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Can Myspace Turn into My Lawsuit: The Application of Defamation Law to Online Social Networks

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CAN MYSPACE TURN INTO MY LAWSUIT?: THE APPLICATION OF DEFAMATION LAW TO ONLINE SOCIAL NETWORKS

I. INTRODUCTION

In the online world of social networking sites, MySpace has emerged as the dominant website on the Internet[1] to "share photos, journals and interests with your growing network of mutual friends."[2] As of July 2006, MySpace accounted for eighty percent of visits to online social networking sites—its closest competition being FaceBook, at 7.6%.[3] In August of 2006, MySpace enrolled its one hundred millionth user,[4] and reportedly registers 230,000 new users on a typical day.[5] To put these numbers in perspective, if MySpace were a country and each user were a citizen, it would rank as the twelfth most populous country in the world, trailing narrowly behind Mexico and beating the next closest, the Philippines, by over ten million people.[6]

MySpace is a social networking website that allows users to create profile pages in which they can include personal information such as age, gender, sexual orientation, relationship status, photographs, and even online journals—commonly known as "blogs."[7] Once users create their profiles, they can invite other friends to join their personal networks,[8]

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1. USATODAY.com, *MySpace Gains Top Ranking of U.S. Websites* (July 11, 2006), http://www.usatoday.com/tech/news/2006-07-11-myspace-tops_x.htm.

2. MySpace.com, About Us, http://www.myspace.com/modules/common/pages/aboutus.aspx (last visited Oct. 18, 2007).

3. USATODAY.com, *supra* note 1.

4. Rupert Murdoch, *Rupert Murdoch Comments on Fox Interactive's Growth* (Aug. 9, 2006), http://seekingalpha.com/article/15237-rupert-murdoch-comments-on-fox-interactive-s-growth.

5. Patricia Sellers, *MySpace Cowboys* (Aug. 29, 2006), http://money.cnn.com/magazines/fortune/fortune_archive/2006/09/04/8384727/index.htm?postversion=2006082909.

6. *See* Matt Rosenberg, About.com, Most Populous Countries, Nov. 10, 2006, http://geography.about.com/cs/worldpopulation/a/ mostpopulous.htm.

7. Amanda Gefter, *This Is Your Space*, NEW SCIENTIST, Sept. 16, 2006, at 46.

8. MySpace.com, Take the MySpace Tour!, http://collect.myspace.com/misc/tour_2.html (last visited Oct. 13, 2007).

browse for new "friends" on MySpace,[9] or browse other users' "Friends List[s]" as well.[10] In addition to the inclusion of a blog for every user, each user page also contains a "Comments" section where the user's friends can leave comments which are displayed for everyone to see.[11] There is also a bulletin feature that allows users to send messages to everyone on their MySpace user's friends list simultaneously.[12] What results is an extended multi-party blog, where users can easily find old friends and make new ones, and even become friends with their friends' friends and so on.

Anytime so many people gather in a single place, even in a virtual setting, problems arise in getting everyone to behave well together. As in the real world, people socializing in the virtual world will inevitably have personality conflicts, misunderstandings, and occasional bouts of misbehavior. Unlike the real world, the virtual world of MySpace is primarily governed by the Terms of Use Agreement ("TUA") which acts as a legally binding contract for its users.[13] MySpace could regulate the majority of its users' unruly behavior by enforcing the TUA, which contains a number of provisions for unacceptable behavior and reserves the absolute right to banish users from its realm.[14] The TUA specifies that "MySpace.com reserves the right to investigate and take appropriate legal action against anyone who, in MySpace.com's sole discretion, violates this provision, including without limitation, removing the offending communication from the MySpace Services and terminating the Membership of such violators."[15] However, due to the novelty, size, and ready accessibility of user profiles, the remedies offered under the TUA may not be adequate to address all conduct.

For example, a university professor in Richmond, Virginia, recently gave his advertising class an assignment to make Oscar, his six-year-old pug, famous.[16] While most of the students approached this assignment by posting fliers around campus with the dog's picture on them, one student made a posting on MySpace under a false name, threatening to kill Oscar.[17]

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9. *Id.*

10. *Id.*

11. Gefter, *supra* note 7, at 47.

12. *Id.* at 46.

13. MySpace.com, Terms of Use Agreement, http://www.myspace.com/modules/common/pages/termsconditions.aspx (last modified Apr. 11, 2007).

14. *Id.*

15. *Id.*

16. USATODAY.com, *Ad Assignment Goes Awry on MySpace* (Sept. 22, 2006), http://www.usatoday.com/tech/news/2006-09-22-myspace-pug-prank_x.htm.

17. *Id.*

After animal activists around the world contacted authorities to report the threat, the Richmond police stated, "[T]his threat is the result of a VCU student's assignment that went awry. We want to stress that at no time was any animal in danger."[18]

Although the university declined to file charges against the student,[19] the fake page about Oscar is a good example of how the simple act of creating an online profile can have amplified consequences on a network as large as MySpace. This story is also an indication that actions in the virtual world can easily have real world consequences. As of this writing, MySpace-related cases have not yet flooded the courts, but the trickle has begun.

In May 2006, Georgia high school teacher Robert Muzillo pressed criminal charges against one of his students after the student posted a fake profile under Muzillo's name on MySpace.[20] The fake profile falsely claimed, among other things, that Muzillo had "lost an eye wrestling with alligators and midgets."[21] The charges were later dropped because they relied on a statute that the Georgia Supreme Court had ruled unconstitutional in 1982,[22] and the student only served a three day suspension from the school.[23]

More recently, San Antonio high school assistant principal Anna Draker filed a civil suit against two students and their parents after the students allegedly posted a lewd MySpace profile under Draker's name because it falsely identified her as a lesbian.[24] In the suit, Draker made claims of "defamation, libel, negligence and negligent supervision over the [MySpace] page."[25] It remains to be seen how the Texas courts will handle these allegations.

The question courts will need to address is whether the law of defamation will apply in the context of a MySpace prank. There is an additional consideration the courts will need to address—namely, how the "virtual law" created by MySpace's TUA will harmonize with "real world

18. *Id.*

19. *Id.*

20. WSBTV.com, *Student Faces Criminal Charges for Teacher Jokes* (May 16, 2006), http://www.wsbtv.com/education/ 9223824/detail.html.

21. *Id.*

22. Johnny Jackson, *MySpace Case: Charge Against ELHS Freshman Dismissed*, HENRY DAILY HERALD-ONLINE, May 24, 2006, http://www.henryherald.com/homepage/local_story_144000539.html?keyword=leadpicturestory.

23. WSBTV.com, *supra* note 20.

24. USATODAY.com, *Official Sues Students over MySpace Page* (Sept. 22, 2006), http://www.usatoday.com/tech/news/2006-09-22-myspace-suit_x.htm.

25. *Id.*

law" in its application to MySpace users.

Section II will provide a background on defamation law and how it has fared on the Internet. Section III will take these findings and apply them to the context of MySpace users. Section IV will conclude that users should be subject to defamation law for the statements or content they create on their personal pages, but not necessarily for statements posted by other users. The casual and social atmosphere of MySpace may make it more difficult for user conduct to rise to the level of tortious defamation under the standard common law elements, but any communication by users that meets those elements will face legal liability. This final section will also make brief recommendations on how defamation law on the Internet could be improved.

II. BACKGROUND

A. The Basics of Defamation Law

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech or of the press."[26] For the first time, in 1964, the United States Supreme Court made it clear that the constitutional protection of free speech applies to defamation law, and that states must remain within constitutional limitations when approaching defamation.[27] Thus, finding liability for defamation not only involves recognizing when there is defamatory communication, but also assuring that liability only attaches when the constitutional protection is abused.[28]

The Second Restatement of Torts provides a general set of elements that would result in liability:

> To create liability for defamation there must be:
>
> (a) a false and defamatory statement concerning another;
>
> (b) an unprivileged publication to a third party;
>
> (c) fault amounting at least to negligence on the part of the publisher; and

26. U.S. CONST. amend. I.

27. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.").

28. *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[29]

1. The First Element: A False and Defamatory Statement Concerning Another

In general, a defamatory statement is one that "harm[s] the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[30] An example of the kind of harm to reputation fitting the mold of defamation is a communication that would adversely affect the perception of a person's morality or financial standing,[31] or that would indicate some kind of mental or physical infirmity, such as venereal disease or insanity.[32]

In addition to harm to reputation, the first element of liability for defamation requires that a statement be false.[33] The statement may purport to be factual,[34] or if stated as an opinion, must imply "the allegation of undisclosed defamatory facts as the basis for the opinion."[35] For example, if a person states, "My neighbor Bob is a drug addict," this qualifies as a statement of fact, and is defamatory if false. If the person says, "I think my neighbor Bob is a drug addict," this implies an assumption of facts pointing to Bob being a drug addict, and also qualifies as a defamatory statement. However, if the statement were, "I think Bob is a real jerk," this is a matter of pure opinion, and is not considered defamatory.

Finally, to qualify as a defamatory statement, the communication does not have to damage a person's reputation in the eyes of society as a whole, but can be limited to damaging one's reputation within a "substantial and respectable" minority group.[36] For example, the use of anti-depressants may be generally accepted, but if there is a segment of society that views such use as a sign of weakness, making false statements about the use of anti-depressants may qualify as defamation.

29. RESTATEMENT (SECOND) OF TORTS § 558 (1977).
30. *Id.* § 559.
31. *See id.* § 559 cmt. b.
32. *Id.* § 559 cmt. c.
33. *Id.* § 558(a).
34. *Id.* § 565.
35. RESTATEMENT (SECOND) OF TORTS § 566 (1977).
36. *Id.* § 559 cmt. e.

2. The Second Element: Unprivileged Publication to a Third Party

The publication element requires communication "to some one other than the person being defamed."[37] A "publication" is a defamatory statement communicated "intentionally or by a negligent act to one other than the person defamed."[38] Under general tort law, an action is "privileged" if made with the consent of the affected party,[39] if justified by necessity,[40] or if "the actor is performing a function for the proper performance of which freedom of action is essential."[41] Unless there is consent or other valid justification, defamatory publication is unprivileged.

3. The Third and Fourth Elements: The Level of Fault Versus the Requirement for Special Harm Caused by the Publication

The third and fourth elements of defamation are interdependent in that the necessity to show special harm depends on the level of the actor's knowledge or "reckless disregard as to the falsity of the communication."[42] The classification of a statement as defamatory is not dependent upon whether a person's reputation is actually damaged.[43] Rather, the question is whether the statement has a "general tendency to have such an effect."[44] However, the Constitution requires a showing of actual damage to reputation if the actor is subjectively unaware of the statement's falsehood.[45]

4. Slander Versus Libel

Defamation law distinguishes between two types of publication: libel, which is communication through written or printed words, and slander, which is communication through speaking.[46] The primary legal distinction is that there are more restrictions regarding when a slanderous publication can result in liability without showing that it caused special harm.[47] This Article assumes that most materials posted to a fixed online

37. *Id.* § 577 cmt. b.
38. *Id.* § 577(1).
39. *Id.* § 10(2)(a).
40. *Id.* § 10(2)(b).
41. RESTATEMENT (SECOND) OF TORTS § 10(2)(c) (1977).
42. *Id.* § 559 cmt. d.
43. *See id.*
44. *Id.*
45. *Id.*
46. *Id.* § 568.
47. *Compare* RESTATEMENT (SECOND) OF TORTS § 569 (1977) ("One who falsely publishes

location, such as MySpace, fall under the category of libel, because this is how the courts have generally treated online defamation.[48] Accordingly, references to defamatory material on MySpace in this Article will be analyzed as libel rather than slander.

5. Liability of Republishers

Every time a defamatory statement is repeated by a new party, it is considered a new publication and is actionable as a separate tort.[49] The Restatement states that, "[e]xcept as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."[50] A major effect of this provision is to hold larger media entities, such as newspapers, liable for publishing defamatory stories even if they make it clear that they are not the original source of the statement.[51]

Liability under this principle can also extend to vendors and distributors, such as bookstores and libraries, unless "they neither know nor have reason to know of the defamation."[52] This exception to liability demonstrates how the First Amendment protection in the Constitution[53] can work to place limitations on recovery in defamation law. For example, the United States Supreme Court struck down a New York law that would hold bookstore owners liable for possession of obscene books, whether or not they were aware of the books' contents.[54]

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matter defamatory of another in such a manner as to make the publication a libel is subject to liability to the other although no special harm results from the publication."), *with* RESTATEMENT (SECOND) OF TORTS § 570 (1977) ("One who publishes matter defamatory to another in such a manner as to make the publication a slander is subject to liability to the other although no special harm results if the publication imputes to the other (a) a criminal offense, as stated in § 571, or (b) a loathsome disease, as stated in § 572, or (c) matter incompatible with his business, trade, profession, or office, as stated in § 573, or (d) serious sexual misconduct, as stated in §574.").

48. *See generally* Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003); Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997); Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998); Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

49. RESTATEMENT (SECOND) OF TORTS § 578 cmt. b (1977).

50. *Id.* § 578.

51. *Id.* § 578 cmt. b.

52. Lerman v. Chuckleberry Publ'g, Inc., 521 F. Supp. 228, 235 (S.D.N.Y. 1981); *accord* Macaluso v. Mondadori Publ'g Co., 527 F. Supp. 1017, 1019 (E.D.N.Y. 1981).

53. U.S. CONST. amend. I.

54. *See* Smith v. California, 361 U.S. 147, 153 (1959) ("'Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience.' 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." (citation omitted)).

B. *The Evolution of Defamation Law on the Internet*

1. *Cubby, Inc. v. CompuServe*[55]

Originally, courts attempted to apply the standard rules of defamation to publications on the Internet. For instance, in *Cubby, Inc. v. CompuServe*, the court found defendant CompuServe free of liability because it did not monitor or edit any of the information posted by its customers.[56] CompuServe provided an online "electronic library" which contained more than 150 special interest forums,[57] one of which was a "Journalism Forum."[58] CompuServe contracted another company, Cameron Communications Inc. ("CCI"), to "'manage, review, create, delete, edit and otherwise control the contents' of the Journalism Forum 'in accordance with editorial and technical standards and conventions of style as established by CompuServe.'"[59] CCI then contracted with other businesses to provide content, one of which was Don Fitzpatrick Associates of San Francisco ("DFA"), the publisher of a daily newsletter called Rumorville.[60]

In 1990, the plaintiffs developed Skuttlebutt, a database intended to compete with Rumorville.[61] Rumorville responded by posting false and defamatory statements alleging that Skuttlebutt was a "new start-up scam" that stole information from Rumorville.[62] The plaintiffs then asserted claims against CompuServe and DFA, including libel.[63]

The court approached the libel claim against CompuServe by first concluding that "[a] computerized database is the functional equivalent of a more traditional news vendor."[64] The appropriate standard of liability for CompuServe, as a news distributor, would be "whether it knew or had reason to know of the allegedly defamatory Rumorville statements."[65] Taking into consideration that CompuServe's product carried "a vast

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

56. *See id.* at 141.

57. *Id.* at 137 ("Forums" here are described as a collection of "electronic bulletin boards, interactive online conferences, and topical databases.").

58. *Id.*

59. *Id.*

60. *Id.*

61. *Cubby*, 776 F. Supp. at 138.

62. *Id.*

63. *Id.*

64. *Id.* at 140–41.

65. *Id.*

number of publications," the court concluded that CompuServe would have "little or no editorial control over [Rumorville]'s contents," especially when an unrelated company managed editorial control over the forum.[66] Accordingly, the court held that CompuServe was not liable for defamation.[67]

2. The Birth of the "Good Samaritan" Provision

In response to concerns that Internet service providers could face liability if they actually did attempt to monitor or remove content, Congress passed § 230(c), also called the "Good Samaritan" provision, of the Communications Decency Act of 1996 ("CDA").[68] The "Good Samaritan" provision states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[69] Congress enacted this provision in the wake of a New York Supreme Court decision that found defendant Prodigy Services Company liable for defamation because it sought to exert editorial control.[70]

In that case, an anonymous poster made defamatory statements about the plaintiffs on Prodigy's "Money Talk" bulletin board, contending that the plaintiffs had committed criminal and fraudulent acts.[71] Based on the court's decision in *Cubby*, the court agreed that "[c]omputer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates."[72] However, the court held that Prodigy had

66. *See id.* at 140–43 ("CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so." The court went on to state "Based on the undisputed facts, the Court concludes that neither CCI nor DFA should be considered an agent of CompuServe. CompuServe, CCI, and DFA are independent of one another.").

67. *Cubby*, 776 F. Supp. at 141.

68. *See* 47 U.S.C. § 230(b)(4) (2000) (stating that it is the policy of the United States "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material"); *see also Zeran*, 129 F.3d at 331 ("Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.").

69. 47 U.S.C. § 230(c)(1) (2000).

70. Stratton Oakmont Inc. v. Prodigy Servs. Co., 23 Media L. Rep. (BNA) 1794, 1798 (N.Y. 1995), *superseded by statute*, Communications Decency Act of 1996, 47 U.S.C. § 230 (2000).

71. *Id.* at 1795.

72. *Id.* at 1798.

distinguished itself from those distribution services, and achieved the status of "publisher," by "actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and 'bad taste.'"[73] The court concluded, "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."[74]

3. The Congressional Purpose of 47 U.S.C. § 230

Congress enacted the "Good Samaritan" provision, in part, as a response to the decision in *Stratton Oakmont*.[75] Where *Stratton Oakmont* held that an interactive computer service provider may be treated as a publisher for editing third party postings,[76] Congress specifically ordered "[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."[77] Where *Stratton Oakmont* found that Prodigy's decision to exercise editorial control over postings opened it to greater liability,[78] the "Good Samaritan" clause states that service providers face no liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[79]

In establishing § 230 of the CDA, Congress found that the "Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens . . . . [offering] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[80] Congress also noted that Americans are becoming increasingly reliant "on interactive media for a variety of political, educational, cultural, and entertainment services," with the Internet and other interactive computer services flourishing, "to the benefit of all Americans, with a minimum of

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73. *Id.* at 1797.

74. *Id.* at 1798.

75. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) ("Congress enacted § 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision.").

76. *See Stratton Oakmont*, 23 Media L. Rep. (BNA) at 1798.

77. 47 U.S.C. § 230(c)(1) (2000).

78. *See Stratton Oakmont*, 23 Media L. Rep. (BNA) at 1798.

79. 47 U.S.C. § 230(c)(2)(A) (2000).

80. *Id.* § 230(a)(3).

government regulation."[81]

Accordingly, Congress stated that the policy reasons of the Act were "to promote the continued development of the Internet and other interactive computer services and other interactive media"[82] 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."[83] In addition, Congress aimed "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material."[84]

The purpose of encouraging regulation of objectionable materials appears related to the establishment of a "Good Samaritan" clause. However, in light of the other purposes detailed above, Congress also seemed to believe that freeing service providers from such liability would protect the development of the Internet as a whole.[85]

The question that remains, and one that courts have continued to deal with since the establishment of the CDA, is who qualifies for immunity under the "Good Samaritan" provision.[86] Section 230(c) repeatedly identifies the protected entities as "providers" or "users" of "an interactive computer service."[87] Section 230(f) defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[88] On its face, it appears that Congress intended "Good Samaritan" immunity to apply, not only to every service provider on the Internet, but to every person who accesses the Internet as well.

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81. *Id.* § 230(a)(4)–(5).

82. *Id.* § 230(b)(1).

83. *Id.* § 230(b)(2).

84. *Id.* § 230(b)(4).

85. *See generally* 47 U.S.C. § 230 (2000).

86. *See generally Zeran*, 129 F.3d 327; *Blumenthal*, 992 F. Supp. 44; *Batzel*, 333 F.3d 1018; Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142 (Cal. Ct. App. 2004), *rev'd*, 40 Cal. 4th 33 (2006); Doe v. Cahill, 884 A.2d 451 (Del. 2005).

87. 47 U.S.C. § 230(c) (2000).

88. *Id.* § 230(f)(2).

C. Court Cases After the "Good Samaritan" Provision

1. Zeran v. America Online, Inc.

The first major case after Congress passed § 230 was *Zeran v. America Online* ("AOL") in 1997.[89] In *Zeran*, an anonymous poster advertised "Naughty Oklahoma T-Shirts" on an AOL bulletin board.[90] These shirts contained "offensive and tasteless" slogans regarding the 1995 bombing of the Oklahoma City Federal Building and instructed any interested buyers to contact "Ken at Zeran's home phone number."[91] As a result, Zeran received a large number of angry and derogatory phone calls, including death threats.[92] Zeran called AOL repeatedly to report the problem, and AOL representatives assured him that they would close the message poster's account.[93] Over the next four days, more and more offensive advertisements appeared on the forums, now touting "bumper stickers and key chains with still more offensive slogans."[94] By the fifth day, "Zeran was receiving an abusive phone call approximately every two minutes."[95]

Zeran argued that, after he notified AOL of the hoax, "AOL had a duty to remove the defamatory posting promptly, to notify its subscribers of the message's false nature, and to effectively screen future defamatory material."[96] The court, interpreting § 230, responded that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."[97] The court reasoned that "[b]ecause the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact."[98]

89. Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997).
90. *Id.* at 329.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Zeran*, 129 F.3d at 329.
96. *Id.* at 330.
97. *Id.*
98. *Id.* at 333.

2. The Reluctant Court in *Blumenthal v. Drudge*

The courts, however, have not always approved of the blanket immunity that Congress created in the "Good Samaritan" provision.[99] In *Blumenthal v. Drudge*, decided the year after *Zeran*, another consumer sued AOL.[100] The court opined:

> [if] it were writing on a clean slate, this Court would agree with plaintiff . . . [b]ecause it has the [r]ight to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor.[101]

However, the court recognized that "Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others."[102] Hence, even in a case where the court disagreed with the outcome, it still kept its decision in compliance with the Congressional intent of § 230.

3. *Batzel v. Smith*

At the same time, some courts have recognized exceptions to blanket immunity.[103] In *Batzel v. Smith*, defendant Robert Smith worked for the plaintiff as a repairman at her home.[104] According to Smith, while he was working, Batzel told him that she was "the granddaughter of one of Adolf Hitler's right-hand men."[105] Smith also claimed to have "overheard Batzel tell[ing] her roommate that she was related to Nazi politician Heinrich Himmler."[106] In addition, Smith alleged that Batzel told him that "some of the paintings hanging in her house were inherited" and Smith believed "these paintings . . . looked old and European."[107]

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99. *See* Blumenthal v. Drudge, 992 F. Supp. 44, 51–52 (D.D.C. 1998); *see also* Gucci Am., Inc. v. Hall & Assocs., 135 F. Supp. 2d 409, 417 (S.D.N.Y. 2001).

100. *Blumenthal*, 992 F. Supp. 44.

101. *Id.* at 51–52.

102. *Id.* at 52.

103. *See, e.g.*, Batzel v. Smith, 333 F.3d 1018, 1034 (9th Cir. 2003); *see also* Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C., 489 F.3d 921, 925 (9th Cir. 2007).

104. *Batzel*, 333 F.3d at 1020.

105. *Id.* at 1020–21.

106. *Id.* at 1021.

107. *Id.*

Suspicious that the paintings were the product of Nazi looting during World War II, Smith conducted an online search for websites about stolen art work and wrote an email expressing his concerns to the Museum Security Network website.[108] Smith closed the email by stating, "Please contact me via email . . . if you would like to discuss this matter."[109]

Instead of responding to Smith, defendant Ton Cremers, the sole operator of the Museum Security Network ("Network"),[110] posted the email on the website and to the listserv[111] for subscribers to his site.[112] Cremers also posted a "moderator's message" that stated that "the FBI has been informed of the contents of [Smith's] original message."[113] The website and listserv mailings exposed Smith's email to "hundreds of museum security officials, insurance investigators, and law enforcement personnel around the world, who use the information in the Network posting to track down stolen art."[114]

Smith was surprised to learn that Cremers posted his message,[115] and told Cremers that if he had known, he would never have sent it.[116] The court found that neither Cremers' "minor alterations of Smith's email" prior to posting it, nor his decision to publish the email, rose to the level of "development," and therefore, "Cremers cannot be considered the content provider of Smith's e-mail for purposes of § 230."[117] The court stated that ordinarily the conclusion that Cremers was not a content provider would end the investigation into his liability.[118] However, the court's interpretation of the "Good Samaritan" provision was that it would not extend immunity to Cremers if the defamatory information was not "*provided* by another information content provider."[119]

In this case, the court reasoned that it was not clear whether Smith

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108. *See id.*

109. *Id.*

110. *See Batzel*, 333 F.3d at 1021.

111. *Id.* at 1021 n.2 ("A listserv is an automatic mailing list service that amounts to an e-mail discussion group . . . Subscribers receive and send messages that are distributed to all others on the listserv.").

112. *Id.* at 1022.

113. *Id.*

114. *Id.*

115. *See id.* ("'I [was] trying to figure out how in blazes I could have posted me [sic] email to [the Network] bulletin board . . . . Every message board to which I have ever subscribed required application, a password, and/or registration, and the instructions explained this is necessary to keep out the advertisers, cranks, and bumbling idiots like me.'").

116. *See Batzel*, 333 F.3d at 1022.

117. *Id.* at 1031.

118. *See id.* at 1032.

119. *Id.* at 1032 (quoting 47 U.S.C. § 230(c) (2000)) (emphasis in original).

"provided" the email for publication on the Internet, because Smith said he would never have sent the email if he had known it would be posted.[120] The court concluded that "[t]he congressional objectives in passing § 230 therefore are not furthered by providing immunity in instances where posted material was clearly not meant for publication."[121] Accordingly, the court framed a new rule to attach to § 230(c)(1), stating that a provider or user would enjoy immunity only if the defamatory information was provided "under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other 'interactive computer service.'"[122]

4. *Barrett v. Rosenthal*

Not all courts have agreed about the scope of immunity offered by the "Good Samaritan" provision. In *Barrett v. Rosenthal*, the California Court of Appeal examined the CDA language that guarantees 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."[123] The court noted a common law notion that "those who publicize another's libel may be treated in one of three ways: as primary publishers (such as book or newspaper publishers); as conduits (such as a telephone company); or as distributors (such as a book store, library, or news dealer)."[124] The court then acknowledged that, although § 230(c) bars liability against interactive computer services as primary publishers of third party information, it would not bar their liability as distributors.[125] Consequently, the court found that the CDA "cannot be deemed to abrogate the common law principle that one who republishes defamatory matter originated by a third person is subject to liability *if he or she knows or has reason to know of its defamatory character.*"[126]

In November 2006, the California Supreme Court reversed the lower court's decision, stating that, while "[t]he prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications . . . by its terms section 230 exempts Internet

120. *See id.* at 1034.

121. *Id.*

122. *Batzel*, 333 F.3d at 1034.

123. Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142, 155 (Cal. Ct. App. 2004), *rev'd* 40 Cal. 4th 33 (2006) (quoting 47 U.S.C. § 230(c)(1) (2000)).

124. *Id.* at 150 (citing 47 U.S.C. § 230(c)(1) (2000)).

125. *Id.* (citing 47 U.S.C. § 230(c)(1) (2001)).

126. *Id.* at 152 (emphasis in original).

intermediaries from defamation liability for republication."[127] Although this decision reinstated blanket immunity as the rule, the history of this case demonstrates how courts are both reluctant and conflicted about this interpretation.

5. *Doe v. Cahill*

In addition to the immunities provided by the CDA, individual users might avoid defamation liability, even if they are the primary publishers, depending on where their statements are published. In *Doe v. Cahill*, the anonymous defendant, "Doe," posted statements on the "Smyrna/Clayton Issues Blog," a website that referred to itself as "your hometown forum for opinions about public issues."[128] In his postings, Doe stated that Smyrna City Councilman Patrick Cahill had "character flaws," suffered "obvious mental deterioration," and was "as paranoid as everyone in the town thinks he is."[129] The Delaware Supreme Court concluded that, because anyone with access to the Internet could post on the board and anonymous postings were the norm, a "reasonable reader would not view the blanket, unexplained statements at issue as 'facts,'"[130] and therefore, such statements could only be interpreted as "'subjective speculation' or 'merely rhetorical hyperbole.'"[131] Although careful to explain that it was not holding, as a matter of law, that blog or chat room statements could never be defamatory, the court maintained that a plaintiff suing for statements made in such forums "must prove that a statement is factually based and thus capable of a defamatory meaning."[132]

III. ANALYSIS

A. "Good Samaritan" Protection Will Apply to MySpace Users

The rise of social networking sites such as MySpace presents users with an environment that contains both novel and familiar elements from the established world of the Internet. As the discussion above demonstrates, most of the online defamation issues that have made it to the courts have originated with statements posted on forums and bulletin

127. Barrett v. Rosenthal, 40 Cal. 4th 33, 62 (2006).
128. Doe v. Cahill, 884 A.2d 451, 454 (Del. 2005).
129. *Id.*
130. *Id.* at 466.
131. *Id.*
132. *Id.* at 467–68 n.78.

boards, which are static locations on the Internet that can often be viewed by anyone.[133] Potentially defamatory statements may also be posted to a listserv,[134] which sends its postings to a list of subscribers.[135] Although the terminology of MySpace features may vary from other networking sites, the communication functions are substantially similar. The basic MySpace profile is simply a location to post information about the user.[136] In addition, the journal or blog functions exist to allow each user to post statements, comments, or observations that can be viewed by anyone with an Internet connection.[137] On MySpace, the "Bulletin Board" function is similar to a listserv in that posted messages are automatically sent to everyone on the user's friend network.[138] Finally, the "Comments" section on each user page gives other users the ability to post their own comments,[139] making each user a potential provider of an interactive service for others.

To determine if and when MySpace users would benefit from the protection of the "Good Samaritan" provision,[140] it is necessary to examine the various methods of communication available to the users in light of the requirements for eligibility under the provision. Section 230(c) of the CDA states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[141] The *Batzel* court broke down § 230(c) into three elements that must be fulfilled in order to qualify for immunity:

> (1) the defendant must be a provider or user of an "interactive computer service;"
>
> (2) the asserted claims must treat the defendant as a publisher or speaker of information; and
>
> (3) the challenged communication must be "information provided by another information content provider."[142]

This three-part test provides a useful guide for determining when

133. *See, e.g.*, Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 138 (S.D.N.Y. 1991); Stratton Oakmont Inc. v. Prodigy Servs. Co., 23 Media L. Rep. (BNA) 1794, 1127, (N.Y. 1995); Zeran v. Am. Online, Inc., 129 F.3d 327, 329 (4th Cir. 1997); Batzel v. Smith, 333 F.3d 1018, 1022 (9th Cir. 2003); *Cahill*, 884 A.2d at 454.

134. *See Batzel*, 333 F.3d at 1022.

135. *Id.* at 1021 n.2.

136. Gefter, *supra* note 7.

137. *Id.* at 46–47.

138. *Id.* at 46.

139. *Id.*

140. 47 U.S.C. § 230(c) (2000).

141. *Id.* § 230(c)(1).

142. *Batzel*, 333 F.3d at 1037.

CDA immunity applies. It may also provide a good starting point in determining whether MySpace users will benefit from its protection.

1. MySpace Users as Providers or Users of an "Interactive Computer Service"

According to the CDA, an "interactive computer service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."[143] The CDA defines the Internet as an "international computer network,"[144] which leads to the logical conclusion that anyone who uses a service to access the Internet would be a user of an interactive computer service. Under this broad definition, all MySpace users fulfill the first element of this test by accessing the Internet.

2. The Asserted Claims Must Treat the MySpace User as a Publisher or Speaker of Information

The second element of the test addresses the defamation rule which states that, "[e]xcept as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."[145] This rule has enabled courts to hold entities such as newspapers liable for publishing defamatory stories, even if they were not the original source of the statements.[146]

In the context of MySpace, there are a number of ways a user could satisfy this element. If a user repeated statements from another source in a blog, comment, or bulletin board post, that user would be treated as a publisher under standard defamation law. If someone else posted comments on the user's page, the user could also be treated as a publisher due to his or her almost exclusive editorial control over the content allowed on the page. In addition, any time users post information on their own MySpace page, on a bulletin board, or as a comment posted on someone else's page, they would be the original publishers of that information and would fulfill this element. However, the third element of the test renders original posters ineligible for CDA immunity.[147]

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143. 47 U.S.C. § 230(f)(2) (2000).

144. *Id.* § 230(f)(1).

145. RESTATEMENT (SECOND) OF TORTS § 578 (1977).

146. *Id.* § 578 cmt. b.

147. *See* Batzel v. Smith, 333 F.3d 1018, 1037 (9th Cir. 2003).

3. The Challenged Communication Must Be Information Provided by Another Information Content Provider

The CDA defines an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[148] A literal following of this definition could yield interesting results. For example, if a MySpace user received an email from a friend containing defamatory statements and posted that information in a blog or comment, the user would be eligible for CDA immunity. However, if the source were a traditional letter instead of an email, immunity would not apply. This kind of inconsistency does not serve any legitimate function. The acts of the MySpace user in this scenario would be essentially identical in both cases, making it farcical to apply immunity in one case and not the other.

Due to the legal issues surrounding the creation of the "Good Samaritan" provision,[149] it is likely that when Congress drafted § 230(c), it intended to protect larger entities like AOL from being held responsible for information that others posted using its service. Under such circumstances, with potentially millions of users, an internet service provider would generally be reposting information passively through the automated nature of the service, despite policies that may attempt to filter or remove harmful content. The inconsistency described above indicates that Congress may not have focused much attention on the details of how such definitions would affect smaller users, as opposed to large providers. This suggests that Congress did not intend to protect a person in the position of a MySpace user who actively republishes defamatory material.

However, the language of § 230(c)(1) identifies any "provider or user of an interactive computer service" as the intended recipient of immunity.[150] This language is so broad that Congress likely intended to protect practically everyone who uses the Internet. Inconsistencies like the one posed in the hypothetical result from an inability to foresee every possible circumstance that arises from constantly changing and evolving technology. In accordance with this idea, the courts have progressively applied immunity to smaller and smaller entities, such as the sole website operator in *Batzel v. Smith*.[151] There, the operator would have qualified for

148. 47 U.S.C. § 230(f)(3) (2000).

149. As previously indicated in Section II(B)(2), the CDA was created in the wake of lawsuits against large corporate entities that provided Internet services.

150. 47 U.S.C. § 230(c)(1) (2000).

151. *See* Batzel v. Smith, 333 F.3d 1018, 1021 (9th Cir. 2003).

immunity if the original publisher had intended his statements to actually be published in the manner that they were.[152] What this suggests, rather, is that a MySpace user who reposts information received in either a letter or an email will only enjoy CDA immunity if the original publisher intended that the statements be posted on the Internet. The language of the "Good Samaritan" provision and the rule framed by the *Batzel* court are consistent with this idea.[153] This means that, despite the definition of "information content provider" found in § 230(f)(3), immunity is not dependent upon whether the defamatory information came from an Internet source or not, but only if it was intended to end up published on the Internet. For example, if a MySpace user received a letter from a friend with defamatory statements and the instruction to, "Get this out on the bulletin board—everyone's going to want to hear about this," then the statements have been provided by a third party whose purpose was to publish on the Internet, and the user would enjoy immunity.

Although this outcome may seem troubling, and likely not the result Congress foresaw when it drafted the "Good Samaritan" provision, this has been the way courts have applied the provision[154] and seems to be consistent with the language of § 230.[155] Of course, the greater role that a MySpace user plays in publishing the information, the more likely it is that courts will view the user as an original publisher.[156] Additionally, because the user in this hypothetical would have to manually enter the contents of the letter into an online posting, this may raise the user to the level of an original publisher, rendering immunity inapplicable. Conversely, if the original publisher sent the message via email and the MySpace user simply pasted it into a bulletin board message, the facts of *Batzel* would be analogous[157] and the user is more likely to enjoy immunity.

The most obvious scenario in which the MySpace user could enjoy immunity would be if a third party posted defamatory statements in the user's "Comments" section. In this case, the user would have republished the statements in a completely passive manner, much like the way AOL and CompuServe "republish" statements made on their forums.

152. *Id.* at 1034.
153. *See* 47 U.S.C. § 230(c)(1) (2000); *Batzel*, 333 F.3d at 1034.
154. Batzel, 333 F.3d at 1034.
155. *See* 47 U.S.C. § 230(c)(1) (2000).
156. *See Batzel*, 333 F.3d at 1034.
157. *Id.* at 1021–22.

B. A Possible Exception to CDA Immunity

The common law recognizes an exception to liability for those republishers who "neither know nor have reason to know of the defamation."[158] The court in *Barrett v. Rosenthal* wanted to preserve the notion that republishers should be liable if they know or have reason to know of a statement's defamatory character, even in light of the CDA "Good Samaritan" provision.[159] However, this is contrary to the general holdings of other cases on the subject, which state that the exercise of editorial functions like deciding whether to publish would still render the republisher immune from liability under the CDA.[160] The whole purpose of the "Good Samaritan" provision is to bar liability on the Internet when liability would otherwise apply.[161]

Therefore, it seems likely that MySpace users who are simply found to be republishers will enjoy CDA immunity regardless of whether they knew or had reason to know of the statements' defamatory character. While this may seem counterintuitive, the majority of courts exclude knowledge as a factor when republishers otherwise qualify for immunity under the CDA.[162]

C. MySpace Users as Original Publishers

As the CDA "Good Samaritan" provision and the *Batzel* test indicate, immunity does not apply to the original publishers of defamatory information.[163] In the pending court cases described in the Introduction, MySpace users posted pages purporting to be created by the plaintiffs.[164] Therefore, the defendants in both of these cases will be subject to standard

158. Lerman v. Chuckleberry Publ'g, Inc., 521 F. Supp. 228, 235 (S.D.N.Y. 1981); *accord* Macaluso v. Mondadori Publ'g Co., 527 F. Supp. 1017, 1019 (E.D.N.Y. 1981).

159. Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142, 166 (Cal. Ct. App. 2004), *rev'd* 40 Cal. 4th 33 (2006) (stating that the "Good Samaritan" provision did not eliminate knowledge-based liability).

160. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) ("[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."); *see also* Blumenthal v. Drudge, 992 F. Supp. 44, 51–52 (D.D.C. 1998) (discussing how the CDA bars liability, even against the court's better judgment).

161. *Blumenthal*, 992 F. Supp. at 52 ("Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.").

162. *See id.* (noting Congress's policy change in providing immunity).

163. *See* 47 U.S.C. § 230(c)(1) (2000); Batzel v. Smith, 333 F.3d 1018, 1034 (9th Cir. 2003).

164. WSBTV.com, *supra* note 20; USATODAY.com, *supra* note 24.

defamation principles without the benefit of CDA immunity. The question then, is whether MySpace users who are original publishers, have fulfilled the standard elements of defamation. As stated in the Background, to create liability for defamation there must be:

> (a) a false and defamatory statement concerning another;
>
> (b) an unprivileged publication to a third party;
>
> (c) fault amounting at least to negligence on the part of the publisher; and
>
> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[165]

In the case of the Georgia student whose false MySpace page claimed to represent teacher Robert Muzillo, the statement that Muzillo had "lost an eye wrestling with alligators and midgets"[166] appears, on its face, to be a false statement of fact. There is no element of opinion in the statement. Broadcasting this kind of statement on MySpace would qualify as an unprivileged publication to a third party, because the page would be viewable by anyone with an Internet connection. Considering that the page was created as a joke aimed at Muzillo, the student's level of fault would rise from mere negligence to knowledge. Such a level of fault would create actionability regardless of whether Muzillo could show special harm. Therefore, at first glance, it appears that the student would fulfill the elements of defamation and would therefore face liability.

However, it is possible that the student could escape liability precisely because the MySpace page was created as a joke. As *Doe v. Cahill* indicates, the plaintiff "must prove that a statement is factually based and thus capable of a defamatory meaning."[167] In *Cahill*, the court held that if a reasonable reader would not view the posted statements as facts, based on the context of where and how the statements were made, then the publisher of those statements would not be liable for defamation.[168] Because the false MySpace profile was so outrageous,[169] it is likely that no reasonable reader would believe that Muzillo lost an eye wrestling alligators and midgets. Thus, it follows that the student is unlikely to face liability under the tort of defamation.

Accordingly, it may be difficult for defamation liability to apply to

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

166. WSBTV.com, *supra* note 20.

167. Doe v. Cahill, 884 A.2d 451, 467–68 n.78 (Del. 2005).

168. *Id.* at 466–67.

169. WSBTV.com, *supra* note 20.

MySpace at all, and without defamation there is no need for CDA immunity. Considering that MySpace is primarily a site for socializing and not the place to go for hard-hitting news or research,[170] many potentially defamatory statements may escape liability simply because MySpace viewers will not necessarily take what they read as fact.

Of course, this does not render MySpace users immune from defamation by default. It is still possible, even in the social context of MySpace, to purposefully make false statements that others believe to be fact and to damage a person's reputation with those statements. Take the hypothetical example of a user who posts a bulletin board message alleging that someone has cheated on his or her spouse. If this message is sent to everyone in their friends network and they take the message seriously, then the statement could be construed as fact and as harmful to reputation. The primary lesson to be gleaned from *Cahill* is that the context of a medium like MySpace, where there are over a hundred million users who can both post and read statements,[171] is different from other media like newspapers, where statements are published by professionals with a responsibility and expectation for truthfulness.[172]

IV. CONCLUSION AND RECOMMENDATIONS

There are some interesting problems that arise when applying the CDA "Good Samaritan" provision in a context as localized as a MySpace user's page. Ironically, the outcomes in these types of cases are counterintuitive in terms of when liability will or will not apply. The reasons for these outcomes seem simple enough: Congress enacted the "Good Samaritan" provision ten years ago. Technology has since evolved and changed, and along with it, so have the roles and functions that individual users play when communicating online. In cases where publishers intuitively deserve liability, courts have found ways to bypass immunity while staying within the framework of the CDA, but this has often created awkward or inconsistent lines of reasoning. The most helpful solution would be for Congress to examine these problems and revisit § 230 from a fresh perspective, taking new forms of online communication such as MySpace into consideration.

According to current case law, MySpace users will be subject to standard defamation law for statements or content they create on their personal pages, but not necessarily for defamatory materials reposted on

170. MySpace.com, *supra* note 2.

171. Murdoch, *supra* note 4.

172. Doe v. Cahill, 884 A.2d 451, 466–67 (Del. 2005).

their pages or posted in their "Comments" section by other users. The casual social atmosphere of MySpace may make it more difficult for conduct to be taken seriously enough to rise to the level of tortious defamation under the standard common law elements. On the other hand, the same casual atmosphere may lead users to believe that they can say anything they want without facing legal consequences. Despite the informal context of MySpace, any communication that meets the elements of defamation potentially faces legal liability. Given that there are over one hundred million users,[173] even a few cases could represent a significant problem looming over the legal landscape.

Ryan Lex[*]

173. Murdoch, *supra* note 4.

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