

# ValpoScholar

## Valparaiso University Law Review

Volume 48  
Number 1 Fall 2013

pp.369-416

Fall 2013

### The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given

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#### Recommended Citation

Patricia Spiccia, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 Val. U. L. Rev. 369 (2013). Available at: <https://scholar.valpo.edu/vulr/vol48/iss1/9>

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## THE BEST THINGS IN LIFE ARE NOT FREE: WHY IMMUNITY UNDER SECTION 230 OF THE COMMUNICATIONS DECENCY ACT SHOULD BE EARNED AND NOT FREELY GIVEN

### I. INTRODUCTION

Barbra is halfway through her freshman year away at college.<sup>1</sup> As she attempts to adjust to her new surroundings on campus, hoping to make new friends to ease her transition, someone in her dorm informs her that she is featured on a website called JuicyCollegeDirt.com. She enters her name into Google, and the first result is a link to a post on JuicyCollegeDirt.com, so she clicks the link and is directed to the particular post involving her.<sup>2</sup> There, Barbra finds a picture of her with a caption—anonously written—that states: “Barbra Balaney has sexually transmitted diseases.” Below the main post is a large thread of other anonymous comments, which include criticisms of her physical appearance, claims that she uses drugs, and allegations that she is sexually promiscuous and cheats on her significant other.

In a panic, Barbra begins navigating the website in search of a way to contact the site and request removal of the false assertions. She finds the site’s policy statement, which provides that, while malicious defamation of character *may* be grounds for removal, the site does not guarantee that it will remove the material upon request or that posts will be removed within a certain time frame. In accordance with the site’s stated removal procedure, Barbra requests removal of the material; however, the site does not remove the posts. Barbra wants redress for the harm to her reputation, but as a college student cannot afford the costs associated with litigation against anonymous posters on the Internet who are likely

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<sup>1</sup> This hypothetical is fictional and solely the work of the Author and is used to describe the legal issues presented in this Note.

<sup>2</sup> GOOGLE, [www.google.com](http://www.google.com), (last visited Feb. 28, 2013). Google.com is a search engine service that assists users in locating material on the Internet. James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 6 (2007). Anthony Ciolli explained that individuals use Google.com to harm others, stating:

malicious individuals—knowing that their actions on the Internet may have real-life consequences for the intended target—have begun to “Google bomb” individuals by creating a large number of defamatory messages about the target that are likely to show up in search engines and be seen by prospective employers, dates, friends, and others.

Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 154 (2008).

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judgment proof.<sup>3</sup> Most importantly, Barbra wants the material removed so that when people—such as future employers—search her name, they are not directed to the posts. Knowing that the website was in the best position to remove the material, but failed to do so, Barbra wants to sue the website.<sup>4</sup>

The law as it stands today protects websites, such as the fictional JuicyCollegeDirt.com, from almost all lawsuits involving content posted by third parties; therefore, Barbra is left with no recourse for the damage to her reputation.<sup>5</sup> Unfortunately, this situation is a reality for thousands of students across the country.<sup>6</sup> Victims seeking removal of unlawful material are often left with no remedy because the posters are typically anonymous and section 230 of the Communications Decency Act (“CDA”) immunizes Internet Service Providers (“ISPs”) from almost all claims involving third-party material on the Internet.<sup>7</sup>

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<sup>3</sup> See Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1131 (2011) (discussing obstacles for victims of Internet abuse, such as jurisdictional and financial issues). “[M]any individual defendants may well be impecunious and, therefore, effectively judgment-proof.” *Id.*

<sup>4</sup> See Brian C. McManus, Note, *Rethinking Defamation Liability for Internet Service Providers*, 35 SUFFOLK U. L. REV. 647, 648 (2001) (explaining that victims of Internet defamation seldom obtain adequate relief from authors of the material; therefore, victims seek alternative types of liability). Although Barbra is not in a financial position to litigate a claim, the website has a deep pocket, which makes litigation worth pursuing. See *id.* at 648–49 (“Deep-pocketed Internet Service Providers . . . who facilitate the dissemination of [defamatory] information, are the most logical source of relief when the authors are judgment proof.”).

<sup>5</sup> See *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712, 726 (Ariz. Ct. App. 2007) (Barker, J., dissenting) (“[W]hen an anonymous speaker is the defendant, if plaintiff is not allowed to learn the identity of the speaker, there is no other opportunity for relief.”); see also Jason C. Miller, *Who’s Exposing John Doe? Distinguishing Between Public and Private Figure Plaintiffs in Subpoenas to ISPs in Anonymous Online Defamation Suits*, 13 J. TECH. L. & POL’Y 229, 243 (2008) (“The practical effect of [the] interpretations of section 230 of the CDA is to leave Internet defamation victims with no deep pocket to sue.”); Cara J. Ottenweller, Note, *Cyberbullying: The Interactive Playground Cries for a Clarification of the Communications Decency Act*, 41 VAL. U. L. REV. 1285, 1287 (2007) (explaining that discovering the identity of the individual responsible for the harmful material is challenging because Internet users are cloaked with anonymity).

<sup>6</sup> See Kimberly Quon, Note, *Implementing a Standard of Care to Provide Protection from a Lawless Internet*, 31 WHITTIER L. REV. 589, 614 (2010) (stating that attacks on the Internet have become an epidemic (citing Ben Leichtling, *Federal Laws Needed to Stop Cyber Bullying, Harassment and Abuse*, BLOGGER NEWS NETWORK (July 8, 2009), <http://www.bloggernews.net/121515>)).

<sup>7</sup> See *infra* Part II.C.2 (describing the current law related to ISP liability and defamatory anonymous posts on the Internet). The definition of ISP includes “entities that host websites, and entities that host message boards, auction sites, e-mail listservs, and Internet dating services.” KrisAnn Norby-Jahner, Comment, “Minor” Online Sexual Harassment and the CDA § 230 Defense: New Directions for Internet Service Provider Liability, 32 HAMLINE L. REV. 207, 230 (2009).

Individuals may not be able to prevent situations like the one described above, but the Federal Communications Commission (“FCC”) may alleviate the unfortunate effects such situations may have on students by creating a division that would serve as a neutral intermediary between the interests of individuals requesting removal of defamatory statements, the posting individuals’ freedom of speech, and the ISPs’ interests.<sup>8</sup> Absent such a division, individuals like Barbra may be left emotionally, personally, and professionally damaged by anonymous postings on the Internet.

This Note encourages the FCC to create a new division to serve as a neutral intermediary that evaluates claims made by potentially defamed individuals and determines whether ISPs should be required to remove particular postings.<sup>9</sup> Before discussing this proposal, Part II provides a brief history of defamation law and the distinctions that exist in the characteristics of defamation law between traditional mediums of expression and the Internet.<sup>10</sup> Next, Part III analyzes whether victims of Internet defamation have adequate methods to protect their reputations.<sup>11</sup> Finally, Part IV proposes a formal removal procedure initiated by a victim of defamation through a neutral division of the FCC that ISPs must abide by to earn immunity from lawsuits concerning third-party content.<sup>12</sup>

## II. BACKGROUND

The Internet is a medium unlike any before, allowing for instant communication that can be accessed by anyone anywhere.<sup>13</sup> If harm

<sup>8</sup> See *infra* Part IV.B (advocating for a notice-and-takedown procedure involving the FCC and explaining why it is superior to other alternatives).

<sup>9</sup> See *infra* Part IV (advocating for a notice-and-takedown procedure that respects each party’s interests).

<sup>10</sup> See *infra* Part II (discussing the common law categories of liability and how section 230 and its judicial construction have exempted the Internet medium from such liability).

<sup>11</sup> See *infra* Part III (asserting that the law, as it stands today, does not adequately protect Internet defamation victims’ interests and that remedies suggested by other academics do not adequately protect the interests of ISPs and publishers of material on the Internet).

<sup>12</sup> See *infra* Part IV (proposing a removal procedure in which the FCC acts as a neutral decision-making intermediary to ensure that truly unlawful material is removed upon notice and lawful speech is not chilled in the process).

<sup>13</sup> Jonathan D. Bick, *Why Should the Internet Be Any Different?*, 19 PACE L. REV. 41, 45 (1998). The Internet has become a major mode of transaction and communication today. See Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Credibility?: Lessons from the DMCA Applied to Online Defamation*, 25 CARDOZO ARTS & ENT. L.J. 237, 238 (2007) (referring to the Internet as “the heart and soul of global culture and society”); Ryan D. O’Day, Note, *Rapists, Sexual Offenders, and Child Molesters: Who Is Your Romantic Match? Why Dating Websites Should Perform Criminal Background Checks*, 48 VAL. U. L. REV. 329, 341–42 (2013) (discussing the evolution of the internet and the many ways in which people use the

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occurs, it is no longer exposed solely to a school or the local community; rather, the damaging material is broadcasted worldwide and can be accessed at all times, often causing more harm than ever imaginable.<sup>14</sup>

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internet today); Quon, *supra* note 6, at 605 (providing statistics regarding Internet transactions). Notably, 78.6% of the North American population uses the Internet today. *Internet Usage Statistics*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats.htm> (last updated Aug. 28, 2013). This is no surprise, as popular websites, such as Facebook and YouTube have made it easier for individuals to express themselves creatively and instantly communicate with others miles away. See Ryan M. Hubbard, Note, *How I Learned to Stop Worrying and Love the Communications Decency Act*, 2007 U. ILL. J.L. TECH. & POL'Y 345, 346 (discussing various websites that have become very influential). Facebook.com is a social networking site that allows individuals to communicate with others and create profiles that include personal information. FACEBOOK, <http://www.facebook.com> (last visited Feb. 27, 2013); see Richard M. Guo, Note, *Stranger Danger and the Online Social Network*, 23 BERKELEY TECH. L.J. 617, 622–23 (2008) (describing Facebook.com and how it operates). See also Lumturije Akiti, Note, *Facebook Off Limits? Protecting Teachers' Private Speech on Social Networking Sites*, 47 VAL. U. L. REV. 119, 122–23 (2012) (indicating that Facebook reached 750 million users worldwide in 2011). YouTube.com is a website that permits individuals to upload video clips for the public to view. YOUTUBE, <http://www.youtube.com> (last visited Feb. 27, 2013).

<sup>14</sup> See Stacy M. Chaffin, Comment, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773, 773 (2008) (explaining that, when the author was younger and got bullied, she was able to escape it by going home but that children today have no escape because when they get home they get bullied on the Internet); see also David A. Myers, *Defamation and the Quiescent Anarchy of the Internet: A Case Study of Cyber Targeting*, 110 PENN. ST. L. REV. 667, 667 (2006) (describing the Internet as “quiescent anarchy” and asserting that it “often leaves victims in its wake”). For example, today college students can and often do utilize gossip websites, such as CollegiateACB.com and TheDirty.com, to anonymously post harmful statements about others. COLLEGIATEACB, <http://www.collegiateacb.com> (last visited Nov. 4, 2012); THE DIRTY, <http://www.thedirty.com> (last visited Nov. 4, 2012); see Michael Burke, Note, *Cracks in the Armor?: The Future of the Communications Decency Act and Potential Challenges to the Protections of Section 230 to Gossip Web Sites*, 17 B.U. J. SCI. & TECH. L. 232, 255 (2011) (“[T]he operators of anonymous gossip board sites are often aware and even encourage third parties to post content that may be defamatory.”). Although there is a wide variety of college gossip sites, there are some features common to all of them such as implicit and explicit encouragement of individuals to anonymously provide sensitive information about their peers with a disregard for the validity of the messages. See Patricia Sanchez Abril, *Repu-Taint Sites and the Limits of § 230 Immunity*, J. INTERNET L., Jan. 2009, at 3, 3–4 (describing “repu-taint” sites and commonalities among them). For example, TheDirty.com, a website in which individuals can anonymously provide “dirt” on others, encourages gossip through its name alone. THE DIRTY, *supra*. Although the trend has been that these websites eventually shut down, they are replaced shortly thereafter by other websites with almost identical features and defamation issues. Burke, *supra*, at 254–55. For example, after JuicyCampus.com shut down in 2009, supposedly due to lack of advertising, anyone who tried to access the site was redirected to CollegeACB.com, which consisted of the same types of posts. Robert D. Richards, *Sex, Lies, and the Internet: Balancing First Amendment Interests, Reputational Harm, and Privacy in the Age of Blogs and Social Networking Sites*, 8 FIRST AMEND. L. REV. 176, 177 (2009); see Ali Grace Ziegrowsky, Note, *Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act*, 61 HASTINGS L.J. 1307, 1319–20 (2010) (discussing

Factors, such as the ease of access and the cloak of anonymity make the Internet particularly susceptible to harmful speech such as defamation.<sup>15</sup> Therefore, Part II.A of this Note discusses defamation law and the interests involved in such claims.<sup>16</sup> Subsequently, Part II.B addresses the common law theories of liability for entities carrying or republishing third-party content.<sup>17</sup> Next, Part II.C explores section 230 of the CDA, its judicial interpretation, and how it altered the theories of liability for ISPs.<sup>18</sup> Part II.D discusses recent case law criticizing section 230.<sup>19</sup> Last, Part II.E investigates previously suggested remedies for assisting victims of Internet harm in mitigating the damage to their reputations.<sup>20</sup>

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JuicyCampus.com and how it operated). CollegeACB.com remained in business until 2012 when it too met its demise; however, soon thereafter an extremely similar site, CollegiateACB.com, came into being and is currently beginning to flourish on college campuses throughout the nation. COLLEGIATEACB, *supra* (providing a list of over 200 universities represented on the website and the number of posts and topics involving each respective university).

<sup>15</sup> See Paul Ehrlich, *Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401, 401 (2002) (providing characteristics of the Internet responsible for a prevalence in harmful speech and discussing the problems related to regulating harmful speech in the Internet medium); see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 385 (1995) (Scalia, J., dissenting) (asserting that anonymity “facilitates wrong by eliminating accountability”); Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 336 (2005) (“Cyberspace offers unscrupulous people an entirely new venue in which to conduct harmful activities without a significant chance of being identified, let alone punished.”); Matthew Altenberg, Comment, *Playing the Mysterious Game of Online Love: Examining an Emerging Trend of Limiting § 230 Immunity of the Communications Decency Act and the Effects on E-Dating Websites*, 32 PACE L. REV. 922, 941 (2012) (“The concept behind the Internet has been to facilitate unrestricted conversations between actors with little regulation or oversight. Therefore, this environment is conditioned for deception, rumors, slander, and intentional misrepresentations involving real humans and imaginary humans.” (footnote omitted)); Sarah Jameson, Comment, *Cyberharassment: Striking a Balance Between Free Speech and Privacy*, 17 COMMLAW CONSPPECTUS 231, 239 (2008) (asserting that, with less accountability, individuals are more likely to act in an unsavory manner).

<sup>16</sup> See *infra* Part II.A (discussing the First Amendment interests involved with defamation and online speech).

<sup>17</sup> See *infra* Part II.B (exploring the various theories of common law liability for entities re-publishing third-party content and the rationale for each theory).

<sup>18</sup> See *infra* Part II.C (explaining that the CDA and its broad judicial construction have eliminated the common law theories of liability for most claims involving re-publishing of third-party content on the Internet).

<sup>19</sup> See *infra* Part II.D (discussing concerns the judiciary has recently expressed regarding section 230's broad construction, including concerns regarding the absence of a takedown procedure).

<sup>20</sup> See *infra* Part II.E (examining previous suggestions, such as using self-help remedies, amending section 230, and repealing section 230 altogether).

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A. *Defamation and the First Amendment Interests at Stake*

Defamation is the cause of action most commonly associated with section 230 of the CDA.<sup>21</sup> Defamation law has been referred to as a “tug-of-war” between two fundamental rights—the plaintiff’s right to her reputation and a defendant’s First Amendment right to free speech.<sup>22</sup> The First Amendment to the Constitution protects, among other things, an individual’s right to speak freely or to refrain from speaking at all.<sup>23</sup> In discussing First Amendment protection, the United States Supreme Court has indicated that it “accords greater weight to the value of free speech than to the dangers of its misuse.”<sup>24</sup> The main theory behind broad free speech protection is that in a society where all types of speech contribute to the market place of ideas, the truth will be unveiled.<sup>25</sup>

The Supreme Court has repeatedly held that the freedom to publish anonymously is within the First Amendment’s free speech protections.<sup>26</sup>

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<sup>21</sup> *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009) (explaining that it is not surprising that “[t]he cause of action most frequently associated with the cases on section 230 is defamation” because section 230 was enacted in response to a defamation case); *see, e.g., Batzel v. Smith*, 333 F.3d 1018, 1022 (9th Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997); *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1014 (N.Y. 2011); *see also* Altenberg, *supra* note 15, at 929 (explaining that the most common type of claims involving section 230 “are speech based torts, such as misrepresentation and defamation”); Joshua Dubnow, Comment, *Ensuring Innovation as the Internet Matures: Competing Interpretations of the Intellectual Property Exception to the Communications Decency Act Immunity*, 9 NW. J. TECH. & INTELL. PROP. 297, 297 (2010) (“Because much of what is written in blogs and on message boards is done anonymously, internet services and websites have quickly garnered negative and defamatory postings about individual non-public people.”). It is important to note, however, that the scope of the law covers a wide variety of causes of action, which will be discussed in more depth in Part II.C.2.

<sup>22</sup> *Medenica & Wahab, supra* note 13, at 239; *see* Amanda Groover Hyland, *The Taming of the Internet: A New Approach [to] Third-Party Internet Defamation*, 31 HASTINGS COMM. & ENT. L.J. 79, 109–10 (2008) (discussing the First Amendment interests at stake in Internet defamation cases involving section 230).

<sup>23</sup> *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (holding that the state could not punish citizens for refusing to display the motto “live free or die” on their license plates). Specifically, the First Amendment states, in part, that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I. The Supreme Court has made clear that the First Amendment’s protections extend wholly to communications on the Internet. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

<sup>24</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (citing *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting)).

<sup>25</sup> *See* Hyland, *supra* note 22, at 110–11 (discussing the marketplace of ideas theory).

<sup>26</sup> *See, e.g., Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199–200 (1999); *McIntyre*, 514 U.S. at 342 (“[A]n author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”); *Talley v. California*, 362 U.S. 60, 64–65 (1960); *see also* *Krinsky v. Doe*, 6, 72 Cal. Rptr. 3d 231, 238 (Ct. App. 2008)

The Court has reasoned that “[a]nonymity is a shield from the tyranny of the majority,” allowing more information to enter the market place of ideas because it protects individuals from retaliation for disseminating information that society may not agree with.<sup>27</sup> Therefore, courts have carefully preserved Internet users’ right to speak anonymously.<sup>28</sup> As a result, ISPs are not required to disclose anonymous posters’ identities, and individuals seeking the identities of anonymous authors of online speech often have to obtain court orders to compel the release of such information.<sup>29</sup>

Although the Supreme Court has indicated that it greatly values free speech, the Court has also indicated that the First Amendment right to

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(“Judicial recognition of the constitutional right to publish anonymously is a longstanding tradition.”). The Court has come to the conclusion that the framers intended to protect anonymous speech because the *Federalist Papers* were published under fictitious names, so anonymous publication traces back to the actual ratification of the U.S. Constitution. *McIntyre*, 514 U.S. at 342; Miller, *supra* note 5, at 248–49 (“[T]he Court recognized a long history of anonymous speech in this country (going back to the *Federalist Papers*) and afforded such speech constitutional protection.”). In *McIntyre*, the Court held that a statute prohibiting anonymous distribution of campaign literature violated the First Amendment. *McIntyre*, 514 U.S. at 357.

<sup>27</sup> *McIntyre*, 514 U.S. at 342, 357. The Court further asserted that anonymity “provides a way for a writer who may be personally unpopular to ensure that readers will not prejudice her message simply because they do not like its proponent.” *Id.* at 342. Additionally, the Court provided examples of well-known writers that wrote under pseudonyms, noting that “[g]reat works of literature have frequently been produced by authors writing under assumed names.” *Id.* at 341 & n.4 (explaining that Mark Twain’s name is actually Samuel Langhorne Clemens and Voltaire’s name is Francois Marie Arouet).

<sup>28</sup> See *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712, 720–21 (Ariz. Ct. App. 2007) (asserting that a plaintiff seeking to compel disclosure of an individual’s identity must be subject to a higher standard because the order would constitute a mandatory injunction, and “an unmasked anonymous speaker cannot later obtain relief from the order should the party seeking the speaker’s identity not prevail on the merits of the lawsuit”); *Krinsky*, 72 Cal. Rptr. 3d at 241 (stating that some courts have exercised heightened scrutiny of a plaintiff’s claim prior to disclosure of a speaker’s identity (citing *Dendrite Int’l, Inc. v. John Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001))). Although the right to speak anonymously is carefully preserved, courts have varied regarding the applicable standard for compelling disclosure. See Erik P. Lewis, Note, *Unmasking “Anon12345”: Applying an Appropriate Standard When Private Citizens Seek the Identity of Anonymous Internet Defamation Defendants*, 2009 U. ILL. L. REV. 947, 954–57 (discussing the variety of standards courts have adopted, such as the motion to dismiss standard, the summary judgment standard, and the good faith standard); see also, e.g., *Doe v. Cahill*, 884 A.2d 451, 460–61 (Del. 2005) (adopting a two-part summary judgment standard); *Dendrite*, 775 A.2d at 760 (articulating a four-step process that has been termed the motion to dismiss standard).

<sup>29</sup> Kraig J. Marton et al., *Protecting One’s Reputation – How to Clear a Name in a World Where Name Calling Is So Easy*, 4 PHOENIX L. REV. 53, 61 (2010); see Miller, *supra* note 5, at 248–50 (discussing the process and challenges involved with John Doe suits seeking to compel ISPs to disclose identities).



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free speech is not absolute.<sup>30</sup> Notably, the First Amendment does not protect defamatory speech to the same degree as most other speech because the Court does not consider defamatory speech valuable in the marketplace of ideas.<sup>31</sup> The *Restatement (Second) of Torts* has defined defamation as a communication that tends “to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”<sup>32</sup> Although defamation laws vary depending on the state, a plaintiff alleging defamation typically must establish the following: “(a) a false and defamatory statement . . . ; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.”<sup>33</sup> The extent of liability imposed on an entity that

<sup>30</sup> See *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (citing cases in which the First Amendment has permitted the imposition of limitations on speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.”).

<sup>31</sup> See *Chaplinsky*, 315 U.S. at 571-72 (specifying categories of speech that do not raise constitutional concerns, such as “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words”). While defamation is not protected to the same degree as most other categories of speech, it is not completely unprotected. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that, to recover for defamation, public officials must prove that the publisher acted with actual malice); *RESTATEMENT (SECOND) OF TORTS* § 580A (1977) (adopting the actual malice standard for public figures). The rationale for the imposition of a higher burden of proof on public figures is that public figures have greater access to channels of communication and thus, have a greater opportunity to minimize the effects of the defamatory communication than private individuals do. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

<sup>32</sup> *RESTATEMENT (SECOND) OF TORTS* § 559 (1977) (defining defamation and providing types of disparagement that rise to the level of actionable defamation). There are two types of defamation: libel and slander. *Id.* § 568; see *Marton et al.*, *supra* note 29, at 55 (recognizing that libel was established overtime after courts determined slander failed to adequately encompass the entire defamation tort). Libel is the publication of defamatory matter through written or printed words; whereas, slander is the publication of defamatory matter through spoken words. *RESTATEMENT (SECOND) OF TORTS* § 568 (1977). However, the distinction between the two causes of action rarely matters; therefore, most courts generally refer to the cause of action as defamation, regardless of whether it is written or spoken. *Marton et al.*, *supra* note 29, at 55-56.

<sup>33</sup> *RESTATEMENT (SECOND) OF TORTS* § 558 (1977). Regarding element (d), a statement can constitute actionable defamation without proof of damages in some limited situations. See, e.g., *id.* § 571 (asserting the standard for imputations of criminal conduct); *id.* § 572 (explaining the rule for imputations of loathsome disease and specifying that “[o]ne who publishes a slander that imputes to another an existing venereal disease or other loathsome and communicable disease is subject to liability without proof of special harm”); *id.* § 573 (providing the rule for imputations affecting business, trade, or profession and explaining that “[o]ne who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful

republishes defamatory third-party content varies depending on the medium used to transmit the information because, while most mediums are subject to the common law framework, the CDA exempted the Internet medium from the common law analysis.<sup>34</sup> As a result, it is instructive to gain an understanding of the common law framework that is applied to non-Internet mediums.<sup>35</sup>

#### B. Common Law Framework

To better understand the application of section 230, one must gain an adequate basis of the common law approach in assessing liability for third-party content. The common law framework focuses on the degree of editorial control that the entity exercises over the material at issue.<sup>36</sup>

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business, trade or profession, or of his public or private office . . . is subject to liability without proof of special harm"); *id.* § 574 ("One who publishes a slander that imputes serious sexual misconduct to another is subject to liability to the other without proof of special harm."). Section 571 states:

One who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is of a type which, if committed in the place of publication, would be

- (a) punishable by imprisonment in a state or federal institution,
- or
- (b) regarded by public opinion as involving moral turpitude.

*Id.* § 571.

<sup>34</sup> Dubnow, *supra* note 21, at 300-01 ("Congress made a 'policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.'" (quoting 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, 852 (1999))); see *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003) (explaining that Congress chose to treat the Internet different from other mediums of communication). Several academics have taken issue with the advantage websites have gained over traditional print media. See, e.g., Medenica & Wahab, *supra* note 13, at 264-65 (suggesting that the distinction is not warranted because the harm suffered is the same regardless of the medium used to impose the harm); 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, 149-50 (1997) (discussing the distinction between legal treatment of printed letters to an editor and electronic letters to an editor); Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1457 (2006) (criticizing the "artificial distinction" section 230 created between the Internet and traditional print mediums).

<sup>35</sup> See *infra* Part II.B (exploring the three common law categories of entities involved in assessing liability for third-party content).

<sup>36</sup> Matthew G. Jeweler, *The Communications Decency Act of 1996: Why § 230 is Outdated and Publisher Liability for Defamation Should Be Reinstated Against Internet Service Providers*, PITT. J. TECH. L. & POL'Y, Fall 2007, at 1, 5; see Ryan French, Comment, *Picking Up the Pieces: Finding Unity After the Communications Decency Act Section 230 Jurisprudential Clash*, 72 LA. L. REV. 443, 453 (2012) (stating that the distinction between each type of common law

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The burden a plaintiff must satisfy to succeed in a suit against an entity that disseminates third-party content depends on whether the entity's status is that of a common carrier, publisher, or distributor.<sup>37</sup>

A common carrier passively provides a forum for third-party speech without editorial control; therefore, it is not liable for information it transmits.<sup>38</sup> In contrast, a publisher exercises editorial control over the third-party information and thus is subject to liability for the content of the speech.<sup>39</sup> Distributors, such as libraries, are held liable only upon a plaintiff's showing that the distributors had actual or constructive knowledge of the unlawful nature of the material.<sup>40</sup> Distributors are

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liability depends on the degree of knowledge each type of entity has regarding the material at issue); Brian J. McBrearty, Comment, *Who's Responsible? Website Immunity Under the Communications Decency Act and the Partial Creation or Development of Online Content*, 82 TEMP. L. REV. 827, 830 (2009) ("The distinction between publishers and distributors under the common law recognizes that increased control over content begets increased exposure to liability."); Sewali K. Patel, Note, *Immunitizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 656 (2002) ("The duty of care and liability increases as the discretion that the disseminator has over the published information increases.").

<sup>37</sup> Jeweler, *supra* note 36, at 3-4 (citing Jay M. Zitter, Annotation, *Liability of Internet Service Provider for Internet or E-mail Defamation*, 84 A.L.R. 5TH 169, 177 (2000)); see Colby Ferris, Student Article, *Communication Indecency: Why the Communications Decency Act, and the Judicial Interpretation of It, Has Led to a Lawless Internet in the Area of Defamation*, 14 BARRY L. REV. 123, 123-26 (2010) (discussing the common law theories of liability and providing examples of each); Ryan Gerdes, Note, *Scaling Back § 230 Immunity: Why the Communications Decency Act Should Take a Page from the Digital Millennium Copyright Act's Service Provider Immunity Playbook*, 60 DRAKE L. REV. 653, 656-57 (2012) (explaining the rationale behind each type of entity's common law liability); Troiano, *supra* note 34, at 1453 (describing the three common law theories of liability for entities that publish third-party content).

<sup>38</sup> See Bryan J. Davis, Comment, *Comment: Untangling the "Publisher" Versus "Information Content Provider" Paradox of 47 U.S.C. § 230: Toward a Rational Application of the Communications Decency Act in Defamation Suits Against Internet Service Providers*, 32 N.M. L. REV. 75, 79-80 (explaining the rationale for the common carrier standard of liability); Jeweler, *supra* note 36, at 3-4 ("A common carrier has no editorial control over the information it carries, such as a telephone company, which has no control over the content of the calls that pass through it."); see also RESTATEMENT (SECOND) OF TORTS § 581 cmt. f (1977) (discussing the type of liability applicable to a party responsible for the transmission of third-party messages); RICHARD A. SPINELLO, REGULATING CYBERSPACE 135 (2002) (discussing common carrier liability).

<sup>39</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, 810 (5th ed. 1984); see Sheridan, *supra* note 34, at 168 (explaining the similarities and distinguishing factors between publishers and distributors); French, *supra* note 36, at 452-53 (describing and providing examples of publishers); Hattie Harman, Note, *Drop-Down Lists and the Communications Decency Act: A Creation Conundrum*, 43 IND. L. REV. 143, 146 (2009) (discussing common law publisher liability).

<sup>40</sup> *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991) ("The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First

subject to limited liability due to concerns that it would be too burdensome for them to read every publication prior to sale or distribution and that liability would result in excessive censorship.<sup>41</sup> While almost all providers of third-party content are subject to liability depending on the above categories, Congress, through the CDA, has made the Internet an exception.<sup>42</sup>

C. *Section 230 of the CDA: How It Came to Be and What It Has Become*

Section 230 of the CDA protects ISPs from incurring liability for third-party content on the Internet.<sup>43</sup> The statute's language contains some ambiguities; therefore, the judiciary has attempted to discern Congress's intentions, interpreting section 230 accordingly.<sup>44</sup> Part II.C.1

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Amendment . . ."); Jeweler, *supra* note 36, at 4; see *Smith v. California*, 361 U.S. 147, 152–55 (1959) (invalidating an ordinance that imposed liability on booksellers for possession of obscene books despite booksellers lacking knowledge as to the books' contents); see also RESTATEMENT (SECOND) OF TORTS § 581 cmt. e. (1977) (adopting the distributor standard of liability for bookstores and libraries).

<sup>41</sup> *Smith*, 361 U.S. at 153–54. Some examples of distributors are libraries, newsstands, and booksellers. See French, *supra* note 36, at 53 (discussing and providing examples of distributors).

<sup>42</sup> See *Batzel v. Smith*, 333 F.3d 1018, 1020 (9th Cir. 2003) ("There is no reason inherent in the technological features of cyberspace why . . . [the] law should apply differently in cyberspace than in the brick and mortar world. Congress, however, has chosen for policy reasons to immunize from liability for defamatory or obscene speech 'providers and users of interactive computer services' when the defamatory or obscene material is 'provided' by someone else."); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003) ("Internet publishers are treated differently from corresponding publishers in print, television and radio.").

<sup>43</sup> Peter Adamo, Comment, *Craigslist, the CDA, and Inconsistent International Standards Regarding Liability for Third-Party Postings on the Internet*, PACE INT'L L. REV. ONLINE COMPANION, Feb. 2011, at 1, 2; Emily K. Fritts, Note, *Internet Libel and the Communications Decency Act: How the Courts Erroneously Interpreted Congressional Intent with Regard to Liability of Internet Service Providers*, 93 KY. L.J. 765, 773 (2004–2005).

<sup>44</sup> Eric Weslander, Comment, *Murky "Development": How the Ninth Circuit Exposed Ambiguity Within the Communications Decency Act, and Why Internet Publishers Should Worry* [*Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008)], 48 WASHBURN L.J. 267, 284 (2008). Because courts have had to interpret much of section 230, it is important to note the methods courts generally use to interpret statutes. See *id.* (explaining that, because section 230 is ambiguous, "a debate rages" regarding what Congress actually intended). There are three levels of analysis involved in the traditional approach to statutory interpretation, each seeking to discern the legislature's intent and meaning regarding the statute. See Hubbard, *supra* note 13, at 353–58 (discussing approaches to statutory interpretation and analyzing how each approach works). First, a court will look directly at "the text and context of the statutory provision." *Id.* at 353. If the intent is unclear from the provision's text, the court will consider its legislative history. *Id.* If the legislative history fails to provide an answer as to the legislature's intent, courts may consider canons of statutory interpretation. *Id.* "[C]anons are general rules created by the judiciary in an attempt to provide uniform guidelines by which a statute can be interpreted

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discusses section 230's legislative history.<sup>45</sup> Next, Part II.C.2 explores how courts have interpreted section 230.<sup>46</sup>

## 1. The Legislative History of Section 230 of the CDA

Congress enacted section 230 the CDA as part of the Telecommunications Act of 1996.<sup>47</sup> Soon after a *Time Magazine* cover story brought attention to the large array of offensive material on the Internet, Senator Exon introduced a draft of section 223 of the CDA in an effort to protect children from sexually explicit content.<sup>48</sup> While Senator

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in the absence of any more concrete guidance or authority on point." *Id.* at 357. One notable canon is *expressio unius est exclusio alterius*, which stands for the proposition that, when certain terms have been explicitly stated in a statute, it may be implied that the statute is inapplicable to terms that have been excluded from the legislation. 73 AM. JUR. 2D *Statutes* § 120 (2012). Another canon is *in pari materia*, which provides that, when two or more parts of a statute concern the same subject, they must be "construed together so that all parts of the statutory scheme are given effect." *Id.* § 95. Similarly, it is important to consider the rule against surplusage. See FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 88 (2009) (describing the rule against surplusage); see also *Kungys v. United States*, 485 U.S. 759, 778 (1988) (criticizing the concurrence for violating "the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant" (citing *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961); *United States v. Menasche*, 348 U.S. 528, 538-539 (1955))); Gregory M. Dickinson, Note, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POL'Y 863, 869-70 (2010) (discussing the rule against surplusage and its applicability to section 230 of the CDA). The rule against surplusage provides that, "if an interpretation of given statutory words would produce a meaning that was duplicative of other statutory language, it is presumed that this is not the correct interpretation." CROSS, *supra*.

<sup>45</sup> See *infra* Part II.C.1 (explaining Congress's motivation for enacting section 230 of the CDA).

<sup>46</sup> See *infra* Part II.C.2 (discussing the judiciary's broad construction of section 230 of the CDA and its reasons for doing so).

<sup>47</sup> *Batzel*, 333 F.3d at 1026; *Medenica & Wahab*, *supra* note 13, at 246-47. The CDA was part of an overall amendment to the Communications Act of 1934. David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 409 (2010).

<sup>48</sup> 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, 57 (1996) ("The fundamental purpose of the Communications Decency Act is to provide much needed protection for children." (quoting 141 CONG. REC. S8088 (daily ed. June 9, 1995))). *Time Magazine* featured a front page exclusive of a pornography study ("Rimm study") performed by a Carnegie Mellon University researcher named Marty Rimm. *Id.* at 53-54 (citing Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849 (1995)). In his study, Rimm asserted that pornographic images comprised 83.5% of the images on the Internet. Rimm, *supra*, at 1867; see Cannon, *supra*, at 54-57 (providing background on the Rimm study and explaining the study's involvement in the CDA's legislative history). The Rimm study was heavily criticized, and *Time Magazine* even

Exon's ultimate goal was uncontested, his method of achieving that goal—namely through FCC regulation—was not well received by some Congressmen.<sup>49</sup> Specifically, Representatives Christopher Cox and Ron Wyden introduced the Online Family Empowerment Act (“Cox-Wyden Amendment”), which was a defensive provision expressly rejecting FCC interference.<sup>50</sup> Although juvenile access to pornography was the initial issue Congress sought to address, the Cox-Wyden Amendment tackled several other concerns that Congressmen had with the emergence of the Internet—such as two recent court applications of traditional defamation law to the Internet, which disincentivised removal of offensive material.<sup>51</sup>

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published a follow-up article that one scholar has considered “all but a retraction and apology for being duped into publishing the study.” Cannon, *supra*, at 55–56 (discussing the problems related to the Rimm study, such as the lack of peer review, plagiarism, and allegations of ethical violations). In support of his draft of the CDA, Senator Exon also introduced, and often cited to, his “blue book,” which was a folder containing pornographic material that was accessible to children via the Internet. David Lukmire, Note, *Can the Courts Tame the Communications Decency Act?: The Reverberations of Zerán v. America Online*, 66 N.Y.U. ANN. SURV. AM. L. 371, 374 (2010). He sought to keep the Internet from becoming a “red light district.” Ardia, *supra* note 47, at 409–10.

<sup>49</sup> 141 CONG. REC. H8469–70 (daily ed. Aug. 4, 1995) (statement of Rep. Christopher Cox). The FCC is an independent federal government agency that regulates national and international communications by methods, such as radio, television, satellite, and cable. *What We Do*, FED. COMM. COMMISSION, <http://www.fcc.gov/what-we-do> (last visited Feb. 26, 2013). It was created by Congress under the Communications Act of 1934, and Congress continues to oversee the agency today. *Id.* On its website, the FCC states that its work involves the following:

[p]romoting competition, innovation, and investment in broadband services and facilities; [s]upporting the nation's economy by ensuring an appropriate competitive framework for the unfolding of the communications revolution; [e]ncouraging the highest and best use of spectrum domestically and internationally; [r]evising media regulations so that new technologies flourish alongside diversity and localism; [p]roviding leadership in strengthening the defense of the nation's communications infrastructure.

*Id.* The FCC is composed of offices and bureaus that implement regulatory programs, encourage the development of innovative services, and investigate and analyze complaints.

*Id.*

<sup>50</sup> 141 CONG. REC. H8468–69. The proposed Cox-Wyden Amendment had a section entitled “FCC Regulation of the Internet and other Interactive Computer Services Prohibited.” *Id.* at H8469. Representative Wyden emphasized that, “parents and families are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats.” *Id.* at H8470. He then proceeded to show his fellow Congressmen a few pieces of emerging technology that enabled parents to block pornography on their children's computers, arguing that the private sector should solve the problem rather than the Government. *Id.*

<sup>51</sup> 141 CONG. REC. H8469–70; *see* *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (classifying CompuServe as a distributor and granting it summary judgment because there was no genuine issue of material fact regarding what

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First, in *Cubby, Inc. v. CompuServe Inc.*, a New York district court held that ISP CompuServe was not liable for a third party's defamatory statement, reasoning that it was a mere distributor that did not exercise editorial control over the material or have actual or constructive knowledge of its defamatory nature.<sup>52</sup> In contrast, the Supreme Court of New York held an ISP liable for a third party's defamatory statements in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, reasoning that the ISP was subject to publisher liability because it filtered the content in efforts to block obscenity from its network.<sup>53</sup> The *Stratton* court distinguished Prodigy from CompuServe, explaining that 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."<sup>54</sup> Hence, the *Stratton* court inadvertently encouraged ISPs to refrain from self-regulating to avoid liability.<sup>55</sup>

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"CompuServe knew or had reason to know" about the alleged defamatory statements); *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, \*4-5 (N.Y. Sup. Ct. May 24, 1995) (holding that making decisions that control the content on internet bulletin boards constitutes editorial control which opened the defendant up to greater liability), *superseded by statute*, 47 U.S.C. § 230(c) (2006); see also Mark G. Materna, *Protecting Generation Z: A Brief Policy Argument Advocating Vicarious Liability for Internet Service Providers*, 47 U.S.F. L. REV. 109, 112 (2012) (discussing Congress's intent in enacting section 230 and stating that "Congress was prompted by two New York state court decisions that reached markedly different conclusions").

<sup>52</sup> 776 F. Supp. at 141. In *Cubby*, developers of a computer database for online gossip filed a defamation suit against an ISP for allowing allegedly defamatory material written by a competitor to appear on one of the ISP's forums. *Id.* at 138. Notably, CompuServe contracted management duties for the forum's content to an independent company and did not have the opportunity to review the contents of the publication prior to its release. *Id.* at 137.

<sup>53</sup> 1995 WL 323710, at \*4-5 ("By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and 'bad taste', for example, PRODIGY is clearly making decisions as to content, and such decisions constitute editorial control." (citation omitted)); see *supra* note 39 and accompanying text (discussing common law publisher liability).

<sup>54</sup> *Stratton*, 1995 WL 323710, at \*5. The court emphasized that Prodigy presented itself to the public as having control over the content of its bulletin boards and that Prodigy implemented an automatic screening program to affect its control. *Id.* at \*4. As for potential concerns, the court stated "the fear that this Court's finding of publisher status for [Prodigy] will compel all computer networks to abdicate control of their bulletin boards, incorrectly presumes that the market will refuse to compensate a network for its increased control and the resulting increased exposure." *Id.* at \*5 (citing Eric Schlachter, *Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 HASTINGS COMM. & ENT. L.J., 87, 138-39 (1993)).

<sup>55</sup> Hyland, *supra* note 22, at 98; Burke, *supra* note 14, at 239; Gerdes, *supra* note 37, at 659; see Charles F. Marshall & Eric M. David, *Prior Restraint 2.0: A Framework for Applying Section 230 to Online Journalism*, 1 WAKE FOREST J.L. & POL'Y 75, 78 (2011) ("Internet companies found themselves in a seemingly untenable position—either take some role in controlling the content on their website and risk significant legal liability for content they

The *Stratton* decision laid the foundation for the Cox-Wyden Amendment, which eventually became section 230 of the final version of the CDA.<sup>56</sup> The Congressmen sought to overturn *Stratton* and encourage ISPs to self-regulate by shielding “Good Samaritan” ISPs from liability.<sup>57</sup> Representative Cox stated that his Amendment would “protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, . . . who takes steps to screen indecency and offensive material for their customers.”<sup>58</sup> To determine whether section 230 has had the intended effect, one must consider both the language of the statute itself and the judiciary’s interpretation of that language.<sup>59</sup>

## 2. Section 230 of the CDA and Its Broad Judicial Construction

The Internet has undergone many changes since Congress passed section 230; therefore, courts have been left with the task of interpreting section 230’s scope and application to the always-emerging methods of

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did not write *or* take a wholly hands-off approach and lose all control over the content on their website.”). As two scholars have noted:

the liability rules were discouraging ISPs from attempting to filter problematic communications. After all, an ISP that refused to self-regulate was likely to fall under the *Cubby* analysis and be characterized as a passive, and hence virtually immune, distributor. An ISP that endeavored to filter, by contrast, was vulnerable to the *Stratton Oakmont* line of reasoning and its associated legal risks.

Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221, 250 (2006).

<sup>56</sup> See Lewis, *supra* note 28, at 958 (“Congress passed the CDA in response to the *Stratton* decision in 1995.”).

<sup>57</sup> 141 CONG. REC. H1130 (daily ed. Jan. 31, 1996) (“One 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.”); Materna, *supra* note 51, at 114 (“Also paramount to Congress’s rationale in passing § 230 was that creating such immunity would subsequently remove disincentives for self-regulation of ISPs.”). Additionally, the Congressmen sought to promote further development of the Internet. Ardia, *supra* note 47, at 410. However, several academics have contended that the Internet is robust enough today that it should be exposed to the same liability as traditional print mediums. See, e.g., Dickinson, *supra* note 44, at 874 (asserting that, because the Internet has flourished, “it no longer serves any coherent purpose to treat defamatory content in the print edition of the *New York Times* differently than that in the online version.”); Jae Hong Lee, Note, *Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 491 (2004) (questioning whether the Internet even needs protection from liability now that it “is no longer in its infancy”).

<sup>58</sup> 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995).

<sup>59</sup> See *infra* Part II.C.2 (discussing the judicial interpretation of section 230, which has been primarily broad).



communication the Internet provides.<sup>60</sup> The portion of the statute that has prompted a great deal of litigation is section 230(c), which states:

**(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>61</sup>

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<sup>60</sup> See Medenica & Wahab, *supra* note 13, at 247 (“As the Internet took on increasing importance in the nation’s daily life, courts began to grapple with its implications.”).

<sup>61</sup> 47 U.S.C. § 230(c) (2006); Ashley Ingber, Note, *Cyber Crime Control: Will Websites Ever Be Held Accountable for the Legal Activities They Profit From?*, 18 CARDOZO J.L. & GENDER 423, 428 (2012) (“The language used by Congress in drafting Section 230 has led to a great deal of litigation about who Congress intended to protect.”). Section 230 is missing one major aspect of Cox and Wyden’s Amendment as originally introduced: part of the section heading, “FCC Regulation of Computer Services Prohibited,” is conspicuously absent. Compare 47 U.S.C. § 230 (2006) (providing the statutory language of section 230), with 141 CONG. REC. H8468 (Aug. 4, 1995) (identifying Congress’s intent in passing section 230). Section 230(b) sets out the following underlying policies for the statute’s enactment:

(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

Litigation has also occurred regarding the statute's distinction between two types of ISPs: interactive computer services ("ICS") and information content providers ("ICP").<sup>62</sup> Notably, the judiciary has

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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.

47 U.S.C. § 230(b). As for Senator Exon, his efforts produced section 223 of the CDA, which criminalized the knowing transmission of obscene or indecent materials to anyone less than eighteen years of age. *See id.* § 223 (outlining the now current language of section 223). However, section 223 was instantly met with hostility, as twenty individuals filed suit challenging its constitutionality the day President Clinton signed it into law. French, *supra* note 36, at 451. Subsequently, the Supreme Court struck down section 223 as a violation of the First Amendment free speech clause in *Reno v. American Civil Liberties Union*. 521 U.S. 844, 874, 879 (1997). The Court reasoned that, while protecting minors from harmful speech is a valid government interest, section 223 of the CDA was not sufficiently narrowly tailored to pass constitutional muster. *Id.* at 875, 879. The Court further explained that, in an effort to protect minors, section 223 of the CDA impermissibly suppressed speech that adults have a constitutional right to receive. *Id.* at 874.

<sup>62</sup> *See* 47 U.S.C. § 230(f)(2)-(3) (defining ICS and ICP); *see also* Ingber, *supra* note 61, at 428 (contending that section 230 does not provide adequate assistance to courts in distinguishing between the two types of Internet entities). To qualify for section 230 immunity: "(1) the defendant must be a provider or user of an 'interactive computer service'; (2) the asserted claims must treat the defendant as a publisher or speaker of information; and (3) the challenged communication must be 'information provided by another information content provider.'" *Batzel v. Smith*, 333 F.3d 1018, 1037 (9th Cir. 2003). Many courts have struggled in determining what types of acts would render an ISP a fellow content provider, precluding it from satisfying the third element. *See, e.g.,* Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1166, 1170 (9th Cir. 2008) (holding that the ISP became an information content provider by requiring users to answer questions about discriminatory preferences as a condition of participating in its housing services); *Batzel*, 333 F.3d at 1031 (holding that the ISP's acts of altering and publishing a defamatory e-mail from a user did not render the ISP an information content provider); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (asserting that, regardless of the editing decisions, an ISP cannot be considered an information content provider of third-party content); *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000) (holding that the ISP's act of deleting some information from the third-party post did not transform the ISP into an information content provider because it was merely engaging in traditional editorial functions). Section 230 defines ICS and ICP as:

**(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

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typically interpreted section 230 very broadly, almost always granting immunity to ISPs.<sup>63</sup>

Although the legislative history and text of section 230 suggests that the statute's scope is narrow—applying only to defamation claims and good faith efforts to self-regulate—the Fourth Circuit in *Zeran v. America Online, Inc.* rejected such a narrow reading of the statute and instead broadly construed the scope of section 230's immunity to apply to claims other than defamation.<sup>64</sup> Additionally, the *Zeran* court rejected notice-based liability, eviscerating the common law distinction between publishers and distributors.<sup>65</sup>

In *Zeran*, an anonymous third party posted a message on an America Online (“AOL”) bulletin board advertising offensive t-shirts praising the Oklahoma City bombing and directing interested buyers to contact plaintiff Kenneth Zeran (“Zeran”).<sup>66</sup> In response, Zeran notified AOL about the hoax, and an AOL employee assured Zeran that AOL would

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development of information provided through the Internet or any other interactive computer service.

47 U.S.C. § 230(f)(2)–(3).

<sup>63</sup> See Jeweler, *supra* note 36, at 10 (asserting that courts have interpreted section 230's immunity very broadly); Eric Taubel, Note, *The ICS Three-Step: A Procedural Alternative for Section 230 of the Communications Decency Act and Derivative Liability in the Online Setting*, 12 MINN. J.L. SCI. & TECH. 365, 366–67 (2011) (“Courts have interpreted [section 230's] immunity in a broad and sweeping manner, making it nearly impossible for any plaintiff to successfully hold an ICS liable for the tortious behavior of a third party.” (footnote omitted)).

<sup>64</sup> See 129 F.3d 327, 330 (4th Cir. 1997) (“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.” (emphasis added)); see also Lukmire, *supra* note 48, at 385 (asserting that the court's interpretation in *Zeran* was unnecessarily broad).

<sup>65</sup> *Zeran*, 129 F.3d at 332; see *supra* Part II.B (explaining that publishers and distributors are subject to different standards of liability for disseminating third-party content).

<sup>66</sup> *Zeran*, 129 F.3d at 329. The advertisement included Zeran's home telephone number, which he could not change because he relied on the home telephone number for his business. *Id.* The t-shirts had slogans, such as “Visit Oklahoma . . . It's a BLAST!!!” and “Finally a day care center that keeps the kids quiet—Oklahoma 1995.” *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1127 nn.3 & 5 (E.D. Va. 1997), *aff'd*, 129 F.3d 327 (1997). The Oklahoma City Bombing occurred on April 19, 1995 and resulted in 168 deaths and more than 500 injured people. STUART A. WRIGHT, PATRIOTS, POLITICS, AND THE OKLAHOMA CITY BOMBING 6 (2007). The deadly explosion was caused by a homemade bomb, which was placed in the back of a truck that was parked in front of the Alfred P. Murrah Federal Building. *Id.* The bombing shocked the nation and was headline news for months not only because of the death toll, but also because it was the work of a domestic rather than foreign terrorist. *Id.* In fact, the perpetrator was a twenty-seven-year-old decorated Gulf War veteran with no previous criminal record, which was even more shocking. *Id.* at 7. As a result of the hoax, Zeran received numerous calls, which predominantly consisted of derogatory messages and even included death threats. *Zeran*, 129 F.3d at 329.

remove the post but refused to post a retraction.<sup>67</sup> After the offensive advertisements continued to appear, Zeran filed suit seeking to hold AOL liable for the third party's defamatory statements based on a theory of common law distributor liability.<sup>68</sup> However, the court expressly rejected the possibility of holding ISPs liable under traditional distributor liability, explaining that distributor liability was a mere subset of publisher liability and was thus barred by section 230.<sup>69</sup> In doing so, the court voiced its concerns that notice-based liability would chill speech because it would prompt ISPs to simply remove the material upon notice without engaging in a careful investigation as to whether the material was in fact defamatory.<sup>70</sup> The court emphasized that decisions regarding "whether to publish, withdraw, postpone, or alter content" fall

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<sup>67</sup> *Zeran*, 129 F.3d at 329. The following day, another similar anonymous Oklahoma City Bombing-related t-shirt advertisement appeared, once again directing interested buyers to contact Zeran. *Id.* Additional anonymous advertisements of the same variety began to appear advertising items including bumper stickers and key chains, which still involved offensive Oklahoma City Bombing-related slogans. *Id.* Consequently, Zeran repeatedly called AOL and was informed by AOL's representatives that the company would close the account from which the material was posted. *Id.* Notably, within five days of the initial advertisement, Zeran received a disgruntled phone call nearly every two minutes. *Id.* Further exacerbating the issue, an Oklahoma City radio station announcer relayed the content of the advertisements on air and urged his listeners to call Zeran's phone number. *Id.*

<sup>68</sup> *Id.* at 331; see *supra* Part II.B (explaining the theory of distributor liability). Zeran argued that, although section 230 immunized ISPs from liability as publishers, section 230's immunity did not extend to AOL because it had knowledge of the defamatory content contained in the posts and thus, was subject to distributor liability. *Zeran*, 129 F.3d at 331.

<sup>69</sup> *Zeran*, 129 F.3d at 332. Although the court recognized that liability varies depending on whether an entity is a distributor or publisher, it nonetheless determined that such differences still fall within the overall umbrella of publishers generally. *Id.* (citing *KEETON ET AL.*, *supra* note 39, at 803). In doing so, the court stated:

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.* (quoting *KEETON ET AL.*, *supra* note 39, at 803).

<sup>70</sup> *Zeran*, 129 F.3d at 333; see Lichtman & Posner, *supra* note 55, at 252 ("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 also Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1007-08 (2001) (asserting that a legal regime imposing liability on an ISP for its subscribers' acts will cause the ISP to purge individuals who are liability risks from its system).

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within a publisher's traditional editorial functions and that lawsuits seeking to hold an ISP liable for any of those functions were barred by section 230, thereby expanding the scope of section 230 immunity.<sup>71</sup> The decision and rationale in *Zeran* has played a prominent role in case law involving the CDA to date.<sup>72</sup>

Shortly after *Zeran*, the United States District Court for the District of Columbia addressed section 230's immunity in *Blumenthal v. Drudge*.<sup>73</sup> Despite finding that the ISP had exercised editorial control over the content of the material and that it would only be fair to hold the ISP liable as a distributor, the court, relying on *Zeran*, held that section 230 immunized the ISP from suit.<sup>74</sup> In its reluctant adherence to precedent,

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<sup>71</sup> *Zeran*, 129 F.3d at 330. *Zeran* framed his claim as a negligence action; however, the court still determined that he was impermissibly seeking to hold AOL liable for traditional editorial functions of publishers. See Shahrzad T. Radbod, Note, *Craigslist – A Case for Criminal Liability for Online Service Providers?*, 25 BERKELEY TECH. L.J. 597, 600 (2010) (discussing *Zeran*'s arguments to the court and why they were ineffective). "Artful pleading did not take away from the fact that AOL assumed a role that Section 230 specifically protected." *Id.*

<sup>72</sup> See *Medenica & Wahab*, *supra* note 13, at 254 ("[T]he *Zeran* decision paved the way for ISPs, relying upon § 230 as a panacea, to ignore and even facilitate a variety of defamatory and sometimes egregious behaviors."); Jennifer Benedict, Comment, *Deafening Silence: The Quest for a Remedy in Internet Defamation*, 39 CUMB. L. REV. 475, 490 (2008-2009) ("Later cases rely on [*Zeran*'s] expansive interpretation in holding that § 230 proscribes the treatment of computer service providers as publishers for liability purposes."); see also Bradford J. Saylor, Case Note, *Amplifying Illegality: Using the Exception to CDA Immunity Carved Out By Fair Housing Council of San Fernando Valley v. Roommates.com to Combat Abusive Editing Tactics*, 16 GEO. MASON L. REV. 203, 210 (2008) (asserting that in *Zeran*, "the Fourth Circuit established a trend of broad [section] 230 ICS immunity"); French, *supra* note 36, at 457 (stating that, as of 2012, seven federal circuits had adopted *Zeran*'s broad interpretation of section 230 (citing *Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010); *Doe v. MySpace, Inc.*, 528 F.3d 413, 422 (5th Cir. 2008); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418-19 (1st Cir. 2007); *Green v. Am Online*, 318 F.3d 465, 471 (3d Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018, 1034 (9th Cir. 2003); *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 985 n.3 (10th Cir. 2000))).

<sup>73</sup> 992 F. Supp. 44 (D.D.C. 1998). In *Blumenthal*, White House employees Sidney and Jacqueline Blumenthal brought a defamation suit against Matt Drudge and AOL after Drudge wrote and published an allegedly defamatory statement about them on his webpage entitled the Drudge Report. *Id.* at 46-47. Specifically, Drudge asserted that Sidney Blumenthal abused his wife. *Id.* at 46. The Blumenthals implicated AOL because when the alleged defamation occurred, AOL had a licensing agreement with Drudge, in which AOL compensated Drudge for making the Drudge Report available to AOL's customers. *Id.* at 47. Pursuant to the licensing agreement, AOL paid Drudge \$3000 each month for access to the Drudge Report. *Id.* The licensing agreement permitted Drudge to create, update, and otherwise manage the Drudge Report's content; however, AOL reserved the right to remove content that did not comply with its standards. *Id.*

<sup>74</sup> *Id.* at 51-53 ("Any attempt to distinguish between 'publisher' liability and notice-based 'distributor' liability and to argue that Section 230 was only intended to immunize the former would be unavailing.").

the court declared that “[i]f it were writing on a clean slate, th[e] [c]ourt would agree with plaintiffs.”<sup>75</sup>

In *Batzel v. Smith*, the Ninth Circuit further expanded the scope of section 230’s immunity in two significant ways. First, the court found that section 230’s immunity extended beyond just entities that provided access to the Internet as a whole, emphasizing that “interactive computer service” refers to “‘any’ information services or other systems, as long as the service or system allows ‘multiple users’ to access ‘a computer server.’”<sup>76</sup> Second, the court determined that an entity does not forfeit its section 230 protection based on its editing decisions, unless the entity substantially alters the content at issue.<sup>77</sup> The court in *Carafano v. Metrosplash.com, Inc.* then interpreted section 230 even more liberally than in *Batzel*, finding that “so long as a third party willingly provides the essential published content,” the ISP is immune regardless of the editing or selection process involved.<sup>78</sup>

<sup>75</sup> *Id.* at 51. The court appeared to take issue with the fact that AOL took advantage of all the benefits that the CDA had to offer without accepting any of the burdens Congress intended; however, the court put aside its own opinion and adhered to precedent. *Id.* at 51–53. One scholar has criticized the *Blumenthal* holding, arguing that it exemplifies a clear injustice, as there was absolutely no reason for AOL to have received section 230 immunity when it actively selected, published, and even publicized the defamatory material. Jeweler, *supra* note 36, at 23.

<sup>76</sup> *Batzel*, 333 F.3d at 1030. The court asserted that the language of section 230 confirmed its finding “that services providing access to the Internet as a whole are only a subset of the services to which the statutory immunity applies.” *Id.* In *Batzel*, handyman Robert Smith (“Smith”) claimed that he overheard Batzel remark that she was related to a former Nazi politician. *Id.* at 1020–21. Smith asserted that Batzel also informed him she was “the granddaughter of one of Adolf Hitler’s right hand men.” *Id.* He also stated that, on another occasion, Batzel told him that she inherited a large number of paintings hanging on her wall, which to him looked old and European. *Id.* at 1021. As a result, Smith became suspicious that the paintings were stolen during World War II, so he e-mailed the Museum Security Network (“Network”) to report his suspicions. *Id.* Subsequently, the Network’s operator published Smith’s e-mail onto the Network’s website. *Id.* at 1021–22. Batzel filed suit disputing Smith’s version of their conversations and contending that Smith defamed her, not because he was genuinely suspicious about her art, but rather because Batzel refused to pass Smith’s screenplay to her Hollywood contacts. *Id.* at 1022. The court determined that the Network’s minor alterations to the e-mail were insufficient to render it an information content provider. *Id.* at 1031.

<sup>77</sup> *Id.* (“The ‘development of information’ therefore means something more substantial than merely editing portions of an e-mail and selecting material for publication.”); see Marshall & David, *supra* note 55, at 82 (relying, in part, on *Batzel* to explain that “courts have . . . adopt[ed] a narrow view of information content provider”).

<sup>78</sup> *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (holding that the ISP could not be considered an information content provider “because no profile has any content until a user actively creates it”). In *Carafano*, an anonymous third-party created a Matchmaker.com profile of popular actress Christianne Carafano (“Carafano”). *Id.* at 1121. The profile did not include Carafano’s name; however, it included two of her films, pictures of her, her home address, and an e-mail address, which when contacted,

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Several courts, relying on *Zeran*, have repeatedly found that section 230 immunity extends to ISPs that have been requested to remove unlawful material, but have refused or failed to do so.<sup>79</sup> In *Barnes v. Yahoo!, Inc.*, Cecilia Barnes became the victim of a cruel Internet prank when her ex-boyfriend created a profile online, which included her personal information, nude pictures taken of her without her knowledge, and open solicitations for sexual intercourse.<sup>80</sup> After receiving several e-mails, phone calls, and visits from unknown men expecting sex, Cecilia contacted Yahoo and informed it that she did not create the profile; however, Yahoo did not remove the profile despite repeated requests for it to do so.<sup>81</sup> Months later, Yahoo's Director of Communications notified Cecilia that she would personally make sure that the profile was removed.<sup>82</sup> Despite the assurance, two more months passed, and Yahoo had still failed to remove the profile; therefore, Cecilia filed a lawsuit against Yahoo for its "negligent undertaking" in promising to remove the material and failing to do so properly.<sup>83</sup> The Ninth Circuit held that section 230 shielded Yahoo from liability as to the negligent undertaking cause of action, reasoning that "removing content is something publishers do, and to impose liability on the basis of such conduct

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automatically replied "'You think you are the right one? Proof it !!' [sic], and providing Carafano's home address and telephone number." *Id.* As a result, Carafano began receiving numerous calls, sexually explicit and threatening voicemail messages, and e-mails. *Id.* at 1121-22. Consequently, she filed suit against Matchmaker.com alleging defamation, among other things. *Id.* at 1122. The court held that section 230 provided the ISPs immunity. *Id.* at 1125.

<sup>79</sup> See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1098 (9th Cir. 2009); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 292, 296 (D.N.H. 2008); *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1014 (N.Y. 2011); see also *McBrearty*, *supra* note 36, at 835 (stating that it is "well established that § 230(c) immunity extends to interactive computer services that refrain from taking any action with respect to offensive content").

<sup>80</sup> 570 F.3d at 1098.

<sup>81</sup> *Id.* Barnes even mailed Yahoo a copy of her photo identification and signed a statement requesting the removal and denying having had any involvement with the profile. *Id.*

<sup>82</sup> *Id.* at 1098-99. Yahoo did so the day before "a local news program was preparing to broadcast a report on the incident." *Id.* Relying on the assurance, Barnes took no further action in relation to the profiles. *Id.* at 1099.

<sup>83</sup> *Id.* Barnes argued that her claim did not treat Yahoo as a publisher because the source of the liability derived from the undertaking, not publishing functions. *Id.* at 1102. Barnes contended that, although Yahoo did not have an initial duty to remove the material, its agent undertook to do so, causing the duty to arise. *Id.* However, the court rejected Barnes's argument, reasoning that the action still involved treating Yahoo as a publisher because the act that Yahoo allegedly undertook and failed to perform with due care was the removal of content, which is a publisher's duty. *Id.* at 1102-03.

necessarily involves treating the liable party as a publisher of the content it failed to remove."<sup>84</sup>

Section 230 also shielded an ISP from liability in *Doe v. Friendfinder Network, Inc.*, where an unidentified third party created a profile on AdultFriendFinder.com using the plaintiff's biographical data, birth date, descriptions of her appearance, a nude photograph, and information regarding her sexual proclivities.<sup>85</sup> Despite the website's assurances to the plaintiff that the profile would be removed, in the following months the profile began to appear as a teaser, with minor modifications, on the defendants' other websites as well as Internet search engines and other third-party websites.<sup>86</sup> As to the plaintiff's state

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<sup>84</sup> *Id.* at 1103, 1105. Despite the court's holding as to the negligent undertaking claim, Barnes was not completely out of luck because the court subsequently held that Yahoo was not immune under a breach of contract theory. *Id.* at 1109. In doing so, the court distinguished the breach of contract claim, reasoning that "[p]romising is different because it is not synonymous with the performance of the action promised. . . . Contract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication." *Id.* at 1107. Several scholars have criticized the court's reasoning in distinguishing the contract-based liability from Barnes's negligent undertaking claim. *See, e.g.,* Lukmire, *supra* note 48, at 402 (criticizing the holding's facial inconsistency with the negligent undertaking portion of the opinion); Quon, *supra* note 6, at 608-09 (asserting that the court's reasoning in *Barnes* was extremely unclear, vague, and prone to further attacks). Furthermore, critics argue that the *Barnes* court's decision and reasoning will only result in an even more substantial disincentive for ISPs to self-regulate, which is contrary to Congress's goal in enacting the statute. *See* Abby R. Perer, Note, *Policing the Virtual Red Light District: A Legislative Solution to the Problems of Internet Prostitution and Sex Trafficking*, 77 BROOK. L. REV. 823, 834-35 (2012) (explaining that websites will avoid the *Barnes* holding by ignoring removal requests altogether and thus, preventing any possible formation of a contract or promissory estoppel claim); Quon, *supra* note 6, at 611 ("To any reasonable ISP, this approach would appear to create an even greater disincentive to self-regulate its online content . . . because any good faith action could potentially translate into a distinct and independent legal duty as recognized by the *Barnes* court's take on a contract theory of recovery.").

<sup>85</sup> 540 F. Supp. 2d 288, 292 (D.N.H. 2008). Adultfriendfinder.com describes itself as "the World's Largest SEX and SWINGER Personal Community." *Id.* at 291. To experience the website's services, individuals had to register by entering a variety of personal information to create a profile that other members of the community could view. *Id.* The profile at issue in *Friendfinder* provided details that reasonably identified the plaintiff and stated that she was seeking "Men or Women for Erotic Chat/E-mail/Phone Fantasies and Discreet Relationship." *Id.* at 292 (footnote omitted).

<sup>86</sup> *Id.* Specifically, search engines displayed the teasers when users entered search terms matching pieces of information in the profile, and third-party websites displayed the advertisements when a user was located "near the Upper Valley region of New Hampshire." *Id.* at 292-93. The teasers directed Internet traffic to the defendants' websites through hyperlinks. *Id.* at 293. Some of the advertisements even directed users to sexually related websites. *Id.* at 292. The plaintiff alleged that the profile teaser deceived consumers into believing that, if they registered for the defendants' dating website, they could meet her. *Id.* Additionally, the plaintiff took issue with the fact that the defendants did not take



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tort law claims, the court held that the defendants were immune from liability, reasoning that “immunity depends on the source of the information in the allegedly tortious statement, not on the source of the statement itself.”<sup>87</sup> Specifically, the court explained that, although the defendants modified the content, a third party was the source of the harmful material in the profile; therefore, the defendants could not be held liable for merely re-posting the profile elsewhere, as doing so would impermissibly treat the ISP as the publisher or speaker of the material.<sup>88</sup> The same holding and reasoning applied to the ISP in *Shiamili v. Real Estate Group of New York, Inc.* despite the fact that the website administrator moved a defamatory third-party post from a discussion thread to a stand-alone post, added an offensive image and new language to the post, and refused to remove the content when asked.<sup>89</sup>

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any steps to verify the accuracy of information posted on the websites and “took special pains’ to ensure the anonymity” of individuals who posted on the website. *Id.*

<sup>87</sup> *Id.* at 295. The court further asserted that the mere fact that the defendants knew the profile was false and unauthorized when they re-posted it was insufficient to remove section 230’s protection. *Id.* at 295 n.7.

<sup>88</sup> *Id.* at 295. However, the court found that the defendants were not immune from liability as to plaintiff’s claims for “infringement of her common-law right to publicity and false advertising.” *Id.* at 306. The right to publicity has been defined as “the inherent right of every human being to control the commercial use of his or her identity.” Dubnow, *supra* note 21, at 298 (quoting J. Thomas McCarthy, *Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1704 (1987)) (internal quotation marks omitted). Additionally, it has been described as “an inherent property right of all individuals.” *Id.* (quoting Matthew Minora, Comment, *Rumor Has It that Non-Celebrity Gossip Web Site Operators Are Overestimating Their Immunity Under the Communications Decency Act*, 17 COMM.LAW CONSP. 821, 851 (2009)). Despite the broad immunity section 230 provides for ISPs, Congress did carve out an exception for intellectual property claims, which states “[n]othing in [section 230] shall be construed to limit or expand any law pertaining to intellectual property.” 47 U.S.C. § 230(e)(2) (2006). *But see also* Lisa Marie Ross, Note, *Cyberspace: The New Frontier for Housing Discrimination – An Analysis of the Conflict Between the Communications Decency Act and the Fair Housing Act*, 44 VAL. U. L. REV. 329, 374 (2009) (advocating the removal of this exception to the CDA). Consequently, plaintiffs have sought to place right to publicity claims into section 230’s intellectual property exception; however, a uniform consensus has not emerged among courts regarding whether section 230’s intellectual property exception includes the right of publicity. Dubnow, *supra* note 21, at 301, 304.

<sup>89</sup> 952 N.E.2d 1011, 1014, 1019 (N.Y. 2011). In *Shiamili*, the court held that section 230 precluded liability when a website administrator moved a defamatory comment from a discussion thread to a stand-alone post and added an image of Jesus, which was comprised of the plaintiff’s face and the words “Chris Shiamili: King of the Token Jews.” *Id.* at 1014. The initial comment suggested that Shiamili was racist and anti-semitic and mistreated his employees. *Id.* As to the stand-alone post, the administrator gave the post the heading “Ardor Realty and Those People” with the subheading, “and now it’s time for your weekly dose of hate, brought to you unedited, once again, by ‘Ardor Realty Sucks’.” and for the record, we are **so. not. afraid.** *Id.* Notably, the parties were officers in competing real estate companies. *Id.* Subsequent defamatory comments made by anonymous individuals on the stand-alone post added to the sting of the initial comment. *Id.* Specifically, some of the

While the majority of courts, such as the *Shiamili* court, have followed *Zeran's* broad interpretation, academic and judicial criticisms may signal a new approach to section 230 claims.<sup>90</sup>

*D. Section 230's Immunity: Is It in Jeopardy?*

Although most courts have construed section 230 of the CDA very broadly, there have been some cases in which courts have raised concerns and attempted to rein in section 230's immunity.<sup>91</sup> For example, Seventh Circuit Chief Judge Frank Easterbrook criticized the *Zeran* court's broad interpretation in both *Doe v. GTE* and *Chicago Lawyers' Committee for Civil Rights v. Craigslist*, contending that providing blanket immunity creates a disincentive because it is easier for ISPs to

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additional posts included allegations that the plaintiff was in financial trouble, cheated on his wife, and abused his wife. *Id.* After learning of the post, the plaintiff contacted the site administrator requesting that he remove the defamatory material; however, he refused to do so. *Id.* In response, the plaintiff filed suit against the website for defamation, seeking damages and injunctive relief to discontinue publication of the material. *Id.* at 1014-15. As to the defendants' act of moving the comment to a stand-alone post, the court explained that such an act does not result in forfeiture of immunity because reposting third-party content falls within a publisher's traditional editorial functions. *Id.* at 1019. Regarding the rest of the post, the court recognized that, although the defendants were content providers with respect to development of the heading, subheading, and illustration, such material did not materially contribute to the defamatory nature of the original comment because "no reasonable reader could have concluded that [it was] conveying facts about the plaintiff." *Id.* at 1019-20. The court further explained that the illustration was "obviously satirical." *Id.* at 1020. In contrast, Chief Judge Lippman argued in dissent that "a reasonable reader, viewing the heading and illustration, might very well have concluded that the site editor was endorsing the truth of the appended facts, which asserted that [the] plaintiff was an anti-Semite." *Id.* at 1021 (Lippman, J., dissenting). He further asserted that the defendants' attachment of the illustration alone should have precluded immunity. *Id.* Concerned with the majority's decision, Judge Lippman stated, "[w]hile I do not dispute the adoption of a broad approach to immunity for on-line service providers under the CDA, an interpretation that immunizes a business's complicity in defaming a direct competitor takes us so far afield from the purpose of the CDA as to make it unrecognizable." *Id.* at 1022.

<sup>90</sup> See *infra* Part II.D (discussing judicial criticisms and attempts to rein in section 230's broad protection).

<sup>91</sup> See, e.g., *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (holding that an ISP forfeits section 230 immunity if it materially contributes to the content's illegality); *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008) (expressing concerns about whether section 230 even provides immunity); *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (asserting that *Zeran's* broad interpretation appears at odds with Congress's goal of encouraging ISPs to self-regulate); *Milo v. Martin*, 311 S.W.3d 210, 218 (Tex. App. 2010) (expressing concern regarding the absence of a takedown procedure in section 230); see also Ingber, *supra* note 61, at 425 (asserting that judges are beginning to construe section 230 more narrowly).

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take the “do-nothing” approach.<sup>92</sup> Additionally, the Ninth Circuit refused to grant absolute immunity in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, reasoning that a website forfeits section 230’s protection “if it contributes materially to the alleged illegality of the conduct.”<sup>93</sup> The court further reasoned that the CDA “was not meant to create a lawless no-man’s-land on the Internet.”<sup>94</sup>

<sup>92</sup> *Craigslist, Inc.*, 519 F.3d at 670; *GTE Corp.*, 347 F.3d at 660; see French, *supra* note 36, at 454 (asserting that the Seventh Circuit has taken the narrowest view of section 230). For example, in *GTE Corp.*, Judge Easterbrook criticized the broad section 230 interpretation from *Zeran* and its progeny, stating:

If this reading is sound, then § 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law. As precautions are costly, not only in direct outlay but also in lost revenue from the filtered customers, ISPs may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1). Yet § 230(c)—which is, recall, part of the “Communications Decency Act”—bears the title “Protection for ‘Good Samaritan’ blocking and screening of offensive material”, hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services. Why should a law designed to eliminate ISPs’ liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?

*GTE Corp.*, 347 F.3d at 660. Five years later, Judge Easterbrook once again criticized broad section 230 interpretations, questioning whether section 230 even grants any type of immunity. See *Craigslist, Inc.*, 519 F.3d at 669 (“Subsection (c)(1) does not mention ‘immunity’ or any synonym.”). In doing so, he expressly rejected the proposition that section 230(c) is a general prohibition against civil liability for ISPs. *Id.*

<sup>93</sup> 521 F.3d at 1168–69 (“A website operator who edits user-created content—such as by correcting spelling, removing obscenity or trimming for length—retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality.”). In *Roommates.com*, a housing website required subscribers to complete a questionnaire that asked, among other things, the subscribers’ sex and sexual orientation, as well as whether the subscriber has children. *Id.* at 1161. *Roommates.com* also required subscribers to indicate whether they are willing to live with people of a certain sex, people of a particular sexual orientation, or people with children. *Id.* at 1165. Therefore, the San Fernando Fair Housing Council filed suit against *Roommates.com* for violation of the Fair Housing Act (“FHA”). *Id.* at 1162.

Section 3604(c) of the FHA makes it unlawful to “make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.”

Saylor, *supra* note 72, at 207 (quoting 42 U.S.C. § 3604(c) (2000)). For an in-depth look into how *Roommates.com* functions as a website, see *id.* at 205–07.

<sup>94</sup> *Roommates.com, LLC*, 521 F.3d at 1164 (explaining that, if something is unlawful face-to-face or by telephone, it does not suddenly become lawful merely because it occurs on the

Recognizing that its holding did not comport with the language of its previous holding in *Carafano*, the Ninth Circuit conceded that in *Carafano* it incorrectly suggested that a website may never be liable when a third party creates the content at issue.<sup>95</sup> In a departure from precedent, the court asserted that, when a website materially contributes to the illegality, it may still be held liable even if a third party supplies the content.<sup>96</sup>

Additionally, in *Milo v. Martin*, the Texas Court of Appeals expressed concerns regarding the absence of a takedown procedure within section 230, stating:

We note our concern that section 230 does not provide a right to request a website's owner to remove false and defamatory posts placed on a website by third parties, and does not provide the injured person with a remedy in the event the website's owner then fails to promptly remove defamatory posts from its site, at least in the absence of extreme and outrageous circumstances . . . .<sup>97</sup>

Similarly, numerous critics have also voiced concerns regarding the broad protection section 230 provides, arguing that the statute has failed to achieve its main objective because ISPs receive immunity regardless of whether they regulate, so they have no incentive to do so.<sup>98</sup> Attempting

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Internet). The court declined to decide whether Roommates.com actually violated the FHA; however, the court noted that "asking questions certainly *can* violate the Fair Housing Act." *Id.*

<sup>95</sup> *Id.* at 1171. The court further explained that "[p]roviding immunity every time a website uses data initially obtained from third parties would eviscerate the exception to section 230 for 'develop[ing]' unlawful content 'in whole or in part.'" *Id.*

<sup>96</sup> *Id.* at 1168. Since *Roommates.com*, uncertainty has arisen regarding what constitutes a material contribution that would render an ISP an information content provider, resulting in forfeiture of section 230 immunity. See *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1017 (N.Y. 2011) ("It may be difficult in certain cases to determine whether a service provider is also a content provider, particularly since the definition of 'content provider' is so elastic, and no consensus has emerged concerning what conduct constitutes 'development . . . .'"); *McBrearty*, *supra* note 36, at 848-52 (discussing the three different standards courts have fashioned, which are the essential published content standard, the material contribution standard, and the traditional editorial functions standard).

<sup>97</sup> *Milo v. Martin*, 311 S.W.3d 210, 218 (Tex. App. 2010). Furthermore, in concurrence, Justice David Gaultney asserted that, "[a] malicious website operator—one who encourages anonymous postings and then intentionally and unreasonably refuses to remove a posting known to be defamatory and easily deleted—joins in the activity the [CDA] was intended to discourage." *Id.* at 220 (Gaultney, J., concurring).

<sup>98</sup> See, e.g., *Medenica & Wahab*, *supra* note 13, at 254 ("[T]he Zeran decision paved the way for ISPs, relying upon § 230 as a panacea, to ignore and even facilitate a variety of defamatory and sometimes egregious behaviors."); *Gerdas*, *supra* note 37, at 667

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to address these concerns, academics and courts have made several recommendations ranging from self-help remedies to modifications of section 230's statutory language.<sup>99</sup>

*E. Previously Suggested Remedies*

Some academics and courts have argued that there are several self-help remedies, such as removal requests, confrontation, and counter speech, which online defamation victims can employ to combat material posted about them online without judicial or legislative interference.<sup>100</sup> One group of scholars has suggested that the victim contact the ISP and request removal of the material at issue, or otherwise, file an injunction in court to have the material removed.<sup>101</sup> Additionally, the same scholars have recommended confronting the individual who posted the material at issue and asking the person to stop.<sup>102</sup> Last, some academics and courts have advocated using counter speech as a remedial measure.<sup>103</sup>

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("Although Congress's intent was to remove disincentives to self-regulation by ISPs—by encouraging ISPs to edit or post third-party material without fear of being regarded as the publisher of the material—§ 230 has failed to provide an incentive for websites to regulate.").

<sup>99</sup> See *infra* Part II.E (discussing previously proposed remedies to combat the harm from third-party posts on the Internet).

<sup>100</sup> See *Doe v. Cahill*, 884 A.2d 451, 464 (Del. 2005) (suggesting that the plaintiff reply to character attacks to correct the misstatements); Marton et al., *supra* note 29, at 70, 77-78 (discussing confrontation and removal requests as possible remedies); Miller, *supra* note 5, at 234-36 (discussing counter speech).

<sup>101</sup> See Marton et al., *supra* note 29, at 77-79 (discussing removal requests and the injunction process). Similar to the injunction suggestion, an obvious remedy is to pursue defamation litigation against the third party; however, such litigation can be very expensive and difficult, as the individual is often anonymous. Bradley A. Areheart, *Regulating Cyberbullies Through Notice-Based Liability*, 117 YALE L.J. POCKET PART 41, 42 (2007) (explaining that a victim's pursuit of a legal remedy against the individual responsible lacks any likelihood in success, as the user is often impossible to identify and judgment-proof, making the high costs of litigation not worth pursuing). As one commentator explained:

Proof would be next to impossible without a named defendant . . . Thus, plaintiffs face the difficult choice of deciding whether the significant front-end litigation costs of an anonymous Internet defamation lawsuit are worth the expense, particularly when the revelation of the poster's identity could lead the plaintiff to conclude that an actual defamation suit is not worth pursuing.

Lewis, *supra* note 28, at 953-54.

<sup>102</sup> See Marton et al., *supra* note 29, at 70 (discussing confrontation and the goals it can accomplish).

<sup>103</sup> See, e.g., *Cahill*, 884 A.2d at 464 (discussing self-help remedies and suggesting that the plaintiff respond to the defamatory material and set the record straight); Areheart, *supra* note 101, at 42 (contending that responding personally is one option used to confront the harassment); Miller, *supra* note 5, at 234-36 (discussing counter speech as an alternative).

The theory behind this particular suggestion is that the best remedy for false speech is the truth.<sup>104</sup> In addition to self-help remedies, scholars have suggested modifying or repealing section 230 altogether.<sup>105</sup>

The most common modification to section 230 that academics have suggested is the adoption of a notice-and-takedown procedure that is almost identical to Title II of the Digital Millennium Copyright Act (“DMCA”), which is entitled the Online Copyright Infringement Liability Limitation Act (“OCILLA”).<sup>106</sup> OCILLA provides that ISPs are immune from liability so long as they do not have actual or apparent knowledge of the infringing nature of the material; they do not benefit financially from the infringing material; and upon notification of claimed infringement, they rapidly remove or restrict access to the material.<sup>107</sup> The notification from the alleged copyright holder is required to be written and must include the following: (1) a physical or electronic signature of the owner of the copyrighted material or his authorized

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Advocates for counter speech suggest that victims respond by posting their side of the story in the same place the original allegedly defamatory material was posted. Marton et al., *supra* note 29, at 70. A similar proposition is an amendment to section 230 that requires ISPs to provide a right of reply. See Michael D. Scott, *Would a “Right of Reply” Fix Section 230 of the Communications Decency Act?*, 4 J. INT’L MEDIA & ENT. L. 57, 67-68 (2011-2012) (advocating for a right of reply statute and contending that it is more beneficial than a notice-and-takedown mechanism because the content at issue will still remain on the Internet). However, it is difficult to predict whether a right of reply statute would be upheld in the Internet medium because the Supreme Court has heard two notable right of reply cases that produced opposite results. Compare *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 244, 258 (1974) (invalidating a statute that required newspapers to provide reply time to election candidates), with *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396 (1969) (upholding an FCC regulation requiring radio stations to provide reply time for individuals to answer personal attacks).

<sup>104</sup> See *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (invalidating the Stolen Valor Act, which made lying about receiving the Medal of Honor a punishable crime).

<sup>105</sup> See, e.g., Jeweler, *supra* note 36, at 20 (advocating for the repeal of section 230 and a return to the common law approach to liability for publishers of third-party material); Medenica & Wahab, *supra* note 13, at 263 (proposing an amendment to section 230 that provides a notice-and-takedown provision).

<sup>106</sup> See, e.g., David E. Hallett, *How to Destroy a Reputation and Get Away With It: The Communication [sic] Decency Act Examined: Do the Policies and Standards Set Out in the Digital Millennium Copyright Act Provide a Solution for a Person Defamed Online?*, 41 IDEA 259, 279 (2001); Medenica & Wahab, *supra* note 13, at 263; Alison Virginia King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 878 (2010).

<sup>107</sup> 17 U.S.C. § 512(c) (2006). In 1998, Congress passed OCILLA in an effort to address emerging issues related to attributing liability for copyright infringement on the Internet. Lateef Mtima, *Whom the Gods Would Destroy: Why Congress Prioritized Copyright Protection Over Internet Privacy in Passing the Digital Millennium Copyright Act*, 61 RUTGERS L. REV. 627, 629, 645-46 (2009) (“The principal purpose of [OCILLA] is to remove the Internet, or perhaps more specifically ISPs, from the center of the battle between copyright holders, unauthorized file-sharers, and other Internet copyright infringers.”).

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agent; (2) identification of the allegedly infringing material; (3) the location of the material at issue; (4) “information reasonably sufficient to permit the [ISP] to contact the complaining party”; (5) a statement that the alleged victim of the infringement “has a good faith belief that use of the material... is not authorized”; and (6) “a statement that the information in the notification is accurate, ... under penalty of perjury.”<sup>108</sup> Because this solution requires Congressional action to amend section 230, some academics have sought to provide other solutions that similarly result in removal of the material but can be implemented quickly without reliance on Congressional action.<sup>109</sup>

For example, one scholar suggested applying an actual malice standard of distributor liability to actions involving an ISP’s failure to remove unlawful material.<sup>110</sup> Specifically, the scholar suggested that courts consider factors, such as the Internet forum’s procedure for posting comments and the importance of the speech at issue, to determine when an actual malice standard should apply.<sup>111</sup> If a court determines that the actual malice standard is applicable, the plaintiff would be required to “show that the operator left the offending statement online for an unreasonable length of time after the operator knew it was false, or acted in reckless disregard of its falsity.”<sup>112</sup> With the commonly proposed solutions discussed above, section 230 would remain intact; however one academic contends that the best solution is to eliminate section 230 entirely.<sup>113</sup> Specifically, Matthew Jeweler suggested applying the traditional common law framework for publisher liability of third-party content, but with a twist—subjecting the ISPs to an

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<sup>108</sup> 17 U.S.C. § 512(c)(3).

<sup>109</sup> See, e.g., Hyland, *supra* note 22, at 120 (using the courts’ reasoning in actual malice cases to create a viable solution); Miller, *supra* note 5, at 240–42 (asserting that “any solution requiring statutory change requires congressional action—something that is very difficult to generate based only on scholarly, legal commentary” and subsequently suggesting judicial remedies to avoid reliance on the legislature).

<sup>110</sup> Hyland, *supra* note 22, at 120. Actual malice refers to statements made with knowledge of their falsity or reckless disregard for whether they are false. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

<sup>111</sup> See Hyland, *supra* note 22, at 121 (explaining types of speech that would trigger the actual malice standard). “Internet commentary about issues of political or social importance falls within the stronger levels of constitutional protection and should weigh in favor of applying actual malice.” *Id.*

<sup>112</sup> *Id.* at 120–21.

<sup>113</sup> See Jeweler, *supra* note 36, at 20 (“Congress should repeal the CDA and courts should apply the common law framework to Internet defamation cases attempting to hold an ISP or website operator liable under a publisher or distributor liability theory.”). Jeweler argued that Congress did not intend to grant ISPs such broad immunity and that, in the alternative, even if such was Congress’s intention, section 230’s immunity is no longer necessary because Internet has grown immensely into an enormous medium. *Id.* at 21.

objective “reasonable ISP” standard, in which the ISP will be liable if, under the circumstances, it reasonably should have known of the defamatory nature of the content.<sup>114</sup>

Although section 230 has garnered a great deal of criticism since it was passed, it remains the primary source of protection for ISPs today.<sup>115</sup> Despite the numerous proffered solutions for combatting the removal issue section 230 has created, none of those suggestions have been implemented.<sup>116</sup> An analysis of the overall issues, law, and previously suggested remedies will shed some light regarding why previous suggestions have been unsuccessful in effectuating change and what type of remedy would prove most effective moving forward.<sup>117</sup>

### III. ANALYSIS

The proliferation of anonymous defamatory postings on the Internet has forced courts and legislatures to engage in the difficult task of balancing victims’ reputation rights with the First Amendment rights of anonymous posters and the ISPs’ business interests.<sup>118</sup> The legislative history of the CDA and the judicial construction of the statute indicate, however, that courts and legislators have afforded greater weight to the anonymous posters and ISPs’ interests than those of the victims.<sup>119</sup>

<sup>114</sup> *Id.* at 26 (explaining that the reasonable ISP standard will keep ISPs from simply ignoring the content to escape distributor liability). In response to concerns that such a standard would chill speech, Jeweler asserted that “not all speech is supposed to go unregulated” and that “[d]efamatory speech that injures other individuals’ reputations is precisely the type of speech that *should* be chilled.” *Id.* at 28–29. He further contended that the concern that non-defamatory speech will be removed does not justify allowing defamatory speech to go unpunished. *Id.* at 29.

<sup>115</sup> *See, e.g.,* *Green v. Am. Online*, 318 F.3d 465, 470–71 (3d Cir. 2003) (holding that section 230 immunized AOL from suit because the plaintiff was alleging, in essence, that AOL failed to properly police its network, which involved treating AOL as a speaker of third-party content); *Carafano v. Metrosplash.com., Inc.*, 339 F.3d 1119, 1120–21 (9th Cir. 2003) (finding a computer match-making service immune under section 230 because it could not be liable for false content posted by a third party).

<sup>116</sup> *See supra* Part II.E (discussing proposed solutions that would help to narrow the broad grant of immunity under section 230 since *Zeran*).

<sup>117</sup> *See infra* Part III (analyzing section 230’s jurisprudence, contending that section 230 has failed to achieve Congress’s goals, and evaluating why previously suggested remedies do not adequately protect the interests of the victims, ISPs, and individual posters).

<sup>118</sup> *See* Richards, *supra* note 14, at 180 (“With the issue of Internet anonymity bubbling up in courts and legislatures across the country, a showdown between reputation, privacy, and safety interests on the one hand, and the First Amendment rights of message posters and online service providers on the other, is inevitable.”); *see also* Medenica & Wahab, *supra* note 13, at 239 (recognizing that the law has evolved into a “tug-of-war” between the various interests at issue).

<sup>119</sup> *See* Jeweler, *supra* note 36, at 27–28 (acknowledging that free speech should be protected, but arguing that in enacting section 230, Congress impermissibly failed to



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Today, ISPs have immunity from suit for almost any action taken by a third party regardless of the ISPs' editing and publishing decisions in the process, which leaves victims with very limited and often ineffective remedies.<sup>120</sup> First, Part III.A discusses the errors that have led to the exceedingly broad interpretation of section 230.<sup>121</sup> Next, Part III.B analyzes why previously suggested remedies do not sufficiently balance the interests of the victims, ISPs, and third-party posters.<sup>122</sup>

A. *The Unintended Consequences of the Courts' Broad Construction of Section 230*

Congress enacted section 230 of the CDA to remove the disincentive created by the *Stratton* case and instead provide ISPs with an incentive to self-regulate.<sup>123</sup> However, the mere fact that Congress removed the disincentive does not conversely mean that Congress also created an incentive for ISPs to self-regulate.<sup>124</sup> Rather, the case law involving

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account for an individual's interest in not being defamed in its quest to preserve free speech); Richards, *supra* note 14, at 198 ("With technological advancements also comes the opportunity—indeed the greater likelihood, given the expansive system—for more widespread distribution of misinformation, but courts nonetheless often have found that the value of allowing such speech outweighs the potential for adverse consequences."); Jameson, *supra* note 15, at 247 (explaining that on the Internet, an individual's privacy is given less weight than her ability to speak freely). As Matthew Jeweler correctly argued:

The conclusion one must draw . . . is that Congress would rather promote speech on the Internet than have ISPs and website operators be cautious about potentially defamatory speech. While free speech is undoubtedly a matter of great public interest and should be protected, Congress should not ignore the compelling competing interest when considering this issue: individuals' interest in not being defamed.

Jeweler, *supra* note 36, at 27.

<sup>120</sup> See Hyland, *supra* note 22, at 82 ("Victims of egregious defamation have virtually no recourse, as the original web publisher is often an anonymous individual that even if identified, has few resources to compensate the plaintiff." (footnote omitted)); Lukmire, *supra* note 48, at 402-03 (providing several obstacles plaintiffs face that make it very difficult for them to remedy the situation).

<sup>121</sup> See *infra* Part III.A (explaining that section 230 has been misinterpreted and fails to accomplish Congress's goal of encouraging ISPs to self-regulate).

<sup>122</sup> See *infra* Part III.B (evaluating previously suggested remedies and the flaws associated with each).

<sup>123</sup> See 141 CONG. REC. H1130 (daily ed. Jan. 31, 1996) ("One of the specific purposes of this section 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."); Marshall & David, *supra* note 55, at 78 (explaining that Congress "passed Section 230 in direct response to *Stratton Oakmont*").

<sup>124</sup> See Hyland, *supra* note 22, at 113 ("By abolishing distributor liability in most jurisdictions, courts have created little incentive for interactive website operators to monitor their website content."); Benedict, *supra* note 72, at 506 (emphasizing that

section 230 indicates that, instead of expending time and money to self-regulate, many ISPs chose to do nothing while still benefitting from the immunity shield that section 230 provides, thereby defeating the primary purpose of the statute.<sup>125</sup> The discrepancy between the statute's main purposes and its resulting consequences has been heavily criticized by scholars and courts alike.<sup>126</sup>

#### 1. The Broad Interpretation of Section 230 Is Not Supported by the Statute's Language or Legislative History

*Zeran* is the most influential case in section 230's jurisprudence, as its overly broad construction of the statute laid the foundation for needless expansive readings of section 230 that have virtually resulted in unwarranted blanket immunity for ISPs.<sup>127</sup> Despite a lack of support

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removing a disincentive is distinct from creating an incentive); *see also* Quon, *supra* note 6, at 600 ("[T]here is still a strong presence of lewd, offensive, and damaging material online, free of any self-filtering efforts exercised by ISPs."). As Matthew Jeweler correctly noted:

Congress has simply assumed that if it immunizes ISPs and website operators from liability, then those entities will screen content for defamatory material out of their own senses of altruism. It is counterproductive to attempt to encourage these entities to self-regulate their content for defamatory speech by immunizing them for that defamatory speech *regardless of whether the ISP attempts whatsoever to be responsible and screen its content*. While we would like to think that ISPs will screen their own content out of the goodness of their corporate hearts, it is a risk that Congress has chosen to take without any evidence. With this choice, Congress has put its faith in ISPs to self-regulate and has cut off individuals' ability to seek redress, regardless of whether those ISPs regulate their content.

Jeweler, *supra* note 36, at 25–26 (footnote omitted).

<sup>125</sup> *See* Hyland, *supra* note 22, at 115 ("[T]he cases that interpret section 230 to immunize distributor liability create disincentives to police content."); Benedict, *supra* note 72, at 493 ("The problem is, however, that § 230 does not *require* self-policing. These providers can reap all of the benefits and are not required to perform any of the service Congress hoped to encourage."); *see also, e.g.,* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1098, 1103 (9th Cir. 2009) (providing immunity from tort claims despite the ISP's failure to remove unlawful material when asked); Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 292, 295 (D.N.H. 2008) (immunizing the ISP from a defamation suit when the ISP was asked to remove unlawful material and instead, made it even more apparent); Shiamili v. Real Estate Grp. of N.Y., Inc., 952 N.E.2d 1011, 1014 (N.Y. 2011) (holding that section 230 barred suit against a website operator for alleged defamatory statements made on the website by a third party).

<sup>126</sup> *See, e.g.,* Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003) (explaining that section 230 induces ISPs to take the "do nothing" approach, as precautions are costly and ISPs are immune regardless of whether they self-regulate); Dickinson, *supra* note 44, at 870 ("The majority view reads subsection (c)(2) entirely out of the text and in the process renders the Section powerless to achieve its stated objective—encouragement of self-censorship.").

<sup>127</sup> Lukmire, *supra* note 48, at 385; *see* Materna, *supra* note 51, at 115 (asserting that *Zeran's* rationale created a "slippery slope" because subsequent courts relied on *Zeran* as precedent and extended section 230 immunity to completely unrelated facts, broadening the statute's

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from the statute's language or its legislative history, the court in *Zeran* bestowed immunity on ISPs for torts other than defamation and broke away from a long-standing common law tradition, eliminating distributor liability on the Internet completely.<sup>128</sup> Section 230 only references protection from publisher liability, which suggests that Congress did not intend to immunize ISPs from distributor liability.<sup>129</sup> Presumably, Congress was well aware of the different common law standards involved in defamation suits; therefore, Congress's inclusion of publisher liability and failure to address distributor liability in section

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scope); Ingber, *supra* note 61, at 429 ("Courts have consistently held, in a variety of contexts, that Section 230 provides a broad and sweeping immunity to ISPs faced with civil liability claims."); Sayler, *supra* note 72, at 210 (explaining that section 230's broad language has provided courts with flexibility in interpreting the Act, and courts have typically erred on the side of granting ISPs protection).

<sup>128</sup> Lukmire, *supra* note 48, at 385; see Ottenweller, *supra* note 5, at 1312 ("[T]he *Zeran* majority abandoned well-settled principles of common law defamation and led subsequent courts down their misguided path."). Two academics have argued that the *Zeran* court erred in "assum[ing] that a mere accusation would be sufficient to trigger ISP liability" because tort law merely compels that a distributor exercise reasonable precautions. Lichtman & Posner, *supra* note 55, at 252-53.

<sup>129</sup> Sheridan, *supra* note 34, at 168; see Medenica & Wahab, *supra* note 13, at 251 ("Noticeably absent from § 230(c)(1) is an express mention of distributor protection. Rather, the section sets forth protection only for 'publishers or speakers' of content."). As one commentator explained:

Nothing in the language of the statute suggests immunization from distributor liability as well, otherwise Congress would not have included "publisher or speaker" in the statute. Further, it would make little sense for Congress to pass an act promoting decency on the Internet by encouraging ISP self-policing efforts if an ISP could instead choose to do no self-policing when notified of harmful content and remain free of liability. Instead, the more likely intent of Congress was to immunize ISPs that actively review and edit inappropriate content while leaving others vulnerable to lawsuits if they "do *not* screen any third-party content whatsoever."

Lewis, *supra* note 28, at 959 (footnotes omitted). Similarly, another critic persuasively argued that:

the placement of "speaker" alongside "publisher" suggests that Congress meant for the statute to eliminate only primary publisher liability for ISPs, but to keep distributor liability intact. Otherwise, Congress would have also stated that ISPs should not be treated as distributors in order to cover all relevant forms of defamation liability.

Ottenweller, *supra* note 5, at 1316 (footnote omitted). The maxim *expressio unius est exclusio alterius* also supports a conclusion that section 230 does not apply to distributor liability because the terms publisher and speaker were both expressly stated and distributor was not, which implies that distributors are excluded from section 230's protection. See *supra* note 44 (explaining that *expressio unius est exclusio alterius* stands for the proposition that expression of particular terms implies inapplicability of excluded terms).

230 does not appear to be accidental.<sup>130</sup> Yet, the court in *Zeran* wrongly concluded that ISPs were protected from distributor liability despite Congress's silence on that issue.<sup>131</sup> The *Zeran* court reasoned that distributor liability was a mere subset of publisher liability; however, such a conclusion is at odds with the common law custom of maintaining a distinction between the two categories.<sup>132</sup>

Additionally, the *Zeran* court incorrectly considered promoting the growth of the Internet to be Congress's primary purpose in enacting the statute, failing to recognize that Congress's primary goal was actually to encourage ISPs to self-regulate and remove offensive material.<sup>133</sup> Last, the rule against surplusage also provides support for the proposition that cases further expanding *Zeran*, such as *Batzel* and *Blumenthal*, have misconstrued section 230's language.<sup>134</sup> Most courts have interpreted

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<sup>130</sup> Lee, *supra* note 57, at 483; see Norby-Jahner, *supra* note 7, at 251 ("It seems highly unlikely that, in light of Congress's intention to protect children from inappropriate and offensive online material and to deter harassing conduct, Congress would intend to provide ISPs with immunity if they know about the material and refuse to remove it.").

<sup>131</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997). See *supra* Part II.C.2. for an in-depth discussion of the *Zeran* case.

<sup>132</sup> See Jeweler, *supra* note 36, at 5 (explaining that there are three separate entities at common law, each subject to different standards of liability); Gerdes, *supra* note 37, at 656-57 (discussing the common law theories of liability and the rationale behind each type). See *supra* Part II.B for an in-depth look at the common law distinction between publisher and distributor liability.

<sup>133</sup> Lukmire, *supra* note 48, at 389 ("[T]he court failed to consider that the end of promoting speech on the Internet was arguably *subsidiary to*, or should at least be considered *in addition to*, section 230's overall purpose of providing '[p]rotection for private blocking and screening of offensive material.'"); see *supra* note 57 and accompanying text (explaining that Congress sought to encourage ISPs to self-regulate by removing the disincentive created by the *Stratton-Cubby* paradox). Others, in accordance with *Zeran*, have also emphasized that Congress's primary purpose in enacting the statute was to promote growth on the Internet. See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003) (stating that Congress's first reason for enacting section 230 was to promote development of e-commerce and free speech on the Internet). Additionally, even if promoting Internet growth was Congress's primary goal, section 230 is no longer necessary to achieve that goal, as the Internet has grown tremendously and has become "such an important part of our society and our everyday life that there is no doubt that it will continue to grow and flourish." Jeweler, *supra* note 36, at 37.

<sup>134</sup> See Dickinson, *supra* note 44, at 869 (criticizing the broad interpretations in *Zeran* and *Blumenthal*, reasoning that they render subsection (c)(2) unnecessary); see also Ottenweller, *supra* note 5, at 1310-11 ("By misinterpreting the meaning and purpose of the CDA, judicial bodies have handed negligent ISPs 'get out of jail free' cards . . ."); Patel, *supra* note 36, at 678 (asserting that "absolute immunity . . . is the result of a misinterpretation" of section 230's language and Congress's intent). According to the rule against surplusage, "if an interpretation of given statutory words would produce a meaning that was duplicative of other statutory language, it is presumed that this is not the correct interpretation." CROSS, *supra* note 44, at 88. For more information regarding rules of statutory construction, see *supra* note 44.

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subsection (c)(1) as an immunity provision for any third-party content, regardless of the ISPs editing decisions involved.<sup>135</sup> However, if ISPs are immune for censoring third-party content under subsection (c)(1), then there appears to be no purpose in the good faith provision found in subsection (c)(2), which independently provides immunity for ISPs that censor third-party material.<sup>136</sup> Accordingly, *Zeran* and its progeny ultimately expanded the scope of section 230 far beyond what Congress actually intended.<sup>137</sup>

## 2. The Lack of Distributor Liability Has Prompted Removal Concerns

Many courts have followed the *Zeran* court's refusal to impose distributor liability on ISPs, resulting in ISP immunity in almost every case.<sup>138</sup> While cases such as *Roommates.com* offer a glimmer of hope for victims, they are very narrow holdings that only apply in rare situations when the ISP materially contributes to the illegality of the material.<sup>139</sup> Today, ISPs still enjoy protection in instances where the ISP is asked to remove offensive material and refuses to do so, which seems contrary to

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<sup>135</sup> See, e.g., *Batzel*, 333 F.3d at 1031 (providing that editing decisions do not cause ISPs to forfeit immunity); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (asserting that, regardless of the editing decisions involved, an ISP cannot be held liable as an information content provider of third-party content); *Zeran*, 129 F.3d at 330 (stating that decisions regarding "whether to publish, withdraw, postpone, or alter content" fall within a publisher's traditional editorial functions and that section 230 bars lawsuits seeking to hold an ISP liable for executing any of those functions).

<sup>136</sup> See *Dickinson*, *supra* note 44, at 869 ("If providers who choose to censor third-party-created content are already immune under subsection (c)(1) because the content is not their own, then what can be the purpose of subsection (c)(2), which grants immunity if they choose to censor?"); *supra* note 61 and accompanying text (discussing section 230's provisions and Congress's purpose in enacting the statute).

<sup>137</sup> *Jeweler*, *supra* note 36, at 36-37. "[B]y using the word 'immunity' to describe the protection from liability § 230 conferred on ISPs, the *Zeran* court set a dangerous precedent that would come to encompass many more internet operators than Congress presumably intended to protect." *Zieglowsky*, *supra* note 14, at 1312.

<sup>138</sup> See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1098, 1103 (9th Cir. 2009) (refusing to apply liability when an ISP was repeatedly asked to remove unlawful material and failed to do so); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 292, 296, 298 (D.N.H. 2008) (relying on *Zeran* in its decision to provide immunity from some causes of action to an ISP that republished third-party content despite the ISP having knowledge as to the unlawful nature of the material); see also *Ferris*, *supra* note 37, at 130 ("Most courts around the country have followed the *Zeran* analysis to the letter.").

<sup>139</sup> See *Adamo*, *supra* note 43, at 11-12 (contending that *Roommates.com* was not a substantial change to the law concerning section 230). Specifically, *Roommates.com* has been described as a narrow exception that is only applicable "where the ISP literally forces third parties to post illegal content as a condition of using its services." *Id.* at 11.

Congress's intention.<sup>140</sup> Congress explained that it wanted to protect self-regulating "Good Samaritans" in passing section 230.<sup>141</sup> However, the law as it stands today protects not only self-regulating Good Samaritans, but also those ISPs that refuse to self-regulate; therefore, no incentive exists for ISPs to behave like the Good Samaritans Congress sought to protect when it passed the statute.<sup>142</sup> Several cases, such as *Barnes*, *Friendfinder*, and *Shiamili*, illustrate that, when asked to remove allegedly illegal content, ISPs often refuse to do so or ignore the requests altogether.<sup>143</sup> In so doing, these ISPs join in the activity that section 230 was intended to discourage.<sup>144</sup>

The ISP's failure to remove the content in *Friendfinder* suggests that bad faith may have been at play. In *Friendfinder*, the plaintiff informed the website that a profile claiming to be her was actually not hers and requested its removal; yet, the ISP chose to make the profile appear as teasers in areas outside its actual webpage, making the content even *more* apparent.<sup>145</sup> As Justice Gaultney explained in *Milo v. Martin*, bad faith conduct should not be worthy of section 230 immunity because the

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<sup>140</sup> See, e.g., *Barnes*, 570 F.3d at 1098, 1103; *Friendfinder*, 540 F. Supp. 2d at 292, 298; *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1014, 1020 (N.Y. 2011); see also *supra* note 57 and accompanying text (explaining that Congress intended to encourage ISPs to remove unlawful material from the Internet).

<sup>141</sup> 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995).

<sup>142</sup> *Otteweller*, *supra* note 5, at 1320 ("Because the ISPs have no threat or fear of litigation for defamatory materials posted by third parties, there no longer remains an incentive for providers to screen for offensive and harmful material and the ISP is free to use its resources on other profitable ventures."); *Patel*, *supra* note 36, at 684 ("Common sense dictates that an ISP will not waste its time and money monitoring content over the Internet when it will suffer no repercussions from failing to do so."); *Quon*, *supra* note 6, at 590 (asserting that section 230's immunity does not provide an "incentive for . . . ISPs to self-regulate the appropriateness of the content posted" on their websites; therefore, the sites are "blank canvases readily available for the actual parties to directly furnish inappropriate material online").

<sup>143</sup> See *Barnes*, 570 F.3d at 1098, 1103 (providing section 230 immunity to an ISP that was repeatedly asked to remove unlawful material and failed to do so); *Friendfinder*, 540 F. Supp. 2d at 292, 298 (allowing section 230 immunity when a plaintiff sought to hold a website liable as a publisher of third-party information, even though plaintiff requested that the website remove the content); *Shiamili*, 952 N.E.2d at 1014, 1020 (holding that an ISP was immune from suit, despite its refusal to remove knowingly defamatory material when asked); see also *supra* Part II.C.2 (providing the background of each case and the removal issues involved).

<sup>144</sup> *Milo v. Martin*, 311 S.W.3d 210, 220 (Tex. App. 2010) (Gaultney, J., concurring); see *supra* Part II.C.1 (explaining that Congress enacted section 230 to encourage ISPs to self-regulate by removing then-existing disincentives).

<sup>145</sup> *Friendfinder*, 540 F. Supp. 2d at 292. See *supra* Part II.C.2 for a more in-depth discussion of the *Friendfinder* case.

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provision was intended for Good Samaritan ISPs.<sup>146</sup> Yet, the law as it stands does not differentiate between good and bad faith for purposes of immunity evaluations; therefore, ISPs, such as the one in *Friendfinder*, are able to act in bad faith while still reaping the benefits of section 230's immunity shield.<sup>147</sup> Meanwhile, victims of online defamation are left to expend time and money litigating the matter with great uncertainty while their reputations rapidly deteriorate.<sup>148</sup>

*B. The Ineffectiveness of Previously Suggested Remedies*

Although critics have recommended using self-help remedies to mitigate the harmful effects of defamatory speech, such remedies are often ineffective.<sup>149</sup> As illustrated in the case law concerning the CDA, contacting the ISP and requesting removal of the material often does not work because ISPs know that they are not required to do so by law.<sup>150</sup> Confrontation, while easy and inexpensive, often does not stop the publications when the individual is anonymous, which is often the case.<sup>151</sup> Furthermore, even if confrontation successfully stops the publication of further defamatory statements, it does not necessarily

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<sup>146</sup> 311 S.W.3d at 221 (Gaultney J., concurring) (arguing that section 230's language indicates that bad faith conduct is not afforded protection by the Act). "By its terms, section 230(c)(2)(A) protects an action taken in 'good faith'—that is, with an absence of malice. A provider that acts maliciously, and that would be held civilly liable under state law, does not enjoy federal immunity under section 230(c)(2)(A)." *Id.* Justice Gaultney asserted that section 230 was intended to protect good faith efforts to remove third-party defamatory statements, even if such efforts ultimately proved unsuccessful. *Id.* Furthermore, Justice Gaultney contended that "a malicious provider who intentionally and unreasonably chooses not to remove material that can easily be deleted, and that is known to be defamatory, should not be immune from civil liability under section 230(c)(2)(A)." *Id.*

<sup>147</sup> See Benedict, *supra* note 72, at 493 ("The problem is, however, that § 230 does not require self-policing. These providers can reap all of the benefits and are not required to perform any of the service Congress hoped to encourage.").

<sup>148</sup> See Miller, *supra* note 5, at 250 (discussing the difficulties involved with John Doe suits seeking to compel ISPs to disclose identities); Sheridan, *supra* note 34, at 178 (recognizing that litigation is expensive); see also Lipton, *supra* note 3, at 1131 (explaining that, even if the plaintiff is able to compel disclosure, the third-party poster is typically unable to satisfy a judgment).

<sup>149</sup> See Miller, *supra* note 5, at 236 ("[S]elf-help has not been a sufficient deterrent to stop defamatory posts.").

<sup>150</sup> See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1098, 1103 (9th Cir. 2009); *Friendfinder*, 540 F. Supp. 2d at 292, 298; *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1014 (N.Y. 2011).

<sup>151</sup> See Areheart, *supra* note 101, at 42 (explaining that the individual posters are often anonymous and difficult to track down); Marton et al., *supra* note 29, at 70 (asserting that confrontation is the easiest and least expensive remedy).

result in removal of the existing material to spare the victim's reputation.<sup>152</sup>

Another suggested remedy is counter speech.<sup>153</sup> However, once the lie is available to the public, the mere fact that a victim replies to a defamatory thread saying "that is false" does not guarantee that everyone—or anyone for that matter—will believe the victim.<sup>154</sup> In fact, counter speech can and frequently does fuel even more defamatory discussion.<sup>155</sup> Moreover, counter speech alone does not stop the defamatory material from appearing on search engine sites when someone searches the victim's name; therefore, the victim's reputation still remains in jeopardy even when the victim uses counter speech.<sup>156</sup>

While most victims of online defamation would want to know the identity of the anonymous poster, more importantly, victims typically want the material removed so as to preserve what is left of their reputations and avoid further damage in the future.<sup>157</sup> The addition of a notice-and-takedown procedure would thus best serve victims' interests. However, the takedown procedure must adequately protect the alleged defamer's First Amendment right to free speech, which is a difficult task to achieve.<sup>158</sup>

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<sup>152</sup> Marton et al., *supra* note 29, at 70. With search engines like Google, victims are susceptible to long-term harm if the material is not removed. See Ciolli, *supra* note 2, at 154 (providing an example of a way in which search engines are used to cause harm and explaining that prospective employers, friends, and others will have access to the material, which can negatively affect individuals in major aspects of their lives).

<sup>153</sup> See Miller, *supra* note 5, at 236 (discussing whether counter speech is an effective remedy).

<sup>154</sup> See Areheart, *supra* note 101, at 42 (asserting that victims may attempt to respond; however, "recent anecdotal evidence . . . suggests this may only make matters worse"); Miller, *supra* note 5, at 236 (contending that counter speech is not effective).

<sup>155</sup> See Miller, *supra* note 5, at 236 (explaining that the "victim can suffer more damage for standing up for himself" because "standing up against a defamer and using online self-help may generate even more defamatory comments and hostile reactions from others on the website or message board").

<sup>156</sup> See *id.* (asserting that counter speech is not an effective solution to Internet defamation in the "Google era"); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 n.9 (1974) (asserting that counter speech is an inadequate remedy because it does not suffice to undo the defamation); Lukmire, *supra* note 48, at 403 (explaining that counter speech can worsen the problem because it may cause the material to be displayed more prominently when the individual's name is searched on Google).

<sup>157</sup> See Lipton, *supra* note 3, at 1131 ("[T]he plaintiff's desired remedy will often not be damages, but rather an injunction to remove a harmful online posting."); Marton et al., *supra* note 29, at 69 ("[A] very common goal is a desire to prevent continued publication.").

<sup>158</sup> See Hyland, *supra* note 22, at 84 ("An effective solution must consider the serious policy implications at stake while remaining consistent with First Amendment jurisprudence. No commentator appears to have crafted a workable solution that relies on First Amendment jurisprudence yet also considers the difficult policy issues . . .").



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An appealing suggestion that many scholars have offered involves the adoption of a notice-and-takedown procedure that is almost identical to OCILLA, which is the DMCA's takedown provision.<sup>159</sup> However, while some aspects of OCILLA would fit well into section 230—such as its detailed notification procedure—others would pose complications that cannot be ignored.<sup>160</sup> Specifically, removal upon notification alone will result in unnecessary censorship if left up to the ISP.<sup>161</sup> Even if the proposed defamation notice-and-takedown procedure requires ISPs to perform a defamation analysis upon notification and thereafter remove defamatory material, such a proposal will still be insufficient to protect the alleged defamer's free speech interests.<sup>162</sup> Because evaluating the validity of a defamation claim is a difficult task and ISPs would be immune from suit for removing the material upon notice, ISPs would likely seek to avoid the risk of liability by removing everything upon notice regardless of whether the content is illegal, thereby chilling free speech through excessive self-censorship.<sup>163</sup> One of the most troublesome aspects of this result is that people could effectively use the procedure as a weapon to silence their critics, even if the speech at issue would have otherwise received protection.<sup>164</sup>

<sup>159</sup> See, e.g., Hallett, *supra* note 106, at 279–80; Medenica & Wahab, *supra* note 13, at 263; King, *supra* note 106, at 878. For the DMCA's notice-and-takedown procedure, see *supra* text accompanying notes 107–08.

<sup>160</sup> Adamo, *supra* note 43, at 39–40.

<sup>161</sup> See *supra* note 70 and accompanying text (explaining the *Zeran* court's concern that liability upon notice would chill free speech because ISPs will elect to remove everything upon notice, rather than engaging in a defamation analysis). *But see* Lichtman & Posner, *supra* note 55, at 252 (asserting that market forces will discipline overzealous ISP behavior and “to the extent that any significant externalities remain, tort immunity is not an efficient response”).

<sup>162</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) (“[L]iability upon notice has a chilling effect on the freedom of Internet speech.”); see Areheart, *supra* note 101, at 44 (referring to the First Amendment as the “elephant in the room” when considering how to regulate the Internet). See *supra* Part II.A for information about the First Amendment interests involved with Internet defamation.

<sup>163</sup> See Lewis, *supra* note 28, at 960 (noting that, if an ISP was faced with notice-based liability, it would place an ISP in a precarious role because of the difficulty associated with determining if a comment is defamatory).

<sup>164</sup> Hyland, *supra* note 22, at 83. As one commentator stated:

If interactive web operators are subject to notice-based liability, they may tend to remove any content that is the subject of a complaint, thereby pulling some content that is not actually false or defamatory. This notice-based liability places great power in the hands of any person who becomes the topic of an uncomplimentary Internet posting, as a notice to the web operator claiming defamation could easily result in the removal of the posting.

*Id.* Similarly, Professor Michael Scott, author of *Scott on Information Technology Law*, emphasized:

One scholar has suggested repealing section 230 completely and reinstating the three-part common-law framework.<sup>165</sup> Similarly, another academic recommended maintaining protection for publishers but not distributors.<sup>166</sup> However, holding ISPs liable for common-law distributor liability is problematic because, as with the proposed DMCA-like takedown procedure, ISPs would likely chill free speech with excessive censorship to avoid liability.<sup>167</sup> Alternatively, ISPs would refrain from monitoring their websites entirely to avoid liability, just as the ISP did in *Cubby*.<sup>168</sup> Congress introduced the CDA precisely to discourage this hands-off approach to Internet management.<sup>169</sup> Therefore, reinstating the common law framework alone does not adequately resolve the overall issues moving forward; rather, it merely sets the law back to the problems that existed nearly two decades ago when the *Stratton* and *Cubby* cases were decided.<sup>170</sup> Additionally, imposing liability based on what the ISP “should have known” would likely require the ISP to filter through all third-party content, which is

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a major problem is that the DMCA take-down provisions have been abused repeatedly by those who do not like what is being said about them online—even when it is true and non-infringing. The DMCA take-down provisions have been used as a means of censoring discussion on controversial issues, not just for removal of copyright infringing materials.

Scott, *supra* note 103, at 66 (footnote omitted).

<sup>165</sup> See Jeweler, *supra* note 36, at 20 (“Congress should repeal the CDA and courts should apply the common law framework to Internet defamation cases attempting to hold an ISP or website operator liable under a publisher or distributor liability theory.”).

<sup>166</sup> Ferris, *supra* note 37, at 134.

<sup>167</sup> *Zeran*, 129 F.3d at 333; see French, *supra* note 36, at 475 (“[W]ebsites might choose instead to just remove all content that is complained about, without regard to its offensiveness or the resulting chilling effect on free speech”). But see Jeweler, *supra* note 36, at 27 (contending that market forces will prevent ISPs from excessively censoring material). As one critic emphasized:

liability upon notice presents the triple threat of (1) encouraging websites to remove any complaint system whereby they might have knowledge imputed to them, (2) the unbearable burden of considering every complaint received, and (3) the risk that websites will just remove all controversial content, thus chilling speech.

French, *supra* note 36, at 483.

<sup>168</sup> See *supra* Part II.C.1 (explaining that CompuServe escaped liability because it refrained from even attempting to filter content); see also French, *supra* note 36, at 475 (explaining that distributor liability will likely discourage websites from even attempting to become aware of the content, and thus websites may refrain from having any system of notification whatsoever).

<sup>169</sup> See *supra* note 57 and accompanying text (discussing the legislative history of section 230 of the CDA and explaining that Congress sought to encourage ISPs to self-regulate).

<sup>170</sup> See *supra* Part II.C.1 (providing background facts on the *Stratton* and *Cubby* cases and the disincentive these decisions created for ISPs to self-regulate).

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extremely burdensome considering the substantial amount of communication that occurs on the Internet today.<sup>171</sup>

A more comprehensive approach than those previously suggested is necessary to resolve problems involving the absence of an incentive for ISPs to remove illegal material. The solution must encourage ISPs to remove illegal material when asked, respect the concerns set out by Congress and the judiciary, protect the First Amendment interests of the Internet users, and consider the interests and capabilities of the ISPs.<sup>172</sup>

IV. CONTRIBUTION

Section 230 of the CDA does not adequately protect the interests of victims of torts committed on the Internet.<sup>173</sup> Additionally, section 230, as it stands today, does not achieve Congress's ultimate goal of encouraging ISPs to remove offensive material online because it gives ISPs immunity from suit for third-party conduct regardless of whether the ISPs remove the material or refuse to do so.<sup>174</sup> As a result, when victims request removal of defamatory material on the Internet, ISPs

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<sup>171</sup> See *Zeran*, 129 F.3d at 333 ("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."); French, *supra* note 36, at 474 (explaining that, with millions of posts on each website, it is financially burdensome and unfeasible to monitor the content); see also Katyal, *supra* note 70, at 1007-08 (asserting that imposing liability on an ISP for its subscribers' acts will lead the ISP to remove risky subscribers from its system).

<sup>172</sup> See *supra* Part II.A (discussing First Amendment rights, such as the right to remain anonymous and speak freely, so long as the speech does not fall within an unprotected category, such as defamation); *supra* Part II.C (explaining that Congress enacted section 230 primarily to encourage ISPs to self-regulate and to remove the disincentives brought on by the *Stratton* decision); *supra* Part II.D (discussing concerns expressed by the judiciary regarding the absence of a takedown procedure to help victims mitigate harm to their reputations and the lack of an incentive for ISPs to self-regulate); *supra* Part III.B (acknowledging concerns regarding the heavy burden some remedies can impose on ISPs and recognizing that such burdens can compel ISPs to censor both lawful and unlawful speech, which infringes on lawful Internet users' First Amendment interests).

<sup>173</sup> See *supra* Part III.A.2 (explaining that section 230 has been construed to remove any type of notice-based liability and there is no takedown procedure in place, so victims are left without a method of removing defamatory material from the Internet to mitigate harm to their reputations).

<sup>174</sup> See *supra* Part III.A.2 (explaining that there is no incentive for ISPs to behave like the Good Samaritans Congress was concerned about when it enacted section 230 because ISPs have immunity irrespective of whether they self-regulate, so there is no reason for them to expend resources for self-regulation).

often do not remove the material because nothing compels them to do so.<sup>175</sup>

While scholars have previously suggested repealing or amending section 230 to include distributor liability or a takedown procedure, the previously requested modifications still fail to adequately protect the free speech interests of the anonymous posters and financial interests of the ISPs; therefore, the concerns raised in *Zeran* would still remain.<sup>176</sup> Consequently, this Note proposes a notice-and-takedown provision for defamatory material in an effort to more adequately protect: (1) the individual victims' interests; (2) the ISPs' interests; and (3) the anonymous posters' right to free speech.<sup>177</sup> Rather than leaving the defamation analysis in the ISPs' hands, the FCC should designate a division to complete good faith evaluations of the validity of complaints from alleged victims and determine whether material complained of necessitates removal.

#### A. Proposed Legislation

##### **Section 230A: Exception to section 230 of the Communications Decency Act:**<sup>178</sup>

(1) *An Internet Service Provider that does not comply with the procedure set forth in subsection (2) below forfeits the protection of Section 230 of the Communications Decency Act and will thus, be subject to liability for third-party content on its website or service.*

(2) *Notice-and-Takedown Procedure:*

(A) *An individual seeking removal of allegedly defamatory material on the Internet must send a notification that complies with subsection (3) of this Act to the Internet Service Provider as well as the Federal Communications Commission requesting such removal.*

(B) *The Internet Service Provider, upon receipt of the removal notification, must promptly notify the third-party poster that:*

<sup>175</sup> See *supra* Part II.C.2 (examining cases in which victims repeatedly requested the removal of unlawful material and the ISPs refused to do so).

<sup>176</sup> See *supra* Part III.B (discussing previously suggested remedies and why they are ineffective).

<sup>177</sup> See *supra* text accompanying note 172 (explaining the various competing interests involved).

<sup>178</sup> This proposed legislation adds another subsection to section 230 of the Communications Decency Act. The language of subsection (3)(A) is based off the DMCA's notice procedure; however, the author created the remaining subsections.

- (i) *The Federal Communications Commission is evaluating the allegedly defamatory content;*
      - (ii) *The agency may require removal of the material;*
      - (iii) *The poster's identity has not been and will not thereafter be disclosed; and*
      - (iv) *The poster, within one (1) week, may provide the Federal Communications Commission with proof of the truthfulness of the speech, if available.*
    - (C) *The Federal Communications Commission, upon receipt of the removal notification, must promptly contact the complaining party to notify him or her that the matter is under advisement.*
    - (D) *The Federal Communications Commission must, within sixty (60) days, conduct a good faith evaluation of the requesting party's claim to determine whether the material at issue could reasonably be deemed defamatory.*
      - (i) *If the Federal Communications Commission finds that the material at issue could not reasonably be deemed defamatory, it must notify the party requesting removal that the material will not be removed and provide that party with the rationale for its decision.*
      - (ii) *If the Federal Communications Commission finds that the material at issue could reasonably be deemed defamatory, it must contact the Internet Service Provider to recommend removal of the material.*
    - (E) *Upon receipt of a removal recommendation from the Federal Communications Commission, the Internet Service Provider must promptly remove the material at issue or otherwise forfeit, pursuant to subsection (1), the immunity that section 230 provides.*
  - (3) *Elements of Removal Request Notification:*
    - (A) *To be effective under this subsection, a notification requesting removal of third-party material from the Internet must include the following:*
      - (i) *Information reasonably sufficient to permit the service provider and agency to contact the complaining party, such as the complaining party's name, address, telephone number, and, if available, an electronic mail address;*
      - (ii) *A copy of the allegedly defamatory material;*
      - (iii) *The precise location of the allegedly defamatory material;*

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(iv) A signed statement from the individual providing, under penalty of perjury, that the material he or she has provided is accurate and that he or she reasonably believes the material at issue is defamatory;

(v) Any documentation, if available, that would prove the falsity of the material at issue; and

(vi) Payment of \$500.00.

(B) Failure to comply with the notice requirements set forth in subsection (3)(A) will result in automatic denial of an individual's removal request.

#### B. Commentary

First, the alleged victim should send her complaint to the ISP as well as the designated FCC division responsible for analyzing defamatory content on the Internet. Once the agency receives the written complaint, it must e-mail the complaining party to notify her that the matter is under advisement. Similarly, once the ISP receives the complaint, it must notify the poster of the material that a government agency is evaluating the content of his speech and that the agency may require removal of the material. In its notification to the poster, the ISP should inform him that the ISP has not disclosed his identity and that if he wants to fight to keep the material up, he can provide the agency with proof of the truthfulness of the speech or argue that the speech is merely an opinion, so long as he does so within one week. If the agency finds that the material could not be deemed defamatory, it will e-mail the complaining party informing her that it will not request that the ISP remove the material and providing a reason for its decision.

There may be some scenarios where the determination of whether material is defamatory is unclear; therefore, if the FCC finds that the material could *reasonably* be deemed defamatory, it must notify the ISP, and the ISP must remove the material immediately. So long as the ISP complies with the procedure, it will retain its immunity. However, if the ISP does not comply with the procedure—i.e. refuses to remove the material after notification from the agency of the defamatory nature of the speech—then it will forfeit its ability to avail itself of section 230's immunity. Immunity should not be freely given regardless of the ISP's actions; rather, immunity should be earned through compliance with the proposed notice-and-takedown procedure.

The proposed notice-and-takedown procedure is superior to previously suggested remedies for several reasons. First, it provides a cost-effective and efficient way for victims to mitigate the damage to

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their reputations by providing an alternative to costly litigation. Second, by leaving the analysis and decision-making to an impartial government agency with knowledge of the law, the alleged defamer's First Amendment rights will receive adequate protection. This is because the FCC will not require that ISPs remove material unless the agency first deems the speech defamatory; therefore, ISPs will not feel compelled to remove everything upon request from alleged victims. Third, the proposed statute preserves the alleged defamer's anonymity throughout the process, further protecting his First Amendment rights.<sup>179</sup> Specifically, subsections 2(A)-(B) serve, in part, to ensure preservation of the alleged defamer's anonymity by providing a process in which the FCC has no direct contact with the anonymous poster and is not informed of the individual's identity.<sup>180</sup> Rather, the agency's interactions will be limited solely to the ISP and the complainant. Fourth, because subsection (3)(A)(iv) subjects the complaining party to the possibility of perjury charges, there will likely be minimal frivolous complaints.<sup>181</sup> Fifth, the procedure is not overly burdensome to ISPs because it does not require that ISPs screen for offensive content or evaluate complaints. Last, although the proposed takedown procedure requires government interference, the agency is merely an impartial middleman, so the government is not overly involved.

Critics of the proposed notice-and-takedown procedure will likely argue that the government cannot afford to allocate time and financial resources for the FCC to evaluate potential claims. However, although this is a valid concern, the fee imposed by subsection (3)(A)(vi) seeks to alleviate the financial burden on the FCC.<sup>182</sup> Notably, it prevents the burden from falling on the taxpayers. Conversely, critics may take issue with the imposition of a \$500 fee on an innocent victim seeking to have the material removed. An alternative would be a conditional fee, in which the FCC would return the \$500 if the material complained of necessitates removal and would retain the fee if the content at issue does not necessitate removal. One benefit of a conditional fee is that it will help to discourage frivolous claims. However, the conditional fee option could cause problems if the agency does not retain enough money to

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<sup>179</sup> See *supra* note 26 and accompanying text (discussing the First Amendment right to publish anonymously).

<sup>180</sup> See *supra* subsections 2(A)-(B) of the proposed legislation, requiring that the anonymous third-party poster receive notice from the ISP rather than the FCC, thus ensuring that the FCC is never informed of the individual's identity.

<sup>181</sup> See *supra* subsection 3(A)(iv) of the proposed legislation, directing the complaining party to sign a statement, under penalty of perjury, indicating the material is defamatory.

<sup>182</sup> See *supra* subsection (3)(A)(vi) of the proposed notice-and-takedown procedure, which imposes a \$500 fee on the complaining party.

continue evaluating claims without financial assistance from the government. Additionally, the financial motivation could negatively influence removal decisions. While it is unfortunate that a victim may have to pay a fee to have unlawful material removed from the Internet, it is important to note that this notice-and-takedown procedure is a more cost-effective and reliable alternative to litigation, which is typically expensive and risky.<sup>183</sup>

## V. CONCLUSION

Congress enacted section 230 of the CDA primarily to encourage ISPs to self-regulate and remove offensive material from the Internet by eliminating the disincentives that emerged after the *Cubby* and *Stratton* cases.<sup>184</sup> However, the broad judicial construction of section 230, immunizing ISPs from liability for almost all third-party content, has prompted the same disincentive Congress sought to eliminate.<sup>185</sup> The mere fact that Congress eliminated a disincentive does not conversely mean that Congress created an incentive. The evisceration of distributor liability on the Internet as well as the lack of procedures or consequences for ISP refusal to remove offensive material has left many individuals with little or no adequate methods of having the material removed to mitigate the damage to their reputations. The proposed notice-and-takedown procedure is an effective solution to this problem because it finally provides a real incentive for ISPs to remove offensive material, yet it also adequately protects the interests of the ISPs and anonymous posters.

Considering the scenario set out in Part I, the law as it stands today leaves Barbra with no recourse against JuicyCollegeDirt.com when it refuses to remove messages on its website which allege, among other things, that Barbra has sexually transmitted diseases and engages in sexual misconduct by cheating on her significant other. This result is completely at odds with Congress's ultimate purpose in enacting section 230. An adoption of the proposed notice-and-takedown procedure would produce the type of results Congress sought to achieve in enacting section 230. With the proposed notice-and-takedown

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<sup>183</sup> See *supra* note 101 (examining the challenges involved in litigation, such as the expense, difficulty compelling disclosure of the anonymous individual, and likelihood that the defendant will not be able to satisfy the judgment).

<sup>184</sup> See *supra* notes 52-55 and accompanying text (explaining that *Cubby* and *Stratton* created a disincentive because taken together, they stood for the proposition that, if ISPs attempt to filter content, they will be held liable as publishers).

<sup>185</sup> See *supra* note 142 and accompanying text (asserting that immunity from suit does not encourage ISPs to self-regulate).



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procedure, Barbra would have a swift and cost-effective process for seeking removal of the defamatory material.

In evaluating the victim's removal request regarding the JuicyCollegeDirt.com postings, the FCC would likely determine that the messages—especially those related to criminal acts, sexual misconduct, and sexually transmitted diseases—are likely defamatory and recommend that JuicyCollegeDirt.com remove the messages promptly.<sup>186</sup> Upon receipt of the FCC's removal recommendation, JuicyCollegeDirt.com would likely remove the messages to ensure that the website remains protected from liability for the third-party content. If JuicyCollegeDirt.com fails to remove the material or refuses to do so, it will be subject to liability as if it had written the defamatory messages itself. Because JuicyCollegeDirt.com has a deeper pocket, it will be a lawsuit worth pursuing regardless of the financial obstacles Barbra is faced with. Either way, Barbra will finally have a cost-effective and reliable method of repairing the damage to her reputation.

Patricia Spiccia\*

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<sup>186</sup> See *supra* note 33 (explaining that imputations of criminal or sexual misconduct and loathsome disease constitute defamation per se).

\* J.D. Candidate, Valparaiso University Law School (2014); B.A., Psychology, Indiana University-Bloomington (2011). First, I would like to thank my parents, Michael and Linda, for their unconditional love and support. Since adopting me from Brazil at the age of six, my parents have gone above and beyond to ensure that I receive the best education possible. When I could not speak English, my parents devoted extra time and effort to get me up to speed with other children my age. Without their patience and assistance, I would not have become the writer I am today. I would also like to thank my grandparents, Michael and Carmella, for generously helping put me through college. A special thanks to my amazing family and friends who have encouraged me to persevere at times when I felt like giving up. Additionally, I would like to recognize and thank Dean Susan Stuart for her constant help and mentorship throughout my years in law school. Last, I greatly appreciate Professor David Myers for engaging in countless thoughtful discussions and providing me with invaluable guidance regarding my Note topic.