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## Defending Section 230: The Value of Intermediary Immunity

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## ARTICLES

### DEFENDING SECTION 230: THE VALUE OF INTERMEDIARY IMMUNITY

*Jeff Kosseff\**

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## I. INTRODUCTION

Twenty years ago, consumers could bring widespread attention to their complaints only if newspapers or television stations reported their problems. Now websites such as ConsumerAffairs.com provide angry customers with a platform. ConsumerAffairs.com allows consumers to post reviews about businesses, and it enables businesses to post responses to those concerns. ConsumerAffairs.com deletes consumer reviews at its discretion.<sup>1</sup> Many of the reviews have upset businesses, including Nemet Chevrolet, a franchised automobile dealer that was the subject of six reviews.<sup>2</sup> Thomas of Oakland Gardens, NY, claimed the company misstated the price it would pay for a trade-in car.<sup>3</sup> “As my wife said they are not like you when you promised to protect life and property as a firefighter your word was good and you fulfilled your promise. I just wanted you to know how Nemet Motors treats firefighters . . . ,” Thomas wrote.<sup>4</sup> ConsumerAffairs.com refused to remove those reviews.<sup>5</sup> Nemet sued ConsumerAffairs.com for defamation and tortious interference with business expectancy.<sup>6</sup> The district court held that Nemet could not sue ConsumerAffairs.com over the third-party postings because Section 230 of the Communications Decency Act immunizes a “provider or user of an interactive computer service” from lawsuits over content “provided by another information content provider,” and the Fourth Circuit affirmed.<sup>7</sup>

*Nemet Chevrolet* is typical of many claims that are dismissed under Section 230, which Congress passed in 1996.<sup>8</sup> Plaintiffs seek to hold websites accountable for damaging content posted by third parties, and courts typically deny these claims under Section 230.<sup>9</sup> Many commentators have argued that such opinions are reasons to limit or repeal Section 230’s immunity for websites.<sup>10</sup> The critics argue that Congress never contemplated such broad immunity for websites from defamation and other torts.<sup>11</sup> But this Article argues that such changes

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1. ConsumerAffairs.com, Frequently Asked Questions, <http://www.consumeraffairs.com/consumerism/faq.html> (last visited on Jan. 3, 2010).

2. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com*, 564 F. Supp. 2d 544, 547 (E.D. Va. 2008).

3. *Id.* Complaint at 9, at 544 (Case No. 1:08cv254 (GBL)).

4. *Id.*

5. *Id.* at 5.

6. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com*, 591 F.3d 250, 252 (4th Cir. 2009).

7. *Id.* at 253-54, 258.

8. Jae Hong Lee, Batzel v. Smith & Barrett v. Rosenthal: *Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 470, 473 (2004).

9. *Id.* at 470.

10. *Id.* at 473.

11. *See, e.g., id.* at 493 (“The broad construction of 230 by the courts is not entirely

are imprudent and inconsistent with Congress's intentions and First Amendment principles. Section 230 has allowed the Internet to flourish as an open medium in which all consumers—rather than just the websites' employees—provide content.<sup>12</sup> If websites were not immune for third-party content, the Internet likely would not be as open as it is today.

Part II of this Article reviews Congress's reasons for passing Section 230: to encourage the growth of the Internet by relieving intermediaries from liability for the content posted by third parties while expressly encouraging them to impose their own content controls. Although some critics have attempted to argue that Section 230 applies only to a small subset of publishers and not to common-law "distributors," I argue that their interpretation is contrary to the statute's plain text and legislative history and that distributors such as websites are included within the broader category of "publisher" covered by Section 230.

Part III reviews First Amendment doctrine, including libel law and the wire service defense, to demonstrate the similarities between the reasons for First Amendment protections and the arguments in favor of Section 230. Although current First Amendment doctrine does not require the breadth of Section 230's immunity, Section 230 addresses many First Amendment concerns that led courts to immunize intermediaries in other contexts. Because Congress passed Section 230 in the Internet's infancy, most courts have not had the chance to determine the scope of constitutional immunity that Internet providers and websites should receive.

Part IV argues that as applied, Section 230 is not as overbroad or unfair as many critics allege. This part first examines many recent decisions in which courts have declined to extend Section 230 immunity to intermediaries and demonstrates that the immunity is not as broad as some critics might suggest. It then surveys the cases in which courts have immunized intermediaries under Section 230 and concludes that much of the speech would be protected even without Section 230. This Article presents the increasingly used alternative to suing the intermediary: using a court's subpoena power to sue the anonymous

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consistent with the intent of Congress and has produced a number of troubling results."); Jennifer Benedict, *Deafening Silence: The Quest for a Remedy in Internet Defamation*, 39 CUMB. L. REV. 475, 509 (2009) ("Currently, the law allows a type of 'wild west' where anything goes, and people are left alone to fend for themselves.").

12. The rapid growth of third-party content can be seen in the success of blogs and social networking websites such as Facebook, which rely on content created by its users. In August 2009, 17% of U.S. Internet usage was consumed by social networks and blogs, three times the percentage of time that was spent on such sites a year earlier. Press Release, Nielsen Co., Nielsen Reports 17 Percent of Time Spent on the Internet in August Devoted to Social Networking and Blog Sites, Up from 6 Percent a Year Ago (Sept. 23, 2009) (on file with author).

poster. The Article finally reviews the practices and policies regarding third-party comments of the largest social networking and news websites, and it finds consumers' expectations for civility and standards drives many of the websites to voluntarily remove objectionable content. It is more consistent with First Amendment values to allow intermediaries—rather than the courts—determine content standards. Websites and Internet service providers have tailored their practices and policies in response to consumer demand. This free-market approach to free speech is well established in the First Amendment.

This Article does not trivialize the legitimate concerns about Section 230. With the vast amount of information available on the Internet, it is easy for an anonymous comment to ruin an individual's reputation who understandably wants to recover damages. But the fairest method of recovery is to sue the person who posted the damaging content, not the passive intermediary that played little or no role in the creation.

Rather than propose sweeping changes to Section 230 or alternative interpretations of the statute, this Article argues that judicial interpretations of Section 230 are correct as matters of statutory law and policy. The general reasons for Section 230's broad immunity are supported by constitutional decisions that limit liability for speech in other contexts. Although Internet service providers and websites have not faced significant tort liability, they have adopted many of the content protection measures that Congress envisioned when it passed the unprecedented statutory immunity.

## II. CONGRESSIONAL PURPOSE OF SECTION 230

Courts have broadly applied Section 230 to websites that are sued over content posted by third parties.<sup>13</sup> Some critics have argued that this broad interpretation is inappropriate and contrary to Congress's intentions when it passed Section 230.<sup>14</sup> They argue that Congress never imagined the statute would provide sweeping immunity to websites. For example, one critic wrote that “[c]ourts have interpreted this immunity provision so broadly as to provide virtually complete immunity for Internet Service Providers (ISPs) from defamation liability for third-

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13. See *infra* Part IV.

14. See Michael H. Spencer, *Defamatory E-mail and Employer Liability: Why Razing Zeran v. America Online is a Good Thing*, 6 RICH. J.L. & TECH. 25, 9 (2000) (stating that Congress intended Section 230 to “force ISPs to stop policing their servers in order to minimize libel suits”); Carl S. Kaplan, *How is Libel Different in Cyberspace?*, N.Y. TIMES, Aug. 9, 2001 (“Ian Ballon, a lawyer with Manatt, Phelps & Phillips in Palo Alto and editor of a cyberlaw treatise, ‘E-Commerce and Internet Law (Glasser LegalWorks, 2001),’ said that he believed that many courts, including Judge Richman’s, have construed the scope of section 230 more broadly than Congress intended.”).

party content, a result that the original co-sponsors of the bill probably did not intend.”<sup>15</sup> Critics also have argued that the common-law distinction between “distributors” and “primary publishers” renders Section 230’s immunity inapplicable to websites.<sup>16</sup> But a closer examination of the reasons for Section 230 reveals that Congress anticipated such broad immunity for intermediary Internet service providers and websites.

### A. Congress Intended Broad Immunity With Section 230

First, it is important to examine whether the First Amendment places restraints on the depth of the immunity that Congress may confer to intermediaries. As Professor Rebecca Tushnet wrote:

My main concern is to show that Congress is free, within rather broad limits, to determine an appropriate intermediary liability regime. The First Amendment does not currently require a particular solution. That being said, if individuals’ speech should not be attributed to intermediaries when it is unlawful, we should at least consider ways in which intermediaries could be deterred from interfering with it when it is lawful. The current regime privileges access providers over both individual speakers and third parties harmed by those speakers’ speech. Sometimes that is a mistake, and it is not one that the First Amendment bars us from correcting.<sup>17</sup>

This Article argues that Section 230 is Congress’s explicitly chosen method of implementing First Amendment values. Section 230 balances the First Amendment need to limit intermediary responsibility for third party-content with the desire of Congress to encourage intermediaries to impose their own content standards. It is helpful to look at Congress’s reasons for passing Section 230. A review of the caselaw leading to Section 230’s passage and statements by members of Congress demonstrates that Congress intended for Section 230 to provide websites and Internet service providers with broad immunity from tort claims.

Common-law liability for republishers is articulated in the Restatement (Second) of Torts, which states that “one who repeats or otherwise republishes defamatory matter is subject to liability as if he

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15. Lee, *supra* note 8.

16. See *infra* Part II.B.

17. Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 988 (2008).

had originally published it.”<sup>18</sup> Courts recognized this common law principle, with one court enunciating a “black-letter rule that one who republishes a libel is subject to liability just as if he had published it originally, even though he attributes the libelous statement to the original publisher, and even though he expressly disavows the truth of the statement.”<sup>19</sup> As explained in the next section, courts have imposed constitutional constraints on this common-law rule by finding that the First Amendment provides some protection to intermediaries that are passive distributors.<sup>20</sup>

Two early cases involving online intermediary liability laid the foundation for Section 230’s passage. *Cubby, Inc. v. CompuServe, Inc.*<sup>21</sup> was the earliest defamation case involving an online intermediary. CompuServe provided bulletin boards and electronic information to people who dialed to this service via their modem.<sup>22</sup> Among CompuServe’s offerings was “Rumorville,” a daily online newsletter about the journalism industry, which was published by a CompuServe contractor.<sup>23</sup> Plaintiffs sued both the contractor and CompuServe, claiming they were defamed in the online newsletter.<sup>24</sup> The Court granted summary judgment for CompuServe, finding an important common-law distinction between publishers and distributors: “With respect to entities such as news vendors, bookstores, and libraries, however, New York courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation.”<sup>25</sup> Therefore, under *Cubby*, an Internet service provider or website is not liable if it has not been monitoring and editing third-party content and does not have a reason to know that the content is defamatory.

Four years later, a New York state trial court applied that rule in a decision that prompted the passage of Section 230. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*,<sup>26</sup> a company sued Prodigy, another online service provider, over comments posted by a third party about the company’s stock. An anonymous poster alleged that the

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18. Restatement (Second) Torts § 578 (1977). See *infra* Part II.B, for a discussion of the distinction between common-law liability for primary publishers and secondary publishers, also known as distributors.

19. *Hoover v. Peerless Publ’ns, Inc.*, 461 F. Supp. 1206, 1209 (E.D. Pa. 1978).

20. See *infra* Part III.

21. 776 F. Supp. 135 (S.D.N.Y. 1991).

22. *Id.* at 137.

23. *Id.*

24. *Id.* at 138.

25. *Id.* at 139 (internal quotations and citations omitted). See *infra* Part III.A, for a discussion of the First Amendment foundations for this limitation.

26. 1995 WL 323710 (N.Y. Sup. Ct. 1995).

company was perpetrating a “major fraud.”<sup>27</sup> The Court found that Prodigy, unlike CompuServe in *Cubby*, was a publisher because Prodigy enforced content guidelines by monitoring postings and using software to screen offensive postings:

By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and “bad taste”, for example, PRODIGY is clearly making decisions as to content . . . and such decisions constitute editorial control. . . . That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimize or eviscerate the simple fact that PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards.<sup>28</sup>

Therefore, under *Stratton Oakmont*, an intermediary could avoid tort liability for third-party content by refusing to impose any content controls. But if an intermediary began to exercise a slight amount of control over the content, it risked losing immunity.

Members of Congress reacted to that disparity. *Stratton Oakmont* was issued in 1995, just as many consumers began using the Internet as a household staple. Many groups were concerned about indecency on the Internet and argued that *Stratton Oakmont* would encourage indecent content on the Internet, because websites and service providers had an incentive to avoid monitoring. *Stratton Oakmont* provided ammunition to members of Congress who were seeking to pass a bill that immunizes ISPs and websites. They framed the court’s decision as one that penalizes online service providers for screening offensive content.<sup>29</sup> Online service providers such as Prodigy teamed with grassroots groups such as the Center for Democracy and Technology and the Electronic Frontier Foundation to lobby Congress for immunity.<sup>30</sup>

The provision’s text is fairly simple, and it contains two main rules: Section 230(c)(1) confers general immunity to Internet service providers and websites by preventing them from being treated as publishers of content created by third parties,<sup>31</sup> and Section 230(c)(2)

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27. *Id.* at \*1.

28. *Id.* at \*4.

29. Mary Jane Fine, *Mom Wants AOL to Pay in Child’s Sex Ordeal, She Calls Service Liable, Despite Law*, BERGEN REC., Apr. 19, 1998.

30. Press Release, Prodigy Services Company, Supported by its Competitors and in Congress, Prodigy Presses its Case in Online Libel Suit (July 26, 1995) (on file with author).

31. “No provider or user of an interactive computer service shall be treated as the



guarantees that the immunity is not abrogated by the online intermediary's effort's to screen out objectionable content.<sup>32</sup> This immunity does not extend to alleged intellectual property violations or alleged federal criminal violations.<sup>33</sup>

In the conference report for the Communications Decency Act, the conferees mentioned *Stratton Oakmont* as an impetus for the bill:

One of the specific purposes of this section is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.<sup>34</sup>

But Congress wanted more than a repeal of *Stratton Oakmont*. It wanted to spur unfettered growth of the Internet. The conference report stated that *Stratton Oakmont* was *one of* the reasons for Section 230, but it was not the only reason.<sup>35</sup> Congressman Bob Goodlatte, one of the bill's co-sponsors, described the need for the emerging Internet industry to have few constraints:

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publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1) (1998). Section 230 defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2). Courts have widely held that websites and Internet service providers are considered interactive computer services for the purposes of Section 230. *See, e.g.*, Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 670-71 (7th Cir. 2008); 47 U.S.C. § 230(e) (1998).

32.

No provider or user of an interactive computer service shall be held liable on account of--(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

47 U.S.C. § 230(c)(2) (1998).

33. 47 U.S.C. § 230(e) (1998).

34. H.R. REP. NO. 104-458, at 174 (1996) (Conf. Rep.).

35. *Id.*

There is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong.<sup>36</sup>

Critics of Section 230's broad immunity, such as Professor Daniel J. Solove, argue that Congress's true intent was not to provide absolute tort immunity, but to encourage content monitoring and that websites lose immunity once they receive notice of the allegedly tortious content.<sup>37</sup> But the text of Section 230 indicates that the congressional purpose was in fact broader. Congress was concerned with any government actors—including the judicial system—burdening the growth of the Internet. As the Seventh Circuit noted, the plain text of Section 230(c)(1) "is general," and although Congress passed the statute partly in response to *Stratton Oakmont*, "a law's scope often differs from its genesis. Once the legislative process gets rolling, interest groups seek (and often obtain) other provisions."<sup>38</sup> Had Congress only passed Section 230(c)(2), critics of the statute's broad application would be correct: the immunity would only apply to websites' attempts to edit and screen objectionable content. But Congress did not only pass Section 230(c)(2); it also included Section 230(c)(1). Therefore, the immunity conferred by the plain text is far broader.

Congress could have written Section 230 as an incentive: if websites screened content, they would receive immunity. But Congress did not do this, and moreover, such a system would be impracticable. It would be difficult for courts or Congress to determine the extent of content screening necessary for a website to be immune. Such a rule likely would lead to over-screening: websites would delete even unobjectionable content in an effort to ensure that they still received

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36. 141 CONG. REC. H8471 (1995).

37. See DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 154 (2007).

Section 230 might be read to grant immunity only before the operator of a website is alerted that something posted there by another violates somebody's privacy or defames her. If the operator of a website becomes aware of the problematic material on the site, yet doesn't remove it, then the operator could be liable.

*Id.*

38. *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008).

immunity. Congress instead gave the websites immunity for content that they have edited, but Congress did not require the editing in order to receive immunity.

Similarly, Congress could have passed a law requiring content screening, although that might have met separate First Amendment challenges similar to the anti-indecency provisions of the Communications Decency Act struck down in *Reno v. American Civil Liberties Union*.<sup>39</sup> Rather than penalize online service providers for failing to screen content, Congress provided them with broad tort immunity that applied regardless of whether they screen content. In his floor statement during debate on the bill, Representative Christopher Cox, the bill's sponsor, acknowledged that Congress could have imposed more regulations rather than confer immunity.<sup>40</sup> But adding regulations as technology is emerging, Representative Cox noted, would be unwise:

The message today should be from this Congress we embrace this new technology, we welcome the opportunity for education and political discourse that it offers for all of us. We want to help it along this time by saying Government is going to get out of the way and let parents and individuals control it rather than Government doing that job for us.<sup>41</sup>

#### *B. Congress Intended to Cover All Types of Publishers, Including Distributors*

The common law recognizes different types of publishers, including primary publishers and secondary publishers, known as distributors.<sup>42</sup> Under defamation common law, publishers were held to different liability standards depending on their classification.<sup>43</sup> Primary publishers, who played a role in the creation of the content, were strictly liable for defamation, regardless of whether they know of the falsity, subject to the First Amendment's requirements for actual malice in the case of public officials and public figures that emerged in 1964.<sup>44</sup> The

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39. 521 U.S. 844 (1997).

40. 141 CONG REC. H8460 (1995) [hereinafter Statement of Congressman Cox]

41. *Id.*

42. See RESTATEMENT (SECOND) OF TORTS § 581, cmt. C (1977); W. Page Keeton, PROSSER AND KEETON ON THE LAW OF TORTS § 113 (5th ed. 1984). Critics of Section 230 tend to use the term "distributors," because this distinguishes them from primary publishers. Defenders of the immunity refer to websites and ISPs as "secondary publishers." But the terms are interchangeable. *Barnes v. Yahoo!, Inc.*, 565 F.3d 560, 562 (9th Cir. 2009) ("Secondary publishers came to be known as distributors.").

43. *Barnes*, 564 F. 3d at 562.

44. See *infra* Part III.C, for a discussion of this constitutional limitation and how it relates

*Stratton Oakmont* court applied primary publisher liability to Prodigy because of its role in screening the content.<sup>45</sup> Secondary publishers, or distributors, are only liable for defamatory content if they know of the defamation.<sup>46</sup> This was the case in *Cubby*.<sup>47</sup> Critics of Section 230's broad application argue that Congress only intended the immunity to apply to primary publishers and not to secondary publishers.<sup>48</sup> Although this argument has merit, it does not comply with the bill's legislative history and text.

Courts generally have held that distributors such as ISPs and websites are among the "publishers" covered by the text of Section 230. A commonly cited opinion for this proposition is *Zeran v. America Online*,<sup>49</sup> which the Fourth Circuit issued a year after Section 230's passage. The plaintiff in *Zeran* sued America Online over allegedly defamatory postings created by an America Online customer.<sup>50</sup> The plaintiff claimed that America Online was liable because it failed to promptly remove the postings after the plaintiff complained.<sup>51</sup> The district court granted America Online's motion to dismiss based on Section 230,<sup>52</sup> and the plaintiff appealed, claiming that Congress did not intend to cover distributors such as America Online in Section 230.<sup>53</sup> The plaintiff argued that distributors are liable once they have notice that they are distributing the defamatory material, and because he provided that notice to America Online, the company was liable for damages.<sup>54</sup> Congress, the plaintiff argued, only intended to immunize Internet service providers in their role as primary publishers, as defined by common law.<sup>55</sup> The Fourth Circuit refused to narrowly construe Section 230's immunity. Noting that under defamation common law, "every repetition of a defamatory statement is considered a publication," the Court said that both primary publishers and distributors are considered publishers for the purposes of Section 230.<sup>56</sup>

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to Section 230 immunity.

45. *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, \*4 (N.Y. Sup. Ct. 1995).

46. See *infra* Part III.A, for a discussion of the First Amendment reasons for this limitation on distributor liability.

47. *Cubby, Inc. v. CompuServe, Inc.* 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991).

48. See *supra* note 8.

49. 129 F.3d 327 (4th Cir. 1997).

50. *Id.* at 328.

51. *Id.*

52. *Id.* at 330.

53. *Id.*

54. *Id.* at 331.

55. *Id.* at 331-32.

56. *Id.* at 332.

Distributor liability, the Court found, is a “subset, or a species, of publisher liability.”<sup>57</sup>

Although its definition of “publisher” has been widely adopted by state and federal courts, *Zeran* received criticism from academics.<sup>58</sup> Opponents of extending Section 230 broadly argued that Congress intended to immunize online “publishers” that edit content, indicated in *Stratton Oakmont*, and not passive “distributors,” as per the case of *Cubby*.<sup>59</sup> But the bill’s sponsors implied they intended to immunize both distributors such as CompuServe as well as an online service provider such as Prodigy, which took a more active role in content editing.<sup>60</sup> Representative Cox, one of Section 230’s primary sponsors, said he wanted to “encourage people like . . . CompuServe . . . [by] . . . [¶] . . . [¶] protect[ing] them from taking on liability such as occurred in the [*Stratton Oakmont*] case in New York that they should not face for helping us . . . solve this problem.”<sup>61</sup> The California Supreme Court, in reversing one of the few opinions that refused to apply Section 230 to distributors, held that the text of Section 230, combined with such legislative history, demonstrates that “Congress implemented its intent not by maintaining the common law distinction between ‘publishers’ and ‘distributors,’ but by broadly shielding all providers from liability for ‘publishing’ information received from third parties.”<sup>62</sup>

By passing Section 230, Congress recognized the free-speech value in allowing intermediaries to determine content standards and not

57. *Id.*

58. See, e.g., Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 640 (2001) (“The court ignored the argument that when a distributor has notice of defamation, its refusal to cease distribution justifies according it the same level of responsibility as a primary publisher.”); 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).

Although Congress wished to “preserve the vibrant and competitive free market that presently exists for the Internet,” the statute should not necessarily protect system operators from all torts related to the publication of third party statements. Immunizing a system operator who knowingly and willfully transmits inaccurate content on an electronic bulletin board does not promote the “vibrant speech” policy behind the CDA.

*Id.*; David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 168 (1997) (arguing that “both the text of the CDA and its meager legislative history support the conclusion that when Congress said ‘publisher,’ it meant ‘publisher,’ and not ‘distributor.’”)

59. See 39 SANTA CLARA L. REV. 905 at 929.

60. *Barrett v. Rosenthal*, 146 P.3d 510, 522 (Cal. 2006) (quoting 141 CONG. REC. H8470 (Aug. 4, 1995)).

61. *Id.*

62. *Id.*

holding them responsible for content created by third parties. As the Fourth Circuit explained in *Zeran*, “The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect.”<sup>63</sup> Therefore, Congress sought to allow websites to screen third-party content based on their own standards without worrying whether those standards were sufficient to protect them from defamation lawsuits.

Six years after the passage of the Communications Decency Act, the House Energy and Commerce Committee, where the bill originated, endorsed the interpretation in *Zeran*:

The Committee notes that ISPs have successfully defended many lawsuits using section 230(c). The courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence (See, e.g., *Doe v. America Online*, 783 So.2d 1010 (Fla. 2001)) and defamation (*Ben Ezra, Weinstein, and Co. v. America Online*, 206 F.3d 980 (2000); *Zeran v. America Online*, 129 F.3d 327 (1997)).<sup>64</sup>

Although such a congressional statement is not binding, it demonstrates that less than a decade after Section 230’s enactment, the committee who wrote the bill endorsed the interpretation in *Zeran*.

From Section 230’s legislative history, Congress wanted to promote robust growth of the Internet. Had Congress wanted to immunize websites and ISPs that do not qualify as distributors under the common law, Section 230 would have had little impact. It would allow courts to impose liability on a website that had knowledge of defamatory content but took no action to remove it.

Granted, Congress would have been able to eliminate these objections by stating that “publishers” in Section 230 means both primary publishers and secondary publishers, but such a distinction was unnecessary, as the Fourth Circuit demonstrated in *Zeran*.<sup>65</sup> In short, the critics who argue that distributors are not covered by Section 230 misinterpret Congress’s actions as well as the definition of “publisher.” Although the common law established multiple categories of “publisher,” there is no evidence in the legislative history that Congress *only* intended to cover one type of publisher.

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63. *Zeran v. America Online*, 129 F.3d 327, 331 (4th Cir. 1997).

64. H.R. REP. NO. 107-449, at 13 (2002).

65. 129 F.3d at 332.

### III. FIRST AMENDMENT FOUNDATIONS OF SECTION 230

Other critics concede that the courts have correctly interpreted the statute, but they argue that Congress should narrow its scope. For example, John Palfrey and Urs Gasser have argued that Congress should amend Section 230 to allow negligence claims against ISPs and websites when plaintiffs' safety has been threatened.<sup>66</sup> Jennifer Benedict has proposed that Congress amend Section 230 to create a "notice-and-takedown" system similar to that under the Digital Millennium Copyright Act: a potential plaintiff would first be required to notify a website about harmful content posted by a third party, and the website would be immune from liability only if it removed the content.<sup>67</sup>

Section 230's critics minimize the importance of First Amendment cases that have immunized intermediaries for decades. Because the Internet did not emerge as a common technology until the 1990s, these cases involved offline intermediaries, but the general principles are similar. Although Section 230's immunity extends beyond intermediary protections provided by the First Amendment, the reasoning behind Section 230 is supported in many First Amendment decisions from the past century. In particular, courts have found that the First Amendment limits liability for distributors of content and news organizations that publish allegedly defamatory articles about public officials and figures.<sup>68</sup> Courts also have adopted a First Amendment-based privilege for news organizations that retransmit stories written by wire services.<sup>69</sup>

#### A. *Smith v. California* and Distributor Liability

Under *Zeran* and its progeny, ISPs and websites that display third-party comments typically are considered distributors, which is a "subset" of publishers under Section 230. To argue that most of the ISPs and websites are primary publishers of third-party content would be a stretch, considering the vast amount of e-mail, blog postings, and other third-party content on the Internet. Therefore, any constitutional protections for distributors also should apply to most websites and ISPs. Although distributors' First Amendment protections are not as far-reaching as Section 230, the reasons for their more limited immunity are

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66. JOHN PALFREY & URS GASSER, *BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES* 106 (2008).

67. Benedict, *supra* note 11, at 475.

68. *See, e.g.*, *N.Y. Times v. Sullivan*, 376 U.S. 254, 264 (1964); *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1964).

69. *See, e.g.*, *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 931 F. Supp. 1487, 1492 (D. Ariz. 1996); *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1476-77 (S.D. Fla. 1986).

analogous to Congress's reasons for passing Section 230.

The roots of distributor First Amendment protection are in *Smith v. California*,<sup>70</sup> a 1959 Supreme Court decision. In *Smith*, a bookstore owner was convicted under a city ordinance that made it illegal “for any person to have in his possession any obscene or indecent writing, [or] book . . . in any place of business where . . . books . . . are sold or kept for sale.”<sup>71</sup> The bookstore owner challenged the ordinance as a violation of his First Amendment rights.<sup>72</sup> The Supreme Court agreed with the bookstore owner and invalidated the city ordinance, finding that it was unconstitutional to hold the distributor of obscene material strictly liable if the distributor did not know the material was obscene.<sup>73</sup> By eliminating any requirement of scienter for liability, the Court found, the city ordinance was unduly burdensome on free speech and the press.<sup>74</sup> The Court held that “this ordinance’s strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold.”<sup>75</sup> The Court’s concern with the ordinance is similar to Congress’s reasons for limiting website liability with Section 230:<sup>76</sup> the Court was concerned that excessive regulation would cause the distributor to over-censor the material that it distributes:

By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public’s access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.<sup>77</sup>

The liability limitation articulated in *Smith* is not as broad as Section 230. *Smith* only protects distributors who lack any knowledge of the content. Applying *Smith*’s First Amendment framework to an Internet defamation dispute, a website could be liable if a defamation plaintiff asked the website to remove a third party’s defamatory comments and

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70. 361 U.S. 147 (1959).

71. *Id.* at 148.

72. *Id.* at 149.

73. *Id.* at 150.

74. *Id.* at 152-53.

75. *Id.* at 152.

76. See Statement of Congressman Cox, *supra* note 40.

77. 361 U.S. at 152-53.



the website refused. Therefore, *Smith* does not require all of Section 230's immunity. But the reasoning behind *Smith* can easily apply to Section 230, and arguably that *Smith* should be seen as a floor for intermediary immunity rather than a ceiling. By passing Section 230, Congress recognized that even with a scienter requirement, intermediary liability would be an excessive burden on free speech. Therefore, Congress chose to extend *Smith*'s immunity regardless of scienter. The Court in *Smith* was concerned that strict liability would cause bookstores to over-censor in an effort to escape liability, and it determined that in the case of bookstores, a scienter requirement was adequate to prevent such over-censoring.<sup>78</sup> Compared to the vast amount of third-party content on many websites, however, the bookstore in *Smith* was responsible for a relatively small amount of information. The *Smith* Court might not have found scienter to be a reasonable protection for free speech on the Internet.

This argument is bolstered by Justice Black's concurrence in *Smith*. Although Justice Black agreed with the majority's finding that the ordinance was unconstitutional, he did not think that the holding provided sufficient protection for distributors' First Amendment rights. Justice Black wrote that the Court should have adopted a rule against any distributor liability for illegal content, regardless of whether the distributor knew of the obscenity: "The fact is, of course, that prison sentences for possession of 'obscene' books will seriously burden freedom of the press whether punishment is imposed with or without knowledge of the obscenity."<sup>79</sup>

Because prosecutors could easily demonstrate that bookstores knew about books' contents, Justice Black wrote, "the way is left open for state censorship and punishment of all other booksellers by merely adding a few new words to old censorship laws. Our constitutional safeguards for speech and press therefore gain little. Their victory, if any, is a Pyrrhic one."<sup>80</sup> Had Justice Black written the majority's opinion in *Smith*, Section 230's absolute immunity for distributors might have been constitutional doctrine.

Moreover, it is important to note that when the majority articulated the rule for distributor liability in *Smith*, it was imposing a duty on distributors that had a relatively finite amount of content; *Smith* involved the inventory of a bookstore. Thus, it might have been more practical to expect distributors to remove objectionable content upon their discovery of the issue. A half century later, with seemingly infinite data streaming across the Internet, it is more burdensome to expect a

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78. *Id.*

79. *Id.* at 155-56 (Black, J. concurring).

80. *Id.* at 156.

distributor or website to thoroughly investigate every complaint and take proper action. The over-censoring that concerned the Court—and particularly Justice Black—would be amplified in the Internet age with *Smith*'s scienter requirement as the sole protection.

*Smith v. California* should be viewed not as a constitutional rejection of Section 230, but as a minimum level of intermediary immunity that stems from the same concerns that prompted Section 230. Courts have applied the opinion's constitutional doctrine to immunize intermediaries in a variety of contexts. For example, in *Misut v. Mooney*,<sup>81</sup> a New York trial court dismissed a lawsuit against a contract printer involving editorials in a weekly newspaper that it printed. Although the printer reviewed the publications for "nudity, profanity and vulgarity"<sup>82</sup> before publishing, it "had no other input into the material which it printed. It did not undertake to confirm facts or to check sources. It did not exercise editorial judgment nor did it seek to determine the truth of the material which it printed."<sup>83</sup> Therefore, the Court concluded, the printer could not be found at fault for any defamatory material that it printed.<sup>84</sup> Courts have extended the logic of *Smith v. California*'s limited immunity for distributors of content beyond simply bookstores and physical distributors.<sup>85</sup> In *Auvil v. CBS*,<sup>86</sup> the plaintiffs sued three CBS affiliates over an allegedly defamatory broadcast on "60 Minutes."<sup>87</sup> Although the affiliates would have been able to preempt the programming, the Court granted a motion to dismiss because fault is required to impose liability on an intermediary.<sup>88</sup> After citing cases immunizing bookstores based on *Smith v. California*, the Court stated that "there is no logical basis for imposing a duty of censorship on the visual media which does not likewise attach to the print chain of distribution."<sup>89</sup>

### B. Wire Service Defense

Courts have extended the reasoning of *Smith v. California* to the wire service defense, which is even more similar, though far from identical, to Section 230. In these cases, courts have immunized newspapers for allegedly defamatory articles that they have published if the articles were written by the Associated Press or other wire

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81. 475 N.Y.S.2d 233 (N.Y. Sup. Ct. 1984).

82. *Id.*

83. *Id.*

84. *Id.* at 236.

85. *Id.*

86. 800 F. Supp. 928 (E.D. Wash. 1992).

87. *Id.* at 931.

88. *Id.*

89. *Id.* at 932.

services.<sup>90</sup> Although the Supreme Court has not ruled on the wire service defense, it has been widely adopted by state and federal courts.<sup>91</sup> The earliest wire service defense case was *Layne v. Tribune Co.*<sup>92</sup> in 1933. The plaintiff sued a newspaper that published two wire service reports about his alleged involvement in a criminal case.<sup>93</sup> The Court ruled that liability for a wire service article is prohibited by the common law:

The mere reiteration in a daily newspaper, of an actually false, but apparently authentic news dispatch, received by a newspaper publisher from a generally recognized reliable source of daily news, such as some reputable news service agency engaged in collecting and reporting the news, cannot through publication alone be deemed per se to amount to an actionable libel by indorsement, in the absence of some showing from the nature of the article published, or otherwise, that the publisher must have acted in a negligent, reckless, or careless manner in reproducing it to another's injury. This is in harmony with the theory that under the ancient rules of the common law, one who heard a slander was not liable for repeating it, if he did so in the same words, and at the same time gave in publishing it, his authority for the statement made.<sup>94</sup>

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90. See, e.g., *Waskow v. Associated Press*, 462 F.2d 1173, 1174, 1176 (D.C. Cir. 1972); *O'Brien v. Williamson Daily News*, 735 F. Supp. 218, 220-21, 225 (E.D. Ky. 1990), *aff'd*, 931 F.2d 893 (6th Cir. 1991); *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 931 F. Supp. 1487, 1491-92 (D. Ariz. 1996); *Winn v. Associated Press*, 903 F. Supp. 575, 579-80 (S.D.N.Y. 1995); *Holden v. Clary*, No. 92-313, 1992 WL 373145, at \*1, \*4 (E.D. Va. Sept. 17, 1992); *Winn v. United Press Int'l*, 938 F. Supp. 39, 44, 46 (D.D.C. 1996), *aff'd*, No. 96-7217, 1997 WL 404959 (D.C. Cir. July 14, 1997); *Brown v. Courier Herald Publ'g Co.*, 700 F. Supp. 534, 537-538 (S.D. Ga. 1988); *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1476-77 (S.D. Fla. 1987); *Gay v. Williams*, 486 F. Supp. 12, 16-17 (D. Alaska 1979); *Kendrick v. Fox Television*, 659 A.2d 814, 824 (D.C. 1995); *McKinney v. Avery Journal, Inc.*, 393 S.E.2d 295, 297 (N.C. Ct. App. 1990); *Van Straten v. Milwaukee Journal Newspaper-Publisher*, 447 N.W.2d 105, 112 (Wis. Ct. App. 1989); *Rust Commc'ns Group, Inc. v. 70 State St. Travel Serv. Ltd.*, 122 A.D.2d 584 (N.Y. App. Div. 1986); *Zetes v. Richman*, 86 A.D.2d 746, 747 (N.Y. App. Div. 1982); *MacGregor v. Miami Herald Publ'g Co.*, 119 So. 2d 85, 87 (Fla. Dist. Ct. App. 1960).

91. See, e.g., *Waskow*, 462 F.2d at 1173; *O'Brien*, 735 F. Supp. at 218; *Med. Lab. Mgmt. Consultants*, 931 F. Supp. at 1487; *Winn*, 903 F. Supp. at 575; *Holden*, 1992 WL at 373145; *Winn*, 938 F. Supp. at 39; *Brown*, 700 F. Supp. at 534; *Nelson*, 667 F. Supp. at 1468; *Gay*, 486 F. Supp. at 12; *Kendrick*, 659 A.2d at 814; *McKinney*, 393 S.E.2d at 295; *Van Straten*, 447 N.W.2d at 105; *Rust Commc'ns Group, Inc.*, 122 A.D.2d at 584; *Zetes*, 86 A.D.2d at 746; *MacGregor*, 119 So. 2d at 85.

92. 146 So. 234 (Fla. 1933).

93. *Id.* at 235.

94. *Id.* at 238.

Courts also base the wire service defense on the First Amendment. For example, in *Waskow v. Associated Press*, the plaintiff sued the *Washington Evening Star* newspaper over an Associated Press article it published, claiming that the plaintiff was sentenced to jail and fined due to protests of the draft law.<sup>95</sup> The D.C. Circuit affirmed the district court's dismissal of the defamation lawsuit, holding that "[n]ewspaper editors have no cause to doubt the accuracy of a major wire service dispatch, absent an apparent inconsistency or other indication of error."<sup>96</sup> Another court held that the defense "is consistent with modern First Amendment jurisprudence," because in a defamation lawsuit brought by a private party "involving a matter of public concern, liability can only be imposed if the plaintiff can establish falsity and intentional or reckless disregard for the truth . . . This approach is consistent with the rule that there can be no 'conduit liability' in the absence of fault."<sup>97</sup>

Section 230's similarity to the wire service defense is apparent in *Ben Ezra, Weinstein, & Co., Inc. v. America Online, Inc.*,<sup>98</sup> in which a publicly traded company sued America Online for allegedly publishing inaccurate stock price information. America Online displayed stock prices as it received them from a stock quote provider.<sup>99</sup> America Online occasionally informed the stock price provider when it learned of inaccurate information and it determined how to present the data to subscribers, but America Online played no further role in the content development.<sup>100</sup> The Tenth Circuit affirmed the district court's dismissal of the claim, holding that under Section 230, the stock price provider, not America Online, would be liable for any damages.<sup>101</sup> America Online's arrangement with the stock price provider is similar to that of a newspaper's relationship with a wire service. Just as newspapers choose the wire services they subscribe to and the stories they will publish, America Online chose the stock price provider and which stocks it would display to subscribers. The result in *Ben Ezra* is similar to the result that many courts would reach by applying the wire service defense.<sup>102</sup> Although news organizations select and place wire service stories, their role does not go far beyond that. They typically do not

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95. 462 F.2d 1173, 1174 (D.C. Cir. 1972).

96. *Id.* at 1175-76.

97. *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 931 F. Supp. 1487, 1492 (D. Ariz. 1996).

98. 206 F.3d 980, 983 (10th Cir. 2000).

99. *Id.*

100. *Id.* at 985.

101. *Id.* at 986.

102. *See also* *Blumenthal v. Drudge*, 992 F. Supp. 44, 49, 53 (D.D.C. 1998) (granting Section 230 immunity to America Online in a defamation lawsuit involving the Drudge Report, which America Online contracted to provide to its subscribers).

make significant changes to the stories' content, and they generally do not verify the facts provided by a reputable wire service. The newspapers are largely intermediaries for the wire services, and the courts have found that such intermediaries should be protected from liability under the First Amendment. This is similar to Section 230 cases, in which websites do not play a role in the creation of the third-party content. The websites may create topic-specific forums, for example, that might play a role in the third party's decision to create the content, but that alone is insufficient to remove Section 230 liability.

The wire service defense is narrower than Section 230's immunity in an important respect. The wire service defense only applies when a news organization publishes content that was provided by a reputable wire service such as the Associated Press. Section 230 applies regardless of the third party that created the content. Therefore, content protected by the wire service defense is more likely to come from a source that attempted to verify its accuracy. Although Section 230 is similar to the wire service defense, it is not identical. But the principles behind the wire service defense are similar to Section 230. The wire service defense and Section 230 both recognize that intermediary liability would burden free speech.

### C. Actual Malice Requirement

Because most Section 230 claims involve defamation, it is helpful to look at *New York Times v. Sullivan*,<sup>103</sup> which recognized First Amendment protection in some defamation claims. The Court held that public officials must demonstrate that defendants in defamation lawsuits acted with actual malice, finding that "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.'"<sup>104</sup> In *Sullivan*, a government official sued a newspaper over claims made in an advertisement.<sup>105</sup> After finding that the public official was required to demonstrate actual malice, the Court found that actual malice was not present in this case.<sup>106</sup> Part of its reasoning centered on the fact that the newspaper acted as an intermediary for the advertiser:

Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories

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103. 376 U.S. 254, 282-83 (1964).

104. *Id.* at 279.

105. *Id.* at 256.

106. *Id.* at 279-80, 285-86.

in the files does not, of course, establish that the Times “knew” the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times’ organization having responsibility for the publication of the advertisement.<sup>107</sup>

The *New York Times*, in publishing an advertisement, was more like an intermediary than a content creator, because it did not have substantial input into the advertisement’s content.<sup>108</sup> The Court broadened this protection three years later, ruling that *Sullivan*’s actual malice requirement applies to “libel actions instituted by persons who are not public officials, but who are ‘public figures’ and involved in issues in which the public has a justified and important interest.”<sup>109</sup>

An examination of Section 230’s intersection with defamation law would not be complete without a discussion of Ripoff Report. Ripoff Report is a website that allows consumers to post reviews of businesses.<sup>110</sup> Most of the reviews are overwhelmingly negative and accuse the businesses of perpetrating scams.<sup>111</sup>

The website’s motto is “Don’t let them get away with it . . . let the truth be known!”<sup>112</sup> Ripoff Report has a strict policy: it will never remove a third-party post, although it allows the businesses to post rebuttals below the review.<sup>113</sup> Of course, many businesses have not been happy with this policy and sued Ripoff Report, seeking damages and the removal of the original posts.<sup>114</sup>

Some businesses have accused Ripoff Report of extortion,<sup>115</sup> a claim that ironically led Ripoff Report to sue the newspaper that published those claims.<sup>116</sup> But businesses largely have not succeeded in their legal claims against Ripoff Report’s parent company. Courts have granted

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107. *Id.* at 287.

108. See Tushnet, *supra* note 17, at 1005 (“*Sullivan* was a case about the Times as intermediary, displaying another entity’s supposedly defamatory ad after only minimal screening.”).

109. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 134 (1967).

110. Ed Magedson, Ripoff Editorial (Sept. 1, 1999), <http://www.ripoffreport.com/consumerssaythankyou/aboutus.aspx>.

111. Latest Reports, <http://www.ripoffreport.com/search/recent/3months.aspx> (last visited Oct. 7, 2010).

112. Ripoff Report, <http://www.ripoffreport.com> (last visited Jan. 3, 2010).

113. About Us: Want to Sue Ripoff Report?, <http://www.ripoffreport.com/ConsumersSayThankYou/WantToSueRipoffReport.aspx> (last visited Jan. 3, 2010).

114. *Id.*

115. Sarah Fenske, *The Real Rip-Off Report*, PHOENIX NEW TIMES, Feb. 1, 2007, available at <http://www.phoenixnewtimes.com/2007-02-01/new/the-real-rip-off-report>.

116. Eric Goldman, *Ripoff Report Folks Sue Newspaper and Reporter for Defamation*, Apr. 30, 2008, [http://blog.ericgoldman.org/archives/2008/04/ripoff\\_report\\_f.htm](http://blog.ericgoldman.org/archives/2008/04/ripoff_report_f.htm).

Section 230 immunity to Ripoff Report in more than 20 cases.<sup>117</sup>

Ripoff Report's absolute prohibition on removal of comments may seem harsh, but it recognizes the First Amendment value in debate: rather than stifle speech that is allegedly inaccurate, this system allows the inaccuracies to be fought by more speech. The Supreme Court in *Gertz v. Robert Welch, Inc.*<sup>118</sup> found that private figures, unlike public figures and officials, were not required to demonstrate actual malice in defamation claims partly because the private figures did not have access to "self help," which it defined as "using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation."<sup>119</sup> The Ripoff Report, like most websites that accept third-party content, provides potential plaintiffs with precisely this form of self help.

Like *Smith, Sullivan* does not require the breadth of Section 230's immunity, but it is another example of the Court's recognition that expansive liability for content could lead to a reduction in speech. *Sullivan* demonstrates the Court's willingness to limit liability that could harm free speech.

The constitutional doctrines outlined in this section demonstrate the wide range of First Amendment protections that courts provide to intermediaries, particularly in defamation actions. Because Congress passed Section 230 at the cusp of the Internet's growth, courts never had the opportunity to develop similar First Amendment protections for website intermediaries that do not play a role in the development of the third-party content. Although it is impossible to know the precise boundaries of the constitutional doctrine that would have evolved had Congress never passed Section 230, it is clear that some level of First Amendment immunity would have emerged.

#### IV. SECTION 230 BALANCES FREE SPEECH AND FAIRNESS TO PLAINTIFFS

Although Section 230 has drawn criticism for the breadth of the immunity that it provides, a review of recent cases finds that courts have defined reasonable limits that conform to preexisting First Amendment

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117. About Us, *supra* note 113 ("Based on the protection extended by the CDA, Ripoff Report has successfully defended more than 20 lawsuits in both state and federal courts. Each time, the courts have consistently found that the CDA shields Ripoff Report from any claims seeking to treat it as the speaker or publisher of information posted by a third party."). See, e.g., *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929 (D. Ariz. 2008); *GW Equity LLC v. Xcentric Ventures LLC*, No. 3:07-CV-976-O, 2009 WL 62173 (N.D. Tex. Jan. 9, 2009).

118. 418 U.S. 323 (1974).

119. *Id.* at 344.

doctrine. In many cases where courts immunize websites under Section 230, the websites would have otherwise been immune because the plaintiff was a public figure or the plaintiff failed to state a claim. Courts have declined to extend Section 230 immunity to cases in which the defendant actively participated in the allegedly harmful conduct. Finally, even when Section 230 immunizes intermediary websites for allegedly harmful content, the defendant remains free to sue the third party that created the content. Although plaintiffs face a technical challenge of identifying the third party, U.S. courts have upheld subpoenas for identifying information when the plaintiff states a valid claim.

*A. Courts Refuse to Grant Immunity to Websites that Participate in Allegedly Harmful Acts*

Courts have found reasonable limits to Section 230. Courts will not grant immunity to websites that played a significant role in the creation of allegedly harmful content, although it sometimes is difficult to define the exact level of participation required to abrogate Section 230 immunity.

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*,<sup>120</sup> the Ninth Circuit refused to grant Section 230 immunity to a housing website that required consumers to answer questions about their sex, sexual orientation, and whether they have children.<sup>121</sup> The plaintiff alleged that this violated federal and California housing discrimination laws.<sup>122</sup> Noting that Section 230 “was not meant to create a lawless no-man’s-land on the Internet,”<sup>123</sup> the Court denied the website’s request to extend Section 230 to these activities.<sup>124</sup> “[T]he fact that users are information content providers does not preclude [the website] from also being an information content provider by helping develop at least in part the information in the profiles.”<sup>125</sup> *Roommates.com* is significant because it demonstrates that websites still can be held accountable for *their own* actions, just not the actions of third parties. *Roommates.com* means that to lose immunity, the website must take specific steps to encourage the illegal actions. In contrast, a civil rights group in Chicago filed a similar federal housing law complaint against Craigslist for allowing discriminatory housing advertisements.<sup>126</sup> In *Chicago*

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120. 521 F.3d 1157 (9th Cir. 2008).

121. *Id.* at 1161.

122. *Id.* at 1162.

123. *Id.* at 1164.

124. *Id.* at 1165.

125. *Id.*

126. *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d



*Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, the Seventh Circuit allowed Craigslist to receive Section 230 immunity because unlike Roommates.com, Craigslist did not present any questions or options that specifically encouraged the allegedly discriminatory advertisements.<sup>127</sup>

Although *Roommates.com* presents a unique fact pattern, its limitation on immunity is present in other appellate and district court opinions. For example, in *Doe v. SexSearch.com*,<sup>128</sup> the plaintiff used an online dating service to meet a person who said she was eighteen years old. They had sexual relations, and the plaintiff was arrested because the female was actually fourteen years old.<sup>129</sup> The plaintiff sued the website, alleging that the site caused him to be arrested.<sup>130</sup> The district court dismissed the lawsuit under Section 230.<sup>131</sup> On appeal, the Sixth Circuit affirmed the dismissal for failure to state a claim, but it declined to dismiss based on Section 230: "We do not adopt the district court's discussion of the Act, which would read § 230 more broadly than any previous Court of Appeals decision has read it, potentially abrogating all state- or common-law causes of action brought against interactive Internet services."<sup>132</sup> Therefore, under Section 230, a website could be liable for taking part in an illegal act. This is a reasonable limit that is in line with the First Amendment's limit on liability for intermediaries.

Courts have generally held that a website is not immune if it actively participates in the allegedly harmful conduct. This presents a tricky question: what constitutes active participation? For example, in *Goddard v. Google, Inc.*,<sup>133</sup> a putative class of consumer plaintiffs sued Google over allegedly fraudulent advertisements for mobile device services that ran on Google's "AdWords" network.<sup>134</sup> The Court dismissed the complaint, finding that the plaintiff did not sufficiently allege that Google participated in the advertisement's creation.<sup>135</sup> However, the Court gave the plaintiff 30 days to amend and refile the

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666, 671 (7th Cir. 2008).

127. *Id.* at 672 ("If [C]raigslist 'causes' the discriminatory notices, then so do phone companies and courier services (and, for that matter, the firms that make the computers and software that owners use to post their notices online), yet no one could think that Microsoft and Dell are liable for 'causing' discriminatory advertisements.").

128. 551 F.3d 412 (6th Cir. 2008).

129. *Id.* at 415.

130. *Id.*

131. *Id.* at 416.

132. *Id.*

133. *Goddard v. Google, Inc.*, No. C 08-2738JF(PVT), 2008 U.S. Dist. LEXIS 101890 (N.D. Cal. Dec. 17, 2008).

134. *Id.* at \*1-\*2.

135. *Id.* at \*26

complaint.<sup>136</sup> “If Plaintiff could establish Google’s involvement in ‘creating or developing’ the AdWords, either ‘in whole or in part,’ she might avoid the statutory immunity created by § 230.”<sup>137</sup> This is a fairly straightforward application of the Ninth Circuit’s *Roommates.com* decision: Google is not liable if it passively transmits a fraudulent advertisement. But Google is liable to the extent that it helped a company create an advertisement and commit fraud.

A number of recent court decisions have applied *Roommates.com* and found that the website defendant’s participation in the harmful acts amounted to a waiver of Section 230 immunity. In *Alvi Armani Medical, Inc. v. Hennessey*,<sup>138</sup> the plaintiff company sued a competitor under a state unlawful trade practices statute, claiming that the competitor’s website contained false and misleading information about the plaintiff. The Court refused to grant a motion to dismiss based on Section 230.<sup>139</sup>

The purpose of the CDA is to establish federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Although the majority of federal circuits have held that such immunity is broad, the statutory immunity provided for under the CDA does not apply without limitation.<sup>140</sup>

In *Capital Corp. Merchant Banking, Inc. v. Corporate Colocation, Inc.*,<sup>141</sup> the Court refused to dismiss a defamation claim against a website that allegedly created the content, finding that Section 230 “provides immunity for the removal of content, not the creation of the content.”<sup>142</sup>

In *Woodhull v. Meinel*,<sup>143</sup> the New Mexico Court of Appeals reversed a grant of Section 230 immunity to a website that solicited allegedly defamatory e-mail messages about the plaintiff and posted the e-mail messages online. The Court distinguished this from cases in which websites have received section 230 immunity.<sup>144</sup> In this case, the Court wrote, “[i]nstead of merely editing an email from a third party, Defendant apparently requested potentially defamatory material for her

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136. *Id.* at \*27.

137. *Id.*

138. 629 F. Supp. 2d 1302 (S.D. Fla. 2008).

139. *Id.* at 1307.

140. *Id.* at 1306 (internal citations and quotation marks omitted).

141. No. 6:07-cv-1626-Orl-19KRS, 2008 U.S. Dist. LEXIS 68154 (M.D. Fla. Aug. 26, 2008).

142. *Id.* at \*10-11.

143. 202 P.3d 126, 128 (N.M. Ct. App. 2008).

144. *Id.* at 133.

own stated purpose of ‘making fun of Plaintiff.’<sup>145</sup> The Tenth Circuit recently held that a website could not use Section 230 as a shield against regulators’ claims that it violated federal privacy laws.<sup>146</sup> In *FTC v. Accusearch, Inc.*, the Federal Trade Commission alleged that a website that sold personal information such as unlisted telephone numbers collected that data illegally.<sup>147</sup> The website argued that it merely received requests for information from customers and contracted the investigations to third-party researchers, so therefore the website was an intermediary protected by Section 230.<sup>148</sup> The Tenth Circuit rejected this defense, however, finding that by soliciting information requests from consumers and paying contracted researchers, the website “was responsible for the development of that content--for the conversion of the legally protected records from confidential material to publicly exposed information.”<sup>149</sup>

These cases demonstrate that Section 230 immunity is not as broad as some critics might suggest. Section 230 reasonably limits liability to harm caused by content that the website played an active role in creating. Granted, as with many legal rules, it is not always clear when this exception to Section 230 immunity applies. In close cases, both sides would be able to make compelling arguments that Section 230 does not apply. But after reviewing the cases, it becomes clear that for an online intermediary to lose its Section 230 immunity, it must play more than a passive role in the alleged injury. At a minimum, for a website to lose immunity it must take specific steps that specifically encourage the plaintiff’s injury, as in *Roommates.com*, but many courts are likely to require varying levels of “encouragement” to abrogate Section 230 immunity.<sup>150</sup>

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145. *Id.*

146. *FTC v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009).

147. *Id.* at 1190.

148. *Id.* at 1196.

149. *Id.* at 1199.

150. See Eric Goldman, *Website Initially Denied 230 Dismissal But Gets It on Appeal*, available at [http://blog.ericgoldman.org/archives/2009/12/website\\_initial.htm](http://blog.ericgoldman.org/archives/2009/12/website_initial.htm) (Dec. 21, 2009).

I believe there are some folks who believe that a website becomes liable for any user content it “encourages.” This is one possible reading of *Roommates.com*, and it underlies the government enforcement agencies’ (e.g., SEC and FTC) content endorsement theories. However, I don’t see precedent supporting that proposition at all.

*Id.*

### B. Many Section 230 Cases Involve Speech that Would Have Been Protected Under Other Laws

Courts have applied Section 230 in a manner consistent with the First Amendment's imposition of liability on the content creator rather than republisher. Section 230 plays the important role of articulating a policy preference of Congress: to encourage, but not mandate, websites to impose their own content controls on third-party material.

To get a sense of how Section 230 is currently applied, a survey was taken of every published opinion that dismissed a lawsuit under Section 230 in 2008 and 2009. Of the 28 opinions that granted Section 230 immunity, five were defamation lawsuits involving plaintiffs who arguably were public officials or public figures.<sup>151</sup> Had Section 230 not been passed, courts very likely would have dismissed these cases for lack of actual malice. It would be difficult for a court to demonstrate that allowing anonymous comments from third parties constitutes knowledge of falsity or reckless disregard of falsity. And five of the lawsuits that were dismissed on Section 230 grounds were also dismissed for other reasons involving failure to state a claim.<sup>152</sup> Additionally, in one opinion, the website had taken prompt action to remove the defamatory content upon receiving a complaint, even before a lawsuit was filed.<sup>153</sup>

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151. See, e.g., *Stayart v. Yahoo! Inc.*, 651 F. Supp. 2d 873, 877 (E.D. Wis. 2009) (dismissing invasion-of-privacy lawsuit filed by noted animal rights activist against search engines); *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 564 F. Supp. 2d 544, 546-47 (E.D. Va. 2008) (dismissing lawsuit against consumer review website filed by automotive dealerships); *Best Western Int'l, Inc. v. Furber*, No. CV-06-1537-PHX-DGC, 2008 U.S. Dist. LEXIS 70552, at \*3-4 (D. Ariz. Sept. 5, 2008) (dismissing lawsuit filed by association of hotel operators against website); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 930 (D. Ariz. 2008) (dismissing lawsuit under Section 230 filed by large consumer retailer against consumer review website); *Whitney Info. Network, Inc. v. Xcentric Ventures, LLC*, No. 2:04-cv-47-FtM-34SPC, 2008 U.S. Dist. LEXIS 11632, at \*6-7 (M.D. Fla. Feb. 15, 2008) (dismissing defamation lawsuit filed by large company against consumer review website).

152. See, e.g., *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735 (RMB), 2009 U.S. Dist. LEXIS 53246, at \*6-7 (S.D.N.Y. June 15, 2009) (dismissing a claim under both Section 230 and Fed. R. Civ. P. 12(b)(6) for failure to state a claim); *McDermott v. N.Y. Metro LLC*, 664 F. Supp. 2d 294, 296 (S.D.N.Y. 2009) (dismissing claim for lack of standing); *Mazur v. eBay Inc.*, No. C 07-03967 MHP, 2008 U.S. Dist. LEXIS 16561, at \*29, \*41-43 (N.D. Cal. Mar. 3, 2008) (dismissing lawsuit against website under Section 230 as well as failure to state a claim for fraud); *Kruska v. Perverted Justice Found., Inc.*, No. CV 08-0054-PHX-SMM, 2008 U.S. Dist. LEXIS 109347, at \*12-15 (D. Ariz. July 8, 2008) (dismissing lawsuit against website host both under Section 230 and because plaintiff failed to state a valid RICO claim); *Steele v. Mengelkoch*, 2008 Minn. App. Unpub. LEXIS 927, at \*2-6 (Minn. Ct. App. 2008) (dismissing claim against website under Section 230 and failure to state a claim of conspiracy).

153. See, e.g., *Doe v. Friendfinder Network, Inc.*, No. 07-cv-286-JL, 2008 U.S. Dist. LEXIS 38177, at \*4-5 (D.N.H. May 8, 2008) (dismissing lawsuit against dating website that removed profile of plaintiff that was created by a third party).

### C. Plaintiffs Still May Sue Anonymous Commenters

Critics of Section 230 argue that if websites are immune from lawsuits over third-party content, plaintiffs may find themselves victims of a tort but unable to recover.<sup>154</sup> This often is not true, because Section 230 does not prevent plaintiffs from suing the people who posted the allegedly tortious comments.<sup>155</sup>

Many of the most objectionable online comments are made anonymously, presenting a challenge to plaintiffs seeking to sue the commenters. But it has become increasingly common for plaintiffs to sue John Doe defendants and subpoena the websites for their identifying information as part of the preliminary discovery.<sup>156</sup> Even if anonymous commenters do not have to register with the websites, many sites log users' Internet Protocol addresses, which are unique sets of numbers associated with each Internet connection.<sup>157</sup> Once a plaintiff has the Internet Protocol address, the plaintiff can send a second subpoena for the Internet subscriber's identity to the Internet service provider who maintains that address.<sup>158</sup> Although this is an imperfect method, it demonstrates that it is possible to identify someone who posts anonymously, even if additional depositions and discovery are necessary.

This method of discovery has sparked a great deal of debate among academics and judges about the level of First Amendment protection to provide to anonymous online speech.<sup>159</sup> The general elements of a commonly used balancing test are: "1) a concrete showing of a *prima facie* claim of actionable harm; (2) the specificity of the discovery request; (3) the absence of alternative means to obtain the subpoenaed information; (4) a central need for the subpoenaed information to advance the claim; and (5) the Doe defendants' expectation of privacy."<sup>160</sup> Under such a test, a plaintiff must at least allege a concrete harm caused by the anonymous speech.<sup>161</sup> However, this First

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154. See PALFREY & GASSER, *supra* note 66.

155. *See id.*

156. For a list of the many recent attempts to unmask anonymous Internet commenters, see Citizens Media Law Project's website regarding anonymous website poster subpoenas, available at <http://www.citmedialaw.org/subject-area/subpoenas>.

157. Jonathan D. Jones, Note, *Cybersmears and John Doe: How Far Should First Amendment Protection of Anonymous Internet Speakers Extend?*, 7 FIRST AMEND. L. REV. 421, 424-25 (2009)

158. *Id.*

159. *Id.* at 422-23 (articulating the various First Amendment balancing tests used to determine whether to allow a subpoena for the identity of an online poster).

160. *Best Western Int'l, Inc. v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, at \*5 (D. Ariz. July 25, 2006).

161. *Id.*

Amendment balancing test does not present an insurmountable obstacle to a plaintiff with a valid claim. For example, in *Doe v. Individuals*,<sup>162</sup> two female law students sued dozens of John Doe defendants who posted allegedly defamatory comments about them on AutoAdmit, a law school discussion website. Although the website was immune from liability under Section 230, the plaintiffs subpoenaed the admissions website and many other websites and ISPs for information that would help them identify the posters.<sup>163</sup> One of the anonymous defendants moved to quash the subpoena, but the Court denied the motion, finding that “the plaintiff has shown sufficient evidence supporting a prima facie case for libel, and thus the balancing test of the plaintiff’s interest in pursuing discovery in this case outweighs the defendant’s First Amendment right to speak anonymously.”<sup>164</sup> This demonstrates that it is often possible for a plaintiff to use subpoenas to identify the person who caused the harm. The practice is becoming increasingly common. Ripoff Report even published instructions for plaintiffs to obtain subpoenas to identify the posters.<sup>165</sup>

In addition to ensuring that plaintiffs are compensated by the individual who actually caused the harm, subpoenas can serve an important deterrent effect: if individuals see that courts are willing to unmask them and hold them accountable for their anonymous postings, they likely will be more careful when posting material online. Holding the intermediary websites responsible also would provide a deterrent effect, but it likely would result in a sweeping and overbroad regulation of speech. In 2007, the average post-trial award in a defamation lawsuit was \$556,000.<sup>166</sup> This is a significant amount of money, and it is larger than the annual budget of many small community websites. If a website were held responsible for every anonymous comment posted on the site, it would only have three options to ensure that it avoids liability: 1) hire editors to screen every comment before it is posted, 2) take down every comment upon receiving complaints, and 3) prohibit third parties from posting online. Because many websites receive thousands of comments an hour, it is impractical to screen every comment. Additionally, even if editors screened every comment, it would be difficult for them to verify the accuracy without a long delay, destroying the real-time characteristics of the Internet. Although a notice-and-takedown system

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162. 561 F. Supp. 2d 249, 251 (D. Conn. 2008).

163. *Id.* at 252.

164. *Id.* at 257.

165. About Us: False Report About me on this Site!, <http://www.ripoffreport.com/ConsumersSayThankYou/FalseReport.aspx> (last visited Jan. 3, 2010).

166. Press Release, Media Law Resource Center, Annual Study Sees Lowest Number of Media Verdicts Since 1980, *available at* [http://www.medialaw.org/Content/NavigationMenu/About\\_MLRC/News/2008\\_Bulletin\\_No\\_1\\_.htm](http://www.medialaw.org/Content/NavigationMenu/About_MLRC/News/2008_Bulletin_No_1_.htm).

is more practical, that still could result in an unfair burden on speech. Such a system likely would result in automatic deletion, because websites generally do not have the ability or resources to investigate every claim of inaccuracy or other harm in third-party content. Although the Digital Millennium Copyright Act imposes a notice-and-takedown system for alleged copyright violations, it is easier to determine that a video or picture infringes copyright than determine whether an online bulletin board post is accurate.<sup>167</sup> Therefore, the likely result in holding intermediaries responsible would be prohibition of third-party content. All content would be created and provided by the websites, an online version of the print newspaper. Such a change would destroy the open community environment for which the Internet is known. Although it would prevent the small amount of harmful third-party speech that has spurred the criticism of Section 230, this change would stifle a much larger amount of socially valuable speech.

Although it is easier—and possibly more lucrative—to sue the website on which defamatory content appeared rather than an anonymous individual, it is fairer to seek compensation from the individual who actually created the allegedly harmful content. In his famous law review article examining fairness and reciprocity in tort liability, Professor George P. Fletcher captured the two often competing goals of tort law: 1) protecting individuals' interests, and 2) maximizing society's benefits: "Protecting innocent victims from socially useful risks is one issue. The relative rationality of defining risks and balancing consequences is quite another. That there are these two levels of tension helps explain the ongoing vitality of both paradigms of tort liability."<sup>168</sup>

Imposing liability on intermediaries, rather than on the parties who created the content, does not adequately accomplish either of those goals. Intermediary liability fails to adequately protect individual interests because it allows the actual tortfeasor—the creator of the defamatory content—to escape responsibility. Intermediary liability harms society because intermediaries' risk aversion reduces the amount of legal speech. By imposing liability on the intermediary, a court is harming society at large by reducing the amount of speech on the Internet. A tort system that imposes the costs on the person who engaged in the legal risk—the anonymous commenter—is the fairest method of imposing liability.

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167. Benedict, *supra* note 11.

168. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 572 (1972).

*D. Websites have Developed Content-Screening Policies Consistent with Congress's Intent*

Section 230 is based on the assumption that allowing a free marketplace of speech is the most efficient way to address concerns about content. By protecting websites from most civil lawsuits rather than forcing websites to censor certain content, Congress assumed that the market would demand a certain level of decency and civility online. That is precisely what has happened; websites and ISPs have developed a wide range of content standards and moderation policies in response to consumer demand.

Such a “marketplace” concept is rooted in free-speech principles. In 1644, John Milton wrote:

And though all the winds of doctrine were let loose to play upon the earth so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her Falsehood grapple; who ever knew Truth put to the wors in a free and open encounter?<sup>169</sup>

In the United States, the First Amendment partly developed with a similar marketplace foundation. Justice Holmes wrote “that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>170</sup>

Critics of Congress's approach in Section 230 could argue that an intermediary's content standards are no better than government censorship. Therefore, a truly free marketplace of speech has not emerged. Although this concern is valid, there is a key difference: websites develop content policies in response to customer demand. For example, a newspaper website is unlikely to allow users to post obscene comments or pornographic pictures beneath a news article; such behavior would drive away many customers. Conversely, a newspaper realizes that some readers value the ability to debate issues on its website, so the newspaper might hesitate before banning third-party comments altogether. Because they seek to please their customers, intermediaries are more likely than courts to develop content standards that conform to basic community values. Such standards may vary by website, allowing consumers to choose. In contrast, if courts or legislatures impose content standards, they likely will apply to all websites equally. This market-based system, of course, is not perfect.

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169. JOHN MILTON, *MILTON AREOPAGITICA*, 51-52 (John W. Hales, ed. Clarendon Press 3d. ed. 1884) (1644).

170. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).



Content standards developed by websites might please a majority of customers while harming a minority. But such a risk is present if the standards come from a court or legislature.

Congress intended to encourage online intermediaries to develop their own content policies, rather than have their standards set by courts. A review of online terms of service for popular websites shows they reserve the right to delete objectionable content.

It would be difficult to determine how often websites actually edit and remove third-party content, because such decisions often are made by internal legal departments and are not subject to public knowledge. But the terms of use provides a glimpse of content control that websites reserve and the standards set. I examined the terms of use for ten websites: the five largest news sites: CNN.com,<sup>171</sup> Yahoo! News,<sup>172</sup> Digg,<sup>173</sup> NYTimes.com,<sup>174</sup> and USATODAY.com,<sup>175</sup> and the five largest social networking sites: Facebook,<sup>176</sup> Myspace,<sup>177</sup> Twitter,<sup>178</sup> LinkedIn,<sup>179</sup> and Classmates.<sup>180</sup> Although the specificity and scope of the policies vary, two common elements are present in all of the terms of use policies: content guidelines and the reserved right of the website to edit content to conform to those guidelines.

The terms of use all generally prohibit offensive content, although they vary in detail.<sup>181</sup> CNN's policy is the least specific, though perhaps broadest, by prohibiting content which violates or infringes in any way upon the rights of others, which is unlawful, threatening, abusive, defamatory, invasive of privacy or publicity rights, vulgar, obscene, profane or otherwise objectionable, which encourages conduct that would constitute a criminal offense, give rise to civil liability or

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171. CNN Service Agreement, [http://www.cnn.com/interactive\\_legal.html](http://www.cnn.com/interactive_legal.html) (last visited Jan. 3, 2010).

172. Yahoo! Terms of Use, <http://info.yahoo.com/legal/us/yahoo/api/api-2140.html> (last visited Jan. 3, 2010).

173. Digg Terms of Use, <http://digg.com/tou> (last visited Jan. 3, 2010).

174. NYTimes.com Terms of Service, <http://www.nytimes.com/ref/membercenter/help/agree.html> (last visited Jan. 3, 2010).

175. USATODAY.com Terms of Service, <http://www.usatoday.com/marketing/tos.htm> (last visited Jan. 3, 2010).

176. Facebook Statement of Rights and Responsibilities, <http://www.facebook.com/terms.php?ref=pf> (last visited Oct. 27, 2010).

177. MySpace.com Terms of Use Agreement, <http://www.myspace.com/help/terms> (last visited Oct. 27, 2010).

178. Twitter Terms of Service, <http://twitter.com/tos> (last visited Jan. 3, 2010).

179. LinkedIn User Agreement, [http://www.linkedin.com/static?key=user\\_agreement&trk=hb\\_ft\\_userag](http://www.linkedin.com/static?key=user_agreement&trk=hb_ft_userag) (last visited Oct. 27, 2010).

180. Terms of Service Classmates Online, Inc., <http://www.classmates.com/cmo/reg/terms.jsp> (last visited Jan. 3, 2010).

181. *See supra* notes 171-80.

otherwise violate any law.<sup>182</sup> Many of the other websites have much more detailed content guidelines. For example, Myspace has a sixteen-part content policy that prohibits, among other things, “nudity, excessive violence, or offensive subject matter,” material that “solicits or is designed to solicit personal information from anyone under 18,” and any content that “exploits people in a sexual or violent manner.”<sup>183</sup> Because MySpace caters to younger consumers than a news site such as CNN, it makes sense that MySpace has more explicit and restrictive content guidelines. This is a restriction that developed because of marketplace demands. Similarly, NYTimes.com’s user policy recognizes the heated political arguments that some articles may prompt among commenters:

In a community full of opinions and preferences, people always disagree. NYTimes.com encourages active discussions and welcomes heated debate on the Service. But personal attacks are a direct violation of these Terms of Service and are grounds for immediate and permanent suspension of access to all or part of the Service.<sup>184</sup>

Just as all of the user policies set content guidelines, they also reserve the right to delete or edit third-party content that violates these guidelines. Generally, the websites give themselves latitude to edit third-party content without obligating themselves to edit. This is the type of content policy that Congress designed when it drafted Section 230; specifically writing a provision that allowed websites to edit some third-party content without becoming responsible for all third-party content on the site, as the *Stratton-Oakmont* case indicated.

Websites must be careful to not over-promise in their content policies. For example, in *Barnes v. Yahoo!, Inc.*,<sup>185</sup> the Ninth Circuit found that the plaintiff might have a valid promissory estoppel claim against Yahoo!, which failed to remove defamatory content about the plaintiff after promising to do so.<sup>186</sup> The Court found that Section 230 does not extend to a website’s broken promise, because promising is not part of the “publishing” that Section 230 covers.<sup>187</sup> Under *Barnes*, a website is not liable for a third party’s defamatory content, and it is not liable if it edits that content, but if the website promises to remove the

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182. *See supra* note 171.

183. *See supra* note 177.

184. *See supra* note 174.

185. 570 F.3d 1096 (9th Cir. 2009).

186. *Id.* at 1109.

187. *Id.* at 1107 (“Promising is different because it is not synonymous with the performance of the action promised.”).

content and fails to do so, it could be liable under promissory estoppel or contract theories.<sup>188</sup> It is unclear how far this recent rule will extend, as no other courts have yet to apply it. Shortly after *Barnes*, a California state trial court in *Scott P. v. Craigslist*<sup>189</sup> declined to dismiss a promissory estoppel claim against Craigslist, which allegedly promised to prevent damaging third-party postings. At a hearing in which the court found that the plaintiff sufficiently pleaded promissory estoppel, the judge stated that “Barnes did decide that the conduct of agreeing to do something is not conduct of a publisher with the meaning of 230, and was separate and apart and could survive.”<sup>190</sup> *Barnes* and *Scott P.* involve promises explicitly made to individuals. It might be more difficult for a plaintiff to recover on a promissory estoppel claim based on a general statement made in a Terms of Use policy.

In theory, Section 230 allows websites to choose to impose no content controls on third-party content, with the exception of material that infringes another party’s intellectual property rights. But in reality, websites that want to thrive in the marketplace must impose some standards of conduct that make the website attractive to the average consumer. Websites have imposed these standards in numerous ways. For example, Craigslist allows its readers to click an icon that “flags” objectionable third-party postings, and if enough people flag a post, it is automatically removed.<sup>191</sup> The *Making Light* blog removes the vowels of objectionable third-party posts, a process that became known as “disemvoweling.”<sup>192</sup> Consumerist prohibits anonymous commenters; all comments must be posted under an individual’s real name and e-mail address.<sup>193</sup> The website of the *Pantagraph* newspaper in Indiana stopped allowing third-party comments altogether, finding that “they are offensive and devoid of civility, the worst of which include personal attacks and/or assertions that have nothing to do with the story.”<sup>194</sup>

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188. *Id.*

189. *Scott P. v. Craigslist*, No. CGC-10-496687 at \*20 (Cal. Sup. Ct., County of San Francisco), transcript of June 2, 2010 hearing available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2010-06-02-Scott%20vP.%20v.%20Craigslist%20Hearing.pdf> (last visited on Sept. 28, 2010).

190. *Id.*

191. Craigslist—Flags and Community Moderation, [http://www.craigslist.org/about/help/flags\\_and\\_community\\_moderation](http://www.craigslist.org/about/help/flags_and_community_moderation) (last visited Jan. 3, 2010).

192. Making Light, Autodisemvoweling, Sept. 27, 2005, <http://nielsenhayden.com/makinglight/archives/006871.html> (last visited on Jan. 3, 2010).

193. The Consumerists, Anonymous Comments and Facebook Connect Deactivated, July 28, 2009, <http://consumerist.com/2009/07/anonymous-comments-and-facebook-connect-deactivated.html> (last visited on Jan. 3, 2010).

194. Pantagraph, To our readers: Comments on Local Content Suspended, [http://www.pantagraph.com/news/local/article\\_766adc82-f58a-11de-b4cc-001cc4c03286.html](http://www.pantagraph.com/news/local/article_766adc82-f58a-11de-b4cc-001cc4c03286.html) (last visited on Jan. 3, 2010).

While there always will be corners of the Internet with no such controls, the most frequently visited websites always will impose standards of third-party conduct that Congress envisioned when it passed Section 230. It is noteworthy that even AutoAdmit, the law school admissions board that became a poster child for irresponsible websites that hide behind Section 230, has begun moderating anonymous comments.<sup>195</sup> AutoAdmit has deleted many of the objectionable threads that caused the plaintiffs to sue.<sup>196</sup> A Google search for the objectionable comments that sparked the lawsuit finds that most of them have vanished from the Internet. Thus, even AutoAdmit, which was a rallying cry for Section 230 opponents,<sup>197</sup> has determined a minimum level of decency that requires the deletion of objectionable content. This demonstrates that even the websites that are far from mainstream will conform, to a certain extent, to community standards. This occurs even though Section 230 immunizes the sites from most lawsuits. A website will not survive in the marketplace if it completely ignores basic standards of decency and fairness.

## V. CONCLUSION

This article aimed to demonstrate that Section 230 is Congress's choice of implementing longstanding First Amendment values. Had Congress not passed Section 230, courts likely would have gradually developed some level of immunity for online intermediaries, although that immunity might not have been identical to Section 230. Although Section 230 has attracted valid criticism, it is Congress's chosen method of preserving free speech on an emerging platform. The growth of social networking and other websites that rely on third-party content shows that Congress accomplished its goals. Section 230 has not spawned a no-man's land that lacks any content controls; as I demonstrated in the previous section, even some of the most permissive websites have developed some content standards in response to consumer demand. It is more consistent with First Amendment values, however, to allow the intermediaries to develop these standards in response to consumer demand than to require the websites to fashion content standards in a way that they can only hope will satisfy the courts. Although Section 230 is far from perfect, it has allowed

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195. David Margolick, *Slimed Online*, PORTFOLIO.COM, Feb. 11, 2009 available at <http://www.portfolio.com/news-markets/national-news/portfolio/2009/02/11/Two-Lawyers-Fight-Cyber-Bullying/index.html> ("Things have calmed down on AutoAdmit, where, Cohen says, he's driven away the worst actors and enlisted volunteer moderators.").

196. *Id.* ("[L]ast spring, Cohen quietly removed the offending threads.").

197. *Id.*

intermediaries to experiment with various policies and practices that allow free speech to thrive on the Internet.