

**CAN THE COURTS TAME THE
COMMUNICATIONS DECENCY ACT?:
THE REVERBERATIONS OF *ZERAN V.*
*AMERICA ONLINE***

BY DAVID LUKMIRE*

Congress passed the Communications Decency Act of 1996 (CDA)¹ amid concern over minors' access to Internet pornography.² Congress enacted the CDA, which included various provisions regulating objectionable Internet content,³ as part of the Telecommunications Act of 1996,⁴ which broadly overhauled United States telecommunications policy.⁵ Passage of the CDA led to vigorous commentary and scholarship concerning freedom of speech on the Internet,⁶ and the CDA was front-page news when the Supreme Court, in *Reno v. ACLU*, struck down as unconstitutional the portions of the Act making it a crime to transmit indecent material in a way accessible to minors.⁷ After *Reno*, public

* J.D. 2010, New York University School of Law; B.A. Oberlin College. Managing Editor of Production for the *New York University Annual Survey of American Law* in 2009–2010.

1. Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 47 U.S.C.). This Act is Title V of the Telecommunications Act of 1996, *infra* note 4. Section 501 of the Telecommunications Act states that the Title may be referred to as the Communications Decency Act.

2. See 141 CONG. REC. 3203 (1995) (statement of Sen. Exon).

3. See *Reno v. ACLU*, 521 U.S. 844, 858–61 (1997) (discussing some of CDA's provisions).

4. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 47 U.S.C.).

5. The House Conference Report stated that the Telecommunication Act's broad aims were "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. REP. NO. 104-458, at 1 (1996) (Conf. Rep.).

6. See, e.g., Eric M. Freedman, *A Lot More Comes Into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make it Particularly Urgent for the Supreme Court to Abandon its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883, 962 (1996).

7. The Court invalidated provisions of section 223(a) and (d), except as applied to child pornography. *Reno*, 521 U.S. at 885.

awareness of the CDA subsided, with some commentators erroneously suggesting that the Court had struck down the CDA in its entirety.⁸ Section 230 of the CDA⁹ not only escaped Supreme Court scrutiny, but has developed in relative obscurity into “one of the most important and successful laws of cyberspace.”¹⁰ Described simply, section 230 provides protection from liability for websites and Internet Service Providers (ISPs)¹¹ who disseminate information provided by third parties.¹² Over the years, state and federal courts have interpreted section 230 expansively, conferring a broad immunity upon website operators that host third-party content.¹³ The statute has grown into a “judicial oak,”¹⁴ with impacts far beyond its language sounding in defamation law and its original intent to prevent the nascent Internet from becoming a “red light district.”¹⁵ This Note analyzes the degree to which judicial interpretations have departed from the statutory language, exploring how section 230 has evolved into an all-purpose liability shield for online entities. Moreover, this Note explains how the root causes of the prevailing judicial view of the statute inform possible new approaches judges might take in re-evaluating this grant of protection to websites and ISPs.

8. See, e.g., Linda Greenhouse, *No Help for Dying: But Justices Leave Door Open to Future Claim of a Right to Aid*, N.Y. TIMES, June 27, 1997, at A1.

9. 47 U.S.C. § 230 (2006). Although this citation is to the United States Code, it is referred to in most legal scholarship as “section 230 of the CDA.” Therefore, this Note will refer to it as such.

10. Recent Case, *Federal District Court Denies § 230 Immunity to Website that Solicits Illicit Content: FTC v. AccuSearch, Inc.*, 121 HARV. L. REV. 2246, 2253 (2008) [hereinafter *Federal District Court Denies § 230 Immunity*].

11. ISPs provide consumers with internet access. Examples include online services such as America Online (AOL) and companies such as Earthlink who simply provide an Internet connection. See DOUG LOWE, NETWORKING: ALL-IN-ONE DESK REFERENCE FOR DUMMIES 392–93 (2005).

12. 47 U.S.C. § 230(c)(1) (2006) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

13. See, e.g., *Green v. AOL*, 318 F.3d 465, 471 (3d Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123–24 (9th Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018, 1030–31 (9th Cir. 2003); *Ben Ezra, Weinstein, & Co. v. AOL*, 206 F.3d 980, 984–86 (10th Cir. 2000); *Zeran v. AOL*, 129 F.3d 327, 330–31 (4th Cir. 1997).

14. “A judicial oak which has grown from little more than a legislative acorn.” *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (discussing federal courts’ interpretation of Rule 10b-5 of securities laws to include private cause of action when none is explicitly stated in rule or enabling statute). Stated generally, the “judicial oak” metaphor refers to a large and complex body of judge-made doctrine overlaying a statute, from which it has seemingly departed.

15. See *infra* note 31 and accompanying text.

2010] CAN COURTS TAME COMMUNICATIONS DECENCY ACT? 373

Part I explores the historical context and legislative history of section 230. Part II discusses the impact of the Fourth Circuit's seminal decision in *Zeran v. America Online, Inc.*¹⁶ on most federal and state courts applying section 230. *Zeran* made two key interpretive moves that invited expansive interpretation of the statute, both of which developed major practical problems for prospective plaintiffs. First, *Zeran* incorporated distributor liability into section 230's immunity provision, thus foreclosing future defamation plaintiffs from relying on that theory. Second, *Zeran* suggested that section 230 provides immunity for almost any claim against a third party. Part III gives an overview of more recent jurisprudence and commentary, and suggests new judicial approaches to solve the two problems *Zeran* created.

PART I

A. *Senator Exon's Communications Decency Act*

To better understand section 230, it is worth exploring the origins of the CDA as a whole. Television ratings, the V-chip, and especially online pornography were high on the agenda for Congress in the mid-1990s¹⁷ and were generating significant public interest.¹⁸ The CDA was a product of a particular historical and political moment: explosive growth occurred in the telecommunications industry, including the growth of cable television, cellular phone technology, and the Internet,¹⁹ just as the Republican Revolution of 1994 pursued an ambitious agenda in Congress.²⁰

The CDA's legislative history illustrates this collision of technological advances and resurgent social conservatism. Senator John Exon introduced the CDA as an amendment to the already-pend-

16. 129 F.3d 327 (4th Cir. 1997).

17. Many provisions in the CDA reflected this concern. *See, e.g.*, Communications Decency Act of 1996, Pub. L. No. 104-104, § 505, 110 Stat. 133, 136 (codified as amended in scattered sections of 47 U.S.C.) (providing for scrambling of sexually explicit video programming); Communications Decency Act § 551 (providing for "parental choice" in television programming).

18. *See, e.g.*, Mark Lander, *TV Turns to an Era of Self-Control*, N.Y. TIMES, Mar. 17, 1996, at H1 (discussing government pressure to implement television ratings system and V-chip); Ramon G. McLeod, *New System to Rate Web Sites*, S.F. CHRON., Feb. 29, 1996, at C1 (discussing development of online ratings system amid concerns over childrens' access to Internet pornography).

19. WALTER SAPRONOV & WILLIAM H. READ, TELECOMMUNICATIONS: LAW, REGULATION, AND POLICY, at xi (1998).

20. In the 1994 midterm elections, Republicans gained majorities in both the House of Representatives and the Senate. DONALD T. CRITCHLOW, THE CONSERVATIVE ASCENDANCY: HOW THE GOP RIGHT MADE POLITICAL HISTORY 247 (2007).

ing Telecommunications Reform Act.²¹ The unveiling of his infamous “blue book,” which was available for inspection to lawmakers who were “not familiar with what is going on the Internet today,” solidified support for the amendment.²² The blue book was a blue folder located on the Senator’s desk containing pornographic downloads from the Internet.²³ Senators cited the “blue book” frequently in debate in support of the CDA, and some contend it was a principal factor in winning passage of the amendment.²⁴ Senator Exon also delivered a prayer on the Senate floor seeking help in controlling obscene and indecent material, leaving little doubt that morality inspired the legislation. Senator Exon’s proposal most notably criminalized knowing transmission of “obscene or indecent” material to minors.²⁵ Notwithstanding strong opposition from Senator Patrick Leahy and House Speaker Newt Gingrich, who presciently objected to these provisions on free-speech grounds,²⁶ Senator Exon’s proposal passed into law.²⁷

The genesis of the CDA as a piece of social-minded legislation with goals having little to do with defamation law reveals a chasm between the original, focused intent of section 230 and the “judicial oak” it has become.

*B. Background: Stratton Oakmont v. Prodigy and
Intermediary “Distributor” Liability*

Congress enacted section 230, titled “Protection for Private Blocking and Screening of Offensive Material,” for the same concern which was underlying sections of the Act struck down in *Reno*: regulating access to indecent or obscene Internet content.²⁸ Instead of employing the blunt instrument of criminal sanctions like the invalidated portions of the CDA, section 230 took the subtler

21. Arthur D. Hellman, *Sex, Drugs, and Democracy: Who’s Afraid of Free Speech?*, 41 BRANDEIS L.J. 417, 418–19 (2003); Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act*, 49 FED. COMM. L.J. 51, 71 (1996).

22. Cannon, *supra* note 21, at 64.

23. *Id.*

24. *See id.*; 141 CONG. REC. S8089 (daily ed. June 9, 1995) (statement of Sen. Exon); 141 CONG. REC. S8330, S8339 (daily ed. June 14, 1995) (statement of Sen. Exon); 141 CONG. REC. S8332 (daily ed. June 14, 1995) (statement of Sen. Coats).

25. 47 U.S.C. § 223(a)(1)(B) (Supp. II 1997), *invalidated by Reno v. ACLU*, 521 U.S. 844, 858–61 (1997).

26. Cannon, *supra* note 21, at 66–68.

27. *Id.* at 92.

28. *See id.* at 53–57.

2010] CAN COURTS TAME COMMUNICATIONS DECENCY ACT? 375

(and constitutional) approach of offering websites limited civil immunity if they self-policed objectionable content.²⁹

Section 230(c)(1), the key operative provision and the focus of this Note, provides for liability protection for websites and ISPs for torts emanating from content created by others. Section 230(c)(1) states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker provided by another information content provider.”³⁰ An “information content provider” is “any person or entity that is responsible, in whole or in part, for the creating or development of information provided through the Internet or any other interactive computer service.”³¹ In plain terms, section 230(c)(1) provides a safe harbor for websites and ISPs so long as they do not “creat[e] or develop[]” the content at issue. Section 230(c)(2) provides another safe harbor for websites and ISPs, eliminating civil liability for actions that websites and ISPs might take to restrict access to content they deem objectionable.³²

Because Congress enacted the invalidated sections of the CDA amid doubts as to the propriety of government regulation of Internet content,³³ section 230 was a complementary backstop to these coercive provisions of the CDA, pursuing the same ends through different means. At the time of its passage, section 230 conferred immunity for a limited goal: corralling the Internet’s rapidly growing “red light district” and protecting children from perceived dangers on the web.³⁴

29. See 47 U.S.C. § 230(b)(4) (2006) (declaring that the “policy of the United States” is to “remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material”).

30. *Id.* § 230(c)(1).

31. *Id.* § 230(f)(3).

32. *Id.* § 230(c)(2).

33. See 141 CONG. REC. S8331 (daily ed. June 14, 1995) (statement of Sen. Leahy).

34. See 141 CONG. REC. 3203 (1995) (statement of Sen. Exon). A recent report sheds doubt on popular perceptions that sexual predators are a significant threat to children online, but did stress that “cyberbullying” remains a serious problem. See Brad Stone, *Report Calls Online Threats to Children Overblown*, N.Y. TIMES, Jan. 13, 2009. See generally INTERNET SAFETY TECHNICAL TASK FORCE, ENHANCING CHILD SAFETY & ONLINE TECHNOLOGIES: FINAL REPORT TO THE INTERNET SAFETY TECHNICAL TASK FORCE TO THE MULTI-STATE WORKING GROUP ON SOCIAL NETWORKING GROUP ON SOCIAL NETWORKING OF STATE ATTORNEYS GENERAL OF THE UNITED STATES (2008), http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF_Final_Report.pdf.

Ironically, future courts' broad interpretations of section 230 ultimately stem from the section's genesis as an effort to overrule a single, trial-level, state-court case that had nothing to do with indecency. *Stratton Oakmont v. Prodigy Services Co.*,³⁵ decided in New York in 1995, announced that an ISP could be held liable as a "publisher" for defamatory content posted by third parties on its online bulletin boards if it exercised some editorial control over that content.³⁶ In the now famous case, Stratton Oakmont, an investment banking firm, brought a defamation lawsuit against Prodigy, then a prominent ISP, over anonymous third-party postings on a Prodigy online bulletin board that implicated Stratton Oakmont and its management in wrongdoing.³⁷ Prodigy had employed various devices to moderate bulletin board content, including the use of software to automatically screen for offensive language, the promulgation of "content guidelines," and the use of "Board Leaders" to enforce the guidelines.³⁸ Prodigy argued it was merely a "deliverer" or "passive conduit" of the allegedly defamatory comments, and thus should not be vicariously liable.³⁹ The court disagreed and held that Prodigy, by using its content moderation devices, exercised sufficient "editorial control" to make it a "publisher" for purposes of defamation law.⁴⁰

"Publication" is a term of art in defamation law, referring to the intentional or negligent transmission of defamatory material to someone other than the person defamed.⁴¹ At common law, repetition of a defamatory statement ordinarily constitutes a new publication,⁴² thereby making the repeater independently liable.⁴³ Thus, "talebearers are as bad as talemakers," and so, for example, a newspaper's repetition of defamatory statements in a letter to the editor

35. No. 3:04-CV-312, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 47 U.S.C.).

36. *Id.* at *4.

37. The postings stated that Stratton's president was a "soon to be proven criminal" and that Stratton was a "cult of brokers who either lie for a living or get fired." *Id.* at *1.

38. *Id.* at *1-2.

39. *Id.* at *3.

40. *Id.* at *4.

41. RESTATEMENT (SECOND) OF TORTS § 577 (1977).

42. *Id.* at cmt. a.

43. *See, e.g.*, RAYMOND E. BROWN, THE LAW OF DEFAMATION IN CANADA 261 n.91 (1987) ("[I]f one reads a libel, that is no publication of it . . . but if . . . after that he knows it to be a libel, he reads it to others, that is an unlawful publication of it.") (citing *John Lamb's Case*, (1610) 9 Co. Rep. 59b, 59b, 77 Eng. Rep. 822, 822).

2010] CAN COURTS TAME COMMUNICATIONS DECENCY ACT? 377

gives rise to independent liability for the paper.⁴⁴ However, because “publication” implicates some level of culpability,⁴⁵ the mere fact of repetition is insufficient for liability to arise. For newspapers, this extension of liability is due to the fact that “[t]he choice of material . . . and the decisions made as to the content of the paper constitute an exercise of editorial control and judgment, and with this editorial control comes increased liability.”⁴⁶ Thus, in *Stratton Oakmont*, the court held that Prodigy incurred strict “publisher” liability for a defamatory statement because it had exercised control over its bulletin board content.⁴⁷

In contrast to “publishers,”⁴⁸ who are liable for repeating defamatory content as if they had originally authored it, “distributors,” such as bookstores, news dealers, and libraries, are generally not liable for disseminating defamatory content.⁴⁹ Whereas the law presumes that publishers know the content of the material they release due to the exercise of editorial supervision,⁵⁰ distributors are not liable for repetition unless they knew or had reason to know of the defamatory content—a negligence standard contrasting with the presumptive liability incurred by publishers.⁵¹ A third category, “common carriers,” or “conduits,” also refers to entities, such as telephone companies, that have no editorial control over the content they carry and accordingly are not liable for information they carry.⁵²

44. LAURENCE H. ELDREDGE, *THE LAW OF DEFAMATION* 233 (1978).

45. Although defamation remains essentially a strict liability tort in Commonwealth jurisdictions such as the United Kingdom, defamation requires some level of fault in the United States. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 324 (1974).

46. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 47 U.S.C.).

47. *Id.* at *4.

48. A “publisher” is sometimes referred to as a “primary publisher” as distinct from a distributor or “secondary publisher.” See 1 RODNEY A. SMOLLA, *THE LAW OF DEFAMATION* § 4:92 (2d ed. 2008). For purposes of this Note, “publisher” and “distributor” are used.

49. *Id.*

50. While the Supreme Court has held that that some element of fault—at least negligence—is necessary to any defamation claim, the standard of care applicable to a primary publisher is extremely high, given that the requisite fault element is typically implied. *Gertz*, 418 U.S. at 324. See also 2 GEORGE B. DELTA & JEFFREY H. MATSUURA, *THE LAW OF THE INTERNET* §11.02(c) (3d ed. Supp. 2010-1).

51. See *id.*; *Cubby Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 139–41 (S.D.N.Y. 1991).

52. Jay M. Zitter, Annotation, *Liability of Internet Service Provider for Internet or E-mail Defamation*, 84 A.L.R. 5TH 169, § 2[a] (2000). Courts have held that common

In *Stratton Oakmont*, the court, citing Prodigy's "control" over its content, rejected Prodigy's contention that because it was merely a transmitter for allegedly defamatory online bulletin board postings it therefore should be subjected to the more favorable "distributor" liability standard.⁵³ In a move perhaps more significant to Congress than was the outcome of the case, the court based its conclusion that Prodigy was a "publisher" partly upon Prodigy's self-proclaimed status as a "family oriented computer network."⁵⁴ The court reasoned that because Prodigy "held itself out as a service exercising editorial control, thereby expressly differentiating itself from its competition," it should bear heightened responsibility for third-party content.⁵⁵ The court cited a passage in an article published by a Prodigy public relations executive: "We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve."⁵⁶

C. *An Alternative Congressional Response: The Cox-Wyden Amendment*

Section 230 emerged as an alternative to other CDA provisions that addressed the same problem of protecting children from sexually explicit content. As Congress grafted the CDA onto the expanding Telecommunications Act in the summer of 1995, Representatives Christopher Cox and Ron Wyden drafted the Cox-Wyden Amendment (Cox-Wyden), which would eventually become section 230.⁵⁷

Section 230's supporters sought to remedy perceived disincentives for websites to monitor and remove "offensive" content posted by third parties, and to encourage the development of "blocking and filtering technologies" that would allow parents to regulate their children's online activities.⁵⁸ Under the guise of the

carriers may not be held liable for defamatory statements because they are required by law to serve all customers. *See, e.g., Anderson v. N.Y. Tel. Co.*, 320 N.E.2d 647, 649 (N.Y. 1974) (Gabrielli, J., concurring). The Internet-age "conduit" equivalent to a telephone company is an ISP that causes emails to be transmitted. *See Lunney v. Prodigy Servs. Co.*, 723 N.E. 2d 539, 542 (N.Y. 1999) ("[A]n ISP, like a telephone company, is merely a conduit.").

53. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 47 U.S.C.).

54. *Id.* at *2.

55. *Id.*

56. *Id.*

57. Stephen Collins, Note, *Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act*, 102 Nw. U. L. REV. 1471, 1479 (2008).

58. 47 U.S.C. § 230(b)(4) (2006).

2010] CAN COURTS TAME COMMUNICATIONS DECENCY ACT? 379

“[p]rotection for ‘good Samaritan’ blocking and screening of offensive material,” section 230(c)(1) sets forth what has proved to be transformative language: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁵⁹ This language has been widely interpreted as conferring very broad immunity on websites, providing a “safe harbor” for a wide range of third-party-generated content.⁶⁰

In creating section 230, Cox and Wyden had the same goal in mind as Senator Exon, “relief . . . from the smut on the Internet,” but sought to achieve that end by “empower[ing] parents without Federal regulation” by the Federal Communications Commission (FCC).⁶¹ Similarly, Representative Cox observed that with the amendment, “[w]e can keep away from our children things not only prohibited by law, but prohibited by parents.”⁶² Drawing a contrast to the rest of the CDA, in advocating for the amendment, Representative Wyden offered a sharp assessment of Senator Exon’s content-based proposal, stating that the Exon amendment to the CDA “seek[s] there to try to put in place the Government rather than the private sector about this task of trying to define indecent communications and protecting our kids.”⁶³ Moreover, as Representative Robert Goodlate noted, Cox-Wyden “doesn’t violate free speech or the right of adults to communicate with one another,”⁶⁴ a swipe at the eventually invalidated provisions of the CDA. In sum, Cox-Wyden was envisioned as a more effective alternative to the original provisions because it (1) was likely constitutional and (2) would provide a more direct means—self-regulation—of preventing children from accessing inappropriate material. The goal of protecting children, of course, remained broadly similar to that reflected in Senator Exon’s proposal.

To effectively achieve this goal, Representatives Cox and Wyden had to reckon with *Stratton Oakmont*. The portions of section 230’s legislative history concerning *Stratton Oakmont* showed that, although Congress intended to encourage the growth of the young Internet, that purpose was subsidiary to and separate from the goal of protecting children. Although *Stratton Oakmont* was met

59. *Id.* § 230(c)(1).

60. *See infra* Part II.

61. 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden).

62. *Id.* at H8470.

63. *Id.*

64. *Id.*

with immediate concern in the business press that the scope of liability would stifle the growth of the Internet,⁶⁵ Congress did not express this concern, despite subsequent cases' contentions that protecting "freedom of speech in the new and burgeoning internet medium" was the main purpose of section 230.⁶⁶ The House Conference Report on the Telecommunications Act reveals that Congress inserted section 230 primarily to encourage content regulation, consistent with other provisions of the CDA:

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.⁶⁷

In a similar vein, Representative Cox stated that "we want to encourage people like Prodigy . . . to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see."⁶⁸

Representative Cox also stated that the Internet had "grown up to be what it is without . . . help from the government."⁶⁹ Instead of concerns about robust public debate and the First Amendment, Representatives Cox and Wyden had concerns that a new "Federal Computer Commission" or the current FCC would examine and regulate Internet content.⁷⁰ Representatives Cox and Wyden envi-

65. See, e.g., Ethan de Seife, *Prodigy Libel Lawsuit Raises Concerns of On-line Industry*, WESTCHESTER CITY BUS. J., Aug 14, 1995, §1, at 9.

66. *Zeran v. AOL*, 129 F.3d 327, 329 (4th Cir. 1997); see also *infra* Parts II and III.

67. H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.) (emphasis added).

68. 141 CONG. REC. H8470.

69. *Id.*

70. This concern was especially pressing given that Cox-Wyden was to be part of a sweeping bill that would define the jurisdiction of the FCC in the years to come. At the time, there was considerable debate as to how much regulatory control the FCC should exercise over the burgeoning Internet. And most significantly, Senator Exon's proposal originally charged the FCC with promulgating regulations necessary for carrying out the CDA's anti-obscenity and anti-indecency provisions. The CDA originally provided that the FCC "may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d)." Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 133, 134, *invalidated by* *Reno v. ACLU*, 521 U.S. 844, 858-61 (1997).

sioned that their amendment would discourage bureaucratic oversight and thereby encourage the robust growth of the Internet, largely by avoiding the unappetizing regulatory implications of Senator Exon's proposal. Their prevailing aim was not to create a liability shield, which was only inserted for the limited end of encouraging ISPs to monitor and, when appropriate, block "offensive" content.

D. The Text of Section 230: Shaky Ground

Although subsequent cases⁷¹ and commentators⁷² have suggested otherwise, the text of section 230 reflects the drafters' delineated objective of shielding children from objectionable content by encouraging websites to self-regulate through the means of explicitly overruling *Stratton Oakmont*. How, then, did section 230 evolve into an all-purpose liability shield for websites over the decade following its enactment? The partial answer is that section 230 is the product of both legislative accident and narrow-minded draftsmanship. Although courts are also responsible for much of section 230's transformation into a broad liability shield, the text of the statute itself sets the stage for future expansive interpretations.

One commonly cited provision is section 230(c)(1)'s safe harbor provision, which was clearly meant to overrule *Stratton Oakmont*. It states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker."⁷³ The scope of this safe harbor rests upon two bases. The first is the meaning of "information content provider," which is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."⁷⁴ The second is that the safe harbor only confers immunity for content provided by "another information content provider."⁷⁵ Therefore, if an Internet entity (an ISP or a website) *itself* is responsible for the "creation or development" of content, it is not entitled to immunity under the statute.

Although section 230(c)(1)'s safe harbor provision has received the most attention in the courts, subsection (c)(2) most directly addresses the "evil to be remedied" that Representatives Cox

71. See *Zeran*, 129 F.3d at 331.

72. See, e.g., Cecilia Ziniti, *The Optimal Liability System for Online Service Providers: How Zeran v. America Online Got it Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 597 (2008).

73. 47 U.S.C. § 230(c)(1) (2006).

74. *Id.* § 230(f)(3).

75. *Id.* § 230(c)(1) (emphasis added).

and Wyden had in mind. Subsection (c)(2)(A)'s "Good Samaritan" protection specifies that "no provider or user of an interactive computer service" will incur liability for taking proactive steps to restrict access to material that the provider considers objectionable,⁷⁶ while subsection (c)(2)(B) provides for liability protection for Internet providers who make technological means available to restrict access to objectionable content, such as filtering software.

In developing an expansive interpretation of section 230, courts have heavily relied upon language contained in its findings and policy subsections. Subsection (a) begins with the finding that "the rapidly developing array of Internet and other interactive computer services available to individual Americans represents an extraordinary advance in the availability of educational and informational resources to our citizens," and proceeds with additional similar statements that generally state the importance of the Internet.⁷⁷ Of these, subsection (a)(4) has proved the most significant: "The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."⁷⁸

Next, subsection (b) enumerates policies that underlie section 230 in language that more precisely suggests the purposes of the statute. The policies are as follows: subsection (b)(1), "to promote the continued development of the Internet; (b)(2), "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal and State regulation"; (b)(3), "to encourage the development of technologies which maximize user control over what information is received," (b)(4), "to remove disincentives for the deployment . . . of blocking and filtering technologies that empower parents to restrict their children's access to objectionable . . . material; and (b)(5), "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer."⁷⁹

76. Subsection (c)(2)(A)'s "no provider or user" language has been interpreted to confer immunity on a wide range of Internet entities, from small, limited-audience websites to large ISPs with millions of subscribers. *See, e.g.*, *Donato v. Moldow*, 865 A.2d 711 (N.J. Super. Ct. App. Div. 2005) (involving community bulletin-board website); *Doe v. Am. Online, Inc. (AOL)*, 783 So. 2d 1010 (Fla. 2001) (involving large ISP); *Grace v. eBay, Inc.*, No. B168765, 2004 WL 214449 (Cal. Ct. App.), *vacated by* *Grace v. eBay Inc.*, 16 Cal. Rptr. 3d 192 (Cal. App. Dep't Super. Ct.), *opinion superseded by* 99 P.3d 2 (Cal. 2004) (involving auction website).

77. 47 U.S.C. § 230(a)(1).

78. § 230(a)(4).

79. 47 U.S.C. § 230(b).

2010] CAN COURTS TAME COMMUNICATIONS DECENCY ACT? 383

As explained above, and as explored further in Parts II and III, courts have often cited these anti-regulatory, pro-market findings and policies in subsections (a)(4), (b)(1), (b)(2), and (b)(3) in support of contentions that section 230's immunity provisions were enacted "[t]o ensure that web site operators . . . would not be crippled by lawsuits arising out of third-party communications."⁸⁰ However, deterring vexatious litigation was scarcely on Congress's radar screen during the period when section 230 was considered and enacted. Rather, these preambles directly reflect section 230's origins as rival to Senator Exon's bill. The legislative history of section 230 demonstrates that the findings and purposes subsections were likely inserted for persuasive effect, serving to differentiate section 230 from the Exon bill. In turn, courts have given these provisions outsize significance, distorting rather than furthering section 230's original purposes.

Additionally, given that what became section 230 was crafted as a rival bill to Senator Exon's, it is possible that its findings and policies sections were designed more for persuasive effect than as statements having the force of law. Jurists and commentators have often observed that legislators deliberately manipulate legislative history to influence judicial interpretations,⁸¹ and an analogous proposition holds with respect to the statutory text itself. This proposition may be equally applicable to congressional findings or statements of policy, as opposed to operative statutory language.

Although statutory findings and purposes can be useful guides to the meaning of statutory language,⁸² there is often reason to look upon findings and statements of purpose with some suspicion, or at least view such statements as less persuasive to courts than operative provisions of statutory text. Professor Joseph Gerken, for example, has suggested that courts consider "findings" and "policies" akin to legislative history, using the example of courts' interpretation of the Americans with Disabilities Act (ADA):

The text of the ADA begins with an extended series of Congressional findings describing the ways that disabled people

80. *See, e.g., Doe v. Myspace, Inc.*, 474 F. Supp. 2d 843, 847 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413 (5th Cir. 2008).

81. *See, e.g., Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring) (suggesting that references to district court decisions were inserted in committee report by staffers "to influence judicial construction").

82. ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 165 (1997) (findings and policy statement can "provide the public with the broad reasoning behind the enactment of legislation and statutory interpreters with a context in which the more detailed language of the statute, particularly if it is ambiguous").

have historically been treated. Congress's findings in this introductory section are not technically "legislative history" since they are part of the legislation; however, they are used in a number of cases in the same way that findings in committee reports might be used.⁸³

If findings and policies are akin to legislative history in terms of their interpretive usefulness, it follows that they share some of the practical limitations of relying on legislative history. For instance, legislative history "is sometimes written to influence an agency or to posture for a constituent, not to establish positions about the meaning of law."⁸⁴ Similarly, there is an ongoing debate as to whether findings and policies, even though enacted as part of statutory text, should carry the persuasive force of operative statutory provisions because "such clauses are often drafted in vacuous language which makes it unhelpful in determining statutory meaning."⁸⁵ Also, "the drafters of a statutory purpose clause might emphasize one purpose to the exclusion of others, in much the same way that they might try to write legislative history favorable to their point of view."⁸⁶ Under the most skeptical view of "findings" and policies, "[s]tatutory findings and statements of purpose are often best understood as little more than rhetorical devices to support the ways in which issues have been framed."⁸⁷

Section 230's findings and policies, especially the negative statements about government regulation of the Internet, remained in the bill after they had outworn their original purpose: explaining how section 230 differed from Senator Exon's proposal. While courts were correct to still consider these provisions, they should have viewed them in light of the CDA's broader purposes, which were confined to the more limited goal of protecting minors online. Nevertheless, beginning with *Zeran*, by far the most influential case on section 230, courts have particularly seized upon the enumerated "policy" in favor of non-regulation in order to promote the unenumerated and court-implied purpose of protecting Internet entities with expansive immunity.⁸⁸ Even from a policy perspective,

83. JOSEPH L. GERKEN, WHAT GOOD IS LEGISLATIVE HISTORY?: JUSTICE SCALIA IN THE FEDERAL COURTS OF APPEALS 264–65 (2007).

84. WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 172 (2007).

85. *Id.* at 221.

86. *Id.*

87. Muriel Morisey, Liberating Legal Education from the Judicial Model, 27 SETON HALL LEGIS. J. 231, 262 (2003).

88. *See infra* Part II.

some commentators have noted that while websites and ISPs may have needed protection from potentially ruinous liability in 1997 when *Zeran* was decided, it makes little sense for the courts to “leave the training wheels intact” given the obviously robust nature of the current Internet.⁸⁹

PART II

A. *The Formation of Expansive Interpretation: Zeran v. America Online*

The first major case interpreting section 230(c)(1) construed the provision in broad strokes, going further than was necessary to effectuate the congressional goals of overruling *Stratton Oakmont* and of removing obstacles to the empowering of parents to determine the content of communications their children receive.⁹⁰ Decided by the Fourth Circuit in 1997, barely a year after the statute went into effect, no case has had more influence on section 230 jurisprudence than *Zeran*.⁹¹ Cited over 1,400 times,⁹² virtually every subsequent opinion regarding section 230 references *Zeran*. Its importance stems from both its timing and its broad construction of the statute’s grant of immunity. *Zeran* laid the groundwork for future expansive readings of section 230 in two principal ways. First, *Zeran* held that section 230(c)(1)’s provision that “no provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider,” also conferred immunity on websites otherwise considered “distributors” under defamation law.⁹³ Second, with virtually no support in the text or history of the statute, the court suggested that section 230(c)(2) conferred immunity on websites and ISPs for non-defamation-based claims.⁹⁴ The *Zeran* court took substantial liberties with section 230’s enumerated and implied purposes, erroneously reasoning that free speech concerns motivated the safe harbor provision of section 230(c)(2).

89. See, e.g., Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Credibility?: Lessons from the DMCA Applied to Online Defamation*, 25 CARDOZO ARTS & ENT. L.J. 237, 238–39 (2007).

90. H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.).

91. *Zeran v. AOL*, 129 F.3d 327 (4th Cir. 1997).

92. Search of Westlaw database, March 10, 2010.

93. *Zeran*, 129 F.3d at 328–32 (4th Cir. 2007).

94. *Id.* at 330. The court stated that § 230 created an immunity for “any cause of action that would make service providers liable for information originating with a third-party user of the service.” *Id.* (emphasis added).

In *Zeran*, an unidentified person posted a message on an America Online (AOL) bulletin board, advertising t-shirts with offensive slogans related to the then-recent Oklahoma City bombing.⁹⁵ The initial message urged interested parties to call Kenneth M. Zeran, the plaintiff in this case.⁹⁶ Predictably, Zeran received a large number of threatening and angry calls.⁹⁷ On the day the message was posted, Zeran called AOL, informing it that he was the victim of a hoax, and was unable to change his telephone number because he needed it for his business.⁹⁸ The next day, after AOL assured Zeran it would remove the posting but denied his request for a retraction, an unknown person again posted more “advertisements” for similar products with slogans “at least as vulgar and offensive as those listed in the prior day’s notice.”⁹⁹ Five days after the first posting, Zeran received abusive calls every two minutes, including death threats.¹⁰⁰

Zeran sued for negligence based on a state common law theory of distributor liability, claiming that AOL, once notified, had a duty to remove the defamatory postings promptly, to notify subscribers of the hoax, and to screen defamatory material in the future, much as a bookstore would be obligated to do as a distributor or transmitter of defamatory content.¹⁰¹ According to Zeran, failure to remove the offending postings after notice subjected AOL to “distributor” liability as distinct from the “publisher” liability safe harbor conferred by the statute.¹⁰² Zeran also argued that the interpretive canon calling for statutes in derogation of common law principles to be strictly construed called for the court to read section 230’s immunity provision restrictively because “publisher” and “distributor” are separate categories at common law, and section 230 speaks to “publishers” only, thus excluding “distributors.”¹⁰³ The Fourth Circuit upheld the dismissal of the case on the basis that section 230 provided AOL with immunity from all state-law def-

95. *Zeran v. AOL*, 958 F.Supp. 1124, 1127 n.3 (E.D. Va 1997), *aff’d*, 129 F.3d 327 (4th Cir. 1997).

96. *Zeran*, 129 F.3d at 329.

97. *Id.*

98. *Id.*

99. The new slogans included “Forget the rescue, let the maggots take over—Oklahoma 1995,” and “Finally a day care center that keeps the kids quiet—Oklahoma 1995.” *Zeran*, 958 F.Supp. at 1127 n.5.

100. *Id.* at 1128.

101. *Zeran*, 129 F.3d at 330.

102. *Id.* at 331.

103. *Id.* at 343–44.

2010] CAN COURTS TAME COMMUNICATIONS DECENCY ACT? 387

amation claims, even if, as Zeran asserted, AOL was a “distributor.”¹⁰⁴

The court reasoned that under the common law of defamation, distributor liability is a subset of publisher liability.¹⁰⁵ Therefore, even if AOL would otherwise be liable for defamatory postings as a distributor of third-party content, AOL was immune from suit under section 230 as a “publisher” because that term encompasses “distributor.”¹⁰⁶ The court conceded that distributors are ordinarily subjected to a different liability standard in defamation law, but determined that because each party involved in a defamation action necessarily is charged with “publication,” the term “publisher” in section 230(c)(1) must include both publishers and distributors.¹⁰⁷ The court also rejected Zeran’s contention that *Stratton Oakmont* recognized distributor liability as existing wholly distinct from publisher liability.¹⁰⁸ Thus, the court’s conclusion was that online providers acting as “distributors” of defamatory content are also “publishers” and thus within the ambit of section 230 immunity.¹⁰⁹

The Fourth Circuit’s conclusion was by no means inevitable. When *Zeran* was decided, it was unclear whether websites could be held liable for third-party content as “distributors” even though they could not be “treated as publishers” under section 230(c)(1). First, *Stratton Oakmont* had a detailed exposition of the common law distinction between publisher and distributor liability standards.¹¹⁰ Also, well-known online defamation cases decided before *Stratton Oakmont* had endorsed the possibility of treating website operators

104. *Id.* at 334.

105. *Id.* at 332.

106. *Id.*

107. *Id.* (“AOL falls squarely within [the] traditional definition of a publisher and . . . is clearly protected by §230’s immunity.”).

108. *Id.* (noting that those cases “do not . . . suggest that distributors are not also a type of publisher for purposes of defamation law”).

109. The court did indicate that its conclusion that AOL enjoyed immunity was not entirely based on this tidy logic, however. The court stated that Zeran’s complaint treated AOL as a *publisher*, because, according to Zeran, “AOL is legally at fault because it communicated to the parties an allegedly defamatory statement,” which is “precisely the theory under which the original poster of the offensive messages would be found liable.” *Id.* at 333. This is incorrect, however, because Zeran principally attempted to hold AOL liable for failure to remove defamatory content, not for allowing it to be posted in the first place. *Id.* at 332.

110. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 47 U.S.C.).

as distributors, as distinct from publishers.¹¹¹ In light of the common law norm of treating “publishers” separately from “distributors,” along with relevant precedents reaffirming this distinction, Congress’s silence on this question was surprising. Since the word “distributor” was conspicuously absent from section 230(c)(1), the court could have concluded that Congress deliberately *excluded* distributors from section 230’s safe harbor.¹¹²

The court held that section 230 precluded distributor liability for online providers because it would be inconsistent with the statute’s purposes. The court viewed Congress’s purpose of fomenting a robust Internet as paramount, stating:

Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.¹¹³

Setting forth policy rationales from its interpretation of congressional purpose, the court went on to note that “the specter of tort liability in an area of . . . prolific speech”¹¹⁴ might lead ISPs to restrict third-party postings, thus having a “chilling effect” on valuable online speech.¹¹⁵ Moreover, of all of Congress’s findings, the Fourth Circuit primarily emphasized the finding that it is “the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . . *unfettered by Federal or State Regulation.*”¹¹⁶

111. See, e.g., *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135, 139–41 (S.D.N.Y. 1991).

112. See 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, 162 (1997) (“[O]ne could argue from the enumeration of publisher and speaker in § 230(c)(1) that distributor was deliberately omitted.”).

113. *Zeran*, 129 F. 3d at 330.

114. *Id.* at 331. The court noted that ISPs had about 12 million members, a figure the court called “staggering.” *Id.* at 331. As of June 2008, Nielson reported that the United States has over 160 million active Internet users. NIELSON ONLINE REPORTS TOPLINE U.S. DATA FOR MAY 2008 2 (2008), http://www.nielsen-online.com/pr/pr_080610.pdf.

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

116. 47 U.S.C. § 230(a)(4) (2006) (emphasis added), *quoted in Zeran*, 129 F.3d. at 330.

2010] CAN COURTS TAME COMMUNICATIONS DECENCY ACT? 389

While this was a valid summation of *part* of Congress's rationale for enacting section 230, the court failed to consider that the end of promoting speech on the Internet was arguably *subsidiary to*, or should at least be considered *in addition to*, section 230's overall purpose of providing "[p]rotection for private blocking and screening of offensive material."¹¹⁷ Additionally, the legislative history of section 230 emphasizes repeatedly Congress's goal of protecting children from offensive online material.¹¹⁸ Unlike section 230's findings and policies sections and its legislative history, the Fourth Circuit announced that protecting the then-nascent Internet was the most important purpose of the statute.¹¹⁹

The court also considered section 230's goal of encouraging ISPs to "self-regulate the dissemination of offensive material," but tellingly referred to that end as "*another* important purpose" (as opposed to "the purpose"), implying that this purpose was less important.¹²⁰ By contrast, the court referred to section 230's goal of protecting "freedom of speech in the new and burgeoning Internet medium" as "*the* purpose" of the statute.¹²¹ This elevation of one of the two announced purposes of section 230, combined with the court's repeated statements that section 230 might immunize websites from other non-defamation-based torts, shaped judicial constructions of the statute for years to come.

Although the vast majority of section 230 decisions have followed *Zeran* in declining to recognize a separate species of "distributor" liability outside of the ambit of the statute,¹²² some

117. The House Conference Report explained that "[o]ne of the specific purposes of [section 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which . . . create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services." H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.).

118. *See supra* Part I.

119. *Zeran*, 129 F.3d. at 330.

120. *Id.* at 331 (emphasis added).

121. *Id.* at 330 (emphasis added).

122. Courts have overwhelmingly interpreted section 230 as a broad grant of immunity for websites and ISPs for third-party content, even if they have notice of the objectionable content. *See, e.g.*, *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998). *See also* Steven D. Zansberg & Adam M. Platt, *The Murky Wake of Roommates.Com: When does the Exercise of "Traditional Editorial Functions" Render a Website Operator Responsible for Third-Party Postings?*, MEDIA L. RES. CTR. BULL. 2 (May 2008), available at http://www.lskslaw.com/publications/Murky_Wake_of_Roommates_com.pdf (noting that after Congress passed section 230, "numerous courts have held that 230 . . . immuniz[es] website operators for a wide range of claims").

commentators have argued forcefully that section 230 left distributor liability intact.¹²³ In 2004, a California appellate court rejected *Zeran's* analysis and held that section 230 immunity does not apply to distributors.¹²⁴ In *Barratt v. Rosenthal*, a case concerning an alternative health advocate who had posted messages to online bulletin boards calling mainstream doctors “quacks,” the court held that section 230 “cannot be deemed to abrogate the common law principle that one who republishes defamatory matter originated by a third person is subject to liability if he or she knows or has reason to know of its defamatory character.”¹²⁵ The court wrote that *Zeran's* “analysis of section 230 is flawed, in that the court ascribed to Congress an intent to create a far broader immunity than that body actually had in mind or is necessary to achieve its purposes.”¹²⁶ Among its many criticisms of *Zeran*, the court reasoned that the word “publisher” in section 230(c)(1) is capable of being read as either denoting “primary publisher”—the plaintiff’s contention in *Zeran*—or referring to any party who engages in the necessary act of “publication,” which was AOL’s position.¹²⁷ Since the meaning of “publisher” is ambiguous, the court reasoned, that is “enough to justify application of the interpretive canon favoring retention of common law principles.”¹²⁸

This judicial stand against *Zeran's* reading of section 230 was short-lived: the California Supreme Court reversed.¹²⁹ Influenced by amicus briefs by the ACLU and numerous commercial websites and ISPs, including Amazon.com, eBay, Google, and AOL,¹³⁰ the court concluded that *Zeran's* original analysis of the question of distributor liability in section 230 was correct.¹³¹ The court relied

123. See, e.g., Sheridan, *supra* note 112, at 151–52 (reading statute as ambiguous as to whether it preserved distributor liability for ISPs, Sheridan writes that “unless and until Congress acts more clearly, courts should continue to resolve cases involving alleged distributor liability according to traditional tort principles”).

124. *Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142, 168 (Cal. Ct. App. 2004) (holding that “section 230 does not restrict distributor liability under the common law”), *rev'd*, 146 P.3d 510 (Cal. 2006).

125. *Id.* at 152.

126. *Id.* at 154.

127. *Id.* at 158.

128. *Id.* at 157.

129. *Barrett v. Rosenthal*, 146 P.3d 510, 511 (Cal. 2006), *rev'g* 9 Cal. Rptr. 3d 142 (Cal. Ct. App. 2004).

130. *Id.* at 512.

131. *Id.* at 519.

2010]CAN COURTS TAME COMMUNICATIONS DECENCY ACT? 391

both on *Zeran*'s doctrinal soundness, and on stare decisis.¹³² The court considered the practical implications of bucking prevailing trends: "Adopting a rule of liability under section 230 that diverges from the rule announced in *Zeran* and followed in all other jurisdictions would be an open invitation to forum shopping by defamation plaintiffs."¹³³

The limited disagreement with *Zeran* poses two related questions. First, given the facts of the case, why did the Fourth Circuit decide the distributor liability question the way it did? Although it is difficult to discern courts' ulterior motives, the opinion suggests that the court relied on unstated reasoning. Second, what were the implications of *Zeran*'s holding on distributor liability? As explained in more detail below, *Zeran*'s collapse of the "distributor" category had implications beyond altering the common law of defamation in the Internet context.

First, it should be noted again that the Fourth Circuit could have held that AOL was impervious to suit as a *primary* publisher. Indeed, the court took a step in this direction, stating that "once a computer service receives notice of a potentially defamatory posting, it is thrust into the role of a *traditional* publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting."¹³⁴ In other words, the court implied that once AOL had notice of the allegedly defamatory content on the bulletin board and failed to remove it, it had exercised sufficient editorial control to be considered a primary publisher. Accordingly, if the court had based its holding on a finding that AOL was a primary publisher, it could have left the question of distributor liability for another day.

The court's decision to address the distributor liability issue was driven partly by the prudential concern of judicial administration. If *Zeran* had held that the section 230 safe harbor did not apply to distributors, this would have enabled state courts, and federal courts sitting in diversity, to apply state law to distributors of defamatory content online. Section 230(e)(3)'s preemption provision states:

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be im-

132. *See id.* at 518 (noting that "[t]he *Zeran* court's views have been broadly accepted, in both federal and state courts").

133. *Id.* at 525–26.

134. *Zeran v. AOL*, 129 F.3d 327, 332 (4th Cir. 1997) (emphasis added).

posed under any State or local law that is inconsistent with this section.¹³⁵

Therefore, if distributors of defamatory content do not fall within the safe harbor provided by the statute, state law would generally govern actions against distributors since defamation is traditionally an area of state law¹³⁶ and section 230(e)(3) permits application of non-conflicting state laws.¹³⁷ In *Zeran*, the Fourth Circuit was concerned that allowing state courts to administer claims of distributor liability would contravene congressional intent to address “a problem of national and international dimension.”¹³⁸

Most obviously, *Zeran*'s potential to engender inconsistent state applications of Internet defamation law was evident from the facts. *Zeran* almost certainly had an otherwise viable case against AOL based on a failure-to-remove-after-notice distributor liability theory. After being alerted to the initial offending posting, AOL did not immediately remove the post,¹³⁹ refused to publish a retraction as a “matter of policy,”¹⁴⁰ and claimed that the post would “soon” be removed.¹⁴¹ In *Zeran*'s case, “soon” was clearly inadequate, as evidenced by the involvement of the FBI and local police to ensure his own safety.¹⁴² And AOL's alleged foot-dragging and refusal to publish a retraction certainly fit the black-letter definition of a party liable as a distributor: “[O]ne who . . . delivers or transmits defamatory matter published by a third person is subject to liability if . . . he *knows* . . . of its defamatory character.”¹⁴³

135. 47 U.S.C. § 230(e)(3) (2006).

136. See Joseph H. King, Jr., *Deus Ex Machina and the Unfulfilled Promise of New York Times v. Sullivan: Applying the Times for All Seasons*, 95 Ky. L.J. 649, 654 (2006).

137. This analysis formed the basis of the California Court of Appeals' argument in *Barrett*. *Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142, 168 (Cal. Ct. App. 2004), *rev'd*, 146 P.3d 510 (Cal. 2006).

138. *Zeran*, 129 F.3d at 334. Put another way, the Fourth Circuit was concerned with effectuating the Congressional aim of *preventing* regulation of the Internet. *Id.*

139. AOL and *Zeran* disputed the date that AOL eventually removed the original posting. *Id.* at 329.

140. *Id.*

141. *Id.*

142. *Id.*

143. RESTATEMENT (SECOND) TORTS § 581(1) (2009) (emphasis added).

PART III

A. *A Recent Case Study on the Distributor Liability Problem:*
Global Royalties Ltd. v. XCentric Ventures, LLC

The Fourth Circuit's refusal to recognize distributor liability in a seemingly fitting case spoke volumes to later courts. *Global Royalties, Ltd. v. Xcentric Ventures, LLC*,¹⁴⁴ decided in the District of Arizona in 2008, is a representative case demonstrating how closely courts have adhered to the interpretation developed in *Zeran* that section 230 precludes distributor liability, even when the competing equities seem to weigh strongly in favor of the plaintiff. In *Global Royalties*, the defendant operated a website called Ripoff Report,¹⁴⁵ where users could post consumer complaints about companies and individuals.¹⁴⁶ The plaintiff, a Canadian¹⁴⁷ investment broker in

144. *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929 (D. Ariz. 2008).

145. The home page contains the following disclaimer:

Ripoff Report is a worldwide consumer reporting website and publication, by consumers, for consumers, to file and document complaints about companies or individuals. While we encourage and even require authors to only file truthful reports, Ripoff Report does not guarantee that all reports are authentic or accurate. Be an educated consumer. Read what you can and make your decision based upon an examination of all available information.

Ripoff Report, <http://www.ripoffreport.com> (last visited May 11, 2010).

146. *Global Royalties*, 544 F. Supp. 2d at 930.

147. This case contained an interesting jurisdictional twist: By the time Global Royalties filed its complaint, it had already obtained a default judgment for defamation against XCentric Ventures in Canada, which included an injunction directing XCentric to remove the offending postings. The complaint filed in district court requested that the court enforce this Canadian judgment. XCentric's motion to dismiss, which the district court granted on section 230 grounds without considering this issue, averred that enforcing the Canadian injunction would amount to an unconstitutional prior restraint on speech. XCentric argued that the Canadian injunction was "repugnant to the public policy of the United States or of the State where recognition is sought," and thus should not be enforced. This case raised the issue of whether a judgment obtained in a jurisdiction without an analogous immunity-conferring statute would be enforced in the United States if the defendant would have been immune under section 230 if sued domestically. Complaint at 7, *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929 (D. Ariz. 2008) (No. CV-07-0956-PHX-FJM), 2007 WL 4448527; Motion to Dismiss at 15, *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929 (D. Ariz. 2008) (No. CV-07-0956-PHX-FJM), 2007 WL 4452683. The Ripoff Report website contains a notice stating that it is intended "solely for use inside the United States," and that "this site should not be used to post information regarding foreign (non-U.S.-based) companies unless the report involves a transaction which took place inside the United States" and that "different countries have very different laws regarding, among other things . . . free speech rights and what may or may not constitute defamation." Ripoff Report, <http://www.ripoffreport.com/>

gemstones, alleged that a site visitor, Sullivan, posted messages stating it was engaged in unlawful activities.¹⁴⁸ After the plaintiff threatened legal action, Sullivan requested that Ripoff Report remove the offending postings and, according to the complaint, disavow their contents,¹⁴⁹ but the site refused.¹⁵⁰ The plaintiff claimed that the defendant website operators not only encouraged the posting of defamatory material, but also profited from it, alleging that they “use Ripoff Report messages as leverage to coerce targeted businesses to pay for defendants’ Corporate Advocacy Program, which purports to help investigate and resolve posted consumer complaints.”¹⁵¹ The court noted that even though it was “obvious that a website entitled Ripoff Report encourages the publication of defamatory content,”¹⁵² section 230 conferred absolute immunity so long as Ripoff Report did not itself “create or develop” the offending content.¹⁵³

Here, *Global Royalties* highlighted a related trend in section 230 jurisprudence that often renders fatal plaintiffs’ inability to rely on the distributor liability theory. While section 230 does not immunize those who create content, courts have endorsed a constricted notion of “creation or development.”¹⁵⁴ *Global Royalties*’ complaint observed that posters to Ripoff Report were *required* to select from a list of categories, like “Scam Artists,” created by the website owners, which seemed to invite the posting of defamatory content.¹⁵⁵ Therefore, the argument went, Ripoff Report was a “creator or developer” of content submitted by “another information

ConsumersSayThankYou/NoticeForUsersOutsideTheUS.aspx (last visited May 11, 2010).

148. *Global Royalties*, 544 F. Supp. 2d at 930.

149. Complaint at 6, *Global Royalties*, 544 F. Supp. 2d 929 (No. CV-07-0956-PHX-FJM), 2007 WL 4448527. Sullivan was not named as a defendant, presumably because he had few assets.

150. *Id.*

151. *Global Royalties*, 544 F. Supp. 2d. at 932.

152. *Id.* at 933. The court references Ripoff Report’s drop-down menus that included such categories as “Con Artists.” The court declined to follow *Fair Housing Council of San Fernando Valley v. Roommates.Com*, which suggested that a website might be held liable as an “information content provider,” the equivalent of the category of “author” at common law, if it encouraged unlawful content with its drop-down menus. *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2008).

153. *Global Royalties*, 544 F. Supp. 2d. at 934.

154. *See, e.g.*, *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998) (holding that AOL was not “creator or developer” of content despite retaining right to exercise control over editorialist Matt Drudge’s news and gossip website).

155. *Global Royalties*, 544 F. Supp. 2d. at 932.

content provider,” and was ineligible for immunity.¹⁵⁶ Despite Rippoff Report’s obvious encouragement, the court held the website was not responsible for “creation or development” because it had not solicited Sullivan’s posting in particular, nor had it solicited postings specifically targeting the plaintiff.¹⁵⁷ While it is reasonable to conclude that “development” might implicate more activity than simply uttering a defamatory statement (i.e., that websites might lose their immunity if they encourage objectionable content to the extent that they are themselves responsible for it), courts, engaging in similarly cramped analyses, have, with a few notable but limited exceptions,¹⁵⁸ virtually erased the word “development” from the statute. Therefore, unless a prospective plaintiff alleges that a website or ISP authored a defamatory statement, itself a high threshold, recovery is virtually impossible.

B. Section 230 Unhinged: Zeran’s Expansion of the Subject Matter of Section 230 Immunity

Zeran’s most unsettling move was broadening the reach of section 230(c)(1) beyond the boundaries of defamation law to cover a broad range of claims. Instead of interpreting section 230 as precluding only claims against primary publishers of third-party content (which *Zeran* advocated) or, even more broadly, as a bar against all defamation or defamation-type lawsuits related to disseminating third-party content (which the court’s collapse of distributor liability into the “publisher” category might suggest), the court employed the more general terms “tort-based lawsuits” and “tort liability” to describe the scope of the safe harbor.¹⁵⁹ This suggested that section 230 immunity might extend to other tort-based causes of action despite section 230(c)(1)’s language referring to “publisher[s] or speaker[s]”¹⁶⁰—terms of art specific to defamation law. Later in the opinion, the *Zeran* court made an even bolder statement: “By its plain language, § 230 creates a federal immunity to *any cause of action* that would make service providers liable for information originating with a third-party user of that service.”¹⁶¹

Properly read, *Zeran*, at its most expansive, ought to have stood for the proposition that section 230 conferred immunity on In-

156. *Id.*

157. *Id.* at 933.

158. *See, e.g.*, Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008).

159. *Zeran v. AOL*, 129 F.3d. 327, 330 (4th Cir. 1997).

160. 47 U.S.C. §230(c)(1) (2006).

161. *Zeran*, 129 F.3d. at 330 (emphasis added).

ternet entities only insofar as third-party content caused “defamation-type” harms. The court’s reliance on doctrine exclusive to defamation law to establish that “distributor liability is a subset of publisher liability”¹⁶² contradicts the notion that section 230’s safe harbor extends to *any* legal malfeasance perpetrated by a third party.¹⁶³ Although it does not make the *Zeran* court’s logic any more credible, the nature of *Zeran*’s claims sheds some light on the court’s possible motivations. *Zeran* did not allege harms to his reputation, which defamation law traditionally protects against.¹⁶⁴ Instead, he alleged that the negligence of AOL resulted in other detriments to him that were perhaps more properly cast as negligent infliction of emotional distress or false light invasion of privacy.¹⁶⁵ If the court had used the phrase “defamation-based torts” to describe section 230’s immunity provision, this language would have been inadequate to sustain the court’s holding that AOL was immune from suit. The court, interpreting section 230 in light of free-speech and Internet-development concerns, likely construed the statute to include a grant of immunity against those publication-based torts—false light invasion of privacy and infliction of emotional distress—that are sometimes treated as “cousins” of defamation law because the harms suffered are analogous and because they also implicate speech interests.¹⁶⁶

While one of *Zeran*’s pronouncements on section 230—rejection of intermediate “distributor” liability—has persisted in largely the same formulations as in *Zeran*, courts have aggressively built upon its suggestion that section 230 immunity encompasses a broad range of claims. Courts have extended it to theories of liability as

162. *Id.* at 332.

163. On the other hand, the court’s rejection of the publisher-distributor distinction, while using analytical tools indigenous to defamation law, enabled future courts considering section 230 to use the term “publisher” in the layman’s sense to refer to the dissemination of any sort of content that results in any sort of harm to a prospective plaintiff.

164. RESTATEMENT (SECOND) OF TORTS § 621 cmt. a (1977) (“In defamation actions general damages are imposed for the purpose of compensating the plaintiff for the harm that the publication has caused to his reputation.”); *see, e.g.*, *Allen v. Pioneer Press Co.*, 41 N.W. 936, 938 (Minn. 1889) (purpose of defamation action is to “vindicate the plaintiff’s character”).

165. *See* Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 149, 155 (2008).

166. *See, e.g.*, *Hustler v. Falwell*, 485 U.S. 46, 56 (1988) (treating torts of defamation and intentional infliction of emotional distress, at least pertaining to public figures, as similar for purposes of First Amendment analysis).

2010]CAN COURTS TAME COMMUNICATIONS DECENCY ACT? 397

diverse as breach of contract,¹⁶⁷ ordinary negligence,¹⁶⁸ interference with prospective economic advantage,¹⁶⁹ false advertising,¹⁷⁰ and distribution of child pornography.¹⁷¹ While there has been some criticism concerning overbroad immunity for Internet entities,¹⁷² there has been silence concerning section 230's dubious applicability to non-speech-based claims.¹⁷³ This trend, however, is more dangerous than concerns about overbroad immunity because it threatens to promote near-lawlessness on the Internet.

After *Zeran*, courts expanded the reach of section 230 immunity beyond defamation law not by construing the term "publisher" in subsection (c)(1) as a term of art, but instead using it as it appears in ordinary parlance.¹⁷⁴ *Doe v. MySpace, Inc.*,¹⁷⁵ decided in the Western District of Texas in 2007, is a typical example of how this notion of "publisher" operates. In *MySpace*, a mother sued the popular social networking website for negligence, fraud, and negligent misrepresentation after her daughter was sexually assaulted by a man she had met on the website.¹⁷⁶ The mother argued that section 230 immunity was inapplicable because she had "not sued MySpace for the publication of third-party content but rather for failing to implement basic safety measures to prevent sexual predators from communicating with minors."¹⁷⁷ She further argued that section 230 immunity was limited to "defamation or related actions."¹⁷⁸ The court disagreed, holding that section 230 "precludes courts from entertaining claims that would place a [website] in a

167. See, e.g., *Jane Doe One v. Oliver*, 755 A. 2d 1000, 1002, 1004 (Conn. Super. Ct. 2000).

168. See, e.g., *Doe v. Myspace, Inc.*, 528 F.3d 413, 418, 422 (5th Cir. 2008).

169. See, e.g., *Optinrealbig.com, LLC v. Ironport Systems, Inc.*, 323 F.Supp. 2d 1037, 1049 (N.D. Cal. 2004).

170. See *Perfect 10, Inc. v. CCBill, LLC*, 340 F. Supp. 2d 1077, 1110–11 (C.D. Cal. 2004), *aff'd in part, rev'd in part*, 481 F.3d 751 (9th Cir. 2007).

171. *Doe v. Bates*, No. 5:05-CV-91DF-CMC, 2006 WL 3813758, at *2, *5 (E.D. Tex. Dec. 27, 2006).

172. See, e.g., Matthew G. Jeweler, *The Communications Decency Act of 1996: Why § 230 Is Outdated and Publisher Liability for Defamation Should be Reinstated Against Internet Service Providers*, 8 U. PITT. J. TECH. L. & POL'Y. 3, 3 (2007).

173. While some commentators have mentioned this phenomenon, there has been little analysis of its import. See, e.g., *Federal District Court Denies § 230 Immunity*, *supra* note 10, at 2253 n.3 (2008).

174. See, e.g., *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 (Cal. App. 2002) (equating "publish" with "dissemination").

175. *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413 (5th Cir. 2008).

176. *Id.* at 846.

177. *Id.* at 848.

178. *Id.* at 849.

publisher's role."¹⁷⁹ Without conducting any independent analysis of the statutory language, the court cited a line of cases, dating back to *Zeran*, supporting the proposition that section 230 immunity applied to non-defamation-based claims.¹⁸⁰ Ironically, despite itself stretching the statute to its breaking point, the court accused the plaintiff of disingenuous "artful pleading" for accusing MySpace of negligence.¹⁸¹ The court construed "publish" to encompass any sort of behavior related to hosting third-party content, and even extended the immunity provision to cover MySpace's *own* failure to act.¹⁸² Under this approach, websites enjoy immunity from virtually any claim¹⁸³ so long as a third party played some role in harming the plaintiff.

A hypothetical helps to illustrate the consequences of overbroad immunity. Assume that there is a federal law making it a crime for a social networking website to negligently allow a convicted sex offender to create a "profile." Assume that there is also a state law that creates a private right of action against social networking websites for negligently permitting sex offenders to register, and makes them strictly liable in tort for violations of the federal law. If parents sued the website in state court after their child was victimized by a convicted sex offender who had been negligently allowed to register on the site, section 230 immunity would operate to preempt the civil state law claim under the current judicial approach. This outcome does not comport with section 230's original aim of encouraging responsible Internet citizenship, nor does it serve to protect the important free speech interests that are often invoked in the section 230 context.¹⁸⁴ It also undermines traditional state prerogatives that are the basis for imposing tort liability.

Despite this worrisome trend, a few courts have moved to limit the subject matter of section 230 immunity. In *Avery v. Idleaire Tech-*

179. *Id.* at 847 (quoting *Dimeo v. Max*, 433 F. Supp. 2d 523, 528 (E.D. Pa. 2006)) (emphasis added).

180. *Id.* at 847-49.

181. *See id.* at 849.

182. *See id.* at 848-51.

183. Section 230 does not provide immunity for criminal or intellectual property claims. 47 U.S.C. § 230(e) (2006). While criminal claims are easy to categorize, courts have struggled with defining whether a law "pertain[s] to intellectual property." *Id.* In *Perfect 10*, for example, the Ninth Circuit determined that "intellectual property" referred to only "*federal* intellectual property" laws. *Perfect 10, Inc. v. CCBill, LLC*, 481 F.3d 751, 768 (9th Cir. 2007) (emphasis added).

184. *See, e.g., Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003); *Ben Ezra, Weinstein, & Co. v. AOL*, 206 F.3d 980, 985 n.3 (10th Cir. 2000).

2010] CAN COURTS TAME COMMUNICATIONS DECENCY ACT? 399

nologies Corp.,¹⁸⁵ a 2007 case from the Eastern District of Tennessee, the court held that section 230 did not bar a sexual harassment claim under Title VII of the Civil Rights Act of 1964 when the plaintiff was subjected to viewing pornographic “pop-ups” that would intermittently appear on company computers.¹⁸⁶ In *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*,¹⁸⁷ although the majority expressly disclaimed any reliance on the fact that the plaintiff made claims under the Fair Housing Act, the dissent forcefully argued that “the majority’s conclusion [that section 230 does not confer immunity] rests on the premise that Roommate’s questions and matching function violate the FHA.”¹⁸⁸ In *FTC v. AccuSearch, Inc.*,¹⁸⁹ a 2005 District of Wyoming case, the court granted summary judgment to the Federal Trade Commission (FTC) against a website that helped users obtain private phone records.¹⁹⁰ While basing its conclusion that AccuSearch did not enjoy immunity on a determination that AccuSearch was not a “publisher,”¹⁹¹ the court did not endorse the extension of section 230 immunity to the FTC’s unfair trade practices theory of liability.¹⁹² The court held that the object of the unfair trade practices claim was not the behavior of a third party, but rather stemmed directly from AccuSearch’s facilitating the release of confidential phone records.¹⁹³

These examples illustrate that courts might be more willing to limit the reach of section 230 immunity if the plaintiff seeks to advance a federal interest or assert a federally-created right. Stated more broadly, some types of claims, such as those involving civil rights, may simply be important enough from a policy perspective to defeat section 230 immunity. Yet the problem of over-expansive immunity unfortunately persists; these cases represent rare exceptions, indicating that courts may be unwilling to go against the precedential grain even in cases where it may be warranted.

185. No. 3:04-CV-312, 2007 WL 1574269 (E.D. Tenn. May 29, 2007).

186. *See id.* at *4, *20.

187. *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1178 (9th Cir. 2008).

188. *Id.* at 1178 (McKeown, J., dissenting). For example, the majority wrote that “Roommate’s website is designed to force subscribers to divulge protected characteristics and discriminatory preferences.” *Id.* at 1172.

189. No. 06-CV-105-D, 2007 WL 4356786 (D. Wyo. Sept. 28, 2007).

190. *Id.* at *10.

191. *Id.* at *5. As explained *infra*, *AccuSearch* also indicates that an online entity might not be entitled to section 230 immunity if it acts culpably in disseminating third-party content.

192. *Id.* at *6.

193. *Id.* Federal law makes phone records confidential and prohibits their unauthorized release. *Id.* at *2.

C. Barnes v. Yahoo!, Inc.

The recent Ninth Circuit case of *Barnes v. Yahoo!, Inc.*¹⁹⁴ gave the expansive view of section 230 another judicial thumbs-up, unfortunately solidifying the defendant-friendly position that the statute is an all-purposes liability shield. But in a puzzling and seemingly inconsistent move, the court did not close the door to liability altogether.

The facts of *Barnes* are not novel for a section 230 case. After Cecilia Barnes ended a relationship with her boyfriend, he allegedly posted “profiles” of Barnes on a Yahoo! website, including nude photographs and open invitations for romantic activity.¹⁹⁵ The profiles also included her real telephone numbers and place of employment.¹⁹⁶ To further his cruel hoax, the ex-boyfriend allegedly visited Yahoo! chat rooms, impersonated Barnes and directed suitors to the fake profile.¹⁹⁷ After many unwanted communications and visits to her office by strange men, Barnes sent a letter to Yahoo! asking them to remove the profiles.¹⁹⁸ After over a month of unsuccessful efforts to contact Yahoo!, the profiles had not been taken down and Yahoo! had not responded.¹⁹⁹ On the eve of a local news story exposing the hoax, a Yahoo! officer contacted Barnes and personally assured her that it would remove the postings.²⁰⁰ After two more months, the postings remained until Barnes filed a lawsuit.²⁰¹

As the court construed her complaint, Barnes made two Oregon state-law claims: first, for negligent provision of services, or “negligent undertaking,” and second, for promissory estoppel.²⁰² The court observed that Oregon law on negligent undertaking covered:

[O]ne who undertakes . . . to render services to another which he should recognize as necessary for the protection of the other[] . . . is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if a) his failure to exercise such care in-

194. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

195. *Id.* at 1098.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 1098–99.

201. *Id.* at 1099.

202. *Id.*

2010] CAN COURTS TAME COMMUNICATIONS DECENCY ACT? 401

creases the risk of such harm, or b) the harm is suffered because of the other's reliance on the undertaking.²⁰³

Essentially, Ms. Barnes claimed that once Yahoo! undertook to remove the offending postings, it incurred a duty to protect Ms. Barnes.²⁰⁴ As for the promissory estoppel claim, Barnes alleged that she detrimentally relied on Yahoo!'s promise to remove the postings.²⁰⁵

The court held that section 230(c)(1) barred Barnes' negligent undertaking claim because it "treated [Yahoo!] as a publisher or speaker of information provided by another information content provider [the ex-boyfriend]."²⁰⁶ The court, like others before it, embraced an expansive interpretation of section 230, but was especially explicit about it, stating that "section 230(c)(1) precludes courts not just from treating internet service providers as publishers not just for the purposes of defamation law, but *in general*."²⁰⁷ With ostensible faithfulness to the statutory text, the court relied on a dictionary definition of "publisher" to give the law broad scope: "[T]he reproducer of a work intended for public consumption" or "one whose business is publication."²⁰⁸ Like other courts, the Ninth Circuit paid no mind to the fact that "publisher" and "speaker" are terms of art in defamation law.²⁰⁹

The court's "in general" language, while supposedly based on a textual reading of the statute, may be more indicative of acquiescence to the direction where section 230 jurisprudence has been headed ever since *Zeran*. The court could have construed Barnes' negligent undertaking claim as an artfully pled defamation claim, and even implied that it might.²¹⁰ The court could have just as easily held that Yahoo! was a "publisher" for "exercising [the] traditional editorial functions"²¹¹ of deciding whether or not to remove or alter content on its website. Instead, the court went out of its way and beyond the facts of the case to pronounce that section 230 was a defense of general applicability.

203. *Id.* at 1102 (citing RESTATEMENT (SECOND) OF TORTS § 323 (1965)).

204. *Id.* at 1103.

205. *Id.* at 1099.

206. 47 U.S.C. § 230(c)(1) (2006).

207. *Barnes*, 570 F.3d at 1104 (emphasis added).

208. *Id.* at 1102 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1837 (1986)).

209. *See supra* Part I.

210. *Barnes*, 570 F.3d at 1102 ("[A] plaintiff cannot sue someone for publishing third-party content simply by changing the name of the theory from defamation to negligence.").

211. *Zeran v. AOL*, 129 F.3d 327, 330 (4th Cir. 1997).

While the Ninth Circuit followed prevailing trends in discussing Barnes' negligent undertaking claim, it left many unanswered questions with respect to the future of the statute by holding that section 230 did not bar Barnes' promissory estoppel claim.²¹² In a convoluted analysis that lacked the firm hand that parsed the negligent undertaking claim, the court held that the promissory estoppel claim did not treat Yahoo! as a "publisher or speaker":

Section 230 creates a baseline rule: no liability for publishing or speaking the content of other information service providers. Insofar as Yahoo made a promise [to remove the offending material] with the constructive intent that it be enforceable, it has implicitly agreed to an alteration in such baseline.²¹³

This holding was facially inconsistent with the portion of the opinion on negligent undertaking; for just as "negligent undertaking" might be a dressed-up, ordinary claim against a "publisher," the court could have held that Ms. Barnes' reliance on the alleged promise to remove the material was similarly based on Yahoo!'s actions as a "publisher."

Although promissory estoppel might only emerge as a claim in situations where an Internet entity promised to remove something and failed to do so, *Barnes* might open up the door to plaintiffs who come up with viable promissory estoppel claims.

D. The Practical Consequences of Zeran's Distributor Liability Problem

Zeran's interpretation that section 230(c)(1) forecloses "distributor" liability eliminated any chance of recovery for plaintiffs in many Internet defamation cases. This consequence stems from the difficulty of identifying the original source of defamatory content on the Internet. Although the *Zeran* opinion claimed that plaintiffs could obtain redress,²¹⁴ the ability to communicate anonymously on the Internet makes this reassurance illusory without distributor liability for several reasons.

First, even where a website or ISP may have the means to identify a poster of defamatory content, defamation plaintiffs may have to subpoena the Internet company multiple times,²¹⁵ and may face

212. *Barnes*, 570 F.3d. at 1109.

213. *Id.* at 1108–09.

214. *Zeran*, 129 F.3d. at 330 (stating that its holding that AOL is immune from suit does not mean "that the original culpable party who posts defamatory messages would escape accountability").

215. See Jason C. Miller, *Who's Exposing John Doe? Distinguishing Between Public and Private Figure Plaintiffs in Subpoenas to ISPs in Anonymous Online Defamation Suits*, 13 J. TECH. L. & POL'Y 229, 245 (2008) (explaining that a first round of subpoenas

2010]CAN COURTS TAME COMMUNICATIONS DECENCY ACT? 403

motions to quash if the website or ISP is reluctant to offer information about its users.²¹⁶ Second, plaintiffs may have trouble obtaining personal jurisdiction over a “John Doe” defamer of unknown origin.²¹⁷ Third, in deference to the First Amendment, many courts have imposed a three-part test that plaintiffs must meet to overcome the qualified privilege against disclosure of anonymous sources.²¹⁸ Fourth, even if a defamation plaintiff obtains the identity of an anonymous poster, libel suits are difficult to win,²¹⁹ and “the typical John Doe has neither deep pockets nor libel insurance from which to satisfy a defamation judgment.”²²⁰ Fifth, even if a defamed party can rebut false statements by posting rebuttals, as some sites allow, search engines like Google can exacerbate the problem by giving indexing preference to the initial false statement, which might display most prominently when searching for a business or a person’s name online.²²¹ Given these obstacles, plaintiffs are often advised not to pursue online defamation litigation.²²²

The lack of distributor liability for websites and ISPs also has the effect of discouraging self-policing of content, an ironic consequence given the original aims of the statute.²²³ Websites and ISPs know that no matter how inflammatory third-party postings are, complaints from aggrieved parties will be to no avail, even after notice to the website or ISP. The Ripoff Report website, for example, contains a page entitled, “About Us: Want to Sue Ripoff Report?,”

might only reveal e-mail addresses and/or IP addresses, making a second round of subpoenas necessary to reveal actual identities of posters).

216. See, e.g., *Donato v. Moldow*, 865 A.2d 711, 714 (N.J. Super. Ct. App. Div. 2005).

217. Miller, *supra* note 215, at 246.

218. Under this test, plaintiffs must show:

- (1) the issue as to which disclosure of the source is sought goes to the heart of the case, (2) disclosure is necessary to prove the issue because the party seeking the information is likely to prevail on all other issues, and (3) all other means of proving the issue have been exhausted.

Sinclair v. TubeSockTedD, 596 F. Supp. 2d 128, 132 (D.D.C. 2009) (citing *Lee v. Dept of Justice*, 413 F.3d 53, 59–60 (D.C. Cir. 2005)); see also Miller, *supra* note 215, at 246–50 (discussing First Amendment in context of defamation case).

219. See Randall P. Bezanson, *Libel Law and the Press: Setting the Record Straight*, 71 IOWA L. REV. 215, 228 (1985) (explaining that very few libel plaintiffs are successful).

220. Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 859 (2000).

221. Miller, *supra* note 215, at 236.

222. *Id.* at 246.

223. See, e.g., David V. Richards, *Posting Personal Information on the Internet: A Case for Changing the Legal Regime Created by § 230 of the Communications Decency Act*, 85 TEX. L. REV. 1321, 1334–35 (2007).

which includes a lengthy exposition of section 230 immunity and responds to many frequently asked questions concerning the practicalities of suing them for defamation and other torts.²²⁴ One heading, “I Know the CDA Protects Ripoff Report, But I am Going to Sue Anyway,” contains an “answer” positing that attorneys and parties filing defamation lawsuits would be subject to Rule 11 sanctions,²²⁵ and states that Ripoff Report will not stipulate to a dismissal once a case is filed absent agreement to pay Ripoff Report’s attorneys fees.²²⁶ Also, as indicated above,²²⁷ it is unlikely that a court would find a website or ISP that edits content responsible for creating that content as “information content providers.”²²⁸

E. Possible Solutions to the Distributor Liability Problem

Because courts should balance the government’s interest in protecting reputation (in the case of individuals) and economic interests (in the case of businesses in the “trade libel” context) against other considerations, including free speech,²²⁹ the current section 230 judicial approach must be changed in order to regain a proper equilibrium. Core American defamation jurisprudence has arguably reached such a balance after *New York Times v. Sullivan*²³⁰ and other landmark cases²³¹ that restrained the harsh effects of common law defamation to coincide with First Amendment doctrine.²³² The principles announced in these cases did not arrive quickly or easily, indicating that swinging the pendulum back in favor of on-

224. Ripoff Report, About Us: Want to Sue Ripoff Report?, <http://www.ripoffreport.com/ConsumersSayThankYou/WantToSueRipoffReport.aspx> (last visited May 11, 2010).

225. Federal Rule of Civil Procedure 11 provides for sanctions of an attorney or party who advances frivolous claims. FED. R. CIV. P. 11(b)(2), (c)(1).

226. Want to Sue Ripoff Report?, *supra* note 224.

227. *See supra* Part II.

228. *See* Richards, *supra* note 223, at 1335–36.

229. *See* Milkovich v. Lorain Journal Co., 497 US 1, 22–23 (1990).

230. *N.Y. Times v. Sullivan*, 376 U.S. 254, 279–80 (1964) (prohibiting newspaper from being sued for defamation for statements about official conduct of public official if statements were not made with knowing or reckless disregard for the truth).

231. *See, e.g.*, *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 324 (1974) (prohibiting states from imposing defamation liability without fault); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (placing burden on private-figure plaintiffs to prove falsity of allegedly defamatory statements).

232. *See* Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1599–1600 (2007) (discussing history of landmark distributor liability cases in First Amendment context).

2010] CAN COURTS TAME COMMUNICATIONS DECENCY ACT? 405

line defamation plaintiffs will not be easy, especially given the reliance on *Zeran's* status quo by entrenched interests.²³³

Although some courts have leaned towards simply re-establishing the common law distributor liability scheme for the Internet,²³⁴ this is not a viable solution. As *Stratton Oakmont* suggested,²³⁵ even if courts based such a scheme on “liability upon notice” of defamatory material—the typical formulation of distributor liability—it would be hard to administer: policing thousands of third-party postings would be difficult and expensive, threatening to put some useful websites out of operation entirely.²³⁶ Some have also reasoned that because it may be hard to determine whether those claiming to be defamed are credible, websites may be overcautious in removing material rather than independently verifying each claim of defamation. For example, in the United Kingdom, which essentially retains the common law defamation regime, evidence suggests that ISPs “typically engage in self-censorship on receipt of a notice alerting to the (alleged) defamatory content of information . . . the present law results in [ISPs] removing material that may be in the public interest and well-researched.”²³⁷

233. Both commercial interests and public interest groups have defended the distributor liability holding of *Zeran*. See, e.g., Brief of Amici Curiae Electronic Frontier Foundation & ACLU of Northern California as Amici Curiae in Support of Defendant-Respondent Ilena Rosenthal, *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006) (No. S122953), 2004 WL 3256405; Brief of Amici Curiae Amazon.Com, Inc. et. al. in Support of Roommate.com, LLC, *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (No. CV-03-09386-PA (RZx)), 2005 WL 2106305.

234. See, e.g., *Global Royalties v. Xcentric Ventures*, No. 07-956-PHX-FJM, 2007 WL 2949002 (D. Ariz. Oct. 10, 2007). Although the court ultimately refused to revert back to common law practice without an amendment of the CDA by Congress, it suggested that by eliminating common law publisher liability the CDA “render[s] plaintiffs helpless against website operators who refuse to remove allegedly defamatory content.” *Id.* at *4.

235. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *4 (N.Y. Sup. Ct. 1995), *superseded by statute*, Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 47 U.S.C.).

236. In a recent Seventh Circuit case involving Fair Housing Act claims against Craigslist, the popular classified advertising website, Judge Easterbrook observed that requiring the leanly-staffed website to vet millions of postings would be impractical. *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668–89 (7th Cir. 2008).

237. DARIO MILO, *DEFAMATION AND FREEDOM OF SPEECH* 216 (2008) (internal citations omitted).

F. *A Proposed Solution to Zeran's Distributor Liability Problem: A Notice-and-Take-Down Statute Modeled on the Digital Millennium Copyright Act*

One solution proposed by a few commentators²³⁸ and courts²³⁹ involves enacting legislation containing “notice-and-take-down” provisions modeled upon the Digital Millennium Copyright Act (DMCA).²⁴⁰ Relevant provisions of the DMCA provide a liability shield for websites and ISPs for copyright-infringing content posted by third parties, but only if they do not have “actual knowledge that the material or an activity using the material on the system or network is infringing” and are “not aware of facts or circumstances from which infringing activity is apparent,” and “upon obtaining such knowledge or awareness, [they act] expeditiously to remove, or disable access to, the material.”²⁴¹ The DMCA also provides for notification procedures for plaintiffs, including a requirement that the complainant be authorized to act on behalf of the owner of the allegedly infringed copyright and a requirement that a notice of claimed infringement include a statement verifying its accuracy.²⁴² An analogous statute concerning liability for hosting defamatory third-party content would preserve liability upon notice, and would have the advantage of vetting meritless claims. The statute would preserve a limited safe harbor for websites and ISPs that were initially ignorant of and played no role in creating defamatory or otherwise offensive postings, but would also give websites incentives to remove offending postings.

However, imposing such a statutory regime for preserving distributor liability would involve significant practical challenges. Copyright infringement and defamation, while they may occur through similar means online, are very different in nature. While copyright results from a delineated federal statutory scheme administered exclusively by federal courts, defamation is a common law creature that does not enjoy the same uniformity. Although the constitutional limits on defamation law partially mitigate this problem, a DMCA-like statute, while creating a uniform federal ap-

238. See, e.g., Medenica & Wahab, *supra* note 89, at 239 (2007); David E. Hallett, *How to Destroy a Reputation and Get Away With It: The Communications Decency Act Examined: Do the Policies and Standards Set Out in the Digital Millennium Copyright Act Provide a Solution for a Person Defamed Online?*, 41 J. L. & TECH. 259, 278 (2001).

239. See, e.g., *Batzel v. Smith* 333 F.3d 1018, 1031–32 n.19 (9th Cir. 2003).

240. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

241. 17 U.S.C. § 512 (c) (1) (A) (i)–(iii) (2006).

242. *Id.* § 512(c) (3) (A) (vi).

2010] CAN COURTS TAME COMMUNICATIONS DECENCY ACT? 407

proach, would also invite the invocation of different states' substantive laws. It might require websites to comply more fully with the defamation laws of multiple jurisdictions, undoing the advantage of uniformity that section 230's liability shield currently provides. While websites must ostensibly contend with states' defamation law now, courts' interpretations of section 230 have rendered them immune in most circumstances. Uniformity prevails, if only in the form of a shield from different states' defamation laws. On the Internet, legal uniformity has enormous practical advantages. Michael L. Rustad and Thomas H. Koenig write that the "e-business community will be handicapped if it is subject to multiple conflicting procedural and substantive ground rules."²⁴³ One commentator highlights another potential problem, writing that "[i]t is easier to establish who holds a copyright than whether a statement is defamatory."²⁴⁴ Lastly, perhaps the biggest practical problem with "these DMCA-like distributor liability proposals is that they generally require Congress to act and amend the CDA."²⁴⁵

G. *A Proposal: A Judicially-Created Objective Bad Faith Exception*

An implied bad faith exception to section 230 immunity for distributors of defamatory content would allow more plaintiffs with meritorious claims to prevail, and would be easier to implement and administer. The exception would prevent websites and ISPs from asserting section 230 immunity if they acted unreasonably in either posting or failing to remove defamatory content. While bad faith operates to undermine a party's defenses in some other contexts,²⁴⁶ courts evaluating section 230 claims usually refuse to inquire into the behavior of the Internet entity hosting allegedly defamatory content.²⁴⁷

However, some courts have taken steps, albeit limited ones, in the direction of recognizing this exception. Most recently, in *Roommates*, the Ninth Circuit ruled that a website that matched prospective roommates could not claim section 230 immunity because it required users to answer impermissible questions in violation of the

243. Michael L. Rustad & Thomas H. Koenig, *Harmonizing Internet Law: Lessons from Europe*, 9 No. 11 J. INTERNET L. 3, 7 (2006).

244. Miller, *supra* note 215, at 239.

245. *Id.* at 240.

246. See, e.g., WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES 101-02 (2d ed. Supp. 2003).

247. See, e.g., *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008).

Fair Housing Act.²⁴⁸ While the court did not explicitly rule on the question of distributor liability or defamation law, holding that the website became an “information content provider” because it “created content,” the court indicated that there are limits to the control that websites may have over third-party content if they are to claim section 230 immunity: “The Communications Decency Act was not meant to create a lawless no-man’s land on the Internet.”²⁴⁹ *Roommates* suggests that courts may be willing to police the boundaries of section 230 immunity, and that a bad faith exception does not present a great doctrinal obstacle. Taking the court at its word that it did not inquire into the merits of the underlying discrimination claims,²⁵⁰ its analysis might apply to a website such as Ripoff Report that seems to invite defamatory content. Although the *Global Royalties* court ruled that Ripoff Report enjoyed immunity because it did not solicit *particular* defamatory content, future courts might reject this analysis as overly formalistic, focusing instead on the site’s apparent awareness of the offending material.

One commentator has proposed a narrow, “mens rea-based” exception to section 230 immunity to address the distributor liability problem, which would hold an online entity liable when it intends to create “an identifiable space . . . overwhelmingly filled with some identifiable kind of illegal content.”²⁵¹ While subjective intent will often be implicit in a determination of a web entity’s acting in bad faith, an objective bad faith standard is more comprehensive and easier to administer. In the insurance context, where the doctrine is the most fully developed, bad faith is essentially a reasonableness standard.²⁵² Adapted for purposes of defamation law on the Internet, a website or ISP acts unreasonably if it either allows defamatory content postings or fails to remove them once notified. While this language sounds of negligence, the bad faith standard

248. Fair Hous. Council of San Fernando Valley v. Roommates.Com, 521 F.3d 1157, 1175 (9th Cir. 2008).

249. *Id.* at 1164. The court suggested that there may be limitations on section 230 immunity that depend the subject matter of the underlying claims, writing that Internet businesses “must comply with laws of general applicability.” *Id.* at 1164 n.15.

250. Judge McKeown’s dissent posited that the majority’s holding that Roommates.Com was not immune from suit resulted from its apparent conclusion that the website’s conduct violated the Fair Housing Act. *Id.* at 1178 (McKeown, J., dissenting).

251. *Federal District Court Denies § 230 Immunity*, *supra* note 10, at 2248–49.

252. Wisconsin, for example, defines the procedural contours of the doctrine: “[B]ad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim. . . .” *Anderson v. Cont’l Ins. Co.*, 271 N.W.2d 368, 376–77 (Wis. 1978).

2010] CAN COURTS TAME COMMUNICATIONS DECENCY ACT? 409

would rely on *affirmative* acts such as failure to remove an obviously defamatory posting, making the effective level of culpability higher. Instead of relying on malicious intent, which is difficult to show, courts could apply this flexible standard based on all of the circumstances of the case before deciding whether the website or ISP is entitled to section 230 immunity.²⁵³ This would inject the equitable consideration of the defendant's conduct into the court's decision, allowing the plaintiff a chance to defeat the claim of immunity while still preserving it in many circumstances. Only particularly egregious conduct would trigger liability. Although the standard would necessarily result in higher litigation costs for defendants, courts could still impose Rule 11 or analogous state-law sanctions to discourage frivolous claims while preventing online entities from "abusing" CDA immunity.

Without aggressive judicial action or an amendment to the CDA, overbroad immunity would persist and the exception may swallow the rule. As the Ninth Circuit did in *Roommates*, courts must take continued steps to constrain the reach of section 230(c)(1) immunity to defamation claims, and should go no further than extending it to those torts that implicate similar personal, reputation-type interests, such as invasion of privacy and infliction of emotional distress. Although *Roommates* illustrates that there are other avenues to limiting the subject matter of immunity, such as holding websites liable as primary publishers or as creators of content,²⁵⁴ courts should confront this issue head-on.

First, courts should address whether to dismiss a plaintiff's claims on the merits before applying section 230's immunity provision. Too often, courts interpreting section 230 have addressed the question of entitlement to immunity before fully considering the merits of the substantive claims. This disciplined approach would reinstate section 230's rightful place as the exception, not the rule. Having a similar rationale to the canon of constitutional avoidance,²⁵⁵ this approach would mandate that if a court can dismiss a claim on either section 230 grounds or its underlying merits, the court should choose to dismiss solely on the merits.²⁵⁶

253. Of course, the plaintiff would still have to make a prima facie showing of the underlying defamation claim before the court applies the bad faith standard.

254. See *Roommates*, 521 F.3d at 1175.

255. According to the canon, ambiguous statutes should be construed to avoid reaching constitutional questions. RICHARD E. LEVY, *THE POWER TO LEGISLATE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 129 (2006).

256. The District Court and Court of Appeals opinions in *Doe v. Sexsearch.com*, a 2008 case decided in the Sixth Circuit, respectively demonstrate the wrong and the right ways to apply this approach. The plaintiff in *Sexsearch* had sex with a

Second, before deciding whether an online entity is immune because of the type of entity it is or the type of role it played in disseminating illegal content, courts should consider whether section 230 should apply based on the theory of liability advanced by the plaintiff. Courts should first assess the nature of the harm the plaintiff alleges she suffered, and evaluate whether she claims defamation-type harms, like injury to reputation, invasion of privacy, and emotional distress. As discussed, the statute should be interpreted in light of its language, which clearly sounds in defamation law. Allowing certain claims that are close to textbook defamation will help clear up whether the plaintiff has artfully pleaded garden-variety tort claims in order to evade the proper boundaries of section 230. Courts should almost never dismiss other claims, such as allegations under civil rights laws or breach of contract claims, on section 230 grounds, for they are much too far removed from the tort of defamation. If those claims are meritless, they should be dismissed on the merits instead of by application of the statute.

CONCLUSION

After more than a decade, section 230 of the Communications Decency Act has become an Internet institution. The Internet has indeed “flourished . . . with a minimum of government regulation.”²⁵⁷ This laissez-faire attitude is reflected in the policies of the FCC, for example, which wields its limited regulatory power over the Internet sparingly.²⁵⁸ Defendants invoking section 230 are quick to selfishly co-opt this anti-regulatory view, often implying that imposing liability in their case risks eroding free speech or sabotaging legitimate commercial interests.²⁵⁹ These fears may be overblown.

fourteen-year-old girl he met on an adult website and was prosecuted for unlawful sexual conduct with a minor. The girl had claimed to be eighteen in her Sex-search “profile.” He brought a variety of claims, including breach of contract (related to the website’s terms of service agreement) and a variety of state-law negligence claims. The District Court dismissed his claims on the merits and also based upon section 230 immunity. The District Court opinion included a lengthy exposition of why section 230 precluded the plaintiff from advancing his wide array of claims. The Sixth Circuit, by contrast, ruled only on the merits, declining to reach issues pertaining to section 230. *Doe v. Sexsearch.com*, 551 F.3d 412, 415–16 (6th Cir. 2008).

257. 47 U.S.C. § 230(a)(4) (2006).

258. See Daniel L. Brenner, *Creating Effective Broadband Network Regulation*, 62 FED. COMM. L.J. 13, 14–15 (2010).

259. See, e.g., Brief of Appellee Yahoo!, Inc. at 34–36, *Barnes v. Yahoo, Inc.*, 570 F.3d 1096 (9th Cir. 2009) (No. 6:05-CV-926-AA).

2010]CAN COURTS TAME COMMUNICATIONS DECENCY ACT? 411

As for re-establishing some version of distributor liability, the prospect of the rare plaintiff prevailing in a defamation action will not impose an undue burden on free speech. Courts will remain reluctant to impose ruinous liability on websites, and under the proposed bad faith exception to section 230 immunity, websites will predominantly lose immunity only as a result of their own unscrupulous conduct.

The case for restricting the subject matter of section 230 immunity is equally strong. Plaintiffs suing web entities over third-party content for ordinary tort and contract claims would have significant hurdles to climb even without section 230's safe harbor, since establishing vicarious liability is often difficult. And again, cases where defendants prevail will be limited to instances of web entities' more egregious misdeeds. One thing is for certain: unless courts narrow their interpretations of section 230, deserving plaintiffs will be without redress.

