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).
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 policymakers 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. 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. Additionally, the CDA amended 47 U.S.C. § 223 (Section 223) such that the illegality of the knowing sending or displaying of any indecent message to a person under 18 years of age would be extended to telecommunications devices and ISPs. Although Section 223 was ruled unconstitutional in Reno v. American Civil Liberties Union, 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. 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. Traditional examples of entities that faced distributor liability include news vendors, bookstores, and libraries. 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.” Factors that indicate publisher liability include evidence of exercising editorial control and judgment over the choice of material published.

Given the novelty of the Internet during the early 1990s, courts encountered difficulties regarding how to fit ISPs into the distinct publisher-distributor frameworks. 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.

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

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. 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. 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.

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. 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.” CompuServe, in contrast, was found to be a distributor, because it exercised no control over statements made by third parties in its Journalism Forum. 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. The irreconcilability of a higher standard of liability for publisher-ISPs

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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.
23 Id. at 3-4.
24 Id. at 4.
25 See Susan Freiwald, supra note 12 at 594; Cannon, supra note 9.
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. 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.” 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. 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. 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. 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. 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. 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.”

Senator Exon’s version of the CDA passed the Senate on June 14, 1995.  

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. Representatives Cox and Wyden introduced the OFEA on June 30, 1995. In contrast to Senator Exon’s CDA, the OFEA specifically stated that it would have no effect on criminal law, namely Section 223. 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. 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.”

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. 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.” In addition, such providers or users of ISPs would not be found liable for any good faith efforts at restricting access to obscene or indecent material. The OFEA also protected ISPs that provide “the technical means to restrict” obscene or indecent material to information content providers. The proposal passed the House with a unanimous vote, and this language was eventually added to the early draft of the Exon Amendment.

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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.” 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.”)
50 See id.
51 See Reno, 521 U.S. 844.
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. 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.* 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. 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, 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, provide first amendment defenses of the statute, and argue that recent attempts to narrow the broad judicial interpretation of the Section 230 could be problematic.

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

Set forth below is a summary of the major cases the 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.

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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


Zeran v. America Online, Inc. is by far the most significant decision interpreting Section 230. 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. 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. From April 25, 1995 to May 14, 1995, Zeran received numerous harassing phone calls throughout the day in response to the postings. Zeran then contacted AOL on various occasions about removing and retracting the false messages. Although AOL representatives informed Zeran the company would remove the postings and deactivate the account that created them, AOL failed to do so. Zeran filed suit against AOL, and AOL asserted Section 230 as an affirmative defense.

The district court granted immunity to AOL under Section 230. 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” 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. The Fourth Circuit disagreed, reasoning that distributor liability was just a subset of publisher liability and therefore was incorporated into the immunity. 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 providers.

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

Since \textit{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 \textit{Zeran} interpreted broadly the grant of immunity for ISPs. Additionally, the \textit{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.


\textit{Blumenthal v. Drudge} was the first major case to address when an “interactive computer service” could become an “information content provider” subject to liability.\textsuperscript{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.\textsuperscript{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.\textsuperscript{79} Drudge transmitted the piece to AOL who offered the story to its subscribers.\textsuperscript{80} After receiving notice from Blumenthal’s counsel, Drudge retracted the story, and AOL removed the story from the column’s archive.\textsuperscript{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.\textsuperscript{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.\textsuperscript{83} Blumenthal claimed that AOL contributed to the development of the story because it paid Drudge a monthly fee of $3,000, advertised

\begin{itemize}
\item \textsuperscript{74} Id. at 333.
\item \textsuperscript{75} Id. at 334.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} 992 F.Supp. 44 (D.D.C. 1998).
\item \textsuperscript{78} Id.
\item \textsuperscript{79} Id. at 47. The headline for the post read: “Charge: New White House Recruit Sidney Blumenthal has Spousal Abuse Past.”
\item \textsuperscript{80} Id. at 47-48.
\item \textsuperscript{81} Id. at 48.
\item \textsuperscript{82} Id. at 53.
\item \textsuperscript{83} Id. at 49.
\end{itemize}
the Drudge Report to its subscribers, and had the right to remove and edit stories under their licensing agreement. 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. 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.

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. 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 Cir. 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. 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. Smith, the author of the email, however, notified the Network that he had not intended for the email to be sent to others.

The court first determined that the Network, including its listserv, constituted an “interactive computer service.” 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.” As such, both the Network’s website and listserv could be considered providers of interactive computer services. Batzel argued that Cremers was also an information content provider since he edited the content of the message. 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.


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.
100 Id at 144.
101 Id. at 145.
102 Id. at 146.
103 Id.
to know of the allegedly defamatory statements, and was therefore ineligible for immunity under
Section 230. \textsuperscript{105} The California Supreme Court reversed and granted Rosenthal immunity under Section
230. \textsuperscript{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.” \textsuperscript{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.” \textsuperscript{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.” \textsuperscript{109}

5. \textit{Doe v. MySpace (5th Circ. 2008)}

\textit{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. \textsuperscript{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. \textsuperscript{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. \textsuperscript{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. \textsuperscript{113} Doe then filed suit against MySpace alleging that
the company’s failure to implement basic safety measures to prevent sexual predators from contacting

\textsuperscript{105} Id.
\textsuperscript{106} Id. at 40.
\textsuperscript{107} Id. at 62.
\textsuperscript{108} Barrett, 40 Cal.4th 33 at 48.
\textsuperscript{109} Id. at 56.
\textsuperscript{110} Doe v. MySpace, Inc. 528 F.3d 413 (5th Cir. 2008).
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 416.
\textsuperscript{113} Id.
minors constituted, among other things, negligence and gross negligence.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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. \textit{Fair Housing Council of San Fernando Valley v. Roommates.com} (9th Circ. 2008)

\textit{Fair Housing Council of San Fernando Valley v. Roommates.com} was a significant decision because the 9\textsuperscript{th} Circuit revisited the issue of when an ISP could be considered an information content provider subject to liability.\textsuperscript{118} The decision provided the first major departure from the broad reading of the immunity provided by the court in \textit{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;\textsuperscript{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.\textsuperscript{120} The plaintiffs argued that the information collection and presentation by Roommates.com were violations of the Fair Housing Act.

\textsuperscript{114} \textit{id.} at 417.
\textsuperscript{115} \textit{id} at 419.
\textsuperscript{116} \textit{id.}
\textsuperscript{117} \textit{id} at 418.
\textsuperscript{118} \textit{Fair Housing Council}, 521 F.3d 1157.
\textsuperscript{119} \textit{id.} at 1161.
\textsuperscript{120} \textit{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 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.\footnote{Id. at 1098-1099. Barnes’ ex-boyfriend also pretended to be Barnes and engaged in conversations with male correspondents in Yahoo! chatrooms.} Once Barnes became aware of the profiles, she notified Yahoo! that they were unauthorized and requested that they be taken down.\footnote{Id. at 1099.} 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.\footnote{Id.} The profiles, however, remained online until Barnes filed suit against Yahoo! at which point they were removed.\footnote{Id.} 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.”\footnote{Id. at 1102.} 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.\footnote{Id. at 1101.} 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.\footnote{Id. at 1107.} In distinguishing Barnes’ promissory estoppel claim from her negligent undertaking claim, the court reasoned that to “undertake a thing” differed from “promising.”\footnote{Id.} 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.\footnote{Id.}

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.

\footnote{Id. at 1098-1099. Barnes’ ex-boyfriend also pretended to be Barnes and engaged in conversations with male correspondents in Yahoo! chatrooms.}
\footnote{Id. at 1099.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id. at 1102.}
\footnote{Id. at 1101.}
\footnote{Id. at 1107.}
\footnote{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.}
\footnote{Id.}
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. The Chicago Lawyers’ Committee (CLC), on behalf of its members, sued Craigslist for violating Section 804(a) of the Fair Housing Act (FHA). The Craigslist website allows third-party users to post and search for a variety of things, including housing and rental opportunities. 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.” The ad postings are created solely by users and may contain contact information, a description of the rental, and optional photographs. The CLC alleged that through this process, Craigslist published housing ads that violate the FHA. Craigslist prevailed, asserting Section 230 as an affirmative defense.

The Seventh Circuit found that Craigslist was only a conduit for information provided by its users, who were the actual information content providers. 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. 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. 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.” 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. 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.

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.

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\(^{152}\) Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1121 (9th Cir. 2003).
\(^{153}\) Id.
\(^{154}\) Id.
\(^{155}\) Id.
\(^{156}\) Id.
\(^{158}\) 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. Global Royalties was a broker in gemstones, and Xcentric Ventures ran a website called Ripoff Report where users could post consumer complaints. 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. 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.

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. The Tenth Circuit Court of Appeals upheld the district court’s decision to grant AOL Section 230 immunity.

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. 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. The court also found that AOL’s deletion of only some of the incorrect data failed to constitute creation or development of that information.

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. Accusearch operated the website Abika.com which sold personal data to users that included telephone call records for any requested phone number. 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.

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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.
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. 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. 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. 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.

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.” 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. 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. 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.

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. 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.

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.
Friendfinder operated the website "AdultFriendFinder.com" where users could register and create online profiles that included a photo, biographical data, general interests, and sexual proclivities. 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. 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. 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.

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. 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. 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. 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.


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.”).

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. Others make that case that judges have not considered whether all ISPs deserve, or even need, blanket immunity and that those judges place too much weight on the risks of chilling free speech.

Another significant group of articles argues that courts have interpreted Section 230 in ways that actually contravene congressional intent. Of these, the majority claims that Congress never intended to offer ISP’s blanket immunity for all claims. 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. 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.

Similarly, another set of articles focuses on Congress’ intentions with respect to the entire CDA, not just Section 230. This set argues that while Congress had the goal of promoting the removal of harmful

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190 Patricia Sanchez Abril, Repu-taint 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).


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; Zieglowksy, 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; Zieglowksy, 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

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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.


202 Bartow, supra note 201.

203 Myers, supra note 201.

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.
208 Benedict, *supra* note 192.
209 Monaghan, *supra* note 207.
and bullying. 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. This leaves victims of harmful speech vulnerable and sometimes helpless. 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.

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. To them the act allows for too much sexually explicit content on the Internet. 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.

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. In this way, some articles argue that Section 230 actually makes minors more susceptible to online sex predators.

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. These
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.\textsuperscript{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.\textsuperscript{224} Some articles reason that Congress enacted the CDA to overrule the \textit{Stratton} decision while maintaining the common law publisher/distributor distinction as applied in \textit{Cubby}.\textsuperscript{225} Similarly, one suggests that the \textit{Zeran} court misinterpreted the statute and that Congress only meant to eliminate primary publisher liability.\textsuperscript{226} Other articles specifically argue for Congress to reinstate notice-based distributor liability for ISPs.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{230}

Finally, there is also a group that argues for developing a new alternative standard of liability for ISPs and website operators.\textsuperscript{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.\textsuperscript{232} Two of these articles even suggest that imposing some standard of liability on ISPs will lead to more truthful and accurate information online.\textsuperscript{233}

\textsuperscript{223} Dickinson, supra note 189; Julian, supra note 187; Myers, supra note 201.
\textsuperscript{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.
\textsuperscript{225} Fritts, supra note 187; McManus, supra note 187.
\textsuperscript{226} Ottenweller, supra note 197.
\textsuperscript{227} Blumstein, supra note 222; Ferris, supra note 187.
\textsuperscript{228} Burke, supra note 193; Jeweler, supra note 222; Lee, supra note 187; Melissa A. Troiano, \textit{The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs}, 55 AM. U. L. REV. 1447 (June 2006); Williams, supra note 222.
\textsuperscript{229} Blumstein, supra note 222; Burke, supra note 193; Ferris, supra note 187; Julian, supra note 187; Lee, supra note 187.
\textsuperscript{230} Burke, supra note 193.
\textsuperscript{231} Citron, supra note 193; Hyland, supra note 206; Kim, supra note 187; Annemarie Pantazis, \textit{Zeran v. America Online, Inc.: Insulating Internet Service Providers From Defamation Liability}, 34 WAKE FOREST L. REV. 531 (Summer 1999); Troiano, supra note 228.
\textsuperscript{232} Citron, supra note 193; Hyland, supra note 206; Kim, supra note 187; Pantazis, supra note 231.
\textsuperscript{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 Amendment\(^ {237}\) and jurisdictional hurdles\(^ {238}\) in court. Identification may not be possible in instances when ISPs do not maintain records of their users\(^ {239}\) 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

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\(^{234}\) 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.


\(^{238}\) Lewis, supra note 237; Lukmire, supra note 187; Waldman, supra note 236.

\(^{239}\) Citron, supra note 193; Lukmire, supra note 187; Waldman, supra note 236.

\(^{240}\) Julian, supra note 187.
disclosure of the identity of the content provider, the provider will frequently be judgment-proof.\footnote{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.}

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.\footnote{Azriel, supra note 235; Bartow, supra note 201; Burke, supra note 193; Hallett, supra note 235; Lipton, supra note 210; Ottenweller, supra note 197.}

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.\footnote{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.} 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.\footnote{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).} Others contend that ISPs who act improperly,\footnote{Lipton, supra note 210.} or who have the opportunity to remedy harms but do not,\footnote{Abril, supra note 190; Blumstein, supra note 222; Citron, supra note 193; Ottenweller, supra note 197.} 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 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 material\footnote{Lipton, supra note 210; Ottenweller, supra note 197; Peterson, supra note 187.} or the material may have already been reposted to other sites.\footnote{Blumstein, supra note 210; Ottenweller, supra note 197; Peterson, supra note 187.} 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.\footnote{Blumstein, supra note 210; Citron, supra note 193; Horton, supra note 243.}

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 redress\footnote{Hyland, supra note 206.} while one article argues that self-help should be encouraged.\footnote{Williams, supra note 222.}

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,\footnote{Williams, supra note 222.}
corporations and business entities who have suffered reputational harms online, footnote 252 and the victims of harassment footnote 253 and child pornography. footnote 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. footnote 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. footnote 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. footnote 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. footnote 258 The second set argues that courts have

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footnote 252 Hines, supra note 237.
footnote 253 Norby-Jahner, supra note 213.
footnote 254 Peterson, supra note 187.
footnote 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.
footnote 256 Jackson, supra note 197; Quon, supra note 234.
footnote 257 King, supra note 255.
footnote 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


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. Two articles question whether the broad immunity granted by courts is consistent with congressional intent and argue for statutory clarification and the other calls for a statutory change in response to an overly broad state court ruling. 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, writing soon after passage of the CDA, predicting that courts would be unable to discern congressional intent.

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. 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

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270 Fritts, supra note 187; Hallett, supra note 235; Ottenweller, supra note 197.
271 Norby-Jahner, supra note 213; Wiener, supra note 193.
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.
Another group of articles argues that Congress failed to protect those who might be harmed by the granting of broad ISP immunity. 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 claims and modern journalistic practices but also for increasing the liability of Internet dating sites and social networks.


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, by implementing a notice and take down model, allowing for a bad faith exception, or taking a totality of the circumstances approach. 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. Another article’s test takes into consideration a victim’s right to privacy and redress when granting immunity.

A subgroup of articles proposes tests that respond specifically to the Roommates decision. One articles proposes a test that would reject the material contribution standard. 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.

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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).
280 Gray, supra note 189.
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; Ziegadowsky, supra note 193.
283 Julian, supra note 187; Lukmire, supra note 187; Nunziato, supra note 190.
284 Lukmire, supra note 187.
285 Ziegadowsky, 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. These propose to apply actual malice review to distributor liability, to hold minor libel defendants to a standard of care of teenagers their own age rather than of adults, or to adjust the application of public figure defamation law in a way that more closely aligns with the standards applicable to print media. Also, one article’s test specifically categorizes online gossip websites as ICPs.

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

B. Articles that Defend Section 230

There are fewer articles that generally defend Section 230 and broad immunity for ISPs (14 articles). 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 2008 that contemplated narrowing the immunity granted to ISPs under the CDA.

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

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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.
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. 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. 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. 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. 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. 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. 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. 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.

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. One of these focuses on expanding immunity to online journalism, where news reporting sites solicit information from third party sources. Another focuses on expanding immunity to bloggers and third party posters. Both argue that such expansions of Section 230 immunity align with the statute’s purpose of promoting free expression on the Internet. One article argues that the intellectual property exemption under subsection (e) is too broad. 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.

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305 Ciolli, *supra* note 298.
308 Ardia, *supra* note 52.
311 Spinosa, *supra* note 272.
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. 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, and two articles suggest that the Ninth Circuit’s underlying motive was to curb Internet exceptionalism. Some articles also believe *Roommates* was incorrectly decided and contradicted the precedent that granted immunity to claims related to third-party content.

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. 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. One suggests that the *Roommates* decision will lead to forum-shopping.

*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).


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).


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


\(^{323}\) 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.


\(^{330}\) 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. Proposals include exempting FHA violations from Section 230 immunity or eliminating 230(e) entirely and expressly stating claims that are precluded from liability in 230(c). One article argues that the most effective way to balance the statutes is to amend the FHA. 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.

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. 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. 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. One article even argues that there needs to be protection for speakers, namely bloggers, from corporate, public and private individual plaintiffs.

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

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; Spinosa, 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 Spinosa, 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; Richards, supra note 275; Tushnet, supra note 276.
344 Lewis, supra note 237; Miller, supra note 337; Richards, supra note 275.
345 Lewis, supra note 237; Miller, supra note 337; Spinosa, 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 and the First Circuit’s decision in Friendfinder. 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. Most of these articles base their arguments on statutory language and note how other subsections of Section 230 explicitly distinguish state or federal law. Additionally, the articles point out that Section 230(e)(2) uses the word “any” in reference to intellectual property laws. 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. A few of these articles also assert that Congress valued intellectual property rights more than the risk of over-regulation of the Internet.

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. Additionally, they emphasize that

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347 Perfect 10, 488 F.3d 1102.
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 COMMLAW 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.  

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. Therefore, they propose Congress should clarify and amend Section 230 to explicitly preclude state right of publicity claims.

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. Other articles emphasize the impossible burden on ISPs to monitor violations of state rights of publicity in light of varying state laws.

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 content—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.

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. 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 Benedit, 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.
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 crediblity 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.
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. 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.

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. 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.”

G. Articles that Focus on Section 230 and Privacy Law

A few articles examine how Section 230 immunity impacts privacy law. 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.

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. Another suggests that certain highly offensive privacy violations should fall outside the scope of the immunity. Finally, a few articles consider how the Roommates.com decision may impact privacy liability. 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.

380 Hamill, *supra* note 351.
381 Madell, *supra* note 379.
382 Hamill, *supra* note 351.
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 defamations.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

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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).
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).
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.\textsuperscript{400} A couple of articles discuss how Section 230 impacts employer-employee interactions and policies.\textsuperscript{401} Another cluster of articles provides general summaries and analysis of the law and how it has been interpreted.\textsuperscript{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.\textsuperscript{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.\textsuperscript{404}


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

\textsuperscript{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., 111\textsuperscript{th} Cong. 1\textsuperscript{st} 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. 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. Some of these bills sought to hold ISPs liable for illegal drug sales if they were to accept

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{409}

2. \textbf{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.\textsuperscript{410} Only one of the bills became law, and Title VII of that law confirmed the immunity in Section 230 for ISPs.\textsuperscript{411}

\textsuperscript{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 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 to protect the public health from the unsafe importation of prescription drugs and from counterfeit prescription drugs, and for other purposes, 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.

\textsuperscript{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.


\textsuperscript{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.

3. Bills Addressing Data Security Measures

A group of bills sought to address issues related to data security and integrity. 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. None were enacted.

4. Bills Addressing Unsolicited Emails

A small number of bills focused on the problem of unsolicited email. 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. 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. These two companion bills became law in 2010 and expressly applied Section 230 immunity to the enforcement of foreign judgments for defamation.

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. For example, the Dodd-Frank Wall Street Reform and

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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.

Consumer Protection Act of 2009 contained a provision relating specifically to Section 230, but the clause was dropped in the final, enacted law. 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. 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-

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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.


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

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).
chair asserted that any review of the policies underlying Section 230 for the development of broadband should be Congressional and not judicial decisions.\textsuperscript{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.\textsuperscript{430}

\section*{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.

\textsuperscript{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., 111\textsuperscript{th} Cong., 2\textsuperscript{nd} Sess. (Apr. 21, 2010).

\textsuperscript{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, 111\textsuperscript{th} Cong., 2\textsuperscript{nd} Sess. (Sept. 23, 2010).
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