



Section 230 of the Communications Decency Act: A Survey of the Legal Literature and Reform Proposals

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I. Research Mission

The goal of this study is to identify the trends in the legal literature and reform proposals surrounding Section 230 of the Communications Decency Act. The Communications Decency Act (CDA) was enacted into U.S. law as part of the Telecommunications Act of 1996, P.L. 104-104. While other provisions of the CDA were struck down by the Supreme Court,¹ Section 230 was not challenged and remains an important and controversial legal rule for Internet sites that host third party content.²

For purposes of this study, the key part of Section 230 provides:

“(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

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

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).”³

Section 230(e)(3) further provides that: “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”⁴ The term “interactive computer service” is defined in the statute to mean “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions”⁵ and has therefore been broadly interpreted to include any website or online service.

Sections 230(c) and (e)(3) read together have provided Internet intermediaries with immunity from a variety of legal claims. Section 230(c)(1) has provided Internet service providers (ISPs)⁶ with immunity from claims based on third party content posted to their sites. Section 230(c)(2) has provided ISPs with immunity from claims based on their good faith filtering and monitoring of content posted and made available through their sites.

¹ See *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down obscenity provisions, but leaving intact Section 230).

² 47 U.S.C. § 230 (1998).

³ 47 U.S.C. § 230(c).

⁴ 47 U.S.C. § 230(e)(3).

⁵ 47 U.S.C. § 230(f)(2).

⁶ The CDA uses the term “interactive computer services,” but throughout this report we will be referring to these services with the more commonly used term “internet service providers” or “ISPs.”

A. Scope of the Project

This study sets forth a survey and analysis of the legal and policy landscape surrounding Section 230. The study seeks to be a comprehensive, objective resource and is designed to assist scholars and policy-makers in their search for materials addressing the purpose and substance of the statutory provision. The study does not take any position on the wisdom, implementation or evolution of Section 230 nor does it take any position on the merits of the materials presented. The study's purpose is to report on the body of information and the observable trends addressing Section 230.

As such, the study will set out the history of the passage of Section 230 and then report on the major cases, legal scholarship and legislative reform proposals addressing Section 230. The study will report on how the statute has been interpreted by the courts and will discuss the major trends in the academic literature defending and critiquing Section 230. The study will also report on legislative reform and policy debates that have arisen since the passage of the CDA.

B. Research Methodology

In developing this report, Fordham CLIP collected, analyzed and summarized the academic literature, case law and legislative materials related to Section 230 of the Communications Decency Act. The Fordham CLIP team put together a list of relevant search terms and applied them to multiple databases of case law, legal scholarship and legislative materials. Once the results were compiled we reviewed cases, articles, and legislative materials to determine their relevance to the report. The pertinent results were then categorized to identify trends in the case law, scholarship and legislative reform.

1. Search Approach

Fordham CLIP selected multiple search terms to use across several legal, academic and legislative reference databases. Key words were used in various combinations in different databases to maximize the chances of locating relevant texts. While some false positives appeared in the initial results, this approach insured that all sufficiently relevant publications were likely to be identified. This approach also helps reduce the chances that a relevant text would be omitted from the final report. Additionally, the searches are reproducible using the search terms and databases described. This allows anyone to replicate the results and update the research as needed in the future.

2. Selection of Search Terms

In order to cast the broadest possible net of relevant texts, Fordham CLIP selected search terms that would necessarily have to be included in any dedicated discussion of Section 230. The terms selected were simply variations on the name of Section 230 of the Communications Decency Act. Any case, work of scholarship or legislative initiative discussing the law would necessarily have to mention it using some variation of the name. The search terms utilized were: "230"; "Section 230"; "Communications Decency"; "Communications Decency Act"; and "CDA."

In applying these terms we also applied some additional search query criteria to limit the results to texts that feature relevant discussions of Section 230 and to filter out those which are truly focused elsewhere and merely mention the statute in passing. To do this we required certain search terms to

appear in the text a minimum number of times. Further, because of the prevalence of non-academic practice notes, some of our queries were designed to filter out these articles. For the legislative materials, however, any mention of Section 230 resulted in a document review.

3. Databases

Fordham CLIP utilized a set of popular academic databases to assure an accurate canvassing of legal scholarship. These included:

- WestLaw's full text index of American law journals
- The Index of Legal Periodicals- an index of 500 significant legal periodicals searchable by title
- The Social Science Research Network (SSRN)- a hosting site where academics from the legal and social science fields can post drafts and completed works of scholarship. SSRN frequently offers access to articles before they are later published in academic journals
- Lexis' full text index of bills in Congress
- The Library of Congress' bill tracking database (<http://thomas.loc.gov>)

4. Review of Search Results

The initial searches resulted in a total of 1,185 results for articles and 226 results for congressional hearings and bills. Fordham CLIP members reviewed initial search results and filtered out duplicate results. False positives were identified by reading article abstracts, introductory sections, and portions of text where the search terms were highly concentrated. Where a text featured the necessary search criteria but was primarily focused on another topic without offering particular insight or analysis of Section 230 it was excluded as not relevant to the report. Texts in which references to Section 230 were found only in footnotes or in passing were also excluded for having low relevance. Publications of practice materials or notes from conferences were excluded as not relevant scholarship. Case notes-articles that merely summarize a judicial opinion without adding substantial commentary or analysis- were similarly treated. Articles, cases and legislative materials found to be relevant were stored for later review and categorization.

After this filtering 14 cases, 192 articles, 10 congressional hearings and 45 bills were identified as relevant texts for analysis. Once all citations were identified Fordham CLIP members reviewed the texts to identify themes. Team members met to discuss common themes and trends in the cases and scholarship that were observed during this round of reviews. For the cases, the Fordham CLIP team identified the key substantive decisions involving Section 230. With respect to the articles, general thematic categories were outlined and the articles were categorized accordingly. After this categorization was complete a member of the Fordham CLIP team was assigned to reexamine the articles of a particular theme to verify their fit within the group and further draw out parallel ideas and concepts within a given cluster. From that point the analyses contained in the report were written. Similarly, for the legislative materials, general thematic categories were identified and the analysis was prepared.

II. Legislative History

On February 1, 1996, Congress passed the CDA as an amendment to the Telecommunications Act of 1996.⁷ In doing so, the CDA affected regulation of the Internet and online communications in two major ways. Most importantly for purposes of this report, the CDA added § 230 (Section 230), to protect providers or users of ISPs from civil liability for the actions of other third parties, even when such providers or users voluntarily, in good faith, restrict the availability of offensive material.⁸ Additionally, the CDA amended 47 U.S.C. § 223 (Section 223) such that the illegality of the knowing sending or displaying of any indecent⁹ message to a person under 18 years of age would be extended to telecommunications devices and ISPs.¹⁰ Although Section 223 was ruled unconstitutional in *Reno v. American Civil Liberties Union*,¹¹ Section 230's protection for Internet service providers remains intact.

A. Common Law Prior to Section 230

Before Congress passed Section 230, courts applied traditional common law publisher-distributor liability to ISPs for alleged defamation posted by users.¹² Under the common law, a party can be found liable for the distribution of defamatory material if the party has knowledge of the defamatory material and fails to remove it.¹³ Traditional examples of entities that faced distributor liability include news vendors, bookstores, and libraries.¹⁴ By contrast, a party may be found liable for the publication of defamatory content where the party "repeats or otherwise republishes defamatory matter . . . as if he had originally published it."¹⁵ Factors that indicate publisher liability include evidence of exercising editorial control and judgment over the choice of material published.¹⁶ Traditional examples of entities that face publisher liability include magazines and newspapers.

Given the novelty of the Internet during the early 1990s, courts encountered difficulties regarding how to fit ISPs into the distinct publisher-distributor frameworks.¹⁷ Some courts viewed websites and online service providers as similar to bookstores and libraries and attempted to apply distributor standards for liability, while other courts found that sites had more control over content than bookstores and applied the publisher standard for liability. Two major cases demonstrate this challenge.

⁷ UNANIMOUS-CONSENT AGREEMENT, 142 Cong. Rec. S687-01, S687, 1996 WL 39705.

⁸ *See id.*

⁹ The language of §223 does not actually use the word "indecent." Rather, the conference committee replaced "indecent" with the definition in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) to avoid a uniform application of Indecency law and the First Amendment. *See* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51 (November 1996), available at <http://www.cybertelecom.org/cda/cannon2.htm>.

¹⁰ TELECOMMUNICATIONS ACT OF 1996, PL 104-104, February 8, 1996, 110 Stat 56.

¹¹ *See Reno*, 521 U.S. 844 (holding §223 (a, d) as amended unconstitutional).

¹² *See* Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: the Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 591 (2001).

¹³ *Cubby, Inc. v. CompuServe, Inc.*, 776 F.Supp 135, 139 (S.D.N.Y. 1991).

¹⁴ *See id.*

¹⁵ *See Cubby*, 776 F.Supp at 139 (quoting *Cianci v. Tew Times Publishing Co.*, 639 F.2d 54, 61 (2d Cir. 1980) (Friendly, J.) (quoting Restatement (Second) of Torts § 578 (1977))).

¹⁶ *See Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, 3 (N.Y. Sup. Ct. 1995).

¹⁷ *See e.g., Cubby*, 776 F.Supp 135, *cf Stratton Oakmont*, 1995 WL 323710.

First, in *Cubby, Inc. v. CompuServe, Inc.*, a federal court applied the distributor standard of liability to the computer network CompuServe in response to defamation claims that arose out of content posted in CompuServe's Journalism Forum.¹⁸ The court found that CompuServe was a distributor because CompuServe was "in essence an electronic, for-profit library," containing publications over which it had virtually no editorial control.¹⁹ The *Cubby* court reasoned that it would be just as onerous for CompuServe to examine every one of its publications for defamatory content as it would a traditional library or bookstore.²⁰ Given the court's decision to apply distributor liability to electronic databases like CompuServe, the court held CompuServe neither knew nor had reason to know of the allegedly defamatory statements posted on the Journalism Forum.²¹

By contrast, in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the court applied the publisher standard of liability to Prodigy, the owner and operator of a computer network, for statements made by a third party on one of its electronic bulletin boards.²² The *Stratton* court distinguished Prodigy from CompuServe because Prodigy had in place an automatic software screening program and a business policy that permitted its Board Leaders to remove certain messages that violated its Content Guidelines.²³ The court found that Prodigy's decision to implement a screening program and to allow its Board Leaders to remove content evidenced sufficient editorial control to deem Prodigy a publisher.²⁴

In response to the *Stratton* ruling, ISPs, members of the interactive computer services industry, and advocates for the deregulation of the Internet petitioned Congress for relief.²⁵ These parties were concerned that the reasoning of the *Stratton* court would discourage ISPs from filtering content and expose them to excessive liability. They argued that the differing rationales behind the *Cubby* and *Stratton* decisions essentially turned on the fact that Prodigy was found to be a publisher because it "held itself out to the public and its members as controlling the content of its computer bulletin board."²⁶ CompuServe, in contrast, was found to be a distributor, because it exercised no control over statements made by third parties in its Journalism Forum.²⁷ The result of the *Cubby* and *Stratton* decisions meant that an ISP that attempted to monitor content on its network would most likely be subject to publisher liability, while an ISP that followed a completely "hands-off" approach would only be subject to distributor liability.²⁸ The irreconcilability of a higher standard of liability for publisher-ISPs

¹⁸ See *Cubby*, 776 F.Supp at 137. CompuServe developed an "electronic library," CompuServe Information Service (CIS), where subscribers paid a membership fee to access multitudes of information sources, including special interest forums such as the Journalism Forum.

¹⁹ See *id.* at 140.

²⁰ See *id.*

²¹ See *id.* at 141.

²² See *Stratton*, 1995 WL 323710 at 4.

²³ *Id.* at 3-4.

²⁴ *Id.* at 4.

²⁵ See Susan Freiwald, *supra* note 12 at 594; Cannon, *supra* note 9.

²⁶ See *Stratton*, 1995 WL 323710 at 4.

²⁷ See *Cubby*, 776 F.Supp at 140.

²⁸ See Susan Freiwald, *supra* note 12 at 593.

that attempted to monitor for offensive content compared to distributor-ISPs, those who “let anything go,” prompted legislative reform.

B. Legislative Response to the *Stratton* Decision

The *Stratton* decision and the increasing public concern about pornography on the Internet served as catalysts for legislators to consider some limited regulation of the Internet.²⁹ In early 1995 several Congressmen began to propose legislative reform to address the problems they identified in the common law regulation of the Internet. Senator Exon, from Nebraska, proposed the first version of the CDA, and Representatives Cox and Wyden, from California and Oregon, respectively, proposed the Online Family Empowerment Amendment (OFEA). Congressional debate about both proposals not only reflected Congress’ attempt to understand, predict, and regulate the Internet at the time, but ultimately led to the creation of Section 230 of the CDA.

1. The Senate: Exon Amendment

With the primary goal of protecting children from pornography on the Internet, Senator Exon proposed an initial draft of the CDA. The goal of his initial draft legislation was to keep “the information superhighway [from becoming] a red light district.”³⁰ Senator Exon’s original proposal amended Section 223 of the Telecommunications Act by extending the indecency and anti-obscenity regulations over telephone calls to all telecommunications devices and ISPs.³¹ The proposal emphasized greater Federal regulation over the Internet while also placing the burden on those in the computer service industry to monitor and censor indecent and obscene content on the Internet.³² The primary focus of Senator Exon’s initial proposal was the regulation of pornography and obscenity online.

Senator Exon’s proposal faced strong opposition from members of the Internet technology industry who were concerned about their increased liability and filtering responsibility under the proposed bill.³³ In response, Sen. Exon included two new defenses to liability under Section 223. The first immunized “access providers,” entities that solely provided general access or connection to the Internet.³⁴ The second defense, the “good faith” defense, immunized entities that made efforts to prevent obscene or indecent material, as recognized under Section 223, from publisher liability for defamatory statements made by users or other third parties.³⁵ This “good faith” defense is the first Congressional attempt to

²⁹ See *id.* at 594. Sen. Exon first introduced the CDA on February 1, 1995. See also Cannon, *supra* note 9 at 51.

³⁰ See Cannon, *supra* note 9.

³¹ See *id.*

³² See *id.*

³³ See *id.* Notably, Exon’s proposal also faced strong opposition within the Senate. In particular, Sen. Leahy proposed an amendment that would relinquish federal legislation over the internet to the Department of Justice.

³⁴ See Cannon, *supra* note 9; 141 CONG. REC. 16025. (Sen. Exon explaining the scope of Sec 223(f)(1), the “access provider” defense).

³⁵ See Cannon, *supra* note 9; 141 CONG. REC. 16025. (Sen. Coats clarifying the intent and purpose of Sec 223 (f)(4), the “good faith” defense with Sen. Exon).

address the *Stratton* decision and “protect companies from being put in such a catch-22 position.”³⁶ Senator Exon’s version of the CDA passed the Senate on June 14, 1995.³⁷

2. The House: Cox/Wyden Amendment

In response to the Senate’s passing of the Exon Amendment, the House, proposed its own amendment to the Telecommunications Act, the OFEA.³⁸ Representatives Cox and Wyden introduced the OFEA on June 30, 1995.³⁹ In contrast to Senator Exon’s CDA, the OFEA specifically stated that it would have no effect on criminal law, namely Section 223.⁴⁰ Rather, the main goals of OFEA included lessening overall Federal regulation of content over the Internet and placing the responsibility of controlling what children access over the Internet on parents.⁴¹ The Representatives intended the proposed amendment to encourage entities such as Prodigy and CompuServe, along with other service providers, to help control “at the portals of our computer, at the front door of our houses, what comes in and what our children see.”⁴²

The proposed amendment provided Good Samaritan protection for entities that filter offensive material on the Internet and offered deference to private sector technology companies to self-regulate, given their expertise and capabilities.⁴³ The Good Samaritan protection of the proposal stated that no “provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by an information content provider.”⁴⁴ In addition, such providers or users of ISPs would be not be found liable for any good faith efforts at restricting access to obscene or indecent material.⁴⁵ The OFEA also protected ISPs that provide “the technical means to restrict” obscene or indecent material to information content providers.⁴⁶ The proposal passed the House with a unanimous vote,⁴⁷ and this language was eventually added to the early draft of the Exon Amendment

³⁶ See 141 CONG. REC. 16025 (1995) (Sen. Coats clarifying the intent and purpose of the “good faith” defense with Sen. Exon).

³⁷ See *id.* (Sen. Exon’s proposal passing with an 84-16 vote).

³⁸ See Cannon, *supra* note 9. Newt Gingrich, then Speaker of the House, characterized Exon’s proposal as merely “a good press release.”³⁸ Additionally, Gingrich “[didn’t] think it [was] a seriously way to discuss a serious issue.” See Cannon, *supra* note 9.

³⁹ See Cannon, *supra* note 9 at n.78.

⁴⁰ See 141 CONG. REC. 22044. (Providing the text of the Amendment, including Sec 104(e)(1) “NO EFFECT ON CRIMINAL LAW”).

⁴¹ See 141 CONG. REC. 22045 (August 4, 1995) (Rep. Cox explaining how it makes more sense to allow those who are in a better position to regulate, regulate).

⁴² See *id.*

⁴³ See *id.* Representatives directly addressed Sen. Exon’s proposal as the wrong way to approach Internet regulation, suggesting Sen. Exon and his advocates were unfamiliar with the Internet (as compared to those who were from or near Silicon Valley). See *id.*

⁴⁴ 141 CONG. REC. 220044

⁴⁵ See *id.* (text of proposed Amendment, Sec 104(c)(1)).

⁴⁶ See *id.* (text of proposed Amendment, Sec 104(c)(2)). This second prong of the Good Samaritan provision was intended to protect those entities that create security systems that parents and individuals could purchase to block unwanted material on the Internet. See 141 Cong. Rec. 22044 (Rep. Wyden explaining why parents should be responsible for regulating what their children see on the Internet and how new computer software will better enable parents to do so).

⁴⁷ *Id.*

establishing a key component of Section 230. In effect, Congress adopted the approach in the OFEA for the promotion of the development and progress of the Internet.⁴⁸

3. The Final Legislation

On February 1, 1996, Congress passed the CDA, amending Section 223, and codifying the Good Samaritan protections outlined in the OFEA as 47 U.S.C. § 230. The conference committee report explicitly noted that “one of the specific purposes of [Section 230] 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.”⁴⁹ The conferees further accepted that such decisions impeded the federal policy of empowering parents to take control of the content their children receive through such interactive computer services.⁵⁰ The conferees also codified the OFEA definition of an “Interactive Computer Service” and “Information Content Provider” under 47 U.S.C. § 230(f). Despite the Supreme Court’s eventual decision to overrule Section 223 in violation of the First Amendment,⁵¹ Section 230 survives, and its legislative history reflects Congress’ intent to overrule the *Stratton* decision.

III. General Analysis of the Literature

Since the passage of the CDA fifteen years ago, a substantial body of literature has developed that relates to Section 230. Much of this material emerges from and creates an ongoing debate regarding the breadth of the immunity granted to ISPs under Section 230 and can be clustered into recurring trends.

This study reviews the major cases decided in the area, the literature discussing the statute and the legislative action related to Section 230. While there have been a significant number of court decisions interpreting and applying Section 230,⁵² most courts uniformly apply a broad reading of the statute. The Fordham CLIP team identified only a small set of major cases that established new precedents in the area and even among this group the judicial interpretations were very similar.⁵³ A significant number of articles have also been written about Section 230.⁵⁴ Among the academic literature, the Fordham CLIP team was able to identify recurring themes and trends which are outline in detail in Section V of this report. The majority of the articles identified were student notes.⁵⁵ In contrast, there has been very

⁴⁸ See William H. Freivogel, *Does the Communications Decency Act Foster Indecency?*, 16 COMM. L. & POL’Y 17, 23 (Winter 2011). See also 141 CONG. REC. 22045 (Rep. Cox calling the Internet the “most energetic technological revolution that [anyone] has ever witnessed.”)

⁴⁹ H.R. CONF. REP. NO. 104-458, at 194 (1996).

⁵⁰ See *id.*

⁵¹ See *Reno*, 521 U.S. 844.

⁵² See David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373 (Winter 2010) (providing an empirical study of all court decisions examining Section 230 between 1996 and 2009).

⁵³ See *infra* Section IV.

⁵⁴ The CLIP team identified 192 articles.

⁵⁵ Of the 192 articles identified, approximately 115 are published student notes.

little legislative action related to Section 230 since its passage.⁵⁶ While the statute has received some mention in a handful of congressional hearings, substantive discussions about the statute and proposals for significant amendments to the act have been very limited.

The majority of the scholarly literature identified is critical of Section 230. These critical articles were generally published in two time period bursts. The first burst of critical scholarship is dated between 1998 and 2005. This early literature is heavily focused on the 1997 Fourth Circuit decision, *Zeran v. American Online, Inc.*⁵⁷ *Zeran* was the first major decision to interpret Section 230 and the Fourth Circuit broadly defined the immunity granted to ISPs under Section 230(c)(1). Scholars in this initial wave of literature are critical of the *Zeran* court's interpretation of Section 230 and caution against broad immunity.

The critical literature continued more sporadically during the mid-2000s and spiked again around 2007 through to the present. This second wave generally argues that negative consequences have arisen as a result of broad Section 230 immunity.⁵⁸ This more recent trend in the literature is focused on tying issues of cyberbullying and online harassment to an overbroad interpretation of Section 230.

While the academic literature about Section 230 tends to be largely critical of broad immunity, courts have generally applied the *Zeran* precedent with consistency. Since *Zeran*, the majority of courts have interpreted the immunity broadly and have extended *Zeran*'s holding to a number of new online situations. These courts repeatedly echo the policy reasoning provided in *Zeran* – that Congress intended to promote free speech on the Internet and protect the Internet from government regulation.

During the late 2000s, a few challenges to broad immunity emerged,⁵⁹ and simultaneously a new cluster of scholarship emerged defending Section 230 immunity. While there have always been a few articles that generally defended Section 230, there has been a substantial increase in scholarship that articulates the benefits of Section 230 immunity during the past five years. These articles seek to counter the arguments against immunity,⁶⁰ provide first amendment defenses of the statute,⁶¹ and argue that recent attempts to narrow the broad judicial interpretation of the Section 230 could be problematic.⁶²

IV. Summary of the Major Case Law Related to Section 230

Set forth below is a summary of the major cases that interpret Section 230. These cases have been selected either because they established significant precedents regarding how Section 230 would be interpreted or they applied well established and accepted precedents to significant new fact patterns.

⁵⁶ See *infra* Section VI.

⁵⁷ 129 F.3d 32 (4th Cir.1997).

⁵⁸ See *infra* Section V.A.4.

⁵⁹ See, e.g., *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir.2008); *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009); *Chicago Lawyer's Committee for Civil Rights Under the Law v. Craigslist*, 519 F.3d 666 (7th Cir. 2008).

⁶⁰ See *infra* Section V.B.

⁶¹ See *infra* Section V.D.

⁶² See *infra* Section V.C.

These cases address the meaning of “provider,” “user,” and “developer of information” as well as the applicability of the statute to torts other than defamation, the relationship to other statutory claims, and the relationship to state contract rights and state intellectual property rights.

A. Main Cases

1. *Zeran v. AOL* (4th Cir. 1997)

Zeran v. America Online, Inc. is by far the most significant decision interpreting Section 230.⁶³ The *Zeran* decision was the first case to clearly establish broad immunity for ISPs under Section 230(c)(1) and its interpretation of the immunity has been generally followed and applied by the majority of courts.

A year after the enactment of the CDA, the Court of Appeals for the Fourth Circuit precluded liability for providers of interactive computer services for notice-based defamation and non-defamation claims.⁶⁴ In *Zeran*, an anonymous user of AOL’s bulletin board services posted messages advertising t-shirts that displayed objectionable slogans about the Oklahoma City Federal Building bombing and posted Kenneth Zeran’s home phone number as the contact for interested purchasers.⁶⁵ From April 25, 1995 to May 14, 1995, Zeran received numerous harassing phone calls throughout the day in response to the postings.⁶⁶ Zeran then contacted AOL on various occasions about removing and retracting the false messages.⁶⁷ Although AOL representatives informed Zeran the company would remove the postings and deactivate the account that created them, AOL failed to do so.⁶⁸ Zeran filed suit against AOL, and AOL asserted Section 230 as an affirmative defense.⁶⁹

The district court granted immunity to AOL under Section 230.⁷⁰ On appeal, Zeran argued that Section 230 only applied to traditional publisher liability, not notice-based distributor liability. Since AOL was on notice of the false nature of the postings, Zeran argued that AOL was a “distributor”⁷¹ and, therefore, precluded from the benefit of Section 230 because 230(c)(1) only states that ISPs shall not be treated as “publisher or speaker” of information provided by another.⁷² The Fourth Circuit disagreed, reasoning that distributor liability was just a subset of publisher liability and therefore was incorporated into the immunity.⁷³ Moreover, the appellate court explained that imposing liability based on notice would contradict Congress’ intent behind Section 230; requiring interactive service providers to immediately investigate every allegation of an unlawful posting would place an impermissible burden on service

⁶³ 129 F.3d 32 (4th Cir.1997).

⁶⁴ *Id.* at 328-27.

⁶⁵ *Id.* at 329

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 330. Both parties agreed that AOL was an interactive computer service.

⁷¹ Zeran argued that AOL, as an interactive service provider, knew or should have known about the postings and did not remove them. *Id.* at 331.

⁷² *Id.* at 330.

⁷³ *Id.* at 332. Once a provider is put on notice of the potentially defamatory content, it becomes a “publisher,” in that it “must decide whether to publish, edit, or withdraw the posting.”

providers and chill free speech on the Internet.⁷⁴ Lastly, the Court also rejected Zeran's argument that Section 230 should be applied narrowly, and instead, emphasized that Section 230 explicitly bars *any* cause of action against an interactive service provider for content posted by a third-party user.⁷⁵ The *Zeran* court found that Congress' intent behind Section 230 was clear—to "promote unfettered speech on the Internet."⁷⁶

Since *Zeran* was decided just one year after Congress passed Section 230, it was the first major case to interpret and apply the statute. By eliminating the possibility for plaintiffs to bring notice-based liability claims against online service providers for content posted by others, the court in *Zeran* interpreted broadly the grant of immunity for ISPs. Additionally, the *Zeran* court found that Congress' intent in passing the CDA and Section 230 was to promote free speech on the Internet and protect the Internet from government regulation.

2. *Blumenthal v. Drudge* (D.C. 1998)

Blumenthal v. Drudge was the first major case to address when an "interactive computer service" could become an "information content provider" subject to liability.⁷⁷ In this case, the court interpreted broadly the term "interactive computer service" and gave wide room to the immunity granted in Section 230(c)(1).

On April 22, 1998, the District Court granted AOL, an interactive service provider, immunity under Section 230 for allegedly defamatory statements made in a gossip column AOL published to its users.⁷⁸ Matt Drudge was the creator of an online gossip column, the Drudge Report, which focused on gossip about Hollywood and Washington D.C. On August 10, 1997, Drudge, while under a licensing agreement with AOL, wrote a piece that referenced then Assistant to the President, Sidney Blumenthal, alleging a history of spousal abuse.⁷⁹ Drudge transmitted the piece to AOL who offered the story to its subscribers.⁸⁰ After receiving notice from Blumenthal's counsel, Drudge retracted the story, and AOL removed the story from the column's archive.⁸¹

The district court held AOL was protected from defamation liability by Section 230 since it was a provider of an interactive computer service and not an information content provider.⁸² Blumenthal argued that although AOL was a provider of an interactive computer service, it was also an information content provider in that it helped to create and develop the story.⁸³ Blumenthal claimed that AOL contributed to the development of the story because it paid Drudge a monthly fee of \$3,000, advertised

⁷⁴ *Id.* at 333.

⁷⁵ *Id.* at 334.

⁷⁶ *Id.*

⁷⁷ 992 F.Supp. 44 (D.D.C. 1998).

⁷⁸ *Id.*

⁷⁹ *Id.* at 47. The headline for the post read: "Charge: New White House Recruit Sidney Blumenthal has Spousal Abuse Past."

⁸⁰ *Id.* at 47-48.

⁸¹ *Id.* at 48.

⁸² *Id.* at 53.

⁸³ *Id.* at 49.

the Drudge Report to its subscribers, and had the right to remove and edit stories under their licensing agreement.⁸⁴ The court, however, found that Section 230 explicitly protects interactive service providers like AOL from liability in such circumstances where it was clear that AOL was not an information content provider.⁸⁵ Since the story was written by Drudge without any substantive or editorial contributions by AOL, the court concluded that AOL was an interactive service provider that simply carried the story and could not be held liable.⁸⁶

As the second major case to interpret Section 230, the court faced the issue of whether AOL would be considered an information content provider as a result of the company's business relationship and licensing agreement with Drudge. The court's holding established a broad definition of interactive computer service and set a precedent that ISPs would not be defined as content providers based simply on licensing agreements that gave them editorial rights.⁸⁷ Like *Zeran*, this case also articulated that the purpose and intent of the CDA was clear and unequivocal—to promote self-regulation of the Internet by granting interactive computer services broad immunity from liability.

3. *Batzel v. Smith* (9th Circ. 2003)

Following the *Drudge* case, *Batzel v. Smith* was the next significant decision interpreting the law because the 9th Circuit further clarified the definition of an "information content provider" under Section 230.⁸⁸ In addition, the court addressed whether Section 230 immunity may be granted to an ISP when the information posted online by the ISP was not intended to be disseminated by the author.

The case originated when Robert Smith sent an email to the Museum Security Network ("Network") accusing Ellen Batzel of possessing stolen WWII artwork. Subsequently, Tom Cremers, moderator of the Network's website and listserv, made a few small changes to Smith's email and then both posted the email on the Network's website and sent the message to the listserv.⁸⁹ Smith, the author of the email, however, notified the Network that he had not intended for the email to be sent to others.⁹⁰

The court first determined that the Network, including its listserv, constituted an "interactive computer service."⁹¹ The court held that the statutory definition of an interactive computer service was not limited to services that provided access to the Internet, but included "any information service or other systems."⁹² As such, both the Network's website and listserv could be considered providers of interactive computer services.⁹³ Batzel argued that Cremers was also an information content provider since he edited the content of the message.⁹⁴ The court rejected Batzel's claims, and instead found that

⁸⁴ *Id.* at 51.

⁸⁵ *Id.* at 49.

⁸⁶ *Id.* at 49-50.

⁸⁷ *Id.* at 51.

⁸⁸ *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).

⁸⁹ *Id.* at 1022.

⁹⁰ *Id.*

⁹¹ *Id.* at 1030.

⁹² *Id.* (emphasis omitted).

⁹³ *Id.*

⁹⁴ *Id.* at 1031.

merely editing portions of the email and selecting which portions of the email would be published did not constitute “development” under Section 230.⁹⁵

With regard to the fact that Smith had not intended for his email to be available to others, the court focused on the statutory language of §230(c)(1). Specifically the court examined the phrase, “provided by another information content provider,” and whether the information at issue was actually “provided” to the interactive service provider.⁹⁶ The court ruled that if it would be reasonable for the provider to conclude that the information was intended to be published on the Internet or any other interactive computer service, then the provider would be protected from liability under Section 230.⁹⁷

In parsing through Section 230’s statutory language, the court further clarified the statute’s key terms. The *Batzel* decision established that the “creation or development of information” needed to be “something more substantial than merely editing portions of an email.”⁹⁸ Additionally, *Batzel* reiterated the judicial focus on Congress’s intent to promote the availability of information on the Internet in exchange for immunity from the content posted by third-party users.

4. *Barrett v. Rosenthal* (Cal. 2006)

Barrett v. Rosenthal was the first case to interpret the immunity granted in Section 230(c)(1) to “user [s] of interactive computer services.”⁹⁹ Prior to the *Barrett* decision, courts addressed the applicability of Section 230 to ISPs and this was the first instance of a user claiming immunity under Section 230.

The defendant in *Barrett*, Ilena Rosenthal, was an active participant of two Usenet newsgroups that focused on alternative medicine.¹⁰⁰ Rosenthal posted to the two newsgroups an email she received from Timothy Bolen that accused Dr. Terry Polevoy of stalking women.¹⁰¹ Rosenthal also wrote and posted messages to the newsgroups calling Dr. Polevoy and Dr. Barrett “quacks.” While the messages that Rosenthal wrote were found to be non-actionable,¹⁰² Barrett had notified Rosenthal that the statements about his purportedly stalking women were false and defamatory and he requested that she remove the messages. Rosenthal refused¹⁰³ and Barrett then filed a defamation suit against her. The trial court found that, with respect to the email written by Bolen, Rosenthal was a user of an interactive computer service and that Section 230 gave her immunity from liability for those messages.¹⁰⁴ The Court of Appeals, on the other hand, found that Rosenthal was a “distributor,” who knew or had reason

⁹⁵ *Id.* The majority opinion also criticizes the partial dissent for asserting that there should be distinction between one who takes an active role in content selection and one who screens for objectionable content, where the former would not be immune and the latter would. Rather, the majority asserts that Congress did not intend for such a distinction. *Id.* at 1032.

⁹⁶ *Id.* at 1034.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1031.

⁹⁹ *Barrett v. Rosenthal*, 9 Cal.Rptr.3d 142 (Cal. Ct. App. 2004).

¹⁰⁰ *Id.* at 144.

¹⁰¹ *Id.* at 145.

¹⁰² *Id.* at 146.

¹⁰³ *Id.*

¹⁰⁴ *Barrett v. Rosenthal*, 40 Cal.4th 33, 39 (Ca. 2006). The trial court found, and the court of appeals affirmed, that Barrett failed to make out a defamation claim. *Barrett*, 9 Cal.Rptr.3d 142, *aff’d* *Barrett*, 40 Cal.4th 33.

to know of the allegedly defamatory statements, and was therefore ineligible for immunity under Section 230.¹⁰⁵ The California Supreme Court reversed and granted Rosenthal immunity under Section 230.¹⁰⁶

The court's decision did two significant things. First, it addressed whether an individual, without any role in the operation of a website that hosted the content at issue, could invoke Section 230 immunity. It concluded that Congress clearly meant for "user" to include anyone who "uses" an interactive computer service, including private individuals. It held that the immunity applies both to individual users who passively allow content to be posted to a website and to those users who actively post content created by another individual. This, the court reasoned, helps to further the policy of "fostering free speech on the Internet."¹⁰⁷ Second, the court upheld the reasoning applied by the *Zeran* court that "publisher" under Section 230 included the subset of "distributor," noting that the common law referred to "distributors" as "secondary publishers."¹⁰⁸ The court agreed that Section 230 immunity applied to notice-based "distributor" liability.

With this case, the California Supreme Court reaffirmed the precedent of granting broad-based immunity to notice-based defamation claims, expressly permitted individual users of an interactive computer service to assert Section 230 as a defense, and reiterated the policy that limiting Section 230 immunity "would tend to chill online speech."¹⁰⁹

5. *Doe v. MySpace* (5th Cir. 2008)

Doe v. MySpace was a significant decision because the Fifth Circuit found that Section 230 could be successfully used as a defense against non-defamation tort claims.¹¹⁰ Prior to this decision, most Section 230 decisions involved tort claims of defamation or fraud which were tied directly to content published on a defendant's website.

In this case, Jane Doe filed suit against MySpace, Inc. and News Corporation on behalf of herself and her daughter Julie Doe.¹¹¹ The MySpace terms of use required that users be older than 14 and only permitted profiles to be made available to the general public when the user is older than 16.¹¹² In 2005, when Julie was 13, she represented that she was 18 years old and registered for a MySpace account. Julie's misrepresentation of her age at the time of registration allowed her to create a public profile without the safety features designed for younger teen users. Julie then made contact with 19 year old Pete Solis via MySpace and eventually the two planned a meeting. Julie and Solis met in person in 2006 and at that meeting Solis sexually assaulted Julie.¹¹³ Doe then filed suit against MySpace alleging that the company's failure to implement basic safety measures to prevent sexual predators from contacting

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 40.

¹⁰⁷ *Id.* at 62.

¹⁰⁸ *Barrett*, 40 Cal.4th 33 at 48.

¹⁰⁹ *Id.* at 56.

¹¹⁰ *Doe v. MySpace, Inc.* 528 F.3d 413 (5th Cir. 2008).

¹¹¹ *Id.*

¹¹² *Id.* at 416.

¹¹³ *Id.*

minors constituted, among other things, negligence and gross negligence.¹¹⁴ MySpace raised Section 230 as a defense and the Fifth Circuit found that the tort claims against MySpace were barred by Section 230.

The Does had argued that the Section 230 immunity should not bar their tort claims because their claims did not attempt to treat MySpace as “a publisher of information.”¹¹⁵ They argued that their claims related to the safety measures made available by MySpace and not to the communications between Julie and Polis published on MySpace.¹¹⁶ The court rejected this reasoning, finding that the majority of courts have “construed the immunity provisions in §230 broadly in all cases arising out of the publication of user-generated content.”¹¹⁷ The circuit court agreed and found that the real basis of Doe’s claims were the communications made between Julie and Polis via MySpace and the claims were therefore “directed toward MySpace in its publishing, editorial, and/or screening capacities” and as such were barred by Section 230.

The *Doe* case made it clear that courts were willing to consider the circumstances out of which a claim arose and would find Section 230 immunity applicable when it appeared that the plaintiff was trying to assert liability against an ISP for its role as publisher or filter. The holding demonstrated that Section 230 immunity is available for a broad range of tort claims.

6. *Fair Housing Council of San Fernando Valley v. Roommates.com* (9th Circ. 2008)

Fair Housing Council of San Fernando Valley v. Roommates.com was a significant decision because the 9th Circuit revisited the issue of when an ISP could be considered an information content provider subject to liability.¹¹⁸ The decision provided the first major departure from the broad reading of the immunity provided by the court in *Blumenthal v. Drudge* and potentially narrowed the Section 230 immunity.

Roommates.com runs a website that helps people locate apartments and rooms to rent. The Fair Housing Council of San Fernando Valley and the City of San Diego sued Roommates.com for violating the Fair Housing Act based on three aspects of the Roommates.com website: (1) questions the website posed to prospective subscribers during registration about the subscriber’s gender, sexual orientation, and other personal information and the subscriber’s preferences with regard to a potential roommate’s gender, sexual orientation, and number of children;¹¹⁹ (2) published profile pages on the website describing a subscriber’s personal preferences; and (3) the “Additional Comments” section of each profile page where users could provide any additional information.¹²⁰ The plaintiffs argued that the information collection and presentation by Roommates.com were violations of the Fair Housing Act

¹¹⁴ *Id.* at 417.

¹¹⁵ *Id.* at 419.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 418.

¹¹⁸ *Fair Housing Council*, 521 F.3d 1157.

¹¹⁹ *Id.* at 1161.

¹²⁰ *Id.*

provisions against discrimination and were proscribed for landlords, tenants and real estate agents. The district court held that Roommates.com was immune under Section 230. However, the Ninth Circuit Court of Appeals reversed..

The Ninth Circuit found that Roommates.com was an information content provider because the company developed the questions and choices posed to users and then published the public profiles based on users' answers. As such, Roommates.com fell outside the scope of Section 230's immunity.¹²¹ With regard to the second function, the user profiles, the court reasoned that even though the individual users were information content providers of their own profiles, Roommates.com was also an information content provider since it helped develop a portion of the information displayed.¹²² The court considered Roommate.com's solicitation of preferences through unlawful questions as "development."¹²³ The court did conclude, however, that Roommates.com was protected by Section 230 for the "Additional Comments" section of profiles, since Roommates.com was not responsible for, nor encouraged, the content of that portion of the user profiles.¹²⁴

Unlike the prior cases that interpreted the Section 230 immunity broadly, the *Roommates* court appeared to narrow Section 230 immunity¹²⁵ by establishing that when a website "materially [contributes] to [the] alleged unlawfulness," it is an information content provider and is not protected by Section 230.¹²⁶ While the court was careful to distinguish search engines such as Google¹²⁷ and websites that host user generated profiles as merely "passive conduits,"¹²⁸ the *Roommates* decision presented one of the first major limitations to Section 230 immunity. The court also suggested that the CDA "was not meant to create a lawless no-man's-land on the Internet."¹²⁹

7. *Barnes v. Yahoo!* (9th Circ. 2009)

Barnes v. Yahoo! was significant decision for two reasons. First, the 9th Circuit followed the 5th Circuit's reasoning from the *Doe v. MySpace* case and found that the Section 230 immunity can apply to any claim that that is premised on treating an ISP as a publisher or speaker of content created by another, not just defamation claims. Second, the court found that a promissory estoppel claim would not be barred by Section 230 immunity.¹³⁰

¹²¹ *Id.* The Court of Appeals did find that Section 230 barred any cause of action against Roommates.com for its "Additional Comments" section of profile pages. *Id.* at 1174.

¹²² *Id.* at 1166.

¹²³ *Id.* at 1161.

¹²⁴ *Id.* at 1174 (emphasizing how the "Additional Comments" section is exactly the type of situation Congress intended to protect).

¹²⁵ *See id.* at 1187-89 (Dissenting opinion).

¹²⁶ *Id.* 1168.

¹²⁷ *Id.* at 1167 (explaining how generic search engines do not use potentially unlawful criteria to limit the scope of searches or design their systems to achieve potentially unlawful ends).

¹²⁸ *Id.* at 1171 (explaining how the dating website in *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003) only provided "neutral tools" and "did absolutely nothing to encourage the posting of defamatory content").

¹²⁹ *Id.* at 1164.

¹³⁰ *Barnes*, 570 F.3d 1096.

The case arose when Cecilia Barnes ended a relationship with her boyfriend. In retaliation, he created and posted profiles on Yahoo! purporting to be Barnes and containing nude photos of Barnes, solicitations to engage in sexual intercourse, and Barnes' home address, phone number, and place of employment.¹³¹ Once Barnes became aware of the profiles, she notified Yahoo! that they were unauthorized and requested that they be taken down.¹³² Yahoo! failed to respond to Barnes and took no action until the day before a local news station was scheduled to broadcast the story. On that date, Yahoo!'s Director of Communications called Barnes and told her she would personally bring the matter to the division responsible for unauthorized profiles.¹³³ The profiles, however, remained online until Barnes filed suit against Yahoo! at which point they were removed.¹³⁴ Barnes alleged both tort and promissory estoppel claims against Yahoo! for its failure to respond to her notices and remove the profiles.

The Ninth Circuit held that Section 230 immunity extends beyond defamation claims to include any cause of action that "inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another."¹³⁵ The court found that Barnes' tort claim of negligent undertaking treated Yahoo! as a publisher because it required the ISP to act as publisher by removing content.¹³⁶ The tort claim was therefore barred by Section 230.

On the other hand, the court found that the promissory estoppel claim was not barred by Section 230.¹³⁷ In distinguishing Barnes' promissory estoppel claim from her negligent undertaking claim, the court reasoned that to "undertake a thing" differed from "promising."¹³⁸ As a contract claim, the promissory estoppel centered on the action of promising rather than on the action of publication and therefore did not fall within the immunity. As such, the court suggested that an interactive service provider that contracts to be legally obligated to do something, i.e. removing third-party content, may fall outside the scope of Section 230 for contract claims related to the obligation.¹³⁹

The Barnes' decision reflected that the court interpreted the Section 230 immunity to broadly encompass any claim that treats an ISP as a publisher of content created by another, but also that it would not bar other types of state claims that center on a different nexus of activity.

¹³¹ *Id.* at 1098-1099. Barnes' ex-boyfriend also pretended to be Barnes and engaged in conversations with male correspondents in Yahoo! chatrooms.

¹³² *Id.* at 1099.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 1102.

¹³⁶ *Id.* at 1101.

¹³⁷ *Id.* at 1107.

¹³⁸ *Id.* The "promissory character" of the claim treated Yahoo! as "the counterparty to a contract, [a] promisor who has breached," rather than a publisher or speaker of third-party content. *Id.*

¹³⁹ *Id.*

8. *Chicago Lawyers' Committee for Civil Rights under the Law v. Craigslist* (7th Circ. 2009)

Chicago Lawyers' Committee for Civil Rights under the Law v. Craigslist was a significant case because it involved facts and claims similar to the *Roommates* case, but the 7th Circuit reached a different holding regarding Craigslist's liability.¹⁴⁰ The Chicago Lawyers' Committee (CLC), on behalf of its members, sued Craigslist for violating Section 804(a) of the Fair Housing Act (FHA).¹⁴¹ The Craigslist website allows third-party users to post and search for a variety of things, including housing and rental opportunities.¹⁴² Users can click on various links to create a posting or search the postings. For example, a user interested in advertising a room for rent may click on the links "I am offering housing," then select the category "rooms & shares."¹⁴³ The ad postings are created solely by users and may contain contact information, a description of the rental, and optional photographs.¹⁴⁴ The CLC alleged that through this process, Craigslist published housing ads that violate the FHA. Craigslist prevailed, asserting Section 230 as an affirmative defense.¹⁴⁵

The Seventh Circuit found that Craigslist was only a conduit for information provided by its users, who were the actual information content providers.¹⁴⁶ The court found that, unlike the Roommates.com website, Craigslist did not create or develop the content posted, and that requiring a filtering or monitoring system for an ISP like Craigslist would be ineffective and unduly burdensome.¹⁴⁷ In addition, the court rejected the CLC's claim that Section 230 was only limited to the context of "sexually orientated material," and, therefore, did not cover FHA violations.¹⁴⁸ Rather, the Court reasoned that because Congress could not have foreseen such housing or internet advertisements at the time of passing Section 230, the scope of Section 230 was in fact, "general."¹⁴⁹ Given Section 230's general scope, the Court held that Craigslist was precluded from liability under Section 230.

The *Craigslist* court reiterated the policy rationale behind Section 230 immunity explaining that interactive computer services have millions of users and the astounding amount of information being communicated makes it impossible to screen each message or posting for possible unlawful content.¹⁵⁰ As such, to protect free speech on the Internet, Congress chose to immunize service providers to avoid the potential chilling effect on speech such liability might pose.¹⁵¹

¹⁴⁰ *Chicago Lawyer's Committee*, 519 F.3d 666.

¹⁴¹ *Id.* at 668. Section 804(a) forbids discrimination based on race, religion, sex, or family status when selling or renting housing, including a ban on ads that indicate a preference with respect to any of the protected classes. *Id.* (citing 42 U.S.C. §3604(a), (c)).

¹⁴² *Id.* at 684.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 685.

¹⁴⁵ *Id.* at 682.

¹⁴⁶ *Id.* at 698.

¹⁴⁷ *Id.* at 689.

¹⁴⁸ *Id.* at 671.

¹⁴⁹ *Id.*

¹⁵⁰ *See id.* at 689.

¹⁵¹ *See id.*

B. Other Cases of Note

1. Cases that Followed and Extended *Zeran*

a) *Carafano v. Metrosplash.com* (9th Cir. 2003)

On October 23, 1999 an unknown user in Berlin posted a profile on Matchmaker.com, an online dating website, claiming to be Christianne Carafano, a well known actress.¹⁵² Carafano's false profile contained photos of Carafano and contained sexually suggestive text.¹⁵³ The profile also posted an email address and provided Carafano's home address and telephone number.¹⁵⁴ As a result, Carafano started receiving sexually explicit and threatening messages in response to the profile.¹⁵⁵ After Carafano discovered the false profile, she requested that the profile be removed. Matchmaker.com first blocked the profile from public view and then deleted it the next day.¹⁵⁶

Carafano filed a lawsuit against Matchmaker.com for various claims including defamation and violations of the right of publicity. Matchmaker.com claimed immunity under Section 230. The district court rejected Matchmaker.com's Section 230 defense and held that the website contributed part of the profile's content.¹⁵⁷ Matchmaker.com requires its members to complete a questionnaire consisting of multiple choice and essay questions which is used to generate the member profile.¹⁵⁸ On appeal, the Ninth Circuit held that Matchmaker was not an information content provider and did not "create or develop" the content on the profile even though it required members to fill out the questionnaire.¹⁵⁹ The Ninth Circuit reasoned that the questionnaire allowed the website to "match" profiles and was therefore essential for website functionality. The court determined that this functionality aligns with Congress's intent to promote the development of the Internet.¹⁶⁰

This decision reinforced courts' adherence to the broad immunity granted in *Zeran* and its progeny, namely that an interactive service provider does not lose full immunity by its editing or selection process "so long as a third party willingly provides the essential published content."¹⁶¹ Although the Ninth Circuit held that Matchmaker.com's questionnaire and profile creation process did not transform the website into an information content provider, many critics note the court's contradictory holding six years later in the *Roommates* case.

¹⁵² *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121 (9th Cir. 2003).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Carafano v. Metrosplash.com, Inc.*, 207 F.Supp.2d 1055 (C.D. Cal. 2002).

¹⁵⁸ *Carafano*, 339 F.3d at 1121.

¹⁵⁹ *Id.* at 1124.

¹⁶⁰ *Id.* at 1125.

¹⁶¹ *Id.* at 1124.

b) *Global Royalties v. Xcentric Ventures (D. Az. 2008)*

The district court in this case reiterated the decision in *Zeran* that Section 230 is a complete bar to notice-based liability, including notice by the author.¹⁶² Global Royalties was a broker in gemstones, and Xcentric Ventures ran a website called Ripoff Report where users could post consumer complaints.¹⁶³ Spencer Sullivan, a third party user, posted multiple messages on Ripoff Report, essentially claiming that Global Royalties was a scam. After Global Royalties threatened Sullivan, he requested that his messages be removed.¹⁶⁴ Global Royalties then filed suit against Xcentric for defamation. Following *Zeran's* reasoning, the court held that Section 230 immunity applies even when the actual author of the content requests removal. The Court's decision emphasized that the purpose of Section 230 was to grant immunity whenever the content at issue is clearly provided by another party.¹⁶⁵

2. Cases that Addressed the Scope of "the creation or development of information"

a) *Ben Ezra, Weinstein, and Co. v. AOL (10th Circ. 2000)*

Ben Ezra, Weinstein, and Co. sued AOL for defamation and negligence, when AOL published incorrect information concerning the company's stock price and share volume.¹⁶⁶ The Tenth Circuit Court of Appeals upheld the district court's decision to grant AOL Section 230 immunity.¹⁶⁷

AOL published stock information provided by ComStock and Townsend. The Tenth Circuit found that AOL's communication with ComStock and Townsend was insufficient to render AOL an information content provider.¹⁶⁸ The court determined that the communications between AOL and ComStock and Townsend about errors in stock data did not constitute the "creation or development" by AOL of the inaccurate stock information.¹⁶⁹ The court also found that AOL's deletion of only some of the incorrect data failed to constitute creation or development of that information.¹⁷⁰

b) *FTC v. Accusearch Inc. (10th Circ. 2009)*

In this case, the Tenth Circuit determined that the "development of information" under Section 230 includes advertising the sale of information to the public.¹⁷¹ Accusearch operated the website Abika.com which sold personal data to users that included telephone call records for any requested phone number.¹⁷² Users could also request, through Abika.com, specific information, such as an individual's demographic details, and the request would then be relayed to a third party researcher.¹⁷³

¹⁶² *Global Royalties, Ltd., et al. v. Xcentric Ventures, LLC, et al.*, 544 F.Supp.2d 929, 932 (D. Az. 2008).

¹⁶³ *Id.* at 930.

¹⁶⁴ *Id.* at 931.

¹⁶⁵ *Id.* at 933.

¹⁶⁶ *Ben Ezra, Weinstein, and Co. v. America Online, Inc.*, 206 F.3d 908, 983 (10th Cir. 2000).

¹⁶⁷ *Id.* at 986.

¹⁶⁸ *Id.* at 985.

¹⁶⁹ *Id.* at 985-86.

¹⁷⁰ *Id.* at 986.

¹⁷¹ *Federal Trade Commission v. Accusearch, Inc.*, 570 F.3d 1187, 1198 (10th Cir. 2009).

¹⁷² *Id.* at 1190-91.

¹⁷³ *Id.* at 1191.

The third party researcher would gather the information and Abika.com would provide the data to the user. The FTC alleged that the website violated the telephone record privacy provisions of the Telecommunications Act of 1996 and that those violations constituted an unfair trade practice under the Federal Trade Commission Act.¹⁷⁴ The District Court rejected the applicability of Section 230 immunity to protect Accusearch, and the Court of Appeals affirmed.

In affirming the district court decision, the Tenth Circuit held that Abika.com was an information content provider.¹⁷⁵ Abika.com was treated as the “developer” because Abika.com advertised the sale of the telephone records to the public and hired the third party researchers to illegally obtain data.¹⁷⁶ The Court expanded on the *Roommates* decision, finding that an entity may be an information content provider if its conduct demonstrates it is more than just a neutral conduit of information.¹⁷⁷

3. Cases that Addressed the Intellectual Property Limitation in Section 230

a) *Perfect 10 v. CCBill* (9th Circ. 2007)

The Ninth Circuit expressly ruled that “absent a definition from Congress,” the term “intellectual property” means “federal intellectual property.”¹⁷⁸ Perfect 10, the publisher of an adult entertainment magazine, sued CCBill and CWIE for unfair competition, false advertising and intellectual property rights violations including violations of a right of publicity for posting stolen images from Perfect 10’s website.¹⁷⁹ The District Court found that Section 230 protected the defendants’ from Perfect 10’s unfair competition and false advertising claims, but that Section 230 did not protect them from Perfect 10’s right of publicity claim.¹⁸⁰ The Ninth Circuit Court of Appeals overturned the decision and granted Section 230 protection to CCBill against Perfect 10’s state law claims, including the right of publicity claim.¹⁸¹

The Ninth Circuit reasoned that because information on the Internet crosses state borders, it would be contrary to interstate commerce principles for federal immunity to be shaped by differing state intellectual property laws.¹⁸² Therefore, in the Ninth Circuit, any user or provider of an interactive computer service is eligible for Section 230 immunity for state intellectual property law claims, including right of publicity claims.¹⁸³

¹⁷⁴ *Id.* at 1192.

¹⁷⁵ *Id.* at 1198.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1199.

¹⁷⁸ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007).

¹⁷⁹ *Id.* at 1108.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 1119.

¹⁸³ *Id.* at 1119-20.

b) Doe v. Friendfinder (D. New Hamp. 2008)

Friendfinder operated the website “AdultFriendFinder.com” where users could register and create on-line profiles that included a photo, biographical data, general interests, and sexual proclivities.¹⁸⁴ An anonymous user created a fake profile using the plaintiff’s photo and personal information. When the plaintiff found out about the fake profile, she notified Friendfinder who then removed the profile. However, images of the plaintiff from the fake profile and “modified” versions of her profile still appeared on other websites belonging to Friendfinder as well as on advertisements for Friendfinder’s websites.¹⁸⁵ Doe filed a right of publicity claim against Friendfinder for use of the images and profile.

The district court determined that the right of publicity claim constituted an exemption under Section 230(e)(2) and did not follow the 9th Circuit’s reasoning in *Perfect 10*. Instead, the New Hampshire court followed dicta in a First Circuit decision, *Universal Communication Systems v. Lycos*, 478 F.3d 413 (1st Cir. 2007). In *Universal*, the First Circuit noted that infringement of intellectual property laws are not protected by Section 230.¹⁸⁶ The District Court gave deference to the dicta of its own circuit and held that Section 230(e)(2)’s intellectual property laws exemption included state and federal intellectual property laws.

V. Summary of the Academic Literature

The Fordham CLIP research team identified 192 articles addressing and analyzing Section 230 of the CDA. The majority of the articles found were critical of the scope of immunity found in Section 230 and critical of the way that the majority of courts have interpreted the statute. The Fordham CLIP research team also found a smaller more recent trend of articles that provides a defense of the statute and limited groupings of articles that examine the statute in relation to other legal doctrines.

Set forth below is a summary of the trends that Fordham CLIP identified. The trends emerge around common arguments advanced by the articles or around the focus on common issues.

A. Articles Critical of Section 230

Fordham CLIP identified approximately 80 articles that were critical of Section 230. There was great variety in the types of critiques made, the viewpoints of the authors and the solutions proposed. The major trends that appear in the articles critical of the CDA are identified below.

1. Courts Have Interpreted Section 230 Too Broadly

A recurring trend in the scholarship is that courts have interpreted the CDA too broadly. Authors express multiple views to explain the overbroad interpretations. The more prevalent views are: misunderstandings of congressional intent, conflation of legal standards, and expansive interpretations as a consequence of vague statutory language.

¹⁸⁴ Doe v. Friendfinder Network Inc., 540 F.Supp.2d 288, 291-92 (D. New Hamp. 2008).

¹⁸⁵ *Id.* at 292-93.

¹⁸⁶ *Id.* at 298.

A significant body of scholarly work contends that courts' overbroad application of Section 230's immunity is primarily the result of a misapplication of publisher and distributor liability under the language of the statute.¹⁸⁷ They contend that though Congress, in reacting to the *Stratton* decision, clearly intended to provide immunity to Internet publishers, it did not act explicitly to immunize ISPs from claims under traditional distributor liability. Under this view, courts that have interpreted the statute to include such immunity have been erroneously expansive.¹⁸⁸ As shown in Section IV of this report, current Section 230 jurisprudence rests largely on the *Zeran* court's finding that the grant of immunity from publisher liability would be frustrated if Section 230 did not also grant immunity for distributor claims. As a result, this scholarship takes the position that immunity has been extended too far because this judicial interpretation eliminates the possibility of distributor claims involving situations in which ISPs have knowledge of harmful content, yet fail to act.

In addition to misconstruing the scope of immunity, multiple authors contest the high bar that courts have set to determine when ISPs qualify as content creators, as opposed to providers of third-party content.¹⁸⁹ This scholarship contends that courts have made it unnecessarily and inappropriately difficult to hold ISPs accountable for content when they have in some way participated in the creation of that content.

¹⁸⁷ Colby Ferris, *Communication Indecency: Why the Communication Decency Act, and the Judicial Interpretation of it, Has Led to a Lawless Internet in the Area of Defamation*, 14 BARRY L. REV. 123 (Spring 2010); Freiwald, *supra* note 12; Emily K. Fritts, *Internet Libel and the Communications Decency Act: How the Courts Erroneously Interpreted Congressional Intent With Regard To Liability of Internet Service Providers*, 93 KY. L.J. 765 (2004-2005); Todd G. Hartman, *The Marketplace vs. The Ideas: First Amendment Challenges to Internet Commerce*, 12 HARV. J.L. & TECH. 419 (Winter 1999); James P. Jenal, *When Is a User Not a "User"? Finding the Proper Role for Republication Liability on the Internet*, 24 LOY. L.A. ENT. L. REV. 453 (2004); Andrea L. Julian, *Freedom of Libel: How an Expansive Interpretation of 47 U.S.C. § 230 Affects the Defamation Victim in the Ninth Circuit*, 40 IDAHO L. REV. 509 (2004); Michelle J. Kane, *Blumenthal v. Drudge*, 14 BERKELEY TECH. L.J. 483 (1999); Nancy S. Kim, *Imposing Tort Liability on Websites for Cyberharassment*, YALE L. J. POCKET PART, Vol. 118, p. 115 (2008) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1507463; Jae Hong Lee, *Batzel v. Smith & Barrret v. Rosenthal: Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469 (2004); David Lukmire, *Can the Courts Tame the Communications Decency Act?: The Reverberations of Zeran v. America Online*, 66 N.Y.U. ANN. SURV. AM. L. 371 (2010); Joshua M. Masur, *A Most Uncommon Carrier: Online Service Provider Immunity Against Defamation Claims in Blumenthal v. Drudge*, 40 JURIMETRICS J. 217 (Winter 2000); Brian C. McManus, *Rethinking Defamation Liability for Internet Service Providers*, 35 SUFFOLK U. L. REV. 647 (2001); Olivera Medenica, *The Immutable Tort of Cyber-Defamation*, 11 No. 7 J. INTERNET L. 3 (Jan 2008); Devon Ishii Peterson, *Child Pornography on the Internet: The Effect of Section 230 of the Communications Decency Act of 1996 on Tort Recovery for Victims Against Internet Service Providers*, 24 U. HAW. L. REV. 763 (Summer 2002); Rachel Seaton, *All Claims are Not Created Equal: Challenging the Breadth of Immunity Granted By the Communications Decency Act*, 6 SETON HALL CIRCUIT REV. 355 (Spring 2010).

¹⁸⁸ See Freiwald, *supra* note 12 at 639 ("The Stratton court held Prodigy liable as a primary publisher, independent of its knowledge of the alleged defamation. While Congress clearly intended to protect intermediaries such as Prodigy from being treated as primary publishers based on their monitoring efforts, it was silent on the separate question of whether treating them as distributors was permissible.").

¹⁸⁹ Gregory M. Dickinson, *An Interpretive Framework for Narrower Immunity Under Section 230 of The Communications Decency Act*, 33 HARV. J.L. & PUB. POL'Y 863 (Spring 2010); Trenton E. Gray, *Internet Dating Websites: A Refuge for Internet Fraud*, 12 FLA. COASTAL L. REV. 389 (Winter 2011); Seaton, *supra* note 187.

Several articles observe that however justified the judicial interpretations of Section 230 may be, judges are not sufficiently weighing the harms associated with the granting of blanket immunity.¹⁹⁰ Others make that case that judges have not considered whether all ISPs deserve, or even need, blanket immunity¹⁹¹ and that those judges place too much weight on the risks of chilling free speech.¹⁹²

Another significant group of articles argues that courts have interpreted Section 230 in ways that actually contravene congressional intent.¹⁹³ Of these, the majority claims that Congress never intended to offer ISP's blanket immunity for all claims.¹⁹⁴ Several within this majority argue that in creating Section 230, Congress intended merely to provide immunity for defamation claims against ISPs, not all claims generally.¹⁹⁵ Others within the group contend that even if Congress intended to incentivize ISPs' filtering of content, it never intended to immunize sites that actively participate in the creation of that content by soliciting or developing it.¹⁹⁶

Similarly, another set of articles focuses on Congress' intentions with respect to the entire CDA, not just Section 230.¹⁹⁷ This set argues that while Congress had the goal of promoting the removal of harmful

¹⁹⁰ Patricia Sanchez Abril, *Reputational Sites and the Limits of § 230 Immunity*, 12 No. 7 J. INTERNET L. 3 (January 2009); Nancy S. Kim, *Web Site Proprietorship and Online Harassment*, 2009 UTAH L. REV. 993 (2009); Dawn C. Nunziato, *Romeo and Juliet Online and In Trouble: Criminalizing Depictions of Teen Sexuality (C U L8R: G2G 2 JAIL)*, 10 NW. J. TECH. & INTELL. PROP. 57 (January 2012).

¹⁹¹ Jenal, *supra* note 187; Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293 (2011), Cardozo Legal Studies Research Paper No. 354, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1950631.

¹⁹² Jennifer Benedict, *Deafening Silence: The Quest for a Remedy in Internet Defamation*, 39 CUMB. L. REV. 475 (2008-2009).

¹⁹³ Michael Burke, *Cracks in the Armor?: The Future of The Communications Decency Act and Potential Challenges to the Protections of Section 230 to Gossip Web Sites*, 17 B.U. J. SCI. & TECH. L. 232 (Summer 2011); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (Feb. 2009); Dickinson, *supra* note 189; Brandy Jennifer Glad, *Determining What Constitutes Creation or Development of Content Under the Communications Decency Act*, 34 SW. U. L. REV. 247 (2004); Hartman, *supra* note 187; Thomas D. Huycke, *Licensed Anarchy: Anything Goes on the Internet? Revisiting the Boundaries of Section 230 Protection*, 111 W. VA. L. REV. 581 (Winter 2009); Jenal, *supra* note 187; Julian, *supra* note 187; Kane, *supra* note 187; Kim, *supra* note 187; Lee, *supra* note 187; Masur, *supra* note 187; Katy Noeth, *The Never-Ending Limits of § 230: Extending ISP Immunity to the Sexual Exploitation of Children*, 61 FED. COMM. L.J. 765 (June 2009); Peterson, *supra* note 187; Molly Sachson, *The Big Bad Internet: Reassessing Service Provider Immunity Under § 230 to Protect the Private Individual From Unrestrained Internet Communication*, 25 J. CIV. RTS. & ECON. DEV. 353 (Winter 2011); David Wiener, *Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran?*, 39 SANTA CLARA L. REV. 905 (1999); Ali Grace Ziegrowsky, *Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act*, 61 HASTINGS L.J. 1307 (May 2010).

¹⁹⁴ Burke, *supra* note 193; Citron, *supra* note 193; Dickinson, *supra* note 189; Fritts, *supra* note 187; Glad, *supra* note 193; Hartman, *supra* note 187; Huycke, *supra* note 193; Kim, *supra* note 187; Noeth, *supra* note 193; Lee, *supra* note 187; Masur, *supra* note 187; Medenica, *supra* note 187; Ziegrowsky, *supra* note 193.

¹⁹⁵ Lukmire, *supra* note 187; Wiener, *supra* note 193.

¹⁹⁶ Burke, *supra* note 193; Citron, *supra* note 193; Glad, *supra* note 193; Huycke, *supra* note 193; Ziegrowsky, *supra* note 193.

¹⁹⁷ Ferris, *supra* note 187; Hartman, *supra* note 187; Aaron Jackson, *Cyberspace ... The Final Frontier: How The Communications Decency Act Allows Entrepreneurs To Boldly Go Where No Blog Has Gone Before*, 5 OKLA. J. L. & TECH. 45 (Sept. 21, 2009); Jenal, *supra* note 187; Julian, *supra* note 187; Kane, *supra* note 187; Kim, *supra* note 190; Medenica, *supra* note 187; Cara J. Ottenweller, *Cyberbullying: The Interactive Playground Cries for a*

material from the Internet, judicial interpretations of Section 230 have frustrated that goal by removing the incentives for self-censorship and content filtering. While Section 230 sought to remove the threat of publisher liability as a means of reducing barriers to policing user-generated content, these articles contend that courts' expansive interpretation of immunity has had the unintended effect of removing any incentives to do just that.

Lastly within this trend, a group of articles acknowledges that while the CDA does offer ISPs some immunity, they should still be subject to liability for claims as a result of their status as proprietors,¹⁹⁸ distributors,¹⁹⁹ or facilitators of the sexual exploitation of children.²⁰⁰

2. Congress Created Overly Broad Immunity

A small group of articles suggests that Section 230 was written in a way that granted overly broad immunity. These articles argue that the immunity is overbroad because it fails to properly account for victims of online harm and because the language of the statute does not anticipate technological change.

One subset of these articles argues that the statute leaves victims of harmful content online without any effective method of recourse.²⁰¹ One of these articles compares Section 230 to the Digital Millennium Copyright Act (DMCA) to highlight the breadth of immunity in Section 230. The article argues that the DMCA's notice and takedown provision places ISPs in a more contained role, reflecting a desire to protect copyright owners, whereas the role of ISPs in Section 230 is largely unrestricted and contains no language reflecting a desire to protect victims of online harassment.²⁰² Another article argues that the immunity is overbroad with an example from journalism. The article argues that a newspaper would be liable for printing a story defaming a private individual, but an Internet site posting the same story would not be held liable.²⁰³

Another set of articles reasons that Congress could not have imagined or anticipated the growth rate of the Internet and new technologies, and consequently, Congress underestimated the breadth of immunity it granted.²⁰⁴ One of these articles specifically argues that Congress failed to anticipate how

Clarification of the Communications Decency Act, 41 VAL. U. L. REV. 1285 (Spring 2007); Peterson, *supra* note 187; Sachson, *supra* note 193; Michael H. Spencer, *Defamatory E-Mail and Employer Liability: Why Razing Zeran v. American Online is a Good Thing*, 6 RICH. J.L. & TECH. 25 (Spring 2000).

¹⁹⁸ Kim, *supra* note 187; Kim, *supra* note 190.

¹⁹⁹ Jenal, *supra* note 187; Julian, *supra* note 187; Lee, *supra* note 187; Peterson, *supra* note 187.

²⁰⁰ Noeth, *supra* note 193; Nunziato, *supra* note 190.

²⁰¹ Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J. L. & GENDER 383 (Summer 2009); David A. Myers, *Defamation and the Quiescent Anarchy of the Internet: A Case Study of Cyber Targeting*, 110 PENN ST. L. REV. 667 (Winter 2006).

²⁰² Bartow, *supra* note 201.

²⁰³ Myers, *supra* note 201.

²⁰⁴ Caitlin Hall, *A Regulatory Proposal for Digital Defamation: Conditioning § 230 Safe Harbor on the Provision of a Site "Rating"*, 2008 STAN. TECH. L. REV. N1 (2008); Nicole Hostettler, *Tongue-In-Cheek: How Internet Defamation Laws of the United States & China are Shaping Global Internet Speech*, 9 J. HIGH TECH. L. 66 (2009); Miree Kim, *Narrowing the Definition of an Interactive Service Provider Under § 230 of the Communications Decency Act*, 2003 B.C. INTELL. PROP. & TECH. F. 33102 (March 2003).

Internet innovation would affect the definition of an ISP and as a result immunity is now granted to non-traditional ISP functions that Congress could not have intended to protect.²⁰⁵

3. Section 230 Has Failed its Purpose

Another group of articles argues that Section 230 has failed its intended purpose of encouraging ISPs to self-regulate the content they provide.²⁰⁶ The majority of these articles argue that courts' broad interpretation of the statute is the reason behind this failure. This literature suggests that since ISPs know they will not be held liable for any content posted by a third party user, they have no incentive to monitor and filter content.²⁰⁷

A few articles propose other justifications for why Section 230 has failed to incentivize the use of filtering and screening mechanisms on the Internet. One article submits that Section 230(c)(2) is ineffective because it makes self-regulation optional rather than mandatory.²⁰⁸ Another article explains how website operators have a disincentive to implement protective measures because wrongful content often brings revenue-generating traffic to a site.²⁰⁹ On the other hand, a different article proposes that self-regulation may increase in the future, motivated by consumer demand.²¹⁰

Some articles examine the effects of Section 230's failure to have a restraining effect on certain types of online content. For example, one group of articles argues that Section 230's failure to incentivize filtering has led to an increase in defamatory posts and cyber-bullying on online forums and social networking websites.²¹¹ These articles argue that intermediaries should be responsible for reducing abusive content and ensuring the safety of users, but instead website operators know that they are virtually judgment proof and therefore have no incentive to implement protective measures. Another small group of articles argues that the prevalence of child pornography online is evidence that Section 230 is not properly functioning to encourage filtering.²¹²

4. Online Harassment and Bullying Demands a Reevaluation of Section 230 Immunity

Some of the literature approaches the CDA by examining the statute's impact on cyberbullying and harassment. These articles contend that the CDA helps to perpetuate an Internet culture of harassment

²⁰⁵ Kim, *supra* note 204.

²⁰⁶ Benedict, *supra* note 192; Stacy M. Chaffin, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773 (Spring 2008); Glad, *supra* note 193; Amanda Groover Hyland, *The Taming of the Internet: A New Approach to Third-Party Internet Defamation*, 31 HASTINGS COMM. & ENT L.J. 79 (Fall 2008); Kane, *supra* note 187; Myers, *supra* note 201; Noeth, *supra* note 193; Sewali K. Patel, *Immunizing Internet Service Providers From Third-Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647 (March 2002); Peterson, *supra* note 187; Spencer, *supra* note 197.

²⁰⁷ Kim, *supra* note 204; Lukmire, *supra* note 187; Joseph Monaghan, *Social Networking Websites' Liability For User Illegality*, 21 SETON HALL J. SPORTS & ENT. L. 499 (2011).

²⁰⁸ Benedict, *supra* note 192.

²⁰⁹ Monaghan, *supra* note 207.

²¹⁰ Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103 (Spring 2011).

²¹¹ Chaffin, *supra* note 206; Citron, *supra* note 193; Lipton, *supra* note 210; Monaghan, *supra* note 207; Myers, *supra* note 201.

²¹² Noeth, *supra* note 193; Peterson, *supra* note 187.

and bullying.²¹³ They believe the law makes the spread of false rumors more likely and their removal less likely because Section 230's immunity allows ISPs to stand between victims and perpetrators-preventing victims from having material removed.²¹⁴ This leaves victims of harmful speech vulnerable and sometimes helpless.²¹⁵ Further, several articles argue that because ISPs have no incentive to help victims or behave in socially responsible ways, they can turn a blind eye to harassment.²¹⁶

Some articles focus on what they perceive to be the CDA's negative impact on efforts to stop the spread of child pornography. Much the same way that some writers believe Section 230 stands as a barrier between victims and perpetrators of bullying, these articles claim that the CDA stands in the way of child pornography victims by hindering their ability to have unauthorized photos removed quickly.²¹⁷ To them the act allows for too much sexually explicit content on the Internet.²¹⁸ As one article notes, anonymous posting technology and the ease of forming online communities, combined with the CDA, help foster the spread of child pornography in ways that were unavailable or more difficult in the offline world.²¹⁹

Commentators also lament the impact that the CDA has on efforts to curb Internet predators. There is some belief that the law perpetuates an environment ripe for injurious sexual exploitation and that by favoring immunity over the ability of victims to seek relief, the CDA places the economic interests of ISPs ahead of the welfare of users.²²⁰ In this way, some articles argue that Section 230 actually makes minors more susceptible to online sex predators.²²¹

5. Common Law Standards of Liability Should Be Restored

There is a trend in the literature proposing a return to the common law standards of liability, where an ISP may be held liable as a distributor if it has notice of defamatory content and fails to act.²²² These

²¹³ Chaffin, *supra* note 206; Kim, *supra* note 187; Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe For Both Teens and Free Speech*, 63 VAND. L. REV. 845 (April 2010); KrisAnn Norby-Jahner, "Minor" Online Sexual Harassment and the CDA § 230 Defense: New Directions for Internet Service Provider Liability, 32 HAMLINE L. REV. 207 (Winter 2009).

²¹⁴ Bartow, *supra* note 201; Chaffin, *supra* note 206; Kim, *supra* note 190; Ottenweller, *supra* note 197.

²¹⁵ Abril, *supra* note 190; Bartow, *supra* note 201; Lipton, *supra* note 210; Ottenweller, *supra* note 197.

²¹⁶ Bartow, *supra* note 201; Citron, *supra* note 193; King, *supra* note 213; Lipton, *supra* note 210; Norby-Jahner, *supra* note 213; Ottenweller, *supra* note 197.

²¹⁷ Nunziato, *supra* note 190; Peterson, *supra* note 187.

²¹⁸ Nunziato, *supra* note 190; Peterson, *supra* note 187.

²¹⁹ Peterson, *supra* note 187.

²²⁰ Noeth, *supra* note 193.

²²¹ Terel Klein, *Combating Sexual Predators Online and Conflicts With Free Speech: An Analysis of Legislative Approaches in New Jersey*, 34 RUTGERS COMPUTER & TECH. L.J. 366 (2008); John Nisbett, *Checkmate: How Sexual Predators In (Your)Space Have Strategically Employed Existing Cyber-Laws To Outflank Their Prey*, 28 MISS. C. L. REV. 181 (2008-2009); Noeth, *supra* note 193.

²²² Stephanie Blumstein, *The New Immunity in Cyberspace: The Expanded Reach of The Communications Decency Act to the Libelous "Re-Poster"*, 9 B.U. J. SCI. & TECH. L. 407 (Summer 2003); Burke, *supra* note 193; Dickinson, *supra* note 189; Ferris, *supra* note 187; Fritts, *supra* note 187; 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 (Fall 2007); Julian, *supra* note 187; Lee, *supra* note 187; McManus, *supra* note 187; Myers, *supra* note 201; Ottenweller, *supra* note 197; Chris Williams, *The*

articles argue that the current blanket immunity eliminates any recourse for the victims of defamatory content on the Internet, whereas traditional common law principles would allow for claims under distributor liability.²²³

The majority of articles in this trend purport that Congress did not intend to grant absolute immunity to ISPs for content posted by third parties.²²⁴ Some articles reason that Congress enacted the CDA to overrule the *Stratton* decision while maintaining the common law publisher/distributor distinction as applied in *Cubby*.²²⁵ Similarly, one suggests that the *Zeran* court misinterpreted the statute and that Congress only meant to eliminate primary publisher liability.²²⁶ Other articles specifically argue for Congress to reinstate notice-based distributor liability for ISPs.²²⁷

Another set of articles seeking the return to the common law argues that the Internet no longer needs the benefit of such broad protection against defamation liability.²²⁸ This literature suggests that Internet entities should now bear some responsibility over the content they permit on their sites, especially when given notice of the defamatory nature of that content. The articles argue that common law standards of liability would not require ISPs and website operators to begin regulating all content, but to simply take reasonable care when given notice of allegedly defamatory content.²²⁹ One article suggests that returning to notice-based distributor liability may provide website operators with a definitive standard of how to conduct their businesses.²³⁰

Finally, there is also a group that argues for developing a new alternative standard of liability for ISPs and website operators.²³¹ These articles suggest a modified distributor standard of liability. They recognize how ISPs differ from traditional forms of distributorship because of the volume of content they are responsible for but also find that blanket immunity is ineffective at preventing wrongful content.²³² Two of these articles even suggest that imposing some standard of liability on ISPs will lead to more truthful and accurate information online.²³³

Communications Decency Act and New York Times v. Sullivan: Providing Public Figure Defamation a Home on the Internet, 43 J. MARSHALL L. REV. 491 (Winter 2010).

²²³ Dickinson, *supra* note 189; Julian, *supra* note 187; Myers, *supra* note 201.

²²⁴ Dickinson, *supra* note 189; Fritts, *supra* note 187; Jeweler, *supra* note 222; Julian, *supra* note 187; McManus, *supra* note 187; Myers, *supra* note 201; Ottenweller, *supra* note 197.

²²⁵ Fritts, *supra* note 187; McManus, *supra* note 187.

²²⁶ Ottenweller, *supra* note 197.

²²⁷ Blumstein, *supra* note 222; Ferris, *supra* note 187.

²²⁸ Burke, *supra* note 193; Jeweler, *supra* note 222; Lee, *supra* note 187; Melissa A. Troiano, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447 (June 2006); Williams, *supra* note 222.

²²⁹ Blumstein, *supra* note 222; Burke, *supra* note 193; Ferris, *supra* note 187; Julian, *supra* note 187; Lee, *supra* note 187.

²³⁰ Burke, *supra* note 193.

²³¹ Citron, *supra* note 193; Hyland, *supra* note 206; Kim, *supra* note 187; Annemarie Pantazis, *Zeran v. America Online, Inc.: Insulating Internet Service Providers From Defamation Liability*, 34 WAKE FOREST L. REV. 531 (Summer 1999); Troiano, *supra* note 228.

²³² Citron, *supra* note 193; Hyland, *supra* note 206; Kim, *supra* note 187; Pantazis, *supra* note 231.

²³³ Hyland, *supra* note 206; Troiano, *supra* note 228.

6. Victims Have No Recourse

A significant trend in the literature contains critiques centered on the extent to which Section 230 leaves victims of online harms without recourse. These articles frequently acknowledge that Congress may have been motivated by concerns over harmful content, but that by attempting to encourage the development of ISPs, Congress inadvertently made things worse for the victims of wrongful content.

One group of articles within this trend argues that the immunity provided in Section 230(c)(2) distorts the incentives for ISPs to filter and aid victims. By immunizing ISPs from publisher liability, Congress hoped to remove the threat of litigation as an obstacle to those ISPs self-policing their sites. But, as a number of articles contend, that immunity can also act as a disincentive to remove content, as no liability will attach for the decision to leave it in place.²³⁴ As such, these articles explain that victims of online harms such as harassment, cyberbullying, defamation and humiliation (e.g. arising from the unwanted posting of explicit photographs) are often unable to effectively pressure ISPs to assist them in removing the content in question.²³⁵

The largest group of articles in this area argues that, while the CDA does not provide immunity to the third party originators of unlawful content, those originators are often anonymous or difficult to identify. These articles focus on the difficulty of obtaining relief from third party content originators. A significant number of articles discuss the threshold problem of identifying the original posters in the context of prevalent online anonymity.²³⁶ More specifically, some explain how plaintiffs wishing to unmask anonymous speakers face First Amendment²³⁷ and jurisdictional hurdles²³⁸ in court. Identification may not be possible in instances when ISPs do not maintain records of their users²³⁹ or when original posters register on sites under false names.²⁴⁰ Some articles lament that even when a plaintiff goes through the often expensive judicial process of obtaining a subpoena to compel the

²³⁴ Benedict, *supra* note 192; Glad, *supra* note 193; Lukmire, *supra* note 187; McManus, *supra* note 187; Myers, *supra* note 201; Ottenweller, *supra* note 197; Kimberly Quon, *Implementing a Standard of Care to Provide Protection from a Lawless Internet*, 31 WHITTIER L. REV. 589 (Spring 2010).

²³⁵ Joshua Azriel, *The California Supreme Court's Decision In Barrett v. Rosenthal: How The Court's Decision Could Further Hamper Efforts To Restrict Defamation On The Internet*, 30 HASTINGS COMM. & ENT L.J. 89 (Fall 2007); Bartow, *supra* note 201; Burke, *supra* note 193; David E. Hallett, *How To Destroy a Reputation and Get Away With It*, 41 IDEA 259 (2001); Ottenweller, *supra* note 197.

²³⁶ Azriel, *supra* note 235; Benedict, *supra* note 192; Burke, *supra* note 193; Citron, *supra* note 193; Ferris, *supra* note 187; Glad, *supra* note 193; Hallett, *supra* note 235; Hyland, *supra* note 206; Julian, *supra* note 187; Lukmire, *supra* note 187; McManus, *supra* note 187; Myers, *supra* note 201; Norby-Jahner, *supra* note 213; Ottenweller, *supra* note 197; Patel, *supra* note 206; Peterson, *supra* note 187; Quon, *supra* note 234; Sachson, *supra* note 193; Barry J. Waldman, *A Unified Approach to Cyber-Libel: Defamation on the Internet, a Suggested Approach*, 6 RICH. J.L. & TECH. 9 (Fall 1999); Williams, *supra* note 222.

²³⁷ Benedict, *supra* note 192; John L. Hines, Jr. et al., *Anonymity, Immunity & Online Defamation: Managing Corporate Exposures to Reputation Injury*, 4 SEDONA CONF. J. 97 (Fall 2003); Erik P. Lewis, *Unmasking "Anon12345": Applying an Appropriate Standard When Private Citizens Seek the Identity of Anonymous Internet Defamation Defendants*, 2009 U. ILL. L. REV. 947 (2009); Lukmire, *supra* note 187.

²³⁸ Lewis, *supra* note 237; Lukmire, *supra* note 187; Waldman, *supra* note 236.

²³⁹ Citron, *supra* note 193; Myers, *supra* note 201; Quon, *supra* note 234.

²⁴⁰ Julian, *supra* note 187.

disclosure of the identity of the content provider, the provider will frequently be judgment-proof.²⁴¹ Finally, a small group of articles argues that in the many instances when plaintiffs are unable to identify original posters (due to anonymity and litigation costs to obtain subpoenas), victims will effectively be foreclosed from any remedy.²⁴²

Another group of writers argues that even when a plaintiff is able to identify and sue the original poster, some liability should remain for the ISP. Articles take the position that ISP liability is necessary because the third parties who remain liable under the law will be unable to offer adequate relief. Some articles contend that ISPs must retain liability as suitably deep pockets for victims.²⁴³ Others contend that ISPs who act improperly,²⁴⁴ or who have the opportunity to remedy harms but do not,²⁴⁵ should be held liable. The desire to hold ISPs at least partially liable is based on a desire to hold all parties responsible for actions that they could have or should have taken.

Some scholars also argue that even when the original poster is able to be identified and sued, Section 230 is a barrier to effective relief because litigation may merely draw attention to the harmful material²⁴⁶ or the material may have already been reposted to other sites.²⁴⁷ A few articles make the point that the ISP and not the original poster is in the best position to remedy the harms of unlawful material since the ISP retains control over the location of the material and can effectively ban problematic users.²⁴⁸

Additionally, a few articles address the issue of private, “self-help” remedies for speech harms that occur on the Internet and that are unaffected by Section 230. These articles address the use of counter-speech to refute defamatory claims. A few contend that the use of self-help remedies is an ineffective means of providing victims with redress²⁴⁹ while one article argues that self-help should be encouraged.²⁵⁰

Finally, a few articles focus on the victims of very specific types of harms and lament how the CDA often leaves them without redress. These articles look at public figures who have been defamed,²⁵¹

²⁴¹ Ferris, *supra* note 187; Hyland, *supra* note 206; Julian, *supra* note 187; Lewis, *supra* note 237; Lukmire, *supra* note 187; Patel, *supra* note 206; Quon, *supra* note 234; Sachson, *supra* note 193; Waldman, *supra* note 236.

²⁴² Azriel, *supra* note 235; Bartow, *supra* note 201; Burke, *supra* note 193; Hallett, *supra* note 235; Lipton, *supra* note 210; Ottenweller, *supra* note 197.

²⁴³ Hallett, *supra* note 235; Allison E. Horton, *Beyond Control?: The Rise and Fall of Defamation Regulation on the Internet*, 43 VAL. U. L. REV. 1265 (Spring 2009); Lipton, *supra* note 210; Sachson, *supra* note 193; Waldman, *supra* note 236.

²⁴⁴ Julian, *supra* note 187.

²⁴⁵ Robert T. Langdon, *The Communications Decency Act § 230: Make Sense? Or Nonsense?--A Private Person's Inability to Recover if Defamed in Cyberspace*, 73 ST. JOHN'S L. REV. 829 (Summer 1999); Jeffrey Lipschutz, *Internet Dating . . . Not Much Protection Provided By the Communications Decency Act of 1996 Based on Carafano v. Metrosplash.Com*, 339 F.3d 1119 (9th Cir. 2003), 23 TEMP. ENVTL. L. & TECH. J. 225 (Fall 2004).

²⁴⁶ Lipton, *supra* note 210.

²⁴⁷ Abril, *supra* note 190; Blumstein, *supra* note 222; Citron, *supra* note 193; Ottenweller, *supra* note 197.

²⁴⁸ Lipton, *supra* note 210; Ottenweller, *supra* note 197; Peterson, *supra* note 187.

²⁴⁹ Blumstein, *supra* note 222; Citron, *supra* note 193; Horton, *supra* note 243.

²⁵⁰ Hyland, *supra* note 206.

²⁵¹ Williams, *supra* note 222.

corporations and business entities who have suffered reputational harms online,²⁵² and the victims of harassment²⁵³ and child pornography.²⁵⁴

7. Section 230 is No Longer Necessary

There is a cluster of articles that suggests that, while Section 230 may have initially served an important policy objective, it is no longer necessary.²⁵⁵ These articles recognize that when the CDA was initially enacted, the Internet was still new and Congress found that granting immunity to ISPs was necessary to promote technological innovation, help new companies survive and encourage free expression online. The articles argue, however, that since the passage of the CDA the technological landscape has changed dramatically and the incentive structure from the 1990s is no longer necessary or beneficial. They claim that Internet services are sufficiently numerous and diverse that online speech is robust and that, given the Internet's critical role in the economy, technology companies will continue to thrive without ISP immunity. Additionally, some of the literature suggests that while immunity initially provided growth opportunities for new struggling companies, it is now being used as a shelter by bad actors who encourage defamatory speech for their own profit.²⁵⁶ One article also argues that Section 230 immunity should be reevaluated because the harm from defamatory speech in 1996 was substantially smaller than the harm that now exists due to the pervasive nature of the Internet today and the ease with which information is spread.²⁵⁷

8. The Line Between Publisher and Content Provider is Difficult to Discern

A group of articles addresses the difficulty in determining whether an ISP should be considered a publisher or a content provider. The articles provide three general rationales for this difficulty. The first group suggests that the development of new unexpected Internet technologies has contributed to the blurring of the publisher and content provider functions.²⁵⁸ The second set argues that courts have

²⁵² Hines, *supra* note 237.

²⁵³ Norby-Jahner, *supra* note 213.

²⁵⁴ Peterson, *supra* note 187.

²⁵⁵ Burke, *supra* note 193; Christopher Butler, *Plotting the Return of an Ancient Tort to Cyberspace: Towards a New Federal Standard of Responsibility for Defamation for Internet Service Providers*, 6 MICH. TELECOMM. TECH. L. REV. 247 (2000); Hostettler, *supra* note 204; Jackson, *supra* note 197; Jeweler, *supra* note 222; Ryan W. King, *Online Defamation: Bringing the Communications Decency Act of 1996 in Line With Sound Public Policy*, 2003 DUKE L. & TECH. REV. 24 (Oct. 2003); Lee, *supra* note 187; Ryan Lex, *Can MySpace Turn Into My Lawsuit?: The Application of Defamation Law to Online Social Networks*, 28 LOY. L.A. ENT. L. REV. 47 (2007-2008); Lukmire, *supra* note 187; Medenica, *supra* note 187; Quon, *supra* note 234; Seaton, *supra* note 187; Troiano, *supra* note 228.

²⁵⁶ Jackson, *supra* note 197; Quon, *supra* note 234.

²⁵⁷ King, *supra* note 255.

²⁵⁸ Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, 12 U. PA. J. CONST. L. 1279 (June 2010); Kim, *supra* note 204; Robert G. Magee & Tae Hee Lee, *Information Conduits or Content Developers?: Determining Whether News Portals Should Enjoy Blanket Immunity From Defamation Suits*, 12 COMM. L. & POL'Y 369 (Autumn 2007); Brian J. McBrearty, *Who's Responsible? Website Immunity Under the Communications Decency Act and the Partial Creation or Development of Online Content*, 82 TEMP. L. REV. 827 (Fall 2009).

confused what constitutes publisher functions from those of content providers.²⁵⁹ The third cluster of articles claims that the problem originates from the way the statute was drafted.²⁶⁰

Many articles discuss the confusion that has arisen from identifying when an ISP is acting as a publisher rather than a content provider in light of new Internet innovations and functionalities. These articles discuss how improvements in technology allow ISPs to implement functions, such as filtering, monitoring and content selection, that could be considered content provider functions.²⁶¹ Some articles also argue that the increase in user-generated content on the Internet has increased the probability that a website operator will be held responsible for the creation of the content.²⁶² One article suggests that ISPs now offer more content while traditional content providers now also offer a wider variety of Internet services, blurring the line between an ISP and an ICP.²⁶³

A second rationale offered to explain the difficulty identifying an ISP as either a publisher or a content provider is that judicial interpretations of the categories have been inconsistent.²⁶⁴ One subset of these articles suggests that recent court decisions, like the Ninth Circuit's *Roommates* decision, are largely the cause for this confusion.²⁶⁵ One article proposes applying the traditional editorial functions standard to determine whether or not an entity becomes a content creator,²⁶⁶ whereas two articles propose a standard that looks at the intent and degree of control of the ISP.²⁶⁷ One other article explicitly rejects the editorial function standard and opts for a "joint work" approach.²⁶⁸

Finally, a few articles cite the statute itself as the source of the problem. They argue that Congress underestimated the amount of innovation possible when it enacted the statute, and therefore, the statutory language fails to address many of the modern functionalities. As a result, there is little guidance to determine when an ISP becomes "responsible" for the creation and development of content.²⁶⁹

²⁵⁹ Glad, *supra* note 193; McBrearty, *supra* note 258; Edward Fenno & Christina Humphries, *Protection Under CDA § 230 and Responsibility for "Development" of Third-Party Content*, 28-AUG COMM. LAW. 1 (2011); Karen Alexander Horowitz, *When Is § 230 Immunity Lost?: The Transformation From Website Owner To Information Content Provider*, 3 SHIDLER J. L. COM. & TECH. 14 (Spring 2007); Samuel J. Morley, *How Broad is Web Publisher Immunity Under §230 of the Communications Decency Act of 1996?*, 84-FEB FLA. B.J. 8 (Feb. 2010); Gray, *supra* note 189.

²⁶⁰ Dickinson, *supra* note 189; Horowitz, *supra* note 259; Magee & Lee, *supra* note 258.

²⁶¹ Frieden, *supra* note 258.

²⁶² Fenno & Humphries, *supra* note 259; Kim, *supra* note 204.

²⁶³ Magee & Lee, *supra* note 258.

²⁶⁴ Bryan J. Davis, *Comment: Untangling The "Publisher" Versus "Information Content Provider" Paradox of 47 U.S.C. § 230: Toward a Rational Application of The Communications Decency Act in Defamation Suits Against Internet Service Providers*, 32 N.M. L. REV. 75 (Winter 2002); Glad, *supra* note 193; McBrearty, *supra* note 258.

²⁶⁵ Gray, *supra* note 189; Horowitz, *supra* note 259; Seaton, *supra* note 187.

²⁶⁶ McBrearty, *supra* note 258.

²⁶⁷ Glad, *supra* note 193; Kim, *supra* note 204.

²⁶⁸ Davis, *supra* note 264.

²⁶⁹ Dickinson, *supra* note 178; Horowitz, *supra* note 259; Magee & Lee, *supra* note 258.

9. Congress Should Fix the Problems in Section 230

A large body of scholarship suggests that Congress should revise the statute to remedy perceived problems. These articles base their calls for legislative reform on various grounds including statutory vagueness, judicial misinterpretation, and unrealized predictions and miscalculations of risk.

With respect to statutory vagueness and misinterpretations, several articles argue that the language was unclear and that Congress must amend the CDA in response to various court decisions. Three of these focus on perceived misreadings by courts of the distinction between publisher and distributor liability.²⁷⁰ Two articles question whether the broad immunity granted by courts is consistent with congressional intent and argue for statutory clarification²⁷¹ and the other calls for a statutory change in response to an overly broad state court ruling.²⁷² Other articles focus less on judicial interpretations and instead highlight worries about statutory vagueness and incompleteness- one urging Congress to update the law to account for social networking and another,²⁷³ writing soon after passage of the CDA, predicting that courts would be unable to discern congressional intent.²⁷⁴

Another trend in the literature suggests that congressional action is needed because, whatever the intentions may have been in 1996 when the CDA was enacted, Congress had not envisioned today's Internet. A significant group of articles calls for Congress to reexamine Section 230 in light of unforeseen developments in the subsequent evolution of the Internet.²⁷⁵ Blogs, social networks, video sharing and e-commerce sites were not inevitable extensions of the 1996-era Internet and these articles contend that had Congress known what would emerge they may well have made different policy choices with respect to ISP immunity.

A third segment of literature posits that Congress needs to correct critical miscalculations it made when formulating Section 230. These articles offer two lines of argument. First, a group of articles calls on Congress to fix an ironic consequence of the CDA- that in passing a law intended to help keep harmful material off the Internet, Congress put in place incentives which allow or encourage that material to go

²⁷⁰ Fritts, *supra* note 187; Hallett, *supra* note 235; Ottenweller, *supra* note 197.

²⁷¹ Norby-Jahner, *supra* note 213; Wiener, *supra* note 193.

²⁷² Shauna L. Spinoso, *Yelp! Libel or Free Speech: The Future of Internet Defamation Litigation in Massachusetts in the Wake of Noonan v. Staples*, 44 SUFFOLK U. L. REV. 747 (2011).

²⁷³ Joshua N. Azriel, *Social Networking as a Communications Weapon to Harm Victims: Facebook, Myspace, and Twitter Demonstrate a Need to Amend Section 230 of the Communications Decency Act*, 26 J. MARSHALL J. COMPUTER & INFO. L. 415 (Spring 2009); Joshua N. Azriel, *Using Social Media as a Weapon to Harm Victims: Recent Court Cases Show a Need to Amend Section 230 of the Communications Decency Act*, 15 NO. 1 J. INTERNET L. 3, 3 (2011).

²⁷⁴ Jeff Magenau, *Setting Rules in Cyberspace: Congress's Lost Opportunities to Avoid the Vagueness and Overbreadth of the Communications Decency Act*, 34 SAN DIEGO L. REV. 1111 (Summer 1997).

²⁷⁵ Thomas J. Curtin, *The Name Game: Cybersquatting and Trademark Infringement on Social Media Sites*, 19 J.L. & POL'Y 353 (2010); Hostettler, *supra* note 204; King, *supra* note 255; Lex, *supra* note 255; Medenica, *supra* note 187; Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Credibility?: Lessons From the DMCA Applied to Online Defamation*, 25 CARDOZO ARTS & ENT. L.J. 237 (2007); Monaghan, *supra* note 207; Noeth, *supra* note 193; Norby-Jahner, *supra* note 213; Robert D. Richards, *Sex, Lies, and the Internet: Balancing First Amendment Interests, Reputational Harm, and Privacy in the Age of Blogs and Social Networking Sites*, 8 FIRST AMEND. L. REV. 176 (Fall 2009); Troiano, *supra* note 228.

uncensored.²⁷⁶ Another group of articles argues that Congress failed to protect those who might be harmed by the granting of broad ISP immunity.²⁷⁷ This group of articles suggests that the amount of defamation on the Internet has actually increased since 1996 and that Congress should amend the CDA to provide some relief (through either subpoena power or intermediary liability) for the victims.

Finally, there are a few articles that advocate Congressional action for specific issues. These include providing ISPs with more immunity for intellectual property claims²⁷⁸ and modern journalistic practices²⁷⁹ but also for increasing the liability of Internet dating sites²⁸⁰ and social networks.²⁸¹

10. Courts Should Fix the Problems in Section 230 Jurisprudence.

This group of articles argues for judicial change and proposes various tests for how courts should approach Section 230. The majority of the articles urge courts to apply 230 narrowly,²⁸² by implementing a notice and take down model,²⁸³ allowing for a bad faith exception,²⁸⁴ or taking a totality of the circumstances approach.²⁸⁵ One article also articulates a test that would narrow the judicial interpretation of 230 by considering whether a forum allows for political discourse or simply functions as a technical support site.²⁸⁶ Another article's test takes into consideration a victim's right to privacy and redress when granting immunity.²⁸⁷

A subgroup of articles proposes tests that respond specifically to the *Roommates* decision.²⁸⁸ One articles proposes a test that would reject the material contribution standard.²⁸⁹ Another proposes a test that would extend the *Roommates* framework by including as a consideration the nature of the ISP, the underlying claims, and the facts involved.²⁹⁰

²⁷⁶ Chaffin, *supra* note 206; King, *supra* note 213; Noeth, *supra* note 193; Pantazis, *supra* note 231; Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721 (July 2010).

²⁷⁷ Ferris, *supra* note 187; Horton, *supra* note 243; Tara E. Lynch, *Good Samaritan or Defamation Defender? Amending The Communications Decency Act To Correct the Misnomer of Section 230 ... Without Expanding ISP Liability*, 19 SYRACUSE SCI. & TECH. L. REP. 1 (Fall 2008); Quon, *supra* note 234.

²⁷⁸ Curtin, *supra* note 275; Rachel A. Purcell, *Is That Really Me?: Social Networking and the Right of Publicity*, 12 VAND. J. ENT. & TECH. L. 611 (Spring 2010).

²⁷⁹ Charles F. Marshall & Eric M. David, *Prior Restraint 2.0: A Framework for Applying Section 230 to Online Journalism*, 1 WAKE FOREST J.L. & POL'Y 75 (April 2011).

²⁸⁰ Gray, *supra* note 189.

²⁸¹ Kaitlin M. Gurney, *MySpace, Your Reputation: A Call to Change Libel Laws For Juveniles Using Social Networking Sites*, 82 TEMP. L. REV. 241 (Spring 2009).

²⁸² Ryan French, *Picking Up the Pieces: Finding Unity After the Communications Decency Act Section 230 Jurisprudential Clash*, 72 LA. L. REV. 443 (Winter 2012); Lukmire, *supra* note 187; McBrearty, *supra* note 258; Nunziato, *supra* note 190; Wiener, *supra* note 193; Zieglowsky, *supra* note 193.

²⁸³ Julian, *supra* note 187; Lukmire, *supra* note 187; Nunziato, *supra* note 190.

²⁸⁴ Lukmire, *supra* note 187.

²⁸⁵ Zieglowsky, *supra* note, 193.

²⁸⁶ Wiener, *supra* note 193.

²⁸⁷ Lipschutz, *supra* note 245.

²⁸⁸ McBrearty, *supra* note 258; Seaton, *supra* note 187.

²⁸⁹ McBrearty, *supra* note 258.

²⁹⁰ Seaton, *supra* note 187.

Some articles propose tests specifically to address defamation claims.²⁹¹ These propose to apply actual malice review to distributor liability,²⁹² to hold minor libel defendants to a standard of care of teenagers their own age rather than of adults,²⁹³ or to adjust the application of public figure defamation law in a way that more closely aligns with the standards applicable to print media.²⁹⁴ Also, one article's test specifically categorizes online gossip websites as ICPs.²⁹⁵

In addition to these main proposals, two articles propose tests that clarify the definition of an ISP using a multi-factor analysis,²⁹⁶ and one article proposes a test that follows Zeran's publisher-approach.²⁹⁷

B. Articles that Defend Section 230

There are fewer articles that generally defend Section 230 and broad immunity for ISPs (14 articles).²⁹⁸ This appears to be a more recent trend in the academic literature, with the majority of the articles dated after 2008. Several of these articles were responding to a cluster of cases decided in late 2007 and 2008²⁹⁹ that contemplated narrowing the immunity granted to ISPs under the CDA.³⁰⁰

The articles defending broad Section 230 immunity make four general arguments. First, several articles argue that Section 230 immunity is necessary to ensure that First Amendment values are preserved online. Second, some articles argue that Section 230 immunity has allowed the development of web 2.0

²⁹¹ Burke, *supra* note 193; Gurney, *supra* note 281; Hyland, *supra* note 206; Julian, *supra* note 187; Williams, *supra* note 222.

²⁹² Hyland, *supra* note 206.

²⁹³ Gurney, *supra* note 281.

²⁹⁴ Williams, *supra* note 222.

²⁹⁵ Burke, *supra* note 193.

²⁹⁶ Kim, *supra* note 204; Seaton, *supra* note 187.

²⁹⁷ French, *supra* note 282.

²⁹⁸ Jon Burns, *Doe v. Sexsearch.com: Placing Real-Life Liability Back Where it Belongs in a Virtual World*, 9 N.C. J. L. & TECH. 69 (Fall 2007); Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137 (Oct. 2008); Paul Ehrlich, *Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401 (2002); Freivogel, *supra* note 48; Jonathan A. Friedman & Francis M. Buono, *Limiting Tort Liability for Online Third-Party Content Under Section 230 of the Communications Act*, 52 FED. COMM. L.J. 647 (May 2000); Eric Goldman, *Online User Account Termination and 47 U.S.C. §230(c)(2)*, Santa Clara University School of Law, Legal Studies Research Papers Series, Working Paper No. 19-11 (Sept. 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934310; Eric Goldman, *Unregulating Online Harassment*, Santa Clara University School of Law Legal Studies Research Papers Series, Working Paper No. 10-02, (February 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1558681; Richard M. Guo, *Stranger Danger and the Online Social Network*, 23 BERKELEY TECH. L.J. 617 (2008); H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369 (Jan. 2008); Jeff Kosseff, *Defending Section 230: The Value of Intermediary Immunity*, 15 J. TECH. L. & POL'Y 123 (Dec. 2010); Michael D. Marin & Christopher V. Popov, *Doe v. MySpace, Inc.: Liability For Third Party Content on Social Networking Sites*, 25-SPG COMM. LAW. 3 (Spring 2007); Aaron Perzanowski, *Relative Access to Corrective Speech: A New Test For Requiring Actual Malice*, 94 CAL. L. REV. 833 (May 2006); Matt C. Sanchez, *The Web Difference: A Legal and Normative Rationale Against Liability for Online Reproduction of Third-Party Defamatory Content*, 22 HARV. J.L. & TECH. 301 (Fall 2008); 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 (2008).

²⁹⁹ See, *Fair Housing Council*, 521 F.3d at 1161; *Chicago Layer's Committee*, 519 F.3d at 668; *Doe v. Sexsearch.com*, 2008 WL 5396830 (6th Cir. Dec. 30, 2008).

³⁰⁰ Burns, *supra* note 298; Kosseff, *supra* note 298; Marin & Popov, *supra* note 298.

technologies and is necessary to continue to promote innovation in Internet technology. Third, a few articles suggest that many of the critiques of Section 230 overstate the problems associated with the statute. Finally, some articles suggest that Section 230 immunity should cover more actors and types of claims.

With respect to the First Amendment arguments, a number of articles maintain that Section 230 immunity is necessary to protect First Amendment values online and ensure the free flow of information.³⁰¹ These articles suggest that broad immunity is important because a notice-based regime like the common law distributor standard would lead to abuse and chill expression online. This literature argues that ISPs are not suited to deal with a large influx of speech-based takedown requests and are not adequately equipped to make important First Amendment decisions regarding posted content. One author points out that many ISPs benefiting from immunity under Section 230 are significantly smaller than the large media companies of the past and are therefore ill-equipped to deal with user complaints about speech.³⁰² The others argue that without immunity, ISPs would simply remove any questionable speech out of fear of liability thereby stifling large amounts of beneficial speech.

A few of the articles that focus on First Amendment values also note the unique nature of the Internet with respect to speech and argue that ISP immunity helps to maintain this unique balance.³⁰³ These articles discuss the open nature of the Internet and the ease with which individuals can post content. As a result, they argue that the Internet encourages and allows people to respond to negative speech. These articles suggest that the Internet's structure creates a robust self-help mechanism that is more beneficial to First Amendment values than ISP policing would be.

With respect to the development of web 2.0, a second set of articles suggests that Section 230 immunity has allowed Internet companies to develop new innovative websites and online services and that without the immunity much of this innovation would be stalled.³⁰⁴ These articles note that the Internet has changed dramatically since the passage of the CDA in 1996 and that ISPs now provide a broad range of activities including searching, managing and analyzing data. This literature argues that Section 230 immunity has allowed companies to explore and develop new services and is necessary to maintain continued innovation. The articles suggest that liability would limit user interaction and user content and therefore threaten current technologies and stall future innovation.

With respect to overstated concerns, a set of articles responds to some of the critiques about Section 230 and argues that their positions are overstated. For example, one author counters arguments idealizing the common law as more effective by suggesting that many ISPs would not be found liable

³⁰¹ Burns, *supra* note 298; Freivogel, *supra* note 48; Friedman & Buono, *supra* note 298; Kosseff, *supra* note 298; Perzanowski, *supra* note 298; Sanchez, *supra* note 298; Ziniti, *supra* note 298; Marin & Popov, *supra* note 298.

³⁰² Sanchez, *supra* note 298.

³⁰³ Holland, *supra* note 298; Perzanowski, *supra* note 298; Sanchez, *supra* note 298.

³⁰⁴ Goldman, *Unregulating*, *supra* note 298; Guo, *supra* note 298; Sanchez, *supra* note 298; Ziniti, *supra* note 298.

under common law standards.³⁰⁵ Two authors suggest that ISPs actually do a good job of filtering and respond well to social norms despite the common critiques that most remain inactive in the face of objectionable content.³⁰⁶ Another argues that critics propose numerous small changes to the immunity, but that each small change would make compliance a greater challenge for ISPs. Immunity, the article argues, is the most workable solution.³⁰⁷ The last article in this grouping presents an analysis of 184 Section 230 court decisions and suggests that the statute may not be as much of a “free pass” as critics claim because defendants still incurred litigation costs and time expenses even where a court found Section 230 preempted a claim. Additionally, in over half of the cases, regardless of the outcome, the plaintiffs were still able to get the offensive content removed.³⁰⁸

Finally, some literature suggests that Section 230 is in fact too narrow and should be expanded in certain circumstances. A couple of articles argue for expanding Section 230 immunity to cover more user-generated content on the Internet.³⁰⁹ One of these focuses on expanding immunity to online journalism, where news reporting sites solicit information from third party sources.³¹⁰ Another focuses on expanding immunity to bloggers and third party posters.³¹¹ Both argue that such expansions of Section 230 immunity align with the statute’s purpose of promoting free expression on the Internet.³¹² One article argues that the intellectual property exemption under subsection (e) is too broad.³¹³ This article explains how plaintiffs circumvent Section 230 immunity by alleging trademark infringement claims against website operators over the use of a mark by a third-party user. Such lawsuits, the article claims, abuse the IP exception for what are actually defamation claims at heart.

C. Articles that Focus on the *Roommates.com* and *Craigslist* Decisions

There is a trend in articles to focus on two specific court decisions: *CLC v. Craigslist* and *Fair Housing Council of San Fernando Valley v. Roommates.com*. These articles present varying perspectives on the different issues that both cases raise. One group explores the impact of the *Roommates* decision on ISP liability. These articles either argue that the court correctly or incorrectly interpreted “creation or development” of information. Another group addresses the statutory conflict between the CDA and FHA and the need for Congress to take action. Lastly, a few articles assess the CDA’s impact on Craigslist’s website overall.³¹⁴

³⁰⁵ Ciolli, *supra* note 298.

³⁰⁶ Goldman, *Online User*, *supra* note 298; Guo, *supra* note 298.

³⁰⁷ Goldman, *Unregulating*, *supra* note 298.

³⁰⁸ Ardia, *supra* note 52.

³⁰⁹ Spinosa, *supra* note 272; Marshall & David, *supra* note 279.

³¹⁰ Marshall & David, *supra* note 279.

³¹¹ Spinosa, *supra* note 272.

³¹² Marshall & David, *supra* note 279.

³¹³ Curtin, *supra* note 275.

³¹⁴ Since the crux of these articles address potential liability for Craigslist’s “Erotic Services” section of the website, these articles will not be discussed in the body of this report. The articles do, however, maintain that it will be unlikely for Craigslist to be held liable for any civil or criminal violations. Peter Adamo, *Craigslist, the CDA, and Inconsistent International Standards Regarding Liability for Third-Party Postings on the Internet*, 2 No. 7 PACE INT’L L. REV. ONLINE COMPANION 1 (February 2011); John E. D. Larkin, *Criminal and Civil Liability for User*

Several articles are critical of the *Roommates* decision arguing that the decision creates confusion as to when an ISP would qualify as an “information content provider” and face potential liability. This literature relies on legislative intent, precedent, and policy arguments to illustrate the confusion. Many of the articles argue that the *Roommates* decision contradicts the congressional intent to grant broad immunity by redefining what constitutes “creation or development” of information.³¹⁵ A few articles hypothesize and criticize the Ninth Circuit’s motives. For example some suggest that the court established a standard based on the underlying discrimination claim, rather than the meaning of “creation or development” of information,³¹⁶ and two articles suggest that the Ninth Circuit’s underlying motive was to curb Internet exceptionalism.³¹⁷ Some articles also believe *Roommates* was incorrectly decided and contradicted the precedent that granted immunity to claims related to third-party content.³¹⁸

With regard to public policy, many of the articles critical of the *Roommates* decision suggest that the result will harm both website operators and consumers. These articles postulate that to avoid the risk of liability, website operators will make their websites less interactive and less tailored to individual users and thus place burdens on consumers to search through masses of information. In turn, websites are likely to lose their customer base.³¹⁹ Similarly, a few articles also express concern that the *Roommates* decision will allow website operators to be penalized for implementing innovative functions that improve their users’ experience.³²⁰ One suggests that the *Roommates* decision will lead to forum-shopping.³²¹

Generated Content: Craigslist, A Case Study, 15 J. TECH. L. & POL’Y 85 (June 2010); *But cf.* Shahrzad T. Radbod, *Craigslist—A Case for Criminal Liability for Online Service Providers*, 25 BERKELEY TECH. L.J. 597 (2010) (recognizing how courts have also been more willing to find carve outs from 230 immunity).

³¹⁵ Burns, *supra* note 298 (arguing that the decision in *Doe v. Sexsearch.com*, 502 F. Supp. 2d 719 (N.D. Ohio 2009), correctly followed congressional intent); Bradford J. Sayler, *Amplifying Illegality: Using the Exception to CDA Immunity Carved Out By Fair Housing Council of San Fernando Valley v. Roommates.Com to Combat Abusive Editing Tactics*, 16 GEO. MASON L. REV. 203 (Fall 2008); Adam Weintraub, “Landlords Needed, Tolerance Preferred”: A Clash of Fairness and Freedom in *Fair Housing Council v. Roommates.com*, 54 VILL. L. REV. 337 (2009); Kevin M. Wilemon, *The Fair Housing Act, the Communications Decency Act, and the Right of Roommate Seekers to Discriminate Online*, 29 WASH. U. J.L. & POL’Y 375 (2009).

³¹⁶ Burns, *supra* note 298; Varty Defterderian, *Fair Housing Council v. Roommates.com: A New Path for Section 230 Immunity*, 24 BERKELEY TECH. L.J. 563 (2009); Jeffrey R. Doty, *Inducement or Solicitation: Competing Interpretations of the “Underlying Illegality” test in the Wake of Roommates.com*, 6 WASH. J. L. TECH. & ARTS 125 (Autumn 2010).

³¹⁷ Defterderian, *supra* note 316 at 592; Hattie Harman, *Drop-Down Lists and the Communications Decency Act: A Creation Conundrum*, 43 IND. L. REV. 143 (2009).

³¹⁸ These articles base their argument in the line of cases that leading up to *Roommates*, namely *Carafano v. Metrosplash*, *Batzel v. Smith*, and *Blumenthal v. Drudge*. *See e.g.*, Defterderian, *supra* note 316; Seth Stern, *Fair Housing and Online Free Speech Collide in Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 58 DEPAUL L. REV. 559 (Winter 2009); *See also* Jeffrey M. Sussman, *Cyberspace: An Emerging Safe Haven for Housing Discrimination*, 19 LOY. CONSUMER L. REV. 194 (2007).

³¹⁹ J. Andrew Crossett, *Unfair Housing on the Internet: The Effect of the Communications Decency Act on the Fair Housing Act*, 73 MO. L. REV. 195 (Winter 2008); Stern, *supra* note 318.

³²⁰ Stern, *supra* note 318.

³²¹ Colette Vogege & Ilana Sabes, *Attention Web Site Operators: Be Certain You Qualify for § 230 Protection*, 12 No. 5 J. INTERNET L. 1 (Nov. 2008).

Nevertheless, there are a few articles that support the result in *Roommates* and base their arguments on the alleged illegality of the content posted.³²² One proposes that courts should apply *Roommates*' "amplifying illegality" framework in determining Section 230 immunity.³²³ Another finds the result in *Roommates* desirable, despite the fact the court may have misapplied the statute.³²⁴ These articles also propose some form of Congressional action, such as clarifying the definition of an "information content provider,"³²⁵ taking out the term "development" and "in whole or in part" of the definition of an internet content provider,³²⁶ and adding FHA violations as an exemption to immunity.³²⁷ One article proposes a rebuttable presumption in the form of a safe-harbor. This formulation would deem any pre-populated content to be created or developed by the website operator, and would allow the presumption to be rebutted if the website operator were to satisfy certain factors deserving immunity.³²⁸

Another important group of articles focuses on the statutory conflict between Section 230 of CDA and Section 3604(c) of the FHA.³²⁹ A subset of these articles argues that Section 230 provides immunity against FHA claims because Congress was aware of the FHA when it enacted the CDA, and as such, chose not to include the FHA in its list of exemptions under 230(e).³³⁰ Another subset argues that the CDA should not protect website operators from discriminatory housing ads posted on their websites. These articles reason that it would be unfair and inconsistent for website operators to be immune for behavior that would lead to liability for their print counterparts.³³¹ Given the statutory conflict, these articles argue that Congress needs to strike a balance between the statutes in a way that preserves the

³²² Saylor, *supra* note 287; Bradley M. Smyer, *Interactive Computer Service Liability for User-Generated Content After Roommates.com*, 43 U. MICH. J.L. REFORM 811, (Spring 2010); Jennifer C. Chang, *In Search of Fair Housing in Cyberspace: The Implications of The Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969 (Dec. 2002).

³²³ Saylor, *supra* note 287.

³²⁴ The author reasoned that Congress could not have intended to grant immunity to an ISP who sufficiently contributed to the "creation or development" of discriminatory housing preferences. Smyer, *supra* note 322.

³²⁵ Wilemon, *supra* note 315.

³²⁶ Eric Weslander, *Murky "Development": How the Ninth Circuit Exposed Ambiguity Within the Communications Decency Act, and Why Internet Publishers Should Worry* [Fair Housing Council of San Fernando Valley v. *Roommates.Com, LLC*, 521 F.3d 1157 (9th Cir. 2008)], 48 WASHBURN L.J. 267 (Fall 2008).

³²⁷ Smyer, *supra* note 322.

³²⁸ Harman, *supra* note 317.

³²⁹ Stephen Collins, *Saving Fair Housing on the Internet: The Case for Amending The Communications Decency Act*, 102 NW. U. L. REV. 1471 (Summer 2008); Diane J. Klein & Charles Doskow, *Housingdiscrimination.Com?: The Ninth Circuit (Mostly) Puts Out the Welcome Mat For Fair Housing Act Suits Against Roommate-Matching Websites*, 38 GOLDEN GATE U. L. REV. 329 (Spring 2008); Rachel Kurth, *Striking a Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. The Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805 (2007); Rigel C. Oliveri, *Discriminatory Housing Advertisements On-Line: Lessons From Craigslist*, 43 IND. L. REV. 1125 (2010); Lisa Marie Ross, *Cyberspace: The New Frontier for Housing Discrimination--An Analysis of the Conflict Between the Communications Decency Act and the Fair Housing Act*, 44 VAL. U. L. REV. 329 (Fall 2009); Matthew T. Wholey, *The Internet is for Discrimination: Practical Difficulties and Theoretical Hurdles Facing the Fair Housing Act Online*, 60 CASE W. RES. L. REV. 491 (Winter 2010).

³³⁰ Ross, *supra* note 329; Sussman, *supra* note 318.

³³¹ Oliveri, *supra* note 329; James D. Shanahan, *Rethinking the Communications Decency Act: Eliminating Statutory Protections of Discriminatory Housing Advertisements on the Internet*, 60 FED. COMM. L.J. 135 (Dec. 2007).

purposes of both.³³² Proposals include exempting FHA violations from Section 230 immunity³³³ or eliminating 230(e) entirely and expressly stating claims that are precluded from liability in 230(c).³³⁴ One article argues that the most effective way to balance the statutes is to amend the FHA.³³⁵ Two articles suggest that the courts should only grant immunity to website operators that make a good faith effort to screen ads that violate the FHA.³³⁶

D. Articles that Focus on Section 230 and the First Amendment

Another significant group of articles addresses Section 230 and First Amendment concerns. These articles articulate the need to strike a balance between promoting free speech on the Internet and providing adequate recourse for victims of defamation.³³⁷ These articles generally support a broad reading of Section 230 immunity. This literature argues that ISPs should have complete immunity against defamatory posts by third-party users.³³⁸ The articles emphasize that there was an intention in Congress to encourage free speech on the Internet and that to impose monitoring or filtering responsibilities on ISPs would contradict that goal.³³⁹ One article even argues that there needs to be protection for speakers, namely bloggers, from corporate, public and private individual plaintiffs.³⁴⁰

A subgroup of articles emphasizes that plaintiffs ultimately need to target the original author of the defamatory statements.³⁴¹ For these articles, the optimal solution is to create different standards of liability for defamation based on the status of the plaintiff.³⁴² For example, one article proposes a tiered standard with more leniencies for private individuals and heightened scrutiny for corporate entities.³⁴³ Other proposals include a notice and take-down system like the one found in the DMCA,³⁴⁴ a rule that facilitates issuing subpoenas to ISPs to reveal the identities of the posters,³⁴⁵ and a rule allowing attorneys' fees to prevent frivolous lawsuits.³⁴⁶

³³² Kurth, *supra* note 329; Ross, *supra* note 329.

³³³ Collins, *supra* note 329; Oliveri, *supra* note 329.

³³⁴ Ross, *supra* note 329.

³³⁵ Wholey, *supra* note 329.

³³⁶ Kurth, *supra* note 329.

³³⁷ Nicholas P. Dickerson, *What Makes the Internet So Special? And Why, Where, How, and By Whom Should its Content Be Regulated?*, 46 HOUS. L. REV. 61 (2009); Hartman, *supra* note 187; Lewis, *supra* note 237; Marshall & David, *supra* note 279; 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 (December 2008); Richards, *supra* note 275; Spinoso, *supra* note 272; Tushnet, *supra* note 276.

³³⁸ Lewis, *supra* note 237; Miller, *supra* note 337; Richards, *supra* note 275; Tushnet, *supra* note 276.

³³⁹ Hartman, *supra* note 187; Lewis, *supra* note 237; Miller, *supra* note 337; Richards, *supra* note 275; Tushnet, *supra* note 276.

³⁴⁰ Spinoso, *supra* note 272.

³⁴¹ Lewis, *supra* note 237; Miller, *supra* note 337; Richards, *supra* note 275.

³⁴² Lewis, *supra* note 237; Miller, *supra* note 337.

³⁴³ Lewis, *supra* note 237.

³⁴⁴ Richards, *supra* note 275; Tushnet, *supra* note 276.

³⁴⁵ Lewis, *supra* note 237; Miller, *supra* note 337; Richards, *supra* note 275.

³⁴⁶ Lewis, *supra* note 237; Miller, *supra* note 337; Spinoso, *supra* note 272.

E. Articles that Address Section 230 and the Right of Publicity

A significant group of articles addresses whether the right of publicity, as a state law claim, may fall outside the scope of Section 230 immunity. The majority of these articles respond to the circuit split between the Ninth Circuit's decision in *Perfect 10*³⁴⁷ and the First Circuit's decision in *Friendfinder*.³⁴⁸ The Ninth Circuit ruled intellectual property law under Section 230 refers only to federal intellectual property laws, and therefore, state law claims under rights of publicity were precluded by Section 230. The First Circuit, however, found that Section 230(e)(2) includes both state and federal intellectual property laws, thus, state law rights of publicity are not precluded by Section 230.

Most articles agree with the First Circuit's decision in *Friendfinder*, that 230(e)(2)'s exemption for intellectual property laws includes federal and state intellectual property law and, consequently, the right of publicity.³⁴⁹ Most of these articles base their arguments on statutory language and note how other subsections of Section 230 explicitly distinguish state or federal law.³⁵⁰ Additionally, the articles point out that Section 230(e)(2) uses the word "any" in reference to intellectual property laws.³⁵¹ Given the use of the word "any" and the lack of an explicit distinction between state and federal law as found in other subsections, the articles argue that Congress intended to exempt both state and federal intellectual property laws from immunity.

Some of these articles also argue that including state and federal intellectual property law in the exemption is consistent with Congressional goals. These articles explain that Congress believed an intellectual property law exemption was necessary to protect IP owners.³⁵² A few of these articles also assert that Congress valued intellectual property rights more than the risk of over-regulation of the Internet.³⁵³

Many articles also present public policy rationales to include state intellectual property rights with federal intellectual property law. These articles argue that individuals should not be denied their right to protect and control their image, likeness, and self-definition.³⁵⁴ Additionally, they emphasize that

³⁴⁷ *Perfect 10*, 488 F.3d 1102.

³⁴⁸ *Friendfinder*, 540 F.Supp.2d 288.

³⁴⁹ See e.g., Joshua Dubnow, *Ensuring Innovation as the Internet Matures: Competing Interpretations of the Intellectual Property Exception to the Communications Decency Act Immunity*, 9 NW. J. TECH. & INTELL. PROP. 297 (Fall 2010); Matthew Minora, *Rumor Has It That Non-Celebrity Gossip Web Site Operators Are Overestimating Their Immunity Under The Communications Decency Act*, 17 COMM.LAW CONSPECTUS 821 (2009); Andrew J. Sabino, *How Joe Schmoe's Name Could Transform the Internet: A Proposal to Preserve ISP Immunity Under the Communications Decency Act*, 45 NEW ENG. L. REV. 913 (Summer 2011); Kristina M. Sesek, *Twitter or Tweeter: Who Should Be Liable for a Right of Publicity Violation Under the CDA?*, 15 MARQ. INTELL. PROP. L. REV. 237 (Winter 2011); Dylan M. Spaduzzi, *Publicity Enemy Number One: Federal Immunity for Virtual World*, 40 U. MEM. L. REV. 603 (Spring 2010); Ericka H. Spears, *Strangers With Our Faces: How the Communications Decency Act Can Prevent Right of Publicity Stunts*, 79 U. CIN. L. REV. 409 (Fall 2010).

³⁵⁰ See e.g., Dubnow, *supra* note 349 at 37 (referring to 47 U.S.C. §230(e)(1)-(4)).

³⁵¹ See e.g., Sabino, *supra* note 349 at 933 (finding Congress deliberately included the word "any").

³⁵² See e.g., Sesek, *supra* note 349 at 253.

³⁵³ See e.g., Spaduzzi, *supra* note 321 at 640-41.

³⁵⁴ See e.g., Spears, *supra* note 349 at 431.

without such state causes of action, individuals would have no recourse for damage to the commercial value of their identities.³⁵⁵

Despite agreeing that 230(e)(2)'s plain language seems to address both state and federal intellectual property laws, some articles argue that ISPs should still be protected against right of publicity claims. These articles place significant importance on promoting free speech online and find that ISP liability for right of publicity claims could have a negative impact on the free flow of information.³⁵⁶ Therefore, they propose Congress should clarify and amend Section 230 to explicitly preclude state right of publicity claims.³⁵⁷

Other articles argue that exempting right of publicity claims from Section 230 immunity is inconsistent with the purpose of Section 230. Some argue that the right of publicity is more similar to a defamation claim than to an intellectual property claim, since the right of publicity addresses reputation and provides no incentive to create or innovate.³⁵⁸ Other articles emphasize the impossible burden on ISPs to monitor violations of state rights of publicity in light of varying state laws.³⁵⁹

F. Articles that Compare Section 230 and the DMCA

Both Section 230 and the DMCA set liability standards for ISPs that host user-generated content, though each takes a significantly different approach. Many articles compare these divergent regimes. Commentators highlight what they see as the many advantages of a safe harbor-conditioned immunity. Among them, that such a system would be better at achieving the original purpose of the CDA-incentivizing the monitoring and filtering of harmful content³⁶⁰ and that safe harbors would do a better job of balancing victim's rights, speakers rights and the burdens placed on ISPs to monitor content.³⁶¹

First, a group of articles recommends that Section 230 should be modified to operate more like the DMCA. Specifically, the articles argue that the CDA's blanket immunity should be replaced with a DMCA-like safe harbor mechanism.³⁶² Several claim that if a notice and takedown regime is able to

³⁵⁵ See e.g., Spaduzzi, *supra* note 321 at 640-41; Spears, *supra* note 349 at 432.

³⁵⁶ See *id.* Dubnow, *supra* note 349 at 39.

³⁵⁷ See e.g., Dubnow, *supra* note 349 at 41; Sabino, *supra* note 349 at 939.

³⁵⁸ See e.g., Adam M. Greenfield, *Despite A Perfect 10, What Newspapers Should Know About Immunity (And Liability) For Online Commenting*, 4 I/S: J. L. & POL'Y FOR INFO. SOC'Y 453 (Summer 2008); Dan Malachowski, "Username Jacking" in Social Media: Should Celebrities and Brand Owners Recover From Social Networking Site When Their Social Media Usernames Are Stolen?, 60 DEPAUL L. REV. 223 (Fall 2010).

³⁵⁹ See e.g., Purcell, *supra* note 278.

³⁶⁰ Benedict, *supra* note 192; Chaffin, *supra* note 206; King, *supra* note 255.

³⁶¹ Bartow, *supra* note 201; Blumstein, *supra* note 222; Ferris, *supra* note 187; Hallett, *supra* note 235; King, *supra* note 255.

³⁶² Sarah Duran, *Hear No Evil, See No Evil, Spread No Evil: Creating a Unified Legislative Approach to Internet Service Provider Immunity*, 12 U. BALT. INTELL. PROP. L.J. 115 (Spring 2004); Hallett, *supra* note 235; Lucy H. Holmes, *Making Waves in Statutory Safe Harbors: Reevaluating Internet Service Providers' Liability for Third-Party Content and Copyright Infringement*, 7 ROGER WILLIAMS U. L. REV. 215 (Fall 2001); Medenica, *supra* note 187; Medenica & Wahab, *supra* note 275; Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335 (May 2005); Cyrus Sarosh & Jan Manekshaw, *Liability of ISPs: Immunity From Liability Under the Digital Millennium Copyright Act and the Communications Decency Act*, 10 COMPUTER L. REV. & TECH. J. 101 (Fall 2005).

function effectively in policing copyright infringement, it should have little problem being applied to defamation law.³⁶³ Another notes that because many ISPs are already equipped with notification agents as part of DMCA compliance, the transition to a notice and takedown regime under the CDA would not be unduly burdensome.³⁶⁴ One article suggests that, in a DMCA-type system, victims of harmful online content would be able to have that material removed far quicker than under the current system.³⁶⁵ Several articles propose that safe harbor mechanisms be added to Section 230 to provide greater relief for victims of specific harms such as overly broad blocking via SPAM filters,³⁶⁶ unauthorized posting of pornographic images,³⁶⁷ and online harassment.³⁶⁸ Other articles argue that adding a safe harbor to the CDA will have the beneficial effect of simplifying and harmonizing the American ISP liability regime.³⁶⁹

Four commentators propose safe harbor revisions to the CDA that are not based explicitly on the DMCA. These include an immunity that is conditioned on the display of ratings labels which alert Internet users to the credibility of information posted on a given site.³⁷⁰ Another takes a more aggressive approach than the current interpretation of the CDA and suggests no ISP should benefit from immunity when it knows or should have known of unlawful material and fails to remove it.³⁷¹ Lastly, two articles lay out safe harbor systems similar to that of the DMCA without describing them as such.³⁷² They call for ISPs, on notice from injured plaintiffs, to contact third party original posters of specified material for the purpose of having them remove the content in question. If the third parties comply, or if the ISP removes the material on its own in the absence of the third party's compliance, the ISP would retain its immunity.

A few articles caution against making the CDA work more like the DMCA. Though these articles do call for greater defamation liability, one takes the position that harmonizing the CDA with the DMCA would be ineffective at deterring malicious speakers and would not undo the harm of defamatory or harassing statements that are quickly copied to other sites.³⁷³ One article notes that notice and takedown would be difficult to implement because unlike the DMCA, which operates under federal copyright law, the CDA implicates various state defamation laws.³⁷⁴ Another worries about a notice and takedown regime being too unwieldy for site operators who might resort to speech-chilling reductions in the amount of

³⁶³ Bartow, *supra* note 201; Blumstein, *supra* note 222; Williams, *supra* note 222.

³⁶⁴ King, *supra* note 213.

³⁶⁵ Hallett, *supra* note 235.

³⁶⁶ Jonathan I. Ezor, *Busting Blocks: Revisiting 47 U.S.C. § 230 to Address the Lack of Effective Legal Recourse for Wrongful Inclusion in Spam Filters*, 17 RICH. J.L. & TECH. 7 (2011).

³⁶⁷ Ariel Ronneburger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP. 1 (Fall 2009).

³⁶⁸ Bartow, *supra* note 201.

³⁶⁹ Duran, *supra* note 362; Holmes, *supra* note 362; Rustad & Koenig, *supra* note 362.

³⁷⁰ Hall, *supra* note 193.

³⁷¹ Norby-Jahner, *supra* note 213.

³⁷² Chaffin, *supra* note 206; Richards, *supra* note 275.

³⁷³ Citron, *supra* note 193.

³⁷⁴ Lukmire, *supra* note 187.

user-generated content they allow.³⁷⁵ Finally, a third article, while stopping short of advocating a notice and takedown approach, calls for amending the CDA to adopt a DMCA-like mechanism for unmasking anonymous defamers.³⁷⁶

Another trend sought to express theories as to why CDA and DMCA immunity standards were set differently. Some articles maintain that the DMCA's tougher standard reflects the government's prioritization of content owners' rights over the victims of harassment and defamation.³⁷⁷ One article suggests that stronger financial incentives and industry lobbying accounts for the divergent standards and explains "It is not surprising that Congress drafted the CDA's safe harbors more broadly than the DMCA's. After all, the content community was far better organized than likely victims of defamation, and thus it was far better situated to lobby against broad safe harbors for ISPs."³⁷⁸

G. Articles that Focus on Section 230 and Privacy Law

A few articles examine how Section 230 immunity impacts privacy law.³⁷⁹ This literature notes that it is difficult to assert liability against ISPs for privacy wrongs because they are protected by CDA immunity. The articles note that it is challenging to have privacy invasive material removed from the web because ISPs are frequently shielded from liability by Section 230 if they fail to remove offending materials.³⁸⁰

These articles suggest ways that Section 230 should be changed or reinterpreted to help remedy privacy harms. One suggests that Section 230 could operate like a safe harbor that is earned by offering users privacy protections.³⁸¹ Another suggests that certain highly offensive privacy violations should fall outside the scope of the immunity.³⁸² Finally, a few articles consider how the *Roommates.com* decision may impact privacy liability.³⁸³ This literature suggests that the *Roommates.com* holding may allow ISPs to be found liable for privacy invasive content when they encourage or ask for such material.

³⁷⁵ Zac Locke, *Asking For It: A Grokster-Based Approach to Internet Sites That Distribute Offensive Content*, 18 SETON HALL J. SPORTS & ENT. L. 151 (2008).

³⁷⁶ Lynch, *supra* note 277.

³⁷⁷ Bartow, *supra* note 190.

³⁷⁸ Jonathan Band & Matthew Schruers, *Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act*, 20 CARDOZO ARTS & ENT. L.J. 295 (2002).

³⁷⁹ Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CAL. L. REV. 1805 (Dec. 2010); David Hamill, *The Privacy of Death on the Internet: A Legitimate Matter of Public Concern or Morbid Curiosity*, 25 J. CIV. RTS. & ECON. DEV. 833, 833 (Summer 2011); Jaime A. Madell, *The Poster's Plight: Bringing the Public Discourse Tort Online*, 66 N.Y.U. ANN. SURV. AM. L. 895 (2011); Samantha L. Millier, *The Facebook Frontier: Responding to the Changing Face of Privacy on the Internet*, 97 KY. L.J. 541 (2008-2009); Andrew B. Serwin, *Poised on the Precipice: A Critical Examination of Privacy Litigation*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 883 (April 2009).

³⁸⁰ Hamill, *supra* note 351.

³⁸¹ Madell, *supra* note 379.

³⁸² Hamill, *supra* note 351.

³⁸³ Citron, *supra* note 379; Millier, *supra* note 351; Serwin, *supra* note 379.

H. Other Smaller Trends in the Literature

Finally, there are some articles that discuss Section 230 but do not fit in any of the general trends identified above. These articles address novel fact patterns or provide a unique perspective or analysis of the law.

There are a few articles that provide an international comparative law analysis of Section 230.³⁸⁴ These articles compare the U.S. treatment of ISPs with the law of other jurisdictions such as the EU³⁸⁵ and Singapore.³⁸⁶ One suggests the need for international harmonization regarding the treatment of online defamation.³⁸⁷

Another group of articles analyzes how Section 230 will apply to specific online technologies and business models. Many of these articles focus on technologies that have not yet been examined in CDA case law such as wireless hotspots,³⁸⁸ mobile marketing advertisements,³⁸⁹ user-generated news reporting models,³⁹⁰ quality control badges,³⁹¹ and user-generated advertisements.³⁹² Other articles provide new legal arguments about existing technologies including blogs,³⁹³ search,³⁹⁴ hyperlinks,³⁹⁵ and Wikipedia.³⁹⁶

There are a few articles that examine specific cases such as *Barrett v. Rosenthal*,³⁹⁷ *Noah v. AOL Time Warner*,³⁹⁸ and *Lunney v. Prodigy*.³⁹⁹ Other articles focus on specific types of tort claims and analyze

³⁸⁴ Patrick J. Carome, et al., *Online Intermediaries and Third Party Content Under EU and US Laws*, Media Law Resource Center Bulletin, Vol. 83 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1881959; Lewis S. Malakoff, *Are You My Mommy, or My Big Brother? Comparing Internet Censorship in Singapore and the United States*, 8 PAC. RIM L. & POL'Y J. 423 (March 1999); Michael L. Rustad & Thomas H. Koenig, *Harmonizing Cybertort Law for Europe and America*, 5 J. HIGH TECH. L. 13 (2005); Matthew Schruers, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205 (March 2002); Scott Sterling, *International Law of Mystery: Holding Internet Service Providers Liable for Defamation and the Need for a Comprehensive International Solution*, 21 LOY. L.A. ENT. L. REV. 327 (2001).

³⁸⁵ Carome, et al., *supra* note 384; Rustad & Koenig, *supra* note 384; Schruers, *supra* note 384.

³⁸⁶ Malakoff, *supra* note 384.

³⁸⁷ Sterling, *supra* note 384.

³⁸⁸ Evan D. Brown, *Secondary Liability for Hotspot Operators*, 10 No. 3 J. INTERNET L. 1 (Sep. 2006).

³⁸⁹ Bryan Clark & Blaine Kimrey, *Litigating Mobile Marketing Claims*, 27-JUL COMM. LAW. 4 (July 2010).

³⁹⁰ Virginia A. Fitt, *Crowdsourcing the News: News Organization Liability for iReporters*, 37 WM. MITCHELL L. REV. 1839 (2011)).

³⁹¹ Note, BADGING: SECTION 230 IMMUNITY IN A WEB 2.0 WORLD, 123 Harv. L. Rev. 981 (Feb. 2010).

³⁹² Tushnet, *supra* note 276.

³⁹³ Jennifer Meredith Liebman, *Defamed By a Blogger: Legal Protections, Self-Regulation and Other Failures*, 2006 U. ILL. J.L. TECH. & POL'Y 343 (Fall 2006).

³⁹⁴ Joseph M. Mercadante, *What is Google's Reputation Score?: A Method for Modified Self-Regulation of Search*, 33 SETON HALL LEGIS. J. 327 (2008).

³⁹⁵ Sheri Wardwell, *Communications Decency Act Provides No Safe Harbor Against Antifraud Liability for Hyperlinks to Third-Party Content Under the Securities and Exchange Act*, 6 WASH. J. L. TECH. & ARTS 49 (Summer 2010).

³⁹⁶ Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 163 (Fall 2006); Kathleen M. Walsh & Sarah Oh, *Self-Regulation: How Wikipedia Leverages User-Generated Quality Control Under Section 230*, forthcoming, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579054.

³⁹⁷ Azriel, *supra* note 235; Blumstein, *supra* note 222; Jenal, *supra* note 187; Lee, *supra* note 187.

whether Section 230 should or does provide immunity from them.⁴⁰⁰ A couple of articles discuss how Section 230 impacts employer-employee interactions and policies.⁴⁰¹ Another cluster of articles provides general summaries and analysis of the law and how it has been interpreted.⁴⁰²

VI. Legislative Reform

The Fordham CLIP research identified 74 congressional hearings and 158 proposed bills in Congress that mentioned Section 230 or intermediary liability.⁴⁰³ The vast majority of these efforts focused on issues tangential or irrelevant to ISP immunity such as Congressional appropriations bills that merely referenced definitions found in Section 230.

For those hearings and bills that were relevant to the immunity rule, none targeted the Section 230 approach and none sought the repeal or revise the text enacted in 1996. Rather they focused on specific issues such as online drug sales and new prohibitions against specific types of online activity such as internet gambling that would establish separate provisions. One hearing on cyberbullying did, though, explicitly raise the question of revisiting Section 230, but was focused on defining cyber-bullying and raising the awareness of adolescents through education.⁴⁰⁴

³⁹⁸ Joseph Dowling, *Noah v. AOL Time Warner: Are There Legitimate Barriers to Civil Rights Protection on the Internet?*, 14 ALB. L.J. SCI. & TECH. 775 (2004); Peter M. McCamman, *Chatting Up a Storm: Noah v. AOL Time Warner and Extending Federal Civil Rights to Internet Chat Rooms*, 12 COMMLAW CONCEPTS 199 (2004).

³⁹⁹ Neil Fried, *Dodging the Communications Decency Act When Analyzing Libel Liability of On-Line Services*, 1 COLUM. SCI. & TECH. L. REV. 1 (Nov. 1999).

⁴⁰⁰ Anthony Ciolli, *Liability of Web 2.0 Intermediaries Under State Consumer Fraud Statutes: A Case Study*, 79 MISS. L.J. 831 (Summer 2010); Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77 (Fall 2003); Shannon N. Sterritt, *Applying the Common-Law Cause of Action Negligent Enablement of Imposter Fraud to Social Networking Sites*, 41 SETON HALL L. REV. 1695 (2011); Daniel Zharkovsky, *"If Man Will Strike, Strike Through the Mask": Striking Through Section 230 Defenses Using the Tort of Intentional Infliction of Emotional Distress*, 44 COLUM. J.L. & SOC. PROBS. 193 (Winter 2010).

⁴⁰¹ Spencer, *supra* note 197; Eric M.D. Zion, *Protecting the E-Marketplace of Ideas by Protection Employers: Immunity for Employers Under Section 230 of the Communications Decency Act*, 54 FED. COMM. L.J. 493 (May 2002).

⁴⁰² Danielle M. Conway-Jones, *Defamation in the Digital Age: Liability in Chat Rooms, on Electronic Bulletin Boards, and in the Blogosphere*, SK102 ALI-ABA 63 (April 21-22, 2005); Jeffrey R. Doty, *Choose Your Words Wisely: Affirmative Representations as a Limit on § 230 Immunity*, 6 WASH. J. L. TECH. & ARTS 259 (Spring 2011); Mitchell P. Goldstein, *Service Provider Liability for Acts Committed By Users: What You Don't Know Can Hurt You*, 18 J. MARSHALL J. COMPUTER & INFO. L. 591 (Spring 2000); Leslie Paul Machado, *Immunity Under § 230 of the Communications Decency Act of 1996: A Short Primer*, 10 No. 3 J. INTERNET L. 3 (Sep. 2006); Morley, *supra* note 259; Bradley C. Nahrstadt & Jeremy T. Burton, *Must You Watch What You Say? Application of CDA to Publications on the Internet*, 12 No. 9 J. INTERNET L. 1 (March 2009); George H. Pike, *A Safe Harbor Against Lawsuits*, INFORMATION TODAY, Vol. 23, No. 10, p. 17, November 2006, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1625921; 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 (1997).

⁴⁰³ The research covered the time period from the enactment of the CDA to March 15, 2012.

⁴⁰⁴ Cyberbullying and Other Online Safety Issues for Children: HR 1996 "Megan Meier Cyberbullying Prevention Act" and HR 3630 "Adolescent Web Awareness Requires Education Act" Hearing before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Comm., 111th Cong. 1st Sess. (Sept. 30, 2009).

The legislative reform trends are set forth below.

A. Legislative Proposals

Of the legislative bills, 39 implicated aspects of the Section 230 liability safe harbor. However, only 3 of these bills were ultimately enacted into law.⁴⁰⁵ The three new laws each addressed specific internet issues (i.e. the protection of children, restrictions on Internet pharmacies and the prohibition of the enforcement of foreign defamation judgments) and each confirmed the immunity approach in Section 230.

While the bills did not truly focus on Section 230, a number of trends as noted below emerged in the congressional interest.

1. Bills Seeking to Regulate Online Pharmacies and Drug Sales

The most significant trend in the proposals was the congressional interest in regulating the sale online of prescription drugs. Twenty-two bills sought to interdict or impose regulatory obligations on internet pharmacies.⁴⁰⁶ Some of these bills sought to hold ISPs liable for illegal drug sales if they were to accept

⁴⁰⁵ Adam Walsh Child Protection and Safety Act, Pub. L. 109-248 (2006)(creating and enhancing penalties for child exploitation and deceptive online actions to expose minors to obscene material); SPEECH Act, Pub. L. 111-223 (2010)(expressly applies Section 230 immunity to the enforcement of foreign judgments for defamation); and, Ryan Haight Online Pharmacy Consumer Protection Act of 2008 Pub. L. 110-425(2008) (prohibits distribution of prescription drugs over the internet with a valid prescription and imposes requirements on online pharmacies.

⁴⁰⁶ A bill to provide for insurance reform (including health insurance reform), amend title XVIII of the Social Security Act to reform Medicare Advantage and reduce disparities in the Medicare Program, regulate the importation of prescription drugs, and for other purposes, March 10, 2010, 2010 H.R. 4813; 111 H.R. 4813 ; A bill to amend the Federal Food, Drug, and Cosmetic Act with respect to the importation of prescription drugs, and for other purposes, June 10, 2009, 2009 S. 1232; 111 S. 1232; A bill to amend the Federal Food, Drug, and Cosmetic Act with respect to the importation of prescription drugs, and for other purposes, March 4, 2009, 2009 S. 525; 111 S. 525 ; A bill to amend the Federal Food, Drug, and Cosmetic Act with respect to the importation of prescription drugs, and for other purposes, March 4, 2009, 2009 H.R. 1298; 111 H.R. 1298; A bill to amend title XVIII of the Social Security Act to replace the Medicare prescription drug benefit adopted by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 with a revised and simplified prescription benefit program for all Medicare beneficiaries, August 1, 2008, 2008 H.R. 6800; 110 H.R. 6800; Ryan Haight Online Pharmacy Consumer Protection Act of 2008; A bill to amend the Controlled Substances Act to address online pharmacies, June 24, 2008, 2008 H.R. 6353; 110 H.R. 6353; A bill to amend the Controlled Substances Act to address online pharmacies, March 23, 2007, 2008 S. 980; 110 S. 980 ; A bill to amend the Federal Food, Drug, and Cosmetic Act with respect to the importation of prescription drugs, and for other purposes, January 10, 2007, 2007 S. 242; 110 S. 242 ; A bill to amend the Federal Food, Drug, and Cosmetic Act to provide for the regulation of Internet pharmacies, February 14, 2007, 2007 S. 596; 110 S. 596 ; A bill to amend the Federal Food, Drug, and Cosmetic Act with respect to the importation of prescription drugs, and for other purposes, January 10, 2007, 2007 H.R. 380; 110 H.R. 380 ; A bill to amend title XVIII of the Social Security Act to replace the Medicare prescription drug benefit adopted by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 with a revised and simplified prescription benefit program for all Medicare beneficiaries, 2006 H.R. 4697; 109 H.R. 4697; A bill to amend the Federal Food, Drug, and Cosmetic Act to protect the public health from the unsafe importation of prescription drugs and from counterfeit prescription drugs, and for other purposes, 2005 S. 184; 109 S. 184; A bill to amend the Federal Food, Drug, and Cosmetic Act with respect to the importation of prescription drugs, and for other purposes, 2005 S. 334; 109 S. 334; A bill to amend the Federal Food, Drug, and Cosmetic Act with respect to the importation of prescription drugs, and for other purposes, 2005 H.R. 700; 109 H.R. 700; A bill to amend the Federal Food, Drug, and Cosmetic Act to protect the public health from the unsafe importation of prescription drugs and from counterfeit prescription drugs, and for other purposes 2005 H.R. 753; 109 H.R. 753; A bill to amend the Federal Food, Drug,

advertising from unlicensed pharmacies who offered prescription drugs without a prescription.⁴⁰⁷ Others explicitly confirmed the immunity for ISPs found in Section 230 by cross-referencing Section 230 to preclude liability of ISPs for a third party's actions.⁴⁰⁸ Ultimately, Congress enacted and the President signed a law in 2008 that prohibited the sale over the Internet of prescription drugs, but at the same time preserved explicitly the immunity in Section 230 for ISPs.⁴⁰⁹

2. Bills Seeking to Protect Children

The next most important trend in Congress was the attempt to create new obligations and responsibilities for the protection of children. Six bills proposed protections ranging from the requirement that filtering mechanisms be available to parents to the enhancement of penalties for the exploitation of children.⁴¹⁰ Only one of the bills became law, and Title VII of that law confirmed the immunity in Section 230 for ISPs.⁴¹¹

and Cosmetic Act with respect to the sale of prescription drugs through the Internet, and for other purposes, 2005 S. 399; 109 S. 399; A bill to amend the Federal Food, Drug, and Cosmetic Act to protect the public health from the unsafe importation of prescription drugs and from counterfeit prescription drugs, and for other purposes, 2004 H.R. 4923; 108 H.R. 4923; A bill to amend the Federal Food, Drug, and Cosmetic Act with respect to the sale of prescription drugs through the Internet, 2004 H.R. 3880; 108 H.R. 3880; A bill to amend the Federal Food, Drug, and Cosmetic Act with respect to the sale of prescription drugs through the Internet, 2004 S. 2464; 108 S. 2464; A bill to amend the Federal Food, Drug, and Cosmetic Act to protect the public health from the unsafe importation of prescription drugs and from counterfeit prescription drugs, and for other purposes, 2004 S. 2493; 108 S. 2493; A bill to amend the Federal Food, Drug, and Cosmetic Act to authorize the importation of prescription drugs from Canada and certain other countries, and for other purposes, 2004 H.R. 4790; 108 H.R. 4790; A bill to amend title XVIII of the Social Security Act to provide for Medicare contracting reforms, and for other purposes. 1999 S. 1255; 104 S. 1255.

⁴⁰⁷ *See, e.g.* A bill to amend the Federal Food, Drug, and Cosmetic Act to protect the public health from the unsafe importation of prescription drugs and from counterfeit prescription drugs, and for other purposes, 2005 H.R. 753; 109 H.R. 753.

⁴⁰⁸ *See e.g.* A bill to amend the Federal Food, Drug, and Cosmetic Act with respect to the sale of prescription drugs through the Internet, and for other purposes, 2005 S. 399; 109 S. 399.

⁴⁰⁹ Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Pub. L. 110-425.

⁴¹⁰ A bill to protect children, to secure the safety of judges, prosecutors, law enforcement officers, and their family members, to reduce and prevent gang violence, and for other purposes, 2006 H.R. 4472; 109 H.R. 4472; A bill to facilitate the creation of a new, second-level Internet domain within the United States country code domain that will be a haven for material that promotes positive experiences for children and families using the Internet, provides a safe online environment for children, and helps to prevent children from being exposed to harmful material on the Internet, and for other purposes, 2002 H.R. 3833; 107 H.R. 3833; A BILL To amend the Communications Act of 1934 to require Internet access providers to provide screening software to permit parents to control Internet access by their children. 1997 H.R. 1180; 105 H.R. 1180; A BILL To protect consumer privacy, empower parents, enhance the telecommunications infrastructure for efficient electronic commerce, and safeguard data security. 1997 H.R. 1964; 105 H.R. 1964; AN ACT To amend the Communications Act of 1934 to require persons who are engaged in the business of distributing, by means of the World Wide Web, material that is harmful to minors to restrict access to such material by minors, and for other purposes. 1998 H.R. 3783; 105 H.R. 3783; Appropriations Bill provision would require internet service providers to provide filtering for material that is harmful to minors, 1998 H.R. 4276; 105 H.R. 4276.

⁴¹¹ Adam Walsh Child Protection and Safety Act, Pub. L. 109-248.

3. Bills Addressing Data Security Measures

A group of bills sought to address issues related to data security and integrity.⁴¹² These dealt with data security breaches and spyware. Several would have imposed an obligation on ISPs to provide notice in the event an ISP's system experienced a security breach.⁴¹³ None were enacted.

4. Bills Addressing Unsolicited Emails

A small number of bills focused on the problem of unsolicited email.⁴¹⁴ While these bills would not have imposed liability on ISPs for third-party spam, some would have required ISPs to offer to its subscribers a means of blocking the receipt of spam.⁴¹⁵ None were enacted.

5. Bills Addressing Foreign Judgments on Defamation

Two bills sought to restrict the enforcement of foreign defamation judgments in the United States.⁴¹⁶ These two companion bills became law in 2010 and expressly applied Section 230 immunity to the enforcement of foreign judgments for defamation.⁴¹⁷

6. Miscellaneous Bills

A series of 6 bills referenced Section 230, but did not appear to have a common theme and did affect the immunities offered in Section 230.⁴¹⁸ For example, the Dodd-Frank Wall Street Reform and

⁴¹² A bill to protect consumers by requiring reasonable security policies and procedures to protect computerized data containing personal information, and to provide for nationwide notice in the event of a security breach, April 30, 2009, 2009 H.R. 2221; 111 H.R. 2221; A bill to protect consumers by requiring reasonable security policies and procedures to protect computerized data containing personal information, and to provide for nationwide notice in the event of a security breach, February 8, 2007, 2007 H.R. 958; 110 H.R. 958; A bill to protect users of the Internet from unknowing transmission of their personally identifiable information through spyware programs, and for other purposes, February 8, 2007 H.R. 964; 110 H.R. 964 ; A bill to amend the Fair Credit Reporting Act to provide for secure financial data, and for other purposes, 2006 H.R. 3997; 109 H.R. 3997; A bill to protect consumers by requiring reasonable security policies and procedures to protect computerized data containing personal information, and to provide for nationwide notice in the event of a security breach, 2006 H.R. 4127, 109 H.R. 4127.

⁴¹³ A bill to protect consumers by requiring reasonable security policies and procedures to protect computerized data containing personal information, and to provide for nationwide notice in the event of a security breach, April 30, 2009, 2009 H.R. 2221; 111 H.R. 2221; A bill to protect consumers by requiring reasonable security policies and procedures to protect computerized data containing personal information, and to provide for nationwide notice in the event of a security breach, February 8, 2007, 2007 H.R. 958; 110 H.R. 958.

⁴¹⁴ A Bill to promote online commerce and communications, to protect consumers and service providers from the misuse of computer facilities by others sending unsolicited commercial electronic mail over such facilities, and for other purposes. 1998 H.R. 4124; 105 H.R. 4124; A Bill to regulate the transmission of unsolicited commercial electronic mail, and for other purposes. 1997 S. 771; 105 S. 771; A Bill to promote online commerce and communications, to protect consumers and service providers from the misuse of computer facilities by others sending bulk unsolicited electronic mail over such facilities, and for other purposes. 1997 S. 875; 105 S. 875.

⁴¹⁵ A Bill To regulate the transmission of unsolicited commercial electronic mail, and for other purposes. 1997 S. 771; 105 S. 771.

⁴¹⁶ A bill to amend title 28, United States Code, to prohibit recognition and enforcement of foreign defamation judgments and certain foreign judgments against the providers of interactive computer services, June 9, 2009, 2010 H.R. 2765; 111 H.R. 2765 ; A bill to amend title 28, United States Code, to prohibit recognition and enforcement of foreign defamation judgments in United States Courts where those judgments undermine the first amendment to the Constitution of the United States, and to provide a cause of action for declaratory judgment relief against a party who has brought a successful foreign defamation action whose judgment undermines the first amendment, June 22, 2010 2010 S. 3518; 111 S. 3518.

⁴¹⁷ SPEECH Act, Pub. L. 111-223 (2010).

Consumer Protection Act of 2009 contained a provision relating specifically to Section 230, but the clause was dropped in the final, enacted law.⁴¹⁹ This was the only bill among this set to be enacted. Others addressed issues such as internet crime and the interstate transport of liquor where ISPs were excluded from new obligations.

B. Congressional Hearings

Of the congressional hearings that mentioned Section 230, ten had a relationship to the liability of ISPs.⁴²⁰ They fell into two categories: (1) those that addressed specific online behavior and proposed solutions that could create new responsibilities for ISPs; and, (2) those that addressed general Internet policies that might have an impact on ISP responsibilities.

1. Particular Online Behavior and Proposed Solutions with New ISP Obligations

A small group of the hearings had a focus on distinct problems associated with particular online behavior. A common theme among the proposed solutions was the proposed imposition of new obligations on ISPs. For example, one hearing focused on cyber-bullying and harassment. The hearing considered the creation of a cyber-bullying felony and an educational program for adolescents. While the hearing itself did not directly address ISP liability, the subcommittee chair did express a concern that the immunity for ISPs might be too broad if a service provider intentionally allows or encourages cyber-

⁴¹⁸ A bill to deregulate the Internet and high speed data services, and for other purposes. 2001 H.R. 1542; 107 H.R. 1542; A bill to maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media, February 13, 2009, 2009 S. 448; 111 S. 448; A bill to fight crime, October 25, 2007, 2007 S. 2237; 110 S. 2237; A bill to provide for injunctive relief in Federal district court to enforce State laws relating to the interstate transportation of intoxicating liquor. 2000 S. 577; 106 S. 577; A bill to provide for injunctive relief in Federal district court to enforce State laws relating to the interstate transportation of intoxicating liquor. 2000 S. 577; 106 S. 577.

⁴¹⁹ Compare Dodd-Frank Wall Street Reform and Consumer Protection Act of 2009, Pub. L. 111-203 with A bill to provide for financial regulatory reform, to protect consumers and investors, to enhance Federal understanding of insurance issues, to regulate the over-the-counter derivatives markets, and for other purposes, December 2, 2009, 2010 H.R. 4173; 111 H.R. 4173.

⁴²⁰ Stop Online Piracy Act: Hearing before the House Judiciary Committee, 112th Cong. 1st Sess. (November 16, 2011); Network Neutrality and Internet Regulation: Warranted or More Economic Harm than Good, Hearing before the Communications and Technology Subcommittee of the House Energy and Commerce Committee, 112th Cong. 1st Sess. (February 16, 2011); ECPA Reform and the Revolution of Cloud Computing, Hearing before the Subcomm. On the Constitution, Civil Rights and Civil Liberties of the House Comm. On the Judiciary, 111th Cong., 2nd Sess. (Sept. 23, 2010); The National Broadband Plan: Deploying Quality Broadband Services to the Last Mile, Hearing before the Sucomm. On Communicatoins, Technology and the Internet of the House Energy and Commerce Comm., 111th Cong., 2nd Sess. (Apr. 21, 2010); The Google Predicament: Transforming US Cyberspace Policy to advance Democracy, Trade and Security: Hearing before the House Foreign Affairs Comm., 111th Cong., 2nd Sess. (Mar. 10, 2010); Cyberbullying and Other Online Safety Issues for Children: HR 1996 “Megan Meier Cyberbullying Prevention Act” and HR 3630 “Adolescent Web Awareness Requires Education Act” Hearing before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Comm., 111th Cong. 1st Sess. (Sept. 30, 2009); Combatting Retail Crime: Hearing before the House Judiciary Comm., 110 Cong., 2nd Sess. (September 22, 2008); Voice-over Internet Protocol: Hearing before the Senate Commerce, Sciences and Transportation Comm., 108 Cong., 2nd Sess. (February 24, 2004) ; Regulation of Internet Gambling: Hearing before the Senate Banking, Housing and Urban Affairs Comm., 108 Cong., 1st Sess. (March 18, 2003) ; S.2537: Dot Kids Implementation and Efficiency Act of 2002, Hearing before the Subcomm. on Science, Technology, and Space of the Senate Comm. On Commerce, Science and Transportation, 107th Cong., 2nd Sess. (Sept. 12, 2002).

bullying or harassment on its site.⁴²¹ This suggested an interest in a carve-out from the safe harbor for cyber-bullying and harassment.

Similarly, another hearing addressed online intellectual property rights violations.⁴²² The “Stop Online Piracy Act” or SOPA did not explicitly address Section 230, but the proposed rules for the shut-down of rogue websites hosting infringing content would have created obligations for hosts and had the effect of limiting the scope of Section 230’s immunity in the context of intellectual property violations analogously to the DMCA. Another hearing addressed online retail crime and considered whether service providers offering an online marketplace should have obligations to investigate allegations of stolen property and to deny access to the marketplace of purveyors of stolen goods.⁴²³ And lastly, Congress addressed the regulation of illegal online gambling and considered ways to shut down gambling websites that could include responsibilities for service providers to block access.⁴²⁴

2. Internet Policies with Possible Impacts on ISP Responsibilities

A group of hearings addressed more general internet policies such as net neutrality and VOIP. The considerations raised in these hearings, while not targeting reform of Section 230, did suggest possible responsibilities for ISPs.

For example, one hearing addressed pressure from repressive foreign governments on intermediaries to suppress content.⁴²⁵ Another explored the creation of a children’s domain, dot kids, to provide a predator-free zone for children’s use of the internet.⁴²⁶ Each of these hearings raised the issue of required content suppression in specific circumstances.

A subset of hearings addressed regulation of data traffic. One hearing explored whether the Federal Communication Commission’s regulatory authority should extend to ISP traffic.⁴²⁷ Similarly, Congress also explored how to regulate and whether to tax VOIP traffic.⁴²⁸ And, Congress explored national policy for the deployment of broadband services in the wake of the Comcast decision and the subcommittee

⁴²¹ Cyberbullying and Other Online Safety Issues for Children: HR 1996 “Megan Meier Cyberbullying Prevention Act” and HR 3630 “Adolescent Web Awareness Requires Education Act” Hearing before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Comm., 111th Cong. 1st Sess. (Sept. 30, 2009).

⁴²² Stop Online Piracy Act: Hearing before the House Judiciary Committee, 112th Cong. 1st Sess. (November 16, 2011).

⁴²³ Combatting Retail Crime: Hearing before the House Judiciary Comm., 110 Cong., 2nd Sess. (September 22, 2008).

⁴²⁴ Regulation of Internet Gambling: Hearing before the Senate Banking, Housing and Urban Affairs Comm., 108 Cong., 1st Sess. (March 18, 2003).

⁴²⁵ The Google Predicament: Transforming US Cyberspace Policy to advance Democracy, Trade and Security: Hearing before the House Foreign Affairs Comm., 111th Cong., 2nd Sess. (Mar. 10, 2010).

⁴²⁶ S.2537: Dot Kids Implementation and Efficiency Act of 2002, Hearing before the Subcomm. on Science, Technology, and Space of the Senate Comm. On Commerce, Science and Transportation, 107th Cong., 2nd Sess. (Sept. 12, 2002).

⁴²⁷ Network Neutrality and Internet Regulation: Warranted or More Economic Harm than Good, Hearing before the Communications and Technology Subcommittee of the House Energy and Commerce Committee, 112th Cong, 1st Sess. (February 16, 2011).

⁴²⁸ Voice-over Internet Protocol: Hearing before the Senate Commerce, Sciences and Transportation Comm., 108 Cong., 2nd Sess. (February 24, 2004).

chair asserted that any review of the policies underlying Section 230 for the development of broadband should be Congressional and not judicial decisions.⁴²⁹

Finally, in one hearing to consider updating the Electronic Communications Privacy Act for an era of cloud computing, Congressional attention was drawn to the structure of the safe harbor in Section 230 and the risks that requiring access to data held by service providers might undermine trust created by that structure.⁴³⁰

VII. Conclusion

The vast majority of case law interpreting Section 230 has applied a broad reading of the statutory immunity. The Fordham CLIP team identified only a small set of major cases that established new precedents in the area and among this group the judicial interpretations were very similar. While this broad interpretation has generally received critical treatment in the academic literature, there has been a recent increase in scholarship that seeks to defend broad Section 230 immunity. Finally, the broad interpretation generally applied by the courts has led to very limited congressional activity. While Section 230 has received some mention in congressional hearings, proposals for significant change have been minimal.

⁴²⁹ The National Broadband Plan: Deploying Quality Broadband Services to the Last Mile, Hearing before the Subcomm. On Communicatoins, Technology and the Internet of the House Energy and Commerce Comm., 111th Cong., 2nd Sess. (Apr. 21, 2010).

⁴³⁰ ECPA Reform and the Revolution of Cloud Computing, Hearing before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the House Comm. On the Judiciary, 111th Cong., 2nd Sess. (Sept. 23, 2010).

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