

## Despite a *Perfect 10*, What Newspapers Should Know About Immunity (and Liability) for Online Commenting

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**Abstract:** Much recent scholarship has focused on the right of publicity's connection to intellectual property law. This relationship is no more apparent and significant than under the Communications Decency Act ("CDA"), where Congress tempered a broad grant of Internet publisher immunity with an intellectual property exception. The CDA thus tees up the issue of whether defendants can assert CDA immunity against right of publicity claims. Analyzed in the context of newspaper online commenting, an emerging area of interactive journalism, this article uses right of publicity's roots in privacy law to tackle a contentious area of the law.

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## I. INTRODUCTION

Privacy and intellectual property converge at the right of publicity, and what appears to be merely a difference in form has staggering implications for immunity under the Communications Decency Act (“CDA”).<sup>1</sup> The CDA precludes imposition of tort liability against providers or users of interactive computer services (e.g., America Online, Inc. or individual website owners) for content created by third parties.<sup>2</sup> But an explicit disclaimer against any effect on intellectual property law qualifies this broad grant of immunity.<sup>3</sup> The intellectual property disclaimer thus tees up the issue—can defendants assert CDA immunity against right of publicity claims?

In addition to supplying interesting fodder for legal scholars, this issue affects companies and individuals looking to incorporate interactive features into their websites. One such example is the newspaper industry, where attracting readers to your website can compensate for declining readership of print editions. In a presentation given at the University of Illinois College of Law, John Beck, the executive editor of a local newspaper called the *News-Gazette*, discussed potentially implementing an online commenting feature.<sup>4</sup> This feature would ask readers to comment on articles and then publish these comments alongside the relevant story. Mr. Beck, however, expressed concern that the newspaper might incur privacy liability for content published on its website. Moreover, he stated that one way the newspaper would avoid liability would be to forego editing the comments.

This article addresses John Beck’s concern and determines that the CDA immunizes the newspaper from invasion of privacy claims, regardless of whether it edits the comments. Although not as clear of an issue, this article also contends that the newspaper can assert

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<sup>1</sup> 47 U.S.C. § 230 (2000).

<sup>2</sup> See § 230(c)(1).

<sup>3</sup> § 230(e)(2).

<sup>4</sup> John Beck, Executive Editor, *News-Gazette*, Remarks at the University of Illinois College of Law (Feb. 27, 2007). Since Mr. Beck’s presentation, the *News-Gazette* instituted a website forum for readers’ comments on different topics and will continue to discuss allowing comments on individual stories. Presently, the *News-Gazette* allows comments on editorials.

immunity against right of publicity claims, despite the right of publicity's overlap with intellectual property.

The article proceeds as follows. Part II provides background on the motivation for newspapers to provide a comment feature on their websites, the implementation of such a feature, and the inevitable complications that newspapers can expect when inviting the public to share their platform. Part III identifies two laws that newspapers must consider before implementing an online commenting feature—the Digital Millennium Copyright Act (“DMCA”) and the Communications Decency Act. Because this article focuses on the privacy implications of newspaper online commenting, Part III spends minimal time on the Digital Millennium Copyright Act and instead swims deeper into the waters of the CDA, including a discussion of its relevant subsections and underlying policy. Part IV examines newspaper online commenting under the CDA. In doing so, Part IV first determines if newspapers qualify for immunity and then examines whether newspapers can assert this immunity against privacy and right of publicity claims. Part V surveys the current state of affairs and recommends steps newspapers should take to protect themselves from liability. Part VI provides a conclusion.

## II. NEWSPAPER ONLINE COMMENTING

The Internet has revolutionized the news industry, creating opportunities for traditional news outlets, as well as innovative forms of media, to capture the public's attention. Gone are the days when the masses would wait in line at the corner newsstand or when families would tune in for the nightly news. Today, consumers simply turn on a computer and summon to the screen one of several accessible news websites. The newspaper industry finds itself in a precarious position as it struggles to retain—let alone boost—readership.<sup>5</sup> Readers now have a choice: they can purchase traditional print newspapers or they can obtain news on the Internet. Although some news websites charge subscription fees, many either do not require registration or ask only that the user provide an e-mail

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<sup>5</sup> Katharine Q. Seelye, *Drop in Ad Revenue Raises Tough Questions for Newspapers*, N.Y. TIMES, Mar. 26, 2007, at C2, available at <http://www.nytimes.com/2007/03/26/business/media/26paper.html?ex=1177387200&en=4942a2903579a97b&ei=5070> (“Newspaper circulation nationally reached its peak in 1984, when there were 1,600 morning and afternoon paid dailies with a circulation of 63 million. . . . Today there are 1,450 paid dailies with a circulation of 53 million. The losses have accelerated over the last two years.”).

address. As a result, many newspapers support their own news website. In the fiercely competitive online news industry, newspapers are searching for innovative ways to reestablish a relationship with readers.

Some websites offer established brand recognition, such as the *Chicago Tribune's* website<sup>6</sup>; other websites offer information tailored to a specific field, such as IP Law360<sup>7</sup>; and still other websites are considering interactive features that allow readers to post comments, such as Champaign's *News-Gazette*.<sup>8</sup> Of course, several websites draw upon a combination of these and other novelties.

This article focuses on the implications that arise when a newspaper allows readers to post comments on its website to supplement the newspaper's own articles. For instance, a website may designate space where a reader can provide her name and type a comment into a text box. After clicking a button that confirms her intent to post the comment to the website, the reader's comment appears on the website either next to or below the original article. Subsequent readers can then post their own comments on the article and/or respond to a previous reader's posting.

Publishing readers' comments provides numerous social and private benefits. First, a website that would otherwise publish only one article may now disseminate the original article *and* the views of readers. These comments can provide additional information to subsequent readers in the form of opinions and/or additional facts. Second, there is an innate benefit in having the public take an active role in the dissemination of news. Such benefits include a well-informed public, an increased sense of community, and public accountability to the citizenry. Small, tight-knit communities may benefit immensely because these individuals likely identify with and have more knowledge about a greater proportion of the local news. Third, the website's sponsoring newspaper reaps a benefit in increased readership. Although readers have free access to the

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<sup>6</sup> Chicago Tribune, <http://www.chicagotribune.com> (last visited Mar. 30, 2008).

<sup>7</sup> IP Law360, <http://ipwww.iplaw360.com> (last visited Mar. 30, 2008).

<sup>8</sup> News-Gazette, <http://www.news-gazette.com> (last visited Mar. 30, 2008); see Pantagraph.com, <http://www.pantagraph.com> (last visited Mar. 30, 2008). According to its website, the *Pantagraph* "is a daily newspaper that services eight counties and more than 60 communities in Central Illinois." Pantagraph.com, About Us, <http://www.pantagraph.com/info/about.php> (last visited Mar. 30, 2008). On its website, the *Pantagraph* posts readers' comments in a separately identified section below each article. I thank Professor Amy Gajda for directing me to this website.

website, the newspaper can earn a profit through other means, the most obvious of which is advertising.

Not surprisingly, these benefits accrue accompanying costs. First, newspapers must grapple with whether they want to provide a forum where readers may post objectionable content. Next, absent an online commenting feature, newspapers control the content they publish online in the same way they control the information printed in hardcopy editions. If a newspaper permits public posting of comments to its website, however, the newspaper must decide whether to review and/or edit any of the comments, as opposed to declining to exercise editorial review altogether. Both editorial practices present interesting legal situations.

Either intentionally or not, some readers' comments may include illegal content, resulting in defamation, copyright infringement, or invasion of privacy. A newspaper may feel that it assumes liability once it begins editing these comments and avoids liability by declining to exercise any editorial control. In this situation, the newspaper will either (1) forego instituting an online commenting feature, or (2) publish public comments without review. Both outcomes are socially undesirable in that the first precludes the aforementioned benefits, and the second permits publication of risky content. Alternatively, other newspapers may believe that they have unfettered immunity regardless of editorial practice. Although these newspapers may institute online commenting features, they have no incentive to practice any self-regulation.

This article strives to clarify the relevant legal issues and, more importantly, to encourage newspapers to implement online commenting features as a result. Discussion now turns to two relevant federal laws that newspapers should consider.

### III. PERTINENT LAW

The extent of newspaper liability in the context of online commenting depends on § 512 of the DMCA and the CDA (§ 230). Newspapers incur the same liability for content published in their own online articles as they do for information published in their traditional print editions. The legal ramifications become more complicated when the content originates from a third party, as is the case for an online commenting feature. To be sure, this analysis does not consider the third party's liability or legal defenses (e.g., news exception). Instead, this article assumes that the author is liable for the content and analyzes whether the newspaper incurs secondary

liability. Section A briefly discusses the DMCA<sup>9</sup> and Section B presents a detailed analysis of the CDA.

### A. THE DIGITAL MILLENNIUM COPYRIGHT ACT

Section 512 of the DMCA prevents service providers from incurring liability for third parties' infringement of copyright if the service providers comply with explicitly identified requirements.<sup>10</sup> The gist of these safe harbors "is that the service provider must do what it can reasonably be asked to do to prevent the use of its service by 'repeat infringers.'"<sup>11</sup> The United States Court of Appeals for the Ninth Circuit recently summarized § 512(c) as immunizing a service provider that "acts 'expeditiously to remove, or disable access to, the [infringing] material' when it (1) has actual knowledge, (2) is aware of facts or circumstances from which infringing activity is apparent, or (3) has received notification of claimed infringement meeting the requirements of § 512(c)(3)."<sup>12</sup> These requirements translate into a "one-bite-at-the-apple form of immunity" because service providers avoid liability for secondary copyright infringement so long as they remove the infringing material upon receiving notice—the original use being the one and only bite.<sup>13</sup> Service providers must also "adopt[] and reasonably implement[], and inform[] subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."<sup>14</sup>

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<sup>9</sup> Although § 512 of the DMCA has attracted much attention in the scholarly community, the issue receives cursory attention here because the focus of this article is on privacy implications. Nevertheless, newspapers should conduct further inquiry into § 512 to ensure compliance with its safe harbors.

<sup>10</sup> 17 U.S.C. § 512(a) (2000).

<sup>11</sup> *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003) (quoting § 512(i)(1)(A)).

<sup>12</sup> *Perfect 10, Inc. v. CCBill L.L.C.*, 488 F.3d 1102, 1111 (9th Cir. 2007) (amended opinion).

<sup>13</sup> See *Batzel v. Smith*, 333 F.3d 1018, 1031 n.19, 1032 (9th Cir. 2003) (discussing the DMCA's "specific notice, take-down, and put-back procedures" and rejecting the partial dissent's suggestion of a "one-bite-at-the-apple form of immunity" under the CDA).

<sup>14</sup> 17 U.S.C. § 512(i)(1)(A) (2000).

Courts have interpreted the term *service provider*, as used in § 512, broadly,<sup>15</sup> and the Internet arm of a newspaper qualifies for protection.<sup>16</sup> The concern for online commenting is that readers will post copyrighted material, including articles from other newspapers. To escape secondary copyright infringement liability, newspapers should implement policies that comply with the “one-free-bite” rule, removing copyrighted material upon receiving notification, and should inform users of such policies.

## B. THE COMMUNICATIONS DECENCY ACT

More relevant to our discussion of privacy law is section 509 of the CDA,<sup>17</sup> codified at 47 U.S.C. § 230.<sup>18</sup> Section 230 extends immunity beyond the copyright law to providers and users of interactive computer services for liability arising from content created by third parties. This Section introduces the relevant provisions of § 230 and then presents the policy motivations behind the statute.

### 1. RELEVANT PROVISIONS OF § 230

Section 230(c)(1) declares unambiguously that “[n]o provider or user of an interactive service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>19</sup> Thus, for a newspaper to claim immunity under this

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<sup>15</sup> See, e.g., *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 623 (4th Cir. 2001) (stating that “[t]he Act defines a service provider broadly”); Charles S. Wright, Note, *Actual Versus Legal Control: Reading Vicarious Liability for Copyright Infringement into the Digital Millennium Copyright Act of 1998*, 75 WASH. L. REV. 1005, 1024 n.167 (2000) (noting that “§ 512 defines ‘service provider’ broadly” (citations omitted)).

<sup>16</sup> See Wright, *supra* note 15, at 1024 n.167 (citing Elizabeth A. McNamara et al., *On-Line Service Provider Liability Under the Digital Millennium Copyright Act*, 17 COMM. LAW. 5, 5–6 (Fall 1999) (noting that the “definition is broad enough to potentially include employers that provide e-mail accounts to their employees and other entities—including newspapers, magazines, and other media companies—that simply host informational Web sites”)).

<sup>17</sup> Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 507, 110 Stat. 56, 133-43 (1996).

<sup>18</sup> Following in the footsteps of previous commentators, this article refers to this provision as § 230.

<sup>19</sup> 47 U.S.C. § 230(c)(1) (2000).

provision, (1) the newspaper must qualify as a provider or user of an interactive service, and (2) such content must have been provided by another information content provider. Part IV.A analyzes these two prongs and concludes that newspapers are eligible for immunity under § 230(c)(1). Notably, § 230(c)(2) elaborates on this immunity and clarifies that self-policing efforts do not otherwise create liability that would hinder Congress's desire to encourage self-regulation.<sup>20</sup>

Still, § 230(e) tempers this immunity in four ways, two of which are relevant to this discussion.<sup>21</sup> First, § 230(e)(2) provides that “[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property.”<sup>22</sup> The statute does not define intellectual property,<sup>23</sup> nor does the legislative history explicitly address subsection (e)(2).<sup>24</sup> Second, § 230(e)(3) addresses state law in general: “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”<sup>25</sup>

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<sup>20</sup> The statute provides as follows:

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).

*Id.* § 230(c)(2).

<sup>21</sup> Section 230(e)(1) concerns criminal law and § 230(e)(4) relates to the Electronic Communications Privacy Act and any similar state law. Neither provision affects this article's analysis.

<sup>22</sup> *Id.* § 230(e)(2) (“No effect on intellectual property law.”).

<sup>23</sup> See *Perfect 10, Inc. v. CCBill L.L.C.*, 488 F.3d 1102, 1118 (9th Cir. 2007) (amended opinion).

<sup>24</sup> See *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 417 (S.D.N.Y. 2001) (“Although [the Defendant] concedes that no legislative history exists regarding subsection (e)(2), it, nevertheless, argues that the general legislative history of Section 230 supports its position.”).

<sup>25</sup> 47 U.S.C. § 230(e)(3)(2000).



In other words, subsection (e)(3) declares that § 230 immunity preempts contrary state law.

## 2. POLICY

Congress explicitly disclosed in § 230(a) five findings that necessitated this broad grant of immunity. First, “[t]he rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.”<sup>26</sup> Newspaper online commenting is one such advancement. Second, “[t]hese services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.”<sup>27</sup>

In the context of newspaper online commenting, users largely control the additional information published by the amount and frequency of comments. Third, “[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”<sup>28</sup> Newspaper online commenting features expand this forum by granting access to everyone. Fourth, “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”<sup>29</sup> This finding indicates Congress’s recognition that interactive computer services have operated well in a regime that encourages self-policing rather than significant government interference. Finally, “[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.”<sup>30</sup> Newspaper online commenting provides such an opportunity.

Consistent with these findings, § 230 and corresponding legislative history reveals Congress’s desire for continued innovation of interactive computer services,<sup>31</sup> its recognition that these services

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<sup>26</sup> *Id.* § 230(a)(1).

<sup>27</sup> *Id.* § 230(a)(2).

<sup>28</sup> *Id.* § 230(a)(3).

<sup>29</sup> *Id.* § 230(a)(4).

<sup>30</sup> *Id.* § 230(a)(5).

<sup>31</sup> *Id.* § 230(b)(1).

are best positioned to manage the Internet,<sup>32</sup> and its realization that these services are more likely to self-regulate if given immunity for content created by third parties.<sup>33</sup> In a leading CDA case, the Ninth Circuit acknowledged these policy reasons and concluded that § 230 “therefore sought to prevent lawsuits from shutting down websites and other services on the Internet.”<sup>34</sup> The court also noted that Congress created § 230:

to overrule the decision of a New York State court in *Stratton Oakmont*, . . . [which] held that Prodigy, an Internet access provider that ran a number of bulletin boards, could be responsible for libelous statements posted on its “Money Talk” bulletin board by an unidentified person. . . . Because of Prodigy’s active role in monitoring its bulletin boards, the court found, Prodigy was a publisher for purposes of state libel law and therefore could be held liable for any defamatory statements posted on the website.<sup>35</sup>

To be sure, § 230 immunity distinguishes Internet publishers from traditional print publishers, which can incur liability for publishing or distributing content created by third parties.<sup>36</sup> Newspapers should be aware that a different standard of secondary liability applies to an online commenting feature than applies to their print editions.

Equipped with the foregoing statutory and policy tools, this article now analyzes how newspapers perform under § 230 for online commenting features.

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<sup>32</sup> 141 CONG. REC. H8460-01, H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (noting that before the CDA “the existing legal system provide[d] a massive disincentive for the people who might best help us control the Internet to do so”), cited in *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at \*4 (E.D. Tex. Dec. 27, 2006).

<sup>33</sup> 47 U.S.C. § 230(b)(4) (noting a desire “to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material”).

<sup>34</sup> *Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003).

<sup>35</sup> *Id.* at 1029.

<sup>36</sup> *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998) (“Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others.”).

#### IV. NEWSPAPER ONLINE COMMENTING UNDER § 230

This Part first conducts the aforementioned two-prong analysis to determine whether newspapers are eligible for § 230 immunity generally. After answering in the affirmative, this Part proceeds to discuss the reach of such immunity under the four privacy torts and the right of publicity.

##### A. APPLICABILITY

To receive CDA immunity, a newspaper must show that (1) it is a “provider or user of an interactive computer service,” and that (2) such information is “provided by another information content provider.”<sup>37</sup> This Section now addresses each element in turn.

##### 1. PROVIDER OR USER OF AN INTERACTIVE COMPUTER SERVICE

The proper starting place for interpreting a statute is with its plain language.<sup>38</sup> The definitions section of the CDA defines interactive computer service as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”<sup>39</sup> Fortunately, courts have *translated* this definition and interpreted it broadly, not only covering services that provide access to the Internet itself<sup>40</sup> but also encompassing individual websites.<sup>41</sup> Indeed, websites

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<sup>37</sup> 47 U.S.C. § 230(c)(1); *see also* *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at \*8 (N.D. Tex. Apr. 19, 2004); Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 163, 178–79 (2006).

<sup>38</sup> *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979) (stating that “[a]s is true in every case involving the construction of a statute, our starting point must be the language employed by Congress”).

<sup>39</sup> 47 U.S.C. § 230(f)(2).

<sup>40</sup> *See, e.g.*, *Green v. Am. Online*, 318 F.3d 465, 470 (3d Cir. 2003) (noting that “[t]here is no dispute that AOL is an interactive computer service as defined in 47 U.S.C. § 230(f)”).

<sup>41</sup> *See, e.g.*, *Batzel v. Smith*, 333 F.3d 1018, 1030 (9th Cir. 2003); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 846–47 (W.D. Tex. 2007); *Dimeo v. Max*, 433 F. Supp. 2d 523, 529–30 (E.D. Pa. 2006).

are “the most common interactive computer services.”<sup>42</sup> Furthermore, § 230(c)(1) immunity covers both providers and users of interactive computer services. All websites, and certainly newspapers at a minimum, “access the Internet through some form of ‘interactive computer service.’”<sup>43</sup>

Without further unnecessary elaboration, it is clear that a newspaper’s online service qualifies as a provider or user of an interactive computer service.<sup>44</sup>

## 2. INFORMATION PROVIDED BY ANOTHER INFORMATION CONTENT PROVIDER

The CDA seeks to prohibit interactive service providers from incurring liability for “any information provided by *another* information content provider.”<sup>45</sup> The statute defines information content provider as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>46</sup> In *Batzel v. Smith*,<sup>47</sup> the Ninth Circuit explained that the statute’s use of the term “another” identifies the precise situation in which the interactive computer service is not also the information content provider *with respect to the pertinent information*.<sup>48</sup> Less than two months later, the Ninth Circuit quoted a California Court of Appeal as follows:

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<sup>42</sup> Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, No. 04-56916, 04-57173, 2008 WL 879293, at \*1 n.6 (9th Cir. Apr. 3, 2008) (en banc) (Kozinski, C.J.).

<sup>43</sup> *Batzel*, 333 F.3d at 1031 (“Thus, both the Network website and the listserv are potentially immune under § 230.”).

<sup>44</sup> See *MySpace*, 474 F. Supp. 2d at 846 (“Neither party contests that MySpace is an ‘interactive computer service’ as defined by the CDA, and it is clear that MySpace meets the statutory definition of such a service.”).

<sup>45</sup> 47 U.S.C. § 230(c)(1) (2000) (emphasis added).

<sup>46</sup> *Id.* § 230(f)(3).

<sup>47</sup> *Batzel*, 333 F.3d 1018.

<sup>48</sup> See *id.* at 1031; see also *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at \*8 (N.D. Tex. Apr. 19, 2004) (noting that “some courts hold that it is not inconsistent with the CDA for an interactive computer service to act as both an interactive service provider and an information content provider” (citations omitted)).

[T]he fact appellants allege eBay is an information content provider is irrelevant if eBay did not itself create or develop the content for which appellants seek to hold it liable. It is not inconsistent for eBay to be an interactive service provider and also an information content provider; the categories are not mutually exclusive. The critical issue is whether eBay acted as an information content provider with respect to the information that appellants claim is false or misleading.<sup>49</sup>

This second prong, which has led to the most litigation,<sup>50</sup> is best analyzed separately in three components: (1) information, (2) provided, and (3) by another information content provider.<sup>51</sup>

First, for the newspaper online commenting feature, the relevant information is the objectionable content expressed in the comment. In the privacy context, the relevant information is the content that allegedly violates one of the four privacy torts—intrusion upon seclusion, publication of private facts, false light, and misappropriation.<sup>52</sup> Analogizing to copyright under § 512 of the DMCA, the relevant information would be the content alleged to infringe another's copyright.

Second, the author of the information *provides* the objectionable content to the newspaper by typing it into the text box and clicking a button to post the comment. Sitting en banc, the Ninth Circuit addressed, *inter alia*, whether a website operator, Roommates.com, L.L.C. (Roommates), could seek immunity for discriminatory statements posted by subscribers in an "Additional Comments" text box.<sup>53</sup> Subscribers entered into the blank text box personal information and/or information about what they were seeking in a roommates. Roommates then published the information as entered

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<sup>49</sup> Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1125 (9th Cir. 2003) (quoting Gentry v. eBay, Inc., 121 Cal. Rptr. 2d 703 (Ct. App. 2002)).

<sup>50</sup> The Ninth Circuit's recent en banc decision in *Roommates.com* focused predominantly on the meaning of "development" and whether Roommates' actions constituted development within the meaning of the CDA so as to preclude immunity. See Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C., No. 04-56916, 04-57173, 2008 WL 879293 (9th Cir. Apr. 3, 2008) (en banc) (Kozinski, C.J.).

<sup>51</sup> See Myers, *supra* note 37, at 187.

<sup>52</sup> See RESTATEMENT (SECOND) OF TORTS § 652A (1977); see also William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

<sup>53</sup> *Roommates.com*, 2008 WL 879293, at \*10–11.

the subscriber. The court noted that Roommates “does not provide any specific guidance as to what the essay should contain, nor does it urge subscribers to input discriminatory preferences.”<sup>54</sup> Writing for the majority, Chief Judge Kozinski concluded that the “simple, generic prompt does not make it a developer of the information posted.”<sup>55</sup> The *Batzel* court’s reasoning is similarly supportive, holding that § 230(c)(1) immunity applies when a third party “that created or developed the information in question furnished it to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other ‘interactive computer service.’”<sup>56</sup> Given the explicit purpose of an online comment feature and its similarity to the text box in *Roommates.com*, newspapers should meet the *provided* requirement with ease.

Finally, the objectionable content is provided by *another information content provider*. At first blush, one might quickly resolve this component by the mere fact that the readers author the substance of the comments. Although ultimately true, this legal conclusion requires consideration of when a newspaper solicits the comments or makes editorial corrections to their content. In other words, whether the newspaper “is responsible, in whole or in part, for the creation or development of [the relevant] information”<sup>57</sup> entails more careful analysis.<sup>58</sup>

To encourage reader use of the online commenting feature, newspapers will likely solicit comments in the same way that commercial websites request product reviews. Newspapers will advertise this feature so that readers (1) know about it and (2) want to use it. In this limited capacity, it can hardly be said that newspapers create or develop the objectionable content. Still, the line between solicitation and creation can blur if newspapers “actively encourage[] and instruct[] a consumer to gather specific detailed information.”<sup>59</sup>

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<sup>54</sup> *Id.* at \*10.

<sup>55</sup> *Id.*

<sup>56</sup> *Batzel v. Smith*, 333 F.3d 1018,1034 (9th Cir. 2003).

<sup>57</sup> 47 U.S.C. § 230(f)(3) (2000); see *Roommates.com*, 2008 WL 879293.

<sup>58</sup> This analysis supports the recommendations made in Part V.B.

<sup>59</sup> See *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at \*10 (N.D. Tex. Apr. 19, 2004).

In *MCW, Inc. v. Badbusinessbureau.com*,<sup>60</sup> defendant encouraged a consumer to take photographs for inclusion on defendant's website.<sup>61</sup> The *MCW* court concluded that such active solicitation exceeds the publisher's role and approaches creation and development.<sup>62</sup> To be safe, newspapers should relegate such active solicitation to their own editors and articles where they can (and already do) exercise oversight.

Recalling the original motivation for this article, John Beck of the *News-Gazette* said that one way his newspaper would avoid liability is by declining to edit the comments.<sup>63</sup> Not only is this belief inconsistent with the purposes of § 230,<sup>64</sup> but it goes beyond what courts require. After noting that a plaintiff "composed the e-mail entirely on his own,"<sup>65</sup> the now familiar *Batzel* court stated that the defendant's "minor alterations to [plaintiff's] e-mail prior to its posting or [the defendant's] choice to publish the e-mail (while rejecting other e-mails for inclusion in the listserv) rise to the level of 'development.'"<sup>66</sup> The court then discussed how "a central purpose" of § 230 was to encourage service providers and users to take affirmative editorial steps.<sup>67</sup> "[T]he exclusion of 'publisher' liability," the court declared, "necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message. The 'development of information' therefore means something more substantial than merely editing portions of an e-mail and selecting material for publication."<sup>68</sup> In sum, newspapers do not

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Beck, *supra* note 4.

<sup>64</sup> See discussion *supra* Part III.B.1.

<sup>65</sup> *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

<sup>66</sup> *Id.*

<sup>67</sup> See *id.*; *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at \*4 (E.D. Tex. Dec. 27, 2006) (explaining that "[i]f internet service providers such as Yahoo! could be liable for reviewing materials but ultimately deciding to allow them, they would likely choose not to regulate at all").

become information content providers when they exercise their traditional editorial purpose.<sup>69</sup>

The foregoing analysis establishes a newspaper's eligibility for § 230 immunity in the context of online commenting. This article now confronts the scope of this immunity.

## B. IMMUNITY

Section 230(c)(1) immunizes providers or users of interactive computer services from publisher liability arising out of content created or developed by third parties.<sup>70</sup> Although Congress explicitly considered defamation law when it passed the CDA,<sup>71</sup> courts have interpreted its immunity to extend beyond such a narrow category of liability.<sup>72</sup> In *Doe v. Bates*, when the plaintiff alleged, *inter alia*, invasion of privacy, the court concluded that "immunity from all private civil liability comports with the clear congressional policies to

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<sup>68</sup> *Batzel*, 333 F.3d at 1031 (citing several other courts in agreement); see *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (concluding that "so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process").

<sup>69</sup> See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (stating that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred").

<sup>70</sup> See *id.* at 328 (noting from the outset that § 230 "plainly immunizes computer service providers like AOL from liability for information that originates with third parties"). The *Zeran* court also acknowledged that the term *publisher* draws its "legal significance" from defamation law. *Id.* at 332.

<sup>71</sup> According to the *Batzel* court, Congress specifically intended to overrule the New York state court decision of *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), which found that an Internet access provider could be held liable for defamation arising out of content created by third parties but posted on its bulletin boards. See *Batzel*, 333 F.3d at 1029; see also H.R. Rep. No. 104-458, at 194 ("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.").

<sup>72</sup> See *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (holding that "immunity extends beyond publisher liability in defamation law to cover any claim that would treat [the defendant] 'as the publisher'"); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849 (W.D. Tex. 2007) (explaining that "[n]othing on the face of the statute supports Plaintiffs' narrow interpretation that the CDA's immunity applies only to cases involving defamation and defamation-related claims").



avoid disincentives to innovation and to encourage self-regulation.”<sup>73</sup> More recently, the Ninth Circuit recognized immunity against right of publicity claims.<sup>74</sup>

This Section first addresses the four established privacy torts. Discussion then broaches a contentious area, namely the application of § 230 immunity to the right of publicity.

## 1. IMMUNITY AGAINST PRIVACY TORTS

The “right to privacy” finds its origin in the famed *Harvard Law Review* article, “The Right to Privacy,” authored by Samuel D. Warren and Louis D. Brandeis in 1890.<sup>75</sup> Standing on the shoulders of these great intellectuals, Dean Prosser partitioned this right into “not one tort, but a complex of four.”<sup>76</sup> They are as follows: (1) intrusion upon seclusion, (2) publication of private facts, (3) false light, and (4) misappropriation of one’s name or likeness.<sup>77</sup> Although huddled under the privacy umbrella, these four torts “have almost nothing in common except that each represents an interference with the right of the plaintiff . . . ‘to be let alone.’”<sup>78</sup>

The first three of these torts comport with society’s common notion of privacy. Taking them in turn, the *Restatement* declares that “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”<sup>79</sup> Thus the intrusion upon seclusion tort concerns “intentional interference” with another’s “interest in solitude or seclusion,” regardless of

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<sup>73</sup> Doe v. Bates, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at \*3 (E.D. Tex. Dec. 27, 2006).

<sup>74</sup> Perfect 10, Inc. v. CCBill L.L.C., 488 F.3d 1102, 1118–19 (9th Cir. 2007) (amended opinion).

<sup>75</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>76</sup> Prosser, *supra* note 52, at 389.

<sup>77</sup> RESTATEMENT (SECOND) OF TORTS § 652A (1977) (reordered).

<sup>78</sup> Prosser, *supra* note 52, at 389 (citation omitted).

<sup>79</sup> RESTATEMENT (SECOND) OF TORTS § 652B (1977).

publicity.<sup>80</sup> One implicates the “publication of private facts” tort, on the other hand, if such publicity “(a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”<sup>81</sup> This tort focuses on both publicity and the private nature of the facts, rather than on the truthfulness of the facts. Finally, one incurs liability under the false light tort when she “gives publicity to a matter concerning another that places the other before the public in a false light,” but only “if (a) the false light . . . would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.”<sup>82</sup> Thus the false light tort focuses on publicity and the accused’s state of mind regarding the falsity of the matter and the false light itself.

The fourth privacy tort identified by Dean Prosser, misappropriation, tests society’s notion of privacy insofar as it effectively affords a property right in one’s name or likeness.<sup>83</sup> Misappropriation is defined as the appropriation for personal use or benefit of another’s name or likeness.<sup>84</sup> According to Dean Prosser, “[i]t is the plaintiff’s name as a symbol of his identity that is involved here, and not his name as a mere name.”<sup>85</sup> The protection of this privacy interest thus distinguishes misappropriation from the right of publicity.<sup>86</sup> This particular right to privacy “protects against intrusion upon an individual’s private self-esteem and dignity.”<sup>87</sup>

The CDA’s broad grant of immunity embraces all four of these torts, and thus newspapers, or more specifically their editors such as John Beck, need not worry about incurring privacy liability. Nothing in § 230 indicates otherwise, and at least one court has explicitly

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<sup>80</sup> *Id.* § 652B cmt. a.

<sup>81</sup> *Id.* § 652D.

<sup>82</sup> *Id.* § 652E.

<sup>83</sup> *Id.* § 652C cmt. a.

<sup>84</sup> *Id.* § 652C.

<sup>85</sup> Prosser, *supra* note 52, at 403.

<sup>86</sup> See discussion *infra* Part IV.B.2.a.

<sup>87</sup> J. THOMAS MCCARTHY, S. MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:6 (4th ed. 2003).

recognized immunity against invasion of privacy claims.<sup>88</sup> The language of *Zeran* still rings true today:

By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role.<sup>89</sup>

In the context of newspaper online commenting, Congress has granted newspapers immunity from tort liability as an incentive for them to edit the content readers post.<sup>90</sup> Regardless of whether newspapers choose to edit or if their editing is successful, they can fend off privacy tort claims with CDA immunity.<sup>91</sup> However, whether such immunity protects newspapers against right of publicity claims is a more delicate issue.

## 2. IMMUNITY AGAINST RIGHT OF PUBLICITY CLAIMS UNDER § 230

As discussed above,<sup>92</sup> § 230 immunity is not absolute. Section 230(e)(2) expressly disclaims any effect on intellectual property law. Thus if the right of publicity is intellectual property as used in § 230(e)(2), newspapers have no claim of immunity against right of publicity claims arising out of third-party-created content. This Section provides necessary background on the right of publicity and then uses this information to argue that the right of publicity is not intellectual property under § 230(e)(2) and thus not exempt from CDA immunity, a conclusion further buttressed by CDA policy.

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<sup>88</sup> See *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at \*1, 22 (E.D. Tex. Dec. 27, 2006).

<sup>89</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

<sup>90</sup> *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998).

<sup>91</sup> *Id.*

<sup>92</sup> See discussion *supra* Part III.B.2.

### A. THE RIGHT OF PUBLICITY

According to the *Restatement (Third) of Unfair Competition*, liability attaches under the right of publicity when a defendant “appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade.”<sup>93</sup> Despite having its origin in privacy law,<sup>94</sup> the right of publicity differs from misappropriation in the harm a plaintiff suffers.<sup>95</sup> More specifically, the right of publicity “protects against commercial loss caused by appropriation . . . for commercial exploitation,”<sup>96</sup> whereas misappropriation protects against “injury to personal feelings”<sup>97</sup> and “damage to human dignity.”<sup>98</sup> Nevertheless, the right of publicity entails all of the elements required for misappropriation, as well as the added requirement of proving the defendant sought a commercial advantage.<sup>99</sup>

### B. RIGHT OF PUBLICITY IS NOT INTELLECTUAL PROPERTY AS USED IN § 230(e)(2)

Although the right of publicity is clearly an intangible property right,<sup>100</sup> § 230(e)(2)<sup>101</sup> should not preclude newspapers (or other defendants) from claiming immunity under the CDA for the following three reasons.

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<sup>93</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

<sup>94</sup> *Id.* § 46 cmt. b; see discussion *infra* Part IV.B.2.b.

<sup>95</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995); see David Kohler, *At the Intersection of Comic Books and Third World Working Conditions: Is it Time to Re-Examine the Role of Commercial Interests in the Regulation of Expression?*, 28 HASTINGS COMM. & ENT. L.J. 145, 183 n.198 (2006). But see Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 228 n.16 (2005) (noting that “[a]s a practical matter, the only difference between the two types of claims is that right of publicity cases generally are brought by celebrities, while non-celebrities bring privacy claims, sometimes together with a [sic] publicity claims, to the extent they bring claims at all”).

<sup>96</sup> MCCARTHY, *supra* note 87, § 28:6.

<sup>97</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995).

<sup>98</sup> MCCARTHY, *supra* note 87, § 28:6.

<sup>99</sup> *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003) (en banc).

<sup>100</sup> See MCCARTHY, *supra* note 87, § 28:46.

First, unlike other forms of intellectual property, which provide incentives to create, the right of publicity is grounded in privacy law.<sup>102</sup> Professor McCarthy endorses classifying the right of publicity as intellectual property.<sup>103</sup> However, the right of publicity need not receive *every* benefit the law affords to traditional forms of intellectual property simply because it also protects an intangible property interest. Indeed, the *Restatement* supports a narrower construction of the right of publicity because its underlying rationales are “less compelling.”<sup>104</sup> Individuals already have an innate incentive to strive for success, thereby automatically bolstering the value of their right of publicity.

Thus “any additional incentive attributable to the right of publicity may have only marginal significance.”<sup>105</sup> Furthermore, plaintiffs can already pursue an action for deceptive marketing to inhibit “false suggestions of endorsement or sponsorship.”<sup>106</sup> In contrast, patent and copyright laws do far more to incentivize innovation, and trademark law focuses primarily on preventing consumer confusion rather than rewarding the trademark owner. In sum, the need to exempt traditional forms of intellectual property from CDA immunity simply does not apply as forcefully to the right of publicity. The right of publicity is more appropriately analogous to the privacy tort of misappropriation,<sup>107</sup> for which defendants do receive immunity.

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<sup>101</sup> 47 U.S.C. § 230(e)(2) (2000) (stating that “[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property”).

<sup>102</sup> See, e.g., RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995) (explaining that “[t]he principal historical antecedent of the right of publicity is the right of privacy”).

<sup>103</sup> MCCARTHY, *supra* note 87, § 28:6.

<sup>104</sup> See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (1995) (explaining that “[t]he rationales underlying recognition of a right of publicity are generally less compelling than those that justify rights in trademarks or trade secrets” and concluding that “courts may be properly reluctant to adopt a broad construction of the right of publicity” as a result).

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

<sup>106</sup> *Id.*

<sup>107</sup> *But see* Gucci Am., Inc. v. Hall & Assocs., 135 F. Supp. 2d 409 (S.D.N.Y. 2001) (addressing trademark claims). In *Gucci*, the District Court for the Southern District of New York refused to limit § 230(e)(2) to intellectual property laws as they existed at the time of the CDA’s enactment in 1996. *Id.* at 414. Although trademark more clearly falls under § 230(e)(2), the court’s language would not be favorable to newspapers arguing that the right of publicity is not intellectual property within the meaning of the CDA. Although the right of publicity has gained acceptance as a form of intellectual property, this article

Second, Congress's intention to encourage development on the Internet that is uninhibited by the need to comply with individual state laws supports immunity for state right of publicity claims. In the text of § 230, Congress expressly recognized the need to untangle the Internet from potentially conflicting State laws. Immediately following the intellectual property exemption, § 230(e)(3) instructs that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." The right of publicity is recognized under State law and the imposition of corresponding liability certainly cuts against the plain language of § 230(c)(1)<sup>108</sup> and the CDA's underlying policy.<sup>109</sup> For these reasons, the Ninth Circuit recently read a federal limitation into § 230(e)(2), interpreting Congress's use of the term "intellectual property" to mean "federal intellectual property."<sup>110</sup> In doing so, the *Perfect 10* court held that § 230 immunity protected defendants from all state claims, including specifically the right of publicity.<sup>111</sup>

For these reasons, § 230 immunity should extend to right of publicity claims. The most recent case on point, *Perfect 10, Inc. v. CCBill L.L.C.*, illustrates this proposition; however, newspapers should proceed cautiously in the event that other circuits disagree.<sup>112</sup>

## V. CURRENT STATE OF AFFAIRS AND WHAT THE FUTURE HOLDS

This Part highlights three important issues that newspapers (and similar CDA defendants) should consider when implementing an

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contends that it need not receive the heightened level of protection that other forms of intellectual property receive under the CDA because it is more analogous to privacy law.

<sup>108</sup> "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1) (2000).

<sup>109</sup> See *id.* § 230(b)(2) (noting that "[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation").

<sup>110</sup> *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007) (amended opinion).

<sup>111</sup> *Id.*

<sup>112</sup> See *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1323 n.4 (11th Cir. 2006) (affirming summary judgment for defendants on other grounds but noting in dicta that "the right of publicity does not fit neatly into the category of tort-based lawsuits from which Congress sought to immunize interactive service providers, i.e., dissemination of damaging information via the internet").

online commenting feature. Broadly speaking, however, newspapers wishing to claim immunity should be mindful of two overarching themes of the *Roommates.com* decision: (1) provide users with “neutral tools,” and (2) “don’t encourage illegal content, or design your website to require users to input illegal content.”<sup>113</sup>

### A. THIRD-PARTY AUTHOR LIABILITY

The CDA’s grant of immunity to providers or users of interactive computer services does not extend to third-party authors of objectionable content.<sup>114</sup> Granting immunity to these providers or users encourages self-regulation and Internet growth. Immunizing third-party authors, on the other hand, would do nothing more than encourage the expression of objectionable material—content the CDA expressly tries to suppress. Thus Congress chose to retain liability for these authors and let the usual “civilizing influence” of the law run its course.<sup>115</sup>

Still, newspapers should be forthright with their readers about potential liability. The motivation for an online commenting feature is to increase readership.<sup>116</sup> A reader unaware of her own accountability, however, will undoubtedly blame the newspaper if she finds herself on the wrong side of a legal dispute. Although the newspaper may be able to escape *legal* liability under the CDA, bad publicity and unhappy readers impose a potentially more devastating type of liability. Newspapers should, therefore, print a disclaimer near the comment feature’s text box that informs readers of their own legal obligations to comply with privacy, defamation, and intellectual property laws.

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<sup>113</sup> Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, No. 04-56916, 04-57173, 2008 WL 879293, at \*11 (9th Cir. Apr. 3, 2008) (en banc) (Kozinski, C.J.).

<sup>114</sup> Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (noting that “the original culpable party who posts defamatory messages would [not] escape accountability”).

<sup>115</sup> See Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 886 (2000), cited in Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 530 (2007).

<sup>116</sup> If registration for accessing news online is free, an increase in readership should still result in additional advertising revenue.

## B. AVOIDING PRIVACY LIABILITY

Second, newspapers will only avoid privacy liability if they maintain their publisher role and avoid becoming the creators or developers of the objectionable content. John Beck's fear about privacy liability is either rooted in (1) an unawareness of § 230 publisher immunity, or (2) a belief that editing online comments would transform the *News-Gazette* into a creator or developer of any objectionable material. The foregoing discussion and the work of other commentators should dispel the former, but it is necessary to expound upon the latter from a practical standpoint.

So long as newspapers practice their traditional publisher role, they can claim § 230 immunity against invasion of privacy claims. Implicit in this statement is the idea that newspapers must not take *other* actions that transform them into providers of objectionable content. For instance, one court has held that the creation or development of titles and headlines transforms defendants into information content providers with respect to the content included in those titles and headlines.<sup>117</sup> Newspapers can avoid liability here by simply giving a generic title to the online comments section (e.g., Readers' Comments), which will also help distinguish readers' comments from the article itself. Furthermore, newspapers should refrain from actively soliciting specific, prohibited content. As aforementioned,<sup>118</sup> courts may view active solicitation as exceeding the scope of CDA immunity.<sup>119</sup> Thus newspapers should merely provide an open forum for public discussion and avoid "encouraging and instructing a consumer to gather specific detailed information."<sup>120</sup> To be sure, this open discussion format is consistent with the motivation

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<sup>117</sup> See *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at \*10 (N.D. Tex. Apr. 19, 2004) (explaining that "the CDA does not distinguish between acts of creating or developing the contents of reports, on the one hand, and acts of creating or developing the titles or headings of those reports, on the other"); see also *Roommates.com*, 2008 WL 879293, at \*3 (explaining that if questions posed to users by Roommate's website "are unlawful when posed face-to-face or by telephone, they don't magically become lawful when asked electronically online").

<sup>118</sup> See discussion *supra* Part IV.A.2.

<sup>119</sup> See *MCW*, 2004 WL 833595, at \*10.

<sup>120</sup> *Id.*



for implementing an online commenting feature in the first instance.<sup>121</sup>

### C. AVOIDING RIGHT OF PUBLICITY LIABILITY

Third, although newspapers should have a claim of immunity against right of publicity actions as well, they would be wise to edit for potential right of publicity violations in the event courts rule otherwise. In other words, newspapers *can* edit in general and may *need* to edit with respect to the right of publicity if courts determine that the CDA does not provide immunity from right of publicity claims. Fortunately, it should be easier to edit for potential right of publicity violations than it would be to edit for defamation, which would require newspapers to determine the truthfulness of statements. Nevertheless, the arguments presented throughout this article should help newspapers that find themselves fighting right of publicity claims with a CDA sword.<sup>122</sup>

## VI. CONCLUSION

This article responds to one newspaper's liability concern about implementing an online commenting feature. Through analysis of the Communications Decency Act, recognition of potential privacy tort actions, and examination of the right of publicity, this article concludes that newspapers are immune from liability for invasion of privacy and most likely immune from right of publicity liability as well. Moreover, the precautions noted above will ensure that newspapers retain this immunity. Newspaper online commenting features hold great promise, but newspapers should proceed cautiously under the CDA.

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<sup>121</sup> This open format is also consistent with the *Roommates.com* decision, finding immunity for comments entered into a text box but no immunity for stock responses provided via a drop-down menu. *Roommates.com*, 2008 WL 879293, at \*3-11.

<sup>122</sup> The Seventh Circuit actually characterized § 230(c)(2) as a "safety net" rather than a "sword." See *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003).

