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Paying the Pied Piper: An Examination of Internet Service Provider Liability for Third Party Speech

Joseph E. Brenner*

No invention since the telephone has had as great an impact on the way society communicates as the internet.¹ Through the internet more than two billion people² explore new worlds, go to places they never could have imagined, attain knowledge otherwise unavailable, and communicate with people otherwise unreachable.³ However, opening new channels of communication is just the beginning of the potential capabilities of the internet.⁴

Just as the internet may potentially expand collaboration across once impenetrable obstacles, it likewise has the power to wreak havoc inconceivable to pre-internet society.⁵ Dangers ranging from libel and defamation to extortion and even assault, show the internet is as unsafe as it is helpful.⁶ This heightened level of danger, often augmented by greater user anonymity, makes recourse difficult to attain.⁷ Unlike the physical world, where discovery and censure of individuals is

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¹ Mark Ward, *How the Web Went World Wide*, BBC NEWS (Aug. 3, 2006, 14:26 GMT), <http://news.bbc.co.uk/2/hi/science/nature/5242252.stm>; Shelley Singh, *The Pervasiveness of the Internet is Pushing Society Towards a Digital Lifestyle*, THE ECON. TIMES (Dec. 16, 2011, 7:50 PM IST), http://articles.economictimes.indiatimes.com/2011-12-16/news/30525185_1_mobile-internet-internet-user-base-digital-lifestyle.

² Singh, *supra* note 1.

³ *Id.*

⁴ Anne S.Y. Cheung, *A Study of Cyber-Violence and Internet Service Providers' Liability: Lessons from China*, 18 PAC. RIM L. & POL'Y J. 323, 346 (2009).

⁵ FBI, 2014 INTERNET CRIME REPORT (2015), available at https://www.fbi.gov/news/news_blog/2014-ic3-annual-report.

⁶ *Id.*

⁷ Kate E. Schwartz, Note, *Criminal Liability for Internet Culprits: The Need for Updated State Laws Covering the Full Spectrum of Cyber Victimization*, 87 WASH. U. L. REV. 407, 412 (2009).

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easier, the internet's unique characteristics make identifying problematic users difficult.⁸

Imposing liability on Internet Service Providers (ISPs) is one possible solution to monitoring the internet's unsafe aspects.⁹ ISPs facilitate harmful speech acts via their internet services. Though currently immune from liability under federal law for user activities,¹⁰ the Federal Communication Commission (FCC) recently redefined the internet as a "public utility," subjecting ISPs to the same rules as all other "common carriers," and opening up the possibility of liability.^{11 12} The reclassification raises significant questions as to the future liability of ISPs for their users' activities, as well as whether third-party ISPs can respond to potential liability, by precluding, removing, or otherwise censoring speech that facilitates criminal or tortious acts.

Section I expounds on the legal standard applicable to several of the areas of speech that may lead to liability. Section II explores the current legal framework governing ISP liability regarding third-party transmitted speech. Section III explores traditional jurisprudence applied to public utilities today. Section IV examines the general policies ISPs use when determining whether to remove content. Section V explores ISP liability as "common carriers" in light of the FCC's reclassification of the internet as a public utility. Section VI critiques the outcome of the analysis in Section V with a focus on constitutional free speech, privacy, and due process jurisprudence. Finally, Section VII proposes an alternative ISP liability framework.

⁸ *Id.*

⁹ An Internet Service Provider (ISP) is "A business or other organization that offers Internet access, typically for a fee." BLACK'S LAW DICTIONARY (10th ed. 2014), available at Westlaw.

¹⁰ 47 U.S.C. § 230 (2012).

¹¹ Protecting and Promoting the Open Internet, 80 Fed. Reg. 19738, §§ 29, 274, 364 (Apr. 13, 2015) (to be codified at 47 C.F.R. pt. 1, 8, 20).

¹² The promulgated regulations were challenged before the D.C. Circuit with oral argument held in December, 2015 before J. Tatel, Srinivasan, and Williams. U.S. Telecom Ass'n v. FCC, Docket No. 15-1063 (and consolidated cases) (D.C. Cir. argued Dec. 4, 2015). In a joint opinion, J. Tatel and Srinivasan upheld the FCC's promulgated regulations as within the FCC's authority under § 706 of the Telecommunications Act of 1996. U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016); 47 U.S.C. § 1302. Previous to this litigation, the D.C. Circuit in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), vacated in part and remanded a 2010 order of the FCC intended to achieve the same goal as that being attempted in the present regulation. The preceding litigation is of particular relevance here because of the broad reliance of the FCC in promulgating 80 Fed. Reg. 19738 upon the instruction of the D.C. Circuit in that case. See generally 80 Fed. Reg. 19738, § 10. The internet is a powerful entity depended upon by millions of people as a means to communicate, research, etc.; as such, the need for greater protections for those persons who utilize the internet is constant.

I. LIABILITY FOR SPEECH AND THE PROBLEM OF THE INTERNET

The United States Constitution guarantees the freedom of speech to all persons.¹³ This section addresses the constitutionally permitted limitations on speech for which an individual may be held liable criminally or civilly, by the government or a private party.¹⁴ ¹⁵ This note also focuses on those areas most commonly implicated by speech activities on the internet and for which Congress has not already imposed third-party liability—i.e. child pornography¹⁶ and copyright violations.¹⁷

Of particular interest are doctrines regarding true threats, incitement, and libel and defamation. This note pays particular attention to how the fundamental assumption underlying all First Amendment doctrine—that there is a degree of geographic and temporal commonality between recipient and sender¹⁸—is challenged by the unique characteristics of the internet.

A. True Threats

Of the many First Amendment doctrines, the “truth threats” doctrine has perhaps caused the most confusion. Defined as a “statement where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,”¹⁹ true threats have caused a great deal of discord amongst the federal circuits.²⁰

¹³ U.S. CONST. amend. I.

¹⁴ See *Watts v. United States*, 394 U.S. 705 (1969).

¹⁵ Admittedly, this note does not explore every area for which liability might be imposed upon a party for their speech.

¹⁶ 18 U.S.C. § 2252A (2012).

¹⁷ 17 U.S.C. § 512 (2012).

¹⁸ Enrique Armijo, *Kill Switches, Forum Doctrine, and the First Amendment's Digital Future*, 32 CARDOZO ARTS & ENT. L.J. 411, 419 (2014).

¹⁹ *Virginia v. Black*, 538 U.S. 343, 359 (2003) (holding a statute making cross burning prima facie evidence of an intent to intimidate unconstitutional as an overbroad violation of the First Amendment).

²⁰ See generally *United States v. Turner*, 720 F.3d 411 (2d Cir. 2013), *cert. denied*, 135 S. Ct. 49 (2014) (holding that the conviction of an individual for threats made against three judges of the Seventh Circuit was reasonable because an ordinary listener, familiar with the context in which the statements were made, could conclude that the statements were true threats made to put the individual in apprehension of future violence); *United States v. Martinez*, 736 F.3d 981 (11th Cir. 2013), *cert. granted*, 135 S. Ct. 2798 (2015) (holding the knowing transmission of the threat, not the specific intent to cause fear, was the proscribable true threat); *United States v. Clemens*, 738 F.3d 1 (1st Cir. 2013) (holding the correct standard, under *Black*, for determining whether something is a true threat requires the threat be intentionally carried out and be considered a threat by a reasonable speaker); *United States v. White*, 670

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Unlike inciting, libelous, or defamatory speech, the line between speech constituting a true threat and protected speech is difficult to discern,²¹ due to the inherent nature of the speech itself. While inciting, libelous, or defamatory speech requires a readily apparent element,²² the ambiguous nature of true threats makes determining a true threat difficult.²³

In *Elonis v. United States*²⁴ a federal jury convicted an individual for making “threatening” comments on Facebook against his estranged wife and a local kindergarten class.²⁵ The Court held that the aggravating statements did not constitute proscribable true threats because the accused must have a subjective intent to threaten to constitute a true threat.²⁶ *Elonis* is particularly relevant to an analysis of ISP liability for third-party speakers when determining speaker intent.²⁷ Before the internet, the speaker had to face an individual in person, call an individual on the phone, or send the individual a letter in order to threaten. The realities of the internet are far different.²⁸ A party does not need to share a geographic or temporal

F.3d 498, 508 (4th Cir. 2012) (holding that the Court, in *Black*, did not adopt a specific-intent-to-threaten requirement for true threat cases); *United States v. Mabie*, 663 F.3d 322 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 107 (2012); *Porter v. Ascension Parish School Bd.*, 393 F.3d 608 (5th Cir. 2004), *cert. denied*, 544 U.S. 1062 (2005) (holding that a student bringing a violent drawing to school, created years previously by a sibling, was not outside the protection of the First Amendment because the drawing was not intentionally or knowingly communicating a threat); *United States v. Bozeman*, 495 F.2d 508, 510 (5th Cir. 1974), *cert. denied*, 422 U.S. 1044 (1975) (holding that the proper test for whether a statement constitutes a true threat is whether the communication, in context, would put the listener in apprehension of violence against them); *see also* *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976), *cert. denied*, 429 U.S. 1022 (1976) (holding that a true threat exists when on its face and in the circumstances, it is so “unequivocal, unconditional, immediate and specific as to the person threatened . . . to convey a gravity of purpose and imminent prospect of execution . . .”); *United States v. Dutsch*, 357 F.2d 331, 333 (4th Cir. 1966) (holding a conviction for making a true threat requires that the prosecution demonstrate the speech was intended as a threat).

²¹ *See* cases cited *supra* note 20.

²² *See* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

²³ *See supra* note 20.

²⁴ *Elonis v. United States*, 135 S. Ct. 2001 (2015).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Amy E. McCann, Comment, *Are Courts Taking Internet Threats Seriously Enough? An Analysis of True Threats Transmitted Over the Internet, as Interpreted in United States v. Carmichael*, 26 PACE L. REV. 523, 541 (2006).

²⁸ Nisha Ajmani, Comment, *Cyberstalking and Free Speech: Rethinking the Rangel Standard in the Age of the Internet*, 90 OR. L. REV. 303, 314 (2011).

commonality in order to threaten;²⁹ rather, individuals can communicate from anywhere at any time.³⁰

Exacerbating the lack of temporal and geographic proximity is the uncertainty caused by anonymous threats via the internet.³¹ Anonymous threats challenge the purpose of the true threat doctrine and the balance between the right of individuals to speak freely and live free of intimidation.³² One need only consider the seemingly omnipresent threats made against schools to understand the challenge presented by threatening speech made on the internet, and the necessity to hold someone liable.³³

True threats are difficult to discern even in the physical world in which they originated.³⁴ The internet's unique characteristics compound this difficulty.³⁵ Where proximity once circumscribed careless action, new technologies trivialize this safeguard, bringing anxiety to those unable to distinguish a joke from a threat.³⁶

B. Incitement

The internet also challenges the incitement doctrine. First considered in *Schenck v. United States*,³⁷ how to define incitement has challenged courts for years.³⁸ Whereas the mere discussion of controversial subjects was once criminally

²⁹ R. Hewitt Pate, Assistant Attorney Gen., Address at Chinese Academy of Social Sciences, Institute of Law (July 1, 2004) (transcript available at <https://www.justice.gov/atr/speech/promoting-economic-growth-through-competition-and-innovation>).

³⁰ *Id.*

³¹ Ajmani, *supra* note 28, at 319.

³² See generally *Virginia v. Black*, 538 U.S. 343, 363 (2003).

³³ See generally Graham Rayman, *Johns Adams High School in Queens Evacuated After Emailed Bomb Threat*, N.Y. DAILY NEWS (Jan. 14, 2016), <http://www.nydailynews.com/new-york/queens/queens-high-school-evacuated-emailed-bomb-threat-article-1.2496923>; Travis Andersen & Olivia Arnold, *Nine Mass. Schools Receive Bomb Threats*, BOSTON GLOBE (Jan. 15, 2016), <http://www.bostonglobe.com/metro/2016/01/15/schools-evacuated-following-bomb-threats/ti3PX84qdHqsZTMurQjIml/story.html>; Scott Carroll, *Bomb Threats Lead to 3 Central High School Pupils' Arrests*, ARK. ONLINE (Jan. 15, 2016), <http://www.arkansasonline.com/news/2016/jan/15/bomb-threats-lead-3-central-high-school-pupils-arr/?latest>; *Bomb Threats Called in to Two High Schools*, REDDING RECORD SEARCHLIGHT (Jan. 14, 2016), <http://www.redding.com/news/education/bomb-threats-called-in-to-two-high-schools-2955cb76-de1c-0462-e053-0100007fbc6c-365376931.html>.

³⁴ See *supra* note 20.

³⁵ Prana A. Topper, Note, *The Threatening Internet: Planned Parenthood v. ACLA and a Context-Based Approach to Internet Threats*, 33 COLUM. HUM. RTS. L. REV. 189, 221 (2001).

³⁶ McCann, *supra* note 27.

³⁷ *Schenck v. United States*, 249 U.S. 47 (1919).

³⁸ See generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Dennis v. United States*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Schenck*, 249 U.S. at 47.

punishable speech,³⁹ the modern incitement doctrine, set forth in *Brandenburg v. Ohio*, permits liability only when speech is intended to cause imminent lawless action and likely to produce the action.⁴⁰

Modern realities make these formerly simplistic determinations far from certain. To illustrate this difficulty, one may compare the facts of *Planned Parenthood v. ACLA*⁴¹ with the analysis in *NAACP v. Claiborne Hardware*.⁴² In *Claiborne*, an Alabama court found the leaders of a boycott were liable to the owners of the stores being boycotted for malicious interference.⁴³ The court held that the claims were not barred by the First Amendment because they fell under the incitement exception.⁴⁴ The holding was based on the language the speaker used to encourage his audience to ensure that other community members were not breaking the boycott.⁴⁵ The speaker asserted that if anyone was caught going into boycotted stores they would “break their [the boycott violator’s] damn necks.”⁴⁶ The Supreme Court reversed the decision, holding that the speech did not rise to the level of incitement⁴⁷ and bore a tangential relationship to any violence that may have befallen persons breaking the boycott.⁴⁸ The Court noted that the worst impact on the boycott violators was that their names were published in a NAACP newsletter to shame them.⁴⁹

In comparison, *Planned Parenthood* involved a Planned Parenthood affiliate that sued the proprietors of an anti-abortion website, “The Nuremberg Files,” for injunctive and compensatory relief.⁵⁰ The website consisted of “wanted” posters, listing the names and personal information of various abortion providers.⁵¹ The Ninth

³⁹ See *Whitney*, 274 U.S. at 357; *Gitlow*, 268 U.S. at 652; *Schenck*, 249 U.S. at 47.

⁴⁰ *Brandenburg*, 395 U.S. at 447.

⁴¹ *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

⁴² *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

⁴³ *Id.* at 891.

⁴⁴ *Id.* at 892.

⁴⁵ *Id.* at 902.

⁴⁶ *Id.*

⁴⁷ *Id.* at 915.

⁴⁸ *Claiborne Hardware*, 458 U.S. at 909.

⁴⁹ *Id.*

⁵⁰ *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1062 (9th Cir. 2002).

⁵¹ *Id.*

Circuit, sitting *en banc*, overturned the panel decision and reinstated the trial verdict, stating that although there was no evidence the speech directly brought about violence against those mentioned,⁵² the context in which the speech was presented raised significant concerns that the speech was designed to incite violent action.⁵³ In particular, the court noted that the site's administrators placed red X's over the posters of murdered providers and made grey the posters of providers who had ceased providing abortions.⁵⁴ ⁵⁵ Based on this evidence, the Ninth Circuit held that a reasonable listener could have considered the website as a threat to the providers and therefore the issuance of an injunction was warranted.⁵⁶

Terrorism is perhaps the most illustrative example of the internet's potential plenary incitement power. Today a party can simply post a video expounding any belief on the internet and the video will live forever, even after the speaker has died⁵⁷ or the content has been removed by its original host.⁵⁸

These stark examples demonstrate the challenges the internet poses to traditional Free Speech doctrines. Where a party once had to be within a certain physical radius of another to incite lawless activity,⁵⁹ such requirements no longer

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1066 (describing how during the period leading up to the litigation, several of the abortion providers—who were listed in the site's files—were murdered, and how subsequent to each of these murders, the site's administrators placed a red x over the face of the individual murdered).

⁵⁵ *But see id.* at 1090–91 (Kozinski, J. dissenting) (But neither Dr. Gunn nor Dr. Patterson was killed by anyone connected with the posters bearing their names. In fact, Dr. Patterson's murder may have been unrelated to abortion: He was killed in what may have been a robbery attempt five months after his poster was issued; the crime is unsolved and plaintiffs' counsel conceded that no evidence ties his murderer to any anti-abortion group. The record reveals one instance where an individual—Paul Hill, who is not a defendant in this case—participated in the preparation of the poster depicting a physician, Dr. Britton, and then murdered him some seven months later. All others who helped to make that poster, as well as those who prepared the other posters, did not resort to violence. And for years, hundreds of other posters circulated, condemning particular doctors with no violence ensuing. There is therefore no pattern showing that people who prepare wanted-type posters then engage in physical violence. To the extent the posters indicate a pattern, it is that almost all people engaged in poster-making were non-violent.).

⁵⁶ *Planned Parenthood*, 290 F.3d at 1088.

⁵⁷ Scott Shane, *Internet Firms Urged to Limit Work of Anwar al-Awlaki*, N.Y. TIMES (Dec. 18, 2015), http://www.nytimes.com/2015/12/19/us/politics/internet-firms-urged-to-limit-work-of-anwar-al-awlaki.html?smid=tw-nytimes&smtyp=cur&_r=1.

⁵⁸ Eugene Volokh, *Crime Facilitating Speech*, 57 STAN. L. REV. 1095, 1106 (2005).

⁵⁹ Shane, *supra* note 57.

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exist with the internet.⁶⁰ Rather, videos or statements made online exist forever and often evade removal because they may be posted to multiple websites.⁶¹ The absence of temporal and geographic constraints on the internet poses particular challenges to the incitement doctrine. Where a person once had to be proximately located to a listener, such a requirement no longer exists.⁶² Today the internet allows for global communication, as if the speech occurred in that instant and place.⁶³

C. *Libel and Defamation*

Libel and defamation are another category of potentially libelous speech. Defined as communication that tends to harm the reputation of another in the estimation of a larger community,⁶⁴ libel and defamation are particularly interesting when examined in context with the internet. It is important to acknowledge the distinct difference between the First Amendment protections afforded speech related to public figures, and topics, vis-à-vis those for private individuals.⁶⁵ The nature of our democratic government demands that speech on public issues, and public officials by extension, “be uninhibited, robust, and wide open.”⁶⁶ This Note is restricted to defamatory and libelous speech made against private individuals on non-public issues.

The seminal case on libel and defamation is *New York Times v. Sullivan*.⁶⁷ In *New York Times*, the Court held that the speech was protected by the First Amendment since a public official was the subject of the advertisement in question.⁶⁸ Though tailored toward public officials, the holding is widely applicable. The *New York Times* principle, that liability for defamation of a private individual on a private

⁶⁰ John Rothchild, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*, 74 IND. L.J. 893, 896 (1999).

⁶¹ Volokh, *supra* note 58; Shane, *supra* note 57.

⁶² Armijo, *supra* note 18.

⁶³ Rothchild, *supra* note 60.

⁶⁴ RESTATEMENT (SECOND) OF TORTS § 559.

⁶⁵ See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁶⁶ *Id.*; see also *Garrison v. Louisiana*, 379 U.S. 64, 82 (1964) (Black, J., concurring) (reasoning that the *New York Times* rule regarding the criticism of public officials extended to encapsulate criticism of the official conduct of public officials); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (holding that regardless of the disturbance caused by the speech of the defendant, because the speech did not cause a clear and present danger beyond public inconvenience, annoyance, or unrest, it was protected under the First Amendment); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (holding the conviction of defendant for mere assistance at a Communist Party meeting unconstitutional because though a state could intervene against abuse of free speech and assembly rights, they cannot curtail the rights themselves in so doing).

⁶⁷ *New York Times*, 376 U.S. at 254.

⁶⁸ *Id.*

matter does not abridge the First Amendment,⁶⁹ is particularly relevant to an analysis of public speech today.

The question arises: can one equate the damage from libel or defamation to the damage from a threat or incitement against an individual? Benjamin Franklin spoke most eloquently on the subject when he noted, “it takes many good deeds to build a good reputation, and only one bad one to lose it.”⁷⁰ As shown with threats made on the internet, it is often difficult, if not impossible, to distinguish between what is true and what is false.⁷¹

In the United States there is no right to reputation, but the damage and risks inherent to libel and defamation claims are still significant. The Boston Marathon bombing and the subsequent assailant manhunt provides a modern example. In the aftermath of the bombing, members of Reddit took it upon themselves to act as citizen “journalists” and expose the suspected identities of the bombing’s perpetrators.⁷² The haste with which these individuals undertook their mission did not reveal the true perpetrators’ identities, but instead wrongly identified individuals far removed from the bombing.⁷³

The anonymity the internet provides can destroy another’s reputation in mere moments.⁷⁴ On the internet, where ostracism and popular checks of the physical world are often replaced with frequent premature jumps to conclusions, a party can be libeled, defamed, and left without recourse for reparation. Such was the case with the family of Sunil Tripathi, who was falsely identified by online sleuths as one of the perpetrators of the Boston Marathon bombing.⁷⁵ Mr. Tripathi, a Brown University student of Indian ethnicity, was identified as one of the perpetrators because of his appearance and the fact he had been missing since March of that year.⁷⁶ This misidentification of Mr. Tripathi, later found deceased in the Providence

⁶⁹ *Snyder v. Phelps*, 562 U.S. 443 (2011) (holding the content of the speech of protestors at a military funeral to be protected under the First Amendment because it highlighted issues on matters of public import).

⁷⁰ Benjamin Franklin, source unknown.

⁷¹ McCann, *supra* note 27.

⁷² Dave Lee, *Boston Bombing: How Internet Detectives Got It Very Wrong*, BBC NEWS (Apr. 19, 2013), <http://www.bbc.com/news/technology-22214511>; Lalit Kundani, *When the Tail Wags the Dog: Dangers of Crowdsourcing Justice*, NEW AM. MEDIA (July 27, 2013), <http://newamericamedia.org/2013/07/when-the-tail-wags-the-dog-dangers-of-crowdsourcing-justice.php>.

⁷³ Kundani, *supra* note 72.

⁷⁴ Schwartz, *supra* note 7, at 414.

⁷⁵ Lee, *supra* note 72; Kundani, *supra* note 72.

⁷⁶ Kundani, *supra* note 72.

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River, led to death threats being made against his sister and heartbreak for his loved ones.⁷⁷

II. LIABILITIES OF THIRD-PARTY ISPs UNDER CURRENT STATUTES

This section analyzes the current legal framework determining third-party ISP liability for their user's activities. Current legislative enactments reflect a policy that encourages the development of technologies and the preservation of free markets and unfettered access.⁷⁸

Considering these policy justifications, it is of little surprise that current law provides broad protections for ISPs against liability for user activities.⁷⁹ The most significant legislative action is Subsection C of § 230 under Title 47 of the United States Code. Under § 230, no service provider may be held liable for their users activities as long as the ISP acts in good faith by restricting access to, or censoring the availability of, offensive materials.⁸⁰ This section is reinforced by Title 47, United States Code § 512, which limits liability for materials posted online.⁸¹ As with § 230, § 512 bars liability against ISPs unless particular requirements are met.⁸² These sections have generally been construed broadly to protect ISPs from third-party liability.⁸³ Courts have held that what distinguishes liable and non-liable ISP action is the material service provided by that entity.⁸⁴

When considering ISP liability, courts examine whether the entity is passively displaying the content or whether it created, developed, or edited the content.⁸⁵ As

⁷⁷ *Id.*

⁷⁸ *See* 47 U.S.C. §§ 230, 512 (2012).

⁷⁹ *Id.* § 230(c).

⁸⁰ *Id.* § 230(c)(2).

⁸¹ *Id.* § 512.

⁸² *Id.* § 512(c)(1)(A)–(C).

⁸³ *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 489 F.3d 921, 925 (9th Cir. 2007), *reh'g granted*, 521 F.3d 1157 (9th Cir. 2008) (holding that although defendant was immune under the Communications Decency Act for mere publication of information, they were not immune for publishing material of which they were the content provider of as a result of their creation of the questionnaires in question).

⁸⁴ *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (holding that because a social media site does not create or develop content when it merely provides a neutral means for a third party to post the information, the site is protected from liability).

⁸⁵ *Id.*

such, neither serving as a conduit for publication⁸⁶ nor merely editing for grammar⁸⁷ creates liability. However, in circumstances where the ISP makes the affirmative decision to publish⁸⁸ or create the dynamic content underlying the publication, it may be held liable.⁸⁹ Such determinations of liability are necessarily made on a case-by-case basis.⁹⁰

It is difficult to establish liability against third-party ISPs due to the broad policy-based commitment to the free and unfettered development of the internet. The decision that the internet is a public utility changes the calculus for determining liability.

III. PUBLIC UTILITIES AND THE EFFECT ON LIABILITY

In an April 2015 ruling,⁹¹ the FCC reclassified the internet as a public utility, subject to the same regulations as every other telecommunications service.⁹² This determination, specifically the FCC's assertion that ISP providers are equivalent to common carriers,⁹³ raises significant questions about the continuing viability of the 1990s free growth policies articulated in the ISP liability framework. Currently, there is no uniform national standard for determining liability of public utilities.⁹⁴

Traditionally, states regulate public utilities with limited federal oversight, although the role of the federal government is growing.⁹⁵ This section discusses the

⁸⁶ *Fair Hous. Council*, 489 F.3d at 925.

⁸⁷ *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (holding that § 230 immunity extends to operators of websites unless such operator engages in some "active role" in supplying material for publication).

⁸⁸ *Klayman*, 753 F.3d at 1359.

⁸⁹ *Fair Hous. Council*, 489 F.3d at 925.

⁹⁰ *Id.*

⁹¹ Protecting and Promoting the Open Internet, 80 Fed. Reg. 19738 (Apr. 13, 2015) (to be codified at 47 C.F.R. pt. 1, 8, 20).

⁹² *Id.*

⁹³ *Id.* §§ 274, 364.

⁹⁴ Ari Peskoe, *A Challenge for Federalism: Achieving National Goals in the Electricity Industry*, 18 MO. ENVTL. L. & POL'Y REV. 209, 241 (2011).

⁹⁵ *Id.*; Robert L. Swartwout, *Current Utility Regulatory Practice from a Historical Perspective*, 32 NAT. RESOURCES J. 289, 305 (1992); see also generally James W. Moeller, *Requiem for the Public Utility Holding Company Act of 1935: The "Old" Federalism and State Regulation of Inter-State Holding Companies*, 17 ENERGY L.J. 343 (1996).

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test used for distinguishing when a utility is operating as a state actor, particularly as a common carrier, or when the utility is a private entity.

A common carrier is a commercial entity providing service to the public for a fee.⁹⁶ Under current law, common carriers have a duty to exercise “the utmost skill, reasonable care, and diligence” in providing customers service.⁹⁷ Stemming from English common law, this standard of care reflects the assumption that serving the public as a common carrier is a privilege entailing great responsibility and a high degree of care.⁹⁸

A public utility may be liable for offenses typically only reserved to the state.⁹⁹ ¹⁰⁰ Under 42 U.S.C. § 1983, a person may only file suit for the abridgement of constitutional rights against state actors.¹⁰¹ As common carriers, public utilities may be liable as state actors if there is a sufficient nexus between the carrier’s activities and the state’s traditional role.¹⁰² Liability arises when the utility’s conduct exhibits such a governmental role that the actor becomes the state.¹⁰³ Conversion is

⁹⁶ BLACK’S LAW DICTIONARY (10th ed. 2014).

⁹⁷ *Squaw Valley Ski Corp. v. Superior Court*, 3 Cal. Rptr. 2d 897, 899 (Cal. Ct. App. 1992).

⁹⁸ *Id.*

⁹⁹ *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (holding that the decision of a private insurer to suspend payment pending independent review did not constitute state action).

¹⁰⁰ At the same time, it is also necessary to acknowledge that public utilities, if determined to be state actors, may be entitled to some degree of sovereign immunity. *Valley Title Co. v. San Jose Water Co.*, 57 Cal. App. 4th 1490, 1495 (1997). Sovereign immunity, in its most rigorous form, shields the government from civil liability for its discretionary actions. BLACK’S LAW DICTIONARY (10th ed. 2014). Though no all-inclusive rule exists for determining when an actor enjoys qualified sovereign immunity, court holdings give some indication. Generally speaking, recipients of qualified immunity are immunized from civil liability so long as they operate within the scope of their authority and are not wanton, or grossly negligent, in their conduct. *James v. Jane*, 282 S.E.2d 864, 869 (Va. 1980). In the absence of further detail it is difficult to state explicitly where the sovereign immunity bestowed upon these ISPs would end. This is because there is no means that will allow us to elicit the scope of authority contemplated for ISPs. For the purposes of this examination, however, we can reasonably assume that the authority contemplated extends to encapsulate many of the regulatory activities usually vested in the State. Under this assumption, we can reasonably conclude that the ISP would lose its immunity when it exceeds the regulatory function permitted it by the state and acts contrary to the limitations imposed upon it. This conclusion allows the assertion that, for the purposes of this note at least, an ISP would be protected from civil liability so long as they did not take actions inconsistent with the standards set forth for the operation of their services as discussed in section VII.B *infra*.

¹⁰¹ 42 U.S.C. § 1983 (2012).

¹⁰² *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 52.

¹⁰³ *Id.*

dependent upon the coercive power exerted by the state and the state's encouraging the entity to act in a certain way.¹⁰⁴

These concerns are relevant due to the ISPs' role in regulating the internet, ISPs almost plenary power in determining what is and is not suitable for internet transmission, and the little recourse that exists for challenging such decisions.¹⁰⁵ The determination that an ISP is subject to common carrier liability raises concerns over whether the broad statutory protection and ISP immunity remains viable. It also raises separation of power concerns regarding the supremacy of legislative acts over bureaucratic regulations.¹⁰⁶

IV. GENERAL ISP STANDARDS AND PROCEDURES FOR THE REMOVAL OF CONTENT

Prior to analyzing the continuing viability of current third-party liability doctrine, it is necessary to examine the standards ISPs apply in making removal decisions, the repercussions of posting removable content, and the societal role ISP standards imply.

A close analysis of the general standards ISPs use in making determinations indicates broad plenary power.¹⁰⁷ Under these standards, ISPs may remove speech-content if the ISP determines that such speech is harmful, offensive, obscene, indecent, libelous, defamatory, or otherwise unlawful either civilly or criminally.¹⁰⁸

At first glance, without considering the inherent nuance or policy questions that exist, the removal of the content in these enumerated categories may appear reasonable. However, closer examination reveals that when ISPs find removable

¹⁰⁴ Real Estate Bar Ass'n for Mass. v. Nat'l Real Estate Info. Servs., 608 F.3d 110, 123 (1st Cir. 2010).

¹⁰⁵ Universal Commc'n. Sys. v. Lycos, Inc., 478 F.3d 413 (1st Cir. 2007) (holding that an internet message board operator was immune from liability under the Communications Decency Act for postings made by third party subscribers).

¹⁰⁶ Save Our Valley v. Sound Transit, 335 F.3d 932, 937 (9th Cir. 2003) (holding that a Department of Transportation disparate-impact regulation did not create an individual federal right that could be enforced under § 1983).

¹⁰⁷ COMCAST AGREEMENT FOR RESIDENTIAL SERVICES (2016), <http://www.xfinity.com/Corporate/Customers/Policies/SubscriberAgreement.html> [hereinafter COMCAST]; VERIZON ONLINE TERMS OF SERVICE (2016), http://www.verizon.com/about/sites/default/files/Internet_ToS_01172016_v16-1_Updated%201.13.2016.pdf [hereinafter VERIZON].

¹⁰⁸ COMCAST, *supra* note 107.

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content, the lack of explicit standards and definitions raises potentially disconcerting outcomes—i.e. chilling of speech, censorship, etc.¹⁰⁹

Consider the following hypothetical. An aspiring musical artist desires to post “lyrics” on a social media site as a means of gathering a musical following.¹¹⁰ These lyrics are graphic, violent in nature, and make passing reference to another individual being the victim of this violence. At the same time as this is occurring, the “creator” of the “lyrics” is going through a contentious divorce with a party who bears some resemblance to this individual mentioned in the content to be posted. Does the “artist” post the “lyrics”?

Whether this party chooses to post the “lyrics” can largely be seen as the product of the weighing of three considerations: the consequences of this action, the ability to convey the desired message effectively through alternative means, and whether the “creator” is able to realize the stated goal efficiently through alternative means. It is at this point that the failure to delineate when content may or may not be removed through explicit, or at minimum specific, standards and guidelines raises the aforementioned possibility of disconcerting outcomes. This is because it introduces uncertainty to the equation. In the absence of clear standards and guidelines, individuals will lack the confidence to make choices regarding whether or not to post certain materials for fear of any accompanying adverse consequences, the very definition of censorship and chilling of speech.¹¹¹

Further complicating this process is the lack of a duty for ISPs to monitor posted content under the terms of service.¹¹² This duty lies with the content’s “publisher”¹¹³ and those who observe the speech.¹¹⁴ It is therefore of little surprise that ISPs are dependent upon third-party observers to report potentially removable content to the ISP for consideration.

The internet’s breadth significantly impairs an ISP’s ability to monitor the content transmitted through the ISP.¹¹⁵ What is more surprising given American free

¹⁰⁹ *Id.*

¹¹⁰ *See, e.g.,* *Elonis v. United States*, 135 S. Ct. 2001 (2015).

¹¹¹ *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

¹¹² *VERIZON, supra* note 107.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Mark Konkel, *Internet Indecency, International Censorship, and Service Providers’ Liability*, 19 N.Y.L. SCH. J. INT’L & COMP. L. 453, 476 (2000); Lateef Mtima, Symposium, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97 n.18 (2009).

speech principles,¹¹⁶ is that ISPs have sole discretion to make suitability determinations over what is published and removed.¹¹⁷ The sole discretion reserved to ISPs reduces the corporation's legal obligation to adhere to their own policies regarding content removability.¹¹⁸ Content may therefore be removed even if a court found that the speech was protected.¹¹⁹ Further compounding the quandary of the discretionary power of an ISP is the power to sanction speakers for their speech beyond the removal of content.¹²⁰ As set forth in most ISP's terms of service, an ISP may terminate or suspend the speaker's ability to access the internet through that ISP.¹²¹ As private organizations, ISPs have the right to control who uses their services. However, the question is whether the standards defined by ISPs are permissible by a common carrier provider of a public utility.

V. ISP LIABILITY IN LIGHT OF PUBLIC UTILITY AND COMMON CARRIER DESIGNATION

Prior to considering the impact of recent FCC regulations on third-party ISP immunity, it is necessary to note that an administrative agency cannot create a cause of action when Congress has spoken on the contrary.¹²² Considering this fundamental principle of constitutional law, the immunizing shield continues to exist, although the calculus for shielding ISP's from liability may change.

First is a direct analysis of the question by examining whether ISP's activities are equivalent to a state's activities. Second, is a discussion of the larger question of whether the FCC designation of the internet as a public utility, and ISPs as common

¹¹⁶ See *supra* Section I.

¹¹⁷ COMCAST, *supra* note 107; VERIZON, *supra* note 107.

¹¹⁸ VERIZON, *supra* note 107.

¹¹⁹ *Id.*

¹²⁰ COMCAST, *supra* note 107; VERIZON, *supra* note 107.

¹²¹ *Id.*

¹²² See generally *Save Our Valley v. Sound Transit*, 335 F.3d 932 (9th Cir. 2003); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) ("They must reject administrative constructions of the statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."); *SEC v. Sloan*, 436 U.S. 103, 117–18 (1978) ("[B]ut the courts are the final authorities on issues of statutory construction, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'") (quoting *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968)) (internal citations omitted); *NLRB v. Brown*, 380 U.S. 278, 292 (1965) ("[T]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.") (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965)) (internal punctuation omitted).

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carrier providers, contradicts congressional policy determinations in various federal statutes.

A. *State Action*

As discussed in Section III, whether a public utility has become a state actor depends on the nexus between the private actor's activities and the traditional role of the state.¹²³ A nexus is determined by asking (1) whether the state is affecting significant coercive power for the utility to act in a certain way,¹²⁴ and (2) whether the state has strongly encouraged the utility to act in the way presented.¹²⁵ It is arguable ISPs have assumed a role traditionally exercised by the state based on the ISP's removal power.

It has traditionally been the government's role to arbitrate justice and determine liability.¹²⁶ Whether removal of content stems from the complaint of a victim or the report of an unaffiliated third-party, the fundamental realization is constant: the ISP is undertaking a traditionally governmental role by remedying wrongs committed against others. One example of this is with *Planned Parenthood*.¹²⁷ In *Planned Parenthood*, described *supra*, the original ISP removed the offending site from the internet because of concerns regarding the propriety of the site's content.¹²⁸

The site's removal suggests an assumption of the ISP's role as a state actor. However, a closer examination of the breadth of the ISP's authority demonstrates the inherent limitations on an ISP's power. While the ISP is closing one channel of the content's presentation, the ISP's ability to limit the content's dissemination is wholly limited to the internet services *they* provide.¹²⁹ As such, even with the removal of content by an ISP, the speaker can still promulgate their speech on the internet through a different ISP.¹³⁰

¹²³ *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999).

¹²⁴ *Real Estate Bar Ass'n for Mass. v. Nat'l Real Estate Info. Servs.*, 608 F.3d 110, 123 (1st Cir. 2010).

¹²⁵ *Id.*

¹²⁶ Michael L. Rustad, Symposium, *Does the World Still Need United States Tort Law? Or Did It Ever?: Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 486 (2011); Andrew Carlon, Note, *Entrapment, Punishment, and the Sadistic State*, 93 VA. L. REV. 1081, 1122 (2007).

¹²⁷ *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

Compare the ISP's power to that of other, traditional, public utilities. Unlike in the case of, for instance, an electric company,¹³¹ where it would be difficult for a party deprived of access to one company's services to receive alternative access given the monopolistic nature of electric companies,¹³² this problem does not exist in relation to ISPs. Rather, even where an individual might lose access to the internet because of the determination of one ISP, the individual is not entirely stymied in this context because of the presence of alternatives.¹³³

Further, it is difficult to assert that an ISP is assuming a sufficiently significant governmental role when one considers the two-prong test set forth for such determinations.¹³⁴ The test, set forth in *Moose Lodge No. 107 v. Irvis*,¹³⁵ and clarified in *Jackson v. Metropolitan Edison Co.*¹³⁶ and *American Manufacturers Mutual Insurance Co. v. Sullivan*, asks whether the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice

¹³¹ See *Dunlap v. PECO Energy Co.*, 1996 U.S. Dist. Lexis 15922 (E.D. Pa. 1996) (holding that an alleged conspiracy between PECO and its employees did not constitute "state action").

¹³² *Id.*; see *Yeager's Fuel v. Pa. Power & Light Co.*, 1992 U.S. Dist. Lexis 15260, 11 (E.D. Pa. 1992) (holding that the utility was immune under state action immunity for methods by which it increased its share of the home heating market).

¹³³ The natural question that arises in response to this is: since there are not an unlimited number of ISPs, eventually the removed individual will run out of ISPs to use for access; therefore, do ISPs in fact assume the same state actor role as other, traditional public utilities? There are two key factors that cause the answer to this question to be negative. The first relates to the inherent attenuation required for an affirmative answer to this query. In order to answer affirmatively, one must go through each and every available ISP in a given place, and be banned by that provider. At a certain point, the number of ISPs required to reach the affirmative dilutes the individual ISPs power to such an extent as to force a negative response.

Second, the negative answer is required by the structure of the entities involved. In the traditional utility context there is but one, possibly two, entities available for the provision of services. Jeffrey Knappy, Comment, *Effective State Regulation of Energy Utility Diversification*, 136 U. PA. L. REV. 1677 n.3 (June 1988); Charles G. Stalon & Reinier H.J.H. Lock, *State-Federal Relations in the Economic Regulation of Energy*, 7 YALE J. ON REG. 427, 437-38 (Summer 1990); see PAUL J. GARFIELD & WALLACE F. LOVEJOY, PUBLIC UTILITY ECONOMICS 15-19 (1964) (discussing historical understandings of the natural monopoly characteristics of public utilities); see also PAUL L. JOSKOW & RICHARD SCHMALENSSEE, MARKETS FOR POWER: AN ANALYSIS OF ELECTRIC UTILITY DEREGULATION 33 (1983) ("Traditionally the production of electric power has been considered to have pervasive natural monopoly characteristics."). This is contrasted with the ISP context where in any given place there is likely to be a multitude of available providers. *Broadband Provider Service Area*, NAT'L BROADBAND MAP, <http://www.broadbandmap.gov/provider> (last updated June 30, 2014). As with the prior factor, the power of any single ISP is diluted to such an extent as to require the negative response.

¹³⁴ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974); see also *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166 (1978).

¹³⁵ *Moose Lodge*, 407 U.S. at 176.

¹³⁶ *Jackson*, 419 U.S. at 351.

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must in law be deemed to be that of the state.”¹³⁷ The state’s approval or acquiescence to the assumption of such a role is insufficient to find state action.¹³⁸ Rather, the entwinement of the function performed by the private entity and the traditional role of the state requires the actions of the private entity be effectively those of the state. Applying this test, nothing in the activities discussed, or the circumstances surrounding the activities of the state or the ISP, is indicative of a coercive force or the state’s encouragement to assume the role traditionally exercised by the state.¹³⁹

One need look no further than *Planned Parenthood* to see the veracity in the statement. Though the state delegates some of its regulatory role to ISP’s, the significant balance of the traditional powers of the state are reserved. Although the ISP removed the site in *Planned Parenthood*,¹⁴⁰ such removal was not binding on the speaker, who continued to exercise its speech through a different ISP.¹⁴¹ It was only a federal district court’s injunction that ultimately removed and permanently enjoined the speech.¹⁴²

It is inevitable that the declaration of the internet as a public utility and ISPs as common carriers affects some change. This change is limited to the ISP’s duty of care.¹⁴³ As discussed in Section III, *supra*, a common carrier holds a higher duty of care.¹⁴⁴ The FCC’s reclassification is a contradiction of Congress’s will and, as such, impermissible. Subsection B of this section examines this more closely.

B. Common Carrier Designation

It is a fundamental principle of constitutional law that neither the act of overturning or modifying Congress’s intent through regulations¹⁴⁵ nor the creation of a new cause of action through the Executive or the Judiciary are constitutionally

¹³⁷ *Id.*

¹³⁸ *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 52.

¹³⁹ *Id.*

¹⁴⁰ *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

¹⁴¹ *See id.*

¹⁴² *Id.*

¹⁴³ Protecting and Promoting the Open Internet, 80 Fed. Reg. 19738 (Apr. 13, 2015) (to be codified at 47 C.F.R. pt. 1, 8, 20).

¹⁴⁴ *Squaw Valley Ski Corp. v. Superior Court*, 3 Cal. Rptr. 2d 897, 899 (Cal. Ct. App. 1992).

¹⁴⁵ *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

permissible.¹⁴⁶ The FCC's reclassification of the internet as a public utility and ISPs as common carriers appears to violate this principle. While the regulation does not explicitly create a new cause of action,¹⁴⁷ there are concerns as to whether the regulations implicitly overturn Congress's intent.

In § 230(c), Congress stated the policy rationale that the internet must be free from liability for users' activities in order for it to develop.¹⁴⁸ Imposition of the common carrier designation raises concerns regarding the continuing viability of this rule due to the higher degree of care. Designating ISPs as common carriers effectively places them in the same position as telephone companies and other telecommunications providers.¹⁴⁹ By lowering the bar for ISP liability, the regulations have implicitly overturned Congress's desire. Under existing statutory law discussed in Section II, *supra*, it is necessary to demonstrate the ISP's direct role in creating or developing the content at issue to establish ISP liability.¹⁵⁰

The policy recognition embodied in current law relies on the principle that the internet is expansive and contains so much content that requiring ISP's to monitor all content is impossible. Therefore, imposing liability for the users' actions would have a deleterious effect on the continuing development and growth of the internet.¹⁵¹ This is because of the cost-benefit implications of such an imposition of liability. Because an ISP is unable to presently monitor all of the content being conveyed over their services, the potential imposition of liability changes the incentive focus for ISPs from continuing their innovation and development to devoting more resources to making sure they are not missing anything for which they might be held liable. In effect, the imposition of liability reduces the incentive to take risks in favor of protecting oneself from potential liability.

The duty of care imposed upon common carriers seemingly contradicts this purpose by demanding that ISPs exercise greater care in monitoring and regulating their services. Therefore, the FCC's regulations holding ISP's to the same standards as other common carriers contradicts Congress's intent. Without congressional

¹⁴⁶ See generally *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Save Our Valley v. Sound Transit*, 335 F.3d 932 (9th Cir. 2003).

¹⁴⁷ *Protecting and Promoting the Open Internet*, 80 Fed. Reg. 19738 (Apr. 13, 2015) (to be codified at 47 C.F.R. pt. 1, 8, & 20).

¹⁴⁸ 47 U.S.C. § 230(b)(1) (2012).

¹⁴⁹ *Protecting and Promoting the Open Internet*, 80 Fed. Reg. 19738 (Apr. 13, 2015) (to be codified at 47 C.F.R. pt. 1, 8, 20).

¹⁵⁰ 47 U.S.C. § 230(c) (2012).

¹⁵¹ See generally *id.* § 230(a)–(b).

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authority in support of this change, it is difficult to foresee how liability might be attached for activities outside of those explicitly mentioned within the relevant statutes solely through agency determinations.

VI. CRITIQUE OF THE CONTINUING NECESSITY OF THE PROTECTIONIST IMMUNITY FOR ISPS

The current ISP liability framework is a highly protective doctrine, and underlying it is the assumption that ISP's need to operate absent the fear of potential liability for their actions in order to effectively develop the internet in a free and unfettered way.¹⁵² The continuing growth of the internet is desirable; however, whether this protectionist policy remains a desirable starting point is a question that requires answering.

With the pervasiveness and omnipresent power of the internet, it is realistic to assert that benefits from operating under this protectionist model no longer outweigh the detrimental effects. This section focuses its attention on free speech and due process, and the continuing viability of the present liability framework.

A. Free Speech

The Arab Spring demonstrated the internet's power to affect changes in society.¹⁵³ Its ability to allow dissident and disenfranchised voices to express their opinions to groups of people is an important interest to protect.¹⁵⁴ However, it is questionable whether the current ISP liability framework adequately protects this fundamental American interest.

¹⁵² *Id.*

¹⁵³ See Philip N. Howard & Muzammil Hussain, *Digital Media and the Arab Spring*, 22 J. DEMOCRACY, No. 3, 2011, 35–48, <http://philhoward.org/digital-media-and-the-arab-spring/>; Ekaterina Stepanova, *The Role of Information Communication Technologies in the "Arab Spring": Implications Beyond the Region*, PONARS EURASIA (May 2011), http://www.gwu.edu/~ieresgwu/assets/docs/ponars/pepm_159.pdf; G.L., *The Arab Spring's Online Backlash*, THE ECONOMIST (Mar. 29, 2012), <http://www.economist.com/blogs/newsbook/2012/03/internet-middle-east>.

¹⁵⁴ See Matthew Mazzotta, Note, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. REV. 833, 837 (2010); Anita L. Allen, *Symposium: Privacy Jurisprudence as an Instrument of Social Change First Amendment Privacy and the Battle for Progressively Liberal Social Change*, 14 U. PA. J. CONST. L. 885, 901 (2012).

The Constitution protects speech as long as it does not fall into specific categories enumerated in First Amendment jurisprudence.¹⁵⁵ ¹⁵⁶ The principle in *New York Times* demands that speech be “robust, uninhibited, and wide open.”¹⁵⁷ This is significant because it goes to the foundations of what society values and the First Amendment’s purpose.¹⁵⁸

It is indisputable that the fundamental purpose of the First Amendment is to foster the democratic process.¹⁵⁹ The idea of a vibrant democratic system comes from the ability of members of society to realize their potential¹⁶⁰ and develop themselves as they see fit¹⁶¹—known as “self-realization.”¹⁶² At its core, self-realization is the belief that in order to develop in the way we desire, we must have the ability to communicate freely.¹⁶³

It is important to remember self-realization is not actualized solely by protecting speakers.¹⁶⁴ Rather, self-realization also is a significant consideration in whether ISP standards provide sufficient protection to speech victims. It is settled that regardless of one’s self-revelatory interest, no one has the plenary power to say whatever one wants.¹⁶⁵

This is particularly true when protecting other persons. Courts have consistently reaffirmed that private dealings of a non-public person on matters outside of public interest enter into the public sphere and are ripe for public disclosure upon the sole discretion of the private person whose private information is being disclosed.¹⁶⁶ An ISP’s ability to completely monitor publication of private

¹⁵⁵ James Weinstein, *Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply*, 97 VA. L. REV. 633, 636 (2011).

¹⁵⁶ For a discussion of some of the areas of speech that the courts have deemed to exist outside of the protections of the First Amendment, see *supra* Section I.

¹⁵⁷ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

¹⁵⁸ Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) [hereinafter Redish, *Value of Free Speech*].

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

¹⁶³ *Id.*

¹⁶⁴ Allen, *supra* note 154, at 899.

¹⁶⁵ *Id.*

¹⁶⁶ Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 199–200 (1890).

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information is nonexistent, the internet is simply too large.¹⁶⁷ However, the absence of a consistent, defined scheme for determining the balance between free speech and privacy is skewed and results in undermining the self-realization principle.¹⁶⁸

Failing to set specific and detailed standards for ISP determinations limits the ability of speakers to speak as they so desire. Moreover, one may argue the generalized guidelines ISP's use chill speech.¹⁶⁹ This is problematic when considering the fundamental role the internet plays in voicing dissident and disenfranchised parties.¹⁷⁰

Writing in 1891, a full one-hundred years before the commercial availability of the internet, the future Justice Brandeis saw potential pitfalls within rapidly changing technologies.¹⁷¹ Brandeis focused his critique on the way in which technological growth effected fundamental privacy rights.¹⁷² Privacy exists at the intersection of the ability to freely associate, without external interference, and one's ability to speak anonymously.¹⁷³ Since such speech is under the protection of anonymity and association, dissident beliefs, dissenting views, and other challenging perspectives are able to advance.¹⁷⁴ ISP policies create a chilling effect that stymies the robust, uninhibited debate the First Amendment demands be available to all members of society.

Undoubtedly, ISP's have a significant interest in protecting their users and their own public perception. As such, it is understandable why ISP's desire to have sole discretion in removing offensive content. However, it is a principle of American law

¹⁶⁷ See *supra* note 115.

¹⁶⁸ See *Hess v. Indiana*, 414 U.S. 105 (1973); *Cohen v. California*, 403 U.S. 15 (1971).

¹⁶⁹ The nature of the "rule-making" function when performed by a private organization is inherently different from when that same function is performed by a governmental entity. In the case of a governmental entity, there exists the ability to effectuate recourse against the "rule-making" entity—in this instance by voting against that party in a forthcoming election. The ability to realize some recourse through popular reaction is absent when the "rule-making" function is performed by a private organization. A private organization, by its nature, is isolated from such reaction and is not required to make its decisions in the same transparent manner required of public institutions. As such, in an area such as free speech, the ability of these private organizations, such as ISPs, to inhibit speech without any real potential for recourse leads to the significant questions pondered herein. For discussion of this topic, see Henry H. Perritt, Jr., *Towards a Hybrid Regulatory Scheme for the Internet*, 2001 U. CHI. LEGAL F. 215, 234.

¹⁷⁰ Allen, *supra* note 154; Mazzotta, *supra* note 154.

¹⁷¹ Warren & Brandeis, *supra* note 166.

¹⁷² *Id.*

¹⁷³ Allen, *supra* note 154, at 899.

¹⁷⁴ *Id.* at 901; Mazzotta, *supra* note 154.

that speech is removable only when there is a compelling reason for doing so.¹⁷⁵ Philosopher Noam Chomsky argues that if we do not tolerate the speech that we despise, we do not believe in the freedom of expression at all.¹⁷⁶

The internet holds itself out as the greatest forum for the expression of ideas and speech ever created.¹⁷⁷ However, the ability ISPs have to silence speech they view as inappropriate undermines this argument and invokes questions of whether ISP's should be allowed to continue removing content without facing any recourse.

B. Due Process

The implications of the aforementioned legal frameworks with respect to internet content and free speech are significant. Chilled speech, censorship of ideas uncouth to the corporate mentality of an ISP, and the silencing of dissident and disenfranchised voices are just some of the potential implications of this framework. However, free speech is not the only constitutional concern. An ISP's power to remove any content at its own discretion also implicates due process.¹⁷⁸

Unlike a governmental entity, a private organization is far more susceptible to market forces and is more willing to take prophylactic measures to remedy a problem than the government.¹⁷⁹ ISPs are more likely to dispose of troublemakers because of the effect their actions can have on the public reputation of the ISP.¹⁸⁰ Two examples of due process concerns are the discretionary power ISP's possess and the standards themselves. As discussed *supra* in Subsection A of this Section, these interests chill speech because of their ambiguous and general nature.

It is a fundamental principle of American jurisprudence that decisions implicating a person's liberty, property, or other rights may be appealed.¹⁸¹ A

¹⁷⁵ Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 149 (1981) [hereinafter Redish, *Content Distinction*]; *Cohen*, 403 U.S. at 24; *Garrison*, 379 U.S. at 82; *Hess*, 414 U.S. at 108; Redish, *supra* note 158.

¹⁷⁶ Interview by John Pilger with Noam Chomsky (Nov. 25, 1992) (transcript available at jmm.aaa.net.au/articles/14177.htm).

¹⁷⁷ Paul DiMaggio et al., *Social Implications of the Internet*, 27 ANN. REV. SOCIOLOGY 307 (2001), http://www.jstor.org/stable/2678624?seq=1#page_scan_tab_contents.

¹⁷⁸ Chris Montgomery, Note, *Can Brandenburg v. Ohio Survive the Internet and the Age of Terrorism?: The Secret Weakening of a Venerable Doctrine*, 70 OHIO ST. L.J. 141, 166 (2009).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Chambers v. Florida*, 309 U.S. 227, 237 (1940) (holding that "the forfeiture of . . . li[fe], liberties or property" by an individual accused of wrongdoing may only come about if the "procedural safeguards of due process have been obeyed").

limitation of the ability to appeal an ISP determination violates this principle. What distinguishes this context from others is the character of the right implicated.

Free speech is fundamental to American society.¹⁸² The ability to communicate ideas to others, even when offensive or unpopular, is at the core of our system.¹⁸³ Further, it is a fundamental principle of due process that before an individual can be liable for their actions, notice of the standards by which an entity judges their activity is required.¹⁸⁴ Therefore, the lack of appellate opportunities regarding speech determinations, as well as the inexact standards for the removal of content, has a significant, deleterious effect on our democratic system because it constricts the ability of individuals to vindicate their right to speak freely by limiting their recourse.¹⁸⁵

It is clear from the prior framework analysis herein, that due process concerns are relevant to this overall analysis. In the absence of standards specifically enumerating the limitations of the speaker's conduct, the speaker must refrain from making statements that may tangentially fall under the general standards ISP's apply. What relevance such activities have in this context—considering that an ISP is not a state actor for § 1983 purposes and is unlikely immune from any further liability beyond that already imposed—remains in question.¹⁸⁶ However, this does not preclude the possibility that a modification of current doctrine is warranted due to the nature of the internet.

VII. PROPOSED FRAMEWORK

The proposed framework relies on ISPs being subjected to a higher standard than other private companies due to the nature of their services.^{187 188} This framework

¹⁸² Kyle A. Mabe, Note, *Long Live the King: United States v. Bagdasarian and the Subjective-Intent Standard for Presidential "True-Threat" Jurisprudence*, 43 GOLDEN GATE U. L. REV. 51, 54 (2013).

¹⁸³ See generally *Cohen v. California*, 403 U.S. 15, 26 (1971); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964); *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

¹⁸⁴ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

¹⁸⁵ *Allen*, *supra* note 154.

¹⁸⁶ See *supra* Section V.

¹⁸⁷ *Squaw Valley Ski Corp. v. Superior Court*, 3 Cal. Rptr. 2d 897 (Cal. Ct. App. 1992).

¹⁸⁸ This framework also relies on a second premise. In the FCC's determination that the Internet is a public utility, the FCC stated that the Internet's purveyors should be regulated in the same manner as any other telecommunications common carrier. This is significant because under current Supreme Court jurisprudence all Americans have a right to make a claim of legitimate entitlement to telecommunications access. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). The application of the Court's

balances the individual users' rights on the internet with an ISP's ability to monitor their services. This framework creates a public-private partnership¹⁸⁹ regulating internet speech in a manner consistent with constitutional principles. The schema advocated herein is comprised of three component parts: (1) enumerated standards for the removal of content,¹⁹⁰ (2) notice and removal requirements,¹⁹¹ and (3) the ability to appeal ISP determinations to independent bodies. This schema obviates constitutional and remedial concerns.

A. Amendment of the U.S. Code

This framework requires that Congress amend the U.S. Code, particularly § 230 and § 512, to reduce ISP liability because neither a regulation promulgated by an administrative agency¹⁹² nor a decision of a court¹⁹³ may overturn Congress's intent and create a new cause of action.¹⁹⁴ An ISP's liability imposed under this construction would not change the current congressional plan in a significant way. Rather, the proposed amendment would allow for filing for injunctive relief against an ISP if a party has exhausted remedies set forth in the framework. The amended

holding that Americans are entitled to telecommunications access has led to the elucidation of a general framework under which telecommunications organizations operate. This generalized framework can be seen as providing a backbone for this analysis.

¹⁸⁹ Perritt, *supra* note 169.

¹⁹⁰ Telecommunication companies are not the censors of morals, whether public or private. As such, courts have inferred that these companies do not have the implicit right to regulate the conduct of those who seek their services, regardless of the nature of the content produced. Rather, telecommunications companies are only permitted to censor speech by their users under certain specific, extraordinary, and compelling circumstances delineated prior to the removal. *See generally* Von Meysenbug v. W. Union Tel. Co., 54 F. Supp. 100 (S.D. Fla. 1944); Mason v. W. Union Tel. Co., 52 Cal. App. 3d 429, 435 (Cal. Ct. App. 2d App. Dist. 1975).

¹⁹¹ Footnote 188 *supra* notes that as a result of the Supreme Court's holding in *Board of Regents v. Roth*, the courts formulated general guidelines for telecommunication companies. One of the requirements set forth by the courts in these cases relates to the notification of persons prior to the cancellation of their services. Under the various court holdings, telecommunications companies were required to notify their customers that they terminated their services. In addition to this notification requirement, these services were required to allow the subject of the termination to appeal the company's determination at a hearing prior to the termination of services—exempting certain circumstances where such notification and hearing prior to termination was not feasible in which case the company was required to hold such proceedings immediately following—or soon after—the termination of the services. *See generally* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600, 624 (1974) (Powell, J., concurring); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Adams v. Dept. of Motor Vehicles, 11 Cal. 3d 146, 151–52 (Cal. 1974) (holding procedural due process requires the provision of notice and the opportunity for a hearing prior to the deprivation of a party's property).

¹⁹² *Save Our Valley*, 335 F.3d at 962.

¹⁹³ Alexander v. Sandoval, 532 U.S. 275 (2001).

¹⁹⁴ *Id.*

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liability would continue Congress's initial policy judgment when § 230 was passed while slightly modifying it in light of (1) the determination that the internet is a public utility, and (2) the realities of the internet.

B. Standards for Removal of Content

As articulated in the critique in Section VI, *supra*, one due process concern from the current framework for ISP liability is the lack of clear and consistent standards for when ISPs may remove content.¹⁹⁵ Consistent with this critique, the framework advocated for here is reliant upon the enumeration of specific standards for ISP regulation of content.

ISPs should be required to inform customers of the specific circumstances that content is removable. Minimizing the subjectiveness within the current model, and providing notice for users,¹⁹⁶ would allow speakers to self-regulate their speech and would prevent the chilling of speech, a natural byproduct of uncertainty in current standards.

C. Notice of Removal Requirement

In order to alleviate due process concerns discussed in Section VI, *supra*, the framework advocated here requires notifying the content's creator of impending removal prior to the content's removal.¹⁹⁷ Through this notice, the speaker is able to challenge the content determination and is allowed to proactively remove the content. Through this basic methodology, relevant parties—i.e. the speaker and the ISP or in the alternative ISP and complainant—would understand why specific actions were taken and would be in a better position to seek remedy for adverse determinations if they so desire.

D. Petition for Redress to an Independent Authority

What is unique about the internet, and particularly the ability of ISPs to regulate their services, amongst the larger group of public utilities is the inherent lack of the user's ability to seek redress for their provider's actions.¹⁹⁸ Unlike electric companies, there is no state Public Utilities Commission for an individual to appeal

¹⁹⁵ See *supra* Section VI.

¹⁹⁶ See *supra* Section VI.

¹⁹⁷ See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Goss v. Lopez*, 419 U.S. 565 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (Powell, J., concurring); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Adams v. Dep't of Motor Vehicles*, 11 Cal. 3d 146 (Cal. 1974).

¹⁹⁸ *Goldin v. Pub. Util. Comm'n*, 592 P.2d 289, 294 (Cal. 1979); see also *Dunlap v. PECO Energy Co.*, 1996 U.S. Dist. Lexis 15922, at 6 (E.D. Pa. 1996).

to for redress.¹⁹⁹ Considering the significance of free speech and the provision of mechanisms by which customers of other public utilities are able to seek redress, the recommended framework requires a structural mechanism from which parties can seek redress.²⁰⁰

This framework's structure is twofold. First, a party would have the right to appeal to an independent authority, whether that be an arbitrator or specially designated body created by the ISP. For example, an individual may appeal to an independent entity because they believe content removal did not violate the terms of service they agreed at the outset of their service. Second, users should be able to

¹⁹⁹ *Dunlap*, 1996 U.S. Dist. Lexis 15922, at 6.

²⁰⁰ Unlike a “traditional public utility”—i.e., electric companies, telecommunications companies, etc.—the basis upon which jurisdiction for the adjudication of complaints stemming from the activities of ISPs is unclear. An individual state's power to adjudicate claims made against a traditional public utility derives from the state's role in the creation of the utility. *Durham v. North Carolina*, 395 F.2d 58, 60 (4th Cir. 1968). The ability of the utility to operate a virtual monopoly comes from the assignment of such power by the state. *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013). Further, as the beneficiary of the imprimatur of the state, and as a functionary of the state, the utility can assume a degree of qualified sovereign immunity for its actions. *See supra* note 97. Therefore, the state, as the grantor of the utilities imprimatur, necessarily requires the ability to regulate and “control” the activities of the utility. The state manifests this authority through the exercise of adjudicatory power over complaints made against the utility, generally through a “Public Utilities Commission.”

Compare this obvious assertion of jurisdiction to the assertion of jurisdiction in the case of ISPs. Unlike traditional public utilities, the existence of ISPs and provision of their services is not dependent upon a monopolistic license from a state. Rather, as is witnessed by the exponential growth of ISPs to this point, the provision of internet services is largely independent of the monopolistic license depended upon by traditional public utilities and the qualified sovereign immunity enjoyed by those entities. (Of course, an argument can be made that provisions, such as § 230, are effectively equivalent to the granting of qualified sovereign immunity. However, for purposes of this exercise, such innate differences between qualified sovereign immunity and those provisions sufficiently differentiate them to reject the supposition.) As a result, no state can claim the necessity of exercising jurisdiction of such entities because of their inherent interest as the licensor of the utility.

However, an argument could still be made that jurisdiction would be properly vested in the federal government. Under the Commerce Clause of the United States Constitution, “Congress shall have power to . . . regulate commerce . . . and among the several states . . .” U.S. CONST. art. 1, § 8, cl. 3. The internet, by its very nature, extends beyond the boundaries of any single state. Further, the operations of the purveyors of internet services are such that they are not constrained to any single state. NAT'L BROADBAND MAP, *supra* note 133. Therefore, because of the trans-border operation of these entities, and the fact that these are entities performing commerce, they necessarily fall outside of the scope of state authority and under the regulatory purview of the federal government.

Whether the exercise of this jurisdiction is permissible under current statutory authority is arguable. Under both the Telecommunications Act of 1996 and the Communications Act of 1934, the FCC is empowered to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Chapter, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i) (2012). Therefore, if the D.C. Circuit, in its review of the regulations herein, determines that the regulations at issue are consistent with the authority granted the FCC under the Telecommunications Act of 1996 and the Communications Act of 1934, then the exercise of federal authority, and creation of an independent regulatory body through which complaints might be made, would be statutorily permissible and jurisdiction could be found. *See supra* note 12.

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appeal the independent adjudicator's decision to first the FCC and then a federal court. This twofold structural mechanism would allow for the expeditious and fair adjudication of complaints and would meet the due process purposes which are currently lacking under the existent framework.²⁰¹

VIII. CONCLUSION

The internet is the most significant communicative development achieved to date. Its ability to bring together people and ideas from around the world, broaden horizons, and foster the development of knowledge is unparalleled. However, the internet also has significant drawbacks complicating the once-easy remedial effort.

This note examined ISP's liability for the suspicious user activities as well as liability for removing content. Under current legislative enactments, the ability to hold ISPs liable for these actions is virtually non-existent. Further, designating the internet as a public utility and ISPs as common carriers only changes the calculus leading to ISP immunity.

The continuing dependence on a protectionist schema stymies the ability of individuals to use the internet without fear that they will have their rights abridged by another user or their ISP. The framework set forth in Section VII ameliorates these concerns by providing protections for those who utilize the internet, and demands clarity from ISPs as to the standards used. By adopting this framework, the balance between the rights of individuals to speak freely and the right of ISPs to be free of liability for unknown speech recalibrates to provide a more equitable delineation of liability.

²⁰¹ See *supra* Section VI.