

**The Communications Decency Act of 1996:  
Why § 230 is Outdated and Publisher Liability for Defamation  
Should be Reinstated Against Internet Service Providers**

*Matthew G. Jeweler\**

I. INTRODUCTION

When Congress enacted § 230 of the Communications Decency Act (“CDA”)<sup>1</sup> it changed the landscape of defamation law on the Internet. In the eleven years since Congress passed § 230, courts have interpreted it broadly, giving seemingly complete immunity to internet service providers (“ISPs”) and website operators in third-party claims for defamation committed on the Internet.<sup>2</sup> This essay argues that today, with the Internet being the dominant medium that it is, the CDA is outdated and unfair, and should be amended or repealed in favor of the common law framework for publisher liability in defamation.<sup>3</sup>

Part II of this essay tracks the development of defamation law on the Internet.<sup>4</sup> First, it describes the common law framework for liability for publishers in defamation claims.<sup>5</sup> Second, it will discuss the two landmark pre-CDA cases that pushed Congress to enact the legislation.<sup>6</sup> Third, it will describe the enactment of the CDA and its legal effect.<sup>7</sup> Lastly, Part II will discuss the post-CDA cases and will exhibit how courts have interpreted the CDA.<sup>8</sup> Part III will

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\* J.D. candidate, expected 2008, University of Maryland School of Law.

<sup>1</sup> 47 U.S.C. § 230 (2000).

<sup>2</sup> *See infra* Part II.D.

<sup>3</sup> *See infra* Part IV.

<sup>4</sup> *See infra* Part II.

<sup>5</sup> *See infra* Part II.A.

<sup>6</sup> *See infra* Part II.B.

<sup>7</sup> *See infra* Part II.C.

<sup>8</sup> *See infra* Part II.D.

summarize the current state of defamation law on the Internet, given how courts have interpreted the CDA.<sup>9</sup>

Finally, Part IV will suggest a new approach to publisher liability for defamation on the Internet.<sup>10</sup> In particular, this essay advocates that defamation liability for ISPs should be based on the common law framework.<sup>11</sup> This approach would make liability based on the amount of control the ISP has over the particular defamatory material.<sup>12</sup> Additionally, this essay articulates why two of Congress's main reasons for enacting § 230 are seriously flawed. First, Congress thought notice-based liability would remove incentives for ISPs to self-regulate, but this essay argues that a) as it stands today, there currently is no incentive to self-regulate, and b) if courts impose a reasonable ISP standard, those entities would be unable to avoid liability by simply turning a cold shoulder to potential defamation.<sup>13</sup> Second, Congress believed that the fear of potential liability would force ISPs to simply remove any possibly defamatory content. This concern is flawed because a) it fails to take into account the fact that some speech – namely, defamatory speech – should be regulated, and b) market forces and online word of mouth will preclude companies from screening too freely.<sup>14</sup>

Such an approach would continue to take into account Congress's concerns about ISPs having to police an enormous amount of material, but would also take into account society's interest in redressing individuals who are defamed through the Internet. Further, there is little reason to continue to grant such broad immunity to ISPs given that one of Congress's purposes

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<sup>9</sup> *See infra* Part III.

<sup>10</sup> *See infra* Part IV.

<sup>11</sup> *See infra* Part IV.A.

<sup>12</sup> *See infra* Part IV.B.

<sup>13</sup> *See infra* notes 167–171 and accompanying text.

<sup>14</sup> *See infra* notes 171–182 and accompanying text.

when enacting the CDA in 1996 was to promote the development of the Internet, and the Internet has grown immensely since that time.<sup>15</sup>

## II. THE DEVELOPMENT OF DEFAMATION LAW ON THE INTERNET

Defamation law as it relates to the Internet has changed significantly in the last fifteen years. In the beginning, there was a framework at common law for publisher liability for defamation based on the amount of control over the material the publisher had.<sup>16</sup> The early cases – *Cubby* and *Stratton Oakmont* – involving defamation claims against ISPs for publisher liability used this framework in assessing liability.<sup>17</sup> In 1996, though, Congress enacted the CDA, which drastically changed the state of the law in Internet defamation.<sup>18</sup> In post-CDA cases, courts have broadly interpreted the CDA’s immunity, even when they do not agree with Congress’s policy choice.<sup>19</sup>

### A. *Common Law Framework*

At common law, liability for an entity that published or distributed defamatory material is based on a three-part framework. An entity is classified as either a publisher, distributor, or common carrier depending on the amount of control it retains over the defamatory material.<sup>20</sup>

The least culpable of the three classifications is a *common carrier*. A common carrier has no editorial control over the information it carries, such as a telephone company, which has no

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<sup>15</sup> See *infra* Part IV.C.

<sup>16</sup> See *infra* Part II.A.

<sup>17</sup> See *infra* Part II.B.

<sup>18</sup> See *infra* Part II.C.

<sup>19</sup> See *infra* Part II.D.

<sup>20</sup> Jay M. Zitter, Annotation, *Liability of Internet Service Provider for Internet or E-mail Defamation*, 84 A.L.R. 5TH 169, § 2[a] (2000).

control over the content of the calls that pass through it.<sup>21</sup> Given a common carrier's lack of editorial control and lack of awareness as to what it is carrying, this "passive conduit" is not liable for the information it transmits from one party to another.<sup>22</sup>

On the other end of the liability spectrum – and, likewise, the control spectrum – is a *publisher*. An entity classified as a publisher is one that retains substantial editorial control over the information it sends out, such as a newspaper.<sup>23</sup> A newspaper, for example, actively selects what content it will publish and thus should have great ability to notice potentially defamatory material. Since the entity has this amount of control, it is liable under normal defamation standards and can be liable if the claimant shows at least negligence on the publisher's part.<sup>24</sup>

Falling in the middle of the liability spectrum are the entities classified as *distributors*. Entities falling into this category are often compared to public libraries or bookstores because they have a choice as to what information to carry and thus are not passive conduits like telephone companies, but they do not retain editorial control over the material to the same extent that a newspaper does.<sup>25</sup> To hold a distributor liable a plaintiff must show that the material was defamatory and that the distributor knew or should have reasonably known of the defamatory nature of the work.<sup>26</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

Thus, the common law framework, which is divided into three categories – common carriers, publishers, and distributors – assesses liability based on the amount of editorial control the entity retains over the defamatory material.<sup>27</sup>

*B. The Pre-CDA Cases: Cubby and Stratton Oakmont*

There are two seminal cases decided before Congress enacted the CDA in which courts applied the common law publisher liability framework to ISPs: *Cubby, Inc. v. CompuServe Inc.*<sup>28</sup> and *Stratton Oakmont, Inc. v. Prodigy Services Co.*<sup>29</sup>

1. *Cubby, Inc. v. CompuServe Inc.*

In *Cubby, Inc. v. CompuServe Inc.*, Cubby, Inc. and Robert Blanchard developed a computer database, “Skuttlebut,” through which they published news and gossip relating to the television and radio industries.<sup>30</sup> Cubby and Blanchard intended Skuttlebut to compete with “Rumorville,” a similar gossip publication that CompuServe provided to its subscribers through its forums.<sup>31</sup> Cubby and Blanchard brought suit against CompuServe, alleging that, as a result of this possible competition, Rumorville published false and defamatory statements about Skuttlebut and Blanchard, and CompuServe carried the statements as part of its forum.<sup>32</sup>

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<sup>27</sup> Barry J. Waldman, Comment, *A Unified Approach to Cyber-Libel: Defamation on the Internet, A Suggested Approach*, 6 RICH. J.L. & TECH. 9, 33 (1999).

<sup>28</sup> 776 F. Supp. 135 (S.D.N.Y. 1991).

<sup>29</sup> 1995 WL 323710 (N.Y. Sup. Ct. 1995).

<sup>30</sup> 776 F. Supp. at 138.

<sup>31</sup> *Id.* at 137–38.

<sup>32</sup> *Id.* at 138 (“[T]he allegedly defamatory remarks included a suggestion that individuals at Skuttlebut gained access to information first published by Rumorville ‘through some back door’; a statement that Blanchard was ‘bounced’ from his previous employer, WABC; and a description of Skuttlebut as a ‘new start-up scam.’”).

CompuServe moved for summary judgment.<sup>33</sup> CompuServe argued that “it acted as a distributor, and not a publisher, of the statements, and cannot be held liable for the statements because it did not know and had no reason to know of the statements.”<sup>34</sup>

The District Court for the Southern District of New York began its analysis by noting that, with respect to entities such as book stores and libraries, these distributors will not be liable if they do not know or have no reason to know of the defamatory content.<sup>35</sup> The court stated that CompuServe in essence ran an electronic for-profit library since it charged subscribers usage fees to view the publications it carried.<sup>36</sup> The court pointed out that CompuServe could decline to carry a given publication, but once it decided to carry one it had little or no control over the publication’s contents.<sup>37</sup>

The court held that the appropriate standard of liability for an entity such as CompuServe is “whether it knew or had reason to know of the allegedly defamatory . . . statements.”<sup>38</sup> In coming to this conclusion, the court reasoned that it was infeasible for CompuServe to examine every publication it carries for possibly defamatory statements, so a knowledge-based approach, like that used in the common law framework for entities classified as distributors, was the best option for liability.<sup>39</sup> Ultimately, the court held that the plaintiffs failed to set forth any facts showing that CompuServe knew or should have known of the Rumorville statements.<sup>40</sup> Thus,

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 139 (citing *Lerman v. Chuckleberry Publ’g, Inc.*, 521 F. Supp. 228, 235 (S.D.N.Y. 1981)).

<sup>36</sup> *Cubby*, 776 F. Supp. at 140.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 140–41.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 141.

because CompuServe, as a distributor, may not be liable if it did not know or should not have known of the statements, the court granted its motion for summary judgment.<sup>41</sup>

## 2. Stratton Oakmont, Inc. v. Prodigy Services Co.

In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the underlying allegedly defamatory statements were made on one of Prodigy's bulletin boards.<sup>42</sup> "Money Talks," the board on which the statements appeared, was at that time the most widely read financial bulletin board in the United States.<sup>43</sup> Prodigy members could post on Money Talks statements about stocks, investments and any other financial matters.<sup>44</sup>

As part of its evidence that Prodigy was a publisher, the plaintiffs argued that Prodigy held itself out as a service that exercised editorial control over the content posted on its bulletin boards.<sup>45</sup> Prodigy argued that its policies were different and that it did not retain such control.<sup>46</sup> The court stated that the critical issue to determine was whether Prodigy "exercised sufficient editorial control . . . to render it a publisher with the same responsibilities as a newspaper."<sup>47</sup>

The court reviewed *Cubby* and found two key distinctions.<sup>48</sup> "First, [Prodigy] held itself out to the public and its members as controlling the content of its computer bulletin boards."<sup>49</sup> Second, Prodigy implemented this control through a screening program and its own guidelines,

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<sup>41</sup> *Id.*

<sup>42</sup> 1995 WL 323710, at \*1.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at \*2.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at \*3.

<sup>48</sup> *Stratton Oakmont, Inc.*, 1995 WL 323710, at \*4.

<sup>49</sup> *Id.*

which it was required to follow.<sup>50</sup> The court held that Prodigy made decisions regarding content because it actively deleted notes from its bulletin boards on the basis of their content.<sup>51</sup> Thus, the court concluded that Prodigy was a publisher rather than a distributor.<sup>52</sup>

The court further clarified that it agreed with the *Cubby* court that computer bulletin boards should generally be treated like bookstores and libraries, but it was Prodigy's own policies and choice to exert editorial control that altered the scenario and made them a publisher in this context.<sup>53</sup> Prodigy's choice to exercise editorial control, according to the court, "opened it up to a greater liability than . . . other computer networks that make no such choice."<sup>54</sup>

C. § 230 of the Communications Decency Act

After *Cubby* and *Stratton*, Congress enacted § 230 of the Communications Decency Act. In fact, Congress enacted § 230 in large part as a response to those earlier decisions. Subsection (a) of the CDA contains Congress's findings; notably, that the Internet and other computer services represent an "extraordinary advance in the availability of educational and informational resources," and that the Internet offers a forum for diversity of political discourse and opportunity for cultural development.<sup>55</sup> Furthermore, Congress found that the Internet will flourish to the benefit of all Americans with minimal government regulation.<sup>56</sup>

In subsection (b), Congress made it clear that its policy was to "promote the continued development of the Internet and other interactive computer services" and preserve the "vibrant

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at \*5.

<sup>54</sup> *Id.* The court foresaw what might occur in the future, stating that the issues it addressed may soon be preempted by the then-pending CDA if Congress passed it. *Id.*

<sup>55</sup> 47 U.S.C. § 230(a)(1),(3) (2000).

<sup>56</sup> *Id.* § 230(a)(4).

and competitive free market . . . for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>57</sup> Section 230 also states that its policy is “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools” and “remove disincentives for . . . blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.”<sup>58</sup>

Subsection (c) of the CDA, known as the “Good Samaritan” provision, states that “[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.”<sup>59</sup> It also states that no provider of an interactive computer service shall be liable for any action that is taken voluntarily and in good faith to restrict access to inappropriate material, whether or not such material is constitutionally protected.<sup>60</sup>

Subsection (e) explicitly preempts state law, stating that no claim may be made under state law that is inconsistent with § 230.<sup>61</sup>

Lastly, subsection (f) provides definitions for the CDA. It provides that the term “interactive computer service,” as it is used in the CDA, means “any information service, system, or access software provider that provides or enables computer access . . . to a computer server.”<sup>62</sup>

The term “information content provider” refers to “any person or entity that is responsible . . . for

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<sup>57</sup> *Id.* § 230(b)(1)-(2).

<sup>58</sup> *Id.* § 230(b)(3)-(4).

<sup>59</sup> *Id.* § 230(c)(1).

<sup>60</sup> *Id.* § 230(c)(2)(A).

<sup>61</sup> *Id.* § 230(e)(3).

<sup>62</sup> *Id.* § 230(f)(2).

the creation or development of information provided through the Internet or any other interactive computer service.”<sup>63</sup>

It has been said that “[o]ne of the specific purposes of [§ 230] was to overrule [*Stratton Oakmont*] and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”<sup>64</sup> Indeed, § 230 precludes claims placing ISPs in a publisher’s role; thus, ISPs cannot be liable for their exercise of traditional editorial functions, “such as deciding whether to publish, withdraw, postpone, or alter content.”<sup>65</sup>

#### D. *Post-CDA Cases*

Following Congress’s enactment of § 230 of the CDA, courts interpreted the Act’s immunity very broadly. Starting with the landmark post-CDA case, *Zeran v. America Online, Inc.*,<sup>66</sup> the cases following §230’s enactment show how it drastically changed the legal landscape of defamation on the Internet.<sup>67</sup>

##### 1. *Zeran v. America Online, Inc.*

In *Zeran v. America Online, Inc.*, an unidentified person posted a message on an America Online (“AOL”) bulletin board advertising t-shirts containing tasteless slogans relating to the 1995 Oklahoma City bombing.<sup>68</sup> The anonymous poster told anyone interested in purchasing a

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<sup>63</sup> *Id.* § 230(f)(3).

<sup>64</sup> NTS AM. JUR. 2D. *Computers and the Internet* § 62 (2006).

<sup>65</sup> *Id.* § 63.

<sup>66</sup> 129 F.3d 327 (4th Cir. 1997).

<sup>67</sup> *See infra* notes 68–126 and accompanying text.

<sup>68</sup> 129 F.3d at 329.

shirt to call “Ken” at Kenneth Zeran’s home phone number.<sup>69</sup> As a result, Zeran received a high volume of angry phone calls, including death threats.<sup>70</sup>

Zeran called AOL to complain about the problem and an AOL employee assured that AOL would remove the posting, but over the next few days the unidentified person continued posting similar messages.<sup>71</sup> Within a few days the messages were being talked about on radio stations, and the situation finally ended when a local newspaper exposed that the shirt advertisements were a hoax.<sup>72</sup>

Zeran filed suit against AOL seeking to hold it liable for the defamatory speech initiated by a third party, but posted through AOL’s service.<sup>73</sup> The Fourth Circuit reviewed § 230, concluding that it barred lawsuits seeking to hold an ISP liable for its role as a publisher when it exercises functions “such as deciding whether to publish, withdraw, postpone or alter content.”<sup>74</sup> The court noted that Congress’s purpose in enacting § 230 was because ISPs have millions of users and it would be impossible for them to screen all of their postings.<sup>75</sup> As a result, the court reasoned, ISPs might choose to restrict the number of messages posted, thus severely affecting speech.<sup>76</sup>

The *Zeran* court then noted that Congress enacted § 230 as a response to *Stratton Oakmont* – to remove the disincentives to self-regulation created by that decision.<sup>77</sup> Zeran

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 330.

<sup>74</sup> *Zeran*, 129 F.3d at 330.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 331.

<sup>77</sup> *Id.* The court reasoned that since the finding of liability in *Stratton Oakmont* was based on Prodigy’s decision to actively screen messages, this created a disincentive for ISPs to exert similar control. *Id.*

argued that § 230 was meant to eliminate only publisher liability and not distributor liability and, as such, ISPs could be still liable if they knew or should have known about defamatory messages posted through their service and did not remove them.<sup>78</sup> The court rejected Zeran's argument, reasoning that distributor liability was merely a subset of publisher liability, and both are precluded under § 230.<sup>79</sup> The court acknowledged that a different standard of liability applies to publishers and distributors, but stated that the difference in liability applies only within the larger publisher umbrella.<sup>80</sup>

In sum, the court noted, imposing liability on ISPs as distributors – a standard based on notice – would defeat the purposes advanced by § 230.<sup>81</sup> The court feared that ISPs would have to rapidly investigate all messages they were notified about and make a legal judgment concerning whether it was defamatory.<sup>82</sup> This might be feasible, the court noted, for a print publisher, but the large number of postings on the Internet would cause a substantial burden on an ISP.<sup>83</sup>

## 2. Blumenthal v. Drudge

After *Zeran*, the next big case involving § 230 was *Blumenthal v. Drudge*.<sup>84</sup> In *Blumenthal*, Sidney Blumenthal, then an Assistant to the President of the United States, brought suit against AOL and Matt Drudge, who was the creator of an electronic gossip column called

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 331–32.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 333.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> 992 F. Supp. 44 (D.D.C. 1998).

the “Drudge Report.”<sup>85</sup> Drudge had entered into an agreement with AOL whereby AOL paid Drudge to have the rights to make the Drudge Report available to its members.<sup>86</sup> Under the agreement, AOL had the right to remove any content from the Report that it determined violated its terms of service.<sup>87</sup>

Drudge wrote a column about Blumenthal and sent it to AOL, who then made it available to its subscribers.<sup>88</sup> The column accused Blumenthal of having a history of spousal abuse.<sup>89</sup> Blumenthal brought suit against Drudge claiming defamation and seeking to hold AOL liable as the publisher of the materials.<sup>90</sup>

The court stated that Congress decided to treat ISPs differently than other providers such as newspapers or television stations, which can be held liable for publishing or distributing defamatory material prepared by others.<sup>91</sup> The court pointed out that had AOL taken part in the creation or development in the story it could have been liable, but AOL played no such role there.<sup>92</sup> Indeed, the court stated, AOL did nothing more than carry the report.<sup>93</sup>

Blumenthal also argued that § 230 did not immunize AOL in this context because Drudge was not simply an anonymous person who sent a message; he was a person with whom AOL contracted and over whose work AOL retained the right to remove any content that violated its terms of service.<sup>94</sup> Also, Blumenthal argued, AOL advertised Drudge’s column as a way of

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<sup>85</sup> *Id.* at 46–47.

<sup>86</sup> *Id.* at 47.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 47–48.

<sup>89</sup> *Id.* at 46.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 49.

<sup>92</sup> *Id.* at 50.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 51.

gaining new subscribers.<sup>95</sup> Interestingly, the court expressly agreed with Blumenthal, stating that if given its own choice it would hold AOL accountable due to its relationship with Drudge.<sup>96</sup> However, the court stated, it was required to follow § 230 and immunize AOL, even though it took advantage of the benefits of the CDA without accepting any of its burdens.<sup>97</sup>

### 3. Lunney v. Prodigy Services Co.

In *Lunney v. Prodigy Services Co.*, an unidentified person opened membership accounts with Prodigy under the plaintiff, Alexander Lunney's, name.<sup>98</sup> From those accounts the unidentified person sent emails to a local Boy Scout scoutmaster explaining how he was going to kill him.<sup>99</sup> Prodigy eventually closed down the accounts; Lunney then sued Prodigy claiming that it was "derelict in allowing the accounts to be opened in his name, and was responsible for his having been stigmatized and defamed."<sup>100</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* In an oft-quoted passage the court expressed its views about its decision were it not restrained by Congress's enactment of § 230:

Because it has the right to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor. But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others. In some sort of tacit *quid pro quo* arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted.

*Id.* at 51–52.

<sup>97</sup> *Id.* at 52–53.

<sup>98</sup> 94 N.Y.2d 242, 246–47 (N.Y. 1999).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 247.

The court analyzed the claims against Prodigy under New York common law, rather than § 230.<sup>101</sup> Regarding the emails and bulletin board messages involved in the case, the court compared the situation to the distinction between a telegraph company and a telephone company.<sup>102</sup> Essentially, the court reasoned, a telegraph company knows the content of the messages it passes because its agents take part in the process, whereas a telephone company plays only a passive role.<sup>103</sup> The court held that Prodigy was much more akin to a telephone company and that no one could expect it to monitor the content of its subscribers' emails. Thus, Prodigy was not a publisher in this instance.<sup>104</sup>

#### 4. Ben Ezra, Weinstein, and Co. v. America Online Inc.

The online publication of incorrect stock quotes was at issue in *Ben Ezra, Weinstein, and Co. v. America Online Inc.*<sup>105</sup> There, the plaintiff claimed that AOL – who contracted with third-party companies that provided it stock information – had on three occasions published incorrect information concerning the plaintiff's stock price and share volume.<sup>106</sup> As a result, the plaintiff claimed, it was defamed.<sup>107</sup> The plaintiff conceded that AOL was an “interactive computer service” under § 230, but argued that AOL worked so closely with the third party companies in the creation of the stock information as to make it an “information content provider” and therefore not immune under § 230.<sup>108</sup>

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<sup>101</sup> *Id.* at 248–49. The events giving rise to the claims occurred before Congress enacted § 230 and thus the court declined to give it retroactive effect. *Id.* at 251.

<sup>102</sup> *Id.* at 249.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> 206 F.3d 980 (10th Cir. 2000).

<sup>106</sup> *Id.* at 983.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 985.

The court rejected the plaintiff's argument, reasoning that while AOL communicated with the third party companies, it was not enough to "constitute the development or creation of the stock quotation information."<sup>109</sup> The plaintiff further argued that because AOL deleted some stock information, this transformed it into an "information content provider."<sup>110</sup> The court also rejected this argument, reasoning that AOL simply made the content unavailable and did not develop or create the content, and as such was "engaging in the editorial functions Congress sought to protect."<sup>111</sup>

#### 5. Carafano v. Metrosplash.com, Inc.

In *Carafano v. Metrosplash.com, Inc.*, an actress sued the creator/operator of Matchmaker.com ("Matchmaker") for defamation resulting from the posting of false statements on a personal profile, which an unidentified person had opened in the plaintiff's name.<sup>112</sup> The plaintiff first argued that the defendant, a website operator, did not qualify for immunity under § 230 because it was not an interactive service provider.<sup>113</sup> The court quickly rejected this argument, stating that website operators do qualify as providers of an interactive computer service under § 230.<sup>114</sup>

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 985–86.

<sup>111</sup> *Id.* at 986.

<sup>112</sup> 207 F. Supp. 2d 1055, 1059–61 (C.D. Cal. 2002), *aff'd*, 339 F.3d 1119 (9th Cir. 2003). The profile included the plaintiff's home address, email address, and answers to questions characterizing her as licentious. *Carafano*, 207 F. Supp. 2d at 1061.

<sup>113</sup> *Id.* at 1065.

<sup>114</sup> *Id.* at 1066. As authority on this issue the court cited *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 39 (Wash Ct. App. 2001), and *Stoner v. eBay, Inc.*, No. 305666, 2000 WL 1705637 (Cal. Super. 2000).

The Ninth Circuit went on to hold that Matchmaker qualified for immunity because it was not an information content provider.<sup>115</sup> The court reasoned that just because Matchmaker provided the questions and the framework from which users create their profiles, this alone did not transform it into an information content provider.<sup>116</sup> The court noted that the users had complete control over the selection of content to input into each profile, and that profiles have no content until a user creates it.<sup>117</sup>

## 6. *Batzel v. Smith*

In *Batzel v. Smith*, a handyman overheard a person on whose house he was working tell a friend that she was related to a former Nazi politician, and on another occasion the homeowner also told the handyman that she inherited some of the paintings hanging in her home.<sup>118</sup> The handyman had a suspicion that these paintings were stolen during World War II and belonged to the Jewish people.<sup>119</sup> He sent an email to the Museum Security Network (“MSN” or “Network”) website indicating his suspicions.<sup>120</sup>

MSN’s operator reviewed the message and then published it to the Network listserv and posted it on the Network’s website after making some minor changes.<sup>121</sup> The operator generally exercised some editorial discretion in choosing which received emails to post on the listserv and

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<sup>115</sup> *Carafano*, 339 F.3d at 1125. The Ninth Circuit reversed the district court on this issue, which held that Matchmaker was an information content provider because it provided the questions for the profiles. *Carafano*, 207 F. Supp. 2d at 1066.

<sup>116</sup> *Carafano*, 339 F.3d at 1124.

<sup>117</sup> *Id.*

<sup>118</sup> 333 F.3d 1018, 1020–21 (9th Cir. 2003).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1021.

<sup>121</sup> *Id.*

website, omitting those that do not pertain to stolen art.<sup>122</sup> After discovering the message, the homeowner sued the handyman and the MSN operator for defamation for implicating her in those activities.<sup>123</sup>

After quickly finding the first requirement of § 230 – that the defendant seeking immunity qualify as an interactive computer service – met, the court focused on whether the MSN operator took part in the creation of the content due to his editorial role in publishing the message.<sup>124</sup> The court held that the operator’s minor alterations of the message or his choice to publish it do not rise to the level of “development” under § 230.<sup>125</sup> “[D]evelopment of information,” the court stated, “means something more substantial than merely editing portions of an e-mail and selecting material for publication.”<sup>126</sup>

### III. THE CURRENT STATE OF INTERNET DEFAMATION LAW

The CDA has dramatically changed defamation law insofar as potential liability for Internet publishers and distributors of defamatory material is concerned. Today, claims attempting to hold an ISP liable for defamation for engaging in traditional editorial functions, “such as deciding whether to publish, withdraw, postpone or alter content . . . are barred.”<sup>127</sup> This immunity, according to the courts that have interpreted the CDA, applies not only to entities that would be liable as a publisher of defamatory material, but also to those that would be liable

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1022.

<sup>124</sup> *Carafano*, 339 F.3d at 1030–31.

<sup>125</sup> *Id.* at 1031.

<sup>126</sup> *Id.*

<sup>127</sup> *Zeran, v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

under a distributor liability theory.<sup>128</sup> Thus, even if an ISP retains editorial control over what it publishes through the Internet and has knowledge of defamatory statements contained therein, it cannot be held liable under either theory.<sup>129</sup>

Three elements are required for § 230 immunity to apply.<sup>130</sup> First, the defendant must be a provider or user of an “interactive computer service.”<sup>131</sup> At least two courts have interpreted the term “interactive service provider” to include website operators, in addition to Internet service providers such as America Online and Prodigy.<sup>132</sup> Second, the claims must treat the defendant as a publisher or speaker of information.<sup>133</sup> Lastly, the information must be provided by another “information content provider,” and not the ISP itself.<sup>134</sup> An information content provider is any person or entity “that is responsible, in whole or in part, for the creation or development of information provided through the Internet.”<sup>135</sup> An ISP will not be liable if the defamatory material is provided solely by a third party, but if the ISP takes any part in the creation of the material it could be liable. For example, a website operator was not a content provider of information and was immune under § 230 when it provided questions for users to answer when making a personal profile on its website.<sup>136</sup>

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<sup>128</sup> NTS AM. JUR. 2D *Computers and the Internet* § 77 (2006) (citing *Zeran v. America Online, Inc.*, 958 F. Supp. 1124 (E.D. Va. 1997)).

<sup>129</sup> *Id.*

<sup>130</sup> *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 39 (Wash. Ct. App. 2001).

<sup>131</sup> *Id.*

<sup>132</sup> *See id.* at 40–41 (finding Amazon, the operator of the website Amazon.com, to be a provider of interactive computer services under § 230); *Carafano*, 207 F. Supp. 2d at 1066 (operator of Matchmaker.com qualified for immunity under § 230).

<sup>133</sup> *Id.* at 39.

<sup>134</sup> *Id.*

<sup>135</sup> 47 U.S.C. § 230(f)(3) (2000).

<sup>136</sup> *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003).

In addition to providing federal immunity to defamation claims, the CDA expressly preempts all state law claims for this type of defamation against the entities protected under the CDA.<sup>137</sup>

#### IV. A NEW APPROACH: REINSTATING THE COMMON LAW FRAMEWORK

Congress should repeal the CDA because it has been interpreted too broadly and works a serious injustice on the victims of defamatory messages posted on the Internet.<sup>138</sup> While immunity for ISPs and website operators makes sense in some circumstances,<sup>139</sup> there should not be near-complete immunity for ISPs and website operators that have an editorial role in posting, or have knowledge of, defamatory material on the Internet.<sup>140</sup> Rather, Congress should repeal the CDA and courts should apply the common law framework to Internet defamation cases attempting to hold an ISP or website operator liable under a publisher or distributor liability theory.<sup>141</sup>

This approach would take into account how much control an ISP has over the content it provides, rather than simply granting blanket immunity to all ISPs. As is discussed below, this approach would also address and resolve the two main concerns Congress had when it enacted § 230: (1) that notice-based liability will disincentivize ISPs from self-regulating due to the fear of liability; and (2) that as a result of potential liability, ISPs will simply remove all questionable

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<sup>137</sup> § 230(e)(3).

<sup>138</sup> *Cf. Barrett v. Rosenthal*, 9 Cal. Rptr.3d, 155 (Cal. Ct. App. 2004), *rev'd*, 51 Cal. Rptr.3d 55 (Cal. 2006) (noting that the *Zeran* court granted a much more expansive immunity than was necessary).

<sup>139</sup> *See infra* notes 152–155 and accompanying text.

<sup>140</sup> *See infra* notes 156–158 and accompanying text.

<sup>141</sup> *See infra* Part IV.A.

content and “chill” online speech.<sup>142</sup> Finally, this approach, unlike § 230, takes into account that a large number of defamation victims are unable to recover damages from the third-party content providers themselves due to their anonymity, and thus are totally barred from recovery due to the ISPs’ immunity.<sup>143</sup>

When applying the common law framework courts should decide on a case-by-case basis what common law category a given ISP falls into based on its role and function in the particular case.<sup>144</sup> Indeed, this approach is preferable because the immunity § 230 provides has been interpreted more broadly than Congress intended when it enacted § 230.<sup>145</sup> Moreover, even if Congress intended to grant such broad immunity, its rationale carries much less weight today given the growth and prosperity of the Internet in the eleven years since Congress enacted § 230.<sup>146</sup>

A. *Courts Should Apply the Common Law Framework*

The common law framework, which divides entities that disseminate third-parties’ material into publishers, distributors and common carriers,<sup>147</sup> should be the standard not only for classic media such as newspaper and television but also for Internet entities.<sup>148</sup> Instinctively, it seems appropriate to hold ISPs to the same standard of liability as non-Internet entities, but as

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<sup>142</sup> See *infra* notes 167–179 and accompanying text.

<sup>143</sup> See *infra* note 187 and accompanying text.

<sup>144</sup> See *infra* Part IV.B.

<sup>145</sup> See *infra* Part IV.C.

<sup>146</sup> See *infra* Part IV.C.

<sup>147</sup> See Zitter, 84 A.L.R. 5TH 169, § 2[a] (2000).

<sup>148</sup> See Jonathan A. Friedman & Francis M. Buono, *Limiting Tort Liability for Online Third-Party Content Under Section 230 of the Communications Act*, 52 FED. COMM. L.J. 647, 665 (2000) (stating that in the event Congress decides to narrow § 230 immunity, the common carrier model is the best option).

long as the CDA is in force, a far different standard applies.<sup>149</sup> That current standard affords near complete immunity to publishers or distributors of online defamation. As a result, the issue of liability should be focused on how much control an ISP possesses over the allegedly defamatory material and not simply whether the entity is an ISP and is therefore immune on that basis alone.<sup>150</sup>

Sometimes § 230 serves its intended purpose and properly immunizes ISPs. This immunity works as intended when ISPs are merely the medium through which millions of third-parties post messages.<sup>151</sup> For example, in *Zeran v. AOL* § 230 properly immunized AOL for a defamatory message posted on one of its bulletin boards.<sup>152</sup> The *Zeran* court refused to hold AOL liable because it would be impossible for the ISP to monitor and control the millions of messages that were posted daily through the service.<sup>153</sup> Most courts and scholars agree that § 230 immunity makes perfect sense in this context given (1) the near impossible task that ISPs would have to face in monitoring and controlling the millions of messages posted through its

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<sup>149</sup> David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 179 (1997) (“[C]onstruing § 230 to immunize interactive services from distributor liability creates an asymmetry between electronic and print media that is difficult to justify.”).

<sup>150</sup> Waldman, *supra* note 27, at 33 (“[T]raditional defamation law imputes liability based upon the nature of the party defamed and the editorial control retained by the particular defendant.”). See Brian C. McManus, Note, *Rethinking Defamation Liability for Internet Service Providers*, 35 SUFFOLK U. L. REV. 647, 668 (2001) (“Unfortunately, when courts began to consider cyber-defamation cases they examined the ISP as an entity instead of isolating the particular function of the ISP that gave rise to the litigation.”).

<sup>151</sup> See *Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142, 163 (Cal. Ct. App. 2004) (“In some contexts – such as e-mail – service providers are not only unaware of the nature of the information they distribute but, as a practical matter, cannot control transmissions.”), *rev’d*, 51 Cal. Rptr.3d 55 (Cal. 2006).

<sup>152</sup> 129 F.3d 327 (4th Cir. 1997).

<sup>153</sup> *Id.* at 331; see also *Batzel v. Smith*, 333 F.3d 1018, 1039 (9th Cir. 2003) (Gould, J., concurring in part, dissenting in part) (noting that it would be impossible for an ISP to screen emails, chat rooms and bulletin boards).

servers daily,<sup>154</sup> and (2) the lack of editorial contribution and control the ISP exerts in these situations.<sup>155</sup>

Section 230's immunity, however, is simply too broad and makes little sense when applied to other situations. *Blumenthal v. Drudge* is a clear example of the injustice that § 230 works.<sup>156</sup> There, the court held that AOL was not liable for defamatory material published through its service, even though AOL paid the author for the rights to his column and actively publicized his column to attract new subscribers.<sup>157</sup> The *Blumenthal* court explicitly stated in its opinion that it would have applied the common law framework to AOL given the amount of control it reserved, but could not do so because of § 230's immunity.<sup>158</sup> In situations such as that in *Blumenthal*, there is no reason that ISPs and website operators should not be held accountable for the defamatory content they actively select and publish, and, in *Blumenthal*'s case, even publicize.

As a result, the common law framework would best serve the special circumstances that the Internet provides without totally precluding recovery for defamation against ISPs and website operators, as § 230 currently does. Different standards for liability would apply based on the

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<sup>154</sup> See *Batzel*, 333 F.3d at 1039 (“Congress understood that entities that facilitate communication on the Internet – particularly entities that operate e-mail networks, ‘chat rooms,’ ‘bulletin boards,’ and ‘listservs’ – have special needs. . . . It would be impossible to screen all such communications . . .”).

<sup>155</sup> See, e.g., *id.* at 1038 (“We should hold that the CDA immunizes a defendant only when the defendant took no active role in selecting the questionable information for publication.”); see also Waldman, *supra* note 27, at 66 (suggesting that ISPs should incur liability when they have substantively edited the defamatory material, but should not incur liability for “minor editing, existence as a mere conduit, or electronic-filtering activities”).

<sup>156</sup> 992 F. Supp. 44 (D.D.C. 1998).

<sup>157</sup> *Id.* at 47.

<sup>158</sup> *Id.* at 51–52.

amount of control and knowledge an ISP retained.<sup>159</sup> An entity that performed traditional editorial duties such as deciding whether and what to publish, and that had the ability to make changes, would be liable for defamatory messages by a third-party author, as long as the plaintiff can show negligence on the part of the ISP.<sup>160</sup> This approach makes the most sense in a situation like that in *Blumenthal*, where the ISP knows precisely what it is publishing and also has the ability to alter its content.<sup>161</sup>

On the other hand, a common carrier that is merely a passive medium through which third-parties send messages would not be liable under any circumstances.<sup>162</sup> As stated above, it is simply infeasible to require ISPs to monitor the millions of messages sent daily through email, bulletin boards and chat rooms for defamatory content.<sup>163</sup> Immunity makes sense in this situation because the Internet has very different communicative characteristics than traditional forms of media.<sup>164</sup> As a result, ISPs and website operators would not be liable in these situations and could avoid the near-impossible task of screening such content. While continued immunity in this context would not help an individual who was defamed through a bulletin board, it is proper, and arguably necessary, to retain § 230 immunity in these areas of Internet publication.

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<sup>159</sup> See *Stratton Oakmont, Inc., v. Prodigy Services Co.*, 1995 WL 323710, at \*5 (N.Y. Sup. Ct. 1995) (noting that Prodigy opened itself up to greater liability than other ISPs because it chose to exert editorial control over the materials that contained defamatory content).

<sup>160</sup> See Zitter, 84 A.L.R. 5TH 169, § 2[a] (2000); Waldman, *supra* note 27, at 54 (“[An ISP] should be held accountable where it takes the role of actively editing, either by adding additional text or by editing for length and content.”).

<sup>161</sup> See *Batzel*, 333 F.3d at 1039 (Gould, J., concurring in part, dissenting in part) (“[A] person who receives a libelous communication and makes the decision to disseminate that message to others . . . would not be immune.”).

<sup>162</sup> *Id.*

<sup>163</sup> See *supra* note 153 and accompanying text.

<sup>164</sup> See, e.g., *Lunney, v. Prodigy Services Co.*, 94 N.Y.2d 242, 249 (N.Y. 1999) (“Prodigy’s role in transmitting e-mail is akin to that of a telephone company, which one neither wants nor expects to superintend the content of its subscribers’ conversations. In this respect, an ISP, like a telephone company, is merely a conduit.”).

In the middle of the spectrum are those entities that are considered distributors. For these entities that do not retain much editorial control over the materials they distribute, but do select what they will and will not distribute, a knowledge-based liability applies.<sup>165</sup> This standard of control would apply to situations that resemble the circumstances in *Batzel v. Smith*, where an ISP decided what to publish on its website and through its listserv, but did not exert much editorial control over the material.<sup>166</sup> This standard of liability, according to scholars and critics, would be fair as applied to ISPs given the way they often operate.<sup>167</sup> Under this level of liability, an ISP would need to address potentially defamatory content if it received notice of such content.

Two concerns are commonly raised regarding notice-based liability for ISPs and website operators that, in the specific function they are performing, would be classified as distributors under the common law framework. First, some courts and scholars worry that this type of notice-based liability for entities classified as distributors will encourage those entities to ignore the content that is posted through their websites to avoid having the required notice.<sup>168</sup> The thrust of this argument is that “[a]ny efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability.”<sup>169</sup> However, with the blanket immunity § 230 provides, Congress has simply assumed that if it immunizes ISPs and website operators from liability, then those entities will screen content for defamatory material out of

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<sup>165</sup> Zitter, 84 A.L.R. 5TH 169, § 2[a]; *but see* Waldman, *supra* note 27, at 54 (noting that when an ISP merely decides whether to publish or remove content it should retain immunity).

<sup>166</sup> *See Batzel*, 333 F.3d at 1018.

<sup>167</sup> *See, e.g.,* Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 617 (2001).

<sup>168</sup> *Zeran, v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997); *see also* Barrett, v. Rosenthal, 51 Cal. Rptr. 3d 55, 73 (Cal. 2006) (noting that the notice-based “aspect of distributor liability would discourage active monitoring of Internet postings” and such would “frustrate the goal of self-regulation.”).

<sup>169</sup> *Zeran*, 129 F.3d at 333.

their own senses of altruism. It is counterproductive to attempt to encourage these entities to self-regulate their content for defamatory speech by immunizing them for that defamatory speech *regardless of whether the ISP attempts whatsoever to be responsible and screen its content.*<sup>170</sup>

While we would like to think that ISPs will screen their own content out of the goodness of their corporate hearts, it is a risk that Congress has chosen to take without any evidence. With this choice, Congress has put its faith in ISPs to self-regulate and has cut off individuals' ability to seek redress, regardless of whether those ISPs regulate their content.

A better solution is to enforce self-regulation by imposing stricter standards on ISPs and website operators. In particular, the law could be changed to account for when an ISP reasonably should or should not have notice. Under this standard, an ISP could not simply evade distributor liability by ignoring the content on its website if a reasonable ISP under the same circumstances would have had notice. This objective "reasonable ISP" standard would continue to preclude liability for those entities which, under the circumstances, were not required to know, nor could reasonably have known, of the defamatory content.<sup>171</sup> On the other hand, under this standard, those ISPs which reasonably should have known of the defamatory content – given what a reasonable ISP or website operator under the circumstances would have known – cannot avoid liability by simply turning away from its duties of being cognizant of the content flowing through its website. This added feature to the common law framework would address the

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<sup>170</sup> *Barrett*, 51 Cal. Rptr. 3d at 70 (“[T]he immunity conferred by section 230 applies even when self-regulation is unsuccessful, or completely unattempted.”).

<sup>171</sup> This would likely apply to an ISP that has bulletin boards and email as part of its network. For an entity such as this, a reasonable ISP would almost surely not be expected to screen that kind of content due to its quantity. Thus, an ISP who failed to screen content such as this would not be unreasonable and would still likely avoid liability under the common law framework.

concern that notice-based liability will encourage ISPs to close their eyes to possibly defamatory content out of fear that they will incur liability once they have notice of it.<sup>172</sup>

Second, proponents and supporters of § 230 fear that a notice-based liability scheme will have “a chilling effect on the freedom of Internet speech.”<sup>173</sup> They fear that “[b]ecause service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not.”<sup>174</sup> The conclusion one must draw given this view is that Congress would rather promote speech on the Internet than have ISPs and website operators be cautious about potentially defamatory speech. While free speech is undoubtedly a matter of great public interest and should be protected, Congress should not ignore the compelling competing interest when considering this issue: individuals’ interest in not being defamed.<sup>175</sup>

The first response to this concern about potential defamation liability is that ISPs and website operators are for-profit businesses, and if they screen too much material they will quickly lose their edge in the Internet marketplace. As courts and scholars have stated, ISPs are incentivized not to over-screen messages because word travels fast, and “a service that removes members’ postings without any investigation is likely to get a bad reputation in a community

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<sup>172</sup> *E.g.*, Friedman & Buono, *supra* note 148, at 663 (noting that the threat of litigation might discourage ISPs from monitoring their sites because any efforts by an ISP would lead to notice of potentially defamatory material and thus create possible liability.).

<sup>173</sup> *Zeran*, 129 F.3d at 333; Lyrrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 888 (2000) (“[C]hilling . . . occurs when defamation law encourages prospective speakers to engage in undue self-censorship to avoid the negative consequences of speaking.”).

<sup>174</sup> *Zeran*, 129 F.3d at 333.

<sup>175</sup> Waldman, *supra* note 27, at 51 (noting that the courts should not ignore the interests of states in protecting its citizens’ reputations).

whose first value is the free flow of information.”<sup>176</sup> This consequence of overly-aggressive content screening – the “marketplace force,” let’s call it – will force ISPs and website operators to take a closer look at potentially defamatory content before simply removing it because of its possibly defamatory nature.

Another response to Congress’s and some critics’ concern that potential liability will chill Internet speech is that there is a reason that an individual or entity can be liable for defamation: “free speech is not an absolute right.”<sup>177</sup> Defamation law is premised on the idea that an individual can be liable for damages if he defames another person, even though he generally has First Amendment free speech rights.<sup>178</sup> However, Congress seemingly ignored the individuals’ interest in not being defamed when enacting § 230.<sup>179</sup> Thus, the short answer to the fear that potential liability for ISPs might chill or stunt online speech is that not all speech is supposed to go unregulated. There is a reason why defamation law exists and it is because there are limits to individuals’ right to free speech when other interests, like an individual’s interest in his reputation, are involved.<sup>180</sup> Applying a modified common law framework, though, would continue to serve Congress’s and society’s interest in promoting speech on the Internet, while not

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<sup>176</sup> Barrett, v. Rosenthal, 9 Cal. Rptr. 3d 142, 162 (Cal. Ct. App. 2004), (citing Sheridan, *supra* note 149, at 176–77), *rev’d*, 51 Cal. Rptr.3d 55 (Cal. 2006).

<sup>177</sup> Schaefer v. U.S., 251 U.S. 466, 474 (1920).

<sup>178</sup> See 16B C.J.S. *Constitutional Law* § 874 (2007) (“As a general rule, defamatory utterances are not within the area of constitutionally protected speech and writing.”).

<sup>179</sup> See Paul Ehrlich, *Cyberlaw: Regulating Conduct on the Internet*, 17 BERKELEY TECH. L.J. 401, 414 (2002) (“[A]pplying full immunity to defamatory speech seems to leave victims both without a way to reduce the amount of defamation on the Internet and without recourse against the perpetrators. As such, full immunity cannot resolve problems associated with defamatory speech.”); see also Freiwald, *supra* note 167, at 633 (noting that the “immunity provision does nothing to address the concerns of future defamation victims; their interests have been completely ignored”); see also Waldman, *supra* note 27, at 56 (“The near preclusion of recovery under current interpretive maxims seems to overlook the very foundational precepts underlying defamation.”).

<sup>180</sup> Price v. Viking Penguin, Inc., 881 F.2d 1426, 1430 (8th Cir. 1989).

completely ignoring individuals' interest in not being defamed. Defamatory speech that injures other individuals' reputations is precisely the type of speech that *should* be chilled. Such speech should not go unpunished on the Internet – as it currently does under § 230 – solely because Congress is concerned that some non-defamatory speech will be screened in the process.

Furthermore, defamation law could actually benefit Internet discourse.<sup>181</sup> Not only does defamation law reflect society's interest in protecting individuals' dignity, it helps to make meaningful public discourse possible by exposing the speech that crosses certain boundaries of decency.<sup>182</sup> Potential defamation liability may actually promote speech on the Internet because the fear of being verbally attacked without the opportunity for redress is a disincentive for people to speak their minds on the Internet.<sup>183</sup> Individuals may choose to keep quiet rather than speaking their minds through the Internet because they know that if they are subsequently attacked through speech on the Internet, they will be unable to recover damages from the ISP or website operator. Also, if there is the potential for defamation liability, Internet speech will be more focused and less irrational. As one scholar has noted, “[t]he quality of speech is improved when speakers realize that their speech has consequences.”<sup>184</sup> Thus, potential publisher and distributor liability for defamation on the Internet has the potential to actually increase the quality and amount of speech, rather than chill it.

Furthermore, it is important to keep in mind that ISPs and website operators profit greatly from their online services. On that basis alone, some scholars argue, these entities should be held at least somewhat accountable for their actions, given that there are victims of defamation out there whose reputations and lives are seriously impaired as a result of defamatory material

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<sup>181</sup> Lidsky, *supra* note 173, at 885.

<sup>182</sup> *Id.* at 885–86.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 887.

published on the Internet.<sup>185</sup> A variety of things in the law are influenced by whether someone is profiting financially from the endeavor at issue,<sup>186</sup> and the same should follow for ISPs who publish defamatory content through their servers and are not held accountable.

Lastly, in many cases the victim of online defamation cannot identify the original author and is left without recourse because the ISP is immune.<sup>187</sup> This anonymity itself does not justify holding ISPs liable, but the Internet provides the ability to disseminate material anonymously and the law should take that into account. A newspaper, on the other hand, knows precisely who its contributing authors are, and so a defamation victim would at least know from whom to seek redress if the newspaper itself was not liable. Because the Internet provides unique situations where an individual can anonymously post defamatory content, there is even more reason why the ISP or website operator should not be immunized from potential liability if it met the standard of knowledge or control that would justify imposing liability on it.

In sum, the CDA should be repealed and courts should apply the common law framework to ISPs to determine publisher liability. This approach would restrict immunity for ISPs to only those situations where an ISP warrants immunity, such as for claims based on emails or the posting of messages in bulletin boards or chat rooms. On the other hand, this approach would allow liability in situations where ISPs have editorial control over what they publish, thus

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<sup>185</sup> Annemarie Pantazis, Note, *Zeran v. America Online, Inc.: Insulating Internet Service Providers from Defamation Liability*, 34 WAKE FOREST L. REV. 531, 555 (1999).

<sup>186</sup> For example, whether a given jurisdiction can retain personal jurisdiction over an individual or entity is influenced by whether that person or entity profits from that jurisdiction. *See, e.g.*, *Neal v. Janssen*, 270 F.3d 328, 333 (6th Cir. 2001) (stating that defendant's intention to profit financially from relationship with plaintiff was a fact that supported the exercise of personal jurisdiction).

<sup>187</sup> Freiwald, *supra* note 167, at 586–87.

eliminating the free pass those entities currently enjoy.<sup>188</sup> Also, regarding the fear of Congress, some courts and scholars that a notice-based liability for those entities that fall into the middle “distributor” category will encourage no self-regulation, the law should be reworked to include a reasonable ISP standard. This standard will ensure that ISPs self-regulate because if an ISP fails to self-regulate for the purpose of avoiding notice, but a reasonable ISP in the same circumstances would have reviewed that content, the ISP will subject itself to possible liability. Furthermore, Congress’s fear that potential liability will encourage ISPs to remove too much potentially defamatory content and thus chill Internet speech is not without counterargument. First, ISPs will inherently be cautious about screening too much material because, if they do, the word will spread that they are over-screening and their popularity will shrink. Second, the type of speech that would be screened – potentially defamatory speech – is of a type that should be screened. Individuals’ rights in the sanctity of their reputations outweigh individuals’ right to free speech in some circumstances, which is why defamation law exists in the first place.

The Internet allows for cheap, fast and far-reaching dissemination of defamatory material and thus facilitates online defamation and the damage it causes.<sup>189</sup> As a result, it is simply unjust to grant near blanket immunity to ISPs and website operators who publish and distribute defamatory material.

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<sup>188</sup> See Waldman, *supra* note 27, at 66 (“This balancing is best achieved by employing a system of liability that opens service providers liability for defamatory statements, when the provider has substantively edited the statement, while not opening liability for minor editing, existence as a mere conduit, or electronic-filtering activities.”).

<sup>189</sup> Freiwald, *supra* note 167, at 587–88.

B. *Courts Should Apply the Common Law Framework on a Case-by-Case Basis*

In this new approach to Internet defamation liability using the three-part common law framework, courts should apply the framework on a case-by-case basis. In the early Internet defamation cases, courts examined all of a given ISP's functions rather than singling out the particular function at issue in the case.<sup>190</sup> It is difficult for courts to apply this approach with today's Internet because most ISPs and website operators perform a variety of functions.<sup>191</sup> For example, AOL still operates chat rooms and acts as a server for email communication, but it also posts articles and acts like a newspaper in that regard.

Determining the proper standard of liability based on what an ISP or website operator is doing in that particular instance will ensure that liability correlates with editorial control and knowledge.<sup>192</sup> For instance, in cases where an ISP or website operator acts like a publisher, such as when it publishes an online newspaper article, it should be held to the same standard of liability as a print newspaper.<sup>193</sup> On the other hand, that same ISP or website operator would only be held to the standard of liability for a common carrier if the defamation arose out of an email sent by third parties through the ISP's server.<sup>194</sup> This would directly address one of the critics' main concerns over stripping § 230 immunity and applying the common law framework: the unreasonableness inherent in requiring ISPs to screen for defamatory content the millions of

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<sup>190</sup> McManus, *supra* note 150, at 661–62.

<sup>191</sup> Sewali K. Patel, Note, *Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 675–76 (2002).

<sup>192</sup> McManus, *supra* note 150, at 669 (noting that courts “should isolate the specific function of the ISP at issue and apply a standard of liability consistent with that function”); *see also* Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142, 164 (Cal. Ct. App. 2004) (“It is one thing to grant an Internet intermediary immunity on the basis of a factual analysis of the degree of control, if any, it exerts over content, but quite another to grant immunity without regard to that critical factor.”) (internal citations omitted), *rev'd*, 51 Cal. Rptr.3d 55 (Cal. 2006).

<sup>193</sup> McManus, *supra* note 150, at 669.

<sup>194</sup> *Id.*

messages and posts they host everyday.<sup>195</sup> Indeed, this approach would almost surely not lead to liability for an ISP that simply allows third-party messages to pass through its servers.<sup>196</sup> But it could, on the other hand (and justifiably so), subject to liability an ISP that has an active role in selecting, approving and editing content it publishes.<sup>197</sup>

This approach would further most of the pertinent public policy goals.<sup>198</sup> Particularly, this approach would further the goal of not unreasonably forcing ISPs and website operators to face liability for all of the functions they serve, while also serving the goal of recognizing individuals' interest in being redressed when their reputation is tarnished. Indeed, this approach would continue to preclude liability for those ISPs that do not retain enough editorial control or knowledge to screen material, but at the same time it would provide defamed individuals a source of recovery in those circumstances when an ISP or website operator should be held accountable for their actions due to the extent of their involvement in publishing the defamatory content.

Also, such an approach would alleviate scholars' concern that the common law categories cannot properly apply to ISPs because of the differing amounts of control they assert over the various functions they perform.<sup>199</sup> It logically follows that an ISP should not be immune from liability for *all* of its functions when some of those functions involve editorial control or

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<sup>195</sup> *E.g.*, Noah v. AOL Time Warner Inc., 261 F. Supp. 2d 532, 538 (E.D. Va. 2003) (noting that AOL has millions of users and it is thus impossible for it to screen each of these postings for possible problems).

<sup>196</sup> *See supra* note 164 and accompanying text.

<sup>197</sup> *E.g.*, Blumenthal v. Drudge, 992 F. Supp. 44, 51 (D.D.C. 1998) (“Because [AOL] has the right to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher. . .”).

<sup>198</sup> McManus, *supra* note 150, at 662.

<sup>199</sup> *See Patel, supra* note 191, at 676 (noting that courts' categorization of an ISP in a particular common law category would not be applicable in all contexts because ISPs exert different amounts of control in different areas).

knowledge of defamatory material.<sup>200</sup> Under this approach, an ISP will not be automatically placed into one common law category, but rather will be characterized as a publisher, distributor or common carrier based on what function it is performing in the particular circumstance.

*C. The Immunity Courts Read into § 230 was Broader than Congress Intended, and Congress's Objectives of Internet Growth Have Been Met and Surpassed*

The immunity § 230 currently provides as interpreted by the courts could not have been what Congress intended.<sup>201</sup> Even if Congress did intend to grant such broad immunity to ISPs to encourage the growth and prosperity of the Internet, such immunity is not necessary anymore since the Internet has become such an enormous medium.<sup>202</sup>

It is likely that Congress's intention when enacting § 230 was to provide a safeguard for ISPs due to the types of new communications that the Internet created.<sup>203</sup> Specifically, the Internet brought about types of communication such as email, chat rooms, bulletin boards and listservs. These forms of communication are unique to the Internet and allow for such a free flow of communication between third-parties that screening them for defamatory material would

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<sup>200</sup> See *id.* (stating that because ISPs have control in some of its functions they should not be characterized as common carriers and thus immune from liability).

<sup>201</sup> See *Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142, 154 (Cal. Ct. App. 2004) (“The view of most scholars who have addressed the issue is that . . . the [*Zeran*] court ascribed to Congress an intent to create a far broader immunity than that body actually had in mind or is necessary to achieve its purposes.”), *rev'd*, 51 Cal. Rptr. 3d 55 (Cal. 2006).

<sup>202</sup> See *infra* notes 214–217 and accompanying text.

<sup>203</sup> See *Noah v. AOL Time Warner Inc.*, 261 F. Supp. 2d 532, 538 (E.D. Va. 2003) (noting that Congress's aim in providing immunity was a result of the “‘staggering’ amount of content” that passes through ISPs); see also *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (stating that Congress's purpose in enacting § 230 was to deal with the problem that millions of AOL users post messages daily and it would be impossible for AOL to screen all such messages).

be all but impossible.<sup>204</sup> With the millions of communications passing through these channels everyday, the threat of tort liability in this area would have a chilling effect on free speech.<sup>205</sup> Possibly even more important to Congress at the time was the fear that the threat of tort liability would stunt the growth of the Internet.<sup>206</sup> Thus, it is likely that Congress enacted § 230 and changed the standards for defamation liability for ISPs due to the unique circumstances the Internet provides.

If this was Congress's intent, though, the *Zeran* court quickly misinterpreted it and changed it forever.<sup>207</sup> In *Zeran*, the Fourth Circuit interpreted § 230 to immunize ISPs not only for defamatory material posted on its websites through message boards and chat rooms, but also for functions that were much more like their print counterparts, such as publication decisions.<sup>208</sup> This interpretation seems to acknowledge Congress's concern over the new types of technologies made available by the Internet, but also extends the same immunity to these other situations

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<sup>204</sup> *Batzel v. Smith*, 333 F.3d 1018, 1039 (9th Cir. 2003) (Gould, J., concurring in part, dissenting in part). Congress's reasoning behind § 230 is evidenced by the statements by Representatives who proposed the bill to the House:

There is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong.

*Barrett*, 51 Cal. Rptr. 3d at 70 n.15 (citing 141 Cong. Rec. H8471-H8472 (statement of Rep. Goodlatte)).

<sup>205</sup> *Batzel*, 333 F.3d at 1039.

<sup>206</sup> *Id.*

<sup>207</sup> *But see* Freiwald, *supra* note 167, at 640 (noting that it was Congress's intent to so broadly immunize ISPs and the *Zeran* court was simply executing policy).

<sup>208</sup> 129 F.3d at 330.

where immunity does not make sense. Indeed, the *Zeran* court, according to courts and scholars, seriously overextended the immunity Congress intended to grant to ISPs.<sup>209</sup>

It is unlikely that Congress intended to immunize ISPs and website operators for performing the same functions as their print counterparts. At the time Congress enacted § 230, the Internet was a relatively new, developing technology and was very limited in its content. Providing online encyclopedias, dictionaries, bulletin boards and chat rooms were some of the small number of functions the Internet performed at the time. Indeed, at the time Congress enacted § 230 it is unlikely that it knew that within a few years almost every newspaper and print medium would have a website publishing the same material.

Extending § 230's immunity to a situation like that in *Blumenthal v. Drudge* exemplifies this problem.<sup>210</sup> In *Blumenthal*, the situation did not involve defamation arising from one of several thousand third party posts that AOL could not be reasonably expected to screen for defamatory material. Rather, the defamatory content stemmed from an article by a columnist with whom AOL contracted to have on its site, advertised for, and had the right to edit.<sup>211</sup> Congress could not have intended to immunize an ISP that had this level of knowledge of the material it published and the amount of editorial control it had over such material. There is simply no reason that ISPs who exert this type of editorial control and have such knowledge of the content they are publishing should be immune from possible defamation liability that results.

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<sup>209</sup> *Barrett v. Rosenthal*, 9 Cal. Rptr.3d 142, 154 (Cal. Ct. App. 2004) (“The view of most scholars who have addressed the issue is that *Zeran*'s analysis of section 230 is flawed, in that the court ascribed to Congress an intent to create a far broader immunity than that body actually had in mind or is necessary to achieve its purposes.”), *rev'd*, 51 Cal. Rptr.3d 55 (Cal. 2006).

<sup>210</sup> *See supra* notes 84–97 and accompanying text.

<sup>211</sup> *Blumenthal v. Drudge*, 992 F. Supp. 44, 47 (D.D.C. 1998).

Indeed, as scholars and critics alike have stated, “court decisions interpreting subsection 230(c) have broadened its ambit far beyond merely protecting ‘Good Samaritan’ editorial control.”<sup>212</sup>

Congress wanted to promote the growth of the Internet and make sure that government regulation did not harm that goal. However, Congress could not have intended its law to create such broad immunity that people are left with little chance to recover if they are defamed through the Internet.<sup>213</sup>

Moreover, even if Congress did intend such broad immunity, the Internet’s growth over the last decade has mooted those goals. One of Congress’s main objectives when enacting § 230 was to promote the growth and development of the Internet.<sup>214</sup> Even at the time Congress enacted § 230 some scholars doubted whether such immunity was necessary for the growth of the Internet.<sup>215</sup> Today, though, with the Internet being the giant medium that it is, there is no doubt that Congress’s original goal of promoting the growth of the Internet has been met and is no longer a concern.<sup>216</sup> The Internet has become such an important part of our society and our everyday life that there is no doubt that it will continue to grow and flourish as Congress desired. There is and will continue to be extensive competition and business interest in the Internet so that, even with stricter laws and potential defamation liability for ISPs and website operators, companies and individuals will continue to develop the Internet.

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<sup>212</sup> Lidsky, *supra* note 173, at 871.

<sup>213</sup> *Batzel v. Smith*, 333 F.3d 1018, 1040 (9th Cir. 2003) (Gould, J., concurring in part, dissenting in part) (“Congress did not want this new frontier to be like the Old West: a lawless zone governed by retribution and mob justice. The CDA does not license anarchy.”).

<sup>214</sup> 47 U.S.C. § 230(b)(1) (2000); *Batzel*, 333 F.3d at 1037 (Gould, J., concurring in part, dissenting in part) (stating that when Congress enacted § 230, it was “worried that excessive state-law libel lawsuits would threaten the growth of the Internet”).

<sup>215</sup> Sheridan, *supra* note 149, at 179 (noting in 1997 that “it is not at all clear that additional protection is necessary for [ISPs] to grow and flourish”).

<sup>216</sup> Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 306 (2005).

Indeed, ISPs and website operators should no longer be able to benefit from an outdated law that was meant to promote the growth of the Internet. The nature of the Internet has changed drastically since Congress enacted § 230 and yet the law has remained idle. Consequently, the law needs to adapt to the current circumstances of the Internet and enforce accountability on ISPs and website operators when they either retain control over the material they publish or have knowledge of its contents.<sup>217</sup> Congress's fear that the Internet will suffer as a result of this potential liability will be eased because the Internet has changed the way we live, it is here to stay, and the competition for Internet marketplace supremacy will assure that potential liability does not stunt the Internet's growth.

## V. CONCLUSION

In sum, § 230 of the CDA needs to be amended or repealed.<sup>218</sup> The current problem is that ISPs and website operators have near blanket immunity for defamation stemming from the materials they publish.<sup>219</sup> A better approach is to allow courts to apply the three-part common law framework.<sup>220</sup> Using the common law framework will properly provide differing standards of liability for ISPs and website operators based on the amount of editorial control they have over, or their knowledge of, the defamatory material they publish or otherwise make available.<sup>221</sup> The law should also change to include a "reasonable ISP" standard that asks whether an ISP should have had notice of defamatory content, rather than simply whether it actually knew of the

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<sup>217</sup> See Sheridan, *supra* note 149, at 179 (stating that lawmakers should carefully reconsider Congress's early policy that ISPs should not have any liability for defamatory material published through the Internet).

<sup>218</sup> See *supra* Part IV.

<sup>219</sup> See *supra* Part IV.

<sup>220</sup> See *supra* Part IV.A.

<sup>221</sup> See *supra* Part IV.A.

content.<sup>222</sup> This approach will take into account critics' concern that ISPs will simply ignore potentially defamatory speech as a way to avoid notice and thus avoid potential liability.<sup>223</sup> It also addresses critics' concern that potential defamation liability will chill online speech because a) as we know from defamation law generally, not all speech is supposed to be free and unregulated, and b) on the contrary, if individuals know that they can successfully seek redress for retaliatory defamation they will be more likely to speak their minds freely on the Internet.<sup>224</sup> Finally, courts should apply the common law framework on a case-by-case basis, placing an ISP into a category – publisher, distributor, common carrier – based on the specific function it was performing at the time.<sup>225</sup>

This approach will properly take into account Congress's concern about ISPs having to police millions of messages posted by third parties, while also addressing society's interest in redressing those defamed through the Internet.<sup>226</sup> Additionally, it will carry out the proper amount of liability that Congress intended, rather than the overly broad immunity the courts have read into § 230.<sup>227</sup> Lastly, using this approach and repealing § 230 is especially sensible given the growth and development of the Internet in the last decade.<sup>228</sup> Indeed, Congress and society as a whole can rest easy knowing that the Internet is a booming business with many interested investors, and it will not be stunted due to the imposition of potential liability for publishers and distributors of defamatory material.

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<sup>222</sup> See *supra* Part IV.A.

<sup>223</sup> See *supra* notes 166–170 and accompanying text.

<sup>224</sup> See *supra* notes 171–182 and accompanying text.

<sup>225</sup> See *supra* Part IV.B.

<sup>226</sup> See *supra* Part IV.C.

<sup>227</sup> See *supra* Part IV.C.

<sup>228</sup> See *supra* Part IV.C.