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Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act

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FREE SPEECH SAVIOR OR SHIELD FOR SCOUNDRELS: AN EMPIRICAL STUDY OF INTERMEDIARY IMMUNITY UNDER SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

*David S. Ardia**

In the thirteen years since its enactment, section 230 of the Communications Decency Act has become one of the most important statutes impacting online speech, as well as one of the most intensely criticized. In deceptively simple language, its provisions sweep away the common law's distinction between publisher and distributor liability, granting operators of Web sites and other interactive computer services broad protection from claims based on the speech of third parties. Section 230 is of critical importance because virtually all speech that occurs on the Internet is facilitated by private intermediaries that have a fragile commitment to the speech they facilitate.

This Article presents the first empirical study of the section 230 case law. It begins by providing a doctrinal overview of common law liability for intermediaries, both online and offline, and describes how section 230 modifies these doctrinal approaches. It then systematically analyzes the 184 decisions courts have issued since the statute's enactment. The Article also examines how courts have applied section 230, finding that judges have been haphazard in their approach to its application.

The Article closes by discussing the study's findings and by offering some insights into how plaintiffs and defendants have fared under section 230. While section 230 has largely protected

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intermediaries from liability for third-party speech, it has not been the free pass many of its proponents claim and its critics lament. More than a third of the claims at issue in the cases survived a section 230 defense. Even in cases where the court dismissed the claims, intermediaries bore liability in the form of litigation costs, and it took courts, on average, nearly a year to issue decisions addressing an intermediary's defense under section 230.

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INTRODUCTION

What many consider the largest public space in human history is not public at all. Paradoxically, the Internet—a content-agnostic communication network available to anyone with access to a computer—contains no true "public forum."[1] It embraces no public commons upon which a citizen is free to stand on his or her virtual soapbox and regale the public.[2] It is layered on privately owned Web sites, privately owned servers, privately owned routers, and privately owned backbones. Without the acquiescence of these intermediaries, the public would have no access to speak or to be heard.

Largely free of the limitations imposed by the First Amendment, private intermediaries transport, host, and index tens of billions of pages of content online. This is not to say, however, that these intermediaries are free of all constraints; civil and criminal liability may attach to the content they intermediate. It is indisputable that some of this content is injurious and even illegal. It defames others, violates privacy rights, discloses confidential information, infringes copyrights, and is implicated in a number of other torts or crimes. Not unlike intermediaries in the offline world, such as mail carriers, libraries, and book stores, online intermediaries would be hard-pressed to screen the deluge of online speech, and the imposition of liability for facilitating the publication or distribution of third-party content would likely constrain their willingness to facilitate

1. In the First Amendment context, a "public forum" includes streets, sidewalks, and parks, which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. 496, 515 (1939). Because this Article's focus is on private intermediaries, the limitations imposed on state actors by the First Amendment are of only passing relevance. For a discussion of the First Amendment's relevance to private-party ordering, see *infra* Part II.B.

2. One of the best-known locations for public speech in the offline world is Speakers' Corner in Hyde Park, London, which has become synonymous with free speech in a public forum. "Officially sanctioned in 1872 by the Royal Parks and Gardens Regulation Act, Speakers' Corner is a site for people to exercise their right of free speech. You can turn up, stand on a makeshift platform (the simplest being a milk crate), and speak about any topic you like, provided that your utterances do not contravene the Regulations." John Michael Roberts, *The Enigma of Free Speech: Speakers' Corner, The Geography of Governance and a Crisis of Rationality*, 9 SOC. & LEGAL STUD. 271, 272 (2000). Indeed, "[s]uch is the power of this symbol that the very name, 'Speakers' Corner', resonates a populist, democratic image which today goes beyond any immediate physical location." *Id.*

continued public use.[3] Moreover, any such constraints would have profound implications for the availability of speech online, particularly speech espousing controversial viewpoints and disfavored subjects.[4]

While the Internet has vastly expanded individuals' ability to engage in speech and has enhanced the public's capacity to hear and to understand that speech, choke points remain. This is not a new problem, of course.[5] Private-party structuring has long had an influence on what speech can be communicated, but the Internet's extensive reliance on private intermediaries makes this influence more extensive and apparent.

Private intermediaries' pervasiveness, combined with the extraordinary power they wield over speech, make them attractive targets for regulators and litigants.[6] Given their essential role in facilitating online communication, intermediaries often are capable of exercising authority over wrongdoers who are otherwise unreachable because these wrongdoers are not capable of being

3. *See* Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901, 916 (2002) (noting the link between intermediary liability and censorship by intermediaries); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 892 (1984) (observing that in response to increased liability, intermediaries "will charge high risk premiums . . . [and] may even withdraw their services entirely from small or risky firms"); Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 273 (2005) ("It is well recognized that imposing liability on intermediaries will affect the services and prices they present to their customers."); *cf.* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278–79 (1964) ("[I]f the bookseller is criminally liable without knowledge of the contents, . . . he will tend to restrict the books he sells to those he has inspected . . . . And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted.") (quoting Smith v. California, 361 U.S. 147, 153–54 (1959)).

4. Jerome Barron, in his seminal article on the power of "the press," cautioned that because media intermediaries are primarily concerned with profitability, they shy away from unorthodox and unpopular speech, and the "vacuum is filled with the least controversial and bland ideas." Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1646–47 (1967).

5. As Professor Barron observed with regard to the limits intermediaries placed on speech in the mid-sixties, "[o]ur constitutional theory is in the grip of a romantic conception of free expression, a belief that the 'marketplace of ideas' is freely accessible." *Id.* at 1641; *cf.* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 656–57 (1994) (noting the threat of censorship by cable providers who control speech bottlenecks).

6. *See* Seth Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 16 (2006). Kreimer calls Internet intermediaries the "weak link" in the free speech chain, observing that "[e]ach intermediary may interdict communications, or identify speakers, listeners, or other intermediaries against whom sanctions may be directed." *Id.*

identified, are beyond the jurisdiction of the state, or are simply not amenable to legal pressure.[7]

But the targeting of intermediaries comes with substantial risks both for the intermediary and for our system of free expression. Many of these risks stem from the fact that intermediaries have a "fragile commitment to the speech that they facilitate."[8] As others have noted, intermediaries are more susceptible to legal threats than are primary speakers because the interests of the two groups, both economic and instrumental, frequently diverge.[9] As a result, intermediaries do not always share society's interest in ensuring a vibrant landscape for speech and often are unwilling to act as champions for the speech of third parties.

Mindful of the roles that intermediaries play online, Congress acted decisively when it enacted section 230 of the Communications Decency Act.[10] In deceptively simple language, section 230 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,"[11] thereby granting operators of Web sites and other interactive computer services broad protection from claims based on the speech of third parties.[12]

In the thirteen years since its enactment, section 230 has been described both as the savior of free speech in the digital age and as

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7. *See* Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653, 661–63 (2003). Moreover, intermediaries make attractive targets because they often are the parties with a "deep pocket," capable of paying a legal judgment if one is rendered. *See* Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383, 1476 (2009).

8. Kreimer, *supra* note 6, at 28. Because revenue from each marginal customer is small and the cost of a legal defense, not to mention potential monetary sanctions, is high, it is almost always cheaper for the intermediary to remove speech than to expend time or resources contesting even meritless claims. *See id.*; *see also* LAWRENCE LESSIG, FREE CULTURE 187–88, 192–93 (2004) (concluding that the threat of lawsuits discourages the distribution of copyrighted material even when doing so would be fair use).

9. *See, e.g.*, Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 435–36 (2009) ("The problem with the strategy of collateral censorship in the Internet context is that it simultaneously leads to too much censorship and too little innovation. Book publishers have a vested interest in the work of their authors, and newspapers have a vested interest in the work of their journalists. But if *A* is not affiliated with *B*, *A* lacks strong incentives to defend *B*'s speech and every incentive to prevent lawsuits."); Kreimer, *supra* note 6, at 29 ("Intermediaries are peculiarly susceptible to chill, for they often face cost and revenue structures quite different from those of first-party speakers.").

10. 47 U.S.C. § 230 (2006).

11. *Id.* § 230(c)(1).

12. *See id.*; *infra* Part II.D. Section 230 has been held to preempt causes of action ranging from discrimination under the Fair Housing Act to unfair competition. *See infra* Part III.B.3.

an ill-conceived shield for scoundrels. Yet no one suggests that this seminal piece of legislation is inconsequential. But what kind of an impact has section 230 had on intermediaries, on those who have been harmed by third parties online, and on speech more generally? Not surprisingly, section 230 has attracted a great deal of attention from scholars,[13] and has engendered considerable commentary in the popular press.[14] Few scholars, however, have undertaken a comprehensive study of the case law involving section 230, and none have done so from a systematic, empirical perspective.[15]

Instead, the primary mode of study within the legal academy has been to focus on a few high-profile cases.[16] This has led to polarizing debates, as commentators typically choose one set of cases to support

13. *See, e.g.*, Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137 (2008); Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569 (2001); H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369 (2008); Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101 (2007); Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 163 (2006); Matt C. Sanchez, *The Web Difference: A Legal and Normative Rationale Against Liability for Online Reproduction of Third-Party Defamatory Content*, 22 HARV. J.L. & TECH. 301 (2008); Matthew Schruers, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205 (2002); Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986 (2008).

14. *See, e.g.*, Brian Baxter, *Tormented by Cyber-Stalker, Ropes Partner Drafts New Legislation*, AMLAW DAILY, Apr. 17, 2009, http://amlawdaily.typepad.com/amlawdaily/2009/04/ropes-gray-partner-fights-cyberstalker.html; Leslie Harris, *Painting a Bulls-Eye on the First Amendment*, HUFFINGTON POST, June 12, 2009, http://www.huffingtonpost.com/leslie-harris/painting-a-bulls-eye-on-t_b_214713.html; Adam Thierer & John Palfrey, *Dialogue: The Future of Online Obscenity and Social Networks*, ARS TECHNICA, Mar. 5, 2009, http://arstechnica.com/tech-policy/news/2009/03/a-friendly-exchange-about-the-future-of-online-liability.ars.

15. The only author to have published a comprehensive summary of section 230 cases is Ken Myers. His insightful article on section 230's application to Wikipedia includes a table listing forty-seven cases, along with the medium of publication, the prevailing party, and, where the plaintiff prevailed, the court's reasoning. Myers, *supra* note 13, at 205–08. This is not to say, however, that non-empirical approaches are without value. Many of the articles cited herein "pursue[] doctrinal, interpretative, and normative purposes rather than empirical ones." Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 153 (2002).

16. Barton Beebe calls this mode of study the "leading cases" or "usual suspects" approach: "This anecdotal method, one essentially of connoisseurship, derives conventional wisdom about our case law from a limited aristocracy of hand-picked opinions appearing primarily in the U.S. Reports—or in the student casebooks." Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 553 (2008). Whether these decisions are representative of the broad sweep of section 230 cases is not a question such an approach can reliably answer. *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 41–42 (2002) (arguing that selection bias, among other problems, makes drawing inferences about a population of cases unreliable).

their normative view that section 230 goes too far in privileging intermediaries, and another set of cases to argue that section 230 strikes the proper balance between competing interests.[17]

This Article aims to ground the debate by presenting an empirical study of section 230 cases. Part I begins by describing the central role intermediaries play online. Part II then presents a doctrinal overview of common law liability for intermediaries, both online and offline, and describes how section 230 modifies these doctrinal approaches.

Part III outlines the methodology employed in this study and sets forth summary statistics on the judicial decisions examined, including their distribution along the dimensions of time, venue, legal claim, medium of publication, and intermediary role. Part III also reports that although the number of decisions has been trending upwards, with an especially sharp increase after 2003, the proportion of unreversed decisions that found claim preemption under section 230 has largely held steady at 60 percent.

Part IV focuses on how judges approached the application of section 230, identifying six areas of judicial inquiry that run throughout the cases. Using correlation and regression analyses, Part IV also examines how these areas of inquiry interact with each other and with the court's ultimate determination of preemption under section 230. Finding that most courts have coalesced around a three-pronged test for determining whether section 230 applies, the data nevertheless suggest that judges have been haphazard in their approach to section 230, often ignoring important threshold questions or assuming that certain requirements are met.

Finally, Part V discusses the study's findings and offers some insights into how plaintiffs and defendants have fared under section 230, including an assessment of each case's viability under common law principles in order to gain insight into how section 230 changed the liability landscape for intermediaries. While section 230 has largely protected intermediaries from liability for third-party speech, it has not been the free pass many of its proponents claim and its critics lament it to be. First, intermediaries continue to face legal claims arising from the speech of third parties. Indeed, the data show

17. There is, of course, gradation between these poles, but much of the scholarship on section 230 gravitates towards one position or the other.

that plaintiffs have filed an increasing number of such cases each year. Second, even in cases where the court dismissed the claims, intermediaries bore their own legal costs, and it took courts nearly a year, on average, to issue a decision addressing the intermediary's defense under section 230.

Although section 230 set a high bar for plaintiffs to overcome, more than a third of their claims survived preemption. Moreover, the data showed that most plaintiffs in the cases analyzed were able to identify and sue the original source of the content that caused them harm. While their success rate in those suits was quite low, it was not out of line with other studies examining defamation and tort litigation.

I. BACKGROUND

Human societies have a long history of utilizing intermediaries to handle communication tasks.[18] This intermediation involves activities ranging from transcription to transportation. Some of the earliest intermediaries were friends and neighbors who passed information via word of mouth.[19] With the advent of writing and papyrus, intermediaries began facilitating the distribution of information through courier systems.[20] The operation of modern communication intermediaries can be traced to the late eighteenth century, when optical telegraphs began passing messages across Europe.[21] The electric telegraph soon followed, revolutionizing the way humans communicated and leading to what one historian has termed the "Victorian Internet."[22]

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18. Black's Law Dictionary defines an "intermediary" as "[a] mediator or go-between; a third-party negotiator." BLACK'S LAW DICTIONARY 712 (8th ed. 2004). For the purposes of this analysis, an intermediary is any entity that enables the communication of information from one party to another.

19. *See generally* ROBIN DUNBAR, GROOMING, GOSSIP, AND THE EVOLUTION OF LANGUAGE (1996) (describing the importance of "gossip" in the evolution of language and human social systems).

20. In ancient Egypt, pharaohs are believed to have used couriers to transport their decrees to the far reaches of their territory. *See* IRVING FANG, A HISTORY OF MASS COMMUNICATION: SIX INFORMATION REVOLUTIONS 14 (1997).

21. *See* TOM STANDAGE, THE VICTORIAN INTERNET: THE REMARKABLE STORY OF THE TELEGRAPH AND THE NINETEENTH CENTURY'S ON-LINE PIONEERS 11–12 (1998) (noting that the first use of a Chappe-style optical telegraph occurred in France in 1793).

22. *Id.* at VII–IX. Indeed, much of the common law related to intermediary liability discussed in Part II was developed in response to the use of the electric telegraph.

The Internet we know today is a network of networks, consisting of privately owned servers, routers, and backbones that communicate using a suite of common languages.[23] These interconnected networks facilitate a diverse array of platforms for speech, including blogs, social networks, discussion forums, video- and photo-hosting services, and collaboratively edited wikis.[24] Together, they have fundamentally altered the capacity of individuals to speak and to be heard by others.[25]

This has led some observers to predict that the Internet will inexorably bring about widespread "disintermediation," as individuals gain the ability to communicate directly with each other.[26] This has not been borne out. To the contrary, while the Internet has had a profound effect on the "industrial information economy,"[27] we have simply exchanged one set of intermediaries (e.g., newspaper publishers and broadcast stations) for another set of intermediaries (e.g., Internet service providers, content hosts, and

23. *See* Jay P. Kesan & Rajiv C. Shah, *Fool Us Once Shame on You—Fool Us Twice Shame on Us: What We Can Learn from the Privatizations of the Internet Backbone Network and the Domain Name System*, 79 WASH. U. L.Q. 89, 131–32 (2001); Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1116 (2005). These private intermediaries communicate via a suite of languages called Transfer Control Protocol/Internet Protocol (TCP/IP). *See* W. RICHARD STEVENS, TCP/IP ILLUSTRATED: THE PROTOCOLS 1 (1994) ("The TCP/IP protocol suite allows computers of all sizes, from many different computer vendors, running totally different operating systems, to communicate with each other.").

24. *See generally* DAN GILLMOR, WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE 23–43 (2004) (discussing how the Internet has changed journalism).

25. *See* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 32 (2006) (observing that, in part because of the Internet, "[b]oth the capacity to make meaning—to encode and decode humanly meaningful statements—and the capacity to communicate one's meaning around the world, are held by, or readily available to, at least many hundreds of millions of users around the globe").

26. *See* MARK S. BONCHEK, FROM BROADCAST TO NETCAST: THE INTERNET AND THE FLOW OF POLITICAL INFORMATION 58 (1997) (opining that "political actors are using the Internet to connect directly with each other and bypass traditional intermediaries"); ANDREW L. SHAPIRO, THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW 55 (1999) ("Disintermediation is the somewhat ungainly word that is used to describe this circumventing of middlemen . . . . The control revolution allows us to take power from these intermediaries and put it in our own hands."); Robert Gellman, *Disintermediation and the Internet*, 13 GOV'T INFO. Q. 1, 2–3 (1996) ("Because of the capabilities of computer networks, the functions of central repository and archive are highly vulnerable to disintermediation.").

27. BENKLER, *supra* note 25, at 32 ("[C]ore functionalities of processing, storage, and communications are widely owned throughout the population of users. Together, these changes destabilize the industrial stage of the information economy.").

search providers).[28] In practical terms, the Internet has made the network itself an indispensable intermediary for speech.[29]

Yet the Internet has no central authority that determines what content can transect the network, or even who can connect to the network.[30] This decentralized structure is intentional,[31] and many believe it has been instrumental to the Internet's widespread adoption as a communication tool and to the rapid pace of third-party innovation online.[32] This lack of a central point of control also has made it possible for private intermediaries to take on a range of communication tasks and, not unexpectedly, they have proliferated.[33]

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28. *See* Jack M. Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933, 936–38 (2008).

29. *See* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 70 (2006). The importance of intermediaries will undoubtedly increase as "cloud computing" becomes more prevalent. *See generally* Luis M. Vaquero et al., *A Break in the Clouds: Towards a Cloud Definition*, 39 ACM SIGCOMM COMPUTER COMM. REV. 50 (2009). "Cloud computing" is associated with a new paradigm for the provision of computing infrastructure. This paradigm shifts the location of this infrastructure to the network to reduce the costs associated with the management of hardware and software resources." *Id.* at 50.

30. *See* INTERNET ARCHITECTURE BOARD, ARCHITECTURAL PRINCIPLES OF THE INTERNET 2–4 (Brian Carpenter ed., 1996), http://www.ietf.org/rfc/rfc1958.txt. Larry Lessig and Jonathan Zittrain describe the architecture of the Internet as embodying an end-to-end principle that places the intelligence of the network at the end of unintelligent conduits. *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 34–35 (2001); JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 105–06 (2008). The genius of this open structure is that components in the system can be agnostic as to what they transport and, in fact, operate with the assumption that the network infrastructure is unreliable and changing. The assignment of Internet Protocol (IP) addresses and operation of the Domain Name System (DNS), however, are centrally managed by the Internet Corporation for Assigned Names and Numbers (ICANN), a nonprofit chartered to administer top-level domain name policy. *See* INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, PROGRESS REPORT ON PERFORMANCE OF IANA FUNCTIONS (2000), http://www.iana.org/periodic-reports/progress-report-may-jul00.html.

31. *See* TIM BERNERS-LEE, WEAVING THE WEB: THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB BY ITS INVENTOR 16 (1999) ("The system . . . had to be completely decentralized. That would be the only way a new person somewhere could start to use it without asking for access from someone else. And that would be the only way the system could scale, so that as more people used it, it wouldn't get bogged down.").

32. *See, e.g.*, Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815, 847 (2004); Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 1980 (2006). Jonathan Zittrain coined the term "generativity" to describe these attributes of the Internet. *Id.* "Generativity denotes a technology's overall capacity to produce unprompted change driven by large, varied, and uncoordinated audiences." *Id.*

33. *See* Mann & Belzley, *supra* note 3, at 252.

A. The Pervasiveness of Private Intermediaries

Given the Internet's decentralized architecture, intermediaries play many different roles. It would hardly be an exaggeration to say that there are as many ways to categorize intermediaries as there are intermediaries.[34] Fortunately, section 230 does not distinguish between types of intermediaries,[35] so we need not set out a comprehensive taxonomy. Instead, this part of the Article will focus on the functions intermediaries perform when facilitating expressive communication in order to develop a conceptual vocabulary that permits comparison between online and offline intermediaries.

To illustrate the functions intermediaries perform, let us take as an example an individual who wishes to upload a video she created to YouTube. When she "publishes" her video online, a number of steps occur, likely involving dozens of intermediaries. First, she goes to YouTube.com to begin the upload process. Even this simple task, however, involves a number of intermediaries. All Internet communication is accomplished by splitting the communication into data packets that are directed by specialized hardware known as routers, which are operated by intermediaries throughout the network.[36] These routers identify computers on the Internet by their Internet Protocol (IP) addresses, which typically look something like 192.0.1.123. Because human beings cannot easily remember this

34. There is no accepted taxonomy of Internet intermediaries. Although economists and computer scientists, among others, have developed various approaches to categorizing intermediaries, these approaches tend to group intermediaries according to categories relevant to the researcher's narrow question of interest rather than devising a comprehensive taxonomy of roles played by online intermediaries. *See, e.g.*, Mitra Barun Sarkar et al., *Intermediaries and Cybermediaries: A Continuing Role for Mediating Players in the Electronic Marketplace*, J. COMPUTER MEDIATED COMM., Dec. 1995, http://jcmc.indiana.edu/vol1/issue3/sarkar.html (noting the challenge of categorizing intermediaries by function in the context of electronic commerce).

35. *See infra* notes 249–251 and accompanying text. Unlike the Digital Millenium Copyright Act (DMCA), which does not protect all Internet intermediaries and provides different levels of immunity based on intermediary classification, *see* 17 U.S.C. § 512(a)–(d) (2006) (defining four classes of intermediaries: conduit providers; service providers that store or cache content hosted by another party; providers who host content posted by another party; and search engines), section 230 extends its protections, at least as an initial matter, to any "provider or user of an interactive computer service." 47 U.S.C. § 230(c)(1) (2006).

36. In technical terms, the Internet comprises multiple operating layers, arranged in a vertical hierarchy, that dictate how data is formatted, transmitted, manipulated, and displayed. *See* Solum & Chung, *supra* note 32, at 816. When speech is communicated via the Internet, it flows, in digital form, down from the content layer through the other layers to the physical layer, across the physical layer in packets, and then back up through the same layers in reverse order. *Id.* at 816–17.

string of numbers, the domain name system (DNS) allows mnemonic names to be associated with IP addresses. When an Internet user enters one of these domain names into her web browser, for example YouTube.com, her computer sends a request to a DNS server, typically operated by her Internet Service Provider (ISP) or another intermediary that maintains a lookup table associating the name with a specific IP address.[37]

Once her request to sign on has been routed to YouTube, she is ready to begin the upload process. Her video does not go directly to YouTube, however. Instead, the video is sent from her computer to the network run by her ISP. The ISP then sends the data constituting the video, via multiple intermediaries that provide "peering connections,"[38] to the network owned by the ISP that services YouTube. From there the data are sent to YouTube's servers, which host the video for her, assuming it does not violate any of YouTube's terms of service. The entire sequence of steps is reversed, with a slightly different set of intermediaries, when her friend visits YouTube to view the video.

From this simple example we can begin to group the various intermediaries into three general classifications: (1) communication conduits; (2) content hosts; and (3) search/application providers.[39] The first category includes intermediaries that facilitate the physical transport of data across the network. Every person who accesses the Internet does so through an ISP, typically a telephone company, cable company, or satellite provider.[40] From the user's point of view, her ISP is the sole entity responsible for making access to content on the Internet possible, but many other intermediaries are involved in transporting that content and ensuring that it arrives at the right

37. This address system also relies on a number of other intermediaries to function, including domain name registrars (DNR) that are responsible for assigning IP addresses and associating those addresses with domain names.

38. Most large ISPs do not exchange payment for the data traffic they swap; instead, they regard the other ISP in the transaction as a "peer." *See, e.g.*, ZITTRAIN, *supra* note 30, at 33 n.50; Paul Milgrom et al., *Competitive Effects of Internet Peering Policies*, *in* THE INTERNET UPHEAVAL, 175–95 (Ingo Vogelsang & Benjamin M. Compaine eds., 2000).

39. There are, of course, other ways to categorize online intermediaries and many intermediaries play more than one role. It is beyond the scope of this Article to describe all of the intermediaries that facilitate communication on the Internet. For example, financial intermediaries (e.g., banks and credit card processors) play a critical role in the functioning of the Internet, but are not the focus for this Article.

40. Zittrain, *supra* note 32, at 1993; Zittrain, *supra* note 7, at 664.

place. Some of the least visible intermediaries in this category are backbone providers that operate solely at the transmission level and have no direct relationship with the actors at either endpoint.[41] Source and destination ISPs, on the other hand, serve—and usually have a contractual relationship with—the end users who seek to access content and the entities responsible for hosting it.[42]

Because the Internet operates without a single authority directing traffic across the network, the various intermediaries responsible for transporting data are left to do so in whatever manner they see fit. Jonathan Zittrain colorfully describes the process as a "bucket-brigade partnership in which network neighbors pass along each other's packets for perhaps ten, twenty, or even thirty hops between two points."[43] Each of these "hops" could involve a university server, an Internet retailer, or a backbone provider, all of whom pass the relevant data packets along to the next stop based on the information contained in the packet header.[44]

In the offline world, examples of "conduits," the first category of intermediaries, include telephone companies with regard to voice traffic, newspaper delivery persons, and mail carriers. Generally speaking, the defining characteristic of conduits is that they have no knowledge of and limited control over the contents of the speech they intermediate.[45]

The second category of intermediaries comprises content hosts. These are intermediaries that store, cache, or otherwise provide access to third-party content.[46] While anyone can set up a blog or Web site on a home server, few people do. Instead, the majority of the speech that occurs online is stored on or made available from servers owned by private intermediaries, the largest of which are

41. While invisible to users, they are not invisible to plaintiffs. *See* Daniel W. Kopko, *Looking for a Crack to Break the Internet's Back: The Listen4ever Case and Backbone Provider Liability Under the Copyright Act and the DMCA*, 8 COMP. L. REV. & TECH. J. 83, 85 (2003) (discussing a lawsuit by record labels against the four major companies that provide the "backbone" infrastructure of the Internet).

42. Mann & Belzley, *supra* note 3, at 255–56.

43. ZITTRAIN, *supra* note 30, at 33.

44. *See* John Palfrey, *The Public and the Private at the United States Border with Cyberspace*, 78 MISS. L.J. 241, 253 (2008)

45. *See* Anderson v. New York Tel. Co., 320 N.E.2d 647, 649 (N.Y. 1974); ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER & RELATED PROBLEMS § 7.3.1 (3d ed. 2007).

46. *See* Balkin, *supra* note 28, at 936–37.

operated by well-known brand names like Google and Yahoo!.[47] As a result, when an anonymous blogger covering police corruption speaks to the world, he likely does so via a blog-hosting service such as Blogger.[48] Groups espousing unpopular views assemble on social networking sites such as Facebook.[49] Citizen journalists publish photos and videos via hosting sites such as Flickr and YouTube.[50] Activists organize protests using microblogs such as Twitter.[51] And artists perform music and poetry in virtual worlds such as Second Life.[52] In each of these instances, their speech is hosted by a private intermediary that decides—subject only to the voluntary limitations it takes on through its terms of use—when, how, and whether to make that speech available to others.[53]

In the offline world, examples of content hosts include book stores and libraries. These intermediaries are also known as "distributors" because they operate between primary publishers and

47. The largest Web site hosting providers in 2008 were GoDaddy Inc. and 1&1 Internet AG with 15,086,689 and 9,616,022 hosted sites, respectively, according to a November 2008 study by Netcraft. *See* Netcraft.com, *Hosting Provider Switching Analysis*, Nov. 5, 2008, http://news.netcraft.com/hosting-provider-switching-dataset.

48. *See* Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 645 (2006) (noting that "Google-provided hosting services—including Blogger, UseNet and Google Groups archives—account for about a third of Google's total [DMCA takedown] notices").

49. *See* Posting of Robert Mackey, Holocaust Deniers Gather on Facebook, to The New York Times News Blog, (May 13, 2009), http://thelede.blogs.nytimes.com/2009/05/13/holocaust-deniers-gather-on-facebook/.

50. Not surprisingly, these hosting sites have been the subject of frequent takedown requests for allowing users to post material. *See, e.g.*, David Ardia, *Fox Television WFLD-TV v. Progress Illinois*, CITIZEN MEDIA LAW PROJECT, Jan. 6, 2009, http://www.citmedialaw.org/threats/fox-television-wfld-tv-v-progress-illinois (describing takedown notice from Fox Television directed at video posted by online news organization that embedded a television news clip).

51. *See* Brad Stone & Noam Cohen, *Social Networks Spread Defiance Online*, N.Y. TIMES, Jun. 16, 2009, at A11 (reporting that "Iranians are blogging, posting to Facebook and, most visibly, coordinating their protests on Twitter, the messaging service").

52. *See* John D. Sutter, *Artists Visit Virtual Second Life for Real-World Cash*, CNN, Apr. 7 2009, http://www.cnn.com/2009/TECH/04/07/second.life.singer/index.html ("With the recording industry in near-shambles and the recession taking a hit on art of all kinds, some musicians, visual artists and fashion designers have turned to another virtual frontier—Second Life—to sell CDs, earn tips, move paintings and grow international followings.").

53. *See* Hannibal Travis, *Of Blogs, Ebooks, and Broadband: Access to Digital Media as a First Amendment Right*, 35 HOFSTRA L. REV. 1519, 1564 (2007); Tushnet, *supra* note 13, at 994. I'll leave for others whether intermediaries should have an affirmative obligation to provide access to certain types of speech. *See, e.g.*, Balkin, *supra* note 28, at 939; Barron, *supra* note 4, at 1641. My concern is the impact that civil liability rules have on the discretion intermediaries exercise over the speech of third parties.

readers.[54] Like conduits, content hosts play an essential role in the distribution of speech, facilitating a speaker's broad reach and a listener's varied choices.

The third category of intermediaries includes application service providers and search engines. These intermediaries facilitate access to content by, among other things, indexing it, filtering it, or formatting it, but do not necessarily host the content themselves.[55] Online examples include Google Search and spam-filtering software. These intermediaries are of vital importance because they allow others to find and make sense of the vast amount of information available on the Internet and to direct their limited attention to information that is of interest to them.[56]

Search and application intermediaries have few analogs in the offline world. Some of the closest examples include the providers of telephone directories, stock prices, and bond ratings. Because they lack precise real-world analogs, application service providers and search engines do not fit neatly into the existing liability categories that have developed under the common law.[57]

B. Intermediary Control over Third-Party Speech

Because speech on the Internet transects the network as standardized electronic bits, the technologies that make the network function also present intermediaries with a powerful set of tools they can use to filter and curtail speech.[58] Indeed, this is the Internet's Achilles' heel, so to speak. For example, it would be a relatively easy matter for content hosts to identify and remove material on their servers because they already run software that directly interacts with

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54. RESTATEMENT (SECOND) OF TORTS § 581(1) cmts. d & e (1977).

55. Although they often make transient copies, called "caching," in order to perform these functions. *See* Viva R. Moffat, *Regulating Search*, 22 HARV. J.L. & TECH. 475, 482 (2009).

56. *See* James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 3 (2007) (concluding that "[s]earch engines are the new linchpins of the Internet"); Kreimer, *supra* note 6, at 40 (observing that "[t]he salience of Internet communication is famously sensitive to marginal changes in availability").

57. *See* Grimmelmann, *supra* note 56, at 15 ("The set of laws potentially applicable to search may seem bewilderingly large.").

58. *See* Kreimer, *supra* note 6, at 16 ("[T]he networks of the Internet involve a series of electronic links; at each link, from user to originating computer to server to ISP to Internet backbone and back down the chain to the end user, the state may find a potential proxy censor. Each intermediary may interdict communications, or identify speakers, listeners, or other intermediaries against whom sanctions may be directed."); Zittrain, *supra* note 7, at 656–73 (describing the control mechanism available to online intermediaries).

the content at issue.[59] Conduit intermediaries face a slightly more challenging task because their interaction with Internet communications occurs below the content layer.[60] However, hardware and software tools currently exist that would permit these intermediaries to filter or block material based on, among other things, the identity of sender or recipient and the substance of the communications themselves.[61] Search and application providers, which have become central to how people find and make sense of information online, can simply modify the criteria they use when indexing information to exclude content that contains a certain word, image, or sound, effectively rendering speakers silent and invisible to others.[62]

Albeit functional, these are blunt tools and approaches. They are blunt in the sense that they invariably block more content than the intermediary intended,[63] and they are blunt in the sense that they are incapable of exercising judgment. While software can identify certain words or phrases, it cannot determine whether the speech in fact defames others or invades their privacy, as such determinations require contextual analysis and, in many instances, additional fact gathering.[64] As a result, the process of assessing legal liability cannot

59. Zittrain, *supra* note 7, at 657; Rebecca MacKinnon, Studying Chinese Blog Censorship, RConversation, http://rconversation.blogs.com/rconversation/2008/11/studying-chines.html (Nov. 28, 2008).

60. Conduit intermediaries handle the flow of communications across their networks by interacting with data at the transport, IP, link, and physical layers. *See* Solum & Chung, *supra* note 32, at 816.

61. *See generally* Steven J. Murdoch & Ross Anderson, *Tools and Technology of Internet Filtering*, *in* ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING 57 (Ronald Deibert et al. eds., 2008).

62. Google's efforts to placate Chinese authorities demonstrate this capability. *See* Edward Wong, *China Disables Some Google Functions*, N.Y. TIMES, June 20, 2009, at A6. A court in Argentina recently ordered Google and Yahoo! to stop linking to Web sites containing photographs of the plaintiff, remarking that "[s]earch engines are responsible due to their activities as Web site access facilitators." David Haskel, *Computer Crime: Argentine Judge Holds Google, Yahoo! Liable for Posting of Third Party Content*, 14 BNA'S ELECTRONIC COM. & L. REP. 1094, 1094 (Aug. 5, 2009).

63. Even if the intermediary accurately excises the speech it intends to target, it may still make errors. *See* Kreimer, *supra* note 6, at 27 ("An ISP or search engine may mistake a family photo album for child pornography, an AIDS prevention site for obscenity, a political commentary for a 'true threat,' or a parody for a copyright violation.").

64. For example, speech that is substantially true cannot be defamatory, even when that speech is highly offensive or injurious. *See, e.g.*, Fisher v. Detroit Free Press, Inc., 404 N.W.2d 765, 767–68 (Mich. Ct. App. 1987). *But see* Noonan v. Staples Inc., 556 F.3d 20, 26 (1st Cir. 2009) (finding that truthful speech on a matter of private concern can create liability if published with actual malice). And it is not just U.S. liability standards that intermediaries need to consider.

be effectively automated. While some intermediaries, particularly those who can pass along to others the cost of the additional staff and resources needed to manually review content, will continue to facilitate the publication of potentially tortious or injurious speech, many others will not be in a position to do so and will therefore block or filter any speech that could arguably result in liability.[65]

Furthermore, when intermediaries remove potentially injurious speech, they often do so without providing an opportunity for the speaker to contest the removal or blocking.[66] It is costly for intermediaries to offer dispute resolution procedures to their users. It is far less costly to simply remove speech at the first sign of trouble or to decline to carry controversial speech in the first place. In fact, any increase in the baseline liability for intermediaries will impact their willingness to facilitate potentially injurious speech.[67] A "profit-maximizing intermediary likely will choose the mechanism that is least costly, rather than the one that preserves the most speech."[68]

Moreover, even if intermediaries were capable of determining what speech is tortious or unlawful, it is unlikely that they would be able to adequately weigh or capture the full social value of the speech they are poised to interdict.[69] Accordingly, "[i]f we impose

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The often inconsistent legal rules of other countries make the task of determining whether speech is tortious or illegal even more difficult. *See, e.g.*, *Pakistan: Blasphemy Case over Cartoons Registered*, ASIA MEDIA, Apr. 26, 2006, http://www.asiamedia.ucla.edu/article-south asia.asp?parentid=44274 (reporting on criminal action lodged against Hotmail, Yahoo!, and Google over cartoons caricaturing the Prophet Muhammad).

65. *See* Kraakman, *supra* note 3, at 891–92 ("[F]irms will . . . pay for the risk of additional liability in the familiar ways. If outside gatekeepers cannot shift their liability risks, they will charge high risk premiums."). Intermediaries that cannot pass these costs along to others will either go out of business or impose tight restrictions on the content they intermediate, "effectively lock[ing] down the Internet." Lemley, *supra* note 13, at 111.

66. *See* Kreimer, *supra* note 6, at 28; Malla Pollack, *The Right to Know? Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 109 (1999). In the context of copyright infringement claims, however, the DMCA provides an incentive for hosting services to give notice to their subscribers when they remove content by providing a safe harbor against claims by the user if the content host improperly removes the content or disables access. *See* 17 U.S.C. § 512(g) (2006).

67. *See* Kraakman, *supra* note 3, at 892; Mann & Belzley, *supra* note 3, at 273.

68. Kreimer, *supra* note 6, at 31.

69. *See, e.g.*, Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 988–89 (2005); Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 279–80 (2007); Assaf Hamdani, *Gatekeeper Liability*, 77 S.

the full social costs of harm from third-party postings on intermediaries, but they cannot capture the full social benefits of those postings, they will respond by inefficiently restricting the uses that third parties can make of the Internet."[70] We would therefore expect to see excessive curtailment of speech, as risk-averse intermediaries filter and block all but the most banal speech.[71] This likely would leave us with something akin to what cable television provides: content from a short list of preapproved providers.[72]

II. DOCTRINAL OVERVIEW

Although intermediaries, by definition, are not primary malfeasors,[73] they are not invisible to the law. Civil and criminal rules impose limited forms of secondary liability on all intermediaries.[74] While the distinction between primary and

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CAL. L. REV. 53, 73 (2003); Sonia K. Katyal, *Privacy vs. Piracy*, 7 YALE J.L. & TECH. 222, 281–90 (2004); Mann & Belzley, *supra* note 3, at 273–74.

70. Lemley, *supra* note 13, at 112.

71. *See* Hamdani, *supra* note 3, at 76 ("The increase in fees associated with gatekeeper liability first drives out law-abiding clients for whom the value of the relevant market is relatively low."); Mann & Belzley, *supra* note 3, at 274 ("[A] risk always exists that imposing additional burdens on intermediaries will chill the provision of valuable goods and services. That will be especially problematic in cases where considerable risk of chilling legal conduct that is adjacent to the targeted conduct exists."). One counterargument is that customer departure provides a hedge against censorship and an incentive for intermediaries to position themselves as more protective of speech. Such claims should be tempered by the fact that switching ISPs, hosting providers, and e-mail services is often difficult, and many Americans do not have a choice when it comes to their ISP, especially with regard to broadband providers. *See* Kreimer, *supra* note 6, at 34–36.

72. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 656–57 (1994). Recognizing the threat of censorship by cable providers, the Court cautioned:

> [S]imply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.
>
> The potential for abuse of this private power over a central avenue of communication cannot be overlooked.

Id.

73. *See* Kraakman, *supra* note 3, at 889.

74. Secondary liability encompasses two distinct concepts: vicarious and contributory liability. Vicarious liability, also called respondeat superior, arises under the common law doctrine of agency and places responsibility on a superior for the acts of subordinates. *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1958). Contributory liability, a concept that arose in the intellectual property context, applies when a party "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." Gershwin Publ'g v. Columbia Artists Mgmt., 443 F.2d 1159, 1162 (2d Cir. 1971). In the criminal context, aiding-and-abetting and conspiracy may also create secondary liability for intermediaries. Under secondary liability doctrines, intermediaries generally do not take on an affirmative duty to act or

secondary liability can often be fluid, primary liability in the speech context typically attaches to those who are the primary speakers or actors;[75] others who may have had some nexus to the wrongful acts, but who are not the actual speakers or actors, are governed by secondary liability principles. Intermediaries may fulfill this nexus by providing access to the content, facilitating its transport or receipt, or providing the instrumentalities that enable others to speak or act.

This part of the Article outlines the most common forms of speech-based liability that intermediaries face and describes how section 230 modifies these doctrinal approaches.

A. Overview of Common Law Liability for Intermediaries

Internet intermediaries face an array of potential legal claims, both civil and criminal, arising from the content and actions of third parties. This may include liability under intellectual property laws, anti-discrimination laws, and state tort laws. At the same time, they also benefit from various statutory protections that create what could best be described as a patchwork of liability.[76] Not surprisingly, determining the liability intermediaries may face with regard to the online content and actions of third parties can be a daunting proposition.

Fortunately, we can short-circuit some of this difficulty because section 230 expressly excludes intellectual property law, federal criminal law, and communications privacy law from its coverage.[77] As a result, and in keeping with this Article's focus on section 230's impact on speech, the present discussion will primarily address the liability that intermediaries face with regard to speech-based torts, such as defamation, invasion of privacy, misrepresentation, and negligence.

Developing an understanding of these common law torts will allow us to establish a baseline of liability from which section 230's

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to prevent tortious or illegal conduct, but only a duty not to facilitate known wrongdoing. *See* Kraakman, *supra* note 3, at 889.

75. *See* Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 389–90 (2008).

76. *See, e.g.*, Lanham Act, 15 U.S.C. § 1114 (2)(B)–(C) (2006); Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125 (d)(2)(D)(ii) (2006); Digital Millennium Copyright Act, 17 U.S.C. § 512 (2006).

77. *See* 47 U.S.C. § 230(e) (2006).

changes can be measured. Indeed, apart from section 230's protections and the constitutional limitations imposed by the Supreme Court in *New York Times Co. v. Sullivan*[78] and its progeny, liability for defamation and other speech-based harms is still dictated largely by the common law doctrines discussed in this section of the Article. While a number of states have created statutory causes of action mirroring the common law,[79] and others have passed retraction statutes[80] and statutes to protect against strategic lawsuits against public participation ("SLAPP suits"),[81] these legislative efforts have not significantly altered the standard of liability primary speakers and intermediaries face.

1. Primary Speaker Liability

Speech-based harms invariably involve a speaker, the original source of the injurious information, who bears direct liability as the "primary speaker."[82] This liability can arise under a number of different legal theories. The most frequently occurring cause of action in the section 230 case law is defamation, including its siblings: libel, slander, and disparagement.[83] As a product of state law, the precise contours of these reputational torts vary from state to state. Generally speaking, however, persons or entities will face liability for defamation if (1) they make a false and defamatory statement concerning another; (2) they communicate that statement to a third party; (3) they evidence fault amounting to at least negligence; and (4) the statement is either actionable irrespective of special harm (*per se*) or there is proof of special harm caused by the publication (*per quod*).[84] This summary of the elements of a claim

78. 376 U.S. 254 (1964).

79. *See, e.g.*, CAL. CIV. CODE §§ 44–46 (West 2009) (defining libel and slander).

80. *See, e.g.*, MASS. GEN. LAWS ch. 231, § 93 (West 2009).

81. Strategic lawsuits against public participation ("SLAPP suits") are lawsuits "without substantial merit brought against individuals or groups with the intention of 'silencing [the] opponents, or at least . . . diverting their resources.'" Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 802 (2000). More than 26 states have passed laws that allow a defendant to dismiss these lawsuits at an early stage in the litigation. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(a) (West 2009); 735 ILL. COMP. STAT. 110/15 (2009).

82. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

83. Defamation claims, including libel, slander, trade libel, and disparagement, occurred in 50.5% of the decisions. *See infra* Part III.B.3.

84. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

for defamation is deceptively simple; entire treatises have been devoted to debating the intricacies of each requirement.[85]

The *sin qua non* of defamation is a false statement of fact. Accordingly, statements of opinion typically cannot support a cause of action for defamation, even if they are outrageous or widely off the mark.[86] A number of other common law privileges have also developed over the years to provide speakers and publishers with additional breathing room, including the fair report privilege, the wire service defense, and the neutral reportage privilege, each of which protects the republication of certain unverified statements.[87]

Defamation law also does not permit recovery for the exposure of private but truthful information,[88] or for false communications that may hurt an individual's feelings but do not cause reputational harm. The four privacy torts—false light, intrusion into seclusion, publication of private facts, and misappropriation of one's name or likeness—developed to provide a remedy in such situations.[89] One of the elements distinguishing a publication of private facts claim from a defamation claim is that truth is not a defense; instead, truth is an essential element of the tort.[90] An individual has no claim for publication of private facts if the publication is false.[91] In addition, the disclosed information must be private.[92] Anything that occurs in

85. One such debated element is what constitutes a "defamatory statement." The gravamen of defamation is injury to reputation. Although states have different definitions for what is defamatory, there is universal agreement that speech that is merely unflattering, annoying, irksome, embarrassing, or simply hurts the plaintiff's feelings is not actionable. SACK, *supra* note 45, § 2.4.1. For example, New York defines a defamatory publication as one that "tends to 'expose the plaintiff to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'" Foster v. Churchill, 665 N.E.2d 153, 157 (N.Y. 1996) (citation omitted).

86. *See, e.g.*, Milkovich v. Lorain Journal Co., 497 U.S. 1, 20–21 (1990); Leidholdt v. L.F.P. Inc., 860 F.2d 890, 894 (9th Cir. 1988).

87. For an excellent summary of these defenses and their potential application to online intermediaries, see Sanchez, *supra* note 13, at 305–08.

88. *See, e.g.*, Campanelli v. Regents of Univ. of Cal., 51 Cal. Rptr. 2d 891, 896 (Ct. App. 1996); RESTATEMENT (SECOND) OF TORTS § 581A (1977). *But see* Noonan v. Staples, Inc., 556 F.3d 20, 26 (1st Cir. 2009) (finding that truthful speech on a matter of private concern can create liability under Massachusetts law if published with actual malice).

89. *See* RESTATEMENT (SECOND) OF TORTS § 652A (1977).

90. *See id.* § 652D.

91. *See, e.g.*, Fellows v. Nat'l Enquirer, Inc., 42 Cal. 3d 234, 242 (1986).

92. *See, e.g.*, Forsher v. Bugliosi, 26 Cal. 3d 792, 808 (1998).

a public place is by definition not private and cannot be the subject of a publication of private facts claim.[93]

As to other claims such as tortious interference,[94] intentional infliction of emotional distress,[95] and negligence, courts generally require that when these claims are based on injurious speech, the plaintiff must surmount the same constitutional and common law protections applicable to defamation claims,[96] regardless of the label selected by the plaintiff for his or her claim.[97]

As this brief overview demonstrates, an essential element of each tort is publication,[98] typically defined as communication to a third party other than the plaintiff.[99] Publication need not involve the help of others, but if it does, those who serve as intermediaries face three potential types of liability for facilitating the speech: (1) publisher liability; (2) distributor liability; and (3) conduit liability.

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93. Rare exceptions to this rule have been made in situations where a private person has been caught in a very embarrassing event outside of her control. *See* Daily Times Democrat v. Graham, 162 So. 2d 474 (Ala. 1964) (allowing a woman to recover for a published picture of her emerging from a fun house where a fan had blown up her skirt without her knowledge). But many courts have refused to recognize an exception in similar contexts. *See, e.g.*, Neff v. Time, 406 F. Supp. 858 (W.D. Pa. 1976); McNamara v. Freedom Newspapers, Inc., 802 S.W.2d 901 (Tex. App. 1991).

94. Tortious interference, sometimes described as tortious interference with contract or tortious interference with prospective economic advantage, is not recognized in every state. For those states that do recognize such claims, the elements generally entail (1) the existence of contractual or business relations with a third party; (2) defendant's knowledge of such relations; (3) defendant's intentional procurement of breach or interference; and (4) damages caused by the breach or interference. *See, e.g.*, Int'l Minerals & Res., S.A. v. Pappas, 96 F.3d 586, 595 (2d Cir. 1996) (citing Jews for Jesus Inc. v. Jewish Cmty. Relations Council, 968 F.2d 286, 292 (2d Cir. 1992)).

95. To make out a claim for intentional infliction of emotional distress, a plaintiff generally must prove: "(1) that the defendant engaged in extreme and outrageous conduct (2) that intentionally or recklessly (3) caused severe emotional distress to the plaintiff." Cunningham v. United Nat'l Bank of Wash., 710 F. Supp. 861, 863 (D.D.C. 1989) (citing Ridgewells Caterer, Inc. v. Nelson, 688 F. Supp 760, 764 (D.D.C. 1988)).

96. *See, e.g.*, Newcombe v. Adolf Coors Co., 157 F.3d 686, 695 (9th Cir. 1998) (negligence); Idema v. Wager, 120 F. Supp. 2d 361, 370 (S.D.N.Y. 2000) (intentional infliction claim); Sorenson v. Chevrolet Motor Co., 214 N.W. 754, 756–57 (Minn. 1927) (Stone, J., dissenting) (tortious interference).

97. *See, e.g.*, Sony Computer Entm't Am., Inc. v. Am. Home Assurance Co., 532 F.3d 1007, 1015 (9th Cir. 2008) (noting that "creative pleading does not change the analysis of a defamation-based claim or applicable privileges").

98. The tort of intrusion upon seclusion, which is not discussed in the main text but is nevertheless one of the privacy torts, does not require publication in order to be actionable. Auto-Owners Ins. Co. v. Websolv Computing, Inc., 580 F.3d 543, 550–51 (7th Cir. 2009).

99. The Restatement (Second) of Torts defines publication for purposes of defamation law as "communication intentionally or by a negligent act to one other than the person defamed." RESTATEMENT (SECOND) OF TORTS § 577(1) (1977).

2. Publisher Liability

Under standard common law principles, a person who publishes a statement by another bears the same liability for the statement as if he or she had initially created it.[100] Because they cooperate actively in the publication, "primary publishers," as they are sometimes called, are held to a standard of liability comparable to that of primary speakers.[101] Thus, a book publisher or a newspaper publisher can be held liable for anything that appears within the pages of its publications. Publisher liability attaches even if the publisher attributes the statement at issue to the original author. The theory behind this liability is that a publisher has the knowledge, opportunity, and ability to exercise editorial control over the content of its publications.[102]

Whether they in fact have this knowledge and ability to exercise editorial control over the contents of their publications is irrelevant under common law principles. Publishers are held liable for injurious statements contained in their works even absent proof that they had specific knowledge of the statements at issue because of an assumed duty to be aware of what they publish.[103] As a result, publisher liability is, in practical terms, coterminous with primary speaker liability.

3. Distributor Liability

Distributor liability is far more limited. Newsstands, bookstores, and libraries are generally not held liable for the content they

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100. *Id.* § 578; *see also* Harris v. Minvielle, 19 So. 925, 928 (La. 1896) (stating that "talebearers are as bad as talemakers"). In fact, each time a defamatory statement is communicated by a new person or entity, a new publication occurs, creating a separate basis of tort liability. RESTATEMENT (SECOND) OF TORTS § 578 cmt. b (1977); *see also* Dixson v. Newsweek, Inc., 562 F.2d 626, 631 (10th Cir. 1977) (stating that a "republication of false defamatory statements is as much a tort as the original publication").

101. RESTATEMENT (SECOND) OF TORTS § 581 cmt. g (1977).

102. *See id.* § 581 cmt. c (1977); W. PAGE KEETON, ET AL., PROSSER & KEETON, THE LAW OF TORTS § 113, at 810 (5th ed. 1984); Loftus E. Becker Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 CONN. L. REV. 203, 222 (1989).

103. *See, e.g.*, Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1119 (11th Cir. 1992) (holding magazine liable for negligently publishing an advertisement that created an unreasonable risk of violent criminal activity); Blinick v. Long Island Daily Press Publ'g Co., 323 N.Y.S.2d 853, 854–55 (1971) (finding newspaper liable for negligence for publishing advertisement containing erroneous telephone number resulting in plaintiff being deluged with sexually oriented calls). Since the Supreme Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), some proof of fault must be shown to establish liability. *See infra* notes 142–56 and accompanying text.

distribute unless they know or have reason to know of its tortious or illegal nature. [104] Moreover, a distributor, such as a bookseller,

> is under no duty to examine the various publications that he offers for sale to ascertain whether they contain any defamatory items. Unless there are special circumstances that should warn the dealer that a particular publication is defamatory, he is under no duty to ascertain its innocent or defamatory character. [105]

However, once a distributor has knowledge of the tortious nature of the material or communications within its possession or control, it must stop making the material available to others or face liability for its continued publication. [106] This knowledge can be actual, as in the case of material that is defamatory on its face, or inferred, as may be the case when "a particular author or a particular publisher has frequently published notoriously sensational or scandalous" material in the past. [107]

The key distinction in the common law between a publisher and distributor is that a publisher inherently has knowledge of the content it is publishing, while a distributor does not. As a result, the law does not impose liability on distributors unless they have knowledge or reason to know that information they are distributing is tortious or unlawful.

4. Conduit Liability

In important respects, conduit liability mirrors distributor liability. That is, there can be no liability imposed on conduits in the absence of knowledge and fault. [108] However, intermediaries that are

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104. *See* Tacket v. General Motors Corp., 836 F.2d 1042, 1046–47 (7th Cir. 1987); RESTATEMENT (SECOND) OF TORTS § 581(1) (1977). Cases against bookstores and libraries are exceedingly rare; indeed, "no one seems to have sued a library for defamation in this century." Becker Jr., *supra* note 102, at 227 (noting that "no American appears ever to have recovered for defamation from a bookseller or distributor not controlled by the primary publisher").

105. RESTATEMENT (SECOND) OF TORTS § 581(1) cmt. d (1977); *see also* Lerman v. Flynt Distrib. Co., 745 F.2d 123, 139 (2d Cir. 1984) (stating that a distributor cannot be held liable "for false and defamatory matter" without "adequate proof of fault").

106. *See* RESTATEMENT (SECOND) OF TORTS § 577(2) (1977) ("One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.").

107. *Id.* § 581 cmt. e.

108. *See, e.g.*, Dworkin v. Hustler Magazine, Inc., 634 F. Supp. 727, 729 (D. Wyo. 1986) (quoting RESTATEMENT (SECOND) OF TORTS ("[O]ne who only delivers or transmits defamatory

"under a duty to the public to accept and transmit messages, stand[] on a different footing from the other persons providing [the] means of publication."[109] For those intermediaries, knowledge alone is insufficient to establish liability.[110] As described in the comments to the Restatement (Second) of Torts, a conduit intermediary

> is not required to make inquiry or investigation as to the circumstances and the reasons or purposes for which its service is demanded. The necessity of prompt transmission of messages precludes the inquiry. Therefore, the public utility is privileged to accept and transmit an obviously defamatory message . . . . The telegraph company may assume that the sender is privileged until it has some sufficient affirmative reason to know the contrary.[111]

O'Brien v. Western Union Telegraph Co.[112] illustrates the policies animating the common law's special treatment of conduits.[113] In *O'Brien*, the First Circuit stated that the immunity provided to telegraph companies "must be broad enough to enable the company to render its public service efficiently and with dispatch. Speed is the essence of the service."[114] Noting that the defendant had handled more than 70,000 messages on the day in question, the court reasoned:

> If the telegraph companies are to handle such a volume of business expeditiously, it is obvious that their agents cannot spend much time pondering the contents of the messages

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material published by a third person is subject to liability if, but only if, he knows or had reason to know of its defamatory character.")).

109. RESTATEMENT (SECOND) OF TORTS § 612 cmt. g (1977). According to the Restatement:

> A public utility under a duty to transmit messages is privileged to do so, even though it knows the message to be false and defamatory, unless
>
> (a) the sender of the message is not privileged to send it, and
>
> (b) the agent who transmits the message knows or has reason to know that the sender is not privileged to publish it.

Id. § 612 (2).

110. The protection for a "public utility under a duty to transmit messages," *id.* § 612(2), is expressly applicable to "common carriers," which include "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio," 47 U.S.C. § 153(10) (2006); *see also* Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) (defining common carriers based on function).

111. RESTATEMENT (SECOND) OF TORTS § 612 cmt. g (1977).

112. 113 F.2d 539 (1st Cir. 1940).

113. *Id.*

114. *Id.* at 541.

> with a view to determining whether they bear a defamatory meaning, and if so, whether the sender might nevertheless be privileged. [115]

The rationale behind this special treatment is that it would be impractical, if not impossible, for intermediaries serving as conduits to review everything they transmit; as a result, imposition of liability would lead them to engage in excessive self-censorship. [116] This protection enshrines the hoary principle that the law does not hold the messenger responsible for the contents of the message. In practical terms, conduits almost never face liability for third-party speech. [117]

This is not to say that it is easy to recognize which intermediaries should be treated as conduits and which should be treated as distributors. The courts struggled for years over what standard of liability to apply to telegraph companies that transmitted defamatory messages, eventually settling on the standard codified in the *Restatement (Second) of Torts* quoted above. [118] Examples of intermediaries that enjoy the protection afforded to conduits include telegraph companies and telephone companies carrying voice traffic. [119] Intermediaries that transmit the communications of others but are not classified as "public utilit[ies] under a duty to transmit," [120] are not entitled to this additional level of protection.

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115. *Id.* at 542.

116. *See* W. Union Tel. Co. v. Lesesne, 182 F.2d 135, 137 (4th Cir. 1950); Auvil v. CBS 60 Minutes, 800 F. Supp. 928, 932 (E.D. Wash. 1992).

117. *See* Anderson v. New York Tel. Co., 320 N.E.2d 647, 649 (N.Y. 1974) (finding telephone company not liable for a user's defamatory answering machine message even when the telephone company knew about the defamatory statements); Sack, *supra* note 45, § 7.3.1.

118. *See* Finley P. Maxson, *A Pothole on the Information Superhighway: BBS Operator Liability for Defamatory Statements*, 75 WASH. U. L.Q. 673, 676 & n.12 (1997) (noting that it was not until 1950, in *W. Union Tel. Co. v. Lesesne*, 182 F.2d 135, that the courts settled on a liability standard for telegraph services).

119. For the most part, ISPs have not been classified as common carriers. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 993–96 (2005); *In re* Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, 22 F.C.C.R. 5901, 5914 (2007) (declaratory ruling); Anthony E. Verona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L.J. 1, 91 (2009). *But see* Jonathan E. Nuechterlein, *Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. TELECOMM. & HIGH TECH. L. 19, 46–49 (suggesting that the FCC has authority to impose common carrier-type non-discrimination requirements on ISPs under its Title I authority).

120. RESTATEMENT (SECOND) OF TORTS § 612(2) (1977).

Instead, their liability rests on the "know or have reason to know" standard applicable to distributors.[121]

Before we examine how section 230 modifies these common law approaches to intermediary liability, one final set of concepts must be added to the mix: the constitutional limitations imposed by the First Amendment.

B. First Amendment Limitations on Intermediary Liability

The Supreme Court has not been silent with regard to the impact civil and criminal sanctions directed at intermediaries can have on First Amendment rights. In a series of cases decided in the 1950s and 1960s, the Court laid out the constitutional framework for evaluating the censorial impact legal sanctions could have on intermediaries.[122] As Seth Kreimer observes about the Court's evolving view of intermediaries, "[t]hese doctrines continue to frame the rights of litigants in modern litigation over efforts to chill weak links in the chain of Internet communications."[123]

In two cases involving booksellers, the Court made clear that the First Amendment does not countenance strict liability imposed on intermediaries and that First Amendment protections embrace the *distribution of speech* as well as its initial publication. In *Smith v. California*,[124] the Court was faced with a statute that made it illegal for the operators of bookstores to have an obscene book on their shelves, whether they knew the book was obscene or not.[125] In

121. *See supra* Part II.A.3.

122. Rejecting the claim that the First Amendment is implicated only when the state itself imposes criminal sanctions, the Court stated in *Bates v. City of Little Rock* that the Constitution's protections for speech and association "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." 361 U.S. 516, 523 (1960) (invalidating demand for NAACP's membership list). By the middle of the decade, the Court also allowed speakers to challenge the impact of restrictions on intermediaries, *see* Bantam Books v. Sullivan, 372 U.S. 58, 65 n.6 (1963), and acknowledged that the First Amendment extended to listeners as well, *see* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 756 (1976) (indicating that "the protection afforded is to the communication, to its source and to its recipients both"); Lamont v. Postmaster Gen., 381 U.S. 301, 306–07 (1965) ("The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. . . . This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights.").

123. Kreimer, *supra* note 6, at 51.

124. 361 U.S. 147 (1959).

125. *Id.* at 149.

invalidating the statute on First Amendment grounds, the Court held that an obscenity statute that did not require scienter on the part of those who distributed such material had the "collateral effect of inhibiting the freedom of expression" by placing the burden on such distributors to continually inspect the contents of their inventory.[126] Justice William J. Brennan, writing for the Court, noted the pernicious effect that such a law would have when applied to intermediaries: "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered."[127]

In a second bookseller case, *Bantam Books, Inc. v. Sullivan*,[128] the Court invalidated the McCarthy-esque practices of the Rhode Island Commission to Encourage Morality in Youth, which notified distributors that certain books and magazines had been found by the Commission to be objectionable for sale or display to minors.[129] While the Commission had no enforcement powers, the Court noted that "[t]hese acts and practices directly and designedly stopped the circulation of publications in many parts of Rhode Island,"[130] which had the effect of suppressing speech by condemning intermediaries that distributed the targeted books.[131] Recognizing that the First Amendment's protections would be meaningless if speech could not be heard by others, Justice Brennan instructed that "[t]he constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication."[132]

One of the most important and widely cited cases involving the First Amendment's protections for speech, *New York Times Co. v. Sullivan*,[133] shortly followed the bookseller cases. In *Sullivan*, the Court again addressed the danger of censorship imposed by

126. *Id.* at 151–53; *see also* New York v. Ferber, 458 U.S. 747, 765 (1982) ("As with obscenity laws, criminal responsibility [for child pornography] may not be imposed without some element of scienter on the part of the defendant."); Manual Enters., Inc. v. Day, 370 U.S. 478, 492 (1962) (rejecting "the power of the Post Office to bar a magazine from the mails, if exercised without proof of the publisher's knowledge of the character of the advertisements included in the magazine").

127. *Smith*, 361 U.S. at 153–54.

128. 372 U.S. 58, 72 (1963).

129. *See id.*

130. *Id.* at 68.

131. *Id.* at 68–69.

132. *See id.* at 65 n.6.

133. 376 U.S. 254 (1964).

intermediaries.[134] Although the factual setting of the case is often overlooked by commentators,[135] *Sullivan* involved The New York Times Company *acting as an intermediary* with regard to a paid editorial advertisement submitted by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South."[136] Not unlike present-day intermediaries, the *New York Times* republished the advertorial after conducting only minimal fact-checking.[137]

Citing his prior opinions in *Smith* and *Bantam Books*, Justice Brennan reiterated that the First Amendment's protections extend to intermediaries:

> Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.[138]

To hold otherwise, he reasoned, would result in "self-censorship" by intermediaries and would "shackle the *First Amendment* in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'"[139]

The Supreme Court's decision in *Sullivan* also addressed the question of whether a party, acting as either a primary speaker or an intermediary, could be found liable for defamation without proof of

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134. *Id.* at 295.

135. *See* Tushnet, *supra* note 13, at 1007 (observing that "*Sullivan* has not generally been understood as a case about intermediary liability").

136. *See Sullivan*, 376 U.S. at 257.

137. *See id.* at 260–61 ("The manager of the Advertising Acceptability Department testified that . . . [n]either he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.").

138. *Id.* at 266.

139. *Id.* (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)). The majority also rejected the claim that, because the case involved a civil lawsuit, there was no state action. *See id.* at 265 ("It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.").

fault.[140] The Court held that the First Amendment required that a public official seeking damages for defamatory speech must prove by clear and convincing evidence that the defendant published the challenged statements with "actual malice."[141] Distinguishing common law malice, the Court stated that a defendant publishes with actual malice when it publishes a defamatory statement knowing that it is false, or with reckless disregard as to its truth or falsity.[142] In making this determination, the Court analyzed what The New York Times Company knew about the truth of the statements at issue, not what the individual author of the advertisement knew.[143]

Courts have applied the heightened liability standards imposed in defamation claims to other speech-based torts as well. For example, given the similarity between defamation and false light claims, courts concerned with plaintiffs doing an end-run around the fault requirements of *Sullivan* require the same level of fault in a false light claim as would be required for a defamation claim.[144] The same holds true for intentional infliction of emotional distress claims and tortious interference claims when such claims involve speech directed to others.[145]

Intermediaries also enjoy a First Amendment privilege to publish and distribute truthful speech on matters of public concern. In *Bartnicki v. Vopper*,[146] the Supreme Court rejected the imposition of civil liability on a radio commentator who had broadcast portions of an illegally intercepted cell phone conversation between union

140. *See id.* at 285–88. At the time, a defendant could be held strictly liable for any false defamatory statement under the common law. *See* Herbert v. Lando, 441 U.S. 153, 159 n.4 (1979).

141. *See Sullivan*, 376 U.S. at 279–80.

142. *Id.* The actual malice inquiry is a subjective one; there must be sufficient evidence that the defendant "in fact" entertained serious doubts about the veracity of the publication. St. Amant v. Thompson, 390 U.S. 727, 731 (1968). The Supreme Court has made clear that this is not measured by what a reasonably prudent man would have published or would have investigated before publishing; even an "extreme departure" from professional publishing standards does not establish actual malice. Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 665 (1989).

143. *See* Tushnet, *supra* note 13, at 1007. The Court's reasoning in *Sullivan* has consistently served as the basis for rejecting liability for defamation without proof of fault. *See, e.g.*, Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990); Time, Inc. v. Firestone, 424 U.S. 448, 463 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

144. *See* Time, Inc. v. Hill, 385 U.S. 374, 387 (1967); SACK, *supra* note 45, § 12.3.

145. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) (intentional infliction of emotional distress claim); Blatty v. N. Y. Times Co., 42 Cal. 3d 1033, 1044–45 (1986) (tortious interference claim).

146. 532 U.S. 514 (2001).

leaders discussing the need to "blow off [the] front porches" of public officials negotiating with the union.[147] The statute at issue imposed liability on any person who disclosed information they knew or had reason to know was the result of illegal interception.[148] Noting that "[a]s a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards,'"[149] the Court held that the act of publishing information provided by an anonymous third party was constitutionally privileged, instructing legislatures and courts that "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."[150]

The Court in *Bartnicki*, however, was careful to limit its holding to truthful speech on matters of public concern.[151] The Court has not yet addressed whether the publication of truthful information on matters of purely private concern enjoys the same protection. Nevertheless, the Court has recognized that the First Amendment plays a role in limiting the scope of claims seeking recovery for the publication of private facts.[152] In addition, the Court has expressed concern that it is improper for any court to determine what is newsworthy,[153] particularly when the media has made a contrary determination.[154]

The requirement that plaintiffs prove falsity to recover for reputational injuries and that defendants must evidence fault before either civil or criminal liability may be imposed, make it feasible for

147. *Id.* at 519.

148. *Id.* at 523–24.

149. *Id.* at 527; *see also* Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989) ("[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . ."); N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (refusing to enjoin publication of Pentagon Papers).

150. *Bartnicki*, 532 U.S. at 529.

151. *Id.* at 533–34 (leaving open "disclosures of . . . information of purely private concern"); *id.* at 535–36 (Breyer, J., concurring) (emphasizing the narrowness of the Court's holding, the "unusual public concern" of the speech at issue, and the need to balance "speech-restricting and speech-enhancing consequences").

152. For example, information that is a matter of public record cannot be the basis for a claim under this tort. *See, e.g.*, *Fla. Star*, 491 U.S. at 524 (holding that the accurate identification of a rape victim's name that was inadvertently revealed in a sheriff's press office was protected under the First Amendment).

153. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

154. *See* Shulman v. Group W Prods., Inc., 955 P.2d 469, 484–85 (Cal. 1998).

intermediaries to rely in good faith on the publication decisions of others. But it may even be the case that the First Amendment requires a higher standard than "know or have reason to know" for online intermediaries that facilitate the speech of others.[155] However, because Congress stepped in and said in section 230 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,"[156] the Supreme Court has not yet had occasion to answer this question.

C. The Early Internet Speech Cases

Not surprisingly, the first Internet intermediaries to be sued based on the speech of third parties argued that they were merely distributors, and not publishers, of the content on their Web sites. The first of these cases was *Cubby, Inc. v. CompuServe, Inc.*[157] A subsidiary of H&R Block, CompuServe, Inc. ("CompuServe") was one of the first national online service providers, with more than 800,000 subscribers at the time of the lawsuit.[158] CompuServe developed CompuServe Information Service, which provided subscribers with access to over 150 specialty electronic "forums," consisting of electronic bulletin boards, interactive online conferences, and topical databases.[159] Many of these forums were provided by third parties who agreed to editorial and technical standards set by CompuServe.[160]

One such forum run by a third party regularly published a newsletter called "Rumorville, U.S.A.," which included reports about broadcast journalism and journalists.[161] The court noted that on several occasions in April 1990, Rumorville carried items about the

155. *See* Floyd Abrams, *First Amendment Postcards from the Edge of Cyberspace*, 11 ST. JOHN'S J. LEGAL COMMENT. 693, 704 (1996) ("It seems to me that a far more protective standard is needed than 'reason to know;' something like 'knowing,' more like 'actual knowledge.' It does not now exist as a matter of common law.").

156. 47 U.S.C. § 230(c)(1) (2006). Section 230 further provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3).

157. 776 F. Supp. 135 (S.D.N.Y. 1991).

158. *See* Terri A. Cutrera, *Computer Networks, Libel, and the First Amendment*, 11 COMP. L.J. 555, 577 (1992).

159. *See id.*

160. *See id.*

161. *See CompuServe*, 776 F. Supp. at 137.

plaintiffs, Cubby, Inc., and Robert Blanchard, that were published in the CompuServe forum. [162]

CompuServe did not dispute that the statements were defamatory. [163] Instead, it argued that it should be treated like a distributor because it did not review the contents of the forum before it appeared on the site. [164] The court agreed. Relying in large part on the reasoning in *Smith v. California*, Judge Peter Leisure held that CompuServe was a distributor and could not be held liable for defamatory statements in its forum unless the plaintiff could prove that CompuServe knew or had reason to know of the defamatory content at the time it distributed the information to its subscribers. [165]

The Court seemed to take two factors into account in finding that CompuServe was a distributor: (1) CompuServe's contract with the third-party forum manager gave CompuServe no editorial control over the contents of the forum at issue; [166] and (2) CompuServe had a "short time frame within which [it] was obliged to load the presented forum onto its service." [167] Judge Leisure explained:

> A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, bookstore or newsstand would impose an undue burden on the free flow of information. [168]

Four years later, a New York state court came to the opposite conclusion when faced with an online service provider that held itself out as a family-friendly computer network. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, [169] an investment banking firm sued Prodigy

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162. *See id.* at 138. Rumorville included a statement saying that a competing news service run by the plaintiffs had "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 [the competing business] as a 'new startup scam.'" *Id.*

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.* at 139–41.

167. Cutrera, *supra* note 158, at 578. Jonathan Zittrain opines that "the court credited—wrongly, as a factual matter—that no pre-screening of uploaded materials was possible within CompuServe's forums, making the service a passive conduit." Jonathan Zittrain, *A History Of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 258 (2006).

168. *CompuServe*, 776 F. Supp. at 140.

169. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

Services Co. ("Prodigy"), another large national online service provider with thousands of users, for allegedly defamatory anonymous postings on its "Money Talk" bulletin board, a forum for the discussion of investments and financial information. [170]

In their motion for partial summary judgment, the plaintiffs argued that the moderator of "Money Talk," although an independent third party, was an agent of Prodigy for the purposes of imputing the moderator's knowledge of the statements at issue to Prodigy. [171] While the court stated that it agreed with the reasoning in *CompuServe*, it held that, because Prodigy was exercising editorial control over the moderator and was using a software screening program to filter content, Prodigy was acting more like a publisher than a distributor and therefore was responsible for all of the content in the forum. [172]

Judge Stuart Ain seems to have "anticipated the firestorm" that would follow the *Stratton Oakmont* decision. [173] In an effort to stave off criticism, Judge Ain wrote that those who claim that imposing liability will compel all computer networks to abdicate control of their bulletin boards "incorrectly presume[] that the market will refuse to compensate a network for its increased control and the resulting increased exposure." [174] Offering a bit of unsolicited advice to the operators of Prodigy, he nevertheless suggested that they might want to structure their operations to become more passive in order to avoid liability in the future. [175]

The perverse upshot of the *Stratton Oakmont* decision was that any online service provider who made an effort to restrict or edit user-submitted content, even for purposes of ensuring a family-

170. *See id.* at *1.

171. *Id.*

172. *Id.* at *3–*5 (citing RESTATEMENT (SECOND) OF TORTS § 578 (1977), which states, *inter alia*, that "one who repeats or otherwise republishes a libel is subject to liability as if he had originally published it").

173. Schruers, *supra* note 13, at 211.

174. *Stratton Oakmont*, 1995 WL 323710, at *5. "In fact, Stratton Oakmont itself may have ultimately doubted the wisdom of construing ISPs as publishers of third party content." Schruers, *supra* note 13, at 211. The plaintiff dropped its $200 million claim against Prodigy in exchange for an apology, "[c]iting the 'best interests of the parties as well as the on-line and interactive services industries.'" Peter H. Lewis, *After Apology From Prodigy, Firm Drops Suit*, N.Y. TIMES, Oct. 25, 1995, at D1.

175. *Stratton Oakmont*, 1995 WL 323710, at *5 ("Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice.").

friendly environment, faced a much higher risk of liability if it failed to eliminate all tortious material than if it simply did not try to control or edit the content of third parties at all. As Judge Ain anticipated, the decision in *Stratton Oakmont* created quite an uproar.

D. The Communications Decency Act of 1996

Some scholars have suggested that the protections for intermediaries contained in section 230 slipped in unnoticed, much like a thief in the night.[176] This is not entirely true. While Congress's clear intent in passing the Communications Decency Act of 1996 (CDA)[177] was to protect children from harmful material on the Internet, the legislative history associated with the amendment that ultimately became section 230 demonstrates that Congress was also responding to Internet service providers who were voicing growing concern about the liability they faced for third-party speech on their services.

1. Legislative History of Section 230

A detailed account of the legislative history of the CDA is beyond the scope of this Article and is available elsewhere.[178] Instead, this section of the Article focuses on the surprisingly short legislative path traveled by the provisions that became section 230.

On February 1, 1995, Senator James Exon, whose earlier attempt to legislate obscenity on the Internet had failed,[179] proposed legislation that would become part of the Telecommunications Act of 1996,[180] the most extensive overhaul of the venerable telecommunications law since it was first enacted in 1934. Senator Exon sought to achieve his purpose by vesting increased authority in the Federal Communications Commission (FCC) and proclaimed at the time: "[T]he information superhighway should not become a red

176. *See, e.g.*, Lemley, *supra* note 13, at 102 (stating that section 230 "arose largely by accident").

177. Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 133 (1996).

178. For a thorough review of the CDA's legislative history, see Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51 (1996).

179. In July 1994, Senator Exon had proposed a stand-alone law intended to "modernize" obscenity regulation "for the digital world." 140 CONG. REC. S9746 (daily ed. July 26, 1994) (statement of Sen. Exon).

180. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

light district. This legislation will keep that from happening and extend the standards of decency which have protected telephone users to new telecommunications devices." [181]

Neither Senator Exon's first bill nor his second bill contained any language resembling section 230. In fact, the provisions that ultimately became section 230 were introduced as part of a competing piece of legislation sponsored by Representatives Christopher Cox and Ron Wyden, and called the Online Family Empowerment Amendment (the "Cox/Wyden Amendment"). [182] The Cox/Wyden Amendment had the dual purpose of overruling the *Stratton Oakmont* decision and encouraging private efforts to deal with Internet indecency. [183] Cox and Wyden made their policy goals clear, adding language to the legislation that stated, *inter alia*, that it

> is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation. [184]

As others have observed, the *Stratton Oakmont* decision appeared to have galvanized congressional support for the Cox/Wyden Amendment because the Amendment sought to enlist online service providers in the battle against indecency and to protect them from liability when they did so. [185] Somewhat surprising in light of the debate about section 230 today, the Cox/Wyden Amendment provoked minimal discussion at the time it was incorporated in the CDA. [186]

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181. 141 CONG. REC. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon).

182. 141 CONG. REC. 22,044 (1995).

183. *See* H.R. REP. NO. 104-458, at 193–94 (1996) (Conf. Rep.); 141 CONG. REC. H8469-70 (daily ed. Aug. 4, 1995) (Statement of Rep. Cox) ("[O]ur amendment will . . . protect [online service providers] from taking on liability such as occurred in the Prodigy case in New York.").

184. 47 U.S.C. § 230(b) (2006).

185. As Professor Zittrain recounts, after the *Stratton Oakmont* decision "the U.S. Congress was seized with a seemingly distinct cyberlaw issue: the ready availability of online pornography to children—much greater than that of its physical-world counterpart. Limits on the availability of *offline* indecent materials to children had already been effected primarily through gatekeeper liability." Zittrain, *supra* note 167, at 261.

186. Schruers, *supra* note 13, at 213; *see also* Cannon, *supra* note 178, at 61–63 (explaining the relationship between *Stratton Oakmont* and section 230).

The Senate and House passed the CDA as Title V of the broader Telecommunications Act of 1996, and President Clinton signed it into law one week later on February 8, 1996.[187] Before the CDA even went into effect, however, a federal court struck down the majority of the CDA as unconstitutional, and the Supreme Court affirmed this decision in *Reno v. ACLU*.[188] But section 230 survived. Indeed, many would say that "it flourished."[189]

2. Judicial Application of Section 230

Section 230 belies its significance with rather modest-sounding provisions.[190] Yet it upended a set of principles enshrined in common law doctrines that had been developed over decades, if not centuries, in cases involving *offline* intermediaries. While the passage of section 230 in 1996, during the Internet's infancy, provided much needed clarity for intermediaries, it halted judicial attempts to adapt the common law to the changing technology.[191] This break from common law doctrine has led some judges to express reluctance when applying section 230's protections,[192] and presumably these misgivings have influenced their interpretations of section 230, which is a proposition examined in more detail in Part IV.

Although section 230 is far from a model of statutory draftsmanship, a review of the cases interpreting this provision reveals that courts largely have coalesced around a three-pronged approach to determine whether a party is entitled to protection under section 230.[193] Based on this approach, a defendant is entitled to

187. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133.

188. 521 U.S. 844, 849 (1997).

189. Lemley, *supra* note 13, at 103.

190. Section 230 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," and "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. §§ 230(c)(1), (e)(3) (2006).

191. *See* Zittrain, *supra* note 167, at 262 (noting that section 230 "ended the percolation of common law cases regarding the proper level of gatekeeping liability").

192. *See* Batzel v. Smith, 333 F.3d 1018, 1031 n.19 (9th Cir. 2003) (opining that "the broad immunity created by § 230 can sometimes lead to troubling results"); Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003); Blumenthal v. Drudge, 992 F. Supp. 44, 51–52 (D.D.C. 1998).

193. While many judges have characterized section 230 as providing immunity from claims relating to content provided by third parties, *see, e.g.*, Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006), the subsection they cite, § 230(c), does not include the term "immunity." The only mention of immunity-like protection occurs in subsection (c)(2), which states that "[n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to . . . obscene, lewd, . . . or

have a claim against it dismissed if each of the following three conditions are satisfied:

1. The defendant is "a provider or user of an interactive computer service."
2. The defendant is being "treated as the publisher or speaker" of information for purposes of liability.
3. The challenged information is "information provided by another information content provider." [194]

A potential fourth prong, stemming from the Ninth Circuit's recent decision in *Barnes v. Yahoo!*, [195] asks whether the defendant made a specific promise to remove content and failed to do so. This new requirement is discussed in Part IV.

III. SUMMARY STATISTICS

The next two parts of the Article move from doctrine to empirical results. Part III.A begins by outlining the methodology employed in the collection and analysis of judicial decisions involving section 230 that form the basis for the study. Part III.B then presents a statistical summary of the decisions that form the corpus of the data. Part IV, which follows, applies a number of statistical tools, including correlation and regression analyses, to examine in more detail how judges actually applied section 230.

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otherwise objectionable" materials. 47 U.S.C. § 230(c)(2) (2006). Although § 230(c)(1) does not grant immunity per se, in practical terms courts have applied it to that effect.

194. 47 U.S.C. § 230(c). Section 230 also prohibits liability directed at intermediaries that facilitate access restrictions to objectionable material. *See id.* § 230(c)(2)(A). While a number of decisions in the study set involve the application of section 230(c)(2), the list of these cases is surprisingly short. *See* Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169 (9th Cir. 2009); Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003); Green v. AOL, 318 F.3d 465 (3d Cir. 2003); e360Insight, LLC v. Comcast Corp., 546 F. Supp. 2d 605 (N.D. Ill. 2008); Quinstreet, Inc. v. Ferguson, No. C08-5525RJB, 2008 WL 5102378 (W.D. Wash. Nov. 25, 2008); Nat'l Numismatic Cert., LLC v. eBay, Inc., No. 6:08-cv-42-Orl-19GJK, 2008 WL 2704404 (M.D. Fla. July 8, 2008); Langdon v. Google, Inc., 474 F. Supp. 2d 622 (D. Del. 2007); Doe v. MySpace, Inc., 474 F. Supp. 2d 843 (W.D. Tex. 2007); Doe v. Franco Prods., No. 99 C 7885, 2000 U.S. Dist. LEXIS 8645 (N.D. Ill. June 21, 2000); Mainstream Loudoun v. Bd. of Tr., 24 F. Supp. 2d 552 (E.D. Va. 1998); Pallorium, Inc. v. Jared, No. G036124, 2007 WL 80955 (Cal. Ct. App. Jan. 11, 2007); Mail Abuse Prevention Sys. LLC v. Black Ice Software, Inc., No. CV 788630, 2000 WL 34016435 (Cal. Super. Ct. Oct. 13, 2000). However, this Article's primary focus is on § 230(c)(1) because this provision is invoked most often in cases dealing with third-party speech.

195. 570 F.3d 1096, 1108–09 (9th Cir. 2009) (refusing to dismiss claims pursuant to section 230 because plaintiff established a prima facie case of promissory estoppel). It is too soon to tell whether the reasoning in *Barnes* will influence other courts.

A. Study Methodology [196]

This study attempts to bring the methodological rigor of social science research to our understanding of the section 230 case law by collecting all judicial decisions involving the application of section 230 and applying "content analysis," a methodology that seeks to "generat[e] objective, falsifiable, and reproducible knowledge about what courts do and how and why they do it." [197] The population of interest is all decisions from February 8, 1996, the effective date of section 230, through September 30, 2009, in which a party or the court interposed section 230 as a defense to liability for online content or acts. In drawing conclusions from these decisions, however, readers should be aware that the analysis in this Article is constrained by the recognition that the factual descriptions contained in the opinions are likely to be incomplete. [198] Accordingly, readers should not assume that the facts discussed in this study necessarily correspond to the entirety of the facts on the ground in each case. [199]

To collect the relevant decisions, I ran searches for decisions citing section 230 on Westlaw and LEXIS, [200] the two primary legal research services, and in the online Legal Threats Database maintained by the Citizen Media Law Project at the Berkman Center for Internet and Society at Harvard University (the "CMLP

196. A more detailed description of the methodology is included in the Appendix.

197. Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63, 64 (2008); *see also* Beebe, *supra* note 16, at 554 n.13; Reed C. Lawlor, *Fact Content Analysis of Judicial Opinions*, 8 JURIMETRICS J. 107, 110 (1968).

198. *See* Hall & Wright, *supra* note 197, at 95. Incompleteness stems from the fact that judges typically limit their discussion only to those facts that are necessary to explain the case and to justify their outcome. *See id.* at 96; Lawlor, *supra* note 197, at 109–10. Bias may also come into play because judges sometimes distort the facts they report to justify the legal results they reach. *See* Hall & Wright, *supra*, at 197. As Mark Hall and Ronald Wright explain, "[w]hile this is a highly contentious charge, distortion does not have to amount to an outright misrepresentation of facts. Instead, distortion results simply when judges emphasize opposing facts less than supporting facts." *Id.* Indeed, this limitation exists in traditional doctrinal analysis no less than in empirical content analysis. In the end, while judge-reported facts may not "purport to be the real facts," they are "near enough so that the savings in labor justifies the approximation." Alan L. Tyree, *Fact Content Analysis of Case Law: Methods and Limitations*, 22 JURIMETRICS J. 1, 32 (1981).

199. Nevertheless, the facts and reasons judges select and espouse make up the substantive content of the law and determine the normative legitimacy of their decisions. *See* Hall & Wright, *supra* note 197, at 96–97; Jack Knight, *Are Empiricists Asking the Right Questions About Judicial Decisionmaking?*, 58 DUKE L.J. 1531, 1544 (2009).

200. Descriptions of the databases searched and search terms used is available in the Appendix.

Database").[201] To have been counted as a judicial decision, the decision must have announced a disposition of the case or motion under consideration (e.g., denied, granted, dismissed, affirmed) and must have stated at least one reason for the decision. If a decision met these criteria, it was included in the universe of cases to be coded, regardless of the form of the decision.[202]

A research assistant reviewed the results to identify any decisions reported uniquely in either LEXIS or Westlaw. This review yielded a total of 249 decisions within the target date range from the two databases. In order to find unreported decisions, I also ran a search for lawsuit entries in the CMLP Database. This yielded 12 additional decisions that had not been reported on LEXIS or Westlaw. I then reviewed all of the decisions to exclude those that mentioned section 230 only in passing or otherwise had tangential relevance to its use as a defense to liability for online content or acts. I excluded 77 decisions on this basis.[203] This left 184 judicial decisions in the sample set.[204]

These decisions were then coded in order to capture general data about each decision (e.g., date, caption, venue, posture); data about the Web site or publication medium involved; data related to section 230 and specific data about the decision (e.g., the disposition of the defense, appeal status); data about specific areas of judicial focus in

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201. The Citizen Media Law Project, which the author directs, maintains a publicly accessible database of lawsuits, cease and desist letters, subpoenas, and other legal threats directed at those who engage in online speech. *See* Citizen Media Law Project, Legal Threats Database, http://www.citmedialaw.org/database (last visited Jan. 4, 2010). The database contains decisions from, among other sources, Westlaw, LEXIS, Bureau of National Affairs (BNA), legal blogs, and reader tips.

202. This definition mirrors the approach taken in the U.S. Court of Appeals Database, an interdisciplinary research effort to study judicial decision making. *See* DONALD R. SONGER, THE UNITED STATES COURT OF APPEALS DATABASE: DOCUMENTATION FOR PHASE 1, at 8.

203. A plurality of the decisions (n = 33) were removed from the sample set because the reference to section 230 was merely definitional (e.g., used to provide a definition for an interactive computer service in another context or to define the Internet generally).

204. It is important to note that this study relies on a sample of the relevant decisions. Although I sought to study the entire population of judicial decisions in which a party or the court interposed section 230 as a defense to liability for content online, I cannot be sure that I collected every decision. It is likely that some decisions, especially in state courts, escaped my notice. Like other studies attempting to empirically examine case law, the exclusion of some unpublished decisions may bias the results to the extent that there is a systematic difference between available and unavailable decisions. *See* Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795, 1884–87 (2005). Table A-1 summarizes the search results and is available in the Appendix and on the author's Web site at http://www.citmedialaw.org/section-230-empirical-study.

the decision (e.g., whether the court analyzed the scope of the parties covered by section 230, the nature of the defendant's relationship to the source of the content); and various miscellaneous data about the case (e.g., whether the plaintiff sued the third-party source of the content, whether the information was submitted anonymously, whether the court awarded sanctions or fees).[205] To check the reliability of the coding process, I selected a random sample of 18 decisions from the 184 decisions in the study set. A second coder independently coded this sample of 18 cases, and the results of the two coded listings were compared in order to assess the degree of inter-coder reliability.[206]

B. Distribution of Decisions

In the more than thirteen years from the February 8, 1996 effective date of section 230 through the conclusion of this study on September 30, 2009, state and federal courts in the United States produced a total of 184 decisions from 140 cases in which a party or the court interposed section 230 as a defense to liability for online content or acts.[207] This is an average of 13.5 decisions per year during the thirteen-year period, with an average of 8.1 decisions each year (59.8%) holding that section 230 preempted at least one claim in the cases studied.

1. Distribution by Year and Jurisdiction

Since section 230 went into effect in early 1996, the number of decisions issued each year has generally increased, with a particularly sharp increase after 2003. Table 1 sets out the yearly distribution of the federal and state court decisions studied.

205. The coding instrument is available on the author's Web site at http://www.citmedialaw.org/section-230-empirical-study.

206. The percentage rate of agreement and "Krippendorf's alpha" for each of the data fields is listed on the coding form, which is available on the author's Web site at http://www.citmedialaw.org/section-230-empirical-study. *See* KLAUS KRIPPENDORFF, CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY 221–30 (2d ed. 2004).

207. Because a case was capable of producing more than one decision, the number of decisions exceeded the number of cases.

TABLE 1

DISTRIBUTION OF DECISIONS BY YEAR

Year	Number of Decisions	Jurisdiction		Preemption Found [208]	
		Federal	State	Number of Decisions	Percentage of Total
1997	4	2	2	4	100%
1998	6	4	2	2	33.3%
1999	4	2	2	1	25.0%
2000	6	2	4	4	66.7%
2001	11	6	5	6	54.5%
2002	4	2	2	3	75.0%
2003	9	7	2	5	55.6%
2004	15	9	6	9	60.0%
2005	16	11	5	11	68.8%
2006	21	14	7	11	52.4%
2007	27	23	4	17	63.0%
2008	40	27	13	23	57.5%
2009	21	14	7	14	66.7%
Total	**184**	**123**	**61**	**110**	**59.8%**

In all but one year—2000—the number of decisions issued by federal courts equaled or exceeded the number of decisions in state courts. Overall, the study set included more than twice as many decisions from federal courts as compared to those from state courts.

208. "Preemption Found" includes decisions in which the court found preemption as to at least one claim. It does not include decisions in which the court found no preemption or did not reach the issue. The latter category accounts for situations where the court dismissed the claims on other grounds, such as statute of limitations.

This imbalance is somewhat surprising, given that federal courts are courts of limited jurisdiction and that most of the claims involving section 230 are state law torts.[209] As the next section in this Article notes, some of this imbalance may be due to the fact that approximately 18.5% of the federal court cases studied were removed from state courts.[210] However, this does not account for all of the disparity which is likely attributable to the fact that fewer state court decisions were reported and available on Westlaw and LEXIS.[211]

Figure A graphs these totals by year and provides a two-year moving average of the number of decisions issued by federal and state courts. As figure A reveals, the moving average of federal court decisions shows a slight dip from 1999 to 2000 and a flattening from 2001 to 2002, followed by a steady and marked increase after 2003. This upward trend largely holds true for state court decisions as well, although there is more volatility in the yearly totals. The sharp decline in decisions issued in 2002—less than half as many were issued in both federal and state courts in 2002 as were issued in 2001—appears to mirror similar declines in other databases that track legal decisions and filings over this time period.[212]

209. On the other hand, the fact that speech on the Internet crosses state lines makes it likely that federal courts had diversity jurisdiction over the defendants in many of the cases. For a detailed breakdown of each claim, see *infra* Part III.B.3.

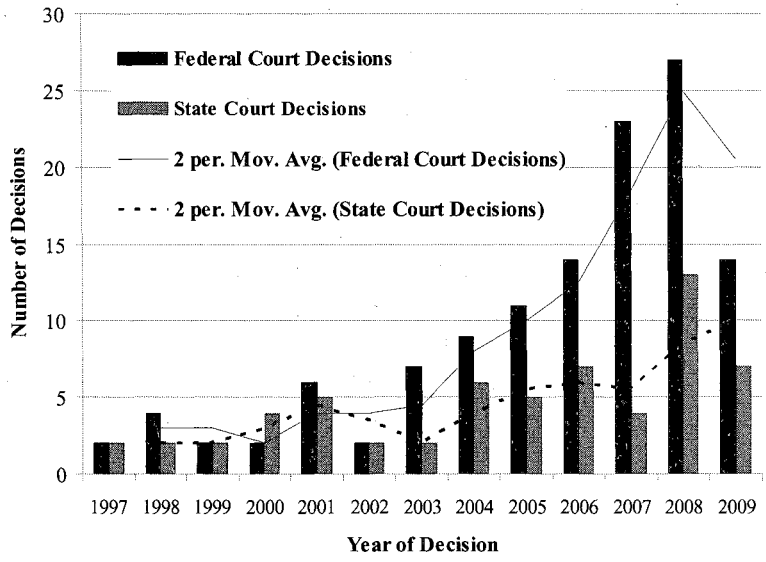
210. *See infra* Part III.B.2.

211. For a discussion of how sampling bias may influence the results, see Krawiec & Zeiler, *supra* note 204.

212. *See* Beebe, *supra* note 16, at 567 (tracking cases raising copyright fair use); David Ardia, *Bloggers and Other Online Publishers Face Increasing Legal Threats*, POYNTER ONLINE, Sept. 22, 2008, http://www.poynter.org/column.asp?id=101&aid=150968 (tracking civil lawsuits filed against online publishers).

FIGURE A

DISTRIBUTION OF FEDERAL AND STATE COURT DECISIONS BY YEAR [213]



Thirty-five states are represented in the study set, including a few unexpected states, such as South Dakota and Wyoming, given their relatively small population sizes. The four most populous states, California, Texas, New York, and Florida, had the largest proportions of the decisions at 23%, 5%, 10%, and 7%, respectively. [214] Listing these states in order of their population sizes reveals, however, that the number of decisions in each state is out of sync with the states' relative population sizes. For example, Texas is the second most populous state, but it does not rank second in decisions issued. Figure B shows how each state's proportion of the decisions deviates from what would be expected based on the state's relative population as determined in the 2000 U.S. Census. [215]

213. Totals for 2009 reflect decisions issued through September 30, 2009.

214. See *infra* Table A-2 in the Appendix for a distribution of decisions by state.

215. Because the number of decisions in many states is relatively small, the deviations shown in figure B are not amenable to statistical analysis for significance.

Relative to its population size, the proportion of decisions in California was nearly double the number that would be expected based on the state's relative population alone.[216] New York and Florida also had higher than expected totals, albeit less dramatic than the difference in California.[217] For Texas, the deviation ran in the opposite direction, as it had 1.98% fewer cases than expected based on its relative population size.[218] These deviations may be due to a number of factors, including the extent to which Internet and technology companies are located in each state, whether the state is considered to be a favorable or unfavorable jurisdiction for plaintiffs, the reduced likelihood of publication of state court decisions, and whether there was a disproportionate number of appeals from trial court decisions in the state.[219]

216. According to the U.S. Census Bureau, California had 12.04% of the U.S. population in 2000. U.S. CENSUS BUREAU, CENSUS 2000 SUMMARY FILE 1 (2000), *available at* http://factfinder.census.gov/servlet/DownloadDatasetServlet?_lang=en. However, 23.37% of the decisions in this study set arose in California.

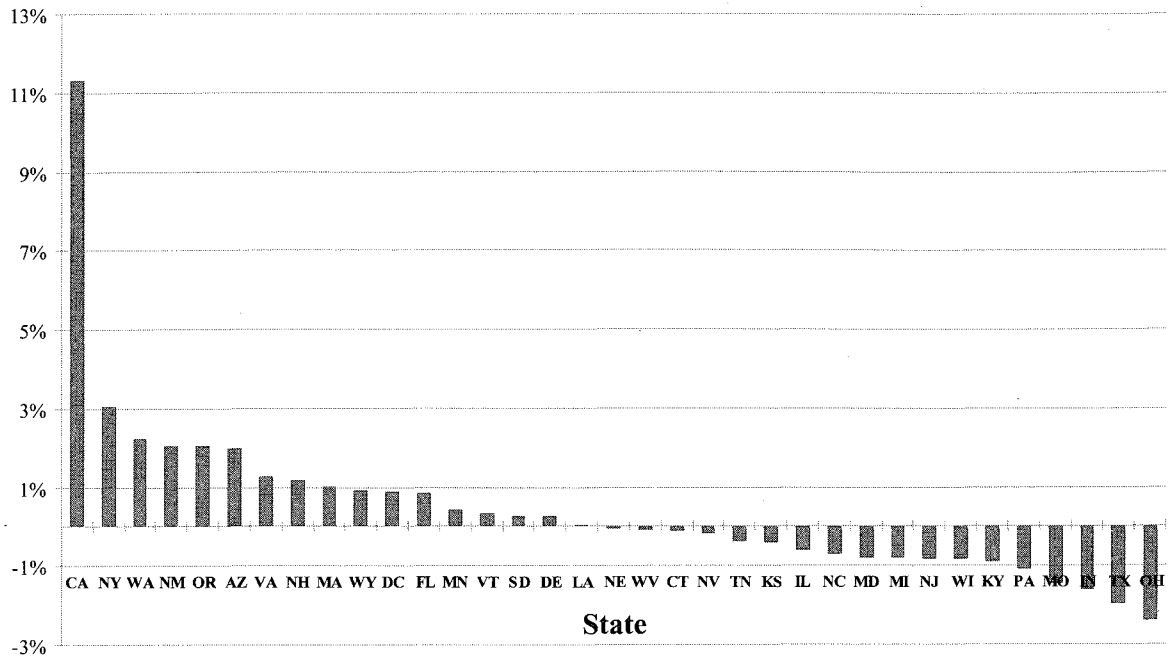
217. According to the U.S. Census Bureau, New York and Florida had 6.74% and 5.98% of the U.S. population in 2000, respectively, but 9.78% and 6.52% of the section 230 decisions. *Id.*

218. According to the U.S. Census Bureau, Texas had 7.41% of the U.S. population in 2000. *Id.*

219. An analysis of the first three factors is outside the scope of the present study, but the fourth factor—the appeal rate in each state—is not. The mean appeal rate for trial court decisions (both state and federal) for all states was 33.7%. The appeal rate for trial court decisions in California (41.9%) was nearly 10 points above the mean.

FIGURE B

DEVIATION OF PROPORTION OF DECISIONS RELATIVE TO STATE'S PERCENTAGE OF U.S. POPULATION



Source for population data: U.S. Census Bureau, Census 2000 Summary File 1 (SF 1) 100-Percent Data

2. Distribution by Venue

As previously noted, the study set included more than twice as many decisions from federal courts as compared to those from state courts. Table 2 breaks down these federal court decisions by circuit and district. Just as with the composite state data, California courts held disproportionate sway in the totals, with the circuit and district courts of the Ninth Circuit dominating the decisions. Indeed, table 2 reports that the Court of Appeals for the Ninth Circuit was responsible for 37.5% of the circuit court decisions, while district courts in the Ninth Circuit issued 27.3% of all district court decisions. Other than the Third Circuit, which issued 12.5% of the circuit court opinions, no other circuit broke into double digits. Among the various district courts, the Northern District of California and Southern District of New York were each responsible for 7.1% of the district court opinions.

TABLE 2

DISTRIBUTION OF FEDERAL DECISIONS BY CIRCUIT AND DISTRICT COURT

Circuit Court Decisions			District Court Decisions				
Circuit	**Number of Decisions**	**Percentage of Total**	**Number of Decisions**	**Percentage of Total**	**District Court**	**Number of Decisions by District Court**	**Percentage of Total**
First	1	4.2%	5	5.1%	D. Mass.	2	2.0%
					D.N.H.	3	3.0%
Second	-	-	10	10.1%	D. Conn.	1	1.0%
					E.D.N.Y.	2	2.0%
					S.D.N.Y.	7	7.0%
Third	3	12.5%	5	5.1%	D. Del.	1	1.0%
					D.N.J.	1	1.0%
					E.D. Pa.	3	3.0%
Fourth	2	8.3%	10	10.1%	D. Md.	1	1.0%
					E.D. Va.	6	6.1%
					M.D.N.C.	2	2.0%
					S.D. W.Va.	1	1.0%

TABLE 2 (*continued*)

DISTRIBUTION OF FEDERAL DECISIONS BY CIRCUIT AND DISTRICT COURT

Circuit Court Decisions			District Court Decisions				
Circuit	**Number of Decisions**	**Percentage of Total**	**Number of Decisions**	**Percentage of Total**	**District Court**	**Number of Decisions by District Court**	**Percentage of Total**
Fifth	1	4.2%	12	12.1%	E.D. La.	1	1.0%
					E.D. Tex.	3	3.0%
					N.D. Tex.	3	3.0%
		-			S.D. Tex.	1	1.0%
					W.D. La.	2	2.0%
					W.D. Tex.	2	2.0%
Sixth	2	8.3%	7	7.1%	E.D. Mich.	2	2.0%
					E.D. Tenn.	1	1.0%
					M.D. Tenn.	1	1.0%
					N.D. Ohio	1	1.0%
					W.D. Ky.	1	1.0%
					W.D. Mich.	1	1.0%

TABLE 2 (*continued*)

DISTRIBUTION OF FEDERAL DECISIONS BY CIRCUIT AND DISTRICT COURT

	Circuit Court Decisions		District Court Decisions				
Circuit	**Number of Decisions**	**Percentage of Total**	**Number of Decisions**	**Percentage of Total**	**District Court**	**Number of Decisions by District Court**	**Percentage of Total**
Seventh	2	8.3%	6	6.1%	N.D. Ill.	3	3.0%
					N.D. Ind.	1	1.0%
					E.D. Wis.	1	1.0%
					W.D. Wis.	1	1.0%
Eighth	-	-	5	5.1%	D. Minn.	3	3.0%
					D.S.D.	1	3.0%
					E.D. Mo.	1	3.0%
Ninth	9	37.5%	27	27.3%	C.D. Cal.	6	6.1%
					D. Ariz.	5	5.1%
					D. Nev.	1	1.0%
					D. Or.	3	3.0%
					N.D. Cal.	7	7.1%
					W.D. Wash.	5	5.1%

TABLE 2 (*continued*)

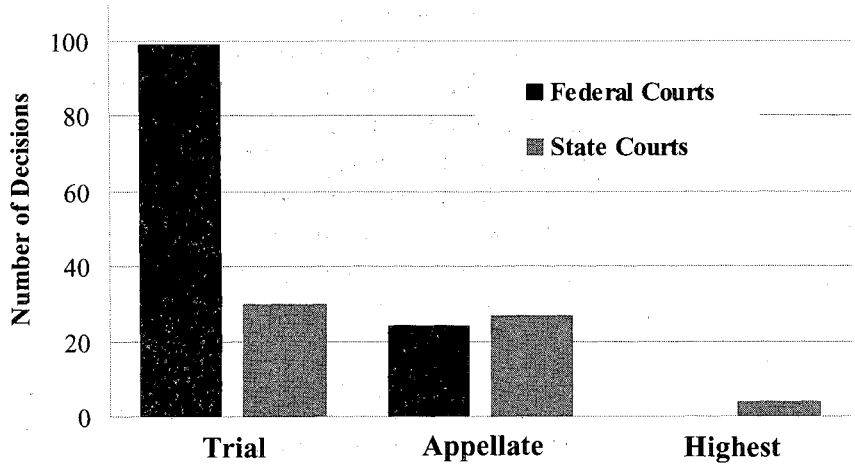
DISTRIBUTION OF FEDERAL DECISIONS BY CIRCUIT AND DISTRICT COURT

	Circuit Court Decisions		District Court Decisions				
Circuit	**Number of Decisions**	**Percentage of Total**	**Number of Decisions**	**Percentage of Total**	**District Court**	**Number of Decisions by District Court**	**Percentage of Total**
Tenth	2	8.3%	3	3.0%	D. Wyo.	1	1.0%
					D.N.M.	2	2.0%
Eleventh	2	8.3%	7	7.1%	M.D. Fla.	5	5.1%
					S.D. Fla.	2	2.0%
D.C.	-	-	2	2.0%	D.D.C.	2	2.0%
Total	24		99			99	

Not surprisingly, the number of federal district court decisions exceeded the number of circuit court decisions by a wide margin of 4.13 to 1. This disparity did not hold true for the state court data; the number of state appellate court decisions was nearly identical to the number of state trial court decisions. Unlike in the federal courts, where the U.S. Supreme Court has yet to hear a case involving section 230, a total of four decisions arose from the highest courts in California, Florida, Massachusetts, and New York.[220] Figure C illustrates the relationship between the three court levels studied.

FIGURE C

DISTRIBUTION OF FEDERAL AND STATE COURT DECISIONS BY COURT LEVEL



220. *See* Barrett v. Rosenthal, 146 P.3d 510 (Cal. 2006); Doe v. Am. Online, Inc., 783 So. 2d 1010 (Fla. 2001); Murphy v. Boston Herald, Inc., 865 N.E.2d 746 (Mass. 2007); Lunney v. Prodigy Servs. Co., 723 N.E.2d 539 (N.Y. 1999).

Figure C also reveals a significant disparity in the number of trial court decisions issued from federal courts as compared to state courts, ninety-nine to thirty, respectively. Given the parity in the number of decisions at the appellate level and relative similarity in appeal rates between the two jurisdictions,[221] the disparity would appear to be due to either a high rate of removal from state courts to federal courts or a lower publication rate of state trial court opinions. Given that only 18.5% of the federal district court decisions arose in cases that were removed from state court, the disparity between the number of federal and state court decisions at the trial court level is likely attributable in part to the fact that fewer state trial court decisions were reported and available on Westlaw and LEXIS.[222]

3. Distribution by Legal Claim

Fifty-seven different legal claims arose in the 184 decisions studied, ranging from aiding and abetting the distribution of obscene material to unfair and deceptive trade practices. Because plaintiffs typically asserted more than one claim, the overall number of legal claims exceeded the number of cases and decisions studied. In total, courts considered 254 claims (an average of 3.2 claims per case) while addressing the application of section 230.[223] Figure D provides a breakdown of the incidence of each claim in both state courts and federal courts and includes several oddball claims that demonstrate the creativity some plaintiffs exhibited in these cases.

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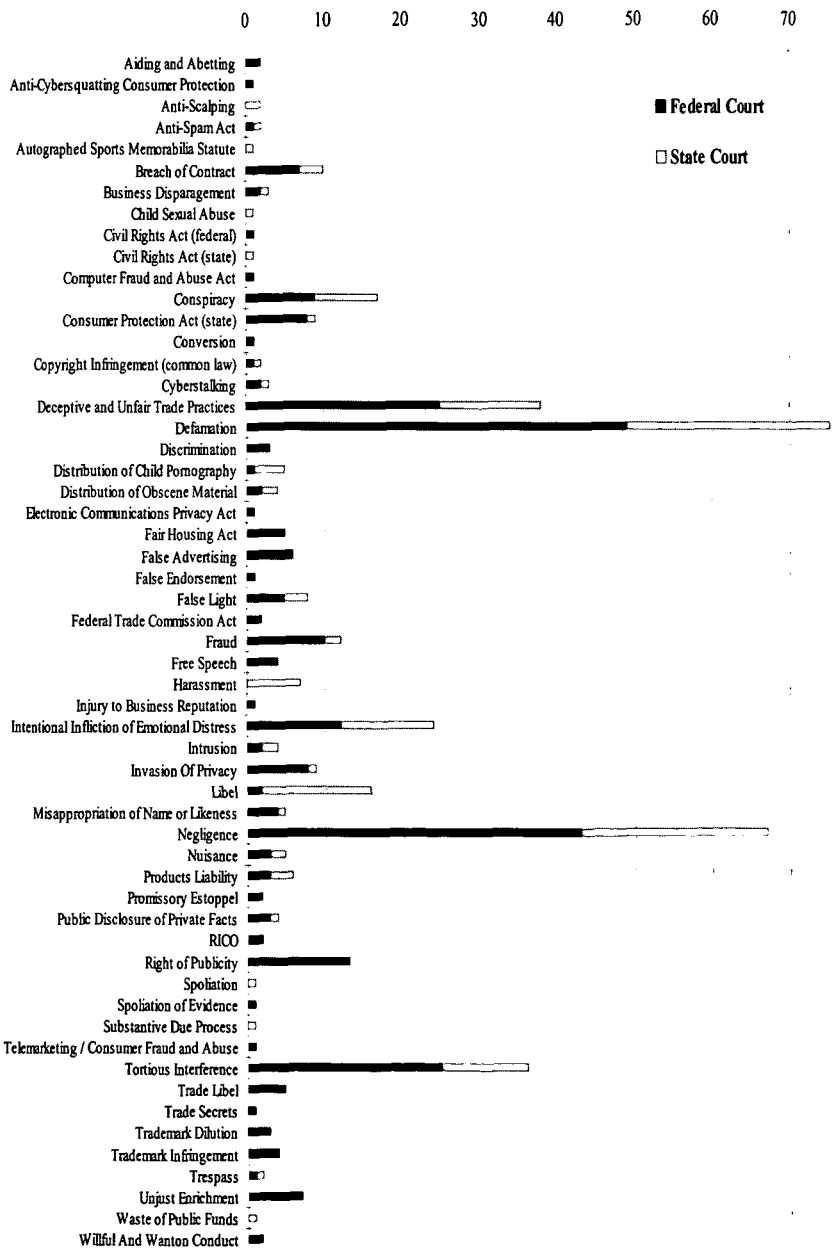
221. In fact, the appeal rate in state courts was higher than in federal courts—44.2% of state trial court decisions were appealed and 28.5% of federal district court decisions were appealed.

222. While there is considerable research on publication rates in federal appellate courts, *see* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 120–21 (2001), the author could not find any studies estimating the publication rates in state trial courts. For a discussion of what impact the exclusion of unpublished state court decisions may have on these results, *see* Krawiec & Zeiler, *supra* note 204.

223. This total includes only claims "considered" by a court in the context of section 230. If a party or the court did not interpose section 230 as a defense to a claim, it was not included in the claims considered category. For example, several cases involved allegations of copyright infringement—a claim expressly excluded from section 230's coverage—and if neither the court nor the defendant raised section 230 as a defense, copyright infringement would not be marked as a claim considered in that case. *See* Kruska v. Perverted Justice Found., Inc., No. CV-08-0054-PHX-SMM, 2008 WL 2705377 (D. Ariz. July 9, 2008); Parker v. Google, Inc., 422 F. Supp. 2d 492 (E.D. Pa. 2006). If, however, a party did interpose section 230 as a defense to copyright infringement, that claim was marked as "considered." *See* UMG Recording, Inc. v. Veoh Networks, Inc., No. 600558/08, 2008 WL 5027243 (N.Y. Sup. Ct. Nov. 24, 2008) (defendant asserted section 230 as defense to copyright infringement but court dismissed on *forum non conveniens* grounds).

FIGURE D

FREQUENCY OF LEGAL CLAIMS IN STATE AND FEDERAL COURTS



Predictably, defamation claims topped the list, making up 17.2% of all claims considered by courts in the context of a section 230 defense. The next most frequent claim was negligence, followed by tortious interference. These findings roughly track other studies examining "cybertort" causes of action, which found that defamation and business torts predominated.[224] Given that states vary in how they title similar causes of action, table 3 summarizes the six most frequently occurring legal claim types.[225] Grouped with its sibling claims, defamation, libel, slander, and disparagement arose in more than half (50.5%) of the decisions under study. Deceptive trade practices, unfair competition, and false advertising also appeared in a significant proportion (20.7%) of the decisions. A large number of these claims arose in cases involving content on search engines and marketplace/auction sites, locations where consumers search for products and post reviews. When these claims, which are not defamation claims but rather are claims asserting that the defendant engaged in some form of unfair business practice, are combined with tortious interference claims, the category of business torts made up the second highest proportion of the claims, arising in 37% of the decisions.

224. *See* Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 92 (2003) (reporting that business torts made up 35% of claims studied and defamation made up 27%).

225. Given that Congress's express intent in passing the CDA was to remove obscene material from the Internet, it is notable that there were only five cases involving the alleged distribution of obscene materials or child pornography and these claims were not among the most frequently occurring claim types. *See* People v. Gourlay, No. 278214, 2009 WL 529216 (Mich. Ct. App. 2009); Voicenet Commc'ns, Inc. v. Corbett, No. 04-cv-1318, 2006 WL 2506318 (E.D. Pa. Aug. 30, 2006); Landry-Bell v. Various, Inc., No. 05-cv-1526, 2006 WL 273599 (W.D. La. Feb. 1, 2006); Doe v. America Online, Inc., 718 So. 2d 385 (Fla. App. 1998). In several other cases, however, plaintiffs brought negligence claims premised on the intermediary's failure to prevent harmful contact with minors or the distribution of obscene material. *See, e.g.*, Doe v. MySpace, Inc., 528 F.3d 413 (5th Cir. 2008); Doe IX v. MySpace, Inc., 629 F. Supp. 2d 663 (E.D. Tex. May 22, 2009); Doe v. Bates, No. 05-cv-91, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006); Doe II v. MySpace, Inc., 175 Cal. App. 4th 561 (Ct. App. 2009); Kathleen R. v. City of Livermore, 87 Cal. App. 4th 684 (Ct. App. 2001).

TABLE 3

MOST COMMON LEGAL CLAIM TYPES

Claims	Decisions	
	Number	Percentage of Total
Defamation (libel, slander) and disparagement	93	50.5%
Negligence	54	29.4%
Deceptive trade practices, unfair competition, false advertising	38	20.7%
Privacy torts (intrusion, false light, publication of private facts, misappropriation/right of publicity)	35	19.0%
Tortious interference with contract or business relations	30	16.3%
Intentional infliction of emotional distress	24	13.0%

4. Distribution by Medium of Publication and Content Type

This section of the Article examines where on the Internet all of this allegedly tortious and illegal content is being published and in what form. The largest proportion (21.3%) of the decisions involved speech that occurred on discussion forums, such as Yahoo! Finance, Craigslist, and Usenet.[226] Other common publication media included online matching services, such as apartment matching and dating sites, as well as e-mail, search engines, retail Web sites, and consumer review sites. None of these other publication media, however, appeared in the decisions more than 10% of the time. Table

226. A list of the publication medium categories is included *infra* in table 4 and a description of each category is included in the Appendix.

4 reports the frequency and relative percentages among the various publication media. [227]

TABLE 4

PUBLICATION MEDIUM AND PROPORTION OF ANONYMOUS CONTENT

	Frequency		Anonymous Content	
Publication Medium	**Number**	**Percentage of Total**	**Number**	**Percentage of Total**
Blog	11	5.2%	3	27.3%
Chat Room	9	4.3%	3	33.3%
Consumer Reviews	15	7.1%	11	73.3%
Content Hosting	4	1.9%	2	50.0%
E-mail	18	8.5%	5	27.8%
Forum	45	21.3%	31	68.9%
Gripe Site	4	1.9%	1	25.0%
Internet Services or Access	11	4.7%	1	10.0%
Marketplace	15	7.1%	5	33.3%
Dating and Matchmaking Services	15	7.1%	10	66.7%
News	7	3.3%	0	0%
Organization	9	4.3%	3	33.3%
Other	1	0.5%	0	0%
Portal/Directory	2	0.9%	1	50.0%
Retail Site	18	8.5%	5	27.8%
Search Engine	16	7.6%	5	31.3%
Social Network	7	3.3%	1	14.3%
Web site – General Information	4	1.9%	0	0%
Wiki – General Information	1	0.5%	0	0%
Total	211			41.2%

227. Because a case could involve more than one publication medium, the total listed in table 4 exceeds the number of decisions studied.

The conventional wisdom seems to be that the Internet is awash in anonymous content.[228] While this may be true in some online contexts, in more than half of the section 230 decisions (58.8%), the speech at issue was not published anonymously. Because the degree of anonymity a user can maintain varies depending on the nature of the communication, the systems used, and other circumstances, for the purposes of this analysis a decision was tagged as involving anonymous speech if the court noted that the speech was anonymous or the parties stated that the source was unknown.[229] In several online contexts, such as news sites, anonymous speech was not at issue in any of the decisions.

This is not to say, however, that anonymous speech is insignificant or unimportant. In several common media of communication, discussion forums, consumer reviews, and online matching/dating services, more than two-thirds of the speech at issue was anonymous. Moreover, as discussed in Part V, anonymity can pose a significant hurdle for plaintiffs seeking to hold a culpable third party liable for injuries he or she has caused.

5. Distribution by Intermediary Role

Intermediaries play many different roles online, and this diversity is reflected in the section 230 case law. In Part I, intermediaries were grouped into three broad classifications based on the functional role they play in facilitating the publication of content online: communication conduits, content hosts, and search/application providers.[230] To these three categories a fourth

228. *See* Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 64 (2009); KrisAnn Norby-Jahner, *"Minor" Online Sexual Harassment and the CDA § 230 Defense: New Directions for Internet Service Provider Liability*, 32 HAMLINE L. REV. 207, 245 (2009); Richard Bernstein, *The Growing Cowardice of Online Anonymity*, N.Y. TIMES, Aug. 27, 2008, http://www.nytimes.com/2008/08/27/world/americas/27iht-letter.1.15670185.html.

229. Anonymity involves two related concepts: anonymity and pseudonymity. The use of identity abstractions, such as Social Security numbers, school IDs, and even nicknames, is pervasive in society. These identifiers are typically referred to as pseudonyms. Unlike pseudonymity, anonymity generally refers to a situation where the individual or entity discloses no identifying characteristics. JOHN HENRY CLIPPINGER, A CROWD OF ONE: THE FUTURE OF INDIVIDUAL IDENTITY 148–49 (2007). Simply because someone uses a pseudonym, does not mean they are anonymous. Traceable details always exist; it is just a matter of how hard one looks. This is especially true on the Internet, where every computer that connects to the network must have a unique IP address and where servers and routers within the network routinely log communications. *See supra* note 37 and accompanying text.

230. *See supra* Part I.

must be added: the actual users of Web sites and other interactive computer services.

Table 5 reports the intermediary role that most closely matches the functions performed by the party claiming protection under section 230.[231] As table 5 shows, the most common role of defendants claiming a section 230 defense was that of content host, with 68% of the total. The number of conduit providers and the number of search/application providers were relatively similar, but well below the total for content hosts. The user category, denoting a defendant who claims immunity under section 230 as a user of an interactive computer service,[232] was the least common role represented in the 184 decisions studied. This is not surprising given that few users are in a position to assert section 230 as a defense to liability because they are typically the source of the information at issue.

TABLE 5

INTERMEDIARY TYPE AND SOURCE STATUS

	Decisions		Party Found to Be Source	
Intermediary Type	**Number**	**Percentage of Total**	**Number**	**Percentage of Total**
Conduit	21	10.7%	0	0%
Content Host	134	68.0%	13	9.7%
Search or Application Provider	28	14.2%	3	10.7%
User	14	7.1%	3	21.4%
Total	197		19	9.6%

231. Because more than one defendant may be involved in a case or decision, the number of defendant types exceeds the total number of decisions studied. For example, if the plaintiff sued YouTube for hosting a defamatory video and her ISP for facilitating its transmission, and both defendants asserted a section 230 defense, the decision would be tagged with two defendant role labels: content host and conduit. If the plaintiff sued two content hosts, the decision would be tagged with one role label: content host.

232. *See infra* Part IV.A.1.

Table 5 also reports how often courts found that the party asserting a section 230 defense was the original source of at least some of the content at issue in the case. This determination needs to be distinguished from the situation in which a court found that the defendant was *responsible* for the content at issue. This is a subtle but important distinction. In making the determination whether the defendant is responsible for the content, courts look both to the defendant's relationship with the third-party source and the defendant's interaction with the content itself.[233] Both of these inquiries presume that a third party—the original source of the content—exists.[234]

But what about the situation where the defendant created the content on its own? A defendant who is the original source of the content is not entitled to protection under section 230 regardless of whether the defendant is a provider or user of an interactive computer service.[235] The rightmost columns in table 5 are meant to capture this relatively rare situation and reveal how often defendants who claimed protection under section 230 were found to be the original source of the content at issue in the case. As table 5 reports, defendants across all role types were found to be the source of some of the content at issue 9.6% of the time. Not surprisingly, users were more likely to claim protection under section 230 in situations where they were the source of the content, while conduits and content hosts fell at the other end of the spectrum.

C. Win Rates

This section of the Article and the next examine the proportion of unreversed decisions that found claim preemption under section 230, as well as the appeal, affirmance, and reversal rates in the section 230 case law. The term "unreversed decisions" is used throughout this Article to indicate preemption findings that were not subsequently reversed on appeal. While it is useful to know the proportion of claims that were held preempted, only a decision that remains good law can truly be considered a "win" for the party asserting section 230 as a defense.

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233. *See infra* Part IV.A.4.

234. *See infra* Part IV.A.4.

235. *See infra* Part IV.A.5.

Overall, courts found preemption under section 230 for at least one claim in 59.8% of the decisions. When reversed decisions are excluded from the calculations, the overall preemption rate rises to 60.3%.[236] As table 1[237] shows, the preemption rate year-to-year showed no discernable trend. It varied from a high of 100% in 1997 to a low of 25% in 1999. There was little difference between the unreversed preemption rates in state courts and those in federal courts. Federal courts preempted at least one claim in 59.7% of the decisions. In state courts, the proportion was 61.8%.

More interesting results can be found by examining the unreversed preemption rates in federal district and circuit courts broken down by federal circuit, as shown in table 6. Federal courts in the Second Circuit and the Sixth Circuit had the lowest preemption rates, finding preemption in only 30% and 33.3% of their decisions, respectively, which is more than 26% below the overall preemption rate for federal court decisions. Courts in two other circuits, the Tenth Circuit and the Eleventh Circuit, also had preemption rates substantially below the overall rate of 59.7% for federal courts.

236. These percentages only address preemption under section 230 and do not indicate that in 39.7% of the decisions the court ultimately found for the plaintiff on the merits of her claims.

237. *See supra* Part III.B.1.

TABLE 6

PREEMPTION STATUS OF UNREVERSED DECISIONS
BY FEDERAL CIRCUIT AND CASE POSTURE

	Distribution by Circuit		Preliminary Injunction		Judgment on the Pleadings	
Circuit	**Number**	**Preemption Rate**	**Number**	**Preemption Rate**	**Number**	**Preemption Rate**
First	6	66.7%	-	-	-	-
Second	10	30.0%	-	-	1	0%
Third	8	75.0%	-	-	-	-
Fourth	12	58.3%	-	-	2	100%
Fifth	12	66.7%	-	-	1	100%
Sixth	9	33.3%	-	-	-	-

TABLE 6 *(continued)*

PREEMPTION STATUS OF UNREVERSED DECISIONS
BY FEDERAL CIRCUIT AND CASE POSTURE

	Distribution by Circuit		Preliminary Injunction		Judgment on the Pleadings	
Circuit	**Number**	**Preemption Rate**	**Number**	**Preemption Rate**	**Number**	**Preemption Rate**
Seventh	8	75.0%	-	-	3	100%
Eighth	5	80.0%	-	-	-	-
Ninth	34	67.7%	2	50.0%	1	0%
Tenth	5	40.0%	-	-	-	-
Eleventh	8	37.5%	-	-	-	-
D.C.	2	100%	-	-	-	-
Total	119	59.7%	2	50.0%	8	75.0%

TABLE 6 *(continued)*

PREEMPTION STATUS OF UNREVERSED DECISIONS BY FEDERAL CIRCUIT AND CASE POSTURE

	Motion to Dismiss/Strike		Summary Judgment		Bench Trial	
Circuit	**Number**	**Preemption Rate**	**Number**	**Preemption Rate**	**Number**	**Preemption Rate**
First	4	75.0%	1	0%	-	-
Second	8	37.5%	1	0%	-	-
Third	7	85.7%	1	0%	-	-
Fourth	8	62.5%	1	0%	-	-
Fifth	6	50.0%	3	100%	-	-
Sixth	8	37.5%	1	0%	-	-

TABLE 6 *(continued)*

PREEMPTION STATUS OF UNREVERSED DECISIONS
BY FEDERAL CIRCUIT AND CASE POSTURE

	Motion to Dismiss/Strike		Summary Judgment		Bench Trial	
Circuit	**Number**	**Preemption Rate**	**Number**	**Preemption Rate**	**Number**	**Preemption Rate**
Seventh	4	50.0%	1	100%	-	-
Eighth	2	100%	1	0%	1	100%
Ninth	16	62.5%	13	92.3%	-	-
Tenth	-	-	4	50.0%	-	-
Eleventh	4	0%	4	75.0%	-	-
D.C.	-	-	2	100%	-	-
Total	67	55.6%	33	69.7%	1	100%

Preemption rates in the federal courts varied considerably based on the case posture as well.[238] Overall, 69.7% of unreversed federal court decisions addressing the application of section 230 in a motion for summary judgment found preemption, while 55.6% of the decisions involving a motion to dismiss or motion to strike did so. Courts in the Ninth Circuit, which generally had higher preemption percentages, found preemption in 62.5% of the cases involving a motion to dismiss. That proportion jumped to 92.3% for summary judgment motions.[239] Courts in several other circuits, including the Fifth Circuit and the Eleventh Circuit, also showed increases in their preemption rates for cases involving summary judgment as compared to motions to dismiss.

As previously noted, the most frequently occurring claims in the section 230 cases were defamation-type claims. As figure E shows, there was a marked disparity in the preemption rates for these claims among federal and state courts. In federal courts, only 44.4% of deceptive trade practices and unfair competition claims were preempted. In state courts, the preemption rate was nearly twenty points higher, coming in at 63.6%. An even larger disparity exists among intentional infliction of emotional distress claims, for which federal courts had an 81.8% preemption rate and state courts were almost thirty-two points lower, at 50%. For the remaining claim categories, the state court preemption rate was within ten points of the preemption rate in federal court.

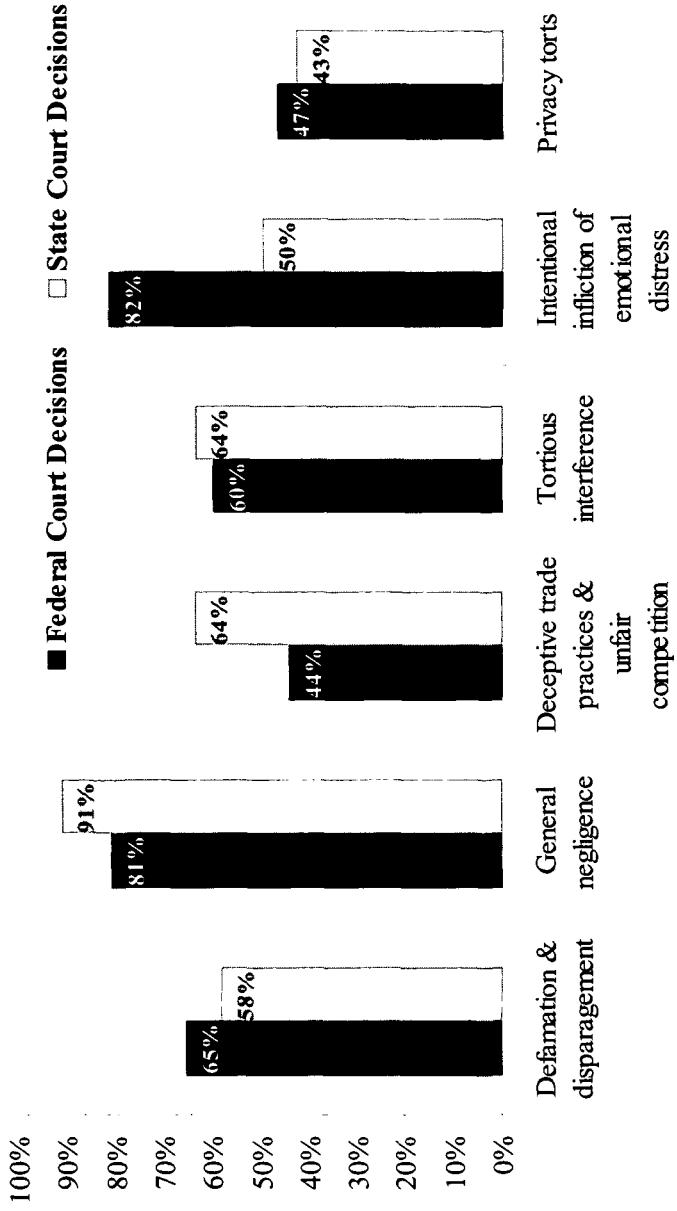
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238. The posture categories indicate the posture of the case at the time when the court addressed the application of section 230. In other words, if the section 230 issue arose in a motion to dismiss, the decision was tagged with "motion to dismiss." If the losing party filed a motion for reconsideration or appealed the first decision to another court, the subsequent decisions were also tagged with "motion to dismiss." Only five of the eleven possible posture categories are listed in table 6. Posture categories with the fewest unreversed decisions are not included. Accordingly, the distribution totals for each row may not equal 100%. For a listing of all posture categories, see *infra* table A-3 in the Appendix.

239. As discussed *infra* Part V.B.1, a number of judges have expressed reluctance in applying section 230 at the motion to dismiss stage, finding that as an affirmative defense it is more appropriately raised after the completion of discovery. *See, e.g.*, Doe v. GTE Corp., 347 F.3d 655, 657 (7th Cir. 2003) (instructing that section 230(c)(1) does not constitute grounds for dismissal for failure to state a claim, and should be analyzed as an affirmative defense to plaintiff's claims); Novak v. Overture Services, 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004) ("As an initial matter, the Court notes that invocation of section 230(c) immunity constitutes an affirmative defense. As the parties are not required to plead around affirmative defenses, such an affirmative defense is generally not fodder for a Rule 12(b)(6) motion.").

FIGURE E

UNREVERSED PREEMPTION RATES FOR FREQUENTLY OCCURRING LEGAL CLAIMS IN STATE AND FEDERAL COURTS



To put these claim groupings into context, table A-4 in the Appendix lists the unreversed preemption rates for all legal claims that were considered by a court in the context of section 230. Predictably, claims that are expressly excluded from section 230's coverage,[240] such as copyright claims, trademark claims, and Electronic Communications Privacy Act claims,[241] showed a preemption rate of 0%.[242] At the other end of the spectrum, a number of claims, including products liability, disclosure of trade secrets, negligence, and nuisance claims, saw preemption rates approaching or equaling 100%.

When courts did not dismiss a claim under section 230, they declined to do so for a number of reasons. In more than half of the decisions (59.4%) in which a court did not dismiss a claim under section 230, the court did not reach the question of section 230's application because it found that the claims at issue warranted dismissal on other grounds.[243] As to the remaining decisions in which a court found section 230's protections inapplicable as to least one claim, the court found that in 56.4% of those decisions, the defendant was either the actual source of, or otherwise responsible for, the content at issue; in an additional 35.9% of the decisions the court held that the claims themselves fell outside section 230's protection. In 7.7% of the decisions in which a court did not dismiss at least one claim, the court found that the defendant did not qualify as a provider or user of an interactive computer service. These findings are described and analyzed more fully in Part IV below.

D. Appeal, Affirmance, and Reversal Rates

Of the 184 decisions studied, 62 were appealed to a higher court, for an overall appeal rate of 33.7%.[244] For federal district court decisions, the appeal rate was 28%, a rate that is substantially higher than the appeal rates calculated by other researchers for federal

240. 47 U.S.C. § 230(e) (2006).

241. 18 U.S.C. § 2510 (2006).

242. For a discussion of how courts have defined and applied these exemptions, see *infra* notes 281–87 and accompanying text.

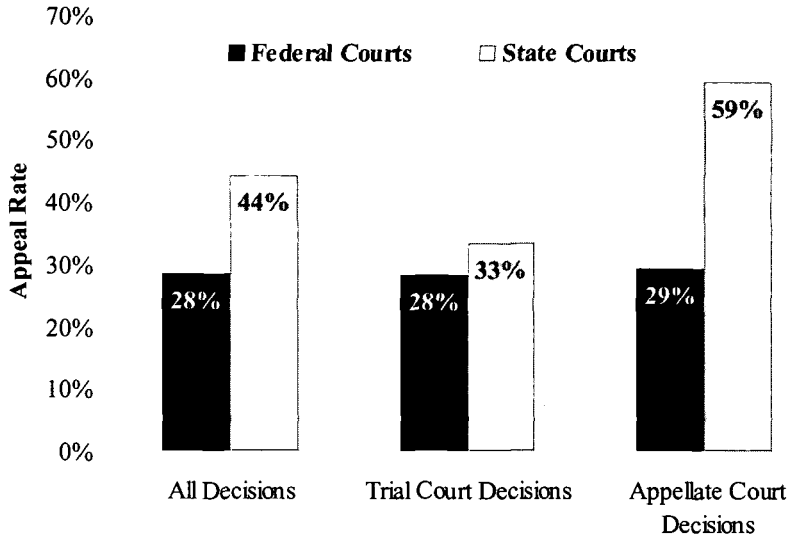
243. If these claims are removed from the calculations, the unreversed preemption rate rises to 76.9%.

244. In 19 of the 184 decisions, the time to appeal had not yet expired when this study was completed. These decisions were excluded from the appeal rate calculations.

district courts in other subject areas.[245] Trial court decisions in state courts evidenced an even higher appeal rate: 33.3%. Figure F charts the appeal rates for decisions from trial and appellate courts, revealing that at all court levels, the appeal rate for state courts exceeded the rate for federal courts.

FIGURE F

APPEAL RATES IN FEDERAL AND STATE COURTS



245. Beebe, *supra* note 16, at 575 (calculating a 25.1% appeal rate from federal district courts in copyright fair use cases for the period 1978–2005); Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 664 & tbl.1 (2004) (calculating a 10.9% appeal rate for all district court cases and a 21% appeal rate for district court cases with a judgment for one party from 1987 to 1996).

However, appeal rates tell only part of the story. While the majority of decisions were not appealed to a higher court, those that were appealed evidenced a relatively low overall reversal rate of 16.4%. The reversal rate for federal court decisions was 11.4%, well below the reversal rates found in other empirical studies.[246] The reversal rate was somewhat higher in state courts: 23.1%. Table 7 reports in detail the affirmance and reversal rates for decisions that were appealed in federal and state court. References to affirmed or reversed "on other grounds" indicate the court's specific treatment of the section 230 issue raised on appeal. As table 7 shows, most appeals resulted in either an affirmance or denial of certiorari, with a substantially higher affirmance rate for decisions dismissing claims under section 230 (45.5%) as compared to decisions that did not dismiss a claim under section 230 (17.7%). Of the decisions that were reversed or vacated, the majority were reversed or vacated on the basis of the lower court's application of section 230, not on other grounds.

246. *See* Beebe, *supra* note 16, at 574 (calculating a 33.8% reversal rate for federal circuit courts in cases involving copyright fair use for the period 1978–2005); Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC'Y REV. 163, 177 tbl.1 (2006) (calculating a 32% reversal rate for all federal circuits during the period 1980–2002).

TABLE 7

AFFIRMANCE AND REVERSAL RATES

	All Decisions			No Preemption Found			Preemption Found		
Appeal Status	**Federal**	**State**	**Both**	**Federal**	**State**	**Both**	**Federal**	**State**	**Both**
Affirmed	45.7%	26.9%	37.7%	37.5%	0%	17.7%	48.2%	41.2%	45.5%
Affirmed on other grounds	11.4%	7.7%	9.8%	12.5%	11.1%	11.8%	11.1%	5.9%	9.1%
Affirmed in part, reversed in part	5.7%	0%	3.3%	0%	0%	0%	7.4%	0%	4.6%
Certiorari denied	20%	38.5%	27.9%	12.5%	44.4%	29.4%	22.2%	35.3%	27.3%
Dismissed	5.7%	3.9%	4.9%	25.0%	0%	11.8%	0%	5.9%	2.3%
Reversed	5.7%	7.7%	6.6%	0%	11.1%	5.9%	7.4%	5.9%	6.8%
Reversed on other grounds	2.9%	3.9%	3.3%	0%	11.1%	5.9%	3.7%	0%	2.3%
Vacated	2.9%	11.5%	6.6%	12.5%	22.2%	17.7%	0%	5.9%	2.3%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%

Lastly, relatively few of the appellate decisions involved a concurrence or dissent. Of the fifty-five decisions arising in appellate courts or higher, only eight (14.5%) included a concurrence or dissent with regard to the majority's holding concerning section 230.[247] Unsurprisingly, three of the eight decisions came from the Court of Appeals for the Ninth Circuit, which generated several concurrences and dissents associated with the circuit's panel and en banc decisions in *Fair Housing Council of San Fernando Valley v. Roommates.com*.[248] Of the remaining forty-seven appellate decisions without a concurrence or dissent, eight (17%) were issued as per curiam decisions.

IV. CONTENT ANALYSIS

This part of the Article seeks to identify what factors led judges to grant or deny dismissal under section 230 and how strongly those factors influenced each other and the outcome in the case. It begins by describing six areas of judicial inquiry and reporting their frequency within the section 230 case law. Part IV.B then applies correlation and regression analyses to examine how these areas of inquiry relate to each other and to a court's ultimate finding on the question of preemption.

A. Areas of Judicial Inquiry

While section 230 does not lay out a stepwise approach for judges to follow when applying its provisions, courts largely have coalesced around a three-pronged test to determine whether a party is entitled to dismissal, which asks (1) whether the party claiming section 230 protection is "a provider or user of an interactive

247. *See* FTC v. Accusearch, Inc., 570 F.3d 1187, 1204–06 (10th Cir. 2009) (concurrence by Judge Tymkovich); Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1178–80 (9th Cir. 2009) (concurrence by Judge Fisher); Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1176–89 (9th Cir. 2008) (concurrence in part and dissent in part by Judge McKeown); Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 489 F.3d 921, 930–35 (9th Cir. 2007) (concurrence in part and dissent in part by Judge Reinhardt and concurrence in part by Judge Ikuta); Batzel v. Smith, 333 F.3d 1018, 1036–41 (9th Cir. 2003) (concurrence in part and dissent in part by Judge Gould); Barrett v. Rosenthal, 146 P.3d 510, 529–31 (Cal. 2006) (concurrence by Justice Moreno); Doe v. Am. Online, Inc., 783 So. 2d 1010, 1018–28 (Fla. 2001) (dissent by Justice Lewis); Maughan v. Google Tech., Inc., 49 Cal. Rptr. 3d 861, 870–79 (Ct. App. 2006) (concurrence in part and dissent in part by Judge Vogel, and concurrence by Judge Rosenthal).

248. 489 F.3d 921 (9th Cir. 2007), *rev'd, aff'd, & vacated in part en banc*, 521 F.3d 1157 (9th Cir. 2008).

computer service"; (2) whether the party claiming protection is being "treated as the publisher or speaker" of information for purposes of liability; and (3) whether the information at issue is "information provided by another information content provider."[249] Although these prongs provide a handy roadmap for judges, they merely provide a starting point for analyzing the section 230 cases. Indeed, to simply say that the court answered yes as to the first and second prongs, but answered no as to the third prong, masks the subtle distinctions in how judges actually decided these cases.

This section of the Article seeks to qualitatively examine the arguments and justifications judges articulated when deciding whether an Internet intermediary should or should not be held liable for facilitating the speech of others.[250] It does so by identifying six areas of judicial inquiry within the cases and categorizing the decisions according to how the court treated each inquiry.[251] The first three areas of inquiry hew closely to the prongs identified above. The latter three areas, which examine the nature of the intermediary's relationship with the source, its interaction with the content, and its relationship with the plaintiff or public, add more nuance.

1. Interactive Computer Services Covered

Courts typically start their analysis by addressing whether the defendant is entitled to invoke section 230 in the first place. Unlike other statutory safe harbors,[252] section 230 does not differentiate between categories of intermediaries. Instead, it applies to any "provider or user of an interactive computer service,"[253] a phrase

249. 47 U.S.C. § 230(c)(1) (2006).

250. An empirical study such as this has its roots in American Legal Realism, which seeks to understand law by focusing on what judges actually do. *See, e.g.*, Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 71–76, 107 (1928) (exhorting law professors to employ social science tools in the study of what courts do). Indeed, as Oliver Wendell Holmes famously proclaimed: "[P]rophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

251. Because some decisions were placed in more than one category, the total number of category tags may not equal the total number of decisions. In addition, in roughly a quarter of the decisions (23.8%), the court did not reach the question of section 230's application, typically because it dismissed the case on other grounds. Those decisions are not included in these category summaries.

252. *See* 17 U.S.C. § 512(a)–(d) (2006) (defining four classes of intermediaries under the Digital Millennium Copyright Act).

253. 47 U.S.C. § 230(c)(1) (2006).

courts have construed broadly.[254] In fact, in many of the decisions studied, either the plaintiff conceded that the defendant was a provider of an interactive computer service (ICS),[255] the court assumed this to be the case based on the plaintiff's own description of the defendant,[256] or the court simply did not address the issue at all.

TABLE 8

INTERACTIVE COMPUTER SERVICES (ICS) COVERED

Finding	Number of Decisions	Percentage of Total
Defendant found not to be provider or user of an ICS	3	2.0%
Defendant found to be an ICS without differentiation	48	32.7%
Defendant found to be provider of an ICS	35	23.8%
Defendant found to be user of an ICS	10	6.8%
Court decision did not address the ICS issue	51	34.7%
Total	147	

254. *See, e.g.*, Batzel v. Smith, 333 F.3d 1018, 1030 n.15 (9th Cir. 2003) (noting that the term "includes a wide range of cyberspace services, not only internet service providers").

255. *See, e.g.*, Ben Ezra, Weinstein & Co. v. Am. Online, Inc., 206 F.3d 980, 984 (10th Cir. 2000) (plaintiff conceded issue); Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 846 (W.D. Tex. 2007) (conceded); Prickett v. InfoUSA, Inc., 561 F. Supp. 2d 646, 651 (E.D. Tex. 2006) (conceded); Noah v. AOL Time Warner Inc., 261 F. Supp. 2d 532, 538 (E.D. Va. 2003) (conceded); Patentwizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001) (conceded).

256. *See, e.g.*, Mayhew v. Dunn, No. 580-11-07, 2008 WL 4281984 (Vt. Super. Ct. Mar. 18, 2008) (assumed); Landry-Bell v. Various, Inc., No. 05-cv-1526, 2005 U.S. Dist. LEXIS 38471, at *6 (W.D. La. Dec. 27, 2005) (court assumed based on plaintiff's description); Schneider v. Amazon.com, Inc., 31 P.3d 37, 40 (Wash. Ct. App. 2001) (assumed).

To aid the analysis that follows, each decision was categorized according to how the court treated the question of whether the party asserting section 230 qualified as a provider or user of an ICS. The five tags used in the coding are listed along with their relative frequencies in table 8. Decisions falling in the first category, indicating that the judge found that the defendant was not a provider or user of an ICS, invariably went on to state that the defendant was not entitled to protection under section 230.[257] The remaining categories represent findings in the defendants' favor.

As table 8 reports, more than one-third (34.7%) of the decisions lacked any discussion regarding whether the defendant was a provider or user of an ICS. When judges did address this question, however, they overwhelmingly found that the defendant qualified under this prong. As a result, nearly all defendants that provide access to online content have been held to be providers or users of an ICS.[258] Examples include online auction Web sites,[259] libraries that provide Internet access to the public,[260] online dating sites,[261] online classifieds,[262] search engines,[263] providers of Internet access through computer rentals,[264] retail Web sites,[265] and employers that provide Internet access to their employees.[266]

257. *See* regression analysis *infra* section B. The three decisions that stated that a defendant did not qualify as a provider or user of an ICS were *800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F. Supp. 2d 273, 295 (D.N.J. 2006); *MCW, Inc. v. Badbusinessbureau.com, LLC*, No. 3:02-CV-2727-G, 2004 U.S. Dist. LEXIS 6678, at *30–31 (N.D. Tex. Apr. 19, 2004); and *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA*, 143 Cal. App. 4th 1284, 1301 (Ct. App. 2006). *Cf.* Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty USA, 129 Cal. App. 4th 1228, 1258 n.9 (Ct. App. 2005) (declining to reach section 230 issue, but expressing doubt that defendant qualifies as a provider or user of an ICS).

258. Courts have been quick to reject the argument that section 230 applies only to ISPs and intermediaries that provide Internet access. *See, e.g.*, Barrett v. Fonorow, 799 N.E.2d 916, 922 (Ill. App. Ct. 2003). *But see 800-JR Cigar*, 437 F. Supp. 2d at 295 (holding that defendant's search engine was not an ICS because "as far as th[e] Court can tell, GoTo does not provide access to the Internet like service providers such as AOL").

259. *See, e.g.*, Gentry v. eBay, Inc., 121 Cal. Rptr. 2d 703, 714 (Ct. App. 2002).

260. *See* Kathleen R. v. City of Livermore, 104 Cal. Rptr. 2d 772, 776–77 (Ct. App. 2001).

261. *See, e.g.*, Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003); Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 294 (D.N.H. 2008).

262. *See, e.g.*, Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 698 (N.D. Ill. 2006).

263. *See, e.g.*, Parker v. Google, Inc., 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006).

264. *See, e.g.*, Patentwizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001).

265. *See, e.g.*, Schneider v. Amazon, Inc., 31 P.3d 37, 41 (Wash. Ct. App. 2001).

266. *See, e.g.*, Delfino v. Agilent Tech., Inc., 52 Cal. Rptr. 3d 376 (Ct. App. 2006).

In addition, while it is often overlooked, Congress did not limit section 230's protections only to *providers* of interactive computer services. Users also are covered,[267] although the term "user" is not defined in the statute and the limited legislative record does not indicate why Congress included users under section 230's umbrella.[268] In the few cases that have addressed the definition of "user," the courts have concluded that individual Internet users, including those who "actively select[] and post[] material based on its content" are entitled to the same protections providers receive under section 230.[269]

2. Legal Claims Covered

In order for a claim to be preempted under section 230(c)(1), the cause of action must treat the defendant as a "*publisher or speaker* of information provided by another information content provider."[270] When applying this standard, courts typically evaluate the substance of the plaintiff's claims to determine whether liability is predicated upon the defendant's status as a publisher of the content at issue.

267. 47 U.S.C. § 230(c) (2006).

268. *See id.*; H.R. CONF. REP. NO. 104-458 (1996) (Conf. Rep.).

269. Barrett v. Rosenthal, 146 P.3d 510, 526, 528 (Cal. 2006); *see also* Grace v. eBay, Inc., 16 Cal. Rptr. 3d 192, 198 (Ct. App. 2004) ("We conclude based on the plain meaning of the statutory language that the term 'user' as used in the statute encompasses all persons who gain access to the Internet through an ISP or other service or system . . . .").

270. 47 U.S.C. § 230(c)(1) (emphasis added).

TABLE 9

SCOPE OF CLAIMS COVERED

Finding	Number of Decisions	Percentage of Total
Claim qualifies for preemption defense under section 230	69	46.6%
Claim does not qualify for preemption defense because claim is based on distributor liability	1	0.7%
Claim does not qualify for preemption defense because claim is not based on publisher liability	5	3.4%
Claim does not qualify for preemption defense because claim is a federal IP claim	3	2.0%
Claim does not qualify for preemption defense because claim is a state IP claim	5	3.4%
Claim does not qualify for preemption defense because claimant seeks equitable relief	2	1.4%
Court decision did not address scope of claims covered by section 230	63	42.6%
Total	148	

Table 9 lists the seven tags used to code how each decision addressed this issue. Decisions falling in the first and last categories involved findings—or assumed findings—in the defendants' favor. Decisions in the remaining categories indicate that the court found that at least one claim at issue in the case fell outside section 230's protection. [271]

271. *See, e.g.*, Atlantic Recording Corp. v. Project Playlist, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009) (finding claim based on state IP law); Gucci Am., Inc. v. Hall & Assocs., 135 F.

As table 9 reports, judges exhibited a surprising tendency to ignore this inquiry. In nearly half (42.6%) of the decisions, the judge did not specifically address whether the claims at issue qualified for preemption under section 230, apparently assuming without discussion that the plaintiff sought to hold the intermediary liable as a publisher or speaker. A small number of decisions (10.9%) found a claim not covered for the reasons described in table 9, while almost half of the decisions (46.6%) expressly found the claims at issue were encompassed by section 230.

Defamation-type claims were far and away the most numerous claims in the section 230 case law,[272] and the courts consistently held that these claims fell within section 230's protections.[273] But section 230 is not limited solely to defamation claims. A wide range of claims fall within its ambit. For example, courts held that section 230 applied to claims such as invasion of privacy,[274] misappropriation,[275] tortious interference,[276] civil liability for criminal law violations,[277] general negligence,[278] and negligent failure to remove information after notification.[279]

Supp. 2d 409, 415 (S.D.N.Y. 2001) (finding no preemption because claim based on federal IP law).

272. *See supra* Part III.B.3.

273. *See, e.g.*, Whitney Info. Network, Inc. v. Verio, Inc., No. 04-cv-462, 2006 U.S. Dist. LEXIS 1424, at *7 (M.D. Fla. Jan. 11, 2006); Patentwizard, Inc. v. Kinko's Inc., 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001); Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998).

274. *See, e.g.*, Parker v. Google, Inc., 242 Fed. Appx. 833, 833 (3d Cir. 2007); Doe v. Bates, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348, at *3 (E.D. Tex. Dec. 27, 2006); Landry-Bell v. Various, Inc., No. 05-1526, 2005 U.S. Dist. LEXIS 38471, at *3 (W.D. La. Dec. 27, 2005). *But see* Doe v. Friendfinder Network, 540 F. Supp. 2d 288, 288, 302 (D.N.H. 2008) (refusing to dismiss invasion of privacy claim insofar as it was based on a right of publicity theory, which the court considered a state IP claim under section 230(e)(2)).

275. *See, e.g.*, Gregerson v. Vilana Fin., Inc., No. 06-1164 ADM/AJB, 2008 U.S. Dist. LEXIS 11727, at *28–29 (D. Minn. Feb. 15, 2008); Chelsea Fine Custom Kitchens, Inc. v. Apartment Therapy LLC, No. 0603554/2007, 2008 WL 2693129, at *2 (N.Y. Sup. Ct. Feb. 8, 2008).

276. *See, e.g.*, Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1117–18 (W.D. Wash. 2004).

277. *See, e.g.*, Doe v. Bates, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at *4 (E.D. Tex. Dec. 27, 2006).

278. *See, e.g.*, Doe v. MySpace, 474 F. Supp. 2d 843, 852 (W.D. Tex. 2007) (dismissing claim asserting that MySpace was negligent for failing to implement age verification procedures and to protect a fourteen-year old from sexual predators), *aff'd*, 528 F.3d 413, 422 (5th Cir. 2008).

279. *See, e.g.*, Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1096 (9th Cir. 2009); Green v. Am. Online, 318 F.3d 465, 465 (3d Cir. 2003); Global Royalties v. Xcentric Ventures, 544 F. Supp. 2d 929, 931–32 (D. Ariz. 2008); Doe v. Am. Online, Inc., No. CIV. CL 97-631 AE, 1997 WL 374223, at *1 (Fla. Cir. Ct. June 26, 1997).

This last claim is especially significant. Recall that under the common law, distributors face liability if they know or have reason to know of the tortious or illegal materials they are distributing.[280] Plaintiffs have long argued that the distinct meanings attributed to these terms under the common law, and Congress's explicit inclusion of the term "publisher" without mention of distributor liability in section 230(c)(1), demonstrate that section 230 limits only publisher liability, while leaving distributor liability intact. Although courts generally have rejected this argument,[281] as discussed in Part IV.A.6, the dispute is not entirely moribund.

While Congress did not expressly list the claims it intended to preclude, it did list the areas of law to which section 230 immunity does not extend: federal criminal law, communications privacy law, and intellectual property (IP) law.[282] The first two categories are relatively straightforward. The last category has been the subject of some disagreement, as courts have grappled with whether state law IP claims—or state claims that could be classified as IP claims, such as the right of publicity—are outside section 230's protections. Mark Lemley has noted: "We can be quite confident that [the section 230 IP exception] applies to patents, copyrights, and trademarks, somewhat less confident that trade secrets and the right of publicity are also IP claims, and even less confident for the penumbra of quasi-IP claims."[283]

An examination of the decisions reveals that only the Ninth Circuit has held that state IP claims qualify for preemption under section 230. The court reasoned that "permitting the reach of any particular state's definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress's expressed goal of insulating the development of the Internet from the various state-law regimes."[284] District courts in other circuits have

280. *See supra* Part II.A.3.

281. *See, e.g.*, Batzel v. Smith, 333 F.3d 1018, 1027 n.10 (9th Cir. 2003); Zeran v. Am. Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997). *But see* Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003) (musing in dicta that section 230 does not extend to distributor liability).

282. 47 U.S.C. § 230(e) (2006).

283. Lemley, *supra* note 13, at 108 (footnote omitted).

284. Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118 (9th Cir. 2007) (finding plaintiff's right of publicity/misappropriation claim preempted under section 230).

roundly rejected this interpretation of section 230,[285] although no other circuit court of appeals has squarely addressed the issue yet.

A second disagreement evident in the decisions stems from the fact that IP claims are not self-defining. For example, misappropriation and right of publicity claims, which arose eighteen times in the decisions studied, exhibit characteristics of both tort law and intellectual property law, generally subjecting to liability anyone "who appropriates to his own use or benefit the name or likeness of another."[286] Although the Eleventh Circuit has suggested in dicta that section 230 does not cover such claims,[287] only one court to date has held that section 230 does not foreclose right of publicity claims.[288]

3. Information Content Providers Covered

In order to be covered by section 230, the information at issue must be "provided by another information content provider."[289] While seemingly straightforward, this short phrase has been the genesis of most of the disagreements within the section 230 case law.

Section 230 defines an information content provider (ICP) in section 230(f)(3) as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[290] Under section 230, a defendant can be both an ICP and a

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285. *See, e.g.*, Atl. Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690, 703–04 (S.D.N.Y. 2009); Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 302 (D.N.H. 2008); Murawski v. Pataki, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007); Gucci Am., Inc. v. Hall & Assocs., 135 F. Supp. 2d 409, 415 (S.D.N.Y. 2001).

286. RESTATEMENT (SECOND) OF TORTS § 652C (1977). Misappropriation arose from Samuel Warren and Louis Brandeis's 1890 article on privacy torts, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). In their highly influential article, Warren and Brandeis expressed concern over the increasingly sensationalist press that was "overstepping in every direction the obvious bounds of propriety and . . . decency[,]" and cautioned that various technological developments—particularly "instantaneous photograph[y]"—posed a grave threat to privacy. *Id.* at 195–96. While misappropriation and its sister claim, the right of publicity, vary widely from state to state, both have their roots in Warren and Brandeis's article. *See* Russell J. Frackman & Tammy C. Bloomfield, *The Right of Publicity: Going to the Dogs?*, L.A. DAILY JOURNAL, Sept. 1996, *available at* http://www.gseis.ucla.edu/iclp/rftb.html (providing an overview of the history, policy, and evolution of the right of privacy among the circuits).

287. *See* Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1323–24 (11th Cir. 2006) (noting in dicta that "there appears to be no dispute that the right of publicity is a type of intellectual property right," but dismissing plaintiff's right of publicity claim on the merits without reaching the question of whether section 230 applied).

288. *Friendfinder*, 540 F. Supp. 2d at 302.

289. 47 U.S.C. § 230(c)(1) (2006).

290. *Id.* § 230(f)(3).

provider or user of an interactive computer service. When a defendant is both an ICP and a provider or user of an interactive computer service, protection under section 230 would extend only to information provided by *another* person or entity that qualifies as an ICP.[291] Accordingly, a defendant will lose out on section 230's protections if either the third-party source of the information fails to qualify as an ICP or the defendant is found to be the source of the content at issue in the case.

TABLE 10

INFORMATION CONTENT PROVIDERS (ICP) COVERED

Finding	Number of Decisions	Percentage of Total
Defendant found not to be the ICP with regard to the content at issue	37	24.3%
Source found to be the ICP with regard to the content at issue	39	25.7%
Source found not to qualify as an ICP	1	0.7%
Defendant found to be the ICP with regard to the content at issue	15	9.9%
Court decision did not address the ICP issue	60	39.5%
Total	152	

Table 10 lists the five tags used to code for this issue, along with their relative frequencies. Decisions falling in the first two categories (which make up 50% of the decisions) represent findings in the defendant's favor. In other words, the court found that an actual third party existed and qualified as an ICP. In the decisions in the next two categories (10.6% of the decisions), the court concluded that the defendant was not entitled to protection under section 230 because

291. *See id.* § 230(c)(1), (d), (f)(3).

either the source did not qualify as an ICP [292] or the defendant was the source of the content at issue. [293]

As with the previous areas of inquiry, judges often (in 39.5 % of the decisions) ignored this inquiry, apparently assuming without discussion that the information was provided by another ICP. Two courts, however, have questioned whether section 230's requirement that the content at issue be provided "through the Internet" means that the original source must be the one that provided the content through the Internet or that the information need only end up on the Internet eventually.

In *Batzel v. Smith*, [294] the Ninth Circuit concluded that this question turned on whether a reasonable person would believe that the original source intended that the content be published on the Internet, noting that "[t]he structure and purpose of § 230(c)(1) indicate that the immunity applies only with regard to third-party information provided *for use on the Internet.*" [295] Policy concerns clearly motivated the court to cabin in section 230's protections: "immunizing a publisher or distributor for including content not intended for Internet publication increases the likelihood that obscene and defamatory material will be widely available." [296]

As table 10 reports, only one decision concluded that a third-party source was not an information content provider. That decision,

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292. Only one decision fell in this category. *See* Brandewyne v. Author Solutions, Inc., No. 2004-CV-4363-TT, 2006 WL 4005011 (D. Kan. Jan. 31, 2006), which is discussed *infra* note 298 and accompanying text.

293. *See, e.g.*, FTC v. Accusearch Inc., 570 F.3d 1187 (10th Cir. 2009); Mazur v. Ebay, Inc., No. C 07-03967 MHP, 2008 WL 618988 (N.D. Cal. Mar. 4, 2008); MCW, Inc. v. Badbusinessbureau.com, LLC, No. 02-CV-2727-G, 2004 WL 833595 (N.D. Tex. April 19, 2004).

294. 333 F.3d 1018 (9th Cir. 2003).

295. *Id.* at 1033.

296. *Id.* at 1034. The Ninth Circuit also focused on whether the defendant received the information in his capacity "as a provider or user of interactive computer services," suggesting that if he received the information in a "snail mail" letter it would be unlikely that the letter was sent to him in his "capacity as [provider of] a Web site service." *Id.* at 1033. The court offered the example of a hard-copy magazine article or book that an online publisher decides to publish to the Internet. "One would not say," the court reasoned, "that the author of [such content] 'provided' it to an interactive computer service provider or user by allowing the article to be published in hard copy off-line. Although such an article is available to anyone with access to a library or a newsstand, it is not 'provided' for use on the Internet." *Id.* at 1032–33. This distinction is not of idle concern given Google's efforts to digitize the world's libraries and make the books—written by authors who never anticipated their publication online—available through its Google Book Search. *See* Google Book Search News, The New York Times, http://topics.nytimes.com/top/news/business/companies/google_inc/google_book_search/index.html (last visited Nov. 14, 2009).

from a state court in Kansas, applied the Ninth Circuit's reasoning in *Batzel* and held that a print-on-demand book publisher was not entitled to protection under section 230 because the information was provided for publication in a hard-copy book, not "on the Internet."[297]

4. Nature of the Intermediary's Relationship with the Content's Source

The analysis now moves to more challenging ground as it seeks to identify the subfactors that may have influenced a court to conclude that the defendant was *responsible* for the creation or development of the content at issue in the case. In making this determination, courts have focused on both the defendant's relationship with the third-party source and the defendant's interaction with the content itself. This first inquiry, which attempts to determine whether the source is truly independent from the defendant, is the subject of this subsection.

Section 230 provides little guidance for courts grappling with this issue, other than to state that the information must be "provided by *another* information content provider."[298] It might seem logical to assume that courts would look to state agency law to assist in this assessment, but only one court has explicitly done this.[299] Because of the proliferation of peer-produced, jointly authored content online, the question of who qualifies as *another* information content provider is likely to take on increasing significance.[300] While no

297. *Brandewyne*, 2006 WL 4005011, at *6–7. *Contra* Almeida v. Amazon, Inc., 456 F.3d 1316, 1326 (11th Cir. 2006) (dismissing claims against Amazon.com based on Internet sales of book); Curran v. Amazon.com, Inc., No. 2:07-0354, 2008 U.S. Dist. LEXIS 12479, at *41–43 (S.D. W. Va. Feb. 19, 2008) (same).

298. 47 U.S.C. § 230(c)(1) (2006) (emphasis added).

299. *See* Raggi v. Las Vegas Metro. Police Dep't, No. 08-cv-943, 2009 WL 653000 (D. Nev. Mar 10, 2009) (finding no principal-agent relationship existed between police department and police officers who allegedly posted defamatory content on union Web site); Myers, *supra* note 13, at 190–92 (examining whether a court might hold Wikipedia responsible for the acts of its moderators, administrators, and sysops); Note, *Badging: Section 230 Immunity in a Web 2.0 World*, 123 HARV. L. REV. 981, 997-1000 (2010) (discussing application of agency principles to interactive Web sites); *cf.* Whitney Info. Network, Inc. v. Xcentric Ventures, LLC, 199 Fed. Appx. 738, 743–44 (11th Cir. 2006) (implying that Xcentric Ventures would be responsible for the actions of its agents in editing third-party reports to include defamatory content).

300. *See* Eric Goldman, *Co-Blogging Law*, 84 WASH. U. L. REV. 1169, 1178 (2006) ("One can expect plaintiffs will allege that co-bloggers are partners or employers to avoid the otherwise terminal effect of § 230 on their lawsuits."). Wikipedia is the best known example of this type of

court has addressed this particularly thorny issue in the context of interactive online services, we can glean some guidance by looking at the handful of decisions that mention facts germane to assessing an intermediary's relationship with the source.

First, courts have held that payment alone does not make a defendant responsible for the third party's actions.[301] Second, independent contractors have been deemed to be sufficiently independent from the defendant so as not to obviate section 230's protections.[302] Third, the fact that the source of the information was the defendant's employee did not lead a court to conclude that the defendant was responsible for the source, presumably because sending threatening e-mail messages and posting on online forums was not part of the employee's official duties.[303]

interactive online service, *see* Myers, *supra* note 13, at 190, but other examples exist, including the free/open-source software development community, *see* BENKLER, *supra* note 25, at 63–68.

301. *See* Blumenthal v. Drudge, 992 F. Supp. 44, 51 (D.D.C. 1998) (noting that Drudge was "paid $3,000 a month—$36,000 a year, Drudge's sole, consistent source of income"). *But see* FTC v. Accusearch, Inc., 570 F.3d 1187, 1201 (10th Cir. 2009) (finding defendant responsible for acts of third party because defendant made payments to third-party purchaser of confidential phone records).

302. *See Blumenthal*, 992 F. Supp. at 51–52.

303. *See* Delfino v. Agilent Tech., Inc., 145 Cal. App. 4th at 790, 806–08 (Ct. App. 2006).

TABLE 11

INTERMEDIARY'S RELATIONSHIP TO SOURCE

Finding	Number of Decisions	Percentage of Total
Not addressed in decision	113	76.4%
No relationship between defendant and source	6	4.1%
Provided computer access	6	4.1%
Encouragement	8	5.4%
Support services	4	2.7%
Independent contractor	2	1.4%
Payment for content	3	2.0%
Editorial control	2	1.4%
Master-agent	1	0.7%
Employer-employee	2	1.4%
Joint venture	1	0.7%
Total	148	

Table 11 lists the eleven tags used to code for this issue along with their relative frequencies. Decisions falling in the first four categories (which make up 90% of the decisions) represent the defendant's minimal control over the source. Decisions in the next three categories (6.1% of the decisions) imply the defendant had some control over the source, and the decisions in the final four categories (4.2% of the decisions) indicate the defendant's high degree of control over the source. Even as to these latter categories, however, courts generally have not held that the defendant was

responsible for the content simply because it had the ability to exercise control over the third-party source.[304]

5. Nature of the Intermediary's Interaction with the Content

This inquiry focuses on the role the defendant played in the creation of the content and seeks to assess whether the defendant was "responsible, in whole or in part, for the creation or development" of the information at issue in the case.[305] When assessing a defendant's level of responsibility, courts have tended to focus on several factors, including the degree to which the defendant exercised editorial control over the content, encouraged the submission of tortious or illegal content, or facilitated the creation or publication of the content.

304. *See, e.g.*, *Blumenthal*, 992 F. Supp. at 51–52; *Delfino*, 145 Cal. App. 4th at 795; Schneider v. Amazon.com, Inc., 31 P.3d 37, 42–43 (Wash. Ct. App. 2001).

305. 47 U.S.C. § 230(f)(3) (2006).

TABLE 12

INTERMEDIARY'S INTERACTION WITH CONTENT

Finding	Number of Decisions	Percentage of Total
Not addressed in decision	48	28.1%
No interaction found	13	7.6%
Passive host	26	15.2%
Linking	4	2.3%
Open submission form	7	4.1%
Profiting from content	9	5.3%
Editorial (moderation)	15	8.8%
Redistribution	10	5.8%
Knowing publication	10	5.8%
Manipulation	4	2.3%
Pre-populated submission form	10	5.8%
Co-Creation	5	2.9%
Self-Creation	10	5.8%
Total	171	

Table 12 lists the categories that capture how courts addressed this issue. The categories are listed roughly in increasing order of interaction, from no interaction to self-creation. Decisions in the first three categories (which make up 50.9% of the decisions) indicate that the defendant had no discernable interaction with the content at

issue. Decisions in the middle categories (32.2% of the decisions) indicate moderate interaction with the content. Decisions falling in the bottom three categories (14.6% of the decisions) denote substantial interaction with the content at issue. Of course, if a court finds that the defendant created the information itself, the defendant is not entitled to protection under section 230.[306]

A review of the decisions reveals that courts have consistently held that the mere exercise of traditional editorial functions, such as deciding what content to publish or remove, does not make an intermediary responsible for the content it publishes.[307] These traditional editorial functions include screening objectionable content prior to publication, as well as correcting, editing, or removing content.[308] Even intermediaries that took an active role in editing content have been found to be entitled to invoke section 230.[309]

Encouraging or soliciting others to submit content also generally has not been found to deprive a defendant of section 230's protections.[310] One recurring defendant that operates a Web site called the "Bad Business Bureau" has provoked several decisions on this point.[311] Although the defendant, Xcentric Ventures, allegedly

306. *See, e.g.*, Whitney Info. Network, Inc. v. Xcentric Ventures, LLC, 199 Fed. Appx. 738, 744 (11th Cir. 2006); Anthony v. Yahoo!, Inc., 421 F. Supp. 2d 1257, 1262 (N.D. Cal. 2006); Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 418 F. Supp. 2d 1142, 1148–49 (D. Ariz. 2005); MCW, Inc. v. Badbusinessbureau.com, L.L.C., No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *9 (N.D. Tex. 2004).

307. *See, e.g.*, Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003) ("[T]he exclusion of 'publisher' liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message.").

308. *See, e.g.*, *id.* at 1031; Ben Ezra, Weinstein, & Co. v. Am. Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000); Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (4th Cir. 1997); GW Equity LLC v. Xcentric Ventures LLC, No. 3:07-CV-976-O, 2009 U.S. Dist. LEXIS 1445, at *18; *Blumenthal*, 992 F. Supp. at 51; Landry-Bell v. Various, Inc., No. 05-CV-1526, 2005 U.S. Dist. LEXIS 38471, at *6–7 (W.D. La. Dec. 27, 2005); *Schneider*, 31 P.3d at 41.

309. *See, e.g.*, Donato v. Moldow, 865 A.2d 711, 725–26 (N.J. Super. Ct. App. Div. 2005) (holding that forum operator who regularly deleted offensive user postings, gave guidelines for posting, and edited and re-posted messages to remove obscenities was protected under section 230).

310. *See, e.g.*, Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003); Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004).

311. *See* Global Royalties, Ltd. v. Xcentric Ventures, LLC, 544 F. Supp. 2d 929, 932–33 (D. Ariz. 2008); Whitney Info. Network, Inc. v. Xcentric Ventures, LLC, No. 2:04-CV-47-FtM-34SPC, 2008 U.S. Dist. LEXIS 11632, at *40 (M.D. Fla. Feb. 15, 2008); *GW Equity LLC*, 2009 U.S. Dist. LEXIS 1445, at *12–15; *Hy Cite Corp.*, 418 F. Supp. 2d at 1149; MCW, Inc. v. Badbusinessbureau.com, LLC, No. 02-cv-2727, 2004 U.S. Dist. LEXIS 6678, at *33–36 (N.D. Tex. Apr. 19, 2004).

encouraged vituperous postings that it then promoted on its site and in its marketing materials, courts in Arizona, Florida, and Texas held that these activities, without more, did not make Xcentric responsible for the allegedly defamatory content submitted by third parties.[312]

Intermediaries, by dint of their position as middlemen, invariably play some role in facilitating the publication or distribution of content. Nevertheless, courts have not found that an intermediary was responsible for third-party content simply because it provided a platform for others to create content, even when that facilitation involved providing submission forms and drop-down selections.[313] This is so even if the intermediary knows that third parties are using its platform to create tortious or illegal content.[314]

However, the Ninth Circuit Court of Appeals sitting en banc recently held that Roommates.com, an apartment matching service, was not shielded from claims under the Fair Housing Act[315] (FHA) and related state laws because it "created or developed" the forms and answer choices that those seeking to use the service had to fill

312. *See Global Royalties*, 544 F. Supp. 2d at 933 ("It is obvious that a Web site entitled Ripoff Report encourages the publication of defamatory content. However, there is no authority for the proposition that this makes the Web site operator responsible, in whole or in part, for the 'creation or development' of every post on the site."); *Whitney Info. Network, Inc.*, 2008 U.S. Dist. LEXIS 11632, at *42. *But see MCW, Inc.*, 2004 U.S. Dist. LEXIS 6678, at *33–34 (finding defendant was itself an ICP because it "directed" consumers to "take photos of (1) the owner, (2) the owner's car with license plate, (3) the owner handing out Rip-off Reports in front of [the plaintiff's] offices, and (4) the [plaintiff's] sign in the background with the Rip-off Reports in hand").

313. *See, e.g.*, *Carafano*, 339 F.3d at 1124 ("Doubtless, the questionnaire facilitated the expression of information by individual users. However, the selection of the content was left exclusively to the user. . . . Matchmaker cannot be considered an 'information content provider' under the statute because no profile has any content until a user actively creates it."); *Whitney Info. Network, Inc.*, 2008 U.S. Dist. LEXIS 11632, at *36 (holding "that the mere fact that Xcentric provides categories from which a poster must make a selection in order to submit a report on the ROR Web site is not sufficient to treat Defendants as information content providers of the reports," even if some of those categories were defamatory); Doe v. SexSearch.com, 502 F. Supp. 2d 719, 725–26 (N.D. Ohio 2007) (noting "the mere fact SexSearch provided the questionnaire Jane Doe answered falsely is not enough to consider SexSearch the developer of the false profile"); Prickett v. InfoUSA, Inc., 561 F. Supp. 2d 646, 651 (E.D. Tex. 2006) (rejecting contention that defendant became an ICP "because the anonymous third party was prompted to select subcategories through the Defendant's database gathering system," thereby "direct[ing] the third party's selections").

314. *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1169 n.24 (9th Cir. 2008); Goddard v. Google, Inc., 640 F. Supp. 2d 1193, 1198–99 (N.D. Cal. 2009).

315. 42 U.S.C. §§ 3601–3619 (2006).

out.[316] The court reasoned that by *requiring* members to answer questions about their gender and sexual-orientation preferences, Roommates.com was essentially causing the third parties to make discriminatory statements, and as such, it was liable as a co-creator of the content.[317] The court also held that Roommates.com was responsible for its users' violations of the FHA because it permitted users to search the profiles of other members by selecting the same discriminatory preferences.[318]

While the Ninth Circuit's en banc decision in *Roommates.com* has been cited in a dozen decisions so far, only two decisions in the study set relied on its definition of "development" to hold that a defendant was not entitled to section 230's protections.[319] The remaining decisions confined the reasoning in *Roommates.com* to that case's rather unique set of facts: a provider of an interactive computer service that *required* the submission of unlawful content.[320]

6. Nature of the Intermediary's Relationship with the Plaintiff or Public

This section of the Article addresses whether an intermediary's relationship with the plaintiff or the public has any bearing on the application of section 230, and touches on one of the oldest and most persistent arguments for liability in the section 230 case law, as well as the newest theory of liability which came out of the Ninth Circuit's recent decision in *Barnes v. Yahoo!, Inc.*[321]

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316. *Roommates.com*, 521 F.3d at 1157–58. For example, all prospective users had to choose from a drop-down menu to indicate whether they were willing to live with "'[s]traight or gay' males," only "'[s]traight' males, only "'[g]ay' males," or "[n]o males" and had to make comparable selections pertaining to females. *Id.* at 1165.

317. *Id.* at 1166.

318. *Id.* at 1167.

319. FTC v. Accusearch, Inc., 570 F.3d 1187, 1200 (10th Cir. 2009) (holding that provider was responsible for developing the content because it paid its researchers to acquire telephone records it knew to be protected by confidentiality laws and therefore "it contributed mightily to the unlawful conduct of its researchers"); NPS LLC v. StubHub, Inc., 2009 WL 995483, at *12 (Mass. Super. Ct. Jan. 26, 2009) (refusing to dismiss anti-scalping claims against ticket broker because broker "materially contributed" to violations).

320. *See, e.g.*, Goddard v. Google, Inc., 640 F. Supp. 2d 1193, 1198 (N.D. Cal. 2009).; Doe IX v. MySpace, Inc., 629 F. Supp. 2d 663, 665 (E.D. Tex. 2009); Atlantic Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690, 701 (S.D.N.Y. 2009); Dart v. Craigslist, Inc., No. 09-CV-1385, 2009 WL 3416106, at *6 (N.D.Ill. Oct. 20, 2009).

321. 570 F.3d 1096 (9th Cir. 2009).

From the earliest section 230 cases onward, plaintiffs have argued that once they put a defendant on notice that it is distributing tortious or illegal material, the defendant is under an obligation to remove the content; if it fails to do so within a reasonable time, it is not entitled to protection under section 230. The first reported decision by an appellate court to address—and ultimately reject—this argument, *Zeran v. America Online, Inc.*,[322] turned out to be tremendously influential, as the Fourth Circuit's lengthy analysis of the issue has served as a guide for other courts facing this theory of liability.[323] In rejecting the plaintiff's assertion that America Online, Inc. (AOL) became liable as a "distributor" once it had notice that it was hosting defamatory information on its bulletin board, the Fourth Circuit reasoned that the distinction between publisher liability and distributor liability was meaningless for purposes of section 230.

> [O]nce a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting. In this respect, Zeran seeks to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability—the publisher role.[324]

Although a few decisions after *Zeran* cast doubt on whether distributor liability was subsumed by section 230's prohibition of publisher liability,[325] the case law is now consistent in holding that an intermediary's refusal to remove content after notification is protected by section 230, and even if the intermediary has actual knowledge of falsity, it will not be liable for the speech of third parties.[326] In fact, courts have held that an intermediary can continue

322. 129 F.3d 327 (4th Cir. 1997).

323. *Id.* The Fourth Circuit's decision in *Zeran* has been cited by courts 137 times as of September 30, 2009.

324. *Id.* at 332–33.

325. *See, e.g.*, Grace v. Ebay, Inc., 120 Cal. App. 4th 984, 996 (Ct. App. 2004); Barrett v. Rosenthal, 5 Cal. Rptr. 3d 416, 430 (Ct. App. 2003), *rev'd*, 146 P.3d 510 (Cal. 2006); Doe v. Am. Online, Inc., 783 So. 2d 1010, 1020–21 (Fla. 2001) (Lewis, J. dissenting).

326. *See, e.g.*, Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1103 (9th Cir. 2009); *Barrett*, 146 P.3d at 521.

to host tortious content after the original author has asked to have it removed. [327]

Until very recently, there was nothing in the case law to suggest that a plaintiff could impose on an intermediary an obligation to remove content or prevent its publication. That changed when the Ninth Circuit issued its decision in *Barnes v. Yahoo!, Inc.*, [328] the latest in a long line of cases involving fake profiles on online dating services. In *Barnes*, the court held that section 230 did not preempt a claim for promissory estoppel that was based on a specific promise made by a Yahoo! employee that she would "personally walk the [plaintiff's complaint] over to the division responsible for stopping unauthorized profiles and they would take care of it." [329] The Ninth Circuit was careful, however, to cabin its holding, stating that section 230 did require dismissal of the plaintiff's negligent undertaking claim, which was predicated upon Yahoo!'s failure to remove the profile after she notified the company that it was fake. [330] The court let the promissory estoppel claim go forward only because a Yahoo! employee made a specific promise to the plaintiff. [331]

The *Barnes* court also cautioned that promises made in a Web site's terms of service—for example, a promise to remove all defamatory content—or in marketing materials do not create an obligation to remove content; "a general monitoring policy, or even an attempt to help a particular person, on the part of an interactive computer service such as Yahoo! does not suffice for contract liability." [332] Even as to her promissory estoppel claim, the court

327. *See* Global Royalties, Ltd. v. XCentric Ventures, LLC, 544 F. Supp. 2d 929, 931–32 (D. Ariz. 2008) (rejecting argument that a Web site operator, by declining to remove material at author's request, had itself become the creator or developer of the content); Sturm v. eBay, Inc., No. 1-06-CV-057926 (Cal. Super. Ct. filed July 27, 2006) (holding that eBay was not required to remove user feedback, even after parties entered into settlement stipulating that feedback was defamatory and both had written eBay asking that it be removed).

328. 570 F.3d 1096 (9th Cir. 2009).

329. *Barnes*, 570 F.3d at 1099, 1109. The fake profile at issue had been created by plaintiff's ex-boyfriend and contained nude photos of the plaintiff, her personal and work contact information, and statements that she was interested in sex. *Id.* at 1098.

330. *Id.* at 1103 (noting that "removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove").

331. *Id.* at 1107 (clarifying that "Barnes does not seek to hold Yahoo! liable as a publisher or speaker of third-party content, but rather as the counter-party to a contract, as a promisor who has breached").

332. *Id.* at 1108.

noted that the plaintiff had merely made out a prima facie claim and sent the case back to the district court to determine whether she could in fact produce sufficient evidence to proceed on the claim.[333] It is too soon to tell whether the reasoning in *Barnes* will influence other courts, but the court's clear statement that general promises do not create enforceable obligations seems to undercut a potential theory of liability that, according to Eric Goldman, had been "festering" as a result of ambiguous language in earlier cases.[334]

TABLE 13

INTERMEDIARY'S RELATIONSHIP WITH PLAINTIFF OR PUBLIC

Finding	**Number of Decisions**	**Percentage of Total**
Not addressed in decision	97	65.1%
Received notice of problematic content	37	24.8%
Promise to plaintiff to take action	4	2.7%
Promise to public in marketing materials	1	0.7%
Promise to public in ICS terms of service	10	6.7%
Total	149	

Table 13 reports how often courts addressed whether the defendant made a specific promise to the plaintiff or a general promise to remove content through its marketing materials or terms of service. Not surprisingly, most decisions (65.1%) did not discuss the nature of the defendant's relationship with the plaintiff or the public. In the few decisions that addressed this issue, a plurality (24.8%) simply mentioned that those defendants had received notice of the tortious or illegal content they were distributing. Relatively

333. *Id.* at 1109.

334. Eric Goldman, Ninth Circuit Mucks Up 47 USC 230 Jurisprudence . . . Again!?—Barnes v. Yahoo!, Tech. & Marketing Law Blog, http://blog.ericgoldman.org/archives/2009/05/ninth_circuit_m.htm (May 13, 2009, 08:04 PM PST).

few decisions focused on whether the defendants had made promises through their marketing materials or terms of service to moderate or remove harmful content, and only one decision found such a promise to be determinative on the question of section 230's applicability. [335]

B. Correlation and Regression Analyses

This section of the Article examines whether the areas of inquiry described above have any relationship to how courts actually decided section 230 cases. It would seem fairly obvious that if the court concludes that the defendant is not a provider or a user of an interactive computer service, the defendant is not going to find protection under section 230. Similarly, if the court concludes that the third-party source of the content at issue does not qualify as another information content provider or the claims under consideration do not qualify for preemption, then section 230 will not preclude liability.

Correlation analysis provides a quantitative way to test these assumptions by examining the interrelationship among these variables. In other words, it can reveal whether the different areas of judicial inquiry described in section A were associated with a finding of preemption and whether a finding as to one area is associated with a finding as to another area. Table 14 presents a contingency table that lists the correlation coefficients for each pairwise comparison of areas of inquiry. A higher correlation coefficient indicates a stronger association with an eventual determination that section 230 preempted the claim, and a stronger relationship between that area and the corresponding area of inquiry in the table. [336] As expected, a

335. Mazur v. eBay Inc., No. C 07-03967 MHP, 2008 WL 618988, at *12 (N.D. Cal. Mar. 4, 2008) (declining to dismiss fraud claim because "eBay's statement regarding safety affects and creates an expectation regarding the procedures and manner in which the auction is conducted and consequently goes beyond traditional editorial discretion"). *But see* Doe v. SexSearch.com, 502 F. Supp. 2d 719, 729–30 (N.D. Ohio 2007) (holding that "[p]laintiff cannot claim he was misled or he reasonably relied on the representation that 'all members are 18+' when the Terms and Conditions clearly state the Web site did not guarantee (and took no responsibility for verifying) members' ages"); Prickett v. InfoUSA, Inc., 561 F. Supp. 2d 646, 650 (E.D. Tex. 2006) (finding that defendant's claim to "call every business to verify the information, so you can be assured of the most current and accurate listings" did not create additional liability).

336. The sum of the absolute values for the pair of correlation coefficients reported for each area of inquiry does not equal zero because the decisions may not have addressed all of the inquiries in equal measure. Each of the six areas was assigned two binary variables (0 = no, 1 = yes) that reflected whether a court's finding favored the defendant or the plaintiff. For example, if the court stated that the defendant qualified as a provider or user of an interactive computer service, the "Defendant is an ICS" finding would be coded with a 1 and the corresponding finding

finding that a claim is covered by section 230 and that the information at issue was provided by another information content provider was statistically correlated (significant at both the $\sigma = 0.05$ and $\sigma = 0.01$ levels) with an eventual finding of preemption. Similarly, a finding that the defendant failed to qualify as a provider or user of an interactive computer service was significantly correlated with a finding of no preemption under section 230.

The remaining three areas of inquiry also present some interesting results, albeit more nuanced. A defendant's level of interaction with the content showed a moderate, but statistically significant, association with a finding of preemption, suggesting that if the court found that the defendant had no interaction with the content at issue, this finding would likely coincide with a conclusion that section 230 preempted the claim. Alternatively, if the court found that the defendant had substantial interaction with the content—for example, through the use of pre-populated submission forms—such a finding would likely coincide with the conclusion that section 230 did not preempt the claim at issue.[337]

for the plaintiff, "Defendant is not an ICS," would receive a 0. If the court instead found that the defendant did not qualify as a provider or user of an ICS, this finding would be in favor of the plaintiff, so the "Defendant is not an ICS" would be coded with a 1 and the corresponding finding for the defendant, "Defendant is an ICS," would be coded with a 0. But if the court did not address this inquiry, as was often the case, or issued a neutral finding, both variables would be coded with a 0. The specific findings that inure to the benefit or detriment of the parties are described in Part IV.A.

337. The fact that the strength of these associations was relatively modest is likely due, in part, to the fact that courts frequently did not explicitly address all of the areas of inquiry in every decision.

TABLE 14

PAIRWISE CORRELATIONS BETWEEN A FINDING OF PREEMPTION AND SIX JUDICIAL AREAS OF INQUIRY

			Interactive Computer Service (ICS)		Scope of Claims Covered		Information Content Provider (ICP)	
Area of Inquiry	**Finding**	**Preemption**	**Defendant**	**Plaintiff**	**Defendant**	**Plaintiff**	**Defendant**	**Plaintiff**
	Claim Preempted	**1**						
Interactive Computer Service (ICS)	Defendant is an ICS	0.130	1					
	Defendant is not an ICS	- 0.267 †	- 0.090	1				
Scope of Claims Covered	Claim Qualifies	0.529 †	0.191 *	- 0.141	1			
	Claim Does Not Qualify	- 0.354 †	- 0.021	- 0.050	- 0.148	1		
Information Content Provider (ICP)	Source is an ICP	0.378 †	0.415 †	- 0.145	0.385 †	- 0.020	1	
	Source is not an ICP	- 0.437 †	0.043	0.103	- 0.254 †	- 0.049	- 0.175 *	1

* Denotes that the correlation coefficient is statistically significant at the 0.05 level.
† Denotes significance at the 0.01 level.
"Defendant" and "Plaintiff" columns indicate which party a finding on that specific factor benefits.

TABLE 14 *(continued)*

PAIRWISE CORRELATIONS BETWEEN A FINDING OF PREEMPTION AND SIX JUDICIAL AREAS OF INQUIRY

			Interactive Computer Service (ICS)		Scope of Claims Covered		Information Content Provider (ICP)	
Area of Inquiry	**Finding**	**Preemption**	**Defendant**	**Plaintiff**	**Defendant**	**Plaintiff**	**Defendant**	**Plaintiff**
Relationship to Source	No Relationship	0.010	0.074	0.054	0.214 *	0.010	0.129	- 0.001
	Full Control	- 0.209 *	- 0.045	- 0.025	- 0.079	0.080	0.001	0.209 *
Interaction with Content	No Interaction	0.258 †	0.322 †	0.030	0.111	- 0.069	0.276 †	- 0.092
	Substantial	- 0.257 †	- 0.058	0.069	- 0.194 *	- 0.026	0.022	0.388 †
Relationship with Others	No Promise	0.172 *	0.123	- 0.087	0.196 *	0.058	0.148	- 0.159
	Promise Made	0.133	0.026	- 0.050	0.172 *	- 0.043	0.071	0.023

* Denotes that the correlation coefficient is statistically significant at the 0.05 level.
† Denotes significance at the 0.01 level.
"Defendant" and "Plaintiff" columns indicate which party a finding on that specific factor benefits.

TABLE 14 *(continued)*

PAIRWISE CORRELATIONS BETWEEN A FINDING OF PREEMPTION AND SIX JUDICIAL AREAS OF INQUIRY

			Relationship to Source		Interaction with Content		Relationship with Others	
Area of Inquiry	**Finding**	**Preemption**	**Defendant**	**Plaintiff**	**Defendant**	**Plaintiff**	**Defendant**	**Plaintiff**
Relationship to Source	No Relationship	0.010	1					
	Full Control	- 0.209 *	0.027	1				
Interaction with Content	No Interaction	0.258 †	0.170 *	- 0.108	1			
	Substantial	- 0.257 †	0.032	.041	- 0.155	1		
Relationship with Others	No Promise	0.172 *	0.001	- 0.100	0.001	- 0.041	1	
	Promise Made	0.133	- 0.107	- 0.058	- 0.023	- 0.026	0.110	1

* Denotes that the correlation coefficient is statistically significant at the 0.05 level.
† Denotes significance at the 0.01 level.
"Defendant" and "Plaintiff" columns indicate which party a finding on that specific factor benefits.

Correlation analysis also suggests that a court's finding that the defendant had substantial interaction with the content or substantial control over the source was significantly associated with a finding that the source of the content did not qualify as another information content provider. This association makes intuitive sense because a defendant's substantial interaction with the content or source could turn the intermediary into the source of the content, leading a court to conclude that the content at issue did not actually come from a third party. As to findings addressing a defendant's relationship with the source or with the plaintiff or the public, the associations between a finding in those areas and the eventual finding that section 230 did or did not preempt a claim are largely negligible. Again, this lack of a statistical correlation reinforces what would be expected given that courts only recently began to focus on these issues after the Ninth Circuit's decisions in *Roommates.com* and *Barnes*.

While the correlation matrix in table 14 reveals a number of statistically significant associations between a court's findings and an eventual finding of preemption, the correlation coefficients cannot tell us whether these findings in fact influenced the likelihood that the court would find preemption. Regression analysis is the proper tool to answer that question, as it can indicate whether the findings predict a finding of preemption by controlling for other variables that covary with the variable of interest and may provide insights into the considerations that drove judges to decide the cases as they did. Table A-5 in the Appendix sets out the results of a logistic regression model predicting the likelihood of preemption as a function of the areas of judicial inquiry described in Part IV.A.[338] While the model presents a number of interesting results, a few of the key findings are discussed below.

338. A logistic regression model was necessary because the dependent variable, "Preemption Granted," is dichotomous (0/1); therefore, linear regression models such as Ordinary Least Squares are not appropriate to perform estimations. As a result, the coefficients listed in table A-5 in the Appendix lack an intuitively meaningful scale for interpreting their strength. Nevertheless, they can reveal statistical significance and provide an indication of whether the independent variable under study leads to an increased or decreased likelihood of a finding of preemption. *See* Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1431–32 n.230 (1998).

1. Expected Findings

The model reports that court findings that the defendant was not a provider or user of an interactive computer service, or that the defendant controlled the third-party source "predict failure perfectly." The model also reports that if a court concludes that the claim at issue did not fall within section 230's coverage, then the likely result is a finding of no preemption. In other words, the model predicts that if a defendant loses on any of these questions, then the court will likely find no preemption.[339] These results are not particularly surprising given that these are fundamental requirements of a section 230 defense.

2. Unexpected Findings

The model also predicts that if a court states in its decision that a claim is within section 230's coverage, then the result will always be a finding of preemption. We know from reviewing the case law, however, that courts do not find preemption as to every claim that potentially falls within section 230's broad scope. Given that the model predicts success perfectly with regard to this finding, we can surmise that when a judge took the time to state that a specific claim type qualified for preemption under section 230, the judge eventually found preemption as to that claim. In fact, this prediction is backed up by a review of the decisions.[340]

Overall, correlation and regression analyses support the initial assumption that courts generally have coalesced around the six areas of judicial inquiry described in Part IV.A. However, the instant analysis also suggests a body of case law that lacks rhetorical and analytical consistency because judges often fail to address key elements of a section 230 defense. While section 230 has been in existence for more than thirteen years, many of the decisions exhibit a haphazard approach to its application, often ignoring threshold questions or assuming that certain requirements are met. While some

339. Overall, the logistic regression model described in table A-5 in the Appendix reports that it correctly classified 86.8% of the decisions. The model automatically dropped any observations (decisions) associated with a variable that predicted success or failure perfectly. As a result, the model dropped seventy-five observations associated with those variables from the calculations.

340. *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327, 327 (4th Cir. 1997) (noting that claim was covered by section 230 and then dismissing the claim); Donato v. Moldow, 865 A.2d 711, 711 (N.J. Super. Ct. App. Div. 2005) (same); Schneider v. Amazon.com, Inc., 31 P.3d 37, 37 (Wash. Ct. App. 2001) (same).

elements of a section 230 defense are relatively straightforward and rarely disputed, courts would do well to at least articulate their findings explicitly.

V. DISCUSSION

As with any empirical study, there are many ways to view and interpret the data. A few of the more interesting findings are discussed in this part of the Article.

A. Viability of Claims Under Common Law Liability Theories

One of the best ways to assess a statute's impact on an area of law is to systematically compare the case law pre- and post-enactment. Unfortunately, this approach will not work for section 230, as courts issued only two reported decisions addressing an Internet intermediary's liability for speech-based harms prior to section 230's enactment.[341] As a rough proxy, however, this section of the Article identifies several factors in the decisions that are germane to the question of liability under the common law, and then applies those factors in a "what if section 230 did not exist" thought experiment in order to gain insight into how section 230 has changed the liability landscape for intermediaries. Readers should be cautious of drawing definitive conclusions from the following discussion, however, because courts almost certainly would have focused on different facts had they been addressing common law liability theories rather than the application of section 230.[342] Nevertheless, the effort is still useful in that it foregrounds how section 230 has changed the liability landscape and whether, as discussed more fully in subsequent subsections, section 230 is providing adequate protection for intermediaries.

To aid in the instant analysis, each defendant in the study set was placed into one of the four online intermediary groupings described earlier—conduits, content hosts, search/application

341. Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Stratton Oakmont, Inc. v. Prodigy Servs., Co., Trial IAS Part 34, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). Another case filed against Prodigy in 1994, *Lunney v. Prodigy Services Co.*, did not come to a decision until after section 230's effective date. 723 N.E.2d 539, 542 (N.Y. App. Div. 1999) (declining to reach section 230 issue but observing that in transmitting e-mail, "an ISP, like a telephone company, is merely a conduit[]").

342. *See supra* Part IV.A.

providers, and users—based on the role the defendant played in facilitating the publication or distribution of the content at issue in the case. Drawing from the areas of judicial inquiry listed previously in tables 11 through 13,[343] each decision was then evaluated to ascertain whether the court noted in its decision that the defendant had knowledge of the tortious or illegal content or exercised editorial control over the content.[344] The tabulations from this review are reported in table 15.

343. *See supra* Part IV.A.

344. This was done solely by looking at the decisions themselves. Decisions falling in the last six and last seven categories in tables 11 and 12, respectively, were counted as evidencing editorial control. Decisions tagged with either "knowing publication" in table 12 or "received notice of problematic content" in table 13, were counted as evidencing knowledge. In addition, decisions in which the court found that the defendant itself was the source of the content were excluded because those defendants were not actually serving as intermediaries.

TABLE 15

PREDICTED LIABILITY FOR INTERMEDIARIES UNDER COMMON LAW THEORIES

		Decision Mentions		Common Law Theory		Section 230 Defense	
Intermediary Type	**Number of Decisions**	**Editorial Control**	**Knowledge of Content**	**No Liability Predicted**	**Percentage of Total**	**Claim Preempted**	**Percentage of Total**
Conduit	21	3	4	18	85.7%	11	52.4%
Content Host	121	42	33	60	49.6%	77	63.6%
Search or Application Provider	25	6	7	14	56.0%	17	68.0%
User	11	6	3	5	45.5%	4	36.4%
Total	178	57	47	97	54.5%	109	61.2%

Table 15 also predicts whether the intermediaries in the section 230 cases would have been susceptible to liability under the common law. In other words, if section 230 did not exist, would courts applying common law liability principles hold these defendants responsible for the third party's tortious speech? In order to answer this question, each defendant was placed in an appropriate common law liability category based on its intermediary type and degree of editorial control and knowledge. It was assumed that conduit intermediaries would qualify for the common law's lenient treatment of common carriers unless they exercised editorial control,[345] in which case they were evaluated under the standard for distributors. Content hosts, search/application providers, and users were all evaluated under publisher liability standards if they exercised editorial control, and under distributor liability standards if they did not.[346]

The results in table 15 must be read with some caution, however, because the common law doctrines do not correspond precisely to the roles intermediaries play online and even within the four classifications, intermediaries varied in their level of interaction with third-party content. It is no wonder that in the early days of the Internet, commentators described the liability standards facing operators of online services as confusing and muddled.[347] Furthermore, this analysis only addresses the *viability* of the claims against the intermediary types under the common law and section 230. It does not assess whether the third-party content at issue in the cases was ultimately actionable. Furthermore, even if section 230 does not preempt the claim at issue, a defendant may still be entitled to dismissal of the claim on other grounds.

Even with the preceding caveats in mind, table 15 presents some intriguing results. It suggests that conduit intermediaries would have fared better under the common law than they did under section 230. However, this may be somewhat misleading, given that all conduits

345. Although ISPs and other providers of Internet access generally have not been classified as common carriers, *see supra* note 119, they share many of the characteristics of traditional common carrier conduits. *See, e.g.*, United States v. Jackson, 208 F.3d 633, 637 (7th Cir. 2000); Anderson v. N. Y. Tel. Co., 320 N.E.2d 647, 649 (N.Y. 1974); *Lunney*, 723 N.E.2d at 542.

346. Search/application providers were an especially difficult group to handicap due to their ambiguous status under the law. *See* Grimmelmann, *supra* note 57, at 27–30.

347. *See* Cutrera, *supra* note 158, at 559; Anne Wells Branscomb, *Common Law for the Electronic Frontier*, 265 SCI. AMER. 154 (1991).

do not currently enjoy the additional protections and obligations the law assigns to common carriers as was assumed for purposes of doing the calculations behind table 15. Nevertheless, of the ten decisions involving conduits in which the court did not find preemption under section 230, the court did not even reach the question of section 230's application in six of those decisions because it found that these cases warranted dismissal on other grounds.[348]

Not surprisingly, this analysis suggests that content hosts and search/application providers fared better under section 230 than they would have under the common law. For these intermediaries, the editorial-control distinction in the common law breaks down because virtually all content hosts and search/application providers have the *ability* to exercise editorial control over third-party speech, even if they do not choose to exercise that power.[349] Indeed, they would likely fare far worse under the common law than predicted if courts were to apply publisher liability to an intermediary that simply has the ability to exercise editorial control.[350]

What is surprising is that intermediaries in all four categories fared as well as they did under the common law.[351] Some of this is undoubtedly due to the fact that judges did not focus on the two key determinates of liability under the common law—knowledge and editorial control—when addressing the application of section 230. Preemption under section 230 does not typically turn on those factors, so the tabulations likely underreport the true number of defendants that would face liability under the common law. But it is likely also due to the fact that many of the intermediaries who interposed section 230 as a defense did nothing more than provide a

348. *See, e.g.*, *Lunney*, 723 N.E.2d at 542; Doe v. GTE Corp., 347 F.3d 655, 658–59 (7th Cir. 2003); Abate v. Maine Antique Digest, 2004 WL 293903, at *1 (Mass. Super. 2004); Morrison, 153 F. Supp. 2d 930, 930 (N.D. Ind. 2001).

349. This refers to the technical ability to control content through filtering. As to the practical challenges of performing this function, many Internet intermediaries do not have the expertise or financial ability to selectively filter or block content; as a result, their only option is wholesale blocking of content. *See supra* Part I.B.

350. As discussed in Part I, *supra*, all content hosts have the ability—at least in theory—to filter or block content.

351. In fact, the difference between the cases predicted not to have liability under the common law and the cases preempted by section 230 was not statistically significant ($X^2 = 6.73$ P = .081).

platform for others to engage in speech.[352] Would the common law have evolved some way to grant these intermediaries a presumption of non-liability akin to the common law's approach to conduit liability?[353] We simply do not know.

What table 15 suggests, however, is that many of the intermediaries that invoked section 230 likely would not have faced eventual liability under the common law because they lacked knowledge of and editorial control over the third-party content at issue in the cases. Given this prediction, one might question whether section 230 is necessary. But this points to one of section 230's most important functions for intermediaries: it seeks to give them the legal certainty, or in First Amendment terms, "breathing space,"[354] to facilitate the distribution of third-party speech that may contain injurious or illegal content. Without this increased certainty, risk-averse intermediaries would be less willing to facilitate the speech of others and the public would be burdened by their censorship.[355] The next section of the Article examines whether section 230 has succeeded in providing this breathing space.

B. Assessing Section 230's Impact on Defendants

Not unlike other entities that operate in uncertain legal environments, an intermediary that facilitates the speech of others has three primary concerns: (1) the likelihood it will be sued; (2) if it is sued, the likelihood that it will succeed in the case; and (3) the cost of defending the case and any liability damages.[356]

352. Table 16 reports that more than half (54.5%) of the intermediaries had no editorial control or knowledge of the content at issue in the case.

353. *Cf.* Auvil v. CBS 60 Minutes, 800 F. Supp. 928, 931–32 (E.D. Wash. 1992) (rejecting plaintiff's argument that CBS broadcast affiliate's power and opportunity to exercise editorial control over network programming "triggered the duty to censor").

354. NAACP v. Button, 371 U.S. 415, 433 (1963) (cautioning that "First Amendment freedoms need breathing space to survive").

355. *See supra* Part I.B; *cf.* Barrett v. Rosenthal, 146 P.3d 510, 525 (Cal. 2006) (observing that intermediaries are not in a position to assess whether the content is in fact defamatory because "[d]efamation law is complex, requiring consideration of multiple factors. These include whether the statement at issue is true or false, factual or figurative, privileged or unprivileged, whether the matter is of public or private concern, and whether the plaintiff is a public or private figure").

356. Of course, intermediaries have other concerns as well, including a desire to avert the potential negative publicity that can arise from being sued for facilitating tortious or illegal speech.

While the first concern is outside the scope of the present study, there is considerable research elsewhere that looks at the risk premiums parties must bear as a result of uncertainty regarding legal liability.[357] As discussed in Part I,[358] this uncertainty has an especially pernicious effect in the speech context because threats of civil and criminal liability often result in excessive self-censorship. Moreover, when an intermediary engages in this form of censorship, the effects are magnified because, as Justice Brennan observed fifty years ago, the intermediary's censorship becomes the "public's burden, for by restricting [the intermediary] the public's access to [speech] would be restricted."[359]

With regard to an intermediary's desire to determine the likelihood that it will win a case, the present study suggests that intermediaries have fared quite well under section 230, with courts granting preemption as to at least one claim in nearly two-thirds of the decisions.[360] But the preemption rate under section 230 tells only part of the story. When dismissals on grounds other than section 230 are included in the calculations, the results for defendants are even better; overall, defendants won dismissal in 76% of the cases studied.[361]

This high rate of dismissal raises the question of why plaintiffs continue to file lawsuits against intermediaries that are shielded by section 230. While the present study cannot answer this question, other research suggests that plaintiffs sometimes engage in litigation to achieve strategic ends: by raising the costs for intermediaries that facilitate the distribution of disfavored speech, plaintiffs can drive up the speaker's costs, assuming the intermediary can pass the expenses along, or drive the speaker off the Internet, if those costs cannot be borne by either the speaker or the intermediary.[362] It is costly for

357. *See, e.g.*, Kraakman, *supra* note 3, at 891–92 (discussing the ways in which corporate entities handle the risk of liability).

358. *See supra* Part I.B.

359. Smith v. California, 361 U.S. 147, 153–54 (1959).

360. *See supra* Part III.C.

361. These calculations are based on completed cases that ended in dismissal on any grounds, including statute of limitations, lack of personal or subject matter jurisdiction, or preemption under section 230. The calculations do not include the fifteen cases that were pending at the time of this study.

362. *See* Kreimer, *supra* note 6, at 39; *cf.* Reno v. ACLU, 521 U.S. 844, 880 (1997) (invalidating large sections of the CDA because they "would confer broad powers of censorship,

intermediaries to dispute even meritless claims. It is far less costly to simply remove or block the speech at issue. A "profit-maximizing intermediary likely will choose the path that is least costly, rather than the one that preserves the most speech."[363] This fact has not gone unnoticed by potential plaintiffs.[364]

Accordingly, intermediaries are keenly interested in what it will cost to defend a lawsuit, even when they feel confident that they will ultimately prevail.[365] Much of the costs associated with litigation arise during discovery, and the longer a case continues, the greater the expenses to both parties.[366] Mindful of these costs, some courts have refused to permit the plaintiff to engage in discovery until the court addressed whether section 230 preempted the claims at issue in the case.[367] In a number of other cases, the plaintiff opposed the defendant's motion by arguing that the section 230 defense was not ripe. This question is taken up in the next section of the Article.

1. The Proper Timing of a Section 230 Defense

There is some disagreement in the case law as to whether section 230 can be raised in a motion to dismiss or otherwise

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in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his . . . child . . . would be present").

363. Kreimer, *supra* note 6, at 31.

364. In an article in *Forbes*, Daniel Lyons advised that the best way to deal with unfavorable speech online is to

> ATTACK THE HOST. Find some copyrighted text that a blogger has lifted from your Web site and threaten to sue his Internet service provider under the Digital Millennium Copyright Act. That may prompt the ISP to shut him down. Or threaten to drag the host into a defamation suit against the blogger. The host isn't liable but may skip the hassle and cut off the blogger's access anyway.

Daniel Lyons, *Attack of the Blogs!*, FORBES, Nov. 14, 2005, at 128, 132 (emphasis in original).

365. Under what is generally known as the "American Rule," each party in a lawsuit is responsible for paying his or her own attorney's fees and costs, regardless of the outcome of the litigation. *See* Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514, 517 (2009). Even in cases that end in settlement, the costs can be substantial. *See id.*

366. Although both parties endure these costs, studies suggest that the costs of defamation litigation disproportionately fall on the defendant. *See* David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U. L.J. 1207, 1207 (1995) (finding that over 90% of the costs in defamation litigation are attributable to the defendants' legal fees and expenses, while plaintiffs' legal fees and expenses account for 3.5% to 8% of total costs).

367. *See, e.g.*, Ben Ezra, Weinstein & Co. v. Am. Online, Inc., No. CIV. 97-485 LH/LFG, 1998 WL 896459, at *2 (D.N.M July 16, 1998) (granting stay and noting that "immunity from the burdens of litigation should appropriately be afforded to AOL"), *aff'd*, 206 F.3d 980 (10th Cir. 2000).

addressed before the parties have had a chance to engage in discovery. While most courts treat section 230 as providing immunity to qualifying defendants,[368] several courts have characterized section 230 as an affirmative defense.[369] Because a plaintiff generally is "not required to plead around affirmative defenses,"[370] the practical consequences that flow from how a court treats this issue can be significant.

If section 230 cannot be raised at the start of the litigation, the defendant will need to file an answer to the complaint, which will trigger a series of obligations to confer with the plaintiff and engage in discovery. Although a defendant may eventually succeed in getting the case dismissed, the defendant will have had to expend time and resources defending against a claim for which it faced no liability.[371]

In the vast majority (84.8%) of the decisions addressing a section 230 defense prior to full discovery, neither the court nor the parties appear to have raised the issue of the proper timing for a section 230 defense. In several other decisions, the plaintiff conceded that section 230 applied or the pleadings themselves provided a sufficient factual basis for the court to make such a ruling.[372] A court refused to address the defendant's section 230 defense prior to discovery in only 7.6% of the decisions.[373]

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368. *See, e.g.*, *Carafano*, 339 F.3d at 1125; *Ben Ezra, Weinstein & Co.*, 206 F.3d at 983, 986.

369. *See, e.g.*, Doe v. GTE Corp., 347 F.3d 655, 657 (7th Cir. 2003); Novak v. Overture Servs., Inc., 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004).

370. *Novak*, 309 F. Supp. 2d at 452. Affirmative defenses can be raised in a motion to dismiss, however, if the existence of the defense is clear from the complaint itself. *See, e.g.*, Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 416, 425 (1st Cir. 2007). For example, when a complaint reveals that the cause of action accrued earlier than is permitted under the applicable statute of limitations, this defense may be raised on a motion to dismiss. *See, e.g.*, Guerrero v. Gates, 357 F.3d 911, 915, 919 (9th Cir. 2004). As previously noted, the fact that the defendant qualifies as an ISP is often apparent from the complaint itself. *See supra* Part IV.A.1.

371. *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1175 (9th Cir. 2008) (noting that "section 230 must be interpreted to protect Web sites not merely from ultimate liability, but from having to fight costly and protracted legal battles").

372. *See, e.g.*, *Lycos*, 478 F.3d at 415; Beyond Sys., Inc. v. Keynetics, Inc., 422 F. Supp. 2d 523, 536–37 (D. Md. 2006); PatentWizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001).

373. *See, e.g.*, *GTE Corp.*, 347 F.3d at 657; Curran v. Amazon.com, Inc., No. 2:07-0354, 2008 WL 472433, at *14 (S.D.W. Va. Feb. 19, 2008); Doctor's Assocs., Inc. v. QIP Holders, LLC., No. 3:06-cv-1710 (JCH), 2007 WL 1186026, at *2 (D. Conn. Apr. 19, 2007); *Novak*, 309 F. Supp. 2d at 452.

However, even in jurisdictions that permit a defendant to move for dismissal under section 230 prior to the completion of discovery, the defendant cannot do so until it first makes an appearance in the case and files a motion for judgment on the pleadings or a motion to dismiss. As a result, intermediaries face costs even when they succeed in getting a case dismissed at an early stage in the litigation.

One way to estimate these costs is to calculate the number of days that elapsed between the filing of the lawsuits under study and the court's decision addressing the application of section 230. Although it is likely to be an imperfect proxy for the costs the parties incurred during the pendency of the litigation, we generally can assume that the longer the period between the filing and the decision, the greater the costs to the parties.

On average, nearly a year elapsed between the date the plaintiffs in the cases studied filed their complaints and the date the trial court judges issued decisions addressing the defendants' section 230 defense.[374] Trial court judges issued their decisions an average of 50 days earlier if they found preemption under section 230 as to at least one claim in the case than they did if they found no preemption.[375]

Not surprisingly, whether the court granted preemption before or after the completion of discovery had the largest impact on how much time elapsed. If a trial court found preemption prior to discovery, it did so an average of 279 days after the complaint was filed.[376] If the court found preemption after discovery, that time frame stretched to an average of 521 days, a statistically significant difference of 242 days.[377] Accordingly, we can conclude that a court's willingness to entertain a defendant's section 230 defense in a motion to dismiss or another pre-discovery motion had a significant and substantial impact on the costs the defendant faced.

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374. *See* table *infra* in note 377.

375. The difference between the mean number of days for decisions granting and not granting preemption, however, was not statistically significant (unpaired *t*-test *p*-value = 0.391).

376. *See* table *infra* in note 377.

377. Summaries of the statistics showing the elapsed days for decisions granting preemption in trial courts are provided below. The difference in means was statistically significant with an unpaired *t*-test *p*-value of 0.0002.

Posture	Mean	Median	Standard Deviation	Maximum
Before Full Discovery	279	254	149.6	708
After Discovery	521.2	477	383.3	1556

2. Imposition of Sanctions and Attorneys' Fees

One way for defendants to recoup their litigation costs, if they are successful in having the case dismissed, is through fee-shifting provisions. While a number of federal statutes contain provisions that provide for the prevailing party to recover some or all of its legal costs,[378] section 230 is not one of those statutes. Nevertheless, some of the cases studied involved claims arising under other statutes or state laws that contained fee-shifting provisions, and even without these provisions, courts retained the discretion to award sanctions in the most egregious cases, although no court has done so to date in a section 230 case.

Overall, the issue of sanctions or attorneys' fees arose in 19 of the 110 decisions (17.3%) in which a court found preemption under section 230 as to at least one claim in the case. In 5 of those decisions, the court awarded sanctions or fees to the defendant.[379] In the remaining 14 decisions, the court denied the defendant's request for fees or sanctions.[380]

In summary, while section 230 has largely protected intermediaries from liability for third-party speech, it has not been a free pass for defendants. Even in cases where the court found section 230 preempted the plaintiff's claims, intermediaries bore liability in the form of litigation costs that they were unable to recoup from plaintiffs. As discussed in Part I, we should be mindful that litigation costs imposed on intermediaries, even those that do not bear liability, can have a chilling effect on their willingness to facilitate the speech of others.

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378. Ashley E. Compton, *Shifting the Blame: The Dilemma of Fee-Shifting Statutes and Fee-Waiver Settlements*, 22 GEO. J. LEGAL ETHICS 761, 763–64 (2009).

379. *E.g.*, Higher Balance, LLC v. Quantum Future Group, Inc., No. 08-233-HA, 2008 WL 5281487 (D. Or. Dec. 18, 2008) (awarding fees under Oregon anti-SLAPP statute); Hamad v. Ctr. for the Study of Popular Culture, No. 06-cv-285 (W.D. Tex. filed Jan. 17, 2007) (awarding sanctions under Rule 11); Barrett v. Clark, No. 833021-5, 2001 WL 881259 (Cal. Super. Ct. July 25, 2001) (awarding fees under California anti-SLAPP statute); *cf.* Steele v. Mengelkoch, No. A07-1375, 2008 WL 2966529 (Minn. Ct. App. August 5, 2008) (affirming dismissal of claims under section 230, but reversing award of sanctions raised *sua sponte* by lower court because plaintiff not given opportunity to withdraw complaint).

380. *E.g.*, Associated Bank-Corp. v. Earthlink Inc., 2005 WL 2240952 (W.D. Wis. 2005); Austin v. CrystalTech Web Hosting, 125 P.3d 389, 389 (Ariz. App. Div. 2005); Univ. Comm. Sys. Inc. v. Lycos Inc., 478 F.3d 413, 413 (Mass. 2007).

C. Assessing Section 230's Impact on Plaintiffs

Countless law review pages have been devoted to debating the question of why plaintiffs file lawsuits. Obviously, there is no one answer that applies to all plaintiffs or all claims. In the context of defamation and other speech-based torts, which are at the heart of the claims covered by section 230, research has shown that plaintiffs primarily want the tortious material to be removed or corrected.[381] Secondarily, they want to recover against the parties responsible. This section of the Article examines whether plaintiffs were successful in achieving either of these objectives.

First, however, a few caveats. The data from this study cannot tell us how many people have been harmed by speech online.[382] Nor can the data tell us how many cases plaintiffs would have filed were it not for section 230.[383] The only thing the data can tell us is how plaintiffs fared in the cases studied.

1. Finding and Suing the Source

A party who believes he or she has been harmed by speech online faces a number of choices, including whether and whom to sue. The intermediaries that facilitated the harm often make appealing targets because typically they have the power to remove the harmful speech, the resources to pay damages, and an online presence that makes them easy to identify.[384] But as the previous

381. *See* Randall P. Bezanson, *Libel Law and the Realities of Libel Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 228 (1985) (reporting that only 20% of the surveyed plaintiffs sued to obtain money as compensation for the alleged libel). Instead, "the major motivating factors are restoring reputation, correcting what plaintiffs view as falsity, and vengeance." Randall P. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CAL. L. REV. 789, 791 (1986).

382. This study necessarily excludes cases without decisions and legal claims that were not adjudicated. *See, e.g.*, Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 26 (1983).

383. Because section 230 sets such a high bar for intermediary liability, some plaintiffs may have brought other causes of action, such as vicarious copyright liability, to force the removal of content. *See* Kreimer, *supra* note 6, at 86–87.

384. In the offline world, the publishers of content, not the distributors, were the ones with the deep pockets. Because it required substantial capital to publish a book or newspaper, publishers had to be well capitalized. Distributors such as bookstores, libraries, and newsstands had relatively little capital in comparison. Not surprisingly, plaintiffs tended to focus on suing publishers because those deeper pockets meant they could recover damages and pay for the cost of the lawsuit. *See* Robert W. Hamilton, *Liability for Third-Party Content on the Internet*, 8 SETON HALL CONST. L.J. 733, 736 (1998). Today, this relationship is inverted—the deep pockets now reside with the intermediaries.

sections in the Article have shown,[385] section 230 provides broad protections for intermediaries. Except in the rare instances when the defendant-intermediary who interposed section 230 was actually the source of the content at issue (9.6% of the decisions), courts have found that the plaintiff's claims were preempted in nearly seven out of ten decisions.[386]

While section 230 provides a high bar for plaintiffs to overcome when suing an intermediary, it presents no bar to a lawsuit against the original source of the content. Before a plaintiff can recover from the source, however, he or she must first identify the source. As reported in Part III, 41.2% of the decisions studied involved anonymous content.[387] While not insurmountable, the fact that a source is anonymous makes the plaintiff's task more challenging. In order to uncover the anonymous source's identity, the plaintiff can either sue the unidentified source as a "John Doe" in the existing case and request the identifying information from the intermediary through the discovery process, or use a third-party subpoena to request identifying information from another entity that has the relevant information.[388]

In order to capture how often plaintiffs sued the original source, each case from which a decision arose was analyzed to determine whether the plaintiff sued the source in that case or in another case.[389] In more than half of the cases (51.1%), the plaintiffs sued the source of the content as well as the intermediary in the same case. In sixteen additional cases, the plaintiffs sued the third-party source in another case or jurisdiction. In total, plaintiffs sued the third-party

385. *See supra* Part II.

386. *See supra* Part III.C.

387. *See supra* note 229 and accompanying text discussing how anonymity was defined for purposes of this study.

388. In either situation, courts typically require that the plaintiff demonstrate, *inter alia*, that she has evidence to support each element of her underlying legal claim before ordering disclosure. *See* Dendrite Int'l v. Doe, 775 A.2d 756, 760 (N.J. App. Div. 2001); Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. LAW REV. 1373, 1378 (2009). In thirty of the seventy-nine cases (38%) in which the plaintiffs sued the third-party source, the source was identified as being anonymous. This study did not seek to determine whether plaintiffs were successful in unmasking these third-party sources.

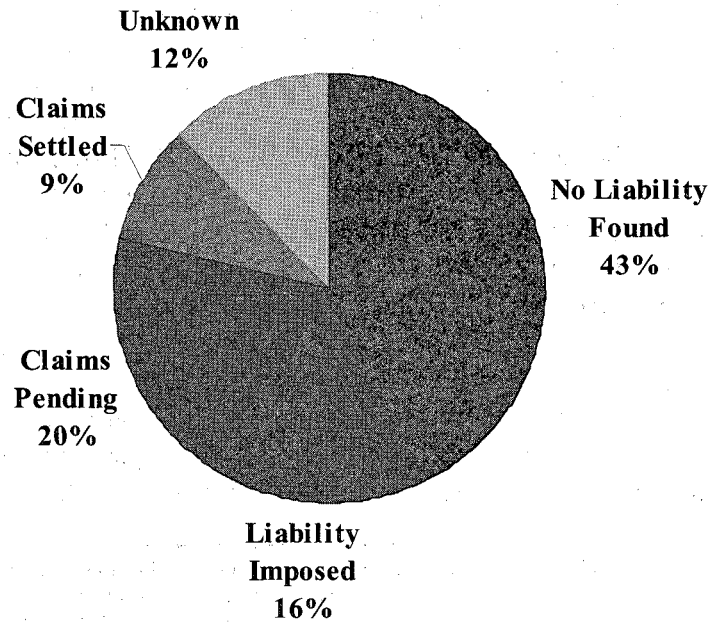
389. This involved the following research: (1) search by party name in the state court docket (if the state makes docket available online) or PACER for federal cases; (2) search by party name in Westlaw dockets database; (3) search via Google for case information; and, if necessary, (4) send an e-mail to the plaintiff's lawyers using contact information available on Westlaw, LEXIS, PACER, or Google. If no information could be found, the case was tagged as unknown.

source of the content at issue in 79 of the 140 cases (56.4%) that were examined.[390]

Of course, finding and suing the source only gets a plaintiff partway to his or her goal. Accordingly, each case in which the plaintiff sued the source was examined to determine whether the court found the source liable.[391] Figure G reports the results. Plaintiffs were able to impose liability on the third-party source in only 16% of the seventy-six cases in which they sued the third-party source. In 43.2% of the cases, a court held that the third-party source had no liability.

FIGURE G

PROPORTION OF CASES FINDING
THIRD-PARTY SOURCE LIABLE FOR CONTENT



390. As noted previously, while the number of decisions under study totaled 184, each case was capable of generating more than one decision so there were fewer cases than decisions.

391. If the plaintiff sued the source in the current case, then liability was assessed by examining the current case docket. If the plaintiff sued the source in another case, a research assistant conducted the following research: (1) review the state court docket (if the docket was available online) or PACER for federal cases; (2) search via Google for case information; and, if necessary, (4) send an e-mail to the plaintiff's lawyers using contact information available on Westlaw, LEXIS, PACER, or Google. If no information could be found, the case disposition was tagged as unknown.

At first blush, a 16% success rate would seem to be abysmally low, and it likely feels that way for those plaintiffs who saw their cases end without a finding of liability. Put in context, however, plaintiffs in the cases studied fared slightly better than plaintiffs in typical defamation cases.[392] As figure G shows, 20% of the cases remain pending. In addition, we were unable to determine the status of another 12% of the cases, so the overall success rate for plaintiffs may end up being above or below 16%.

2. Content Removal

Plaintiffs appear to have fared better with regard to their other objective: the removal or correction of harmful information. While section 230 does not mandate that an intermediary remove tortious or illegal content, even upon notification or request by the plaintiff, a number of intermediaries did so in any event.

In order to assess the current availability of the content at issue in each case, a research assistant was tasked with identifying the content and determining whether it was currently available from the defendant; if the content was no longer available, the researcher recorded the reason why it was unavailable.[393] This research showed that in more than half of the cases (55%), the content plaintiffs sued over was no longer available as of mid-2009. As to an additional 3.6% of the cases, some but not all of the content was available. Table 16 reports these results as well as the reasons the content was unavailable, if that information could be determined.

As table 16 shows, for those cases in which the content was no longer available, the unavailability was attributable to the defendant's voluntary removal in more than a quarter of the cases. In a number of these cases, the court mentioned in its decisions that the

392. In a study of libel litigation during the period 1974–1984, researchers at the University of Iowa found that plaintiffs succeeded in imposing liability on media defendants in only 12.6% of the cases. *See* RANDALL P. BEZANSON ET AL., LIBEL LAW AND THE PRESS: MYTH AND REALITY 116 tbl.6-6 (1987); David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 511 (2001) (reporting that media defendants won pretrial dismissal in nearly 77% of defamation cases studied for the period 1980–1996).

393. This was accomplished by examining the decision and, if necessary, the complaint and other filings in the case to identify the content at issue in the plaintiff's claims. If the content could not be specifically identified, its availability was tagged as unknown. The researcher then performed a search for the content on the intermediary's Web site or online service. If it was not available, the reasons were determined by reviewing the court record and any statements on the defendant's Web site or online service. Additional information on these procedures is provided in the Appendix.

defendant had voluntarily removed the offensive material.[394] In another 18.3% of the cases, the defendant's Web site was defunct. In a small number of cases (4.9%), all or some of the material was no longer available because of a court order.

394. *See, e.g.*, *Almeida*, 456 F.3d at 1319; *Ben Ezra, Weinstein, & Co.*, 206 F.3d at 985–86; *Carafano*, 339 F.3d at 1122; *Zeran*, 129 F.3d at 328–30.

TABLE 16

CURRENT AVAILABILITY OF CONTENT AT ISSUE IN CASE

			Reasons for Unavailability					
Content Available	**Number of Cases**	**Percentage of Total**	**Court Order**	**Settlement**	**Voluntary**	**Ephemeral**	**Web Site Defunct**	**Unknown**
No	77	55.0%	2 (3.0%)	4 (5.0%)	21 (27.0%)	9 (12.0%)	14 (18.0%)	27 (35.0%)
Yes	39	27.9%	-	-	-	-	-	-
Partially	5	3.6%	2 (40.0%)	0	1 (20.0%)	1 (20.0%)	0	1 (20.0%)
Unknown	19	13.6%	-	-	-	-	-	-
Total	140							

As table 16 reports, some of the content at issue also was unavailable because the case was settled, which occurred in 18 of the 140 cases studied (12.9%). This rate of settlement was slightly below the settlement rate in non-Internet libel cases reported by other researchers.[395] In the majority of the cases studied (61.4%), the court dismissed the plaintiff's complaint in its entirety, while in only 5.7% of the cases, the court issued a verdict in the plaintiff's favor. Approximately 1 out of every 10 cases (10.7%) is still pending.

Overall, these findings present a mixed picture for plaintiffs in the cases studied. On the one hand, as to almost two-thirds of all claims for which a defendant or the court interposed section 230 as a defense, plaintiffs were unable to proceed against the intermediaries who facilitated the publication or distribution of content they believed had caused them harm. Yet the data show that plaintiffs were not left without a remedy. In more than half of the cases studied, plaintiffs sued the original source of the content at issue in the case. Although plaintiffs were largely unsuccessful in establishing that the third-party source was liable for their injuries, they appear to have done slightly better—with a 16% success rate—than plaintiffs typically do in defamation cases.

On the other hand, if success is measured by how often plaintiffs were able to get the harmful content removed, then they achieved some measure of success. In more than half of the cases studied (55%), the harmful material was no longer available from the defendant-intermediary at the time this research was conducted.

CONCLUSION

In the thirteen years since its enactment, section 230 has become one of the most important—and one of the most intensely criticized—statutes impacting speech on the Internet. This criticism comes from both sides of the spectrum. Those who believe section 230 goes too far in privileging intermediaries suggest that it should be narrowed to allow notice-based liability or be repealed altogether. Those who think section 230 does not go far enough suggest that it should be expanded to cover additional claims and to include a fee-shifting provision to deter meritless claims against intermediaries.

395. *See* Bezanson, *Libel Law and the Realities of Libel Litigation: Setting the Record Straight*, *supra* note 381, at 228 (reporting that 15% of libel cases settle).

It is likely that both sides will find support for their arguments in this study. While section 230 has largely protected intermediaries from liability for third-party speech, it has not been the free pass many of its proponents claim and its critics lament it to be. Indeed, intermediaries continue to face legal claims arising from the speech of third parties. Even in cases where the court found that section 230 preempted plaintiffs' claims, intermediaries bore liability in the form of litigation costs, and it took the court nearly a year, on average, to issue a decision addressing an intermediary's defense under section 230.

Scholars who follow these cases closely will likely be surprised to find that more than a third of the claims at issue in the cases survived section 230's broad protection. In the majority of those decisions, however, the courts did not need to reach the question of section 230's application because they found that the claims against the intermediary warranted dismissal on other grounds. When these decisions are included in the calculations, defendants won dismissal on section 230 or other grounds in more than three-quarters of the cases studied.

As to section 230's impact on plaintiffs, the data revealed that section 230 has not been a complete bar to relief. A large proportion of plaintiffs were able to identify and sue the original source of the content that caused them harm. Although their success rate in those suits was quite low, it was not out of line with findings from other studies examining defamation litigation. Moreover, in more than half of the cases studied, plaintiffs succeeded in getting the offensive content removed from the defendants' Web sites or online services.

As with any empirical study, especially one that is the first to systematically examine a body of case law, there are many ways to view and interpret the data. The intent of this research was not to foreclose discussion of the important issues at play in what is largely a normative debate. The decision to privilege intermediaries clearly has had repercussions for those who have been harmed by speech or conduct online. Whether the benefit to society that comes from providing broad protections to intermediaries that facilitate speech outweighs the harms that go unredressed is not something this study can answer.

If Congress considers modifying section 230, it should keep in mind that the rich informational ecosystem we know today is not

simply a product of the decentralized, open architecture of the Internet. It is a function of the "breathing space" Internet intermediaries currently have under the law to facilitate speech that may be injurious or illegal. Whether the Internet remains open to diverse forms of speech will depend to a considerable degree on whether the intermediaries that make it function can continue to be agnostic as to the content they intermediate.

APPENDIX

This appendix describes the methodology employed in the collection and analysis of judicial decisions involving section 230 of the Communications Decency Act[396] that form the basis for *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act.* It also includes several additional tables of data that supplement the main text.

I. METHODOLOGY

The collection and coding of judicial decisions involved the following methodology.

A. Target Population

The population of interest for this study is all reported judicial decisions from February 8, 1996—the effective date of section 230—through September 30, 2009, in which a party or the court interposed section 230 as a defense to liability for content or acts online.

B. Sample Selection

To collect the relevant decisions, I ran searches for decisions citing section 230 on Westlaw[397] and LEXIS,[398] the two primary legal research services, and in the online Legal Threats Database maintained by the Citizen Media Law Project at the Berkman Center for Internet and Society at Harvard University (the "CMLP Database").[399]

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396. 47 U.S.C. § 230 (2006).

397. On Westlaw, I ran the following search in the ALLCASES database at the start of the research and again at the conclusion on November 15, 2009: "47 U.S.C. § 230" & da (bef 9/30/2009). This search yielded 208 decisions. I then ran a KeyCite search in the Westlaw USCA database for cases citing 47 U.S.C. § 230, which yielded 256 citing decisions within the target date range.

398. On LEXIS, I ran the following search in the Federal & State Cases, Combined database at the start of the research and again at the conclusion on November 15, 2009: "47 U.S.C. § 230" and date leq (9/30/2009). This search yielded 215 decisions. I then ran a Shephard's search on Lexis for cases citing 47 U.S.C. § 230, which yielded 221 citing decisions within the target date range.

399. The Citizen Media Law Project, which the author directs, maintains a publicly accessible database of lawsuits, cease & desist letters, subpoenas, and other legal threats directed at those who engage in online speech. *See* Citizen Media Law Project, Legal Threats Database, http://www.citmedialaw.org/database (last visited Jan. 4, 2010). The database contains decisions

To be counted as a judicial decision, the decision must have announced a disposition of the case or motion under consideration (e.g., denied, granted, dismissed, affirmed) and must have stated at least one reason for the decision. If a decision met these criteria, it was included in the universe of cases to be coded, regardless of the form of the decision.[400]

A research assistant reviewed the results to identify any decisions reported uniquely in either LEXIS or Westlaw. This review yielded a total of 249 decisions within the target date range from the two databases. In order to find unreported decisions, I also ran a search for lawsuit entries in the CMLP Database.[401] This yielded 12 additional decisions that had not been reported on LEXIS or Westlaw. I then reviewed all of the decisions to exclude those that mentioned section 230 only in passing or otherwise had tangential relevance to its use as a defense to liability for content or acts online. I excluded 77 decisions on this basis.[402] This left 184 judicial decisions in the sample set.[403] Table A-1 summarizes where the judicial decisions that made up the study were found.

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from, among other sources, Westlaw, LEXIS, Bureau of National Affairs (BNA), legal blogs, and reader tips.

400. This definition mirrors the approach taken in the U.S. Court of Appeals Database, an interdisciplinary research effort to study judicial decision making. *See* Donald R. Songer, *The United State Court of Appeals Database: Documentation for Phase 1*, at 8.

401. I ran a search for lawsuit entries containing the subject area tag "section 230" and "date on or before 9/30/2009." Most entries in the database include the underlying pleadings, which were acquired from the U.S. Federal Court's PACER system and similar state court electronic docketing systems. *See* Citizen Media Law Project, *supra* note 4.

402. A plurality of the decisions (n = 33) were removed from the sample set because the reference to section 230 was merely definitional (e.g., used to provide a definition for an interactive computer service in another context or to define the Internet generally).

403. It is important to note that this study relies on a sample of the relevant decisions. Although I sought to study the entire population of judicial decisions in which a party or the court interposed section 230 as a defense to liability for content online, I cannot be sure that I collected every decision. It is likely that some decisions, especially in state courts, escaped my notice. Like other studies attempting to empirically examine case law, the exclusion of some unpublished decisions may bias the results to the extent that there is a systematic difference between available and unavailable decisions. *See* Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795, 1884–87 (2005).

TABLE A-1

SOURCE OF RELEVANT DECISIONS

Database Source	Number of Decisions	Percentage of Total
Westlaw and LEXIS	151	82.1%
Westlaw only	20	10.9%
LEXIS only	1	0.5%
Citizen Media Law Project	12	6.5%
Total	184	

C. Coding

Each decisions was then coded in order to capture general data about the decision (e.g., date, caption, venue, posture); data about the Web site or publication medium involved; data about the decision specifically related to section 230 (e.g., disposition of the defense, appeal status); specific areas of judicial focus in the decision (e.g., whether the court analyzed the scope of the parties covered by section 230, the nature of the defendant's relationship to the source of the content); and various miscellaneous data about the case (e.g., whether the plaintiff sued the third-party source of the content, whether the information was submitted anonymously, whether the court awarded sanctions or fees).

To check the reliability of the coding process, I selected a random sample of 18 decisions from the 184 decisions in the study set. A second coder independently coded this sample of eighteen cases, and the results of the two coded listings were compared in order to assess the degree of inter-coder reliability. [404]

D. Case and Party Research

As part of the coding process, various case and party attributes were recorded for each decision in the study set. This research consisted of the research methods described below.

404. The percentage rate of agreement and "Krippendorf's alpha" for each of the data fields is listed on the coding form, which is available on the author's Web site at http://www.citmedialaw.org/section-230-empirical-study. *See* KLAUS KRIPPENDORFF, CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY 221–30 (2d ed. 2004).

1. Third Party Sued in Another Case

Whether a third party was sued in another case was determined through the following research: (1) a search by party name in the state court docket (if the state makes the docket available online) or PACER for federal cases; (2) a search by party name in the Westlaw dockets database; (3) a search via Google for case information; and if necessary, (4) a request for information via an email to the plaintiff's lawyers using the contact information available on Westlaw, LEXIS, PACER, or Google. If no information could be found, the case was tagged as unknown.

2. Third-Party Source Liability

If the plaintiff sued the source in the current case, then liability was assessed by examining the current case docket. If the plaintiff sued the source in another case, a research assistant conducted the following research: (1) a review of the state court docket (if the docket was available online) or PACER for federal cases; (2) a search via Google for case information; and, if necessary, (3) a request for information via an email to the plaintiff's lawyers using the contact information available on Westlaw, LEXIS, PACER, or Google. If no information could be found, the case disposition was tagged as unknown.

3. Content Available Online

Whether the online content at issue was available was assessed by examining the decision and, if necessary, the complaint and other filings in the case to identify the content at issue in the plaintiff's claims. If the content could not be specifically identified, its availability was tagged as unknown. A research assistant then performed a search for the content on the intermediary's Web site or online service. If it was not available, the reasons for its unavailability were determined by reviewing the court record and any statements on the defendant's Web site or online service.

4. Anonymous Online Content

Whether the online content was anonymous or attributable to an anonymous source was assessed by examining the decision and, if necessary, the complaint and other filings in the case to identify the content at issue in the plaintiff's claims. For the purposes of this

analysis, a decision was tagged as involving anonymous speech if the court noted that the speech was anonymous or the parties stated that the source was unknown.

5. Case Disposition

The disposition of the case was determined through (1) a review of the docket on PACER, Westlaw or the state court filing system to determine the outcome of the case; (2) a search via Google for information about the case; or (3) a request for information via an email to the lawyers in the case using the contact information available on Westlaw, LEXIS, PACER, or Google. If no information could be found, the case was tagged as unknown.

6. Verdict or Settlement Amount

The verdict or the settlement amount was determined through (1) a review of the docket on PACER, Westlaw or the state court filing system to determine the outcome of the case; (2) a search via Google for information about the case; or (3) a request for information via an email to the lawyers in the case using the contact information available on Westlaw, LEXIS, PACER, or Google. If no information could be found, the case was tagged as unknown.

7. Appeal Status

The status of any appeal was determined through (1) a review of the docket on PACER, Westlaw or the state court filing system to determine the outcome of the case; (2) a search via Google for information about the case; or (3) a request for information via an email to the lawyers in the case using the contact information available on Westlaw, LEXIS, PACER, or Google. If no information could be found, the case was tagged as unknown.

E. Analysis

I analyzed the coded data using Stata 11 for Windows, a statistical software package in wide use within the social and natural sciences. A Microsoft Excel spreadsheet containing the data is available upon request from the author and will be posted on the author's Web site.

II. ADDITIONAL TABLES AND FIGURES

TABLE A-2

DISTRIBUTION OF DECISIONS BY STATE

State	Number of Decisions	Percentage of Total	Jurisdiction		Preemption Found	
			Federal	State	Number of Decisions	Percentage of Total
AZ	7	3.8%	5	2	6	85.7%
CA	43	23.4%	19	24	26	60.5%
CT	2	1.1%	1	1	1	50.0%
DC	2	1.1%	2	0	2	100%
DE	1	0.5%	1	0	1	100%
FL	12	6.5%	9	3	7	58.3%
IL	7	3.8%	5	2	6	85.7%
IN	1	0.5%	1	0	0	0%
KS	1	0.5%	0	1	0	0%
KY	1	0.5%	1	0	0	0%
LA	3	1.6%	3	0	2	66.7%
MA	6	3.3%	3	3	2	33.3%
MD	2	1.1%	1	1	2	100%
MI	5	2.7%	4	1	2	40.0%
MN	4	2.2%	3	1	3	75.0%
MO	1	0.5%	1	0	1	100%
NC	4	2.2%	3	1	2	50.0%
NE	1	0.5%	0	1	0	0%
NH	3	1.6%	3	0	2	66.7%
NJ	4	2.2%	2	2	3	75.0%
NM	5	2.7%	3	2	3	60.0%
NV	1	0.5%	1	0	1	100%
NY	18	9.8%	9	9	7	38.9%
OH	3	1.6%	2	1	1	33.3%
OR	6	3.3%	5	1	6	100%

TABLE A-2 *(continued)*

DISTRIBUTION OF DECISIONS BY STATE

State	Number of Decisions	Percentage of Total	Jurisdiction		Preemption Found	
			Federal	State	Number of Decisions	Percentage of Total
PA	6	3.3%	5	1	5	83.3%
SD	1	0.5%	1	0	1	100%
TN	3	1.6%	2	1	0	0%
TX	10	5.4%	10	0	7	70.0%
VA	7	3.8%	7	0	4	57.1%
VT	1	0.5%	0	1	1	100%
WA	8	4.3%	6	2	4	50.0%
WI	2	1.1%	2	0	2	100%
WV	1	0.5%	1	0	0	0%
WY	2	1.1%	2	0	0	0%
Total	184		123	61	110	59.8%

TABLE A-3

DISTRIBUTION OF DECISIONS BY POSTURE OF SECTION 230 ISSUE

			Preemption Found	
Posture	**Number of Decisions**	**Percentage of Total**	**Number of Decisions**	**Percentage of Total**
Preliminary Injunction	2	1.1%	1	50.0%
Discovery	2	1.1%	0	0%
Motion for Leave to Amend	3	1.6%	1	33.3%
Judgment on the Pleadings	9	4.9%	7	77.8%
Motion to Dismiss	95	51.6%	58	61.1%
Motion to Remand	2	1.1%	0	0%
Motion to Strike	16	8.7%	6	37.5%
Summary Judgment	48	26.1%	32	66.7%
Bench Trial	3	1.6%	3	100%
Jury Trial	2	1.1%	0	0%
Motion for Sanctions or Fees	2	1.1%	2	100%
Total	184		110	59.8%

TABLE A-4

UNREVERSED PREEMPTION RATES BY LEGAL CLAIM

Claim	Frequency of Claim	Preemption Rate
Aiding and Abetting	2	100%
Anti-Cybersquatting Consumer Protection	1	0%
Anti-Scalping	1	100%
Anti-Spam Act	2	50.0%
Autographed Sports Memorabilia Statute	1	100%
Breach Of Contract	10	70.0%
Business Disparagement	3	66.7%
Child Sexual Abuse	1	0%
Civil Rights Act (federal law)	1	100%
Civil Rights Act (state law)	1	100%
Computer Fraud and Abuse Act	1	100%
Conspiracy	15	60.0%
Consumer Protection Act (state law)	9	44.4%
Conversion	1	0%
Copyright Infringement (common law)	2	0%
Cyberstalking	3	66.7%
Deceptive and Unfair Trade Practices	36	50.0%
Defamation	73	64.4%
Discrimination	3	0%
Distribution of Child Pornography	5	40.0%
Distribution of Obscene Material	3	66.7%
Electronic Communications Privacy Act	1	0%
Fair Housing Act	4	50.0%
False Advertising	6	33.3%
False Endorsement	1	0%
False Light	8	75.0%
Fraud	12	66.7%
Free Speech	4	50.0%
Harassment	7	28.6%

TABLE A-4 *(continued)*

UNREVERSED PREEMPTION RATES BY LEGAL CLAIM

Claim	Frequency of Claim	Preemption Rate
Injury to Business Reputation	1	100%
Intentional Infliction Of Emotional Distress	23	65.2%
Intrusion	3	33.3%
Invasion Of Privacy	8	62.5%
Libel	10	50.0%
Misappropriation of Name or Likeness	5	20.0%
Negligence	65	84.6%
Nuisance	5	80.0%
Products Liability	6	83.3%
Promissory Estoppel	2	50.0%
Public Disclosure of Private Facts	4	50.0%
RICO	2	0%
Right of Publicity	13	30.8%
Spoliation	1	0%
Spoliation of Evidence	1	100%
Substantive Due Process	1	100%
Telemarketing & Consumer Fraud and Abuse	1	0%
Tortious Interference	36	61.1%
Trade Libel	5	60.0%
Trade Secrets	1	100%
Trademark Dilution	3	33.3%
Trademark Infringement	4	0%
Trespass	2	50.0%
Unjust Enrichment	7	42.9%
Waste of Public Funds	1	100%
Willful and Wanton Conduct	2	100%
Total	429	60.1%

TABLE A-5

LOGISTIC REGRESSION OF A FINDING OF PREEMPTION AS A FUNCTION OF FINDINGS IN SIX JUDICIAL AREAS OF INQUIRY

Area of Inquiry	Finding	Coefficient	Standard Error	z	P > z	95% Confidence Interval
Interactive Computer Service (ICS)	Defendant is an ICS	-1.06	0.86	-1.22	0.22	-2.75 to 0.64
	Defendant is not an ICS	***				
Scope of Claims Covered	Claim Qualifies	**	1.46	-3.11	0	-7.39 to -1.68
	Claim Does Not Qualify	-4.53 *				
Information Content Provider (ICP)	Source is an ICP	2.51 *	1.09	2.31	0.02	0.38 to 4.64
	Source is not an ICP	-2.13 *	1.02	-2.10	0.04	-4.12 to -0.14

Dependent Variable: Preemption Granted (0/1)
Log Likelihood = -24.893132
Number of Observations = 68
LR chi2(9) = 41.58
Probability > chi2 = 0
Pseudo R2 = 0.4551
Decisions Correctly Classified: 86.76%

* Denotes statistical significance at the 0.05 level.
** Indicates that the variable predicts success perfectly.
*** Indicates that the variable predicts failure perfectly.

TABLE A-5 (*continued*)

LOGISTIC REGRESSION OF A FINDING OF PREEMPTION AS A FUNCTION OF FINDINGS IN SIX JUDICIAL AREAS OF INQUIRY

Area of Inquiry	Finding	Coefficient	Standard Error	z	P > z	95% Confidence Interval
Relationship to Source	No Relationship	-1.36	1.22	-1.11	0.27	-3.75 to 1.03
	Full Control	***			0.16	
Interaction with Content	No Interaction	1.13	0.80	1.42	0.10	-0.43 to 2.69
	Substantial Interaction	-1.47	0.89	-1.66		-3.21 to 0.26
Relationship with Others	No Promise	-0.01	0.99	-0.01	0.99	-1.95 to 1.93
	Promise Made	0.55	1.82	0.30	0.76	-3.02 to 4.12
	Constant	1.28	0.69	1.85	0.07	-0.08 to 2.63

*** Indicates that the variable predicts failure perfectly.