Legislation and Policy Brief

Volume 3 | Issue 2 Article 2

6-21-2011

Attention All Internet Users: How Proposed Amendments to the Communications Decency Act Could Save Your Reputation

Niki Blumentritt
Faulkner University School of Law, npierce@thenationaltriallawyers.org

ATTENTION ALL INTERNET USERS: HOW PROPOSED AMENDMENTS TO THE COMMUNICATIONS DECENCY ACT COULD SAVE YOUR REPUTATION

Niki Blumentritt[1]

Introduction

Imagine a beautiful fall day on a Southern college campus. The leaves are changing, and the sound of the band practicing for this weekend's big game echoes throughout campus. Jane, a college fresh-

[1] J.D. Candidate, Thomas Goode Jones School of Law, 2011; B.A., Auburn University, 2008. I want to thank the staff of the *Legislation & Policy Brief* for their editorial refinements. I am enormously indebted to Professor Andy Olree for his astute insights, patience and guidance throughout the brainstorming, writing and editing process. I am deeply grateful to Ms. Lisa Wood of Troy, Alabama for inspiring me to pursue the law and for her selfless love toward all her students. Finally, I am most thankful to whom this piece is dedicated: my parents, my sister, my family and my fiancé, Gantt. Their incredible love, support and encouragement is what made publishing this piece possible.

man, is walking through campus on the way back to her dorm from her Biology 101 class. Usually, Jane's walk is uneventful, aside from the occasional run-in with a friend or sorority sister; however, today is much different. Jane notices that many people are staring, pointing, and snickering at her. Is there something on her face? She quickly pulls out her compact and realizes that all makeup is intact. Is there something wrong with her clothes? She briskly looks herself over and nothing is out of place. Paranoid, Jane starts to walk back to her dorm a little faster, but people are still staring. All of a sudden, someone in the crowd yells, "Hey Jane, nice picture on collegegossip.com!"[2]

Confused, Jane tries to imagine what this guy is talking about. What picture? Her memory is faded from the events of last weekend due to her drinking too much at a keg party. But her friends would not have let anyone take picture of her passed out, right? Finally arriving at her dorm, Jane hurries onto the computer and goes to the website. There, Jane is horrified to view an anonymously posted picture of her passed out naked on a stranger's bed. Under the picture is a string of comments claiming that Jane is a "whore, who gave me syphilis." Desperate, Jane contacts the operators of the website and begs them to remove the picture and the comments. Jane also informs the operators that she has never contracted a sexually transmitted disease and that, if they did not remove the material, she would sue for defamation. Days later, the operators respond to Jane, and tell her that they are protected by federal law and are not required to remove the statements. The operators also inform Jane that the anonymous posters have a First Amendment right to tell it how it is.

Unfortunately, this nightmare is all too real. Anonymous gossip websites, blogs, social networking websites, online bulletin boards, and other similar types of Internet forums allow people to speak their minds and exercise their First Amendment right to free speech and expression; however, these online forums can be abused when people use the sites to defame others. When a defamatory statement is posted on the Internet, it is often times difficult to locate the individual responsible because most of the defamers are given anonymity by their Internet service provider ("ISP").[3] Plaintiffs in Internet defamation suits are unable to easily name their defamers since usually only the defamer's screen name is available.[4] Furthermore, most courts interpret the Communications Decency Act of 1996 ("CDA") to give ISPs complete immunity from liability for the defamatory posts of third par-

---

[2] *See e.g.,* CAMPUS GOSSIP, http://www.campusgossip.com (last visited Mar. 21, 2011) (allowing users to post gossip and pictures anonymously).

[3] *See, e.g.*, Jennifer O'Brien, Note, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 FORDHAM L. REV. 2745, 2746 (2002).

[4] *Id.* at 2746.

ties, even if notified that certain statements are defamatory.[5] Thus, ISPs have no civil liability to remove defamatory material, and the defamed plaintiffs are left with little recourse.[6] This judicial interpretation of the CDA is significantly different from the well-established common law of defamation, as well as the very purpose for the enactment of the CDA.[7]

Internet defamation is an increasing problem, leaving the defamed helpless and the defamers believing they have a First Amendment right to post defamatory content. This Article will reemphasize the notion that the First Amendment does not protect defamatory speech on the Internet. Part I of this Article will discuss defamation law as part of common law, as applied to the Internet before the passage of the CDA, while Part II will discuss the judicial interpretation of the CDA in defamation cases. Part III of this Article will address the problems with the CDA as currently interpreted by the judicial system. Finally, Part IV will propose amendments to the CDA, which are intended to clarify the statute in order to give more legal options to defamed victims. Furthermore, Part IV will explain how the proposed amendments would not violate the First Amendment.

I. Internet Defamation and the Congressional Response

A. Defamation As An Unprotected Category of Speech

Although the First Amendment protects the right of freedom of speech, this right is not absolute.[8] There are some classes of speech which do not have a First Amendment protection. These include words that are lewd, obscene, profane, libelous, and "fighting words."[9] Libel is defined as defamation of character in the form of print or visual presentation; slander is the defamation of character by oral presentation.[10] Generally, both libel and slander are actionable under the tort of defamation.[11] However, a speaker's First Amendment right to free speech constrains the tort of defamation.[12] Although the First Amendment

[5] *See infra* Parts II.A, II.C (citing cases that have adopted this interpretation of Section 230 of the CDA).

[6] *See infra* Part II; *see also* Communications Decency Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 56, 137-39 (codified as amended at 47 U.S.C. § 230(c) (2006))(absolving internet services providers from civil liability for restricting or not restricting the posting of obscene and other offensive material online).

[7] *See* discussion *infra* Part III.

[8] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *see, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

[9] 315 U.S. at 571-572.

[10] 2 David M. O'Brien, Constitutional Law and Politics: Civil Rights and Civil Liberties 526 (W.W. Norton & Company 6th ed. 2005).

[11] The elements of defamation are (1) a defamatory statement concerning another, (2) an unprivileged publication to a third-party, (3) at least negligence on the part of the publisher, and (4) damage caused by the publisher to the Plaintiff. Restatement (Second) of Torts § 558 (1977).

[12] *See* Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 Harv. J.L. & Tech. 569, 583 (2001) ("In recognition of the risks to non-de-

limits the reach of defamation, the Court has recognized that "[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by [the Court's] decisions. The constitutional safeguard …'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[13]

One of the Supreme Court's most influential cases, *New York Times Company v. Sullivan*, held that although the First Amendment mandates the balance of the policy of protecting individuals' reputations with the policy of protecting an individual's personal expression, recovery for defamation of character is constitutionally permissible and does not offend one's free speech.[14] *Sullivan* held that the guarantee of free speech contained in the First Amendment of the Constitution bars a public official from suing for defamation unless it is made with "actual malice," meaning that the plaintiff must show that the defendant acted with "knowledge that [the statement] was false or with reckless disregard of whether it was false or not."[15] After *Sullivan*, the Court had some issue with defining who was a "public official" and who was a private individual.[16] However, in *Gertz v. Robert Welch, Inc.*, the Supreme Court realized that if private citizens who had been defamed were held to the rigorous actual malice standard set out in *Sullivan*, it could ultimately lead to the private citizen resorting to some type of "self-help"; therefore the Court created a new category of libel standard for private individuals.[17] The Court held that private individual plaintiffs "must prove only that a publisher was negligent in failing to exercise normal care in reporting the defamatory statement."[18] The Court also detailed the "actual malice" standard by adding "that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the publisher must act with a 'high degree of awareness of . . . probable falsity.'"[19] Thus, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."[20]

---

famatory speech posed by defamation liability, the Supreme Court has erected First Amendment based hurdles to defamation claims.").

[13] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

[14] *Id.*

[15] *Id.* at 280.

[16] *See generally* Rosenblatt v. Baer, 383 U.S. 75 (1966) (finding that "public officials" can be government officials that have substantial responsibility or control over governmental affairs); Associated Press v. Walker, 388 U.S. 130 (1967) (finding that "public figures" can be people that thrust themselves into the middle of important public controversy).

[17] 418 U.S. 323, 344-48 (1974).

[18] David M. O'Brien, *supra* note 9, at 529; *Gertz*, 418 U.S. at 349.

[19] *Gertz*, 418 U.S. at 332 (citing St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).

[20] *Id.* at 341.

B. Defamation Defendant Liability Based on Editorial Control

Under common law principles, the author of a defamatory statement is not the only party that can be held liable.[21] Ordinarily, individuals that re-publish defamatory material can also be held liable for such action.[22] There are three categories of individuals for purposes of determining defamation liability.[23] First, publishers are those persons who directly have control to edit, create, or distribute the material.[24] If publishers are found negligent during the publishing and distribution process, they can be held to be liable for defamation against private figure plaintiffs.[25] "Publishers, such as newspapers, generally exert the greatest amount of editorial control over content"[26] because they usually know "or can find out whether a statement in a work produced is defamatory or capable of defamatory import."[27]

The second category is "distributors," who may be held liable if they distribute defamatory material, but do not exert any editorial control over the defamatory material.[28] An example of a distributor would be a bookstore.[29] To hold distributors liable, the injured person must prove that the distributor had notice of the defamatory material and did not take reasonable steps to remove it.[30] That is, distributors will be held liable if they knew or had reason to know of the defamatory material, and distributed the material anyway.[31] The phrase "reason to know" means that the actor has knowledge of facts from which a reasonable person "would either infer the existence of the fact in question

[21] Restatement (Second) of Torts: Liability Of Republisher § 578 (1977) states: "Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."

[22] *Id*. § 578. *See also* Cianci v. New Times Publ'g Co., 639 F.2d 54, 61 (2d Cir. 1980) (adopting the language of § 578).

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

[24] *Id*. at 332-33.

[25] Restatement (Second) of Torts: Defamation Of Private Person § 580B (1977) states: "One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them."

[26] Sarah Beckett Boehm, Note, *A Brave New World of Free Speech: Should Interactive Computer Service Providers Be Held Liable for the Material They Disseminate?*, 5 Rich. J.L. & Tech. 7, ¶ 6 (1998).

[27] Restatement (Second) of Torts: Transmission Of Defamation Published By Third Person § 581 cmt. c (1977).

[28] Restatement (Second) of Tort: Transmission Of Defamation Published By Third Person § 581 (1977) states: "(1) Except as stated in subsection (2), one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character. (2) One who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher."

[29] *Id*. § 581.

[30] Zeran v. American Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).

[31] *Id*. at 331.

or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist."[32] The expression "reason to know" also imposes a negligence standard on distributors.

"Negligence is conduct that creates an unreasonable risk of harm."[33] The elements for a *prima facie* case for negligence in Massachusetts, for example, are 1) a duty the defendant owes to the plaintiff, 2) a breach of that duty by the defendant, 3) a causal connection of causation between the breach and the plaintiff's injury, and 4) actual injury.[34] The standard of conduct for negligence is the reasonable, prudent person standard.[35] A distributor acting as a reasonable person may be hesitant to disseminate material of which he knew or had reason to know could be false, because if it was disseminated anyway, the distributor would be held liable for negligently distributing the defamatory material created by a third-party.[36] With negligence, the burden of proof falls on the plaintiff to show the falsity of the defamatory communication.[37]

Finally, the third category of disseminators is conduits,[38] such as telephone companies. Courts have interpreted that these conduits cannot be held liable because they do not have any control over the material being distributed, and are thus more like distributors than publishers.[39]

C. Defamation Comes to the Internet

The advent of the Internet created a new mode of communication, which dramatically changed public dialogue by allowing a large and increasingly diverse group of people to partake in public discourse.[40] "The Internet is a truly democratic forum for communication. It allows for the free exchange of ideas at an unprecedented speed and scale. For this reason, the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded."[41]

During Twentieth century American history, whenever a new form of communications media has emerged, Congress and courts alike have struggled with the application of defamation law to that par-

[32] Restatement (Second) of Torts § 12 cmt. a (1965).

[33] Restatement (Second) of Torts: Defamation Of Private Person § 580B cmt. g (1977). *See also* Restatement (Second) of Torts: Negligence Defined § 282 (1965).

[34] Magarian v. Hawkins, 321 F.3d 235,238 (1st Cir. 2003).

[35] Restatement (Second) of Torts: Defamation Of Private Person § 580B cmt. g (1977). *See also* Restatement (Second) of Torts: Conduct Of A Reasonable Man: The Standard § 283 (1965).

[36] Restatement (Second) of Torts: Defamation Of Private Person § 580B cmt. h (1977).

[37] Restatement (Second) of Torts: Defamation Of Private Person § 580B cmt. j (1977).

[38] *See* Zeran v. America Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).

[39] *Id*. at 331.

[40] Doe v. Cahill, 884 A.2d 451, 455 (Del. 2005).

[41] Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001). *See* Internet Usage Statistics, *The Internet Big Picture*, Internet World Stats, http://internetworldstats.com/stats.htm (last visited Mar. 20, 2011) (documenting that as of June 30, 2010, close to 2 billion people used the Internet worldwide. This usage increased 444.8% since the year 2000).

ticular medium.[42] Like communication mediums before, "[i]n trying to keep up with the Internet boom, defamation law has struggled to adapt to cyberspace."[43] During the beginning stages of the Internet, the Supreme Court in *Reno v. ACLU* ruled that online speech is no different from other forms of speech and, thus, should be subjected to the same constitutional protection as traditional forms of communication.[44] However, "[a]lthough the Internet has gained notoriety as an instrument of global information dissemination, it has faced a concomitant number of ideological and pragmatic challenges as society has struggled to find a means of understanding and regulating its scope as an unprecedented technological advancement."[45] Other courts continued to struggle with the application of common law defamation to statements posted on the Internet.[46] This judicial confusion ultimately led to the enactment of the Communications Decency Act.[47]

1. Pre-enactment of Section 230

The first of the paradoxical cases leading to the enactment of Section 230 was *Cubby, Inc. v. Compuserve, Inc*.[48] *Cubby* involved alleged defamatory statements made on the Defendant CompuServe's electronic bulletin board publication called "Rumorville."[49] The alleged defamatory statements on the "Rumorville" website were made against Skuttlebutt, which was another Internet publication site in competition with CompuServe.[50]

Skuttlebutt claimed CompuServe was liable for the defamatory statements because CompuServe was the publisher of the defamatory material.[51] CompuServe responded that it should not be held liable because it was not acting as a publisher, but as a distributor without actual knowledge of the defamatory content.[52] Since CompuServe did not review the content of the statements before it allowed them to be posted to its website, the court held that CompuServe acted more like a distributor because it did not know or have reason to know about the alleged defamatory statements.[53] The *Cubby* court held that CompuServe did not exercise editorial control over the alleged defam-

[42] Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 Am. U. L. Rev. 1447, 1465 (2006).

[43] Stephanie Blumstein, Note, *The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act to the Libelous "Re-Poster"*, 9 B.U. J. Sci. & Tech. L. 407, 410 (2003) (citing Michelle J. Kane, Note, *Blumenthal v. Drudge*, 14 Berkeley Tech L.J. 483, 487 (1999)).

[44] Reno v. ACLU, 521 U.S. 844, 870 (1997).

[45] Jennifer O'Brien, *supra* note 2, at 2749.

[46] *See infra* Part I.C.i.

[47] *See infra* Part I.C.ii.

[48] Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y 1991).

[49] *Id.* at 138.

[50] *Id.*

[51] *Id.* at 139.

[52] *Id.* at 138.

[53] *Id*. at 141.

atory materials and, therefore, was a distributor for the purposes of the law of defamation.[54] Because CompuServe did not have actual knowledge of the defamatory material, it was not liable.[55] Therefore, CompuServe was granted summary judgment.[56]

Four years after the *Cubby* decision, *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[57] also contributed to the enactment of Section 230. Similar to the facts in *Cubby*, Defendant Prodigy operated an electronic bulletin board called "Money Talk," in which an unidentified third-party posted allegedly defamatory statements about Stratton Oakmont, an investment banking firm.[58] Stratton Oakmont sued Prodigy for the defamatory statements made by the unidentified third-party claiming that Prodigy was a publisher of the content; however, Prodigy argued that it could not be held liable for the statements as a publisher because it was merely a distributor of the content.[59] Unlike the holding in *Cubby*, the *Prodigy* court held that because Prodigy was "an online service that exercised control over the content of messages posted on its computer bulletin boards," Prodigy acted more like a publisher and therefore should be held liable for the defamatory statements.[60]

The holdings in *Prodigy* and *Cubby* created a paradoxical choice for ISPs: either they could choose to monitor and edit the content being posted on their websites and be subject to liability for defamation as a publisher,[61] or they could choose to act like a distributor which does not control the content posted by third-parties[62] and therefore not be subject to liability.[63] Many legal scholars criticized the decision made by the *Prodigy* court because it created a disincentive for ISPs to self-regulate when self-regulation should have been encouraged.[64] Based on the criticisms of this decision, Congress felt compelled to take action.[65]

---

[54] *Id.* at 140.

[55] *Id*. at 141.

[56] *Id.*

[57] Stratton Oakmont, Inc. v. Prodigy Services Co., 23 Med. L. Rptr. 1794 (N.Y. Sup. Ct. 1995).

[58] *Id*. at 1795.

[59] *Id.* at 1795-97.

[60] *Id.* at 1797-98. *But see* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991) (holding that if an internet service provider has no knowledge or reason to know about defamatory comments, it is a distributor and not liable for defamation).

[61] *See Prodigy*, 23 Med. L. Rptr. at 1799.

[62] *See Cubby,* 776 F. Supp. at 141.

[63] Thomas D. Huycke, Note, *Licensed Anarchy: Anything Goes on the Internet? Revisiting the Boundaries of Section 230 Protection*, 111 W. VA. L. REV. 581, 583-84 (2009) (citing 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, 154 (1997)).

[64] *See, e.g.*, Andrea L. Julian, Comment, *Freedom of Libel: How an Expansive Interpretation of 47 U.S.C. § 230 Affects the Defamation Victim in the Ninth Circuit*, 40 IDAHO L. REV. 509 (2004). Julian observes that the *Prodigy* and *Cubby* holdings created a paradoxical decision. *Id*. at 514. Although common law principles are applicable, Julian notes that these decisions assign defamation liability to internet service providers that self-regulate, while internet service providers that do not self-regulate are free from liability. *Id*. at 514-16.

[65] *See infra* Part II.C.ii.

2. Congress Enacts Section 230 of the CDA

In order to rectify the problem created by the paradoxical cases stated above,[66] Congress enacted Section 230 of the Communications Decency Act.[67] "One of the specific purposes of [Section 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such [internet service] providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."[68] Congress also wanted to give Internet service providers the "Good Samaritan" incentive to monitor and restrict access on their websites to objectionable online material.[69]

The relevant portion of Section 230 states: "[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." [70] Furthermore, the CDA gives civil immunity to any ISP that takes "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 [by the First Amendment]."[71] This illustrates that Congress encouraged Internet service providers to self-regulate because they are in the best position to regulate the content posted on the Internet.[72] Through Congress' policy of encouraging self-regulation for Internet service providers, Congress promoted the expansion of ISPs by eliminating the possibility of ISPs' state tort liability stemming from information posted by third parties.[73]

This preemptive power exercised by Congress is derived from the Commerce Clause.[74] Section 230(e)(3) states: "[n]othing 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

---

[66] *See supra* Part II.C.i.

[67] Communications Decency Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 56, 137-39 (codified as amended at 47 U.S.C. § 230(c) (2006)).

[68] H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.); *See also* S. Rep. No. 104-230, at 194 (1996) (Conf. Rep.).

[69] Huycke, *supra* note 62, at 605.

[70] 47 U.S.C. § 230(c)(1).

[71] § 230(c)(2)(A).

[72] Matthew Minora, Comment, *Rumor Has It That Non-Celebrity Gossip Web Site Operators Are Overestimating Their Immunity Under The Communications Decency Act*, 17 CommLaw Conspectus 821, 831 (2009) (citing Adam M. Greenfield, *Despite a Perfect 10, What Newspapers Should Know About Immunity (and Liability) for Online Commenting*, 4 I/S: J.L. & Pol'y for Info. Soc'y 453, 461-62 (2008)(stating Congress' desire for continued internet innovation and that providers are best able to manage internet)).

[73] Minora, *supra* note 71, at 831.

[74] Zeran v. AOL, Inc., 129 F.3d 327,334 (explaining that congressional power to regulate commerce between states supersedes state law).

inconsistent with this section."[75] The plain language stated in Section 230(d)(3) clearly communicates the policy that Congress desired to promote unfettered free speech on the Internet, and that desire supersedes any common law causes of action.[76] With respect to this preemptive right of Congress, the Supreme Court has stated that when Congress has clearly proclaimed that its enactments are a part of the regulation of commerce, state laws which pertain to the regulation of commerce are superseded.[77] This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.[78] Here, Congress explicitly states that Section 230 preempts state law causes of action.[79] However, the CDA does not state any congressional intent, express or implied, that the statute is to preempt all state law causes of action, but it does clearly and unambiguously reflect Congress' intent to retain all state law remedies unless those remedies conflict with the CDA.[80] Federal and state courts have given ISPs immunity for the torts of third parties predicated on the theories of invasion of privacy,[81] negligence,[82] negligent misrepresentation,[83] defamation,[84] distributor liability,[85] intentional infliction of emotional distress,[86] and spam.[87]

---

[75] 47 U.S.C. § 230(e)(3) (2006).

[76] *Zeran*, 129 F.3d at 334; *see also* 47 U.S.C. § 230(e)(3) (2006).

[77] *Zeran*, 129 F.3d at 334 (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)(explaining judicial interpretation of commerce clause)).

[78] *Jones*, 430 U.S. at 525 (citing City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 633 (1973) (detailing how the federal government may apply its commerce power either explicitly or implicitly)).

[79] 47 U.S.C. § 230(e)(3).

[80] *Zeran*, 129 F.3d at 334.

[81] *See, e.g.*, Does 1 Through 30 Inclusive v. Franco Prods., No. 99 C 7885, 2000 U.S. Dist. LEXIS 8645, at *10-16 (N.D. Ill. June 22, 2000) (finding internet service providers were not liable for allowing access to images of athletes taken while unclothed in locker room without the athletes' knowledge or consent), *aff'd sub nom.* Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003).

[82] *See, e.g.*, Doe v. Am. Online, Inc., 783 So. 2d 1010, 1013-17 (Fla. 2001) (finding that internet service providers are not liable for negligently allowing "chat rooms" to market obscene photos of a minor because they are protected under the CDA).

[83] *See, e.g.*, Schneider v. Amazon.com, Inc., 31 P.3d 37, 39, 43 (Wash. Ct. App. 2001) (discussing harsh comments on a website that were not removed pursuant to its own posting standards does not put administrator at fault).

[84] *See, e.g.*, Ben Ezra, Weinstein, & Co. v. Am. Online, Inc., 206 F.3d 980, 985 (10th Cir. 2000) (holding that internet access provider was immunized for providing access to misleading stock information).

[85] *See, e.g.*, Green v. Am. Online, Inc., 318 F.3d 465, 471 (3d Cir. 2003) (holding that internet service provider was immune from liability for two subscribers' defamatory posts about another subscriber in a chat room).

[86] *See, e.g.*, Ramey v. Darkside Prods., Inc., No. 02-730 (GK), 2004 U.S. Dist. LEXIS 10107, at *12-18 (D.D.C. May 17, 2004) (granting summary judgment in favor of publisher of online advertising guide for adult entertainment on tort claims of intentional infliction of emotional distress, unjust enrichment, negligence, and fraud).

[87] *See, e.g.*, OptInRealBig.com, LLC v. IronPort Sys., Inc., 323 F. Supp. 2d 1037, 1047 (N.D. Cal. 2004) (holding CDA immunizes anti-spam software company from liability).

The fall out of policy provisions, along with the effect of the *Prodigy* decision, required that Congress pass the CDA for purposes of encouraging ISPs to self-regulate content posted on the Internet without fear of being held liable.[88] The CDA assures ISPs that they will not be held liable for acting as a "Good Samaritan" and taking affirmative steps to monitor and regulate defamatory material posted on their website.[89] However, subsequent courts have interpreted the CDA to give absolute immunity to ISPs for content posted by third-parties.[90]

II. Judicial Interpretation of Section 230

A. Zeran v. American Online, Inc. Creates Full Immunity for Internet Service Providers

In 1997, the Fourth Circuit Court of Appeals decided *Zeran v. American Online, Inc*.[91] The cause of action arose when an anonymous third-party posted on American Online's (AOL) bulletin board an advertisement for "Naughty Oklahoma T-Shirts," which contained tasteless and offensive slogans referring to the Oklahoma City Bombing.[92] The advertisement also instructed interested buyers of the t-shirts to contact "Ken" at Zeran's home's phone number.[93] As a result of the defamatory posting, Zeran received threatening and obnoxious calls, some of which included death threats.[94] Zeran contacted AOL and informed them of the posting and the damage it caused.[95] AOL assured Zeran that the statement would be taken off the bulletin board, but would not offer a retraction.[96] AOL did in fact remove the posting; however, the anonymous third-party re-posted the advertisement and the calls to Zeran continued.[97] Subsequently, Zeran, acting as a private citizen, brought a negligence claim against AOL for an unreasonable delay in removing defamatory messages posted by an anonymous third-party.[98] Furthermore, Zeran alleged in his cause of action that AOL refused to remove the defamatory statements and failed to monitor the bulletin board for similar statements thereafter.[99]

The district court granted summary judgment in favor of AOL,[100] holding that any conflict between the CDA and application of distributor liability to an ISP arises because distributor liability, liability for

---

[88] Barrett v. Rosenthal, 5 Cal. Rptr. 3d. 416, 436 (Cal. Dist. Ct. App. 2003).
[89] *Id*. at 436.
[90] *See infra* Part III.
[91] Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997).
[92] *Id*. at 329.
[93] *Id*.
[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] *Id*.
[98] *Id*. at 328.
[99] *Id*.
[100] *Id*. at 330.

knowingly or negligently distributing defamatory material without exercising editorial control over the material, is essentially the same thing as publisher liability.[101] The district court relied on Section 577 of the Restatement (Second) of Torts, which explains that the law treats a publisher as both one who intentionally communicates defamatory material and one who fails to take reasonable steps to remove defamatory statements under his control.[102] Thus, since Section 230(c) of the CDA gives ISPs immunity from publisher liability, the ISPs should be immune from distributor liability as well.[103] Furthermore, the CDA preempted Zeran's state law claim on AOL for negligent distribution of the defamatory material.[104] The court recognized that the CDA did not preempt all state law claims concerning ISPs, but Zeran's negligent distributor liability claim did conflict with the express preemptive language of the CDA.[105]

On appeal to the Fourth Circuit, Zeran argued that Congress enacted Section 230 to give immunity to ISPs acting as publishers of third-party statements, but that immunity should not reach ISPs who act as *distributors* of third-party statements.[106] Therefore, Zeran believed that AOL should be held to a notice-based distributor liability standard because once he notified AOL of the defamatory postings; AOL had actual knowledge of the defamatory statements that were being posted.[107] In it's reasoning, the court first looked to the legislative intent of Section 230.[108] The court decided that the first reason Congress enacted Section 230 was to encourage the freedom of speech on the Internet, and the second reason, was to "encourage service providers to self-regulate the dissemination of offensive material over their services" and therefore overrule *Prodigy*.[109]

In analyzing the claim, the court of appeals stated "Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech."[110] Furthermore, the court of appeals believed that Zeran

---

[101] Zeran v. Am. Online, Inc., 958 F. Supp. 1124, 1132-33 (E.D. Va. 1997).
[102] *Id*. at 1133; *see also* RESTATEMENT (SECOND) OF TORTS § 577 (1977).
[103] *Zeran*, 958 F. Supp. at 1132-33.
[104] *Id*. at 1133.
[105] *Id*. at 1135.
[106] Zeran, v. Am. Online, Inc., 129 F.3d 327, 331-32 (4th Cir. 1997); *see* Stratton Oakmont Inc. v. Prodigy Serv. Co., 23 Med. L. Rptr. 1794 (N.Y. Sup. Ct. 1995)(holding that an internet service provider was a publisher and therefore liable for defamation); Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991)(holding an internet service provider to be a distributor and therefore not liable for defamation); *see also* 47 U.S.C. § 230 (2006).
[107] *Zeran*, 129 F.3d at 331-32.
[108] *Id.* at 330-31.
[109] *Id.*
[110] *Id.* at 330.

placed too much emphasis on the element of notice in arguing for an ISP to be considered a distributor:[111] "[t]he simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law."[112] According to the court, once an ISP receives notice of an alleged defamatory statement, it is transformed into a publisher role because it "must decide whether to publish, edit, or withdraw the posting."[113] Thus, when an ISP decides to remove a posting, it acts as a publisher, not a distributor, and publishers are expressly immune from liability under Section 230 of the CDA.[114]

The court reasoned that Congress implicitly intended that both distributors and publishers were to have immunity from liability, because if distributors did not have immunity, then the legislative intent to expand freedom of speech would be ignored.[115] If distributors did not have immunity from liability and were forced to remove all statements that could be potentially defamatory, then protected speech could be removed, creating a chilling effect on free speech on the Internet.[116] Zeran further argued that Section 230 should have been interpreted to impose liability on ISPs that have actual knowledge of the defamatory content because this interpretation would have been consistent with the statute's purpose.[117] However, the court disagreed and found that this interpretation was inconsistent with the statute's purpose because it would result in ISPs' abstention from self-regulation.[118] The court reasoned that the statute should not be interpreted as such because this would lead to the ISP being held liable whenever it obtained actual knowledge of defamatory content.[119] Therefore, the court affirmed the lower court's decision and found the ISP, AOL, not liable.[120]

B. The Problematic Effect of Zeran

1. *Blumenthal v. Drudge*

In *Blumenthal v. Drudge*, an Internet gossip columnist, Matt Drudge, operated a website called the "Drudge Report" that mostly discussed topics circulating around Hollywood and Washington, D.C.[121] Drudge had a license agreement for his internet column with AOL, for which Drudge was compensated with a monthly royalty.[122] Blumenthal, a White House assistant, alleged that she had been defamed by Matt

[111] *Id*. at 332.
[112] *Id.*
[113] *Id*.
[114] *Id*. at 332-33.
[115] *Id.* at 333.
[116] *Id.*
[117] *Id*. at 332.
[118] *Id*.
[119] *Id*.
[120] *Id.* at 335.
[121] Blumenthal v. Drudge, 992 F. Supp. 44, 47 (D.D.C. 1998).
[122] *Id.* at 47.

Drudge in his column, and therefore brought suit against both Drudge and AOL.[123] In a seemingly reluctant decision, the court held that AOL could not be held liable for the defamatory statements made by Drudge because Section 230 afforded him immunity.[124]

> If it were writing on a clean slate, this Court would agree with plaintiffs. AOL has certain editorial rights with respect to the content provided by Drudge and disseminated by AOL, including the right to require changes in content and to remove it . . . . Because it has the right to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor. But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others. In some sort of tacit quid pro quo arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted.[125]

It is clear that the court realized the inherent problems with the CDA, and that prior judicial interpretation encouraged ISPs to forgo website monitoring, even when the material posted is not protected by the First Amendment. However, the *Blumenthal* court expanded immunity from liability by applying immunity to ISPs in defamation suits where the ISP was a mere conduit for the third-party's defamatory posting.[126]

2. *Batzel v. Smith*

In 1999, Robert Smith worked as a handyman for Ellen Batzel, who told Smith stories that gave him the impression that some artwork located in Batzel's home may have been looted during World War II.[127] Going off this impression, Smith sent an email stating his concerns about the artwork to Tom Cremers, who operated a museum website.[128] Cremers posted Smith's email on the museum website without Smith's permission or knowledge.[129] When Batzel discovered the email on the website, she sued both Smith and Cremers for defamation.[130] Cremers

---

123 *Id.* at 47-48.

124 *Id.* at 53.

125 *Id.* at 51-52.

126 Sewali K. Patel, Note, *Immunizing Internet Service Providers From Third-Party Internet Defamation Claims: How Far Should Court Go?*, 55 Vand. L. Rev. 647, 668 (2002).

127 Batzel v. Smith, 333 F.3d 1018, 1020-22 (9th Cir. 2003).

128 *Id.* at 1021.

129 *Id.* at 1022.

130 *Id.*

filed a motion to dismiss the case pursuant to Section 230's ISP immunity by claiming that since he was not the original author, he could not be liable; however, the district court denied the motion.[131] Cremers appealed to the Ninth Circuit.[132]

The Ninth Circuit held that an ISP is immune from liability when it publishes information developed by a third-party and when the ISP reasonably believes that the third-party intended the information to be published on the Internet.[133] The court reasoned that Congress' intent in enacting Section 230 to promote free speech on the Internet was not met by giving immunity to ISPs or users who "knew or had reason to know that the information provided was not intended for publication on the Internet."[134] The court went on to state:

> Absent an incentive for service providers and users to evaluate whether the content they receive is meant to be posted, speech over the Internet will be chilled rather than encouraged. Immunizing providers and users of 'interactive computer service[s]' for publishing material when they have reason to know that the material is not intended for publication therefore contravenes the Congressional purpose of encouraging the 'development of the Internet.'[135]

Furthermore, the court observed that Congress' exclusion of "publisher" liability for third-party content shields ISPs for "the usual prerogative of publishers to choose among preferred material and to edit the material published while retaining its basic form and message."[136] Thus, the court remanded the case to the district court to decide whether Cremers had a reasonable belief that Smith did not intend for his statements to be posted on the website.[137]

3. *Barrett v. Rosenthal*

Stephen J. Barrett and Terry Polevoy were physicians who sought to discredit alternative medical practices.[138] Ilena Rosenthal was an activist for alternative medicine and often participated in website discussions about alternative medicine.[139] Around 2000, Rosenthal began posting emails that she had received from Timothy Bolen, a fellow activist. The emails accused Polevoy of being a stalker of women and

---

[131] *Id.* at 1023.
[132] *Id*. at 1022.
[133] *Id.* at 1034.
[134] *Id.* at 1033-34.
[135] *Id.* at 1034.
[136] *Id*. at 1031.
[137] *Id*. at 1035.
[138] Barrett v. Rosenthal, 5 Cal. Rptr. 3d 416, 418-19 (Cal. Ct. App. 2003).
[139] *Id*. at 419

of being part of a "criminal conspiracy," with Barrett.[140] Rosenthal and Bolen urged the readers of the emails to file governmental complaints against the physicians.[141] The physicians first contacted the activists and demanded that the statements be removed because they were defamatory, and when the statements continued, the physicians filed suit.[142] The California superior court found Rosenthal to be immune under Section 230 because she had merely reposted the messages and was not the original author.[143]

On appeal, the court entertained the issue of whether the *Zeran* court was correct in deciding that Section 230 was enacted to promote unrestricted speech on the Internet.[144]

Specifically, the *Barrett* court questioned "whether a statute that encourages the restriction of certain types of online material 'whether or not such material is constitutionally protected'. . . can fairly be said to reflect a desire 'to promote unfettered speech'"[145] The court was not entirely persuaded that a type of statute that issued distributor "liability would have an unduly chilling effect on cyberspeech."[146]

In its analysis, the court recognized that "American courts, and above all the Supreme Court, have struggled to define the proper accommodation between the common law of defamation and the constitutional freedom of speech."[147] The court reviewed the proper procedures for a claim of defamation.[148] The court stated

> as to defamation, our jurisprudence establishes a nuanced legal regime: while 'libel can claim no talismanic immunity from constitutional limitations,' neither does the constitutional freedom provide an unfettered right to libel. Proposals to create such an unfettered right, as by the creation of a categorical immunity or privilege, have been controversial and strongly contested.'[149]

The court in *Barrett* held that defamation victims could bring action for defamatory statements posted on the Internet because ISPs are distributors, which are not covered by the CDA's immunity.[150] Furthermore, the *Barrett* court held that the lower court erred in determining that the CDA gave absolute immunity to ISPs for statements posted by third parties.[151] Moreover, the *Barrett* court stated that the

[140] *Id*. at 420.
[141] *Id*.
[142] *Id*. at 420-21.
[143] *Id*. at 421.
[144] *Id*. at 436-37.
[145] *Id*. (citing 47 U.S.C. § 230(c)(2)(A) (2000)).
[146] *Id*. at 437.
[147] *Id*. at 440.
[148] *Id*.
[149] *Id*. (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)).
[150] *Id*. at 441-42.
[151] *Id*. at 427.

Zeran court's "characterization of [Section] 230 is misleading insofar as it suggests that [Section] 230 reflects a superseding congressional 'desire to promote unfettered speech on the Internet.'"[152] The court also reasoned that widely-accepted common law principles of defamation mandate that the distinction between distributor liability and publisher liability remain intact.[153] Under common law principles of defamation, if an ISP is given actual notice of a defamatory statement posted on the Internet and takes no steps to remedy the statement, then the ISP can be held liable as a traditional distributor.[154] Thus, the *Barrett* court questioned and declined to follow the *Zeran* court's holding.[155]

C. Summary of Case Law

In summary, the *Prodigy* decision prompted Congress to erect the CDA, which provides publishers with immunity from content posted by third-parties. Subsequently after the passage of the CDA, the *Zeran* court interpreted the statute to afford ISPs with absolute immunity for both publishers and distributors, even if the ISP knew or had reason to know that defamatory material was posted.[156] This is an interpretation that strays from well-established traditional common-law principles of defamation.[157] The realistic effect of this interpretation is that ISPs are completely absolved from civil liability for content posted by third parties, even when they have the ability to remove the material if put on notice.[158] However, recent decisions, such as *Batzel*[159] and *Barrett*,[160] recognize the dangerous effect this interpretation creates, not only for liability purposes, but also First Amendment reasons.

III. Problems With Section 230 as Currently Interpreted

Defamation is the most frequent cause of action under Section 230.[161] Critics that advocate for an amendment to Section 230 believe that although the Internet has created a vital forum for free expression, by its nature, it can also create the potential that users might abuse the communication medium by quickly disseminating defamatory material throughout cyber-space to every computer in the world.[162] "This potential for widely-circulated, quickly disseminated harmful speech over the internet, combined with the difficulty of identifying the source of the speech, can leave the victim of defamatory speech in the unten-

[152] *Id*. at 428 (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 334 (4th Cir. 1997)).
[153] *Id*. at 430.
[154] *Id*. at 426-27.
[155] *Id*. at 429.
[156] Zeran v. Am. Online Inc., 129 F.3d 327, 333 (4th Cir. 1997).
[157] *Id*. at 331.
[158] Doe v. Am. Online, Inc., 783 So. 2d 1010, 1018 (Fla. 2001).
[159] Batzel v. Smith, 333 F. 3d 1018 (9th Cir. 2003).
[160] Barrett v. Rosenthal, 5 Cal. Rptr. 3d 416 (Cal. Ct. App. 2003).
[161] Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 (9th Cir. 2009).
[162] Cahill v. Doe, 879 A.2d 943, 951 (Del. Super. Ct. 2005).

able situation of sitting idly by, without any recourse, as his reputation quite literally is destroyed."[163] The Internet in this context should not bar viable causes of action for defamation.[164] As Daniel Solove stated in his book:

> Words can wound. They can destroy a person's reputation, and in the process distort that person's very identity. Nevertheless, we staunchly protect expression even when it can cause great damage because free speech is essential to our autonomy and to a democratic society. But protecting privacy and reputation is also necessary for autonomy and democracy. There is no easy solution to how to balance free speech with privacy and reputation. This balance isn't like the typical balance of civil liberties against the need for order and social control. Instead, it is a balance with liberty on both sides of the scale—freedom to speak and express oneself pitted against freedom to ensure that our reputations aren't destroyed or our privacy isn't invaded.[165]

It has been argued that courts have expanded Section 230 immunity beyond Congressional intent.[166] "[T]he extent of immunity offered by the courts is in conflict with the language of … [Section 230]" which removes "any incentive for [internet service providers] to self-regulate … content" and leaves "plaintiffs without an effective remedy."[167] Some courts follow the sentiment that "providing broad immunity to [internet service providers] where they have exercised traditional editorial functions or merely made information available to others on their services" is consistent with Congressional intent. However, "following the decision in *Zeran*, courts proceeded to extend immunity beyond those scenarios envisioned by Congress."[168] The CDA's definition of "internet content provider" is also unclear because "the threshold where a provider or user of an ISP is transformed into an information content provider through the exercise of editorial control is not expressly noted, defined, or clarified."[169] Therefore, it is tough to

---

[163] *Id*. at 951.

[164] Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 449 (Md. 2009).

[165] Daniel J. Solove, The Future of Reputation: Gossip, Rumor, and Privacy on the Internet 159-60 (Yale Univ. Press 2007).

[166] *See, e.g.*, Carl S. Kaplan, *How Is Libel Different in Cyberspace?*, N.Y. TIMES, Aug. 9, 2001, available at http://www.nytimes.com/2001/08/09/technology/10CYBERLAW.html (discussing rationale underlying Barrett v. Clark, 29 Med. L. Rptr. 2473 (Cal. Super. Ct. 2001)).

[167] Brandy Jennifer Glad, Comment, *Determining What Constitutes Creation or Development of Content Under the Communications Decency Act*, 34 SW. U. L. REV. 247, 258 (2004).

[168] *Id.* at 258-59.

[169] Karen A. Horowitz, Comment, *When is § 230 Immunity Lost?: The Transformation From Website Owner to Information Content Provider*, 3 SHIDLER J. L. COM. & TECH. ¶¶ 12, 18 (2007).

decide when an ISP becomes "responsible" for the creation or development of content.[170]

Another problem with congressional intent in the CDA flows not from what is in the statute, but what was left out. The statute states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker . . . ."[171] Because the issue of distributor liability was expressly left out of the statute, it is argued that this has led to judicial confusion in distinguishing between publisher and distributor liability as applied to ISPs.[172] "[I]t would be reasonable to surmise that Congress would say 'distributor' in addition to 'publisher' if it meant 'distributor' in addition to 'publisher.'"[173] However, even though the statute clearly does not mention distributor liability, courts have interpreted the statute broadly to include "entities that would be liable as a publisher of defamatory material" and "those that would be liable under a distributor liability theory."[174]

Since the *Zeran* case, courts have "removed all legal incentives for [internet service providers], or individuals given [internet service provider] protections, to be cognizant of the material they are reposting or to refrain from improper behavior."[175] This has now led to the trend which disincentives ISPs from monitoring posters who make defamatory claims on their websites, while they are shielded with full immunity under Section 230.[176] What their users say or post on their websites is of no concern to the ISPs.[177] As critic Andrea Julian explains:

> By immunizing [internet] service providers who have generated at least a minor amount of offending content… as well as those who either knew or should have known of the defamatory character of the material, Section 230 very nearly encourages reckless dissemination of injurious material. It is, perhaps, too generous to rely on [internet] service providers or user to self-regulate when there is no repercussion for failing to do so.[178]

However, it has also been argued that this imposition of common law principles on the Internet would be detrimental to the Internet's

---

170 *Id*. ¶ 18.

171 47 U.S.C. § 230(c)(1) (2006).

172 Emily K. Fritts, Note, *Internet Libel and the Communications Decency Act: How the Courts Erroneously Interpreted Congressional Intent with Regard to Liability of Internet Service Providers*, 93 Ky. L.J. 765, 776-77 (2005).

173 Sheridan, *supra* note 62, at 168.

174 Matthew J. Jeweler, *The Communications Decency Act of 1996: Why § 230 Is Outdated and Publisher Liability for Defamation Should Be Reinstated Against Internet Service Providers*, 8 U. Pitt. J. Tech. L. & Pol'y 3, 18-19 (2007).

175 Blumstein, *supra* note 42, at 419-20.

176 *Id*. at 419.

177 *See* Julian, *supra* note 63, at 531 (advocating a narrow interpretation of Section 230's immunity).

178 See Julian *supra* note 63 at 530.

progression.[179] Some commentators argue that holding ISPs "liable for every defamatory statement printed over the Internet would put some [internet service providers] out of business and cause others to shut down their chat rooms, message boards, or e-mail services in order to avoid paying large damage awards."[180] This is viewed as effectively putting a limit on free speech on the Internet.[181] "Thus, holding [internet service providers] liable for third-party defamation on the Internet would impede technology and be detrimental to the functioning of an advanced society."[182] Furthermore, commentators have argued that "[t]oo much tort liability propagates widespread online censorship, which would greatly impede freedom of expression on the Internet."[183] These arguments against imposing any form of distributor liability on ISPs is consistent with the *Zeran* court's opinion which stated, "[i]f [internet] service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement--from any party, concerning any message."[184] Although both arguments concerning the CDA are compelling and an amendment to Section 230 of the CDA could easily strike a balance for both sides of the case.

IV. A PROPOSED AMENDMENT TO SECTION 230

When defamatory content is posted on the Internet for possibly millions of viewers to see, the law should require ISPs or users to promptly remove the content if the provider or user is notified. However, current judicial interpretation does just the opposite by granting broad immunity.[185] This has resulted in ISPs exercising a hands-off approach to monitoring material, even when they know that the content is defamatory in nature.[186] It also allows the original speakers of the defamation to believe that they have a First Amendment right to say such harmful statements, but they are misguided.[187] These harmful speakers should

---

[179] *See* Patel, *supra* note 125, at 687-88.

[180] *Id*.

[181] *Id*. at 688.

[182] *Id*.

[183] Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 371 (2005).

[184] Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997). The court also stated: "The terms 'publisher' and 'distributor' derive their legal significance from the context of defamation law. . . . Because the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of tort liability. . . . Publication does not only describe the choice by an author to include certain information. In addition, both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party . . . constitute publication." Id. at 332 (citations omitted).

[185] *See* discussion *supra* Part II.

[186] *See* SOLOVE, *supra* note 165, at 154.

[187] *Id*.

know that under common law principles, defamation has no constitutional protection.[188]

Part IV of this note proposes that the growing problem of Internet defamation compels Congress to amend the CDA, specifically Section 230.[189] This Note encourages Congress to implement common law principles of defamation into the CDA, which would lead courts to interpret the CDA as giving only qualified immunity to ISPs and users.[190] The result of the newly amended statute would be an equal play ground where ISPs can regulate material on a notice basis, users can exercise their First Amendment right of free speech, and the victims of defamation would have more legal options when injured.[191] Part IV.A proposes possible amendments to the CDA Section 230 and is followed by commentary in Part IV.B discussing the possible effects of such amendments.[192] More specifically, Part IV.B.i explains the possible amendments, Part IV.B.ii gives a guide to judicial interpretation, and Part IV.B.iii will discuss how the proposed amendments are permissible under the First Amendment.[193]

A. Proposed Amendments to Section 230 of the CDA[194]

§ 230. Protection for Private Blocking and Screening of Offensive Material

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

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

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, *defamatory*, 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 [subparagraph (A)].

(3) Exceptions. A provider or user of an interactive computer service,

188 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

189 *See infra* Part IV.A.-IV.B. and accompanying text.

190 *See infra* Part IV.A.-IV.B. and accompanying text; *See also supra* Part III.

191 *See infra* Part IV.A.-IV.B. and accompanying text.

192 *See infra* Part IV.A.-IV.B. and accompanying text.

193 *See infra* Part IV.A.-IV.B. and accompanying text.

194 This Note's contribution is in italicized text. The text in regular font is taken from the current version of Section 230.

who is also a distributor as defined in § 230(g)(5), may be treated as a publisher or speaker of any information and held liable when:

> *(A) The provider or user of the interactive computer service knows or has reason to know or is put on notice that certain material is objectionable; and*
> *(B) The provider or user of the interactive computer service, acting with negligence or gross negligence, fails to remove or restrict access to or availability of material that is objectionable or constitutes defamation in a reasonable amount of time.*

. . .

(g) In general.--A service provider shall not be liable if the service provider--

(1) (a) does not have actual knowledge that the material on the system or network is defamatory or harmful in nature;

(b) in the absence of such actual knowledge, is not aware of facts or circumstances from which defamatory or harmful content is apparent; or

(c) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the defamatory or harmful material, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed defamatory or harmful material as described in section (e), responds expeditiously to remove, or disable access to, the material that is claimed to be defamatory or harmful material.

(h) Elements of notification.--

(1) To be effective under this subsection notification of claimed defamatory statement or otherwise objectionable content must be written communication provided to the designated agent of an internet service provider or information content provider that includes substantially the following:

(a) A physical or electronic signature of a complaining party.

(b) Identification of the material that is claimed to be defamatory or to be harmful in nature and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the internet service provider to locate the material.

(c) Information reasonably sufficient to permit the internet service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(d) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is defamatory or harmful in nature.

(e) A statement made by the complaining party that the

information in the notification is accurate.

(2) (a) Subject to clause (b), a notification from a complaining party or a person acting on behalf the defamed or harmed party that fails to comply substantially with the provisions of subparagraph (1) shall not be considered under paragraph (f)(1) in determining whether a service provider has actual knowledge or was aware of facts or circumstances from which defamatory or harmful material is apparent.

(b) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (1) but substantially complies with clauses (b), and (c) of subparagraph (1), clause (a) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (1).

(3) At the court's discretion, notice may be determined to be reasonable or unreasonable under the circumstances.

(*i*) Definitions. As used in this section:

(1) Internet. The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service. The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider. The term "information content provider" and means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider. The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(5) Distributor. The term "distributor" means any person or entity that transmits, delivers, or disseminates information created by another information content provider through the Internet or any other interactive computer service.

(6) Actual Knowledge. The term "actual knowledge" as used in this section means direct and clear knowledge that would lead a reasonable person to inquire further.

(j) Misrepresentations.--Any person who knowingly materially misrepresents under this section-

(1) that material or activity is defamatory, or

(2) that material or activity was removed or disabled by mistake or misidentification,

shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged defamer, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be defamatory or harmful in nature, or in replacing the removed material or ceasing to disable access to it. (h) Replacement of removed or disabled material and limitation on other liability.--

(1) No liability for taking down generally.-- A service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be defamatory or based on facts or circumstances from which defamatory activity is apparent, regardless of whether the material or activity is ultimately determined to be defamatory.

B. COMMENTARY

1. PROVIDING CLARIFICATION OF PROPOSED AMENDMENTS

These proposed amendments give ISPs limited liability by imposing distributor liability on these providers when they have actual knowledge of defamatory material. These proposed amendments are modeled after the Digital Millennium Copyright Act ("DMCA").[195] The DMCA was enacted in 1998 in order to preserve copyright enforcement on the Internet as well as provide ISPs with immunity from copyright infringement liability when those ISPs do not have actual knowledge of the copyright infringement.[196] Under the DMCA, protection of an innocent ISP disappears at the moment it becomes aware that a third-party used its system to infringe on copyrighted material.[197] By shifting responsibility to the ISP to disable the copyrighted material when it becomes aware of the violation, the DMCA creates strong safe harbor incentives for ISPs to strive to detect and deal with copyright infringements on the Internet.[198]

By amending Section 230 as stated above,[199] Congress could effectively clarify the language, intent, and desired result of the statute.

---

[195] Digital Millennium Copyright Act, PUB. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C. (2006)).

[196] *See* Perfect 10, Inc. v. CCBill, LLC, 340 F. Supp. 2d 1077, 1086 (C.D. Cal. 2004), *rev'd in part*, 481 F.3d 751 (9th Cir. 2007).

[197] *Id*.

[198] *Id*.

[199] *See supra* Part III.

First, it should be noted that ISPs would still be able to retain their publisher immunity for information created by a third-party.[200] This change would still allow ISPs to be immune from liability when a third-party posts defamatory or otherwise objectionable material to their site without the ISP's knowledge of the information being defamatory or objectionable.[201] However, under the proposed amendment adding subsection (c)(3), an ISP's status of publisher may shift to that of distributor when the ISP knows or has reason to know of defamatory material posted on its site and fails to remove or restrict the material in a reasonable amount of time.[202] This distributor liability exception will leave the *Prodigy* decision of publisher immunity intact, while still allowing courts to invoke distributor liability as set out in *Cubby*.[203] This will also reinforce the original Congressional intent of self-regulation by clarifying that Congress never intended for ISPs to be shielded from all types of liability.[204]

The proposed amendment next sets out elements that need to be met for an ISP to qualify for the safe harbor provisions.[205] These elements include the requirements that the ISP (a) either 1) did not have actual knowledge, 2) was not aware of the defamatory or objectionable nature of the material, or 3) if it obtained such knowledge, it acted expeditiously to remove or disable the material and (b) that it did not make a financial profit directly attributable to the defamatory or harmful content.[206] By laying out these elements in simple terms, it allows ISPs to be aware of how to qualify for the safe harbor affirmative defense of the proposed amendment.

The next proposed amendment adding subsection (e)(1)-(3) defines the elements of notice.[207] In order for a notice to an ISP to be effective, it must include 1) the name of the complaining party, 2) sufficient information to identify the material being complained of and its location, 3) contact information for the complaining party, 4) a statement that the complaining party has a good faith belief that the material complained of is defamatory or harmful in nature, and 5) a statement made by the complaining party that the information in the notification is accurate.[208] The proposed amendment also states that if the notification is incomplete, it will be determined that the ISP did not have actual notice.[209]

---

[200] *See supra* Part IV.A (proposed amendment § 230(c)(1)).

[201] *See supra* note 201.

[202] *See supra* Part IV.A (proposed amendment § 230(c)(3)(B)).

[203] *See supra* Part II.C (describing the counter-intuitive effect created by *Prodigy* and *Cubby* decisions that motivated Congress to pass the CDA).

[204] *See* Kaplan, *supra* note 167 (noting that Congress aimed to encourage monitoring and filtering of harmful content).

[205] *See supra* Part IV.A (proposed amendment § 230(e)).

[206] *See supra* Part IV.A (proposed amendment § 230(e)(1)-(3)).

[207] *See supra* Part IV.A (proposed amendment § 230(f)(1)(a)-(e)).

[208] *See* supra note 207.

[209] *See supra* Part IV.A (proposed amendment § 230(f)(2)(a)).

However, if the notification gives the contact information for the complaining party and gives the identification of the material complained of, the notification will be considered to have substantially complied with the section.[210] Nevertheless, the proposed section provides instructions that allow the court to determine whether the notification was reasonable under the circumstances.[211]

Furthermore, Congress could amend the "definitions" section of Section 230 by defining the term "distributor" and "actual knowledge."[212] These definitions apply common law principles of defamation, as well as the above stated case law which states that under some circumstances ISPs are distributors and should be treated as such.[213] These proposed amendments not only correct the inconsistent interpretations of Section 230, but also promote a notice-based liability.[214] Furthermore, this notice-based liability is consistent with common law principles of defamation, but does not violate the First Amendment.[215]

The proposed amendment adds a bad-faith provision.[216] This provision makes users of the Internet accountable for not sending frivolous and bad-faith takedown requests to ISPs. If a user does send a takedown request to an ISP in bad-faith, and the material is subsequently removed, the user could be liable for damages, including attorneys' fees incurred by the alleged defamer or service provider.[217] Finally, proposed Section 230(h)(1) allows ISPs to remove or disable material upon actual notice of defamatory material.[218] When an ISP has a good-faith basis for removing or disabling the allegedly defamatory material, the ISP will not be subject to liability.[219] Although some speech may inevitably be censored, the First Amendment does not protect defamation as a form of speech,[220] and thus, removal of such speech would not burden the goal of encouraging free speech on the Internet. This amended section will entitle and encourage ISPs to be self-regulating.[221] Therefore, these ISPs may remove some speech; however, this will still implement very little civil regulation while still allowing people to speak their minds.[222] The above amendments coupled with the bad-faith provision of the proposed bad-faith provision creates an equal playing field for

---

[210] *See supra* Part IV.A (proposed amendment § 230(f))2)(b)).
[211] *See supra* Part IV.A (proposed amendment § 230(f)(3)).
[212] *See supra* Part IV.A (proposed amendment § 230(f)(5)-(6)).
[213] *See* discussion *supra* Part II.
[214] *See supra* note 213.
[215] *See supra* note 213.
[216] *See supra* Part IV.A (proposed amendment § 230(g)).
[217] *See supra* note 216.
[218] *See supra* Part IV.A (proposed amendment § 230(h)(1)).
[219] *See supra* note 218.
[220] *See* discussion *supra* Part II.
[221] *See supra* Part V.B.i.
[222] *See supra* note 221.

the protection of a person's reputation, an ISP's right to limited liability, and the public's concern for free expression.

2. Instructional Guide to Judicial Interpretation

When faced with the issue of whether an ISP is a publisher or distributor for purposes of liability, courts should use the common law definitions as stated in the proposed amendments to section 230.[223] It should be noted that while an ISP is protected as an interactive service provider under the CDA, "internet service providers are only a subclass of the broader definition of interactive service providers protected by the [CDA]."[224] Under section 230, an Internet website is considered a "provider or user of an interactive computer service."[225] However, whether or not the ISP is a publisher or distributor for purposes of the statute will rest on whether the ISP knew or had reason to know of the defamatory material. This is a notice-based standard.

The court is advised on what constitutes reasonable notice. If the notice meets the elements laid out in the proposed amendment, the ISP will be found to have actual knowledge of the defamatory content and, thus, be a distributor. This proposed amendment stated above is based on an actual knowledge standard because a constructive notice rule could create the danger that ISPs would overwhelmed with frivolous take-down requests. The constructive knowledge rule assumes that a reasonable ISP should have known about the defamatory material and in effect, monitors all the content on its websites.[226] This rigid constructive knowledge standard would have a chilling effect on free speech by causing some ISPs to shut down their websites or remove content that is not defamatory in an effort to shield themselves from liability.

Black's Law Dictionary defines "actual knowledge" as "direct and clear knowledge . . . . that would lead a reasonable person to inquire further."[227] The application of an actual knowledge standard of distributor liability would be provide a fair balance between the exercise of responsibility by ISPs and the first amendment right to free speech on the Internet. An ISP may acquire actual knowledge of defamatory material by either receiving a complaint or by noticing the material itself, although it would have no affirmative duty to monitor its own websites. Furthermore, the proposed amendment does allow some lee-

[223] *See supra* note 216.

[224] Am. Jur. 2d. *Computers and the Internet* § 63.

[225] *Id*. § 63; 47 U.S.C. § 230 (f)(2) (2006). "The term '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." *Id*.

[226] *See* Black's Law Dictionary 950 (9th ed. 2009). Constructive knowledge is "knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." *Id.*

[227] *Id.*

way with the rigid notice requirement in the form of court discretion. This provision allows a court to determine in light of the circumstances whether the notice was reasonable or not.

For example, this may take in consideration the number of times a complaining party gave notice to the ISP weighed against how large an ISP is. Take an ISP such as Google, for example. Google is ranked number one in the United States for user traffic.[228] The number of reports it could potentially receive daily would be outstanding. Therefore, if a complaining party only notified Google once of defamatory material posted on one of its websites, a court may, in its discretion, find that this was inadequate notice for purposes of liability. However, if the complaining party can prove that it notified Google ten times and Google still did not remove the material expeditiously, then the court could find that Google knew or had reason to know of the defamatory material. This is further imposing the negligent standard of defamation on the ISP. If the plaintiff can prove that the material was defamatory and that Google was negligent (i.e. that it did not remove the material expeditiously, was negligent in not opening the notice, or was negligent in some other form), Google can be held liable as a distributor of defamation because it knew or had reason to know that the material was defamatory and it failed to act. If the court determines that the ISP is not sufficiently notified of the defamatory material, then the court should find that the ISP is a publisher and therefore immune from liability.

3. WHY THE PROPOSED AMENDMENT WOULD BE PERMISSIBLE UNDER THE FIRST AMENDMENT

"There is no reason inherent in the technological features of cyberspace why First Amendment and defamation law should apply differently in cyberspace than in the brick and mortar world."[229] Critics, like Daniel Solove, believe that the courts have interpreted Section 230 of the CDA too broadly by applying too much immunity, which eliminated the incentive to promote a balance between the First Amendment right of free speech and privacy.[230] This interpretation applauds harmful free speech at the price of one's reputation.[231] As a result, a slew of websites have been created to encourage people to spread gossip and rumors.[232] These websites prosper under the court's interpretation of Section 230's broad immunity.[233]

---

[228] Alexa, http://www.alexa.com/siteinfo/google.com (last visited Mar. 21, 2011).
[229] Batzel v. Smith, 333 F.3d 1018, 1020 (9th Cir. 2003).
[230] SOLOVE, *supra* note 165, at 159.
[231] *Id*.
[232] *Id*.
[233] *Id*.

It has long been held that there is no constitutional value in defamatory statements.[234] "Although existing law lacks nimble ways to resolve disputes about speech and privacy on the Internet, completely immunizing operators of websites works as a sledgehammer. It creates the wrong incentive, providing a broad immunity that can foster irresponsibility."[235] The broad immunity afforded by the CDA must be abolished because the Internet is no longer a new medium needing to grow.[236] If the CDA [Section 230] keeps giving immunity to persons who posts defamatory content written by third parties, it is likely that these persons will purposefully post this defamatory material in order to attract an audience.[237]

"Because the Internet is no longer in its infancy, it is time to amend the CDA to adapt to the times and to strike a better balance between Congress' desire to promote self-regulation of Internet content and an individual's right to be free from defamatory Internet statements."[238]

Solove advocates for an alternative interpretation to Section 230 so that it would not eliminate distributor liability, which is a notice type base of liability. [239] A distributor will not have immunity under Section 230 if one knows or has reason to know that something is defamatory or invasive of privacy.[240] The proposed amendment imposes this type of distributor liability.[241]

First Amendment issues may arise when defamation laws start to "overdeter" and cause prospective speakers to engage "in undue self-censorship to avoid the negative consequences of speaking."[242] However, critics still argue that traditional defamation laws should apply to the Internet.[243] These critics believe that Congress should clarify its intent in enacting the CDA by issuing guidelines that follow traditional common law standards of liability for distributors of material who have actual notice of defamatory material.[244] This liability could also extend to re-posters of material.[245] When a re-poster of material has actual knowledge that a statement is defamatory, distributor liability could easily apply to the re-poster because individual users are responsible for the monitoring of considerably less material than an

---

234 Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

235 Solove, *supra* note 165, at 159.

236 Troiano, *supra* note 41, at 1465-66.

237 *Id*. at 1466.

238 *Id*. at 1451.

239 Solove, *supra* note 165, at 154.

240 *Id*.

241 *See supra* Part IV.A (proposed amendment § 230(c)(3)(A)).

242 Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Disclosure in Cyberspace*, 49 Duke L.J. 855, 888 (2000).

243 *See, e.g.*, Troiano, *supra* note 41, at 1466-67.

244 Annemarie Pantazis, Note, Zeran v. America Online, Inc.*: Insulating Internet Service Providers From Defamation Liability*, 34 Wake Forest L. Rev. 531, 555 (1999).

245 *Id*.

ISP.[246] A notice-base standard is firmly rooted in the First Amendment protection of free speech.[247]

Some critics believe that a return to common law distributor liability would place a huge burden on free speech.[248] However, "[i]t is important to emphasize that distributor liability would not require [internet service providers] to review individual messages before they are posted on the Internet. Instead, [internet service providers] would only be required to take reasonable measures after receiving notice that a particular message is defamatory."[249]

This notice-base liability for distributors is analogous to the Digital Millennium Copyright Act ("DMCA"), which requires an ISP to take action only when it has actual notice about use of copyrighted material.[250] Under Section 512(c) of the DMCA, ISPs will receive immunity for copyright infringement so long as: (1) the ISP does not have actual knowledge of the infringement, is not aware of facts indicating infringement, or in the case where it does receive knowledge of the infringing material, it prevents the use of such infringing material; (2) the ISP does not receive any financial benefit from the copyrighted material; and (3) the ISP expediently removes the copyrighted material upon receipt of written notice of the infringing content.[251] The DMCA also does not require ISPs to monitor content, but they must remove the material upon discovery of the infringement.[252] Thus, under the DMCA, an ISP will not receive federal immunity if it obtains actual knowledge of infringing material and fails to swiftly remove or disable the copyrighted material.[253]

"Although, Congress wished to 'preserve the vibrant and competitive free market that presently exists for the Internet,' the [CDA] should not necessarily protect [internet service providers] from all torts related to the publication of third-party statements."[254] This "vibrant speech" policy behind Section 230 is not furthered by the immunizing of an

---

[246] *Id*.

[247] Jae Hong Lee, Note, Batzel v. Smith *&* Barrett v Rosenthal*: Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 489 (2004); *see also* Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991)(noting that the requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed is rooted in the First Amendment).

[248] Lee, *supra* note 248, at 492.

[249] *Id*.

[250] *Id*.; *see* Digital Millennium Copyright Act § 202, 17 U.S.C. § 512 (2006).

[251] 17 U.S.C. § 512(c)(1).

[252] *Id.* § 512(c)(1).

[253] *Id.* § 512(c)(1). In most instances, the internet service provider will acquire actual knowledge of the copyright infringement by receipt of a complaint. The proposed amendment mimics the DMCA's procedure, which requires the person filing the complaint to provide sufficient information to identify defamatory material and contact the internet service provider. *See* § 512(c)(3).

[254] David Wiener, Comment, *Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After* Zeran?, 39 SANTA CLARA L. REV. 905, 929-30 (1999) (quoting from congressional findings noted in the CDA's enactment).

ISP who knows or has reason to know that a statement is defamatory, and does not take steps to remedy the statement.[255] Instead, the current interpretation creates an incentive for ISPs against self-monitoring when posting content that could potentially be defamatory and, thus, is not protected by the First Amendment.[256] Congress "did not intend to provide a free pass to someone who acts with impunity and posts information that he or she knows to be false simply because he didn't write it."[257]

"Some argue that cyberspace, unlike other forums of expression, is the ultimate free speech medium, where everybody potentially has the right to vindicate themselves through the medium in which they were allegedly wronged, and by which the Internet could self-regulate."[258] Defamation victims could simply reply to the statement and claim that it was untrue, thereby creating an instant response.[259] While this could potentially be an option, it "provides no deterrent effect for malicious postings because no one is potentially accountable under the law for their actions."[260] It also seems that giving victims the only option of just replying back to the statement will be a kind of "self-help" found inadequate for private individuals in the *Gertz* decision, one of the leading common-law defamation cases.[261] Furthermore, the posters who write such harmful content do not have a First Amendment right in stating defamatory content.[262] Also, simply encouraging the victim to just reply back to a defamatory statement is ineffective because people who initially read the defamatory statement may not go back to the same website to read the victim's reply, thus the damage sustained by the defamatory statement will have already been caused.[263]

It has long been held that "[l]ibelous utterances [are] not . . . within the area of constitutionally protected speech . . . . "[264] Defamation and libelous speech "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[265] From a lay person's perspective, the term "opinion" usually means "statements couched in loose, figurative, or vituperative language, statements that are purely subjective expressions of the speaker's point of view, and statements that contain 'deductions

---

[255] Blumstein, *supra* note 42, at 419.
[256] *Id*.
[257] *Id*. at 420. (*citing* Kaplan, *supra* note 167).
[258] Blumstein, *supra* note 42, at 423.
[259] *Id*.
[260] *Id*. at 424.
[261] *Id*. at 344.
[262] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
[263] Blumstein, *supra* note 42, at 424.
[264] Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).
[265] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

from known data or personal observation."'[266] The First Amendment extends a protection of free expression for statements that are not objectively factual, either because no one could reasonably interpret that these assertions are factually true or because such assertions are not provably false.[267] These types of expressions are inherently permissible and receive First Amendment free speech protection because they offer "an important contribution to public discourse."[268] But when an individual abuses the right to free speech and defames another, that person and whoever distributes the material should be held responsible. Unfortunately, the current interpretation of the CDA precludes defamed victims from obtaining any remedy from those that distribute such material. Therefore, Congress should amend Section 230 of the CDA.

Amending Section 230 of the CDA to include a distributor, notice-base liability would unnecessarily hinder the exercise of free speech with minimal regulation on the Internet.[269] Users would still be able to speak their minds and express themselves with very little civil liability.[270] The amended Section 230 would simply apply well-established common-law defamation principles while implementing an exception requiring ISPs acting like publishers to self-regulate.[271] Although the ISPs may be required to remove material when notified of its defamatory content, this regulation would be consistent with Congress' original intent of encouraging these providers to be self-regulating.[272] Furthermore, the 1st amendment does not protect defamation, so removal of such material would not burden the exercise of free speech.[273] Therefore, these ISPs may remove some speech; however, this will still spur very little government regulation while still allowing people exercise their First Amendment right to free expression.[274]

CONCLUSION

The Internet is a dynamic form of communication. Its ability to enrich the lives of its users by information and dialogue dissemination is unquestionable. However, the virtues of the Internet are countered by the vice of its ability to ruin people's lives. Internet defamation is an increasing problem that must be remedied. Like the girl Jane we mentioned in the introduction, people are often helpless when a per-

---

[266] Lidsky, *supra* note 243, at 921 (*quoting* Diane Leenheer Zimmerman, *Curbing the High Price of Loose Talk*, 18 U.C. DAVIS L. REV. 359, 398-99 (1985)).
[267] *Id.* at 926.
[268] *Id*. at 942.
[269] *See supra* Part IV.B.i-ii.
[270] *See supra* note 269.
[271] *See supra* note 269.
[272] *See supra* Part II.B.i.
[273] *See supra* note 214.
[274] *See supra* note 215.

son defames them. The flawed interpretation of Section 230 successfully abandons the original intent of the statute, traditional defamation and First Amendment laws, and the general welfare of the victims of defamation. Nevertheless, an amendment to the CDA would solve this problem and effectively further the First Amendment. A notice-base distributor form of liability would encourage ISPs to be self-regulating, without imposing government interference on users' First Amendment right to free expression and speech. In conclusion, the proposed amendment would only have positive effects on the First Amendment. It also could possibly save the reputation of Jane, and maybe one day, quite possibly your reputation as well.