0.023
								-0.026
								0.110
								1

\* Denotes that the correlation coefficient is statistically significant at the 0.05 level.

† Denotes significance at the 0.01 level.

"Defendant" and "Plaintiff" columns indicate which party a finding on that specific factor benefits.

Correlation analysis also suggests that a court's finding that the defendant had substantial interaction with the content or substantial control over the source was significantly associated with a finding that the source of the content did not qualify as another information content provider. This association makes intuitive sense because a defendant's substantial interaction with the content or source could turn the intermediary into the source of the content, leading a court to conclude that the content at issue did not actually come from a third party. As to findings addressing a defendant's relationship with the source or with the plaintiff or the public, the associations between a finding in those areas and the eventual finding that section 230 did or did not preempt a claim are largely negligible. Again, this lack of a statistical correlation reinforces what would be expected given that courts only recently began to focus on these issues after the Ninth Circuit's decisions in *Roommates.com* and *Barnes*.

While the correlation matrix in table 14 reveals a number of statistically significant associations between a court's findings and an eventual finding of preemption, the correlation coefficients cannot tell us whether these findings in fact influenced the likelihood that the court would find preemption. Regression analysis is the proper tool to answer that question, as it can indicate whether the findings predict a finding of preemption by controlling for other variables that covary with the variable of interest and may provide insights into the considerations that drove judges to decide the cases as they did. Table A-5 in the Appendix sets out the results of a logistic regression model predicting the likelihood of preemption as a function of the areas of judicial inquiry described in Part IV.A.<sup>338</sup> While the model presents a number of interesting results, a few of the key findings are discussed below.

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338. A logistic regression model was necessary because the dependent variable, "Preemption Granted," is dichotomous (0/1); therefore, linear regression models such as Ordinary Least Squares are not appropriate to perform estimations. As a result, the coefficients listed in table A-5 in the Appendix lack an intuitively meaningful scale for interpreting their strength. Nevertheless, they can reveal statistical significance and provide an indication of whether the independent variable under study leads to an increased or decreased likelihood of a finding of preemption. See Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1431-32 n.230 (1998).



### 1. Expected Findings

The model reports that court findings that the defendant was not a provider or user of an interactive computer service, or that the defendant controlled the third-party source “predict failure perfectly.” The model also reports that if a court concludes that the claim at issue did not fall within section 230’s coverage, then the likely result is a finding of no preemption. In other words, the model predicts that if a defendant loses on any of these questions, then the court will likely find no preemption.<sup>339</sup> These results are not particularly surprising given that these are fundamental requirements of a section 230 defense.

### 2. Unexpected Findings

The model also predicts that if a court states in its decision that a claim is within section 230’s coverage, then the result will always be a finding of preemption. We know from reviewing the case law, however, that courts do not find preemption as to every claim that potentially falls within section 230’s broad scope. Given that the model predicts success perfectly with regard to this finding, we can surmise that when a judge took the time to state that a specific claim type qualified for preemption under section 230, the judge eventually found preemption as to that claim. In fact, this prediction is backed up by a review of the decisions.<sup>340</sup>

Overall, correlation and regression analyses support the initial assumption that courts generally have coalesced around the six areas of judicial inquiry described in Part IV.A. However, the instant analysis also suggests a body of case law that lacks rhetorical and analytical consistency because judges often fail to address key elements of a section 230 defense. While section 230 has been in existence for more than thirteen years, many of the decisions exhibit a haphazard approach to its application, often ignoring threshold questions or assuming that certain requirements are met. While some

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339. Overall, the logistic regression model described in table A-5 in the Appendix reports that it correctly classified 86.8% of the decisions. The model automatically dropped any observations (decisions) associated with a variable that predicted success or failure perfectly. As a result, the model dropped seventy-five observations associated with those variables from the calculations.

340. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 327 (4th Cir. 1997) (noting that claim was covered by section 230 and then dismissing the claim); *Donato v. Moldow*, 865 A.2d 711, 711 (N.J. Super. Ct. App. Div. 2005) (same); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 37 (Wash. Ct. App. 2001) (same).

elements of a section 230 defense are relatively straightforward and rarely disputed, courts would do well to at least articulate their findings explicitly.

## V. DISCUSSION

As with any empirical study, there are many ways to view and interpret the data. A few of the more interesting findings are discussed in this part of the Article.

### *A. Viability of Claims Under Common Law Liability Theories*

One of the best ways to assess a statute's impact on an area of law is to systematically compare the case law pre- and post-enactment. Unfortunately, this approach will not work for section 230, as courts issued only two reported decisions addressing an Internet intermediary's liability for speech-based harms prior to section 230's enactment.<sup>341</sup> As a rough proxy, however, this section of the Article identifies several factors in the decisions that are germane to the question of liability under the common law, and then applies those factors in a "what if section 230 did not exist" thought experiment in order to gain insight into how section 230 has changed the liability landscape for intermediaries. Readers should be cautious of drawing definitive conclusions from the following discussion, however, because courts almost certainly would have focused on different facts had they been addressing common law liability theories rather than the application of section 230.<sup>342</sup> Nevertheless, the effort is still useful in that it foregrounds how section 230 has changed the liability landscape and whether, as discussed more fully in subsequent subsections, section 230 is providing adequate protection for intermediaries.

To aid in the instant analysis, each defendant in the study set was placed into one of the four online intermediary groupings described earlier—conduits, content hosts, search/application

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341. *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991); *Stratton Oakmont, Inc. v. Prodigy Servs., Co.*, Trial IAS Part 34, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). Another case filed against Prodigy in 1994, *Lunney v. Prodigy Services Co.*, did not come to a decision until after section 230's effective date. 723 N.E.2d 539, 542 (N.Y. App. Div. 1999) (declining to reach section 230 issue but observing that in transmitting e-mail, "an ISP, like a telephone company, is merely a conduit[]").

342. See *supra* Part IV.A.



providers, and users—based on the role the defendant played in facilitating the publication or distribution of the content at issue in the case. Drawing from the areas of judicial inquiry listed previously in tables 11 through 13,<sup>343</sup> each decision was then evaluated to ascertain whether the court noted in its decision that the defendant had knowledge of the tortious or illegal content or exercised editorial control over the content.<sup>344</sup> The tabulations from this review are reported in table 15.

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343. *See supra* Part IV.A.

344. This was done solely by looking at the decisions themselves. Decisions falling in the last six and last seven categories in tables 11 and 12, respectively, were counted as evidencing editorial control. Decisions tagged with either “knowing publication” in table 12 or “received notice of problematic content” in table 13, were counted as evidencing knowledge. In addition, decisions in which the court found that the defendant itself was the source of the content were excluded because those defendants were not actually serving as intermediaries.

**TABLE 15**  
**PREDICTED LIABILITY FOR INTERMEDIARIES UNDER COMMON LAW THEORIES**

Intermediary Type	Number of Decisions	Decision Mentions			Common Law Theory			Section 230 Defense	
		Editorial Control	Knowledge of Content	No Liability Predicted	Percentage of Total	Claim Preempted	Percentage of Total		
Conduit	21	3	4	18	85.7%	11	52.4%		
Content Host	121	42	33	60	49.6%	77	63.6%		
Search or Application Provider	25	6	7	14	56.0%	17	68.0%		
User	11	6	3	5	45.5%	4	36.4%		
<b>Total</b>	<b>178</b>	<b>57</b>	<b>47</b>	<b>97</b>	<b>54.5%</b>	<b>109</b>	<b>61.2%</b>		



Table 15 also predicts whether the intermediaries in the section 230 cases would have been susceptible to liability under the common law. In other words, if section 230 did not exist, would courts applying common law liability principles hold these defendants responsible for the third party's tortious speech? In order to answer this question, each defendant was placed in an appropriate common law liability category based on its intermediary type and degree of editorial control and knowledge. It was assumed that conduit intermediaries would qualify for the common law's lenient treatment of common carriers unless they exercised editorial control,<sup>345</sup> in which case they were evaluated under the standard for distributors. Content hosts, search/application providers, and users were all evaluated under publisher liability standards if they exercised editorial control, and under distributor liability standards if they did not.<sup>346</sup>

The results in table 15 must be read with some caution, however, because the common law doctrines do not correspond precisely to the roles intermediaries play online and even within the four classifications, intermediaries varied in their level of interaction with third-party content. It is no wonder that in the early days of the Internet, commentators described the liability standards facing operators of online services as confusing and muddled.<sup>347</sup> Furthermore, this analysis only addresses the *viability* of the claims against the intermediary types under the common law and section 230. It does not assess whether the third-party content at issue in the cases was ultimately actionable. Furthermore, even if section 230 does not preempt the claim at issue, a defendant may still be entitled to dismissal of the claim on other grounds.

Even with the preceding caveats in mind, table 15 presents some intriguing results. It suggests that conduit intermediaries would have fared better under the common law than they did under section 230. However, this may be somewhat misleading, given that all conduits

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345. Although ISPs and other providers of Internet access generally have not been classified as common carriers, *see supra* note 119, they share many of the characteristics of traditional common carrier conduits. *See, e.g.*, *United States v. Jackson*, 208 F.3d 633, 637 (7th Cir. 2000); *Anderson v. N. Y. Tel. Co.*, 320 N.E.2d 647, 649 (N.Y. 1974); *Lunney*, 723 N.E.2d at 542.

346. Search/application providers were an especially difficult group to handicap due to their ambiguous status under the law. *See* Grimmelmann, *supra* note 57, at 27–30.

347. *See* Cutrera, *supra* note 158, at 559; Anne Wells Branscomb, *Common Law for the Electronic Frontier*, 265 SCI. AMER. 154 (1991).

do not currently enjoy the additional protections and obligations the law assigns to common carriers as was assumed for purposes of doing the calculations behind table 15. Nevertheless, of the ten decisions involving conduits in which the court did not find preemption under section 230, the court did not even reach the question of section 230's application in six of those decisions because it found that these cases warranted dismissal on other grounds.<sup>348</sup>

Not surprisingly, this analysis suggests that content hosts and search/application providers fared better under section 230 than they would have under the common law. For these intermediaries, the editorial-control distinction in the common law breaks down because virtually all content hosts and search/application providers have the *ability* to exercise editorial control over third-party speech, even if they do not choose to exercise that power.<sup>349</sup> Indeed, they would likely fare far worse under the common law than predicted if courts were to apply publisher liability to an intermediary that simply has the ability to exercise editorial control.<sup>350</sup>

What is surprising is that intermediaries in all four categories fared as well as they did under the common law.<sup>351</sup> Some of this is undoubtedly due to the fact that judges did not focus on the two key determinates of liability under the common law—knowledge and editorial control—when addressing the application of section 230. Preemption under section 230 does not typically turn on those factors, so the tabulations likely underreport the true number of defendants that would face liability under the common law. But it is likely also due to the fact that many of the intermediaries who interposed section 230 as a defense did nothing more than provide a

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348. See, e.g., *Lunney*, 723 N.E.2d at 542; *Doe v. GTE Corp.*, 347 F.3d 655, 658–59 (7th Cir. 2003); *Abate v. Maine Antique Digest*, 2004 WL 293903, at \*1 (Mass. Super. 2004); *Morrison*, 153 F. Supp. 2d 930, 930 (N.D. Ind. 2001).

349. This refers to the technical ability to control content through filtering. As to the practical challenges of performing this function, many Internet intermediaries do not have the expertise or financial ability to selectively filter or block content; as a result, their only option is wholesale blocking of content. See *supra* Part I.B.

350. As discussed in Part I, *supra*, all content hosts have the ability—at least in theory—to filter or block content.

351. In fact, the difference between the cases predicted not to have liability under the common law and the cases preempted by section 230 was not statistically significant ( $X^2 = 6.73$   $P = .081$ ).



platform for others to engage in speech.<sup>352</sup> Would the common law have evolved some way to grant these intermediaries a presumption of non-liability akin to the common law's approach to conduit liability?<sup>353</sup> We simply do not know.

What table 15 suggests, however, is that many of the intermediaries that invoked section 230 likely would not have faced eventual liability under the common law because they lacked knowledge of and editorial control over the third-party content at issue in the cases. Given this prediction, one might question whether section 230 is necessary. But this points to one of section 230's most important functions for intermediaries: it seeks to give them the legal certainty, or in First Amendment terms, "breathing space,"<sup>354</sup> to facilitate the distribution of third-party speech that may contain injurious or illegal content. Without this increased certainty, risk-averse intermediaries would be less willing to facilitate the speech of others and the public would be burdened by their censorship.<sup>355</sup> The next section of the Article examines whether section 230 has succeeded in providing this breathing space.

#### *B. Assessing Section 230's Impact on Defendants*

Not unlike other entities that operate in uncertain legal environments, an intermediary that facilitates the speech of others has three primary concerns: (1) the likelihood it will be sued; (2) if it is sued, the likelihood that it will succeed in the case; and (3) the cost of defending the case and any liability damages.<sup>356</sup>

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352. Table 16 reports that more than half (54.5%) of the intermediaries had no editorial control or knowledge of the content at issue in the case.

353. *Cf. Auvil v. CBS 60 Minutes*, 800 F. Supp. 928, 931-32 (E.D. Wash. 1992) (rejecting plaintiff's argument that CBS broadcast affiliate's power and opportunity to exercise editorial control over network programming "triggered the duty to censor").

354. *NAACP v. Button*, 371 U.S. 415, 433 (1963) (cautioning that "First Amendment freedoms need breathing space to survive").

355. *See supra* Part I.B; *cf. Barrett v. Rosenthal*, 146 P.3d 510, 525 (Cal. 2006) (observing that intermediaries are not in a position to assess whether the content is in fact defamatory because "[d]efamation law is complex, requiring consideration of multiple factors. These include whether the statement at issue is true or false, factual or figurative, privileged or unprivileged, whether the matter is of public or private concern, and whether the plaintiff is a public or private figure").

356. Of course, intermediaries have other concerns as well, including a desire to avert the potential negative publicity that can arise from being sued for facilitating tortious or illegal speech.

While the first concern is outside the scope of the present study, there is considerable research elsewhere that looks at the risk premiums parties must bear as a result of uncertainty regarding legal liability.<sup>357</sup> As discussed in Part I,<sup>358</sup> this uncertainty has an especially pernicious effect in the speech context because threats of civil and criminal liability often result in excessive self-censorship. Moreover, when an intermediary engages in this form of censorship, the effects are magnified because, as Justice Brennan observed fifty years ago, the intermediary's censorship becomes the "public's burden, for by restricting [the intermediary] the public's access to [speech] would be restricted."<sup>359</sup>

With regard to an intermediary's desire to determine the likelihood that it will win a case, the present study suggests that intermediaries have fared quite well under section 230, with courts granting preemption as to at least one claim in nearly two-thirds of the decisions.<sup>360</sup> But the preemption rate under section 230 tells only part of the story. When dismissals on grounds other than section 230 are included in the calculations, the results for defendants are even better; overall, defendants won dismissal in 76% of the cases studied.<sup>361</sup>

This high rate of dismissal raises the question of why plaintiffs continue to file lawsuits against intermediaries that are shielded by section 230. While the present study cannot answer this question, other research suggests that plaintiffs sometimes engage in litigation to achieve strategic ends: by raising the costs for intermediaries that facilitate the distribution of disfavored speech, plaintiffs can drive up the speaker's costs, assuming the intermediary can pass the expenses along, or drive the speaker off the Internet, if those costs cannot be borne by either the speaker or the intermediary.<sup>362</sup> It is costly for

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357. See, e.g., Kraakman, *supra* note 3, at 891–92 (discussing the ways in which corporate entities handle the risk of liability).

358. See *supra* Part I.B.

359. *Smith v. California*, 361 U.S. 147, 153–54 (1959).

360. See *supra* Part III.C.

361. These calculations are based on completed cases that ended in dismissal on any grounds, including statute of limitations, lack of personal or subject matter jurisdiction, or preemption under section 230. The calculations do not include the fifteen cases that were pending at the time of this study.

362. See Kreimer, *supra* note 6, at 39; cf. *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (invalidating large sections of the CDA because they "would confer broad powers of censorship,



intermediaries to dispute even meritless claims. It is far less costly to simply remove or block the speech at issue. A “profit-maximizing intermediary likely will choose the path that is least costly, rather than the one that preserves the most speech.”<sup>363</sup> This fact has not gone unnoticed by potential plaintiffs.<sup>364</sup>

Accordingly, intermediaries are keenly interested in what it will cost to defend a lawsuit, even when they feel confident that they will ultimately prevail.<sup>365</sup> Much of the costs associated with litigation arise during discovery, and the longer a case continues, the greater the expenses to both parties.<sup>366</sup> Mindful of these costs, some courts have refused to permit the plaintiff to engage in discovery until the court addressed whether section 230 preempted the claims at issue in the case.<sup>367</sup> In a number of other cases, the plaintiff opposed the defendant’s motion by arguing that the section 230 defense was not ripe. This question is taken up in the next section of the Article.

### 1. The Proper Timing of a Section 230 Defense

There is some disagreement in the case law as to whether section 230 can be raised in a motion to dismiss or otherwise

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in the form of a ‘heckler’s veto,’ upon any opponent of indecent speech who might simply log on and inform the would-be discourses that his . . . child . . . would be present”).

363. Kreimer, *supra* note 6, at 31.

364. In an article in *Forbes*, Daniel Lyons advised that the best way to deal with unfavorable speech online is to

ATTACK THE HOST. Find some copyrighted text that a blogger has lifted from your Web site and threaten to sue his Internet service provider under the Digital Millennium Copyright Act. That may prompt the ISP to shut him down. Or threaten to drag the host into a defamation suit against the blogger. The host isn’t liable but may skip the hassle and cut off the blogger’s access anyway.

Daniel Lyons, *Attack of the Blogs!*, *FORBES*, Nov. 14, 2005, at 128, 132 (emphasis in original).

365. Under what is generally known as the “American Rule,” each party in a lawsuit is responsible for paying his or her own attorney’s fees and costs, regardless of the outcome of the litigation. See Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514, 517 (2009). Even in cases that end in settlement, the costs can be substantial. See *id.*

366. Although both parties endure these costs, studies suggest that the costs of defamation litigation disproportionately fall on the defendant. See David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U. L.J. 1207, 1207 (1995) (finding that over 90% of the costs in defamation litigation are attributable to the defendants’ legal fees and expenses, while plaintiffs’ legal fees and expenses account for 3.5% to 8% of total costs).

367. See, e.g., *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, No. CIV. 97-485 LH/LFG, 1998 WL 896459, at \*2 (D.N.M. July 16, 1998) (granting stay and noting that “immunity from the burdens of litigation should appropriately be afforded to AOL”), *aff’d*, 206 F.3d 980 (10th Cir. 2000).

addressed before the parties have had a chance to engage in discovery. While most courts treat section 230 as providing immunity to qualifying defendants,<sup>368</sup> several courts have characterized section 230 as an affirmative defense.<sup>369</sup> Because a plaintiff generally is “not required to plead around affirmative defenses,”<sup>370</sup> the practical consequences that flow from how a court treats this issue can be significant.

If section 230 cannot be raised at the start of the litigation, the defendant will need to file an answer to the complaint, which will trigger a series of obligations to confer with the plaintiff and engage in discovery. Although a defendant may eventually succeed in getting the case dismissed, the defendant will have had to expend time and resources defending against a claim for which it faced no liability.<sup>371</sup>

In the vast majority (84.8%) of the decisions addressing a section 230 defense prior to full discovery, neither the court nor the parties appear to have raised the issue of the proper timing for a section 230 defense. In several other decisions, the plaintiff conceded that section 230 applied or the pleadings themselves provided a sufficient factual basis for the court to make such a ruling.<sup>372</sup> A court refused to address the defendant’s section 230 defense prior to discovery in only 7.6% of the decisions.<sup>373</sup>

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368. See, e.g., *Carafano*, 339 F.3d at 1125; *Ben Ezra, Weinstein & Co.*, 206 F.3d at 983, 986.

369. See, e.g., *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003); *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004).

370. *Novak*, 309 F. Supp. 2d at 452. Affirmative defenses can be raised in a motion to dismiss, however, if the existence of the defense is clear from the complaint itself. See, e.g., *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 416, 425 (1st Cir. 2007). For example, when a complaint reveals that the cause of action accrued earlier than is permitted under the applicable statute of limitations, this defense may be raised on a motion to dismiss. See, e.g., *Guerrero v. Gates*, 357 F.3d 911, 915, 919 (9th Cir. 2004). As previously noted, the fact that the defendant qualifies as an ISP is often apparent from the complaint itself. See *supra* Part IV.A.1.

371. See *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1175 (9th Cir. 2008) (noting that “section 230 must be interpreted to protect Web sites not merely from ultimate liability, but from having to fight costly and protracted legal battles”).

372. See, e.g., *Lycos*, 478 F.3d at 415; *Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536–37 (D. Md. 2006); *PatentWizard, Inc. v. Kinko’s, Inc.*, 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001).

373. See, e.g., *GTE Corp.*, 347 F.3d at 657; *Curran v. Amazon.com, Inc.*, No. 2:07-0354, 2008 WL 472433, at \*14 (S.D.W. Va. Feb. 19, 2008); *Doctor’s Assocs., Inc. v. QIP Holders, LLC.*, No. 3:06-cv-1710 (JCH), 2007 WL 1186026, at \*2 (D. Conn. Apr. 19, 2007); *Novak*, 309 F. Supp. 2d at 452.



However, even in jurisdictions that permit a defendant to move for dismissal under section 230 prior to the completion of discovery, the defendant cannot do so until it first makes an appearance in the case and files a motion for judgment on the pleadings or a motion to dismiss. As a result, intermediaries face costs even when they succeed in getting a case dismissed at an early stage in the litigation.

One way to estimate these costs is to calculate the number of days that elapsed between the filing of the lawsuits under study and the court's decision addressing the application of section 230. Although it is likely to be an imperfect proxy for the costs the parties incurred during the pendency of the litigation, we generally can assume that the longer the period between the filing and the decision, the greater the costs to the parties.

On average, nearly a year elapsed between the date the plaintiffs in the cases studied filed their complaints and the date the trial court judges issued decisions addressing the defendants' section 230 defense.<sup>374</sup> Trial court judges issued their decisions an average of 50 days earlier if they found preemption under section 230 as to at least one claim in the case than they did if they found no preemption.<sup>375</sup>

Not surprisingly, whether the court granted preemption before or after the completion of discovery had the largest impact on how much time elapsed. If a trial court found preemption prior to discovery, it did so an average of 279 days after the complaint was filed.<sup>376</sup> If the court found preemption after discovery, that time frame stretched to an average of 521 days, a statistically significant difference of 242 days.<sup>377</sup> Accordingly, we can conclude that a court's willingness to entertain a defendant's section 230 defense in a motion to dismiss or another pre-discovery motion had a significant and substantial impact on the costs the defendant faced.

374. See table *infra* in note 377.

375. The difference between the mean number of days for decisions granting and not granting preemption, however, was not statistically significant (unpaired *t*-test *p*-value = 0.391).

376. See table *infra* in note 377.

377. Summaries of the statistics showing the elapsed days for decisions granting preemption in trial courts are provided below. The difference in means was statistically significant with an unpaired *t*-test *p*-value of 0.0002.

Posture	Mean	Median	Standard Deviation	Maximum
Before Full Discovery	279	254	149.6	708
After Discovery	521.2	477	383.3	1556

## 2. Imposition of Sanctions and Attorneys' Fees

One way for defendants to recoup their litigation costs, if they are successful in having the case dismissed, is through fee-shifting provisions. While a number of federal statutes contain provisions that provide for the prevailing party to recover some or all of its legal costs,<sup>378</sup> section 230 is not one of those statutes. Nevertheless, some of the cases studied involved claims arising under other statutes or state laws that contained fee-shifting provisions, and even without these provisions, courts retained the discretion to award sanctions in the most egregious cases, although no court has done so to date in a section 230 case.

Overall, the issue of sanctions or attorneys' fees arose in 19 of the 110 decisions (17.3%) in which a court found preemption under section 230 as to at least one claim in the case. In 5 of those decisions, the court awarded sanctions or fees to the defendant.<sup>379</sup> In the remaining 14 decisions, the court denied the defendant's request for fees or sanctions.<sup>380</sup>

In summary, while section 230 has largely protected intermediaries from liability for third-party speech, it has not been a free pass for defendants. Even in cases where the court found section 230 preempted the plaintiff's claims, intermediaries bore liability in the form of litigation costs that they were unable to recoup from plaintiffs. As discussed in Part I, we should be mindful that litigation costs imposed on intermediaries, even those that do not bear liability, can have a chilling effect on their willingness to facilitate the speech of others.

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378. Ashley E. Compton, *Shifting the Blame: The Dilemma of Fee-Shifting Statutes and Fee-Waiver Settlements*, 22 GEO. J. LEGAL ETHICS 761, 763-64 (2009).

379. *E.g.*, Higher Balance, LLC v. Quantum Future Group, Inc., No. 08-233-HA, 2008 WL 5281487 (D. Or. Dec. 18, 2008) (awarding fees under Oregon anti-SLAPP statute); Hamad v. Ctr. for the Study of Popular Culture, No. 06-cv-285 (W.D. Tex. filed Jan. 17, 2007) (awarding sanctions under Rule 11); Barrett v. Clark, No. 833021-5, 2001 WL 881259 (Cal. Super. Ct. July 25, 2001) (awarding fees under California anti-SLAPP statute); *cf.* Steele v. Mengelkoch, No. A07-1375, 2008 WL 2966529 (Minn. Ct. App. August 5, 2008) (affirming dismissal of claims under section 230, but reversing award of sanctions raised *sua sponte* by lower court because plaintiff not given opportunity to withdraw complaint).

380. *E.g.*, Associated Bank-Corp. v. Earthlink Inc., 2005 WL 2240952 (W.D. Wis. 2005); Austin v. CrystalTech Web Hosting, 125 P.3d 389, 389 (Ariz. App. Div. 2005); Univ. Comm. Sys. Inc. v. Lycos Inc., 478 F.3d 413, 413 (Mass. 2007).



### C. Assessing Section 230's Impact on Plaintiffs

Countless law review pages have been devoted to debating the question of why plaintiffs file lawsuits. Obviously, there is no one answer that applies to all plaintiffs or all claims. In the context of defamation and other speech-based torts, which are at the heart of the claims covered by section 230, research has shown that plaintiffs primarily want the tortious material to be removed or corrected.<sup>381</sup> Secondly, they want to recover against the parties responsible. This section of the Article examines whether plaintiffs were successful in achieving either of these objectives.

First, however, a few caveats. The data from this study cannot tell us how many people have been harmed by speech online.<sup>382</sup> Nor can the data tell us how many cases plaintiffs would have filed were it not for section 230.<sup>383</sup> The only thing the data can tell us is how plaintiffs fared in the cases studied.

#### 1. Finding and Suing the Source

A party who believes he or she has been harmed by speech online faces a number of choices, including whether and whom to sue. The intermediaries that facilitated the harm often make appealing targets because typically they have the power to remove the harmful speech, the resources to pay damages, and an online presence that makes them easy to identify.<sup>384</sup> But as the previous

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381. See Randall P. Bezanson, *Libel Law and the Realities of Libel Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 228 (1985) (reporting that only 20% of the surveyed plaintiffs sued to obtain money as compensation for the alleged libel). Instead, "the major motivating factors are restoring reputation, correcting what plaintiffs view as falsity, and vengeance." Randall P. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CAL. L. REV. 789, 791 (1986).

382. This study necessarily excludes cases without decisions and legal claims that were not adjudicated. See, e.g., Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 26 (1983).

383. Because section 230 sets such a high bar for intermediary liability, some plaintiffs may have brought other causes of action, such as vicarious copyright liability, to force the removal of content. See Kreimer, *supra* note 6, at 86–87.

384. In the offline world, the publishers of content, not the distributors, were the ones with the deep pockets. Because it required substantial capital to publish a book or newspaper, publishers had to be well capitalized. Distributors such as bookstores, libraries, and newsstands had relatively little capital in comparison. Not surprisingly, plaintiffs tended to focus on suing publishers because those deeper pockets meant they could recover damages and pay for the cost of the lawsuit. See Robert W. Hamilton, *Liability for Third-Party Content on the Internet*, 8 SETON HALL CONST. L.J. 733, 736 (1998). Today, this relationship is inverted—the deep pockets now reside with the intermediaries.

sections in the Article have shown,<sup>385</sup> section 230 provides broad protections for intermediaries. Except in the rare instances when the defendant-intermediary who interposed section 230 was actually the source of the content at issue (9.6% of the decisions), courts have found that the plaintiff's claims were preempted in nearly seven out of ten decisions.<sup>386</sup>

While section 230 provides a high bar for plaintiffs to overcome when suing an intermediary, it presents no bar to a lawsuit against the original source of the content. Before a plaintiff can recover from the source, however, he or she must first identify the source. As reported in Part III, 41.2% of the decisions studied involved anonymous content.<sup>387</sup> While not insurmountable, the fact that a source is anonymous makes the plaintiff's task more challenging. In order to uncover the anonymous source's identity, the plaintiff can either sue the unidentified source as a "John Doe" in the existing case and request the identifying information from the intermediary through the discovery process, or use a third-party subpoena to request identifying information from another entity that has the relevant information.<sup>388</sup>

In order to capture how often plaintiffs sued the original source, each case from which a decision arose was analyzed to determine whether the plaintiff sued the source in that case or in another case.<sup>389</sup> In more than half of the cases (51.1%), the plaintiffs sued the source of the content as well as the intermediary in the same case. In sixteen additional cases, the plaintiffs sued the third-party source in another case or jurisdiction. In total, plaintiffs sued the third-party

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385. See *supra* Part II.

386. See *supra* Part III.C.

387. See *supra* note 229 and accompanying text discussing how anonymity was defined for purposes of this study.

388. In either situation, courts typically require that the plaintiff demonstrate, *inter alia*, that she has evidence to support each element of her underlying legal claim before ordering disclosure. See *Dendrite Int'l v. Doe*, 775 A.2d 756, 760 (N.J. App. Div. 2001); Lyrisa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. LAW REV. 1373, 1378 (2009). In thirty of the seventy-nine cases (38%) in which the plaintiffs sued the third-party source, the source was identified as being anonymous. This study did not seek to determine whether plaintiffs were successful in unmasking these third-party sources.

389. This involved the following research: (1) search by party name in the state court docket (if the state makes docket available online) or PACER for federal cases; (2) search by party name in Westlaw dockets database; (3) search via Google for case information; and, if necessary, (4) send an e-mail to the plaintiff's lawyers using contact information available on Westlaw, LEXIS, PACER, or Google. If no information could be found, the case was tagged as unknown.

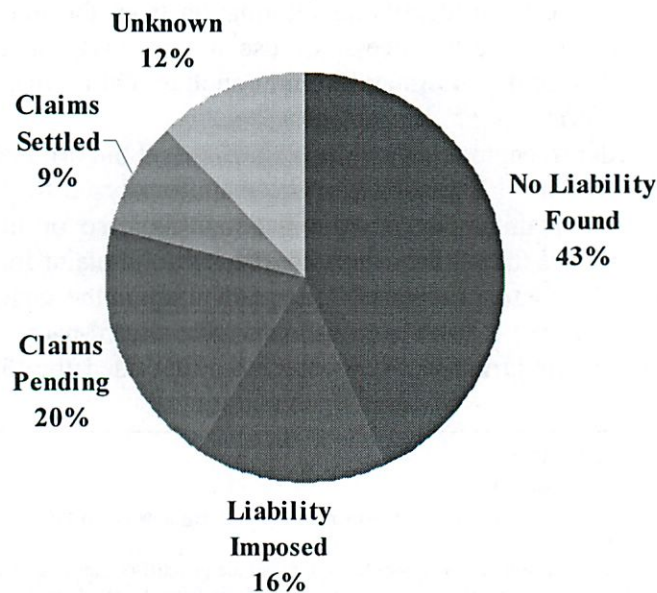


source of the content at issue in 79 of the 140 cases (56.4%) that were examined.<sup>390</sup>

Of course, finding and suing the source only gets a plaintiff partway to his or her goal. Accordingly, each case in which the plaintiff sued the source was examined to determine whether the court found the source liable.<sup>391</sup> Figure G reports the results. Plaintiffs were able to impose liability on the third-party source in only 16% of the seventy-six cases in which they sued the third-party source. In 43.2% of the cases, a court held that the third-party source had no liability.

**FIGURE G**

PROPORTION OF CASES FINDING  
THIRD-PARTY SOURCE LIABLE FOR CONTENT



390. As noted previously, while the number of decisions under study totaled 184, each case was capable of generating more than one decision so there were fewer cases than decisions.

391. If the plaintiff sued the source in the current case, then liability was assessed by examining the current case docket. If the plaintiff sued the source in another case, a research assistant conducted the following research: (1) review the state court docket (if the docket was available online) or PACER for federal cases; (2) search via Google for case information; and, if necessary, (4) send an e-mail to the plaintiff's lawyers using contact information available on Westlaw, LEXIS, PACER, or Google. If no information could be found, the case disposition was tagged as unknown.

At first blush, a 16% success rate would seem to be abysmally low, and it likely feels that way for those plaintiffs who saw their cases end without a finding of liability. Put in context, however, plaintiffs in the cases studied fared slightly better than plaintiffs in typical defamation cases.<sup>392</sup> As figure G shows, 20% of the cases remain pending. In addition, we were unable to determine the status of another 12% of the cases, so the overall success rate for plaintiffs may end up being above or below 16%.

## 2. Content Removal

Plaintiffs appear to have fared better with regard to their other objective: the removal or correction of harmful information. While section 230 does not mandate that an intermediary remove tortious or illegal content, even upon notification or request by the plaintiff, a number of intermediaries did so in any event.

In order to assess the current availability of the content at issue in each case, a research assistant was tasked with identifying the content and determining whether it was currently available from the defendant; if the content was no longer available, the researcher recorded the reason why it was unavailable.<sup>393</sup> This research showed that in more than half of the cases (55%), the content plaintiffs sued over was no longer available as of mid-2009. As to an additional 3.6% of the cases, some but not all of the content was available. Table 16 reports these results as well as the reasons the content was unavailable, if that information could be determined.

As table 16 shows, for those cases in which the content was no longer available, the unavailability was attributable to the defendant's voluntary removal in more than a quarter of the cases. In a number of these cases, the court mentioned in its decisions that the

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392. In a study of libel litigation during the period 1974–1984, researchers at the University of Iowa found that plaintiffs succeeded in imposing liability on media defendants in only 12.6% of the cases. See RANDALL P. BEZANSON ET AL., *LIBEL LAW AND THE PRESS: MYTH AND REALITY* 116 tbl.6-6 (1987); David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 511 (2001) (reporting that media defendants won pretrial dismissal in nearly 77% of defamation cases studied for the period 1980–1996).

393. This was accomplished by examining the decision and, if necessary, the complaint and other filings in the case to identify the content at issue in the plaintiff's claims. If the content could not be specifically identified, its availability was tagged as unknown. The researcher then performed a search for the content on the intermediary's Web site or online service. If it was not available, the reasons were determined by reviewing the court record and any statements on the defendant's Web site or online service. Additional information on these procedures is provided in the Appendix.



defendant had voluntarily removed the offensive material.<sup>394</sup> In another 18.3% of the cases, the defendant's Web site was defunct. In a small number of cases (4.9%), all or some of the material was no longer available because of a court order.

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394. See, e.g., *Almeida*, 456 F.3d at 1319; *Ben Ezra, Weinstein, & Co.*, 206 F.3d at 985-86; *Carafano*, 339 F.3d at 1122; *Zeran*, 129 F.3d at 328-30.

TABLE 16

CURRENT AVAILABILITY OF CONTENT AT ISSUE IN CASE

Content Available	Number of Cases	Percentage of Total	Reasons for Unavailability					
			Court Order	Settlement	Voluntary	Ephemeral	Web Site Defunct	Unknown
No	77	55.0%	2 (3.0%)	4 (5.0%)	21 (27.0%)	9 (12.0%)	14 (18.0%)	27 (35.0%)
Yes	39	27.9%	-	-	-	-	-	-
Partially	5	3.6%	2 (40.0%)	0	1 (20.0%)	1 (20.0%)	0	1 (20.0%)
Unknown	19	13.6%	-	-	-	-	-	-
Total	140							



As table 16 reports, some of the content at issue also was unavailable because the case was settled, which occurred in 18 of the 140 cases studied (12.9%). This rate of settlement was slightly below the settlement rate in non-Internet libel cases reported by other researchers.<sup>395</sup> In the majority of the cases studied (61.4%), the court dismissed the plaintiff's complaint in its entirety, while in only 5.7% of the cases, the court issued a verdict in the plaintiff's favor. Approximately 1 out of every 10 cases (10.7%) is still pending.

Overall, these findings present a mixed picture for plaintiffs in the cases studied. On the one hand, as to almost two-thirds of all claims for which a defendant or the court interposed section 230 as a defense, plaintiffs were unable to proceed against the intermediaries who facilitated the publication or distribution of content they believed had caused them harm. Yet the data show that plaintiffs were not left without a remedy. In more than half of the cases studied, plaintiffs sued the original source of the content at issue in the case. Although plaintiffs were largely unsuccessful in establishing that the third-party source was liable for their injuries, they appear to have done slightly better—with a 16% success rate—than plaintiffs typically do in defamation cases.

On the other hand, if success is measured by how often plaintiffs were able to get the harmful content removed, then they achieved some measure of success. In more than half of the cases studied (55%), the harmful material was no longer available from the defendant-intermediary at the time this research was conducted.

#### CONCLUSION

In the thirteen years since its enactment, section 230 has become one of the most important—and one of the most intensely criticized—statutes impacting speech on the Internet. This criticism comes from both sides of the spectrum. Those who believe section 230 goes too far in privileging intermediaries suggest that it should be narrowed to allow notice-based liability or be repealed altogether. Those who think section 230 does not go far enough suggest that it should be expanded to cover additional claims and to include a fee-shifting provision to deter meritless claims against intermediaries.

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<sup>395</sup> See Bezanson, *Libel Law and the Realities of Libel Litigation: Setting the Record Straight*, *supra* note 381, at 228 (reporting that 15% of libel cases settle).

It is likely that both sides will find support for their arguments in this study. While section 230 has largely protected intermediaries from liability for third-party speech, it has not been the free pass many of its proponents claim and its critics lament it to be. Indeed, intermediaries continue to face legal claims arising from the speech of third parties. Even in cases where the court found that section 230 preempted plaintiffs' claims, intermediaries bore liability in the form of litigation costs, and it took the court nearly a year, on average, to issue a decision addressing an intermediary's defense under section 230.

Scholars who follow these cases closely will likely be surprised to find that more than a third of the claims at issue in the cases survived section 230's broad protection. In the majority of those decisions, however, the courts did not need to reach the question of section 230's application because they found that the claims against the intermediary warranted dismissal on other grounds. When these decisions are included in the calculations, defendants won dismissal on section 230 or other grounds in more than three-quarters of the cases studied.

As to section 230's impact on plaintiffs, the data revealed that section 230 has not been a complete bar to relief. A large proportion of plaintiffs were able to identify and sue the original source of the content that caused them harm. Although their success rate in those suits was quite low, it was not out of line with findings from other studies examining defamation litigation. Moreover, in more than half of the cases studied, plaintiffs succeeded in getting the offensive content removed from the defendants' Web sites or online services.

As with any empirical study, especially one that is the first to systematically examine a body of case law, there are many ways to view and interpret the data. The intent of this research was not to foreclose discussion of the important issues at play in what is largely a normative debate. The decision to privilege intermediaries clearly has had repercussions for those who have been harmed by speech or conduct online. Whether the benefit to society that comes from providing broad protections to intermediaries that facilitate speech outweighs the harms that go unredressed is not something this study can answer.

If Congress considers modifying section 230, it should keep in mind that the rich informational ecosystem we know today is not



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simply a product of the decentralized, open architecture of the Internet. It is a function of the "breathing space" Internet intermediaries currently have under the law to facilitate speech that may be injurious or illegal. Whether the Internet remains open to diverse forms of speech will depend to a considerable degree on whether the intermediaries that make it function can continue to be agnostic as to the content they intermediate.

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### APPENDIX

This appendix describes the methodology employed in the collection and analysis of judicial decisions involving section 230 of the Communications Decency Act<sup>396</sup> that form the basis for *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*. It also includes several additional tables of data that supplement the main text.

#### I. METHODOLOGY

The collection and coding of judicial decisions involved the following methodology.

##### *A. Target Population*

The population of interest for this study is all reported judicial decisions from February 8, 1996—the effective date of section 230—through September 30, 2009, in which a party or the court interposed section 230 as a defense to liability for content or acts online.

##### *B. Sample Selection*

To collect the relevant decisions, I ran searches for decisions citing section 230 on Westlaw<sup>397</sup> and LEXIS,<sup>398</sup> the two primary legal research services, and in the online Legal Threats Database maintained by the Citizen Media Law Project at the Berkman Center for Internet and Society at Harvard University (the “CMLP Database”).<sup>399</sup>

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396. 47 U.S.C. § 230 (2006).

397. On Westlaw, I ran the following search in the ALLCASES database at the start of the research and again at the conclusion on November 15, 2009: “47 U.S.C. § 230” & da (bef 9/30/2009). This search yielded 208 decisions. I then ran a KeyCite search in the Westlaw USCA database for cases citing 47 U.S.C. § 230, which yielded 256 citing decisions within the target date range.

398. On LEXIS, I ran the following search in the Federal & State Cases, Combined database at the start of the research and again at the conclusion on November 15, 2009: “47 U.S.C. § 230” and date leq (9/30/2009). This search yielded 215 decisions. I then ran a Shepard’s search on Lexis for cases citing 47 U.S.C. § 230, which yielded 221 citing decisions within the target date range.

399. The Citizen Media Law Project, which the author directs, maintains a publicly accessible database of lawsuits, cease & desist letters, subpoenas, and other legal threats directed at those who engage in online speech. See Citizen Media Law Project, Legal Threats Database, <http://www.citmedialaw.org/database> (last visited Jan. 4, 2010). The database contains decisions



To be counted as a judicial decision, the decision must have announced a disposition of the case or motion under consideration (e.g., denied, granted, dismissed, affirmed) and must have stated at least one reason for the decision. If a decision met these criteria, it was included in the universe of cases to be coded, regardless of the form of the decision.<sup>400</sup>

A research assistant reviewed the results to identify any decisions reported uniquely in either LEXIS or Westlaw. This review yielded a total of 249 decisions within the target date range from the two databases. In order to find unreported decisions, I also ran a search for lawsuit entries in the CMLP Database.<sup>401</sup> This yielded 12 additional decisions that had not been reported on LEXIS or Westlaw. I then reviewed all of the decisions to exclude those that mentioned section 230 only in passing or otherwise had tangential relevance to its use as a defense to liability for content or acts online. I excluded 77 decisions on this basis.<sup>402</sup> This left 184 judicial decisions in the sample set.<sup>403</sup> Table A-1 summarizes where the judicial decisions that made up the study were found.

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from, among other sources, Westlaw, LEXIS, Bureau of National Affairs (BNA), legal blogs, and reader tips.

400. This definition mirrors the approach taken in the U.S. Court of Appeals Database, an interdisciplinary research effort to study judicial decision making. See Donald R. Songer, *The United State Court of Appeals Database: Documentation for Phase 1*, at 8.

401. I ran a search for lawsuit entries containing the subject area tag "section 230" and "date on or before 9/30/2009." Most entries in the database include the underlying pleadings, which were acquired from the U.S. Federal Court's PACER system and similar state court electronic docketing systems. See Citizen Media Law Project, *supra* note 4.

402. A plurality of the decisions (n = 33) were removed from the sample set because the reference to section 230 was merely definitional (e.g., used to provide a definition for an interactive computer service in another context or to define the Internet generally).

403. It is important to note that this study relies on a sample of the relevant decisions. Although I sought to study the entire population of judicial decisions in which a party or the court interposed section 230 as a defense to liability for content online, I cannot be sure that I collected every decision. It is likely that some decisions, especially in state courts, escaped my notice. Like other studies attempting to empirically examine case law, the exclusion of some unpublished decisions may bias the results to the extent that there is a systematic difference between available and unavailable decisions. See Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795, 1884-87 (2005).

TABLE A-1

## SOURCE OF RELEVANT DECISIONS

<u>Database Source</u>	<u>Number of Decisions</u>	<u>Percentage of Total</u>
Westlaw and LEXIS	151	82.1%
Westlaw only	20	10.9%
LEXIS only	1	0.5%
Citizen Media Law Project	12	6.5%
Total	184	

*C. Coding*

Each decisions was then coded in order to capture general data about the decision (e.g., date, caption, venue, posture); data about the Web site or publication medium involved; data about the decision specifically related to section 230 (e.g., disposition of the defense, appeal status); specific areas of judicial focus in the decision (e.g., whether the court analyzed the scope of the parties covered by section 230, the nature of the defendant's relationship to the source of the content); and various miscellaneous data about the case (e.g., whether the plaintiff sued the third-party source of the content, whether the information was submitted anonymously, whether the court awarded sanctions or fees).

To check the reliability of the coding process, I selected a random sample of 18 decisions from the 184 decisions in the study set. A second coder independently coded this sample of eighteen cases, and the results of the two coded listings were compared in order to assess the degree of inter-coder reliability.<sup>404</sup>

*D. Case and Party Research*

As part of the coding process, various case and party attributes were recorded for each decision in the study set. This research consisted of the research methods described below.

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404. The percentage rate of agreement and "Krippendorf's alpha" for each of the data fields is listed on the coding form, which is available on the author's Web site at <http://www.citmedialaw.org/section-230-empirical-study>. See KLAUS KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* 221-30 (2d ed. 2004).



### 1. Third Party Sued in Another Case

Whether a third party was sued in another case was determined through the following research: (1) a search by party name in the state court docket (if the state makes the docket available online) or PACER for federal cases; (2) a search by party name in the Westlaw dockets database; (3) a search via Google for case information; and if necessary, (4) a request for information via an email to the plaintiff's lawyers using the contact information available on Westlaw, LEXIS, PACER, or Google. If no information could be found, the case was tagged as unknown.

### 2. Third-Party Source Liability

If the plaintiff sued the source in the current case, then liability was assessed by examining the current case docket. If the plaintiff sued the source in another case, a research assistant conducted the following research: (1) a review of the state court docket (if the docket was available online) or PACER for federal cases; (2) a search via Google for case information; and, if necessary, (3) a request for information via an email to the plaintiff's lawyers using the contact information available on Westlaw, LEXIS, PACER, or Google. If no information could be found, the case disposition was tagged as unknown.

### 3. Content Available Online

Whether the online content at issue was available was assessed by examining the decision and, if necessary, the complaint and other filings in the case to identify the content at issue in the plaintiff's claims. If the content could not be specifically identified, its availability was tagged as unknown. A research assistant then performed a search for the content on the intermediary's Web site or online service. If it was not available, the reasons for its unavailability were determined by reviewing the court record and any statements on the defendant's Web site or online service.

### 4. Anonymous Online Content

Whether the online content was anonymous or attributable to an anonymous source was assessed by examining the decision and, if necessary, the complaint and other filings in the case to identify the content at issue in the plaintiff's claims. For the purposes of this

analysis, a decision was tagged as involving anonymous speech if the court noted that the speech was anonymous or the parties stated that the source was unknown.

#### 5. Case Disposition

The disposition of the case was determined through (1) a review of the docket on PACER, Westlaw or the state court filing system to determine the outcome of the case; (2) a search via Google for information about the case; or (3) a request for information via an email to the lawyers in the case using the contact information available on Westlaw, LEXIS, PACER, or Google. If no information could be found, the case was tagged as unknown.

#### 6. Verdict or Settlement Amount

The verdict or the settlement amount was determined through (1) a review of the docket on PACER, Westlaw or the state court filing system to determine the outcome of the case; (2) a search via Google for information about the case; or (3) a request for information via an email to the lawyers in the case using the contact information available on Westlaw, LEXIS, PACER, or Google. If no information could be found, the case was tagged as unknown.

#### 7. Appeal Status

The status of any appeal was determined through (1) a review of the docket on PACER, Westlaw or the state court filing system to determine the outcome of the case; (2) a search via Google for information about the case; or (3) a request for information via an email to the lawyers in the case using the contact information available on Westlaw, LEXIS, PACER, or Google. If no information could be found, the case was tagged as unknown.

#### *E. Analysis*

I analyzed the coded data using Stata 11 for Windows, a statistical software package in wide use within the social and natural sciences. A Microsoft Excel spreadsheet containing the data is available upon request from the author and will be posted on the author's Web site.



## II. ADDITIONAL TABLES AND FIGURES

TABLE A-2

## DISTRIBUTION OF DECISIONS BY STATE

State	Number of Decisions	Percentage of Total	Jurisdiction		Preemption Found	
			Federal	State	Number of Decisions	Percentage of Total
AZ	7	3.8%	5	2	6	85.7%
CA	43	23.4%	19	24	26	60.5%
CT	2	1.1%	1	1	1	50.0%
DC	2	1.1%	2	0	2	100%
DE	1	0.5%	1	0	1	100%
FL	12	6.5%	9	3	7	58.3%
IL	7	3.8%	5	2	6	85.7%
IN	1	0.5%	1	0	0	0%
KS	1	0.5%	0	1	0	0%
KY	1	0.5%	1	0	0	0%
LA	3	1.6%	3	0	2	66.7%
MA	6	3.3%	3	3	2	33.3%
MD	2	1.1%	1	1	2	100%
MI	5	2.7%	4	1	2	40.0%
MN	4	2.2%	3	1	3	75.0%
MO	1	0.5%	1	0	1	100%
NC	4	2.2%	3	1	2	50.0%
NE	1	0.5%	0	1	0	0%
NH	3	1.6%	3	0	2	66.7%
NJ	4	2.2%	2	2	3	75.0%
NM	5	2.7%	3	2	3	60.0%
NV	1	0.5%	1	0	1	100%
NY	18	9.8%	9	9	7	38.9%
OH	3	1.6%	2	1	1	33.3%
OR	6	3.3%	5	1	6	100%

TABLE A-2 (continued)

DISTRIBUTION OF DECISIONS BY STATE

State	Number of Decisions	Percentage of Total	Jurisdiction		Preemption Found	
			Federal	State	Number of Decisions	Percentage of Total
PA	6	3.3%	5	1	5	83.3%
SD	1	0.5%	1	0	1	100%
TN	3	1.6%	2	1	0	0%
TX	10	5.4%	10	0	7	70.0%
VA	7	3.8%	7	0	4	57.1%
VT	1	0.5%	0	1	1	100%
WA	8	4.3%	6	2	4	50.0%
WI	2	1.1%	2	0	2	100%
WV	1	0.5%	1	0	0	0%
WY	2	1.1%	2	0	0	0%
Total	184		123	61	110	59.8%



TABLE A-3

## DISTRIBUTION OF DECISIONS BY POSTURE OF SECTION 230 ISSUE

Posture	Number of Decisions	Percentage of Total	Preemption Found	
			Number of Decisions	Percentage of Total
Preliminary Injunction	2	1.1%	1	50.0%
Discovery	2	1.1%	0	0%
Motion for Leave to Amend	3	1.6%	1	33.3%
Judgment on the Pleadings	9	4.9%	7	77.8%
Motion to Dismiss	95	51.6%	58	61.1%
Motion to Remand	2	1.1%	0	0%
Motion to Strike	16	8.7%	6	37.5%
Summary Judgment	48	26.1%	32	66.7%
Bench Trial	3	1.6%	3	100%
Jury Trial	2	1.1%	0	0%
Motion for Sanctions or Fees	2	1.1%	2	100%
Total	184		110	59.8%

TABLE A-4

## UNREVERSED PREEMPTION RATES BY LEGAL CLAIM

<b>Claim</b>	<b>Frequency of Claim</b>	<b>Preemption Rate</b>
Aiding and Abetting	2	100%
Anti-Cybersquatting Consumer Protection	1	0%
Anti-Scalping	1	100%
Anti-Spam Act	2	50.0%
Autographed Sports Memorabilia Statute	1	100%
Breach Of Contract	10	70.0%
Business Disparagement	3	66.7%
Child Sexual Abuse	1	0%
Civil Rights Act (federal law)	1	100%
Civil Rights Act (state law)	1	100%
Computer Fraud and Abuse Act	1	100%
Conspiracy	15	60.0%
Consumer Protection Act (state law)	9	44.4%
Conversion	1	0%
Copyright Infringement (common law)	2	0%
Cyberstalking	3	66.7%
Deceptive and Unfair Trade Practices	36	50.0%
Defamation	73	64.4%
Discrimination	3	0%
Distribution of Child Pornography	5	40.0%
Distribution of Obscene Material	3	66.7%
Electronic Communications Privacy Act	1	0%
Fair Housing Act	4	50.0%
False Advertising	6	33.3%
False Endorsement	1	0%
False Light	8	75.0%
Fraud	12	66.7%
Free Speech	4	50.0%
Harassment	7	28.6%



TABLE A-4 (continued)

## UNREVERSED PREEMPTION RATES BY LEGAL CLAIM

Claim	Frequency of Claim	Preemption Rate
Injury to Business Reputation	1	100%
Intentional Infliction Of Emotional Distress	23	65.2%
Intrusion	3	33.3%
Invasion Of Privacy	8	62.5%
Libel	10	50.0%
Misappropriation of Name or Likeness	5	20.0%
Negligence	65	84.6%
Nuisance	5	80.0%
Products Liability	6	83.3%
Promissory Estoppel	2	50.0%
Public Disclosure of Private Facts	4	50.0%
RICO	2	0%
Right of Publicity	13	30.8%
Spoliation	1	0%
Spoliation of Evidence	1	100%
Substantive Due Process	1	100%
Telemarketing & Consumer Fraud and Abuse	1	0%
Tortious Interference	36	61.1%
Trade Libel	5	60.0%
Trade Secrets	1	100%
Trademark Dilution	3	33.3%
Trademark Infringement	4	0%
Trespass	2	50.0%
Unjust Enrichment	7	42.9%
Waste of Public Funds	1	100%
Willful and Wanton Conduct	2	100%
Total	429	60.1%

**TABLE A-5**  
**LOGISTIC REGRESSION OF A FINDING OF PREEMPTION AS A FUNCTION**  
**OF FINDINGS IN SIX JUDICIAL AREAS OF INQUIRY**

Area of Inquiry	Finding	Coefficient	Standard Error	z	P > z	95% Confidence Interval
Interactive Computer Service (ICS)	Defendant is an ICS	-1.06	0.86	-1.22	0.22	-2.75 to 0.64
	Defendant is not an ICS	***				
Scope of Claims Covered	Claim Qualifies	**	1.46	-3.11	0	-7.39 to -1.68
	Claim Does Not Qualify	-4.53 *				
Information Content Provider (ICP)	Source is an ICP	2.51 *	1.09	2.31	0.02	0.38 to 4.64
	Source is not an ICP	-2.13 *	1.02	-2.10	0.04	-4.12 to -0.14

Dependent Variable: Preemption Granted (0/1) \* Denotes statistical significance at the 0.05 level.  
 Log Likelihood = -24.893132 \*\* Indicates that the variable predicts success perfectly.  
 Number of Observations = 68 \*\*\* Indicates that the variable predicts failure perfectly.  
 LR chi2(9) = 41.58  
 Probability > chi2 = 0  
 Pseudo R2 = 0.4551  
 Decisions Correctly Classified: 86.76%



**TABLE A-5 (continued)**  
**LOGISTIC REGRESSION OF A FINDING OF PREEMPTION AS A FUNCTION  
 OF FINDINGS IN SIX JUDICIAL AREAS OF INQUIRY**

Area of Inquiry	Finding	Coefficient	Standard Error	z	P > z	95% Confidence Interval
Relationship to Source	No Relationship	-1.36	1.22	-1.11	0.27	-3.75 to 1.03
	Full Control	***			0.16	
Interaction with Content	No Interaction	1.13	0.80	1.42	0.10	-0.43 to 2.69
	Substantial Interaction	-1.47	0.89	-1.66		-3.21 to 0.26
Relationship with Others	No Promise	-0.01	0.99	-0.01	0.99	-1.95 to 1.93
	Promise Made	0.55	1.82	0.30	0.76	-3.02 to 4.12
	Constant	1.28	0.69	1.85	0.07	-0.08 to 2.63

\*\*\* Indicates that the variable predicts failure perfectly.

# OECD Council Recommendation on Principles for Internet Policy Making

13 December 2011





## ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

The OECD is a unique forum where governments work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD member countries are: Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The Commission of the European Communities takes part in the work of the OECD.

## RECOMMENDATION OF THE COUNCIL ON PRINCIPLES FOR INTERNET POLICY MAKING

*December 2011*

**THE COUNCIL,**

**HAVING REGARD** to article 5 b) of the Convention on the Organisation for Economic Cooperation and Development of 14<sup>th</sup> December 1960;

**HAVING REGARD** to Rule 18 b) of the Rules of Procedure;

**HAVING REGARD** to the *Declaration for the Future of the Internet Economy (The "Seoul Declaration")* of 18 June 2008 [C(2008)99], which recognises that the Internet provides an open, decentralised platform for communication, collaboration, innovation, creativity, productivity improvement and economic growth;

**HAVING REGARD** to the *Recommendation of the Council concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* [C(80)58/FINAL], the *Recommendation of the Council concerning Guidelines for the Security of Information Systems and Networks – Towards a Culture of Security* [C(2002)131/FINAL], the *Recommendation of the Council on Broadband Development* [C(2003)259/FINAL], the *Recommendation of the Council on the Protection of Critical Information Infrastructures* [C(2008)35];

**RECOGNISING** that, at the OECD's High Level Meeting on *The Internet Economy: Generating Innovation and Growth* held in June 2011, representatives of OECD Members, Egypt, the Business Industry Advisory Committee to the OECD (BIAC) and the Internet Technical Advisory Committee (ITAC), agreed to the *Communiqué on Principles for Internet Policy-Making (the "Communiqué")*;

**RECOGNISING** that this Communiqué, building on the Seoul Declaration, highlighted that the strength and dynamism of the Internet depend on its ease of access through high speed networks, on openness, and on user confidence; that the Internet allows people to give voice to their democratic aspirations and that any policy-making associated with it must promote openness and be grounded in respect for human rights and the rule of law;

**On the proposal of the Committee for Information, Computer and Communication Policy:**

I. **RECOMMENDS** that, in developing or revising their policies for the Internet Economy, Members, in co-operation with all stakeholders, take account of the following high level principles as explained in the *Communiqué*:

1. Promote and protect the global free flow of information;
2. Promote the open, distributed and interconnected nature of the Internet;
3. Promote investment and competition in high speed networks and services;
4. Promote and enable the cross-border delivery of services;
5. Encourage multi-stakeholder co-operation in policy development processes;



6. Foster voluntarily developed codes of conduct;
7. Develop capacities to bring publicly available, reliable data into the policy-making process;
8. Ensure transparency, fair process, and accountability;
9. Strengthen consistency and effectiveness in privacy protection at a global level;
10. Maximise individual empowerment;
11. Promote creativity and innovation;
12. Limit Internet intermediary liability;
13. Encourage co-operation to promote Internet security;
14. Give appropriate priority to enforcement efforts.

II. **RECALLS** that the *Communiqué on Principles for Internet Policy Making*, which is attached for information purposes, provides context and support to Members and stakeholders in their effort to implement effective and compatible approaches for Internet policy making, both at the national and international levels;

III. **INVITES**

Members to:

- Disseminate this Recommendation throughout their government and to all partner stakeholders, including business, civil society, the Internet technical community and other international forums, and;
- Consult, co-ordinate and co-operate at national and international levels, through multi-stakeholder processes, towards the effective implementation of the Recommendation;

Non-Members to take account of and adhere to this Recommendation and collaborate with Members in its implementation;

IV. **INSTRUCTS** the Committee for Information, Computer and Communications Policy to:

- Promote the dissemination of this Recommendation;
- Assist Members and non-Members in its implementation through a multi-stakeholder process.

ANNEX

COMMUNIQUE ON PRINCIPLES FOR INTERNET POLICY-MAKING

[adopted at the High Level Meeting on The Internet Economy: Generating Innovation and Growth  
28-29 June 2011]

The *Seoul Declaration on the Future of the Internet Economy* adopted at the 2008 OECD Ministerial on the *Future of the Internet Economy* recognised that the Internet provides an open, decentralised platform for communication, collaboration, innovation, creativity, productivity improvement and economic growth. Building on the Seoul Declaration, the OECD's High-Level Meeting on *The Internet Economy: Generating Innovation and Growth*, held in June 2011, highlighted that the strength and dynamism of the Internet depends on its ease of access to high-speed networks, openness, and on user confidence.

In the context of this High-Level Meeting, we, the representatives of OECD Members, Egypt and of stakeholders including the Business and Industry Advisory Committee to the OECD (BIAC), and the Internet Technical Community (ITAC), agreed on a number of basic principles for Internet policy making as an important step in ensuring that the Internet remains open and dynamic.

We recognised that the Internet allows people to give voice to their democratic aspirations, and any policy-making associated with it must promote openness and be grounded in respect for human rights and the rule of law.

We recognised the essential contribution of stakeholders, including business, civil society, the Internet technical community and academic institutions, to the ongoing development of the Internet and the enrichment of society using the Internet.

We stressed that more ubiquitous access to and use of broadband Internet networks, which are available in a competitive market and at affordable prices, will help foster innovation and drive the growth of the Internet Economy and of the economy in general.

We emphasised that, in certain cases, public support and investment may be needed to ensure the greatest practical availability of these networks in our countries, in particular in rural and remote areas, and that such public intervention should support market competition and promote private investment initiatives.

We underlined the importance of generating demand and the significant role that governments can play in this regard by stimulating the use of broadband Internet networks in areas such as science, education, health, transportation and smart electricity grids as well as promoting the use of Internet for an ageing society.

We recognised that new and evolving technologies and protocols, with their enabling effect on broader opportunities and innovation such as IPv6, the Semantic Web and cloud computing, are emerging as a general engine for economic and social development. In the context of recent natural disasters we recognised that a resilient network can play a crucial role in ensuring information sharing and facilitating rapid aid distribution.

The Internet has grown and diffused extremely rapidly across the globe, and continues to bring significant benefits to economies and societies. Individual innovators, and a co-operative multi-stakeholder



environment, have played significant roles in this process. Enhancing access and participation in the Internet economy through the deployment of high-speed broadband Internet networks can also help in increasing the availability of legitimate content, in addition to supporting the free flow of information and knowledge, the freedom of expression, association and assembly, the protection of individual liberties, as critical components of a democratic society and cultural diversity.

The policy-making principles in this communiqué are designed to help preserve the fundamental openness of the Internet while concomitantly meeting certain public policy objectives, such as the protection of privacy, security, children online, and intellectual property, as well as the reinforcement of trust in the Internet. Effective protection of intellectual property rights plays a vital role in spurring innovation and furthers the development of the Internet economy. Internet policy making principles need to take into account the unique social, technical and economic aspects of the Internet environment. It is clear that the open and accessible nature of the Internet needs to be supported for the benefit of freedom of expression, and to facilitate the legitimate sharing of information, knowledge and exchange of views by users, including research and development, that has brought about widespread innovation to our economies.

Recognising the reliance of our economies on the Internet, the global nature of the Internet, and the various approaches implemented to stimulate the Internet economy, including innovative governance strategies in convening diverse groups of stakeholders to forge consensus-based policies, we agreed as governments, private sector stakeholders and civil society to the following basic principles for Internet policy making:

- **Promote and protect the global free flow of information:**

The Internet Economy, as well as individuals' ability to learn, share information and knowledge, express themselves, assemble and form associations, depend on the global free flow of information. To encourage the free flow of information online, it is important to work together to advance better global compatibility across a diverse set of laws and regulations. While promoting the free flow of information, it is also essential for governments to work towards better protection of personal data, children online, consumers, intellectual property rights, and to address cybersecurity. In promoting the free flow of information governments should also respect fundamental rights.

- **Promote the open, distributed and interconnected nature of the Internet:**

As a decentralised network of networks, the Internet has achieved global interconnection without the development of any international regulatory regime. The development of such a formal regulatory regime could risk undermining its growth. The Internet's openness to new devices, applications and services has played an important role in its success in fostering innovation, creativity and economic growth. This openness stems from the continuously evolving interaction and independence among the Internet's various technical components, enabling collaboration and innovation while continuing to operate independently from one another. This independence permits policy and regulatory changes in some components without requiring changes in others or impacting on innovation and collaboration. The Internet's openness also stems from globally accepted, consensus driven technical standards that support global product markets and communications. The roles, openness, and competencies of the global multi-stakeholder institutions that govern standards for different layers of Internet components should be recognised and their contribution should be sought on the different technical elements of public policy objectives. Maintaining technology neutrality and appropriate quality for all Internet services is also important to ensure an open and dynamic Internet environment. Provision of open Internet access services is critical for the Internet economy.



- **Promote investment and competition in high-speed networks and services:**

High-speed networks and services are essential for future economic growth, job creation, greater competitiveness and for people to enjoy a better life. Public policies should promote robust competition in the provision of high-speed broadband Internet that is available to users at affordable prices and promote investment also to attain the greatest geographic coverage of broadband Internet. They should also promote an optimal level of investment by creating demand for high-speed broadband networks and services, in particular in areas where governments play a key role such as in education, health, energy distribution and transport. Public policies should help foster a diversity of content, platforms, applications, online services, and other user communication tools that will create demand for networks and services, as well as to allow users to fully benefit from those networks and services and to access a diversity of content, on non-discriminatory terms, including the cultural and linguistic content of their choice.

- **Promote and enable the cross-border delivery of services:**

Suppliers should have the ability to supply services over the Internet on a cross-border and technologically neutral basis in a manner that promotes interoperability of services and technologies, where appropriate. Users should have the ability to access and generate lawful content and run applications of their choice. To ensure cost effectiveness and other efficiencies, other barriers to the location, access and use of cross-border data facilities and functions should be minimised, providing that appropriate data protection and security measures are implemented in a manner consistent with the relevant OECD Guidelines and reflecting the necessary balance among all fundamental rights, freedoms and principles.

- **Encourage multi-stakeholder co-operation in policy development processes:**

The Internet's complexity, global reach, and constant evolution require timely, scalable, and innovation-enabling policies. Due to the rapidly changing technological, economic and social environment within which new policy challenges emerge, multi-stakeholder processes have been shown to provide the flexibility and global scalability required to address Internet policy challenges. These multi-stakeholder processes should involve the participation of all interested stakeholders and occur in a transparent manner. In particular, continued support is needed for the multi-stakeholder environment, which has underpinned the process of Internet governance and the management of critical Internet resources (such as naming and numbering resources) and these various stakeholders should continue to fully play a role in this framework. Governments should also work in multi-stakeholder environments to achieve international public policy goals and strengthen international co-operation in Internet governance.

- **Foster voluntarily developed codes of conduct:**

Governments may be able to achieve certain policy goals through flexible, adaptive means by encouraging, facilitating and supporting the development of codes of conduct that are supported by effective accountability mechanisms. These codes would be developed by voluntary participants in a multi-stakeholder process and, if appropriate, enforceable under appropriate governmental authority. Such codes of conduct should encourage and facilitate voluntary co-operative efforts by the private sector to respect the freedoms of expression, association and assembly online, and to address illegal activity, including fraudulent, malicious, misleading and unfair practices taking place over the Internet. Such co-operative efforts should be balanced and consistent with the applicable legal framework and where those co-operative efforts are not forthcoming, other policy



options consistent with these principles should be considered in consultation with relevant stakeholders.

- **Develop capacities to bring publicly available, reliable data into the policy-making process:**

Publicly available data can increase the quality of all stakeholders' participation in Internet policy making as well as governments' ultimate policy decisions. The collection, validation and public dissemination of objective data to inform Internet policy decisions should be reinforced and used to augment the combined research capacities of governments, other competent authorities and other stakeholders. International comparable metrics will help to quantify the ongoing economic developments and assess the proportionality and effectiveness of any policy solutions created in multi-stakeholder processes. Data gathering should be undertaken so as to avoid administrative burdens and data analysis should be done carefully to enable sound policy making.

- **Ensure transparency, fair process, and accountability:**

In order to build public trust in the Internet environment, policy-making processes and substantive policies that ensure transparency, fair process, and accountability should be encouraged. Transparency ensures that Internet users have timely, accessible, and actionable information that is relevant to their rights and interests. Fair process provides predictable decision-making procedures to govern the definition, assertion, and defence of rights. Accountability is achieved through policies that make parties answerable, where appropriate, for their actions on the Internet.

- **Strengthen consistency and effectiveness in privacy protection at a global level:**

Strong privacy protection is critical to ensuring that the Internet fulfils its social and economic potential. Current privacy challenges are likely to become more acute as the economy and society depends more heavily on broadened and innovative uses of personal information that can be more easily gathered, stored, and analysed. As individuals increasingly engage via the Internet in their public and private lives, they should be empowered to better understand how their personal data may be used, exercise greater control over those uses, and be confident that it will be handled fairly. Privacy rules should be based on globally recognised principles, such as the OECD privacy guidelines, and governments should work to achieve global interoperability by extending mutual recognition of laws that achieve the same objectives. Cross-border enforcement co-operation will further protect privacy and promote innovation. Privacy rules should also consider the fundamental rights of others in society including rights to freedom of speech, freedom of the press, and an open and transparent government.

- **Maximise individual empowerment:**

The Internet offers potential for individuals to exercise control over the information that they receive as well as the personal data that is disclosed about them. To maximise this potential governments, the private-sector, the Internet technical community and civil society should all work together to provide the capacity for appropriate and effective individual control over the receipt of information and disclosure of personal data, which should include user education and digital literacy initiatives.



- **Promote creativity and innovation:**

Numerous factors account for the extraordinary creativity and innovation found on the Internet, including intellectual property protection for creative endeavours and low barriers to entry which have enabled creation and deployment of new technologies, products and services. The Seoul Declaration of the OECD on the Future of the Internet Economy highlighted some of these factors including an open environment that supports the free flow of information, research, innovation, entrepreneurship, the wide accessibility to public sector information and content, the encouragement of basic and applied research on the Internet and of collaborative knowledge and innovation networks involving universities, governments, and public research. Low barriers to entry enabled by the open platform nature of the Internet environment have been crucial to online creativity and innovation. Policies and practices should continue to encourage and promote an Internet environment which is conducive to launching creative and innovative technologies, businesses, and other endeavours that respect recognised legal rights without having to obtain permission or affirmative co-operation from established service providers. Intellectual property protection is a fundamental tool for the advancement of innovation and creativity on the Internet. New and complementary approaches balanced to ensure effective protection of intellectual property should also be encouraged where necessary, and should also ensure protection of legitimate competition and fundamental principles such as freedom of expression, access to lawful content and Internet services and technologies, fair process, and privacy. Sound Internet policy should encompass norms of responsibility that enable private sector voluntary co-operation for the protection of intellectual property. Appropriate measures include lawful steps to address and deter infringement, and accord full respect to user and stakeholder rights and fair process. In keeping with the multi-stakeholder processes set out in this document, all parties have a role to play, including individuals, providers, intermediaries, and judicial authorities.

- **Limit Internet intermediary liability:**

Appropriate limitations of liability for Internet intermediaries have, and continue to play, a fundamental role, in particular with regard to third party content. Internet intermediaries, like other stakeholders, can and do play an important role by addressing and deterring illegal activity, fraud and misleading and unfair practices conducted over their networks and services as well as advancing economic growth. Limitations play an important role in promoting innovation and creativity, the free flow of information, and in providing the incentives for co-operation between stakeholders. Within this context governments may choose to convene stakeholders in a transparent, multi-stakeholder process to identify the appropriate circumstances under which Internet intermediaries could take steps to educate users, assist rights holders in enforcing their rights or reduce illegal content, while minimising burdens on intermediaries and ensuring legal certainty for them, respecting fair process, and more generally employing the principles identified in this document. In achieving these current objectives the social and economic costs and benefits, including impacts on Internet access, use, security and development of the policy options should be assessed as part of their development process as should also be their compatibility with the protection of all relevant fundamental rights and freedoms and their proportionality in view of the seriousness of the concerns at stake.

- **Encourage co-operation to promote Internet security:**

Policies to address security threats and reduce vulnerabilities are important to the continued vitality of the Internet. The implementation of internationally recognised, market-driven security standards and best practices to promote online security should be encouraged. In addition, breakthrough R&D on novel security systems capable of dealing with the high complexity of ICT networks,



information systems and applications should be encouraged. Policies to enhance online security should not disrupt the framework conditions that enable the Internet to operate as a global open platform for innovation, economic growth, and social progress and should not be used as pretence for protectionism. Policies should also aim to enhance individual and collective efforts for self-protection and promote trust and confidence. Their consistency with, and potential impact on, other economic and social dimensions of the Internet should be carefully assessed through a multi-stakeholder process prior to adoption and implementation.

- **Give appropriate priority to enforcement efforts:**

Encouraging investment and innovation in the Internet marketplace requires clearly defined legal rights and a robust and fair process to protect those rights, including users' rights, consistent with the need of governments to enforce applicable law. It is important in this regard that governments, industry and civil society work together to foster respect for the law and protect fundamental rights. Sufficient government enforcement resources and industry co-operation should also be available to ensure that Internet-based activities comply with law. Current legislative and regulatory provisions could be reviewed to ensure that they can be effectively enforced and are consistent with fundamental rights. Finally, co-operation on cross-border investigations and enforcement actions should be improved.

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## Google bosses convicted in Italy

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Most popular now, in detail

**An Italian court has convicted three Google executives in a trial over a video showing an autistic teenager being bullied.**

The Google employees were accused of breaking Italian law by allowing the video to be posted online.

Judge Oscar Magi absolved the three of defamation but convicted them of privacy violations.

The UK's former Information Commissioner Richard Thomas said the case gave privacy laws a "bad name".

The three employees, Peter Fleischer, David Drummond and George De Los Reyes, received suspended six-month sentences, while a fourth defendant, product manager Arvind Desikan, was acquitted.



Google spokesman on the conviction of three executives



*cut off*

office for hate mail that is sent in the post," he told BBC News. pursuing such cases are less clear.

"I can't imagine anything similar happening in this country. The case wasn't brought by the Italian equivalent of the information commissioner but by criminal prosecutors and we don't know their motives.

"I find it worrying that the chief privacy officer who had nothing to do with the video has been found guilty. It is unrealistic to expect firms to monitor everything that goes online."

**Seeking consent**

The verdict is likely to have ramifications for content providers around the globe.

Google said at the trial that pre-screening all YouTube content was impossible.

The video at the centre of the case was posted on Google Video in 2006 shortly before the firm acquired YouTube.

Prosecutors argued that Google broke Italian privacy law by not seeking the consent of all the parties involved before allowing it to go online.

Google's lawyers said that the video was removed as soon as it was brought to its attention and that the firm also provided information on who posted it.

*diff laws*

As a result four students were expelled from their school in Turin, northern Italy.

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Congressional Hearing

Interactive (computer services)

Section 230

1996

Not much ~~at~~ thought behind it

- But ended up being very powerful/important

Enabled social networks

3 Panels

Pretty theatrical

Interest  $\rightarrow$  more substantive

In a real committee mtg lots of work

Courts look at it

Reality can be disappointing



②

Committee might read or talk or not even show up

QnA is the meat

Staffers write qu

Members might not know

Execs try not to say interesting stuff

They do crystallize debates

SOPA + PIPA one was big

But members still feel that it's there  
(responsibility to be heard)

(I didn't read anything on SOPA vs EOPA)

Staff

2/3 majority

1/3 minority

Seated by seniority on committee

3

Sometimes Strategic

- whispering
- note passing

Invite witnesses

Rarely compelled

Can refuse to answer question

↳ 5th amendment

Must show up

---

## Open Statements

Set the stage

Be very welcoming → even though from other party

Lay out your position

Fight interest case



4

US econ loses a lot from piracy  
200 jobs

Repeal law to address

illegal transfer of files

(all seem against it)

(not going in order)

Well all speak about illegal

↳ but inter cos must balance

Self-regulate, innovations - creativity

Split dem, rep

important safeguard

↳ Chaffetz i spoke fast

5

Wyden

Section 230

Motivation:

Freedom + Innovation Friendly

Not publishers

Good sanitation - can filter

Not catch all to be negligent

Q Why protect users

users using content generated by other users

not when they were generators

Q Why didn't AOL remove info

(so not like DMCA - where must remove in X time)

Q Why go after companies & not generators

\* Wyden suggested a possibility making EOS allow generators to be liable



⑥

Q: Piracy

Some way to hold ISPs responsible for traffic over network

Wyden proposed SOPA - equivalent

Q: Anon info?

↳ Would make someone liability

Wyden not feasible to prevent

Q Specific services set up to violate the law

---

2nd Panel

Harris → internet grew a great deal

↳ Center for Democracy + Tech

Freedom of expression

Open network

(no economic argument)

(7)

McLarty: trial lawyers

Collect liability from the huge cos that  
run the internet

Not required to take quote down

Levine - YouTube

3rd most visited site on web

every min → 72 hrs

Cos required to verify accuracy of every page

Could not exist

Must screen everything

Would be hosted worldwide

individual liability matters

778 bill → e-commerce

devastating blow

w/ econ → should avoid



② More like distributors

We care about quality standards

↳ vol take down

Q Does Google monitor it?

Yes for copyright

Not for defamation

Q: DMCA pirated content?

(? sep matter

- from defamation)

Q It seems like Congress trying to role in

↳ but DMCA -- (?)

9

(I should have prewrote my article  
to cover (d) rnh)

Q The Pirated Bay  
Foreign site  
ISPs don't care since safe harbor  
230 - specifically mentions nothing w/ IP

Q Youtube  
No plan  
We ~~are~~ could not exist as sharing platform

Q Lawyer  
No interest in keeping sites alive  
Perfa my kids not on FB  
AOL is dead  
(censored correct)

Issa corrected pronunciation



10

Q Google allows flagging + has automated to  
your own better censorship  
How strengthen?

Q Risk of self censor if repeated  
How still protect speech?

↳ More access to legit content  
(poor knowledge of how internet works)

↳ My Cathy: re only to incentivize good sanitation  
just that

YouTube:

Prod: How does 230 apply or not?  
Not involved  
(missed something here)

⑩

(Intel must analyze large amts of info)

Recess

---

Prof: Copy vs publish

©

pat / state law

DMCA

two legal classifications

Copyright: publishing or not does not matter  
just making a copy

Rep crafty marshing them together

- ISPs <sup>Thermei</sup> are more responsible

Panel can jump in

Seguey into your point

Chair can cut you off

Witness don't want to let an important pt across



(17)

Goldman Sachs  
Prof Sun Jose

Lots of case law

Would throw out of window

Section 230 for GitHub

Even no speech

GitHub won as intermediary

Terminate users for hate speech

~~But~~ S.P. couldn't term. user

Would have to tolerate

(Good to emphasize removing

safe harbor means no filtering

- he others just thought would shut down
- but could just not filter

(13)

Family Reserch - law would prevent porn transmission

Obama doesn't enforce

(no talking about law

Prevent transmission of obscene porn

Facebook - How many use?

Share + communicate

Q for FB: What would you propose as alt

Reporting system

-flagging

~~Ans~~

O ?

Self sensor attached



(14)

Q Reactionary - Why not more proactive  
~~Q~~ ;

Q ~~Q~~ \$

Not up front

But over time

Since so broadly applied

Vote

Shipping market  
3-5 min to caucus

Roomates.com - if users

~~don't break down~~  
encouraged to break can

Yea or Nay or Reconciliation

↑  
repeat 230

Q

2 Yeh

6 Nays

# THH Report

9/20

Pros: You can pick your own tilt?  
- FB here -

Do I do balanced?

I think I'll do slight to not repeat

Pro: porn, copyright, libel

3                      2                      1  
can't go after indivs  
Cons: push costs onto cos  
hold accountable

Cons: YouTube would be impossible to monitor  
break biz model  
Lawsuit costs  
Work sensor

Or could not filter at all

This is more like a pre written before the  
hearing - not the most interesting tilt  
- but adequate



②

(We are can ~~gone~~ sum up so fast

- Standard of TV reporters

- now written)

(15) (my report)

Prof: Reporting Style  
Dany

I did Chron not ~~impr~~ order of importance

(Revise in writing) (but I think I pulled together)  
(and no eye contact)

---

Prof: Debiel

Was surprised 6-2

When so many leading qv

? Stay in character or true beliefs

Youtube: surprised no one asked about all arab  
video blocked

Hal: Years ago Youtube ~~didn't want~~ <sup>reluctant</sup> to block anything  
Now more careful in each country



(16)

Alan: Very hard issue to do local country  
- how much to do

IP restriction new tech

Thailand blocked all of Youtube  
But will you check every video

Do you IP-restrict in 200 regions  
Could small publishers do?

Google in China

Alan: Felt like defeat  
Countries sovereign  
block services wholesale

~~at~~ 72 hrs hard  
but when get notice

(17)

Q How does IP-blocking mesh w/ IP blocking?

Q How ~~much~~ much do you take stuff down?

Hate Speech in US only

US people would condemn it

↳ know 5 folks

This is not Congress

- Just Youtube not saying we'll show it

Google doesn't have any obligation to carry it  
User choice

That was the core of 230

Remove disincentives

dominate disassenters; protect kids from bad material  
let private cos choose to do what they want



(18)

it was the few, big brands that ruled  
the Internet at this time

Not the gov filtering

↳ but a co

Prof: Not censoring but editing  
Danny

Q Common carrier?

Many would like to extend it

Large speakers - that is inapplicable to them  
↳ some editorial choice

But we don't want phone companies to  
~~monitor phone calls~~ + be liable for robbing

It's only half

↳ no common carrier

↳ you carry what you want

(19)

Information provider vs interactive computer service  
↑ FB claims it is

Perhaps competition over the Internet

But ~~as~~ YouTube

- We are not a common carrier  
We want to editorial

- but we're just the neutral platform

Alan: Is that the problem?

Is there a way where they become liable

Q ~~could~~ Should YouTube take down defamatory videos?

Does YouTube ~~want~~ fact-check?



(W)

Paul: Does anonymity matter?

Is YouTube an anonymity barrier?

Is that the line

Tracable leg

Publisher vs Distributor

Alan: I've argued many times 230 is good  
+ DMCA

Why US is innovation friendly

But raises qu

Should there be no responsibility?

Should Cos make editorial choice?

- remove 230 protection - chip away
- more like info service

Arab Protects 'good reason to censor

(20)

Student:

Q Is there a diff text + video  
can it do that automatically  
Analogies might not work

Danny: When written → flow of content overwhelming  
Now lots more automated tech

Were once 6000 ISPs

Now fewer, bigger

So give them low liability - ↑ diversity

---

Alan: Many witnesses were better at answering Qs

And Qs more substantive

less hysterical - "protect the kids"

"<sup>will</sup> destroy the Internet"



60

## End of Semester Projects

By next week → graded

Then lay out steps

1. Commercial privacy

2. Cyber security

3. Electronic surveillance

4. Global free flow of info

5. Global internet governance

6. Copyright

7. Broadband adoption + deployment

Agenda 2013 → How to approach  
these

(23)

These are all too broad → narrow!

Child Privacy  
- burden or not strong enough

What could you do on ~~policy~~ policy for security

Wiretapping Somewhat broken

Trade laws

Very little on info side  
but tariffs don't matter really

Other policy stuff

blocking

diplomacy

OECD

Internet freedom + human rights



(24)

Global Internet Governance - gecky

IETF

ICANN

Broadband

\$ 7 bil spent

30% of pop has never used Internet

Very expensive

What do you do?

25-40 pgs long

~~short, but no~~

more concise better

not just advocacy

but broad view of options

8. Yarr idea - Propose to prof  
? Health IT

(25)

Pick a group

Surveillance

UAV

Many lens about people

But if unmanned



**TITLE 47 - TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS**  
**CHAPTER 5 - WIRE OR RADIO COMMUNICATION**  
**SUBCHAPTER II - COMMON CARRIERS**  
**Part I - Common Carrier Regulation**

**§ 230. Protection for private blocking and screening of offensive material**

**(a) Findings**

The Congress finds the following:

- (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
- (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
- (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

**(b) Policy**

It is the policy of the United States—

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) 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;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
- (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

*Users  
Control  
Themselves*

**(c) Protection for "Good Samaritan" blocking and screening of offensive material**

**(1) Treatment of publisher or speaker**

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

**(2) Civil liability**

No provider or user of an interactive computer service shall be held liable on account of—

- (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
- (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).<sup>1</sup>

**(d) Obligations of interactive computer service**

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

**(e) Effect on other laws**

**(1) No effect on criminal law**

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

**(2) No effect on intellectual property law**

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

**(3) State law**

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

**(4) No effect on communications privacy law**

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

**(f) Definitions**

As used in this section:

**(1) Internet**

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

**(2) Interactive computer service**

The term "interactive computer service" means 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.

**(3) Information content provider**

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

**(4) Access software provider**

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

- (A) filter, screen, allow, or disallow content;
- (B) pick, choose, analyze, or digest content; or
- (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

**Footnotes**



*NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscpri.html>).*

<sup>1</sup> So in original. Probably should be “subparagraph (A).”

(June 19, 1934, ch. 652, title II, § 230, as added Pub. L. 104–104, title V, § 509, Feb. 8, 1996, 110 Stat. 137; amended Pub. L. 105–277, div. C, title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681–739.)

### References in Text

The Electronic Communications Privacy Act of 1986, referred to in subsec. (e)(4), is Pub. L. 99–508, Oct. 21, 1986, 100 Stat. 1848, as amended. For complete classification of this Act to the Code, see Short Title of 1986 Amendment note set out under section 2510 of Title 18, Crimes and Criminal Procedure, and Tables.

### Codification

Section 509 of Pub. L. 104–104, which directed amendment of title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) by adding section 230 at end, was executed by adding the section at end of part I of title II of the Act to reflect the probable intent of Congress and amendments by sections 101(a), (b), and 151(a) of Pub. L. 104–104 designating §§ 201 to 229 as part I and adding parts II (§ 251 et seq.) and III (§ 271 et seq.) to title II of the Act.

### Amendments

1998—Subsec. (d). Pub. L. 105–277, § 1404(a)(3), added subsec. (d). Former subsec. (d) redesignated (e).

Subsec. (d)(1). Pub. L. 105–277, § 1404(a)(1), inserted “or 231” after “section 223”.

Subsecs. (e), (f). Pub. L. 105–277, § 1404(a)(2), redesignated subsecs. (d) and (e) as (e) and (f), respectively.

### Effective Date of 1998 Amendment

Amendment by Pub. L. 105–277 effective 30 days after Oct. 21, 1998, see section 1406 of Pub. L. 105–277, set out as a note under section 223 of this title.

Washington Post  
Article

9/22

500 words

Already late in submitting

Need headline

Do importance first → ~~the~~ vote list

Oh wait other part of assignment says due Sun

Reading Wash Po Committee write ups it

Seems like most fit on large issues

Not just a basic summary

But I will do more of a summary

Little color

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I could add some color from my readings  
Or do much of a starter Committee thing



2

Next some by an Section  
- m first who voted

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History

Then that history on display

How much control themselves?

Can view submissions online

Yes & online for download

Could also not filter

Intentional

Setting anyway

Not common carrier - still have control

(3)

Copyright

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I have a feeling this is not very  
article-like

(can revise later)

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End on a wimper



# The Washington Post

Sample Article  
Real-Life

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## House Ethics Committee decides against charges for California Democratic Rep. Maxine Waters

By Associated Press, Published: September 20 | Updated: Friday, September 21, 1:41 PM

WASHINGTON — California Democratic Rep. Maxine Waters won't be charged with ethics violations following allegations she steered a \$12 million federal bailout to a bank where her husband owns stock.

House Ethics Committee members said Friday at a hearing their investigation found no violation by Waters, a senior member of the House Financial Services Committee. She could become the panel's senior Democrat next year, or the chairwoman, if Democrats win control of the House.

What happened  
Practically  
Technically

However, the ethics panel said that Waters' chief of staff, Mikael Moore, did take actions in Congress in an attempt to help the bank and that he violated House standards of conduct. Moore, who is also Waters' grandson, likely will receive a letter admonishing him for his conduct but will not face more severe punishment, such as a reprimand, by the full House.

The next step is for the committee to vote to issue its final report and send Moore the letter.

The case has been beset by internal partisanship that led to all five committee Republicans and the top Democrat stepping aside in the case last February in favor of substitutes, to leave no questions about the committee's impartiality.

Why?

An outside counsel, Billy Martin, was hired to investigate the committee first and then to investigate the substance of the case. He found no wrongdoing by the committee, which had never hired an outside lawyer to investigate itself.

Virginia Republican Rep. Bob Goodlatte, acting chairman of the panel specifically for the Waters case, announced the tentative findings at the hearing but noted the committee had not issued its final report.

Details

Goodlatte said the committee was convinced that when Waters asked for a meeting at the Treasury Department to discuss financial help for minority banks, she believed she did so on behalf of all minority banks — not just OneUnited, where her husband owns stock. Goodlatte said the committee agreed with Waters' assertion.

The acting chairman said that when Waters realized OneUnited was in serious trouble, she told then-chairman of the House Financial Services Committee, Rep. Barney Frank, D-Mass., to handle any further matters in the case. Goodlatte said, however, that Moore continued efforts in Congress to get committee help for OneUnited, even sending the committee staff an email saying, "OneUnited is in trouble."

790 words - so matches  
9/22/2018 1:49 PM



Waters did not testify at the hearing, but Moore defended himself, saying he violated no House rules. He insisted his actions were not aimed at helping OneUnited and said he received no financial gain.

Moore told the committee he was not aware that his grandfather, Sidney Williams, had a \$350,000 stock investment in OneUnited in September 2008 when Rep. Waters tried to get the Treasury Department to help minority banks.

He argued the committee actions were based on what *detail on person - not really analogous in* "the committee believes I should have known" and said this was "an impossible standard" to meet. *o/s*

Waters routinely wins her Los Angeles district overwhelmingly. Now serving her 11th term, Waters won her last race with 79 percent of the vote.

Her position as top Democrat on the financial services panel next year also would be important to the Congressional Black Caucus because Waters is a senior member of the group. The caucus has been deeply concerned with how the mortgage foreclosure crisis affects minorities.

Goodlatte said at the hearing the committee agreed with Martin, the outside counsel, that Waters should not be charged "because there is not sufficient evidence in the record to prove violations by a clear and convincing standard, which is necessary *q votes* before formal sanctions are recommended in the House of Representatives."

But when speaking of Moore, Goodlatte said, "It is abundantly clear that Rep. Waters told Mr. Moore that he should not specifically assist OneUnited." Goodlatte said there were "substantial issues of credibility" involving Moore.

The key issue in the case was whether Waters requested the meeting at the Treasury Department to assist an association of troubled minority-owned banks — as she contended — or whether she was trying to get a bailout for OneUnited, the bank where her husband is an investor.

She contended she had nothing to do with the government's eventual decision to give OneUnited a \$12 million bailout, and U.S. officials involved in the decision backed her up on that point. Ethics committee members ultimately agreed.

The banks were in trouble because of their investments in mortgage giants Fannie Mae and Freddie Mac, which were taken over by the government.

Waters had been under investigation since 2009, starting with the independent Office of Congressional Ethics. The case later shifted to the Ethics Committee, where it has caused much dissension.

The two committee lawyers who originally worked on the case were suspended by the panel's former Democratic chairman, who accused them of meeting with committee Republicans while excluding Democrats.

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Final

# House Judiciary Committee Upholds Liability Limitations for Internet Platforms

By Michael Plasmeier – Washington Post

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Internet platforms such as Google's YouTube will continue to be immune from liability for content posted onto them by third parties.

The House Judiciary Committee voted 6-2 to table the Internet Truth and Responsibility Act, which would repeal Section 230 of the Communications Decency Act. Rep. Lamar Smith (R-TX) and Bob. Goodlatte (R-TX) were the only two members who voted to repeal Section 230. All 3 Democrats and the 3 other Republicans on the committee voted to keep Section 230.

Proponents of Section 230 argued that repealing the act would do little to prevent objectionable content online because so much of it is hosted overseas. Instead, proponents argued that repealing the law would simply bury legitimate US corporations in a mountain of lawsuits or force providers to refrain from filtering their platforms at all. Those who thought the law should be repealed spoke about protecting Internet users from copyright infringement and pornography, as well as providing a recourse from those harmed by defamatory speech online.

Section 230 has long been a staple of the Internet world. It was originally introduced after *Stratton Oakmont vs Prodigy Services* where the New York Supreme Court found that Prodigy should be liable for all content posted to its bulletin boards, because it made some effort to monitor and remove offensive posts. That case contrasted with an earlier *Cubby vs CompuServe* case where the courts found that internet platforms are not liable for content if they do not screen it. Congress enacted Section 230 to provide a "good Samaritan" incentive for providers to filter user submissions to their websites without making them liable for missing content.

That spirit was on display as Zahavah Levine, the Chief Counsel of YouTube attributed YouTube's success and continued existence on the law. Levine testified that over 72 hours of video are uploaded to YouTube to every minute. Levine claimed that there would be no possibly way for YouTube to effectively screen that volume of material. Sheryl Sandberg, the CEO of Facebook, spoke about the current filtering efforts of Facebook. Sandberg testified that Facebook receives "hundreds of thousands" of reports of objectionable content on its network every week. It employs an army of employees and contractors to find objectionable material and remove it.

Leslie Harris, from the Center for Democracy and Technology spoke about how Section 230 has allowed Internet companies to create their own community standards, without government involvement. This allows different organizations to target different audiences with different standards. Harris also attributes the United States' success in Internet innovation to Section 230. Internet platforms reach

massive scale; unlike with traditional publishers, there would be no way for platforms to monitor and be responsible for everything that goes over their network. Former Google Director of Public Policy Alan Davidson, who attended today's hearing in the audience, believes that no VC would fund a company without this protection from liability.

Professor Eric Goldman, from the University of San Jose Law School warned lawmakers that were the law repealed, platform owners could still avoid liability by firing their filtering staff and not filtering. This would make the Internet platforms open grounds for all sorts of offensive materials, something which Goldman argued should strongly be avoided.

Those who spoke against Section 230 wanted the Internet platforms to do more about copyright and protecting users from illegal content.

Rep. Goodlatte spoke about how the Internet is used as a tool for a massive amount of copyright violations and was interested in ways that Internet platforms could prevent infringement. Tony Perkins, from the Family Research Council, spoke about protecting children from child pornography online, though Section 230 protects no protection to platform owners for either of these issues.

Mary McLarty, represented the trial lawyers, spoke about how identifying the individuals responsible for the offensive content is usually difficult, especially when such content is posted anonymously. Instead, McLarty argues that plaintiffs should be able to sue the big Internet companies. Indeed, Internet platforms are not even required to take down offensive content after being notified of its presence, unlike as in copyright law.

The issue is further complicated by the international nature of the Internet. Content is uploaded from around the world to websites hosted around the world. Internet executives spoke about the difficulties in distinguishing legitimate content from illegal content, especially due to legal differences around the world.

Some have questioned the freedom Internet platforms providers have to be selective, but free from liability. Internet platforms are not common carriers. They have no responsibility to carry all content that is posted to them. This is unlike telephone companies, who are not liable for content spoken over their networks, but must also provide services to everyone.

Ultimately the Committee chose to not allow any amendments and to simply allow Section 230 to stand as-is.



B+

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Comment [AGC1]: Good - you put this into the standard journalistic "inverted pyramid" style by leading with the most important fact, as Danny suggested in class.

Comment [AGC2]: This should probably be in the first paragraph to give context for the headline.

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Comment [AGC3]: It's true they spoke about copyright, but note that this was a misconception

Comment [AGC4]: Slightly awkward

Comment [AGC5]: Good

Comment [AGC6]: Did she say this goes on now? I think this was a hypothetical if 230 was repealed

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Comment [AGC8]: Not sure this is quite right – I think his argument was that we aren't quite sure what the outcome would be, as with the pre-230 rulings.

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Nicely done – this reads like a credible press summary of the proceedings. Your organization of the article is logical and journalistic – the inverted pyramid with later discussions of both sides and key moments in the hearing. Watch out for repetitive language – for each person you say “Person X, of Y Organization, spoke about how...” Try to vary the phrasing to make it more readable and engaging.