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Licensed Anarchy: Anything Goes on the Internet - Revisiting the Boundaries of Section 230 Protection

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LICENSED ANARCHY: ANYTHING GOES ON THE INTERNET? REVISITING THE BOUNDARIES OF SECTION 230 PROTECTION

I. INTRODUCTION

Ilena Rosenthal operates an internet discussion group.[1] She receives an email from an acquaintance which contains defamatory, disparaging statements about Dr. Terry Polevoy, who operates a website devoted to exposing health frauds.[2] Rosenthal reads this email and proceeds to spread the defamatory statements online by posting them, not on her own discussion group website, but rather on various health newsgroup websites,[3] impugning Dr. Polevoy's character and competence as a doctor and disparaging his efforts to combat fraud.[4] Under any reasonable interpretation of the common law, Rosenthal would be guilty of defamation.[5] However, simply because Rosenthal provides an online service, she is currently immune from prosecution for her actions in defaming Dr. Polevoy.[6] This is because courts have interpreted Section 230 of the Communications Decency Act ("CDA"), which was designed to protect internet service providers from liability for independent statements of third parties, to allow anyone who operates a website to create and encourage defamatory statements while flaunting the protection of Section 230.

Section 230 was designed to protect internet service providers from liability for screening offensive online materials and to simultaneously promote self-regulation, so that free speech and the continued growth of the internet with minimal governmental regulation could be achieved.[7] Thus, Section 230 functions by protecting internet service providers and other online entities from liability when they serve only as intermediaries for dissemination of third party statements and when they act to restrict online access to objectionable material.[8] However, courts have impermissibly broadened the scope of the protection provided by Section 230 so that internet service providers and other online entities can now boast an almost absolute immunity from any civil cause of action. "Unfortunately, courts are interpreting Section 230 so broadly as to provide too

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1 Barrett v. Rosenthal, 146 P.3d 510, 513 (Cal. 2006).

2 *Id.* at 514.

3 *Id.*

4 *Id.* at 513.

5 *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977).

6 *Barrett*, 146 P.3d at 529.

7 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

8 *See* 47 U.S.C. § 230 (2008); H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.).

much immunity, eliminating the incentive to foster a balance between speech and privacy. The way courts are using Section 230 exalts free speech to the detriment of privacy and reputation."[9]

This Note seeks to rediscover the boundaries of Section 230 protection that Congress intended when it enacted the CDA. Part II provides a background of pre-Section 230 online defamation law and the Congressional intent behind the enactment of Section 230. Part III reviews the seminal Section 230 case, *Zeran v. America Online, Inc.*,[10] and its progeny. Finally, Part IV provides a new look at the proper interpretation of Section 230. Part IV(A) proposes three test cases, and asks whether Section 230 applies in these situations. Part IV(B) reveals broad generalizations made by the *Zeran* court and notes the effect that these generalizations have had on the improper expansion of Section 230 protection. Part IV(C) analyzes Section 230 to rediscover the proper boundaries of protection that are consistent with both the text of the statute and Congressional intent, and concludes that Section 230 does not protect users and providers of internet services if they alter, manipulate, select, or facilitate objectionable third party content, unless the user or provider is acting in good faith to restrict the objectionable content.

II. BACKGROUND

A. Cubby *and* Stratton Oakmont*: The Pre-Section 230 Paradox*

Section 230 was enacted to eliminate the paradoxical result of two 1990s internet-based defamation cases, one of which found an internet service provider to be a publisher of third party defamatory statements and therefore liable, and the second of which found an internet service provider to be a distributor and therefore not liable.[11] A key distinction exists at common law between "publishers" and "distributors" for the purpose of finding secondary defamation liability.[12] A "publisher" is an entity, such as a book or newspaper publisher, which is responsible for the creation and/or editing of content in a publication.[13] If the defendant in a defamation suit is considered a publisher, the plaintiff does not need to prove that the defendant knew of the specific utterance

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9 DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 159 (2007).

10 129 F.3d 327 (4th Cir. 1997).

11 Steven M. Cordero, Comment, *Damnum Absque Injuria:* Zeran v. AOL *and Cyberspace Defamation Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 775, 792 (1999); *see also* Doe v. America Online, Inc., 783 So. 2d 1010, 1014 (Fla. 2001); 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, 159-60 (1997).

12 Sheridan, *supra* note 11, at 154.

13 *Id.*

that is the subject of the suit for the defendant to be held liable.[14] A "distributor," on the other hand, is an entity, such as a bookstore or library, which makes publications available to the public.[15] If the defendant in a defamation suit is considered a distributor, the plaintiff must prove that the defendant knew, or had reason to know, of the specific utterance for the defendant to be held liable.[16]

1. *Cubby, Inc. v. Compuserve, Inc.*: Internet Service Providers Are Not Liable for Defamatory Statements of Third Parties If They Do Not Monitor Online Content

The first of the two internet-based defamation cases, decided in 1991 by the U.S. District Court for the Southern District of New York, was *Cubby, Inc. v. Compuserve, Inc.*[17] *Cubby* involved allegedly defamatory statements made in the electronic publication *Rumorville*, which was available to approved Compuserve subscribers in the "Journalism Forum," one of Compuserve's many electronic bulletin boards.[18] The statements were made against *Skuttlebut*, an electronic publication developed to compete with *Rumorville*.[19] The developers of *Skuttlebut* accused Compuserve of libel, alleging that Compuserve was the publisher of the defamatory statements.[20] In response, Compuserve argued that it acted only as a distributor of the statements, and that it therefore could not be held liable because it did not know or have reason to know of the statements.[21] The court, noting that Compuserve did not review the contents of *Rumorville* before it was uploaded and made available to subscribers,[22] compared Compuserve to traditional news vendors and found that the appropriate standard of liability to be applied in the case was distributor liability.[23] Thus, since Compuserve did not know or have reason to know of the allegedly defamatory statements, summary judgment was granted to Compuserve on the libel claim.[24]

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14 *Id.*

15 *Id.*

16 Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 at *3 (N.Y. Sup. Ct. May 24, 1995); *see also* Sheridan, *supra* note 11.

17 776 F. Supp. 135 (S.D.N.Y. 1991).

18 *Id.* at 137.

19 *Id.* at 138.

20 *Id.*

21 *Id.*

22 *Id.* at 137.

23 *Id.* at 140-41.

24 *Id.* at 141.

2. *Stratton Oakmont, Inc. v. Prodigy Services Co.*: Internet Service Providers Are Liable for Defamatory Statements of Third Parties if They Screen Online Content for Objectionable Material

Four years later, a New York State Supreme Court decided *Stratton Oakmont, Inc. v. Prodigy Services Co.*[25] Similar to the facts of *Cubby*, *Stratton Oakmont* involved allegedly defamatory statements made by an unidentified user about Stratton Oakmont, an investment banking firm, on the Prodigy electronic bulletin board "Money Talk."[26] Stratton Oakmont sued Prodigy for libel.[27] Again similar to *Cubby*, Stratton Oakmont argued that Prodigy was a publisher, and Prodigy argued that it was simply a distributor.[28] The *Stratton Oakmont* court, however, reached a different conclusion than the *Cubby* court. It looked to Prodigy's stated claims of being a family oriented computer network and "an online service that exercised editorial control over the content of messages posted on its computer bulletin boards,"[29] to distinguish Prodigy from Compuserve in *Cubby* and find Prodigy liable as a publisher.[30] In coming to this conclusion, the court listed evidence supporting its finding of publisher liability, including promulgation of "content guidelines," use of bulletin board "leaders" to enforce the guidelines, and use of a software screening program,[31] all of which were utilized to screen and prevent objectionable material.

The *Stratton Oakmont* holding created an interesting, paradoxical choice for internet service providers such as Compuserve, Prodigy, and America Online. If they attempted to monitor the content being posted on their bulletin boards and forums to create a safe, family friendly environment, they would be subject to liability for defamation. However, if they simply made no effort to control content, they would not be subject to liability.[32] Considering the massive amount of content that is transmitted through internet service providers each day,[33] the result of the *Stratton Oakmont* / *Cubby* paradox was that service providers had no incentive to monitor online content. Instead, by simply refusing to monitor content, the service providers could enjoy a practical immunity from liability and not have to endure the enormous cost of monitoring content closely enough to catch and remove all defamatory statements.

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25 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

26 *Id.* at *1.

27 *Id.*

28 *Id.* at *2-3.

29 *Id.* at *2.

30 *Id.* at *4.

31 *Id.* at *2.

32 Sheridan, *supra* note 11, at 159.

33 For the quarter ending December 31, 2008, AOL reported 54 billion domestic page views, as well as an average of 109 million visitors per month, for the AOL networks. AOL Corporate Company Overview, http://corp.aol.com/about-aol/company-overview (last visited Feb. 8, 2009).

B. *Enactment of Section 230*

Congress recognized and sought to rectify the situation caused by *Stratton Oakmont*, which subjected internet service providers to liability for taking actions to monitor and restrict objectionable online material,[34] by including the CDA as part of the Telecommunications Act of 1996.[35] Section 230 of the CDA was enacted to provide "Good Samaritan" protections for responsible internet service providers that take actions to monitor and restrict access to objectionable online material.[36] As stated by Representative Cox, a co-author of the law, Section 230 was designed to do two things:

> First, it . . . protect[s] 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. It . . . protect[s] them from taking on liability such as occurred in [*Stratton Oakmont*] that they should not face for helping us and for helping us solve this problem. Second, it . . . establish[es] as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet . . . because frankly the Internet has grown up to be what it is without that kind of help from the Government.[37]

In other words, Section 230 was enacted (1) to prevent interactive computer services ("ICSs"), including internet service providers and other services,[38] from being subjected to publisher liability for screening objectionable material and (2) to encourage self-regulation, in order to promote free speech and the continued growth of the internet with minimal governmental regulation.[39]

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[34] *See* H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.); S. REP. NO. 104-230, at 194 (1996) (Conf. Rep.).

[35] *See generally* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[36] H.R. REP. NO. 104-458, at 194; S. REP. NO. 104-230, at 194.

[37] 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

[38] "Interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2) (2008).

[39] Representative Cox noted during Congressional proceedings that the minimal governmental regulation approach of Section 230 would work more effectively than proposed laws that promoted governmental regulation of the internet. He also noted that Section 230 would remove disincentives to ICSs to screen objectionable content:

> Some have suggested, Mr. Chairman, that we take the Federal Communications Commission and turn it into the Federal Computer Commission, that we hire even more bureaucrats and more regulators who will attempt, either civil-

To achieve these goals, Section 230 provided protection in two ways. First, subsection (c)(1) was enacted to overrule *Stratton Oakmont* and any similar decision that treated ICSs as publishers or speakers of content not their own.[40] Subsection (c)(1) thus states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[41] Second, subsection (c)(2) was enacted to provide immunity from civil liability for actions voluntarily taken by providers or users of ICSs to restrict access to or availability of objectionable online material.[42]

To summarize, Section 230 provides two functions. First, it protects ICSs from liability when they act only as intermediaries for dissemination of third party statements.[43] Second, it immunizes actions by ICSs to restrict access to objectionable online material.[44]

> ly or criminally, to punish people by catching them in the act of putting something into cyberspace. Frankly, there is just too much going on on the Internet for that to be effective. No matter how big the army of bureaucrats, it is not going to protect my kids because I do not think the Federal Government will get there in time. Certainly, criminal enforcement of our obscenity laws as an adjunct is a useful way of punishing the truly guilty. Mr. Chairman, what we want are results. We want to make sure we do something that actually works. Ironically, the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so. . . . We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see.

141 CONG. REC. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

[40] H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.) ("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."); S. Rep. No. 104-230, at 194.

[41] 47 U.S.C. § 230(c)(1) (2008). An information content provider is "any person or entity that is *responsible*, in whole *or in part*, for the creation *or development* of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3) (italics added).

[42] 47 U.S.C. § 230(c)(2). This section, entitled "Civil liability," reads 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).

47 U.S.C. § 230(c)(2). (Note that "paragraph (1)" is likely a typographic error, and should read "subparagraph (A)." *See* 47 U.S.C. § 230(c)(2)(B) n. 1.).

[43] *See* 47 U.S.C. § 230(c)(1); H.R. REP. NO. 104-458, at 194; S. REP. NO. 104-230, at 194.

[44] *See* 47 U.S.C. § 230(c)(2); H.R. REP. NO. 104-458, at 194; S. REP. NO. 104-230, at 194.

III. *ZERAN V. AMERICA ONLINE, INC.* AND ITS PROGENY

A. *The Decision: Section 230 Protects ICSs from both Publisher and Distributor Standards of Liability*

One year after the CDA became law, the seminal Section 230 case of *Zeran v. America Online, Inc.* was decided by the Fourth Circuit Court of Appeals.[45] *Zeran* was a negligence action brought against America Online ("AOL") for failure to remove allegedly defamatory messages posted by an anonymous user on an AOL bulletin board.[46] The messages advertised t-shirts with various tasteless slogans related to the Oklahoma City bombing incident and instructed interested buyers to contact "Ken" at Zeran's home phone number.[47] As a result of this malicious prank, Zeran began to receive a high volume of angry and derogatory phone calls and messages, including several death threats.[48] Zeran contacted AOL, and a company representative informed him that the bulletin board message would be taken down but that AOL, as a matter of policy, would not post a retraction.[49] AOL did indeed remove this posting, but other similar anonymous messages were posted soon thereafter, and the phone calls to Zeran's residence intensified.[50] Zeran repeatedly contacted AOL and was assured that the account through which the messages were being posted was soon to be closed; however, he was continually harassed for a number of weeks until the situation was finally resolved.[51]

In analyzing Zeran's negligence action against AOL, the court characterized the claim as Zeran seeking to hold AOL liable for the defamatory speech of a third party.[52] AOL had successfully asserted Section 230 as an affirmative defense at the district court level, but Zeran argued that once he notified AOL of the defamatory messages, AOL had a duty to promptly remove the messages, notify AOL subscribers of the false nature of the messages, and screen future messages for defamatory material.[53] Zeran attempted to get around Section 230 by arguing that when Congress enacted Section 230, it used the term "publisher" in subsection (c)(1) to immunize ICSs from publisher liability (the standard imposed in *Stratton Oakmont*), but not from distributor liability (the standard imposed in *Cubby*).[54] Thus, Zeran argued that once he notified AOL of the exis-

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45 129 F.3d 327 (4th Cir. 1997).

46 *Id.* at 328-29.

47 *Id.* at 329.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.* at 330.

53 *Id.*

54 *Id.* at 331-32; *see* 47 U.S.C. § 230(c)(1) (2008).

tence of defamatory statements on an AOL bulletin board, AOL could be held liable as a distributor, because AOL had knowledge that the distributed material was defamatory.[55]

The court, however, disagreed with Zeran.[56] The court found that publication is a required element to succeed in a defamation claim at common law, and that the publisher and distributor categories are merely subsets of the publication element.[57] Noting that *Stratton Oakmont* and *Cubby* correctly state two different standards of liability but do not suggest that distributors are not a type of publisher, the court found AOL immune to Zeran's negligence action under Section 230(c)(1).[58]

B. *The Progeny: Post-*Zeran *Expansion of Section 230*

Courts since *Zeran* have seized upon broad generalizations made in the *Zeran* opinion[59] to grant almost absolute immunity to ICSs under Section 230(c)(1). For example, courts have allowed defendants who take an active role in selecting and posting defamatory material to claim Section 230 immunity as long as the material was originally written by someone else.[60] In a 2003 Ninth Circuit case, the defendant maintained a website and an electronic newsletter about museum security and stolen art.[61] The defendant received an email from a third party, who was also named as a defendant in the case, accusing the plaintiff of bragging about being the granddaughter of a Nazi and asserting that paintings in the plaintiff's house were stolen from Jewish people during World War II.[62] The defendant read this email and made the decision to include it in his newsletter, because he viewed it as meriting distribution to his subscribers.[63] The defendant then made alterations to the wording of the email and added a message to it stating that the FBI had been informed of the content of the message.[64] The court dismissed the plaintiff's defamation claim, finding that the defendant's alterations and choice to publish the email, while rejecting other emails, did not cause the defendant to be classified as an information content

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55 *Zeran*, 129 F.3d at 331.

56 *Id.* at 332.

57 *Id.*

58 *Id.* at 332, 335. This Note does not dispute the *Zeran* court's publisher / distributor conclusion. *See infra* Part IV.B.1.

59 *See infra* Part IV.B.2.

60 Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003); Barrett v. Rosenthal, 146 P.3d 510 (Cal. 2006).

61 *Batzel*, 333 F.3d at 1021.

62 *Id.*

63 *Id.* at 1021-22.

64 *Id.* at 1022.

provider ("ICP").[65] Thus, the court found the defendant protected by Section 230.[66] The court stated that "the scope of [Section 230] immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal,"[67] effectively ignoring Section 230(c)(2), which does make this distinction.[68]

Similarly, in a 2006 California state case, the defendant was an operator of an internet discussion group.[69] Although many disparaging remarks about the plaintiff were posted on the discussion group website by the defendant and others, the trial court found that the only actionable statement against the defendant was in an article authored by a third party and emailed to the defendant.[70] The defendant had proceeded to post a copy of this defamatory article, not on her own website, but on the websites of two separate newsgroups,[71] and in doing so impugned the plaintiff's character and competence as a doctor.[72] Despite the defendant's active role in selecting and posting the defamatory article to websites other than her own, the California Supreme Court reversed the decision of the appellate court, finding the defendant protected by Section 230 as a distributor and considering only in passing whether the defendant was an ICP.[73] In so doing, the court admitted that the defendant played an "active role in selecting and posting material disparaging plaintiffs."[74] However, the court justified these actions as protected by incorrectly stating that Section 230 acts to "broadly shield[] *all* providers from liability for 'publishing' information received from third parties."[75] Thus, these two cases broadened a "Good Samaritan" law, intended to encourage providers and users of ICSs to self-regulate and screen for

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65 *Id.* at 1031. An ICS is outside of Section 230 protection if it is also an ICP for the statements in question. *See infra* notes 126-27127 and accompanying text.

66 *Batzel*, 333 F.3d at 1031.

67 *Id.* at 1032.

68 "Any action voluntarily taken in good faith *to restrict* access to or availability of" objectionable material is immune from civil liability. 47 U.S.C. § 230(c)(2) (2008) (italics added).

69 Barrett v. Rosenthal, 146 P.3d 510, 513 (Cal. 2006).

70 *Id.* at 514.

71 *Id.*

72 *Id.* at 513.

73 *Id.* at 528-29. Most of the California Supreme Court's analysis was aimed at rebutting the reasoning of the Court of Appeals, which rejected *Zeran* and found distributors to be liable on a notice basis and not protected by Section 230. *Id.* at 515-25. The California Supreme Court was likely correct in rejecting the analysis of the Court of Appeals on this ground, *see infra* Part IV.B.1, but nevertheless should have affirmed the judgment on the grounds that the defendant was an ICP and therefore not protected by Section 230(c)(1). *See infra* notes 126-27 and accompanying text.

74 *Barrett*, 146 P.3d at 520.

75 *Id.* at 522 (italics in original).

objectionable material,[76] into a law that encourages providers and users of ICSs to seek out and post objectionable materials without any fear of repercussions.

Another area in which courts have allowed defendants to claim Section 230 immunity is when they create "pre-prepared responses" to questions for users to submit in questionnaires.[77] In a 2003 Ninth Circuit case, the defendant ran a commercial internet dating service.[78] Members of the service, and those who wanted to try out the service free of charge, created "profiles" by completing a required questionnaire which included over fifty questions, with answers to those questions being selectable from a pull-down menu.[79] Some of the answers were innocuous, and some were sexually suggestive.[80] The defendant used these questionnaires to classify user characteristics into discrete categories, match profiles, and allow highly structured searches based on various user characteristics.[81] An unknown user created a free trial profile on the defendant's service, falsely pretending to be the plaintiff, a popular actress.[82] The unknown user selected "Playboy/Playgirl" as the answer to the question "main source of current events," and "looking for a one-night stand" as the answer to "why did you call."[83] As a result, the plaintiff received numerous sexually suggestive phone calls and eventually sued the defendant for defamation.[84] The Ninth Circuit Court of Appeals found that the defendant was not an ICP, and was thus protected under Section 230.[85] In so finding, the court explicitly stated that "[d]oubtless, the questionnaire facilitated the expression of information by individual users,"[86] but then proceeded to ignore the statutory definition of an ICP as "any person or entity that is *responsible . . . in part . . .* for the *development* of information . . ." over the internet.[87] Instead, the court impermissibly created a new, higher standard for finding an entity to be ICP, requiring a "*significant* role in creating, developing or 'transforming' the relevant information."[88] Thus, the court broadened a law designed to protect ICSs from being liable for indepen-

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76 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

77 *See generally* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003).

78 *Id.* at 1121.

79 *Id.*

80 *Id.*

81 *Id.* at 1124.

82 *Id.* at 1121.

83 *Id.*

84 *Id.* at 1122.

85 *Id.* at 1124-25.

86 *Id.* at 1124.

87 47 U.S.C. § 230(f)(3) (2008) (italics added).

88 *Carafano*, 339 F.3d at 1125.

dent statements of third parties,[89] transforming it into a law that protects ICSs that put words into the mouths of those third parties.

Finally, although an ICS must be classified as a publisher or speaker of third party content to be protected by subsection (c)(1) of Section 230, courts have applied Section 230 to immunize ICSs from claims that are unrelated to this classification.[90] An Eighth Circuit District Court, for example, using Section 230 to immunize an ICS, granted a motion to dismiss claims for negligent failure to maintain proper and adequate records, negligent spoliation of evidence, intentional spoliation of evidence, aiding and abetting defamation, and aiding and abetting interference with prospective business relationships.[91] The court found that the complaint sought to treat the defendant as a publisher by seeking to impose liability for the defendant's conduct in disseminating a third party's online statements and by seeking to hold the defendant responsible for allegedly defamatory material published by the third party.[92] However, the court failed to look at *each individual* claim when deciding whether to treat the defendant as a publisher, instead dismissing all claims as a group.[93] The court failed to realize that many of the claims, such as allegations of failure to maintain records, spoliation of evidence, and aiding and abetting defamation, were aimed at the defendant's own acts and did not require that the defendant be treated as a publisher for liability to be imposed. Similarly, a California state appeals court immunized an ICS from claims alleging that it violated the state "Autograph Sports Memorabilia" statute and was engaged in unfair business practices because it failed to furnish certificates of authenticity.[94] Despite the fact that these claims would treat the defendant as a dealer, and not a publisher, the court found Section 230 immunity.[95]

The courts' expansive view of Section 230 has effectively prevented the CDA from working as Congress intended, to encourage ICSs to self-regulate and restrict objectionable content.[96] Instead, the decisions of the courts have effectively "license[d] professional rumor-mongers and gossip-hounds to spread

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89 *See* 47 U.S.C. § 230(c)(2); H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.); S. REP. NO. 104-230, at 194 (1996) (Conf. Rep.).

90 *See* 47 U.S.C. § 230(c)(1).

91 Patentwizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069, 1070-71 (D.S.D. 2001).

92 *Id.* at 1071.

93 *Id.* at 1072.

94 *See* Gentry v. Ebay, Inc., 99 Cal. App. 4th 816 (Cal. Ct. App. 2002).

95 It should be noted that the court found the defendant in this case, Ebay, not liable under the state dealer laws, but still proceeded to analyze Section 230 protection. *Id.* at 829. The fact that Ebay would have properly won on the merits of the case demonstrates the fact that, although Section 230 protection does not provide complete immunity, plaintiffs still have to prove their cases, and ICSs such as Ebay are not doomed if they are not provided with absolute Section 230 immunity.

96 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

false and hurtful information with impunity."[97] This expansive view should be reevaluated, and the proper boundaries of Section 230 need to be rediscovered and implemented.

IV. A NEW LOOK AT SECTION 230 IMMUNITY

A. *Section 230 Test Cases—Does Section 230 Apply Here?*

To illustrate the need for boundaries on Section 230 immunity, which will ensure that interpretation of the law complies with the text of the statute and with Congressional intent, consider the following situations. Consider a company that operates an online roommate matching service.[98] Before subscribers can use the service, they must create online profiles by filling out an online questionnaire. These questionnaires require subscribers to disclose their sex, sexual orientation, and willingness to bring children into a household, and then to list their preferences in roommates with regard to the same three criteria.[99] The answers to these three criteria are selectable from "drop-down" and "select-a-box" menus prepared by the company.[100] For example, prospective members must indicate whether "Straight males," "Gay males," "Straight females," or "Lesbian females," currently live in a household.[101] They must then indicate whether they are willing to live with "Straight or gay" males, "Straight" males only, "Gay" males only, or "No males."[102] The company then channels information based on members' answers so that other members can search the profiles of members with compatible preferences.[103] When the company that operates the housing website is sued for violating the Fair Housing Act,[104] is the company immune from suit under Section 230?

Next, reconsider the situation posed at the beginning of this Note. A website operator receives an email from a third party which contains defamatory, disparaging statements about another person.[105] The operator reads this email and proceeds to spread the defamatory statements online by posting them at various websites,[106] and in doing so impugns the person's character and competence.[107] Is the operator immune from suit under Section 230?

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97 Batzel v. Smith, 333 F.3d 1018, 1038 (Gould, J., dissenting).

98 Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1161 (9th Cir. 2008).

99 *Id.*

100 *Id.* at 1165.

101 *Id.*

102 *Id.*

103 *Id.* at 1162.

104 *Id.*

105 Barrett v. Rosenthal, 146 P.3d 510, 513 (Cal. 2006).

106 *Id.* at 514.

107 *Id.* at 513.

Finally, consider a college gossip website that actively solicits objectionable content with the promise of anonymity.[108] Postings on the website "have devolved from innocuous tales of secret crushes to racist tirades and lurid finger-pointing about drug use and sex, often with the alleged culprit identified by first and last name."[109] Sample titles of discussions on the website include "most overrated person at duke," "HOTTEST ASIAN SORORITY CHICK," "GUYS WITH STDS!," and "Best BlowJ."[110] The website operator, rather than seeking to restrict defamatory and objectionable material from being posted on the website, encourages this material by flaunting its supposed Section 230 immunity and the anonymity of the internet.[111] Is the operator of this website immune from suit under Section 230?

Under a proper reading of the law, all three defendants in the above situations are outside the boundaries of Section 230 protection.[112] The proper boundaries of Section 230 immunity need to be rediscovered so that Section 230 can be allowed to fulfill the Congressional goals of preventing ICSs from being subjected to liability for screening objectionable material and encouraging self-regulation.[113] These rediscovered boundaries would promote free speech and the continued growth of the internet with minimal governmental regulation,[114]

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[108] Jessica Bennett, *What You Don't Know Can Hurt You*, NEWSWEEK, Dec. 17, 2007, *available at* http://www.newsweek.com/id/74322 (discussing the website http://www.juicycampus.com, which shut down on Feb. 5, 2009. *See* A Juicy Shutdown, http://juicycampus.blogspot.com/2009/02/juicy-shutdown.html (Feb. 4, 2009, 11:47 EST)).

[109] *Id.*

[110] Daniel J. Solove, *Juicy Campus: The Latest Breed of Gossip Website*, CONCURRING OPINIONS, Dec. 9, 2007, http://www.concurringopinions.com/archives/2007/12/juicy_campus_th.html (discussing the website http://www.juicycampus.com, which shut down on Feb. 5, 2009. *See* A Juicy Shutdown, http://juicycampus.blogspot.com/2009/02/juicy-shutdown.html (Feb. 4, 2009, 11:47 EST)).

[111] *Id.*

[112] *See infra* Part IV.D. The first two situations are actual cases that have been decided. In the first case, the defendant was surprisingly unsuccessful in claiming Section 230 protection. *See generally* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008). However, commentators who espouse the courts' broad immunity interpretation of Section 230 have questioned the *Roommates.com* decision. *See* Roommates.com Denied 230 Immunity by Ninth Circuit En Banc (With My Comments), http://blog.ericgoldman.org/archives/2008/04/roommatescom_de_1.htm (Apr. 3, 2008, 20:05 EST) ("Unfortunately, it's virtually impossible to articulate in crystal-clear terms why Roommates.com crossed the line while many other websites with similar user interactions still qualify for 230."). In the second case, the defendant successfully claimed Section 230 protection. *See generally* Barrett v. Rosenthal, 146 P.3d 510 (Cal. 2006). The third situation involves the activities of the website JuicyCampus.com, which shut down on Feb. 5, 2009. *See* A Juicy Shutdown, http://juicycampus.blogspot.com/2009/02/juicy-shutdown.html (Feb. 4, 2009, 11:47 EST). The third party content that the website promoted made the website operator ripe for a defamation lawsuit, and the website operator would surely have claimed Section 230 immunity as a defense.

[113] 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden).

[114] *Id.*

while not allowing ICSs to take advantage of and manipulate a perceived limitless Section 230 immunity.

B. The Broad Generalizations of Zeran

The first step to rediscovering the proper boundaries of Section 230 protection is to analyze the cause of the current expansion. Thus, the broad generalizations made in the *Zeran* court's decision, which led to the expansion of Section 230, must be examined.

1. The *Zeran* Holding Was Correct

The *Zeran* holding that Section 230 protects ICSs from being treated as publishers or distributors of third party material is probably correct. As noted in *Zeran*, the Second Restatement of Torts lists four elements required to create liability for defamation, one of which is "fault amounting at least to negligence *on the part of the publisher.*"[115] The Restatement then notes that "one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character."[116] These statements clearly categorize the distributor standard of liability as a subset of publisher liability. It is reasonable to infer from the Restatement that one who delivers or transmits defamatory material and has knowledge of its defamatory character would be viewed as a publisher, fulfilling the publisher element of defamation liability. If the *Zeran* court had ruled the other way and allowed a separate distributor standard of liability to survive Section 230, ICSs would be in the same paradoxical situation as that following *Cubby* and *Stratton Oakmont*, and would simply shut down their forums and chat rooms to avoid notice and thus avoid liability, rather than endure the costs of investigating every report of defamatory language.[117] Since Congress enacted Section 230 to prevent this paradox and to encourage ICS self-regulation, in order to promote free speech and the continued growth of the internet, Congress obviously intended to avoid an interpretation of the law that would lead to this same paradox.[118]

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115 RESTATEMENT (SECOND) OF TORTS § 558(c) (1977) (italics added).

116 *Id.* § 581(1).

117 *See infra* Part IV.C.2.

118 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox); *see infra* Part IV.C.2. It should be noted that Congress explicitly endorsed the *Zeran* court's holding in later legislation. *See* H.R. REP. NO. 107-449, at 194 (2002).

2. Broad Generalizations Made by the *Zeran* Court Were Incorrect, and Led to the Improper Expansion of Section 230

In interpreting Section 230, the *Zeran* court made several problematic broad-sweeping statements regarding the "immunity" granted by subsection (c)(1).[119] These statements have allowed other courts to interpret Section 230 as granting ICSs virtually complete immunity from any civil cause of action, even if the ICS was significantly and actively involved in the dissemination of allegedly defamatory materials. First, the court over-generalized subsection (c)(1) by stating that it "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."[120] Second, it incorrectly stated that Section 230 "precludes courts from entertaining claims that would place a computer service provider in a publisher's role . . . [by] 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 . . . ."[121] By making this statement, the *Zeran* court "include[d] conduct within the scope of immunity that conflicts with statutory language."[122] Section 230 does not protect ICSs that are acting as publishers with respect to traditional editorial functions. Instead, it protects ICSs from being *treated* as publishers when they are *not* acting as publishers but are simply intermediaries for dissemination of third party information.[123]

If Congress had intended to immunize ICSs from *any* cause of action involving information originating with a third party user, or to immunize ICSs acting as publishers with respect to traditional editorial functions,[124] Congress could have written Section 230(c)(1) to simply state: "[n]o provider or user of an interactive computer service shall be treated as a publisher or speaker." By stating that an ICS shall not be treated as a publisher or speaker "of any information *provided by another information content provider*,"[125] Congress clearly intended for there to be limits on the protection given to providers and users of ICSs. However, courts analyzing Section 230 routinely ignore Congress's definition of an ICP to find ICSs immunized even if they alter, manipulate, select, or facilitate third party content, simply because the content originated with the third party. The courts should take a closer look at Section 230(c)(1) and the way that Congress has defined ICPs to find boundaries to the Section 230 protection of providers and users of interactive computer services.

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[119] Note that subsection (c)(1) makes no mention of immunity, in stark contrast to the civil immunity explicitly granted in subsection (c)(2). *See* 47 U.S.C. §§ 230(c)(1), (2) (2008).

[120] Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

[121] *Id.*

[122] Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 695 (N.D. Ill. 2006).

[123] *See infra* Part IV.C.3.

[124] *Zeran*, 129 F.3d at 330.

[125] 47 U.S.C. § 230(c)(1) (2008).

C. *Proper Boundaries of Section 230 Protection*

An ICS is outside of the protection of Section 230(c)(1) if it acts as an ICP for the statements in question.[126] An ICP is "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."[127] Thus, users and providers of ICSs are protected by Section 230(c)(1) against liability as publishers or speakers if they are merely intermediaries for dissemination of third party information.[128] Users and providers of ICSs are, unfortunately, also protected by Section 230(c)(1) if they are made aware of objectionable material, such as defamatory comments, and do nothing to restrict the objectionable content.[129] However, users and providers of ICSs are not protected by Section 230(c)(1) if they alter, manipulate, select, or facilitate the objectionable third party information in question, although they are immune under Section 230(c)(2) if the alterations are made in good faith to restrict the objectionable content.[130] Finally, users and providers of ICSs are not protected by Section 230(c)(1) against claims that do not seek to treat the user or provider as a publisher or speaker.[131]

1. ICSs Are Protected by Section 230(c)(1) from Liability As Publishers or Speakers If They Are Merely Intermediaries for Dissemination of Third Party Information, and by Section 230(c)(2) When Acting to Restrict Objectionable Content

The situations in which providers and users of ICSs are most deserving of Section 230 protection are when they are unaware of third party information provided to the ICS, or when they attempt to restrict objectionable third party information provided to the ICS. These situations go to the core of the functions Congress intended Section 230 to perform: protecting ICSs from *Stratton Oak-*

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126 Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1125 (9th Cir. 2003); Ben Ezra, Weinstein, & Co. v. America Online Inc., 206 F.3d 980, 986 (10th Cir. 2000) ("Defendants concede that . . . an [ICS] could also act as an [ICP] by participating in the creation and development of information, and thus not qualify for § 230 immunity."); Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 833 n.11 (Cal. Ct. App. 2002) ("It is not inconsistent for eBay to be an [ICS] and also an [ICP]; the categories are not mutually exclusive. The critical issue is whether eBay acted as an [ICP] with respect to the information that appellants claim is false or misleading.").

127 47 U.S.C. § 230(f)(3) (italics added).

128 *See infra* Part IV.C.1.

129 *See infra* Part IV.C.2.

130 *See infra* Part IV.C.3; *see also infra* Part IV.C.1.

131 *See infra* Part IV.C.4.

mont-like liability for independent statements of third parties,[132] and immunizing actions by ICSs to restrict access to objectionable material.[133]

For example, in *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, the plaintiffs sued AOL for defamation and negligence based on inaccurate stock quotes published in the AOL "Quotes & Portfolios" service area.[134] The stock information was supplied by two independent third parties, who alone created the stock information posted in the service area.[135] AOL's sole participation was in occasionally removing inaccurate stock quotes to correct errors and in contacting the third parties to request changes to inaccurate information when these inaccuracies came to its attention.[136] The court, finding no evidence that AOL participated in the creation of the stock information, properly held AOL to be protected by Section 230 from the claims of defamation and negligence.[137]

Similarly, in *Blumenthal v. Drudge*, a D.C. District Court case, the plaintiffs sued AOL for defamation based on a false report posted on AOL by a gossip columnist.[138] AOL was unaware of the defamatory nature of the report until notified by the columnist, who had received a letter from plaintiff's counsel.[139] AOL immediately posted the columnist's retraction, and later removed the report from its electronic archive.[140] The court, finding no evidence that AOL had any role in creating or developing any of the information in the report, held that AOL was protected from defamation liability under Section 230.[141]

These cases are excellent examples of plaintiffs trying to hold ICSs responsible as publishers of independent third party content, which is barred by Section 230(c)(1),[142] and trying to hold ICSs responsible for actions to remove material that the ICSs viewed as objectionable, which is barred by Section 230(c)(2).[143] It is unreasonable to expect a provider or user of an ICS, such as AOL, to monitor all information conveyed through the ICS for fear of defamation liability. It is equally as unreasonable to hold an ICS liable when it acts responsibly and restricts objectionable material. Finding ICSs liable for inaccurate stock quotes or disparaging gossip independently provided by third parties and subsequently removed by the ICSs would, similar to the pre-Section 230

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132 *See* 47 U.S.C. § 230(c)(1); H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.); S. REP. NO. 104-230, at 194 (1996) (Conf. Rep.).

133 *See* 47 U.S.C. § 230(c)(2); H.R. Rep. No. 104-458, at 194; S. Rep. No. 104-230, at 194.

134 206 F.3d 980, 983 (10th Cir. 2000).

135 *Id.* at 986.

136 *Id.* at 985.

137 *Id.* at 986.

138 992 F. Supp. 44, 47-48 (D.D.C. 1998).

139 *Id.* at 48.

140 *Id.*

141 *Id.* at 50-53.

142 *See* 47 U.S.C. § 230(c)(1) (2008).

143 *Id.* § 230(c)(2).

situation, have a profoundly chilling effect on the growth of the internet. Congress desired that ICSs be immune in these situations, in order to allow the internet to flourish[144] and to remove disincentives for ICSs to restrict objectionable materials.[145]

2. ICSs Are Protected by Section 230(c)(1) If They Are Notified of Third Party Defamatory Statements but Do Not Act

"While Congress could have made a different policy choice, it opted not to hold interactive computer services liable for their failure to edit, withhold or restrict access to offensive material disseminated through their medium."[146] This is a correct interpretation of Section 230, based on Congress's stated goals and *Zeran's* rejection of the distributor standard of liability. Although this middle ground is admittedly uncomfortable and undesirable, the alternative, requiring ICSs to act when they receive notice and holding them liable for failure to do so, would fly in the face of the Congressional goal of encouraging self-regulation, in order to promote free speech and the continued growth of the internet.[147] As the *Zeran* court correctly noted:

> [N]otice-based liability would deter service providers from regulating the dissemination of offensive material over their own services. Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to further possible lawsuits, service providers would likely eschew any attempts at self-regulation.[148]

Thus, a notice-based liability interpretation of Section 230 would have the same result as that under the pre-Section 230 *Cubby / Stratton Oakmont* paradox: ICSs would either simply shut down their forums and chat rooms, in order to avoid notice and thus avoid liability, or they would employ monitors to restrict speech with an incredible severity, taking down every piece of information that could remotely be considered defamatory, in order to insure that there was no chance that they would be held liable.[149] Given the massive amount of content that is transmitted through ICSs every day, [150] ICSs would be likely to

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144 47 U.S.C. § 230(a)(4).

145 *Id.* § 230(b)(4).

146 Blumenthal v. Drudge, 992 F. Supp. 44, 49 (D.D.C. 1998).

147 141 Cong. Rec. H8460-01, H8470 (daily ed. Aug. 4, 1995).

148 Zeran v. America Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).

149 *See* Dimeo v. Max, 433 F. Supp. 2d 523, 528 (E.D. Pa. 2006).

150 *See supra* note 33.

shut down their forums and chat rooms to avoid notice and thus avoid liability rather than endure the costs of investigating every report of defamatory language. Congress enacted Section 230 to overcome the profoundly chilling effect of the *Stratton Oakmont / Cubby* paradox and promote self-regulation.[151] Section 230 cannot be interpreted in a way that results in this same chilling effect and a lack of self-regulation.

3. ICSs Are Not Protected by Section 230(c)(1) If They Alter, Manipulate, Select, or Facilitate the Third Party Information in Question

Several unduly broad-sweeping statements by the *Zeran* court[152] have allowed other courts to incorrectly interpret Section 230(c)(1) as granting ICSs virtually complete immunity from any civil cause of action, even if the ICS was significantly and actively involved in the dissemination of allegedly defamatory materials. The fallacies of the *Zeran* court's statements with regard to altering and manipulating third party content are clearly explained by a Seventh Circuit District Court:

> Zeran holds that ICSs are immune from suit whenever they exercise the duties of a (professional) publisher by "alter[ing] content." In so holding, *Zeran* includes conduct within the scope of immunity that conflicts with statutory language. By *altering* content, an [ICS] would no longer be posting information provided by "*another* content provider" – a prerequisite under Section 230(c)(1).[153]

Section 230 does not protect ICSs that are acting as publishers with respect to traditional editorial functions, as the *Zeran* court assumed.[154] Instead, it protects ICSs from being *treated* as publishers when they are *not* acting as publishers but are simply intermediaries for dissemination of third party information.[155] A proper interpretation of Section 230(c)(1) is that it protects an ICS only when the ICS takes no active role in altering, manipulating, selecting, or facilitating the third party content in question.[156]

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151 141 Cong. Rec. H8460-01, H8469-70 (daily ed. Aug. 4, 1995).

152 *See supra* Part IV.B.2.

153 Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 695 (N.D. Ill. 2006).

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

155 *See* 47 U.S.C. § 230(c)(1) (2008) ("No provider or user of an interactive service *shall be treated* as the publisher . . . ."). Of course, when an ICS is pursuing traditional editorial functions, it is immunized for those actions taken *to restrict* objectionable content. *See id.* § 230(c)(2).

156 *See* Batzel v. Smith, 333 F.3d 1018, 1038 (Gould, J., dissenting).

Section 230(c)(1) requires courts to evaluate whether an ICS is also an ICP for the statements in question; thus, based on the definition of ICP, courts are required to "consider whether a party '*is responsible*, in whole *or in part*, for the creation or development of information.'"[157] Several courts have managed to ignore the plain language definition of ICP, thereby improperly broadening the protection of Section 230(c)(1). For example, when an ICS reads an email sent to him and makes the decision to edit it and include it in his newsletter because he views it as meriting distribution to his subscribers,[158] the ICS is also an ICP and thus not protected under Section 230(c)(1). The ICS is "responsible . . . in part, for the . . . development" of the information,[159] and thus is an ICP, because the selection and editing of the email "add the [ICS's] imprimatur" to the email, such that the email is transformed, bolstered, and strengthened to do more harm if wrongful.[160] Similarly, an ICS that creates "pre-prepared responses" for users to submit to the ICS,[161] cannot claim Section 230(c)(1) protection because, by effectively putting words in the mouths of the third parties, it is "responsible . . . in part, for the creation" of the information.[162]

Courts frequently manage to confuse the proper interpretation of Section 230(c)(1) by claiming that altering, manipulating, or editing content is the type of behavior that Congress sought to encourage when it enacted Section 230, and that this behavior must *always* be protected, regardless of the type of alteration or manipulation that is being done.[163] This argument ignores the existence of Section 230(c)(2). Section 230(c)(2) explicitly provides civil immunity for any action taken to restrict access to objectionable materials.[164] Thus, good faith editing, alteration, or manipulation of third party content in order to restrict or remove offensive material is clearly immune under Section 230(c)(2), while editing, alteration, or manipulation of third party content in order to facilitate or encourage offensive material is not protected by either Section 230(c)(1) or

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157 MCW, Inc. v. Badbusinessbureau.com, L.L.C., 2004 WL 833595, at *10 n.12 (N.D. Tex. Apr. 19, 2004) ("[T]he statute does not require a court to determine only whether a party creates or develops the information at issue. Being responsible for the creation or development of the information is sufficient."); *see* 47 U.S.C. § 230(f)(3).

158 Batzel v. Smith, 333 F.3d 1018, 1021 (9th Cir. 2003); *see also* Barrett v. Rosenthal, 146 P.3d 510, 514 (Cal. 2006).

159 47 U.S.C. § 230(f)(3).

160 *Batzel*, 333 F.3d at 1038-39 (Gould, J., dissenting).

161 *See generally* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003).

162 47 U.S.C. § 230(f)(3); *see MCW, Inc.*, 2004 WL 833595, at *10 n.12 (criticizing *Carafano*, 339 F.3d 1119).

163 Dimeo v. Max, 433 F. Supp. 2d 523, 530 (E.D. Pa. 2006) ("If 'development of information' carried the liberal definition that [plaintiff] suggests, then § 230 would deter the very behavior that Congress sought to encourage. In other words, § 230(c)(1) would not protect services that edited or removed offensive material."); *Batzel*, 333 F.3d at 1031 ("[A] central purpose of the Act was to protect from liability service providers and users who take some affirmative steps to edit the material posted.").

164 47 U.S.C. § 230(c)(2) (2008).

(c)(2). In other words, when an ICS chooses to perform editorial functions and republishes content online that originated with a third party, the basis of the ICSs immunity is the ICSs intent. The ICS is outside of Section 230(c)(1) protection, because it is "responsible . . . in part, for the . . . development" of the information.[165] However, if the editorial functions were performed in good faith to restrict objectionable content, the ICS is immune under Section 230(c)(2).

Proper interpretation of Section 230 serves to promote the self-regulation and Good Samaritan screening goals of Congress when it enacted Section 230, while not allowing ICSs that encourage rumor-mongers and gossip-hounds and that promote objectionable material to thrive by brandishing the current broad immunity interpretation of Section 230.[166]

4. ICSs Are Not Protected by Section 230(c)(1) Against Claims that Do Not Treat the ICS as a Publisher or Speaker

"Section 230(c)(1) does not bar 'any cause of action,' as *Zeran* holds . . . but instead is more limited–it bars those causes of action that would require treating an ICS as a publisher of third party content."[167] The protection provided by Section 230(c)(1) is not so limited as to only apply to defamation claims, of course. For example, when multiple third-party users access a website and post allegedly discriminatory housing notices, the provider of the website is protected by Section 230(c)(1) against liability under the Fair Housing Act, because holding the provider liable would treat the provider of the website as the publisher of the housing notices.[168] Similarly, an ICS accused of tortuous interference with contractual relations because it refused to remove material deemed objectionable by the plaintiffs from its online discussion groups is protected by Section 230(c)(1).[169]

However, when an ICS is accused of fraud and negligent misrepresentation in its operation of online dating services, Section 230 protection does not apply.[170] Similarly, when an ICS is accused of negligent failure to maintain proper and adequate records, negligent spoliation of evidence, intentional spoliation of evidence, aiding and abetting defamation, and aiding and abetting interference with prospective business relationships,[171] Section 230 protection

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165 47 U.S.C. § 230(f)(3).

166 *See Batzel*, 333 F.3d at 1038 (Gould, J., dissenting); SOLOVE, *supra* note 9.

167 Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 693 (N.D. Ill. 2006).

168 *Id.* at 698.

169 Novak v. Overture Serv., Inc., 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004). Unfortunately, based on a Congressional policy decision, Section 230(c)(1) does not protect ICSs for refusing to remove objectionable material. However, this policy is better than the alternative notice-based liability. *See supra* Part IV.C.2.

170 *See generally* Anthony v. Yahoo! Inc., 421 F. Supp. 2d 1257 (N.D. Cal. 2006).

171 Patentwizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069, 1070-71 (D.S.D. 2001).

should not apply. Congress worded Section 230(c)(1) to protect ICSs only from being treated as publishers or speakers of independent third party content;[172] Congress did not provide complete immunity from all civil causes of action under Section 230(c)(1).[173]

D. Proper Application of Section 230

Recall the three situations posed previously as test cases. The first situation is an online roommate matching service which requires prospective members to fill out online questionnaires with answers selectable from drop-down menus,[174] and then channels this information so that other members can search only the profiles of compatible members.[175] Second is a website operator who, in taking an active role in selecting and choosing what materials to post on the website, reads a defamatory email and proceeds to post its contents online.[176] The final situation is a website that actively solicits defamatory and objectionable material by flaunting its supposed Section 230 immunity and the anonymity of the internet.[177] Under a proper interpretation of Section 230, none of these ICSs can claim immunity.

The first situation is the recently decided *Roommates.com* case.[178] Surprisingly, the *Roommates.com* court did properly find the website not protected by Section 230.[179] The court recognized that "by requiring subscribers to provide . . . information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate[s.com] becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information."[180] Indeed, this case should not have been difficult to decide. Since the ICS created "pre-prepared responses" and required users to submit them, it cannot claim Section 230(c)(1) protection.[181] By effectively putting words in the mouths of the third parties, the ICS is "responsible . . . in part, for the creation or development" of the information.[182] In so ruling, however, the *Roommates.com* court refused to admit the

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172 47 U.S.C. § 230(c)(1) (2008).

173 Note the absence of the words "civil liability" in Section 230(c)(1), but the presence of those same words in Section 230(c)(2). *See* 47 U.S.C. §§ 230(c)(1), (2).

174 Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1165 (9th Cir. 2008).

175 *Id.* at 1162.

176 Barrett v. Rosenthal, 146 P.3d 510, 514, 520 (Cal. 2006).

177 SOLOVE, *supra* note 9.

178 521 F.3d 1157.

179 *Id.* at 1175.

180 *Id.* at 1166.

181 *See supra* notes 161-62 and accompanying text.

182 47 U.S.C. § 230(f)(3); *see* MCW, Inc. v. Badbusinessbureau.com, L.L.C., 2004 WL 833595, at *10 n.12 (N.D. Tex. Apr. 19, 2004) (criticizing Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003)).

errors of its rulings in *Batzel* and *Carafano*, instead feebly attempting to distinguish these decisions.[183] Additionally, the court attempted to narrowly tailor its ruling, improperly focusing on the "illegal content" of the website.[184] The focus of a Section 230 inquiry cannot be on the illegality of the website content; this issue can be decided only after an ICS is found to be not protected by Section 230. Thus, while the Roommates.com decision is a step in the right direction, the courts still have a long way to go in recognizing the proper scope and interpretation of Section 230 protection.

The second situation is the *Barrett* decision.[185] Here, when the ICS took an active role in deciding to publish defamatory material online, it should have lost its Section 230 protection. The ICS was "responsible . . . in part, for the . . . development" of the information,[186] and thus was an ICP, because the active selection and posting of the material "add[ed] the [ICS's] imprimatur" to the material, such that the material was transformed, bolstered, and strengthened to do more harm.[187] It is noted that this view would also cause ICSs that screen content responsibly, in order to restrict defamatory and objectionable materials, to lose protection under Section 230(c)(1). However, ICSs that do this can claim immunity under Section 230(c)(2), for "any action voluntarily taken in good faith to restrict access to or availability of" objectionable material.[188] Thus, under this view, ICSs are encouraged to screen in order to restrict objectionable content but cannot flaunt their Section 230 immunity by reposting defamatory third party materials. This promotes Congress's goal in enacting Section 230 of encouraging self-regulation.[189]

The third situation is based on the activities of the website JuicyCampus.com, which shut down on February 5, 2009.[190] Operators of websites similar to JuicyCampus.com, who encourage defamatory and objectionable postings on their websites by flaunting their supposed Section 230 immunity and the

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183 *See* 521 F.3d at 1170-72. For a discussion of the *Carafano* and *Batzel* cases, see *supra* notes 61-68, 77-89, and 158-62 and accompanying text. The *Roommates.com* court did at least admit that language used in the *Carafano* decision was overly broad, and "disavow[ed] any suggestion that *Carafano* holds an information content provider *automatically* immune so long as the content originated with another information content provider." 521 F.3d at 1171 n.31.

184 *Id.* at 1175 ("The message to website operators is clear: If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune."). It is shocking that the court would declare the content of the website in *Roommates.com* "illegal," presumably for violating the Fair Housing Act, when the actual issue of illegality under the Fair Housing Act had not yet been decided. *See id.* (remanding the case for the district court to decide whether the website in question violated the Fair Housing Act).

185 Barrett v. Rosenthal, 146 P.3d 510 (Cal. 2006).

186 47 U.S.C. § 230(f)(3).

187 Batzel v. Smith, 333 F.3d 1018, 1038-39 (9th Cir. 2003) (Gould, J., dissenting).

188 47 U.S.C. § 230(c)(2)(A); *see supra* Parts IV.C.1, IV.C.3.

189 141 Cong. Rec. H8460-01, H8470 (daily ed. Aug. 4, 1995).

190 *See* A Juicy Shutdown, http://juicycampus.blogspot.com/2009/02/juicy-shutdown.html (Feb. 4, 2009, 11:47 EST).

anonymity of the internet,[191] lose Section 230 protection. By encouraging and facilitating defamatory and objectionable material, they are "responsible . . . in part, for the creation" of the material, and thus are ICPs.[192] By following the plain language of Section 230 and holding gossip websites such as JuicyCampus.com liable for encouraging defamatory material, courts would restore the balance between freedom of speech and privacy that has been lost in the wake of so many improperly broad interpretations of Section 230.[193]

V. CONCLUSION

Section 230 was designed to protect internet service providers from liability for screening offensive online materials and to simultaneously promote self-regulation, so that free speech and the continued growth of the internet with minimal governmental regulation could be achieved.[194] Section 230 provides two functions. First, it protects ICSs from liability when they act only as intermediaries for dissemination of third party statements.[195] Second, it immunizes actions by ICSs to restrict access to objectionable material.[196] Section 230 should not be interpreted to allow ICSs to put words in the mouths of third parties, to seek out and post defamatory and objectionable material, and to encourage and facilitate defamatory and objectionable material without any fear of repercussion.

> Congress did not want this new frontier to be like the Old West: a lawless zone governed by retribution and mob justice. The CDA does not license anarchy. A person's decision to disseminate the rankest rumor or most blatant falsehood should not escape legal redress merely because the person chose to disseminate it through the Internet rather than through some other medium.[197]

Congress intended Section 230 to have limits. Under Section 230(c)(1), ICSs are not protected if they alter, manipulate, select, or facilitate the third party information in question. ICSs also are not protected by Section 230(c)(1) against claims that do not treat the ICS as a publisher. However, when an ICS is acting in good faith to restrict or prevent objectionable content, these actions will always be immunized from suit by Section 230(c)(2). If Section 230 is

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191 *See* Bennett, *supra* note 108.

192 47 U.S.C. § 230(f)(3).

193 *See* SOLOVE, *supra* note 9.

194 141 Cong. Rec. H8460-01, H8470 (daily ed. Aug. 4, 1995).

195 *See* 47 U.S.C. § 230(c)(1); H.R. Rep. No. 104-458, at 194; S. Rep. No. 104-230, at 194.

196 *See* 47 U.S.C. § 230(c)(2); H.R. Rep. No. 104-458, at 194; S. Rep. No. 104-230, at 194.

197 Batzel v. Smith, 333 F.3d 1018, 1040 (9th Cir. 2003) (Gould, J., dissenting).

correctly interpreted as having boundaries, it will work the way that Congress intended, promoting free speech and self-regulation on the internet, while not allowing ICSs that encourage rumor-mongers and gossip-hounds and that promote objectionable material to thrive by brandishing the current broad immunity interpretation of Section 230.[198]

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[198] *Id.* at 1038; *see* SOLOVE, *supra* note 9.

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