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**COMMUNICATION INDECENCY:
WHY THE COMMUNICATIONS DECENCY ACT, AND THE JUDICIAL
INTERPRETATION OF IT, HAS LED TO A LAWLESS INTERNET IN
THE AREA OF DEFAMATION**

*Colby Ferris**

INTRODUCTION

Imagine you are a lawyer representing a client charged with driving under the influence.¹ After researching and analyzing case law, you decide how the case should be argued but the client does not agree with your strategy. He wants to argue a different theory, but professional responsibility prevents you from presenting the case the way your client desires. When the dispute culminates, the client finds other counsel, and you later learn he was acquitted of the charge.

Usually this would be the end of the story. However, your former client is angry that you refused to see things his way, a way that eventually led to success, and that he spent his time and money on your legal strategy. As an outlet for his anger the former client joins a legal forum on Yahoo! (‘‘Yahoo!’’), an extremely popular Internet Service Provider (‘‘ISP’’) with millions of subscribers. The former client posts bulletins in the legal forum claiming you do not have a valid law degree, are practicing law without a license, and are violating professional responsibility rules by sleeping with your current clients. Weeks later, when these posts come to your attention, you notify Yahoo! of the defamatory content and ask that the bulletins be removed and a retraction printed. Yahoo! replies that, per its stated policy, it does not police forums and does not remove posts or offer retractions.

After few weeks, the former client posts new bulletins claiming you win cases by bribing judges and, in fact, offered to bribe a judge on his behalf. Again, you contact Yahoo! and ask that the bulletins be removed, or that the user be blocked from posting additional defamatory bulletins. Yahoo! replies that it is not in a position to determine what material is defamatory, and it will not remove the bulletins or block future bulletins. Instead, Yahoo! informs you that the former client’s posts have drawn significant interest, so it is moving them to a more prominent position on its website.² You want redress for the harm to your reputation, and you know that your former client will never be able to pay a judgment, but can you sue Yahoo! for the role it played in allowing the bulletins to remain and for even moving them so more people could view them?

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1. Though additional details have been added, this illustration is based in part on the experience of Rafe Banks. Laura Parker, *Courts are asked to crack down on bloggers, websites*, USA TODAY, Oct. 2, 2006, available at http://www.usatoday.com/tech/news/2006-10-02-bloggers-courts_x.htm?loc=interstitialskip.

2. *Compare* Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998) (holding America Online immune from liability even though it actively promoted the gossip column that created a defamatory story).

First, this article explores how law of defamation has been applied in the brick and mortar world, and how those same principles were applied to the cyber world.³ Next it looks at Congress's legislation of defamation law on the Internet, and how that legislation has been applied in court. Finally, it evaluates the changing attitude toward that legislation, and changes Congress should consider making.

I. THE COMMON LAW OF DEFAMATION

A. Generally

A communication is defamatory when it tends to harm the reputation of another in a way that disparages him in the community, or deters others from associating with him.⁴ No actual harm to the reputation needs to be proven, it is enough that the communication is the type that generally tends to have such an effect.⁵ Additionally, the comment need only prejudice the person in the eyes of a substantial and respectable minority of the community, rather than the community at large.⁶ Liability for defamation hinges on the requirements that there must be: (1) a false and defamatory statement concerning another; (2) publication of that statement to a third party; (3) negligence, or some higher standard of fault, on the part of the publisher; and (4) the statement is either harmful per se, or the publication caused special harm.⁷

B. Three Standards of Liability

One who repeats or republishes information is known as a secondary disseminator and is liable as the original publisher even if he acknowledges the original publisher.⁸

Courts have softened the blow of secondary disseminator liability by dividing them into three classes: common carriers, distributors, and publishers. Common carriers, most often telephone and telegraph companies, have no control over the communications flowing over their wires; thus, they are generally not liable for publishing defamatory statements, even if they knew or had reason to know the statements were defamatory.⁹

3. While reading also consider the result if your scenario took place in the brick and mortar world: Your former client printed his bulletins on a flyer and gave them to a magazine stand to give to customers. After you told the magazine stand the fliers contained defamatory material the stand continued to hand out new fliers, and even moved them right next to the register to draw more customers.

4. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

5. *Id.* cmt. d.

6. *Id.* cmt. e.

7. RESTATEMENT (SECOND) OF TORTS § 558. *See also* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (analyzing the general requirements that the communication be published, and "of or concerning the plaintiff," but holding that a showing of actual malice on the part of the publisher is required for statements concerning public officials).

8. Cianci v. N.Y. Times Publ'g Co., 639 F.2d 54, 61 (1980).

9. Anderson v. N.Y. Tel. Co., 35 N.Y.2d 746 (1974) (holding that the telephone company, by law, may only restrict certain uses, defamation not included). Additionally, telephone companies have no technological means by which to edit or restrict the rapidly flowing content. *Id.* at 751. The court reasoned that Xerox could not

Distributors, such as libraries, news stands, book stores, and television network affiliates, have little or no control over the editorial aspects of the products they sell, and are not liable for publishing the defamatory comment of another unless the distributor knew or had reason to know of the comment's defamatory character.¹⁰ In *Hustler*, the plaintiff sought to hold two distributors of *Hustler Magazine* liable for allegedly defamatory statements contained in the magazine.¹¹ The District Court held that if distributors were forced to self-censor all the books and magazines they sold, the available materials would be depleted either because they were not acceptable or because the distributor simply did not have time to censor them.¹² Therefore, a distributor is under no duty to examine the materials he sells to ascertain whether they are defamatory.¹³

In another case, the court held that a television affiliate is a mere conduit for information and will only face liability if it knows, or has reason to know, of the defamatory statements it republished.¹⁴ The court noted that the television affiliate did not exercise any editorial control over the program, though it had the contractual right to do so, and had, in fact censored other programs in the past.¹⁵ The court held that these facts did not impose a duty to censor all programming.¹⁶

Finally, courts treat publishers, such as newspapers and book publishers, like the original speaker of the statement because these entities carry out significant editorial functions and maintain control over the statements and communications they publish.¹⁷ Publication includes intentionally or negligently communicating defamatory statements to people other than the one defamed.¹⁸ In a case involving *Newsweek Magazine*, the magazine republished statements taken out of context

be held liable for defamatory statements printed on a machine it leased to a third party even if it had notice of those statements, therefore the telephone company could not be held liable for defamatory statements transmitted through its leased equipment. *Id.*

10. *Lewis v. Time, Inc.*, 83 F.R.D. 455, (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983).

11. *Dworkin v. Hustler Magazine Inc.*, 611 F. Supp. 781 (D. Wyo. 1985).

12. *Id.* at 786. (citing *Smith v. California*, 361 U.S. 147, 153-54 (1959)).

13. *Hustler*, 611 F. Supp. at 786. citing RESTATEMENT (SECOND) OF TORTS § 581 cmt. d. Additionally the court held: A realization that *Hustler* was once sued for libel, is not the equivalent of actual knowledge, and is not sufficient to put the distributor on notice to check each *Hustler* magazine for defamatory material. *Hustler*, 611 F. Supp. at 787. "If that was the proper standard, every distributor of publications, such as the *National Enquirer*, or such respected publications as *Time* and *The New York Times*, which have also had their fair share of libel suits, would have to check each issue, at his peril, for possible libelous statements about people or events of which the average publication distributor might have no basis for judgment." *Id.* "Such a standard is not in our society's best interests; it would foster excessive censorship, and would deprive the public of reading educational and entertainment materials, all in direct contradiction of the right of freedom of the press guaranteed by the First Amendment." *Id.*

14. *Auvil v. CBS 60 Minutes*, 800 F. Supp. 928, 931-32 (E.D. Wash. 1992).

15. *Id.* at 931.

16. *Id.* The court also noted that the affiliate could carry the burden of censoring every item it aired. *Id.*

17. RESTATEMENT (SECOND) TORTS § 557.

18. *Id.* The scale between which a statement must be published intentionally or negligently slides depending on the public and political status of the subject. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270-280 (1964) (holding that a publisher is only liable for defamatory statements about public figures that are published with actual malice); *Gertz v. Welch*, 418 U.S. 323, 347 (1974) (holding that, so long as they don't impose liability without fault, states may determine the level of negligence required to recover for defamatory statements about private individuals).

and were held liable for the resulting defamation.¹⁹ Because Newsweek has editorial control over the content it publishes, and because it republished quotes in a context that made them defamatory, it was held liable as the primary publisher of the quotes.²⁰

Under the common law most defendants were either a distributor, facing liability only if it knew or had reason to know of the defamatory material, or a publisher, facing liability just as if it were the original speaker of the statement.²¹

C. Applying the Common Law Principals in an Uncommon Space

As the Internet developed, courts had to decide how to handle defamatory statements plastered across the Internet in chat rooms, blogs, message boards, e-mails, and online forums. Particularly, courts needed to determine the liability of ISPs for defamatory statements published on sites hosted by the ISPs.

In an early case, CompuServe provided access to an electronic library that gave subscribers access to thousands of information sources and over 150 special interest forums.²² One forum dedicated to journalism provided the publication Rumorville USA (“Rumorville”), a daily newsletter about broadcast journalists.²³ Cubby claimed that CompuServe, through Rumorville, published defamatory statements about his competing publication.²⁴ CompuServe argued that it was merely a distributor and not a publisher, and thus could not be held liable for defamatory content of which it was unaware.²⁵ The court analyzed the defamation claim in the context of the everyday world, unimpeded by the abnormalities of the Internet. It held that CompuServe’s database was essentially an electronic, for-profit library.²⁶ Although CompuServe could decline to carry a given publication, once it committed to do so it had little to no editorial control over the contents.²⁷ The court held that CompuServe had the same control over the publications it carried as a public library, book store, or newsstand, and that it would be no more feasible for CompuServe to examine every publication than any of those distributors to do so.²⁸ Because the court determined CompuServe was a distributor, the appropriate standard of liability was whether CompuServe knew or had reason to know of the defamato-

19. Dixon v. Newsweek, Inc., 562 F.2d 626, 631 (10th Cir. 1977) (holding “A **publisher** may not escape liability for defamation when it takes words out of context and uses them to convey a false representation of fact”).

20. *Id.*

21. Let’s go back to the brick and mortar example of your problems with your former client, *supra* note 3. In that example, the magazine stand is a traditional distributor, and he had knowledge that fliers he was distributing contained defamatory material. Thus, he is going to be liable to you for damages.

22. Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 137 (S.D.N.Y. 1991).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 140.

27. *Id.* The court placed nearly no weight on the fact that Cameron Communications, Inc. contracted to manage, review, edit, and otherwise control the content of the journalism forum for CompuServe. *Id.* at 137.

28. *Id.* The court reasoned that a computerized database is the functional equivalent of a traditional news vendor, and since a national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes, applying an inconsistent standard of liability to an electronic news distributor such as CompuServe would impose an undue burden on the free flow of information. *Id.*

ry material.²⁹ Cubby did not allege that CompuServe had any such knowledge; therefore, the court granted CompuServe summary judgment on the defamation issue.³⁰

CompuServe's holding was based on sound legal reasoning that left the three traditional types of secondary disseminators in place. This allowed courts to evaluate websites and ISPs on a case-by-case basis to determine which standard should apply to that particular website or ISP. However, after *Stratton Oakmont, Inc. v. Prodigy Services* Congress stepped in with legal reasoning of its own. In that case, the court held the ISP liable for defamatory statements posted by an individual user.³¹ Prodigy had at least two million subscribers and hosted the most widely read financial computer bulletin board in America, Money Talks.³² Prodigy, to distinguish itself from the competition, expressly held itself out as exercising editorial control, like that of a newspaper, on its site.³³ Prodigy advanced content guidelines and stated that it would remove insulting and harassing material when brought to its attention.³⁴ Several comments were posted alleging that Stratton Oakmont and its executive officers committed fraud, criminal violations, and were a group of brokers who lied for a living.³⁵ The court found that Prodigy was a publisher of the defamatory statements because it chose to take editorial control over the content on its site.³⁶ Because Prodigy held itself out as controlling the content of the bulletin boards, and Prodigy actually implemented this control through guidelines enforced by board leaders and automated software screening, Prodigy gained the benefits of editorial control, and the burden of greater liability.³⁷

II. CHANGING THE COMMON LAW TO COPE WITH ETIQUETTE ON THE INTERNET

A. Legislation protecting ISPs

In 1998, Congress passed 47 U.S.C.A. § 230 (“section 230”) of the Communications Decency Act (“CDA” or the “Act”). Congress found that, with minimal government regulation, the Internet flourished to the benefit of all Americans because it offered a forum for diverse political discourse, opportunities for cultural development, and avenues for intellectual activity.³⁸

29. *Cubby, Inc.*, 776 F. Supp. at 141.

30. *Id.*

31. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1995). *See also Zeran v. Am. Online, Inc.* 129 F.3d 327, 331 (4th Cir.1997) (indicating that Congress legislated in response to the *Stratton Oakmont* decision).

32. *Stratton Oakmont*, 1995 N.Y. Misc. Lexis 229, at *3.

33. *Id.*

34. *Id.* at *5.

35. *Id.* at *1, 2.

36. *Id.* at *10. The court dismissed the argument that Prodigy, now receiving over 60,000 messages a day, had long ago abandoned its policy of reviewing all messages. *Id.* at *8. Prodigy submitted no documentation stating it had abandoned that policy, or that it disseminated news of such a change. *Id.*

37. *Id.* at *10-13.

38. 47 U.S.C.A. § 230(a)(3),(4).

The pertinent section of the Act gives “protection for ‘Good Samaritan’ blocking and screening of offensive material.”³⁹ The Act states, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴⁰

The Act immunizes any provider or user of an interactive computer service from liability for “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.”⁴¹ The Act further immunizes providers and users from liability for making available to other information content providers the technical means to restrict access to the above material.⁴²

B. Courts Interpret the CDA as the Downfall of ISP Liability for Defamation

“[C]ourts have treated section 230(c) immunity as quite robust, adopting a relatively expansive definition of “interactive computer service” and a relatively restrictive definition of “information content provider.”⁴³

The seminal case applying section 230 of the CDA eliminates liability for ISPs in nearly every scenario.⁴⁴ In that case, an anonymous user posted advertisements for offensive t-shirts on one of America Online’s (“AOL”) community bulletin boards.⁴⁵ The t-shirts had tasteless slogans relating to the Oklahoma City bombings that had occurred just weeks before.⁴⁶ The advertisement instructed purchasers to contact “Ken” at Zeran’s home phone number.⁴⁷ Zeran received a high degree of angry phone calls, some including death threats, and contacted AOL that evening in regards to the posting.⁴⁸ The AOL employee promised to remove the posting, but stated that, as a matter of policy, AOL did not print retractions.⁴⁹ The anonymous user continued to post the advertisements for four days.⁵⁰ By the fifth day Zeran was receiving abusive phone calls approximately every two minutes.⁵¹ During this time Zeran repeatedly contacted AOL and was told the anonymous user’s account

39. § 230(c).

40. § 230(c)(1). The Act defines “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server. . . .” § 230(f)(2). It defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” § 230(f)(3).

41. § 230(c)(2)(A).

42. § 230(c)(2)(B).

43. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003).

44. *Zeran*, 129 F.3d at 333. The lone exception appears to be if the ISP actually thinks up, drafts, and posts its own statement. *See Carafano*, 339 F.3d at 1123-25.

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

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

would soon be closed.⁵² Zeran filed suit against AOL, and AOL interposed section 230 of the CDA as an affirmative defense.⁵³ The court held lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions, such as deciding whether to publish, withdraw, postpone or alter content, are barred because section 230 prevents courts from hearing claims that would place a computer service provider in a publisher's role.⁵⁴

In evaluating Congress's purpose for passing section 230, the court stated that Congress recognized the threat of tort liability to the Internet as simply another form of intrusive government regulation on speech, and made a policy choice not to deter harmful online speech by imposing tort liability on companies that serve as intermediaries for other parties' potentially defamatory messages.⁵⁵ The court emphasized that service providers have millions of users so that it would be impossible to screen all postings for possible problems, and if faced with potential liability for each message posted, the providers might choose to severely restrict the number and type of messages posted, which would have an obvious chilling effect on free speech.⁵⁶ Finally, the court noted that Congress wanted to encourage self-regulation of offensive material distributed over service provider's networks.⁵⁷ Thus, Congress passed § 230 in part to remove disincentives to self-regulation stemming from *Stratton Oakmont*.⁵⁸

To this point, the holding in *Zeran* held no surprises in light of section 230. However, the court took the CDA one step further and held that ISPs could not be held liable as distributors of defamatory information when they knew or had reason to know of it.⁵⁹ Zeran argued that "distributor" carried a legally distinct meaning from "publisher" in the area of defamation law.⁶⁰ In section 230 Congress chose to employ only the term "publisher," thus leaving distributors liable under common law defamation standards.⁶¹ The court disagreed, stating that distributor liability is merely a subset of publisher liability, and is also immunized under section 230.⁶² The Court held that the terms "publisher" and "distributor" derive their legal significance from defamation law and are indistinguishable from garden-variety defamation claims.⁶³ Furthermore, it explained that everyone who takes part in the publication, even the distributor, is considered a "publisher" for the purposes of defa-

52. *Zeran*, 129 F.3d 329. Adding to the ordeal, a radio station in Oklahoma received a copy of the AOL postings and urged listeners to call Zeran's home number. About fourteen days later, after Zeran spoke with the station, it issued an on-air apology, and the calls receded to about fifteen per day.

53. *Id.*

54. *Id.* at 330.

55. *Id.* at 330-31.

56. *Id.* at 331.

57. *Id.*

58. *Id.* The court reasoned that the ISP in *Stratton Oakmont* subjected itself to liability for attempting to regulate the dissemination of offensive material; therefore, other ISPs would not risk such liability, and would instead let harmful and offensive material reign free on their services. *Id.*

59. *Zeran*, 129 F.3d at 332.

60. *Id.* at 331-32.

61. *Id.* at 332.

62. *Id.*

63. *Id.*

mation law.⁶⁴ The court explained the distinction between publisher and distributor only signified different levels of liability within the larger publisher category, and though decisions like *Stratton Oakmont* and *Cubby* utilized the terms separately, those cases did not suggest that distributors are not also a type of publisher for purposes of defamation law.⁶⁵ Finally, the court held the interpretive canon favoring retention of common law principles unless Congress speaks directly to the issue did not apply because Congress did speak directly to the issue by employing the legally significant term “publisher.”⁶⁶

Though nearly every circuit evaluating this issue has agreed with the Fourth Circuit’s analysis, it has met much criticism in the academic world. First, the court noted that the terms publisher and distributor are indistinguishable from the garden-variety defamation claim. However, this misses the point; section 230 does not immunize ISPs from garden-variety defamation claims, it immunizes claims against publishers only. The court went on to point out that the terms only signify different levels of liability, but this doesn’t seem to advance the court’s argument. If Congress’s intent was to destroy liability, then it is logical that Congress would have spoken directly to all levels of liability. Next, the court noted that, although *Stratton Oakmont* and *Cubby* speak of distributors and publishers separately, they do not suggest distributors are not also publishers. Although this is true, it is of little value. Those courts did recognize that distributors are necessarily publishers, but fundamental to the issue of liability is the *level* of publisher. Lastly, the court claimed that Congress did speak directly to the distinction between distributor and publisher, by “using the legally significant term publisher.”⁶⁷ This conclusion is circular. Courts have spent hundreds of reporter pages evaluating whether defendants were distributors or publishers because, under defamation law, there is a legally significant difference -one that the court in *Zeran* brushes aside with far too little consideration.⁶⁸

Most courts around the country have followed the *Zeran* analysis to the letter. If the defendant satisfies the following three requirements laid out in section 230, it receives complete immunity from defamation claims. First, the defendant must be an interactive computer service as defined by the Act.⁶⁹ Next, the plaintiff must allege the defendant is a publisher or speaker of the material.⁷⁰ Finally, the communication must have been provided by “another” information content provider, specifically someone other than the defendant.⁷¹ In a Tenth Circuit case, the plaintiff admitted that AOL was an interactive service provider, but argued that it was

64. *Id.*

65. *Id.*

66. *Zeran*, 129 F.3d at 333-34.

67. *Id.*

68. While interesting, whether courts should have continued to recognize distributor liability under the CDA section 230 is beyond the scope of this note. Moreover, Congress has recognized that it agrees with the courts’ interpretation and application of section 230. H.R. REP. NO. 107-449 at 13. (2002).

69. *Dimeo v. Max*, 433 F. Supp. 2d 523, 529 (E.D. Pa. 2006), *aff’d*, 248 F. App’x 280 (3d Cir. 2007). See also *supra* text accompanying note 40 for the definition of an interactive computer service.

70. *Id.*

71. *Id.* See also *supra* the text accompanying note 40 for the definition of an information content provider.

also a content provider because it participated in the creation and development of the incorrect stock quotation information.⁷² In an effort to correct errors, AOL worked closely with the stock quote providers, and sometimes deleted stock symbols and other information.⁷³ The plaintiff argued that those editorial actions constituted “creation or development” of information, making AOL an information content provider under section 230.⁷⁴ The plaintiff could not show that AOL contributed to the material posted, and, in fact, AOL’s contract with the stock quote providers stipulated that AOL could not modify or revise the submitted information.⁷⁵ The court determined that by deleting incorrect information, AOL performed the exact self-regulating functions Congress sought to protect, and affirmed the lower court’s grant of immunity.⁷⁶

In the First Circuit, a plaintiff tried to avoid demise under section 230 by claiming the defendant did not provide access to the Internet, and, therefore, was not an interactive service provider.⁷⁷ The court held that an interactive service provider does not actually have to provide service to the Internet.⁷⁸ The plaintiff also attempted to claim that the defendant created and developed the information because through the construction and operation of its website, it allowed anonymous subscribers to spread misinformation in a context associated with objective content.⁷⁹ The court rejected this argument because no misinformation was prompted by the website’s registration process and the features of the website were aligned with message boards on other websites.⁸⁰ The website operator escaped with no liability.⁸¹

A lower court in the Ninth Circuit attempted to hold a matchmaking website liable for defamation as a publisher because the website provided part of the profile content by requiring users to answer certain questions from a list of pre-prepared responses.⁸² In this case an anonymous user created a profile for a well-known actress.⁸³ The profile included the actress’s home address and phone number, and indicated that the actress was looking for a one-night stand, and a “hard and dominant” man with “a strong sexual appetite,” and that she “liked sort of being controlled by a man, in and out of bed.”⁸⁴ As a result of the posting, the actress received sexually explicit phone calls, and a sexually explicit and threatening fax, which also threatened her son.⁸⁵

72. Ben Ezra, Weinstein, and Co. v. America Online, Inc., 206 F.3d 980, 984 (10th Cir. 2000).

73. *Id.* at 985.

74. *Id.*

75. *Id.* at 986.

76. *Id.*

77. Universal Commc’n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 419 (1st Cir. 2007).

78. *Id.*

79. *Id.* at 420.

80. *Id.*

81. *Id.* at 427.

82. *Carafano*, 339 F.3d at 1122.

83. *Id.* at 1120-21.

84. *Id.*

85. *Id.*

The Appellate Court reversed the decision, holding that the website did not play a significant role in creating or developing the relevant information because the underlying misinformation was provided solely by the user, and most of the relevant defamatory information was provided through essay questions.⁸⁶

The application of section 230 has consistently led to broad immunity for ISP's, website operators, and other Internet users. Since most information content providers are unidentifiable, unreachable, or unable to satisfy judgment, section 230 leaves the defamed victim without any source of redress.

C. The Decency Act Deviants: Courts Working Towards a Fairer Interpretation of the Good Samaritan Statute.

The District Court for the District of Columbia questioned the logic behind allowing the ISP to promote the defamation and then escape liability for it.⁸⁷ In *Blumenthal*, AOL actively promoted a gossip column that defamed a politician by alleging he abused his wife.⁸⁸ The court questioned why an ISP should be able to flaunt a rumormonger's ability to make rumors instantly accessible to its subscribers and then claim immunity when that person, as might be anticipated, defames another?⁸⁹ Although the court did not agree with the implications of § 230, it upheld the ISP's immunity in that case.⁹⁰

In a Ninth Circuit case, the court carved out an exception to the rigid immunity usually applied under § 230.⁹¹ In that case, a handyman sent an e-mail to a Museum Security Network ("Network") claiming a local lawyer told him she was related to Hitler's right-hand man, and telling the Network he thought she possessed stolen European artwork.⁹² The Network published the e-mail on its listserv and e-mailed it to Network subscribers.⁹³ The handyman maintained he never would have sent the e-mail had he known it would be published.⁹⁴ The court took issue with whether the handyman actually provided content to the ISP for use on the Internet, since the handyman did not fathom that the information would be published.⁹⁵ The court held that "immunizing providers and users of interactive computer services for publishing material when they have reason to know that the material is not intended for publication . . . contravenes the Congressional purpose of encouraging the development of the Internet."⁹⁶ Therefore, an ISP is immune from liability only

86. *Id.* at 124-25.

87. *Blumenthal*, 992 F. Supp at 51.

88. *Id.* at 46-48.

89. *Id.* at 51.

90. *Id.* The court opined that AOL had editorial rights with respect to the gossip column, and actively promoted it, but took no responsibility for the harm it caused. *Id.* The court said that, had it been writing on a clean slate, the court would have found it fair to hold AOL to the same liability standard applied to a traditional publisher, or at least to that of a distributor. *Id.*

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

92. *Id.* at 1021-22.

93. *Id.* at 1022.

94. *Id.* Because of the publication the lawyer lost clients and was investigated by the state bar. *Id.*

95. *Id.* at 1032.

96. *Id.* at 1034.

when a third party furnished information to the provider under circumstances in which a reasonable person in the service provider's position would conclude the information was provided for publication on the Internet.⁹⁷ The *Batzel* decision provides one of the first deviations from the strict immunization usually provided under section 230.

The dissent in that case suggested the court should focus on the defendant's acts to determine whether liability attaches for publication of defamatory material.⁹⁸ The dissent argued that the "CDA immunizes a defendant only when the defendant took no active role in selecting the questionable information for publication."⁹⁹ Judge Gould reasoned that when the defendant takes an active role in selecting text for publication, the information ceases to be provided by another as required under the Act.¹⁰⁰ He argued that if a website employed a person to read through submissions to determine which should be published, that person could also screen the submissions for defamatory content.¹⁰¹

In a later Ninth Circuit case, the court held a website operator liable for violating the Fair Housing Act because the website operator was also an information content provider.¹⁰² Roommate.com ("Roommate") required subscribers to create profiles by answering a prepared list of questions with a prepared list of answers.¹⁰³ The prepared questions required subscribers to answer questions regarding their sex, sexual preference, parental status, and preference of those aspects in a roommate, which violated the Fair Housing Act.¹⁰⁴ "The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet."¹⁰⁵ Roommate designed its registration process around questions and choice of answers it created.¹⁰⁶ "Therefore, Roommate is undoubtedly the 'information content provider' as to the questions and can claim no immunity for posting them on its website, or for forcing subscribers to answer them as a condition of using its services."¹⁰⁷ The court held that by requiring every profile page to be a collaborative effort between Roommate and the subscriber, Roommate was responsible at least in part for every such page.¹⁰⁸ Roommate lost immunity under section 230 when it became an information content provider rather than merely a website host.

One defamation law commentator stated after *Roommate*: "[t]he erosion of the immunity provisions for interactive service providers picks up some serious momentum as the Courts now begin picking apart the broad immunity interpretation

97. *Id.*

98. *Batzel*, 333 F.3d at 1038.

99. *Id.*

100. *Id.*

101. *Id.* at 1038-39.

102. *Fair Housing Council v. Roommates.com, LLC*, 521 F.3d 1157 (Ninth Cir. 2008).

103. *Id.* at 1161.

104. *Id.*

105. *Id.* at 1164.

106. *Id.*

107. *Id.* The court emphasized that unlawful questions lead to unlawful answers and Roommate.com made answering discriminatory questions a condition of doing business. *Id.* at 1165.

108. *Id.* at 1167.

taken by free speech advocates.”¹⁰⁹ The commentator speculated that in reality section 230 immunity was being abused by “mobospheres” encouraging and facilitating defamatory attacks.¹¹⁰

D. Working Toward Actual Decency on the Internet: Middle Ground Between Lawlessness and Overregulation.

In response to the rampant, unpunished defamatory material on the Internet, many victims are pursuing cases against individual users who are primary publishers, even when there is no chance the individual will be able to satisfy a judgment.¹¹¹ In one such case, Sue Scheff sued Carey Bock for defamatory statements Bock made over the Internet.¹¹² Scheff knew Bock would not be able to satisfy the judgment, but Scheff was so vested in getting vindication for the defamation she was even willing to pay the court costs.¹¹³ She wanted to send a message to people who are using the Internet to destroy people they do not like. Individuals should not be forced to file fruitless lawsuits to send a message that Congress and the judicial system should have sent all along. In the world outside of the Internet, the law has never allowed individuals to destroy the reputations of other people simply because the individual does not like the other person. It makes no sense that the law currently allows individuals to do just that in the cyber world – a world where it is infinitely easier and faster to disseminate defamatory information. Congress must pass legislation that facilitates free speech on the Internet without encouraging the rampant spread of defamatory material.

One obvious solution available to Congress is to maintain immunity for ISPs acting in traditional publishing functions, but reinstate liability for ISPs acting as distributors when those ISP’s know or should know of defamatory content. Several courts have argued that imposing liability only when ISPs fail to remove material will chill free speech because ISPs will have incentive to rip down all complained of material, and no incentive to leave up material that could be protected speech. Moreover, courts have fretted that ISPs are not in the position to know or judge which statements are defamatory, and could not keep pace with every user who complains that she does not like what someone else said. First, ISPs do not necessarily have to resort to taking down all complained of material. For example, if User complains of defamatory content on Bulletin A. The ISP could simply place a disclaimer on Bulletin A stating that the allegations are not supported by fact, or

109. *Courts Attack Immunity*, Apr. 4, 2008, <http://johndozierjr.typepad.com/dozierinternetlaw/2008/04/dozier-intern-1.html>. The commentator mentioned as noteworthy that the Ninth Circuit is traditionally one of the most liberal when it comes to free speech rights. *Id.*

110. *Courts Attack Immunity*, *supra* note 109. This commentator also noted that the United Kingdom does not have an immunity law similar to section 230 and recently exercised jurisdiction over a comment published in the United States. *Id.* The British court handed down a six figure verdict for a “mobosphere” attack. *Id.*

111. Laura Parker, *Jury awards \$11.3M over defamatory Internet posts*, USA TODAY, Oct. 11, 2006, available at http://www.usatoday.com/news/nation/2006-10-10-internet-defamation-case_x.htm.

112. *Id.*

113. *Id.* Scheff said she pursued the lawsuit to send a message to people who are using the Internet to destroy people they do not like. *Id.*

that they may be defamatory. Additionally, ISPs could install software that evaluates reported posts to determine if they simply state an opinion. For example, if software was designed to detect words like “feel,” “think,” “in my opinion,” “believe,” and so forth, the software would be able to detect opinion statements that cannot be defamatory and would require no action by the ISP.

Congress could also regulate defamation liability similar to how the Digital Millennium Copyright Act (“DMCA”) regulates liability for copyright infringement over the Internet. The DMCA has extensive notice and takedown procedures that protect both copyright holders and fair users. Generally, ISPs must comply with standard technical measures, and must remove repeat infringers.¹¹⁴ Additionally, in order to avoid liability for contributory infringement ISPs: 1) must not receive any benefit directly attributable to the infringing activity; 2) must not be aware of the presence of infringing material, or know any facts that would make the infringing material apparent; and 3) upon receiving notice from copyright owners, must act expeditiously to remove the purported infringing material.¹¹⁵ Moreover, the DMCA requires copyright owners provide specific notice of possible infringement. The owner must identify the original copyrighted work and the alleged infringing material with enough particularity to allow the ISP to locate it.¹¹⁶ The complaining party must submit two statements: first, that he has a good-faith belief that the material is infringing on a copyright; and second, that the information in the notice is accurate.¹¹⁷ Finally, the ISP must designate an agent to receive notifications of alleged infringement and must provide the agent’s contact information on the ISP’s website.¹¹⁸

The standards provided under the DMCA strike a balance between the exclusive rights granted to copyright holders and the fair use right of the public to use certain copyrighted works. Similar standards should be enacted to protect victims of defamation, while also staying true to the First Amendment’s guarantee of freedom of speech.

First, new legislation should mimic the DMCA’s notice requirements by implementing a procedure by which complainants can notify ISPs of defamatory material. The complainant’s notice should be required to state:

1. With particularity what material is defamatory and where the material is located on the website;
2. That the alleged defamatory material is presented as fact, not opinion, and that it is false; and
3. Under penalty of perjury, that the information included in the notice is true to the best of the complainant’s knowledge.¹¹⁹

114. 17 U.S.C.A § 512.

115. *Id.* at §§ 512(c)(1)(A)-(C).

116. *Id.* at §§ 512(c)(3)(A)(ii),(iii). The notice must also include a written or electronic signature and sufficient information to allow the ISP to contact the owner. *Id.* at §§ 512(c)(3)(A)(i),(iv).

117. *Id.* at §§ 512(c)(3)(A)(v),(vi).

118. *Id.* at § 512(c)(2).

119. Of course, the notice must also include the complainant’s contact information and signature. And, like under the DMCA, if the complainant fails to comply with the notice requirements, the ISP should not be held liable as a publisher of the defamatory content. *See* 17 U.S.C.A. § 512(c)(3)(B).

Second, the new legislation should maintain the DMCA's requirements that the ISP not receive a benefit attributable to the defamation¹²⁰ and not have knowledge of the defamatory nature of the material. Finally, upon receiving notice, the ISP should be required to act in one of three ways: by removing the defamatory material; by removing the defamatory material and posting a retraction; or by simply posting notice that the material may be defamatory.¹²¹

This type of legislative act upholds the First Amendment values while allowing redress for defamation victims. By exempting opinion statements, and requiring the complainant to attest to the falseness of the alleged defamatory material, the notice provision restricts claims that can be made. This prevents complainants from asking ISPs to remove every unpopular statement that may nevertheless be protected under the First Amendment. Additionally, the ISP may not be required to take down all allegedly defamatory material. The ISP may be given the option to simply add notice to the site stating that the material may be defamatory. Allowing the material to remain on the site gives additional First Amendment protection because the speech is not stifled.

It is clear that the Communications Decency Act has not advanced decency on the Internet. Congress must reevaluate the CDA and legislate to balance the competing interest of free speech and the right to redress when defamation occurs of the Internet.

120. This would address situations such as the *Blumenthal* case where AOL benefited from actively promoting the Drudge report. See *Blumenthal*, 992 F. Supp. 44.

121. The author finds it best to leave to congress which reaction is the most appropriate, however, ideally the reaction of the ISP would respond to the gravity of the defamation and ability of the complainant to show that the material is false. For example: P, an elementary school principal, views a statement on Yahoo! alleging she was arrested on March 15 for bribing public officials in order to avoid prosecution for prostitution. P sends Yahoo! appropriate notice that the information is defamatory, and includes airline tickets showing she was out of town on March 15. Because the defamatory statements could be extremely damaging to P's professional career, and because P has provided concrete evidence that the statements are untrue, Yahoo! should both remove the defamatory content and post a retraction. On the other hand, assume Q, a mail delivery worker, views a statement on Yahoo! that claims he is cheating on his wife. Q then sends appropriate notice to Yahoo!, simply stating that the claim is untrue. In this situation it may suffice for Yahoo! to only remove the statement, or to simply post notice that the statement may be defamatory.