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## Section 230 of the Communications Decency Act: Why California Courts Interpreted It Correctly and What That Says About How We Should Change It

E. Alex Murcia

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## Section 230 of the Communications Decency Act: Why California Courts Interpreted It Correctly and What That Says About How We Should Change It

### Cover Page Footnote

J.D. Candidate, May 2021, Loyola Law School, Los Angeles; B.A., Philosophy and English Literature, Chapman University, Orange, CA, December 2017. Thank you to Professor Paul T. Hayden for his advice and feedback on this Note. Thanks, also, to the editors and staff of the Loyola of Los Angeles Law Review for their hard work editing this Note.

# SECTION 230 OF THE COMMUNICATIONS DECENCY ACT: WHY CALIFORNIA COURTS INTERPRETED IT CORRECTLY AND WHAT THAT SAYS ABOUT HOW WE SHOULD CHANGE IT

*E. Alex Murcia\**

*In 1996, Congress passed the Communications Decency Act (CDA). In 1997, the United States Supreme Court struck down most of the CDA. However, section 230, which protects providers and users of interactive computer services from liability for defamatory content posted to their platforms by third parties, remains in effect. In the California and federal judicial systems, courts interpret section 230's immunity provisions broadly—so that the statute conveys broad immunity. This Note argues that the broad application of section 230's protections is consistent with the intent of the statute's drafters. However, it also contends that (1) this interpretation of section 230 has had unexpected, negative consequences for plaintiffs seeking to recover in online defamation cases and (2) that we should consider making changes to section 230 that would allow it to accomplish its original purpose while also ensuring protection for persons injured by malicious actors online.*

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\* J.D. Candidate, May 2021, Loyola Law School, Los Angeles; B.A., Philosophy and English Literature, Chapman University, Orange, CA, December 2017. Thank you to Professor Paul T. Hayden for his advice and feedback on this Note. Thanks, also, to the editors and staff of the *Loyola of Los Angeles Law Review* for their hard work editing this Note.

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## I. INTRODUCTION

As the internet gained popularity in the 1990s, it created a new public forum. Unsurprisingly, it also created a new venue for defamatory and illicit content online. The spreading of false and “unseemly” material online led Congress to pass the Communications Decency Act (CDA) as part of the Telecommunications Act of 1996.<sup>1</sup> The CDA included several provisions, now known as “section 230,” that immunized providers and users of interactive computer services from liability as “publishers” if they participated in the spread of defamatory content that they did not create.<sup>2</sup> The bill’s sponsors reasoned that this protection was necessary to ensure that startups operating online had protection from litigious plaintiffs seeking to hold them liable for defamatory material that the startups did not have the means to monitor or take down.<sup>3</sup>

Today, many well-established companies like Facebook, Twitter, and Reddit, rely on third-party content to draw in users.<sup>4</sup> In addition, the explosion of online traffic and commerce in the 2000’s<sup>5</sup> led politicians to question the necessity of section 230’s defamation-related protections.<sup>6</sup> For instance, in 2020, then President Trump took steps to reduce the scope of section 230’s immunity via an executive order.<sup>7</sup> President Biden proposed doing away with the statute entirely.<sup>8</sup>

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1. See Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM’NS L.J. 51, 91–92 (1996) (discussing the passage of the Telecommunications Act of 1996 and the CDA); see also Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in various section of 47 U.S.C.).

2. See Telecommunications Act of 1996 § 509, 110 Stat. at 138 (codified as amended at 47 U.S.C. § 230 (2018)) (“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.”).

3. See JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 95 (2019).

4. See VALERIE C. BRANNON, CONG. RSCH. SERV., R45650, *FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT I* (2019), <https://fas.org/sgp/crs/misc/R45650.pdf>.

5. Max Roser et al., *Internet*, OUR WORLD IN DATA, <https://ourworldindata.org/internet> (last visited Oct. 4, 2020).

6. Berin Szoka, *Lindsey Graham’s Sneak Attack on Section 230 and Encryption: A Backdoor to a Backdoor?*, TECHDIRT (Jan. 31, 2020, 12:05 PM), <https://www.techdirt.com/articles/20200131/11252343832/lindsey-grahams-sneak-attack-section-230-encryption-backdoor-to-backdoor.shtml>; Makena Kelly, *Joe Biden Wants to Revoke Section 230*, VERGE (Jan. 17, 2020, 10:29 AM), <https://www.theverge.com/2020/1/17/21070403/joe-biden-president-election-section-230-communications-decency-act-revoke> (discussing Joe Biden’s and Beto O’Rourke’s proposals to eliminate section 230).

7. See Preventing Online Censorship, 85 Fed. Reg. 34,079, 34,080 (May 28, 2020).

8. Kelly, *supra* note 6.

In light of the controversy surrounding section 230, this Note focuses on how courts have already defined section 230's immunity; whether that definition is based on a robust interpretation of the law; and whether section 230, as codified, adequately serves the interests of the public and companies operating in the online space.

The Note is organized as follows: Part II begins with a brief explanation of the historical principles governing defamation law, and the changes made to those principles by section 230.<sup>9</sup> Part II also addresses two significant cases about what class of defendants section 230 protects.<sup>10</sup> Part II also discusses two important California cases that dealt with the question of whether section 230's immunity is limited to specific remedies—e.g., damages—or whether it also immunizes defendants from injunctive relief.<sup>11</sup>

Part III evaluates the interpretations of section 230 adopted by the cases discussed in Part II and analyzes interpretations of and proposed modifications to section 230.<sup>12</sup> Part III contends that there is a definite meaning to the provisions of section 230 that pertain to defamation and that controlling California case law correctly interprets those sections of the statute.<sup>13</sup>

Part III also argues that the interpretation of section 230 adopted by most courts, although logically sound, produces undesirable consequences.<sup>14</sup> Most notably, it eliminates virtually all recourse for people and businesses defamed online.<sup>15</sup> The Note concludes with a legislative proposal to amend section 230.<sup>16</sup> Instead of proposing broad changes to the statute or attacking its purpose, as President Biden and former President Trump have done, this proposal recommends minor modifications to section 230 to address some of its demonstrated shortcomings.

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9. *See infra* Parts II.A, II.B, II.C.

10. *See infra* Part II.D.

11. *See infra* Part II.E.

12. *See infra* Parts III.A, III.B, III.D.

13. *See infra* Parts III.A, III.B.

14. *See infra* Part III.C.

15. *See infra* Part III.C.

16. *See infra* Part III.E.

## II. BACKGROUND

### A. Common-Law Defamation

To prevail on a common-law defamation claim in most United States courts, a plaintiff must demonstrate that (1) the defendant published defamatory material; (2) it concerned the plaintiff; (3) it was directed to a third person; (4) the defendant was guilty of fault equivalent to negligence or something greater; (5) the publication was false; and (6) the plaintiff suffered actual damages.<sup>17</sup>

To satisfy the first element, a plaintiff must show that a defendant “published” the material.<sup>18</sup> Publication means “communication, by any method, to one or more persons who can understand the meaning.”<sup>19</sup> Courts divide up “publishers” of information, i.e., entities that make information available to third parties, into two categories: publishers and distributors/transmitters.<sup>20</sup>

Publishers include anyone from the author of a book to a newspaper publishing company.<sup>21</sup> The hallmark of the publisher is that, with respect to the disputed publication, it “exercise[s] . . . traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.”<sup>22</sup> Notably, liability for defamatory content attaches to publishers regardless of whether they have notice of the defamatory nature of a publication.<sup>23</sup>

A distributor, on the other hand, plays a lesser role in formatting and creating a work, but still publishes it.<sup>24</sup> Distributors include book vendors, public libraries, and newsstands.<sup>25</sup> Understandably, courts are less willing to impose liability on distributors than publishers.<sup>26</sup>

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17. DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 519 (2d ed. 2011). Note also that there are exceptions to this basic formula, and some plaintiffs are required, by virtue of their status as public figures, to meet a higher standard. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (holding that public figures must meet a higher “actual malice” standard to prevail on a defamation claim).

18. *See* DOBBS ET AL., *supra* note 17, § 520.

19. *Id.*

20. Sewali K. Patel, Note, *Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 651 (2002) (“Under traditional defamation law, liability may be imposed upon the creator of a defamatory statement, as well as on the disseminator of the defamatory material.”).

21. *See* DOBBS ET AL., *supra* note 17, § 520.

22. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

23. *Barrett v. Rosenthal (Barrett II)*, 146 P.3d 510, 513 (Cal. 2006).

24. *See* DOBBS ET AL., *supra* note 17, § 522.

25. *See id.*

26. *See id.*

Most courts only find distributors liable for defamation if the distributor published defamatory material “with notice of its defamatory character.”<sup>27</sup>

### *B. The Common Law and the Early Internet*

The first suit for defamation against a provider of internet services was *Cubby, Inc. v. CompuServe Inc.*<sup>28</sup> In *Cubby*, the plaintiff brought suit against CompuServe in the Southern District of New York.<sup>29</sup> The plaintiff alleged that Rumorville USA, which produced posts about the journalism industry and made them available on a forum hosted by CompuServe, had published defamatory statements about the plaintiff.<sup>30</sup> The plaintiff also alleged that CompuServe was liable as a publisher of the content developed by Rumorville USA because it made Rumorville USA available to its subscribers and thus “published” the material.<sup>31</sup> The district court rejected Cubby’s libel claim and ruled in favor of CompuServe.<sup>32</sup> The court found that CompuServe exercised “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.”<sup>33</sup> Accordingly, it held that CompuServe was not a publisher but a distributor of Rumorville USA’s content.<sup>34</sup> As a distributor, CompuServe was not liable for Rumorville USA’s defamatory publication because it did not have notice of its defamatory content.<sup>35</sup>

In the next case addressing a similar question, *Stratton Oakmont, Inc. v. Prodigy Services Co.*,<sup>36</sup> the facts largely matched those in *Cubby*. At the time of the suit, Prodigy Services was an online company that allowed subscribers to exchange messages on its

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27. *Barrett II*, 146 P.3d at 513.

28. 776 F. Supp. 135 (S.D.N.Y. 1991).

29. KOSSEFF, *supra* note 3, at 38–39.

30. *Cubby, Inc.*, 776 F. Supp. at 137–38.

31. *Id.*

32. *Id.* at 142.

33. *Id.* at 140.

34. *See id.*

35. *See id.* at 141.

36. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Telecommunications Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 56, 138 (codified as amended 47 U.S.C. § 230 (2018)).



bulletin boards.<sup>37</sup> Before the suit, a series of posts supplied by an anonymous user appeared on one of Prodigy's bulletin boards.<sup>38</sup> The posts accused Stratton Oakmont of wrongdoing in connection with a financial transaction.<sup>39</sup> Stratton Oakmont disputed the legitimacy of the posts and filed a lawsuit against Prodigy.<sup>40</sup> Prodigy relied on *Cubby* in its defense.<sup>41</sup>

The court distinguished Prodigy's role in the publication process from that of CompuServe' in *Cubby*. The court concluded that Prodigy "held itself out" as having more "control[] [over] the content of its computer bulletin boards" than CompuServe.<sup>42</sup> Therefore, unlike CompuServe, Prodigy could be held liable as a publisher of content.<sup>43</sup>

Notably, the court made a concerted effort to point out that it agreed with the *Cubby* opinion and that this scenario differed because Prodigy, unlike CompuServe, promoted itself as a family-friendly platform that actively moderated content.<sup>44</sup> However, commentators took a different message from *Stratton Oakmont*; that being, platforms that moderated content in good faith might be liable for any defamatory material on their bulletins.<sup>45</sup> This holding worried commentators.<sup>46</sup> One concern was that *Stratton Oakmont* might force some providers of internet services to police content too strictly to ensure that they are not held liable for defamatory material made

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37. *Id.* at \*1.

38. David P. Miranda, *Defamation in Cyberspace: Stratton Oakmont, Inc. v. Prodigy Services Co.*, 5 ALB. L.J. SCI. & TECH. 229, 233–35, 235 n.39 (1996) (addressing the fact that the posts were anonymous, so Stratton Oakmont could not sue the immediate poster and instead had to sue Prodigy).

39. *Stratton Oakmont*, 1995 WL 323710, at \*1.

40. *Id.*

41. *Id.* at \*4.

42. *Id.*

43. *Id.*

44. *Id.* at \*5 ("Let it be clear that this court is in full agreement with *Cubby*. . . . Computer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates."); see Peter H. Lewis, *Personal Computers; The CompuServe Edge: Delicate Data Balance*, N.Y. TIMES (Nov. 29, 1994), <https://www.nytimes.com/1994/11/29/science/personal-computers-the-compuserve-edge-delicate-data-balance.html>; see also Robert D. Shapiro, *This Is Not Your Father's Prodigy*, WIRED (June 1, 1993, 12:00 PM), <https://www.wired.com/1993/06/prodigy/> (indicating that Prodigy did pull down content on the grounds that it was inappropriate).

45. See R. Hayes Johnson, Jr., Case Note, *Defamation in Cyberspace: A Court Takes a Wrong Turn on the Information Superhighway in Stratton Oakmont, Inc. v. Prodigy Services Co.*, 49 ARK. L. REV. 589, 623 (1996).

46. David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 409 (2010) (noting that the *Stratton Oakmont* decision created "quite an uproar" among commentators).

accessible by their services.<sup>47</sup> However, others feared that the opposite would result, i.e., that providers would stop monitoring content entirely in order to hide behind distributor protections.<sup>48</sup>

It was mainly because of these concerns that Congress put an end to the common law of defamation, with respect to online content, just a few months later.<sup>49</sup>

### C. *The Communications Decency Act*

The CDA was not initially proposed to protect providers of internet services from liability for defamatory content. Instead, the bill began as an effort to protect minors from encountering pornography online.<sup>50</sup> In fact, Senator James Exon initially proposed the CDA to regulate pornography on the internet.<sup>51</sup>

Exon's proposal sought to effect penalties on providers of internet services that exposed minors to pornography.<sup>52</sup> Exon's bill, which posed a risk of censoring other speech, sparked concern among free speech advocates and civil liberties groups.<sup>53</sup>

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47. See KOSSEFF, *supra* note 3, at 272 (discussing how the elimination of protections for intermediaries online might result in mass censorship); see also discussion *infra* note 237.

48. See James P. Jenal, *When Is a User Not a "User"?: Finding the Proper Role for Republication Liability on the Internet*, 24 LOY. L.A. ENT. L. REV. 453, 459 (2004); see also Peter H. Lewis, *After Apology from Prodigy, Firm Drops Suit*, N.Y. TIMES (Oct. 25, 1995), <https://www.nytimes.com/1995/10/25/business/after-apology-from-prodigy-firm-drops-suit.html> (stating that the *Stratton Oakmont* case could result in online service providers either having to moderate all content to protect themselves from liability or decline moderating anything in order to fit within the protections provided by the *Cubby* decision); Johnson, *supra* note 45, at 594 n.10, 623.

49. Andrew P. Bolson, *Flawed but Fixable: Section 230 of the Communications Decency Act at 20*, 42 RUTGERS COMPUT. & TECH. L.J. 1, 5–8 (2016) (explaining that Congress was motivated to pass section 230, in part, by *Stratton Oakmont* and the concern that *Stratton Oakmont* would place a heavy burden on companies operating in the internet space).

50. KOSSEFF, *supra* note 3, at 62–63.

51. 141 CONG. REC. 3203 (1995). Exon became concerned about this matter around the time that an undergraduate at Carnegie Mellon University, Marty Rimm, published an article alleging that over 80 percent of images on the internet were pornography. Rimm's article was published in the *Georgetown Law Review*. See Lynne Christensen, *Cyberporn Study: More Heat Than Light?*, 21STC, <http://www.columbia.edu/cu/21stC/issue-1.2/Cyber.htm> (last visited Oct. 4, 2020); see also Cannon, *supra* note 1, at 53–54. Rimm's article was major news at the time: it appeared on the front page of *Time* magazine, and was referenced on the Senate floor by Senator Grassley. Cannon, *supra* note 1, at 54. However, the article has since been discredited. *Id.* at 55. For more on the Rimm article, see Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849 (1995).

52. KOSSEFF, *supra* note 3, at 62.

53. *Id.* at 63–64.

While Exon’s proposal attracted heat from public interest groups, representatives Christopher Cox and Ron Wyden worked on a different bill that also sought to protect minors from indecent content online. This bill employed a more “hands-off” approach to ensuring that online platforms regulated content.<sup>54</sup> Instead of punishing providers for incidentally providing users with access to false or inappropriate content, the bill protected providers of internet services from treatment as “publishers” of content, defamatory or otherwise, even if they, like Prodigy, moderated content.<sup>55</sup> This protection was designed to prevent the two scenarios that critics of *Stratton Oakmont* feared it might produce: over and underpolicing of online content.<sup>56</sup> This new immunity ensured that companies already taking steps to monitor content on their platforms would not be penalized with publisher liability, as was the case under *Stratton Oakmont*.<sup>57</sup>

The relevant portions of the Cox-Wyden bill, later codified as 47 U.S.C. § 230, state the following:

**(c) Protection for “Good Samaritan” blocking and screening of offensive material**

(1) **Treatment of publisher or speaker**[:] 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.

(2) **Civil liability**[:] No provider or user of an interactive computer service shall be held liable on account of—

(A) 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; or

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54. *Id.* at 63.

55. 141 CONG. REC. 22045 (1995) (statement of Rep. Cox) (“Mr. Chairman, our amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem.”).

56. *Id.* (statement of Rep. Cox) (indicating his bill intended to overrule the absurd consequences of *Stratton Oakmont*).

57. *Id.*

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1). . . .

(e) **Effect on other laws** . . . .

(3) **State law**[:] Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.<sup>58</sup>

For the purposes of defamation law, section 230 can be distilled to these three provisions: (c)(1), (c)(2), and (e)(3).<sup>59</sup> The first provision, subsection (c)(1), provides immunity for providers or users of an interactive computer service (typically websites or website users) from treatment as publishers of defamatory content provided by information content providers (often persons) on platforms hosted by the interactive computer service.<sup>60</sup>

The second significant provision, subsection (c)(2), prevents civil liability from attaching to providers or users of interactive computer services regardless of what steps the user or provider takes to eliminate third-party content on its platform.<sup>61</sup> This section ensures that no matter what a provider or user of an interactive computer service does to moderate content provided by third parties, it cannot be held liable if it unfairly restricts access to that content.<sup>62</sup> This is distinct from (c)(1) in that it protects against only civil liability and applies only if a lawsuit seeks to hold providers and users of interactive computer services liable for the *removal* of content.<sup>63</sup>

The third provision of importance, subsection (e)(3), provides that section 230 does not bar states from enforcing their own defamation law so long as the state law is consistent with section

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58. 47 U.S.C. § 230(c), (e)(3) (2018).

59. *See id.*

60. *See id.* § 230(c)(1).

61. *See id.* § 230(c)(2).

62. *See id.* The plain text of subsection (c)(2) strongly supports this explanation of the statute. However, this interpretation is also bolstered by statements made by former U.S. Representative from California Christopher Cox in the Congressional Record where he indicated that his proposal was designed to protect persons taking steps to censor inappropriate or otherwise objectionable content. 141 CONG. REC. 22045 (1995) (statement of Rep. Cox).

63. *See discussion supra* Part II.C.

230.<sup>64</sup> Defamation is typically a state law cause of action, so this provision ensures that section 230 provides immunity from state law claims where state law provides a remedy not permitted by section 230.<sup>65</sup>

#### *D. Interpreting Section 230: The Class Protected*

After section 230 passed, the question of who qualified for the immunity provided by the statute immediately became crucial. The first case concerning this question was *Zeran v. America Online, Inc.*<sup>66</sup>

The controversy in *Zeran* arose when Seattle resident Ken Zeran began receiving threatening phone calls from angry America Online, Inc. (“AOL”) subscribers.<sup>67</sup> The callers claimed that Zeran had posted an advertisement on an AOL forum in which he offered for sale offensive t-shirts that ridiculed the bombing of the Alfred P. Murrah Federal Building in Oklahoma.<sup>68</sup> However, Zeran did not post the advertisements; instead, the user who posted the advertisement, listed Zeran’s phone number as the number to call to obtain one of the shirts.<sup>69</sup> Zeran asked AOL to remove the advertisements.<sup>70</sup> It did not.<sup>71</sup> After experiencing months of additional threats from AOL users,<sup>72</sup> Zeran filed a suit against AOL in federal court.<sup>73</sup>

Zeran alleged that because he made AOL aware of these defamatory posts, AOL acted negligently when it failed to remove them.<sup>74</sup> AOL raised section 230 as a defense.<sup>75</sup> Zeran argued that the statute’s bar against treating providers of interactive computer services as “publishers,” under subsection (c)(1), did not block suits against

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64. See discussion *infra* Part II.E.

65. See Matthew G. Jeweler, Essay, *The Communications Decency Act of 1996: Why § 230 Is Ouidated and Publisher Liability for Defamation Should Be Reinstated Against Internet Service Providers*, 8 PITT. J. TECH. L. & POL’Y 1, 9 (2008).

66. 958 F. Supp. 1124 (E.D. Va. 1997), *aff’d*, 129 F.3d 327 (4th Cir. 1997); David Lukmire, Note, *Can the Courts Tame the Communications Decency Act?: The Reverberations of Zeran v. America Online*, 66 N.Y.U. ANN. SURV. AM. L. 371, 385 (2010) (describing *Zeran* as the first major case interpreting section 230).

67. See *Zeran*, 958 F. Supp. at 1126.

68. *Id.*

69. *Id.*

70. *Id.* at 1127.

71. See KOSSEFF, *supra* note 3, at 81–83 (discussing Zeran’s communications with AOL in which he requested that it remove the posts).

72. *Zeran*, 958 F. Supp. at 1128.

73. KOSSEFF, *supra* note 3, at 83.

74. *Zeran*, 958 F. Supp. at 1128.

75. *Id.* at 1126.

providers of interactive computer services as “distributors” of defamatory content, and therefore he could proceed with his suit.<sup>76</sup> The district judge agreed with AOL.<sup>77</sup> Zeran appealed, but the Fourth Circuit affirmed.<sup>78</sup> The Fourth Circuit held that the term “publisher” historically encompassed distributors and publishers, so AOL was protected from suit by section 230.<sup>79</sup>

The *Zeran* ruling, although called into question by commentators,<sup>80</sup> is a seminal case in the history of section 230 jurisprudence as many federal and state courts follow its broad reading of subsection (c)(1).<sup>81</sup>

The California Supreme Court adopted the *Zeran* court’s reasoning and holding in *Barrett v. Rosenthal*.<sup>82</sup> The *Barrett* decision is particularly significant with respect to section 230 because unlike in *Zeran*, where the Fourth Circuit affirmed the lower court’s judgment, the California Supreme Court overturned a lower court ruling.<sup>83</sup> This gave the supreme court an opportunity to knock down some of the counterarguments to the *Zeran* court’s expansive view of the statute.

In *Barrett*, two physicians sued defendant Rosenthal for sharing allegedly libelous messages on a website that promoted alternative medicine.<sup>84</sup> The defamation claims centered around several email messages that Rosenthal received from another party and then reposted.<sup>85</sup> The messages made various false accusations, including that one of the plaintiffs stalked a Canadian radio personality.<sup>86</sup>

Departing from *Zeran*, the California Court of Appeal declined to immunize Rosenthal and found that section 230 did not protect against

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76. *Id.* at 1133.

77. *Id.* at 1137.

78. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 335 (4th Cir. 1997).

79. *Id.* at 332, 334.

80. See David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 162 (1997) (arguing that section 230(c)(1) may not in fact protect distributors).

81. Ian C. Ballon, ‘*Zeran v. AOL*’ and Its Inconsistent Legacy, RECORDER (Nov. 10, 2017, 12:45 AM), <https://www.law.com/therecorder/sites/therecorder/2017/11/10/2017ballon-essay/> (noting that “[m]ost circuits construe the CDA broadly, consistent with *Zeran*”).

82. 146 P.3d 510 (Cal. 2006).

83. See *Barrett v. Rosenthal (Barrett I)*, 9 Cal. Rptr. 3d 142, 167 (Ct. App. 2004), *rev’d*, 146 P.3d 510 (Cal. 2006).

84. *Id.* at 144.

85. Ilena Rosenthal’s Respondent’s Brief at 7–8, *Barrett I*, 9 Cal. Rptr. 3d 142 (Ct. App. 2004) (No. A096451).

86. *Barrett I*, 9 Cal. Rptr. 3d at 149–50.

distributor liability.<sup>87</sup> In addition, it criticized the reasoning in *Zeran* and noted that even though distributor liability is sometimes considered a subset of publisher liability, the common law treated distributors and publishers differently, and liability attached under different circumstances.<sup>88</sup> The court then concluded that the “word ‘publisher’ [in subsection (c)(1) of the statute was] . . . too flimsy a basis upon which to grant . . . ‘absolute protection’ . . . [as it was] at least capable of two reasonable constructions.”<sup>89</sup>

Lastly, the court stated that the *Zeran* interpretation of subsection (c)(1), which interpreted subsection (c)(1) to protect distributors, rendered subsection (c)(2) meaningless.<sup>90</sup> It reasoned that if absolute immunity were granted by (c)(1), then (c)(2), which protects entities that take good-faith steps to eliminate objectionable content online, would be duplicative.<sup>91</sup>

The California Supreme Court reversed.<sup>92</sup> Unlike the court of appeal, it found that the term “publisher” was not too ambiguous to justify subsection (c)(1)’s application to traditional publishers and distributors.<sup>93</sup> Distributors, it noted, are often classified as secondary publishers, and Congress was aware of this when it passed the statute.<sup>94</sup> The court also rejected the contention that broadly construing subsection (c)(1) of the statute negated the purpose of subsection (c)(2).<sup>95</sup> Instead, it determined, correctly, that subsection (c)(2), which states that “no provider . . . shall be held liable [for] any action . . . to restrict access . . . or make available . . . technical means to restrict access,”<sup>96</sup> protected providers of interactive computer services from liability stemming from *censorship*, not publication, of material.<sup>97</sup>

The supreme court’s decision in *Barrett* brought California in line with most jurisdictions that had addressed the question of whether

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87. *Id.* at 152; Jae Hong Lee, Note, *Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 477 (2004).

88. *Barrett I*, 9 Cal. Rptr. 3d at 156.

89. *Id.* at 157.

90. *Id.* at 158.

91. *Id.*; Gregory M. Dickinson, Note, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POL’Y 863, 869–70 (2010).

92. *Barrett II*, 146 P.3d 510, 529 (Cal. 2006).

93. *Id.* at 519.

94. *Id.*

95. *Id.*

96. 47 U.S.C. § 230(c)(2) (2018).

97. *Barrett II*, 146 P.3d at 520.

section 230(c)(1) protected both distributors and publishers.<sup>98</sup> But, the points made by the court of appeal also exposed some ambiguities in the statute.

*E. Interpreting Section 230: The Extent of Protection*

The next major interpretative question concerning section 230 jurisprudence was the scope of the immunization provided by the statute. The courts discussed above agreed that section 230 protects providers and users of interactive computer services from claims under which damages are sought.<sup>99</sup> But, other courts have disagreed about whether it also provides immunity from injunctive relief.<sup>100</sup> In *Kathleen R. v. City of Livermore*,<sup>101</sup> the California Court of Appeal determined that it did.<sup>102</sup>

In *Kathleen R.*, the plaintiff brought suit against the City of Livermore after her underage son obtained pornography through the city library's internet.<sup>103</sup> She alleged that the City, which made the internet available on its computers and did not bar access to sexually explicit content, could be held liable to her under various state and federal laws.<sup>104</sup> She requested an injunction against the city that would require it to cease offering unrestricted access to the internet on its computers.<sup>105</sup>

In dismissing the plaintiff's claims, the court of appeal first reasoned that the library was not the *creator* of pornographic content and that the library qualified as a provider of interactive computer services because it made the internet connection available.<sup>106</sup> This meant it had immunity under the *Zeran* and *Barrett* interpretation of subsection (c)(1) of section 230.<sup>107</sup>

The next question the court addressed was whether the immunity that applied to the city under section 230 was broad enough to protect

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98. See Ballon, *supra* note 81 (“[m]ost circuits construe the CDA broadly, consistent with *Zeran*.”).

99. See discussion *supra* Part II.D.

100. See discussion *infra* Parts II.E, II.F.

101. 104 Cal. Rptr. 2d 772 (Ct. App. 2001).

102. *Id.* at 781.

103. *Id.* at 775.

104. *Id.* (discussing plaintiff's state law claims and her cause of action under 42 U.S.C. § 1983).

105. *Id.* at 776.

106. *Id.* at 777.

107. *Id.* at 780–81.



it from injunctive relief.<sup>108</sup> The court found that it was.<sup>109</sup> In support of its finding that the city was immune, the court cited subsection (e)(3) of the statute.<sup>110</sup> Subsection (e)(3) states 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.”<sup>111</sup> To the court, this meant that if the city was immunized from an injunction, that immunity had to stem from either the phrase “no cause of action” or the phrase “no liability may be imposed.”<sup>112</sup> In looking at these phrases, the court found that the word “liability” could arguably be interpreted to refer only to damages.<sup>113</sup> This meant that it might not provide immunity from an injunction. However, it also concluded that even if liability “mean[t] only [immunity from] an award of damages . . . the statute by its terms also preclude[d] *other causes of action for other forms of relief*.”<sup>114</sup>

The *Kathleen R.* decision answered the question of whether section 230 protected defendants from injunctions when the injunctions were sought under a cause of action brought under state law directly against an immunized defendant. However, the result in *Kathleen R.* also left one question open: Were defendant providers and users of interactive computer services immunized from injunctions obtained against them in suits brought by defamed plaintiffs against third party information content providers? In other words, did section 230 protect a provider or user of an interactive computer service from an injunction ordering it to take down defamatory content when the injunction was obtained in a lawsuit against a third-party information content provider? In *Hassell v. Bird*,<sup>115</sup> the California Supreme Court offered its answer.<sup>116</sup>

The controversy in *Hassell* stemmed from a brief period of time when the Hassell Law Group (“Hassell”) represented Ava Bird in the

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108. *Id.* at 781.

109. *Id.*

110. *Id.*

111. 47 U.S.C. § 230(e)(3) (2018).

112. *Kathleen R.*, 104 Cal. Rptr. 2d at 781.

113. *Id.*

114. *Id.* (emphasis added). As additional support for this interpretation, the court looked to several non-California courts that declined to permit injunctive relief against a provider of interactive computer services under section 230. *Id.* (citing *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 983–84 (10th Cir. 2000)).

115. 420 P.3d 776 (Cal. 2018).

116. *See id.*

summer of 2012.<sup>117</sup> Bird contacted and retained Hassell to assist her on a personal injury claim.<sup>118</sup> But, after just twenty-five days of representation, the firm withdrew.<sup>119</sup> It cited difficulties communicating with Bird as the basis.<sup>120</sup>

Several months later in January 2013,<sup>121</sup> someone posted a Yelp review criticizing Hassell and its legal work on behalf of the poster.<sup>122</sup> The poster went by the username “Birdzeze B.”<sup>123</sup> The review accused the firm of “mak[ing] a bad situation much worse,” improperly renegeing on a legal obligation, and failing to communicate with an insurance company regarding the poster’s claim.<sup>124</sup> The post also advised readers not to hire Hassell.<sup>125</sup> After seeing the review, and under the suspicion that Bird had posted it, Hassell contacted Bird via email.<sup>126</sup> Bird was asked to remove the review.<sup>127</sup> Bird refused.<sup>128</sup>

After this exchange, Hassell filed a suit against Bird.<sup>129</sup> In the suit, Hassell alleged that Bird’s review was defamatory.<sup>130</sup> The firm sought an injunction ordering Bird to take down the review.<sup>131</sup> More

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117. *Hassell v. Bird* (*Hassell I*), 203 Cal. Rptr. 3d 203, 208–09 (Ct. App. 2016), *rev’d*, 420 P.3d 776 (Cal. 2018).

118. *Id.*

119. *Id.*

120. See Plaintiff’s Summary of the Case in Support of Default Judgment and Request for Injunctive Relief at 1, *Hassell I*, 203 Cal. Rptr. 3d 203 (Ct. App. 2016) (No. CGC13-530525) [hereinafter Plaintiff’s Summary of the Case].

121. *Hassell I*, 203 Cal. Rptr. 3d at 208.

122. Birdzeze B., Comment to *Hassell Law Group*, YELP (Jan. 28, 2013), <https://www.yelp.com/biz/hassell-law-group-san-francisco-2?start=20> [hereinafter Bird’s Original Yelp Review].

123. *Id.* The court of appeal and supreme court sometimes refer to the relevant Yelp username as “Birdseye B.” However, the correct username is “Birdzeze B.”

124. *Id.*

125. *Id.*

126. *Hassell I*, 203 Cal. Rptr. 3d at 209.

127. *Id.*

128. *Id.* Note also that Bird admitted, contrary to her post on Yelp, that Hassell had contacted her insurance company about her claim. This made Hassell’s defamation cause of action particularly strong because Bird essentially conceded that she lied in her post on Yelp. Compare Plaintiff’s Summary of the Case, *supra* note 120, at 1 (indicating that Bird admitted in an email that Hassell had contacted her insurance company), with Bird’s Original Yelp Review, *supra* note 122 (indicating that Hassell failed to contact Bird’s insurer).

129. *Hassell I*, 203 Cal. Rptr. 3d at 210.

130. *Id.* at 209.

131. *Id.* Shortly after Hassell served Bird with notice of the suit, another Yelp review appeared under the Birdzeze B. username. This review claimed, among other things, that Hassell had filed a lawsuit against the reviewer for the initial review and was now trying to “threaten, bully, intimidate, [and] harass [her] into removing the [original] review!” See Birdzeze B., Comment to *Hassell Law Group*, YELP (Apr. 29, 2013), <https://www.yelp.com/biz/hassell-law-group-san-francisco-2?start=20>. Moreover, plaintiff also believed, but was never able to prove, that Bird created another

significantly though, it also requested an order demanding that Yelp remove the review if Bird refused.<sup>132</sup>

Bird did not answer Hassell's complaint and Hassell petitioned the trial court for entry of a default judgment against Bird.<sup>133</sup> The trial court, after a hearing on the merits of Hassell's claim, found the reviews defamatory and entered a judgment for Hassell.<sup>134</sup> The corresponding order instructed Bird to remove the reviews.<sup>135</sup> The court also ordered Yelp to remove the reviews if Bird failed to do so.<sup>136</sup> Bird did not remove the reviews,<sup>137</sup> so Hassell served Yelp with the trial court's order.<sup>138</sup> Yelp appealed.<sup>139</sup>

In its appellate briefs, Yelp argued that it was immune from the injunction because of section 230.<sup>140</sup> The court of appeal rejected these contentions.<sup>141</sup> It concluded that Yelp was not immune under section 230 because (1) an injunction obtained against Yelp in a proceeding in which Yelp was not a party was not an imposition of "liability" within the meaning of section 230, and (2) no cause of action had been alleged directly against Yelp.<sup>142</sup>

After the court of appeal ruled against Yelp, Yelp petitioned the California Supreme Court to review the case; the court granted Yelp's petition.<sup>143</sup> In reversing the court of appeal, the California Supreme Court declined to enforce the injunction against Yelp.<sup>144</sup>

In its briefs filed with the California Supreme Court, Hassell reused the argument that subsection (e)(3), which bars plaintiffs from

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Yelp account under the username "J.D." *Hassell I*, 203 Cal. Rptr. 3d at 209–10. Bird later denied that she had posted anything under that username. *Hassell v. Bird (Hassell III)*, 420 P.3d 776, 781, n.5 (Cal. 2018); Application for Leave to File Amicus Curiae Brief; Amicus Curiae Brief of Ava Bird, Defendant, in Support of Appellant Yelp, Inc. at 3, *Hassell III*, 420 P.3d 776 (Cal. 2018) (No. S235968).

132. Plaintiff's Summary of the Case, *supra* note 120, at 22.

133. *Hassell I*, 203 Cal. Rptr. 3d at 210.

134. *Id.*

135. *Id.* at 210–11.

136. *Id.*

137. *Id.* at 211–12.

138. *Id.* at 211.

139. *Id.* at 212–13. Yelp refused to comply with the order and instead filed a motion to set aside and vacate the trial court's judgment on the grounds that the ruling was not in line with the applicable facts or law. The presiding superior court judge declined to reverse the defamation finding and upheld the injunction. Yelp then appealed.

140. *Id.* at 224–27 (discussing Yelp's claim of immunity under section 230 and dismissing it).

141. *Id.*

142. *Id.*

143. *Hassell v. Bird (Hassell II)*, 381 P.3d 231 (Cal. 2016).

144. *Hassell III*, 420 P.3d 776, 779 (Cal. 2018).

bringing state law causes of action inconsistent with section 230, did not apply under the circumstances because Hassell had not alleged any cause of action against Yelp.<sup>145</sup> However, the court rejected this contention and noted that section 230 did not actually state that a “cause of action always must be alleged directly against [a provider or user of an interactive computer service]” in order for immunity to apply.<sup>146</sup>

The plurality opinion of the California Supreme Court also rejected the argument adopted by the court of appeal that the injunction did not subject Yelp to “liability.”<sup>147</sup> Unlike the court of appeal, it concluded that historical use of the term “liability” was “broad” enough to encompass an injunction.<sup>148</sup>

After refusing to uphold the injunction, the plurality closed its opinion by expressing sympathy for Hassell’s predicament.<sup>149</sup> However, it also insisted, rather paradoxically, that Hassell still had “powerful . . . remedies available.”<sup>150</sup> The court declined to specify how those remedies could provide any relief under the circumstances.<sup>151</sup>

Given the difficulty of the question presented to the court, the case also resulted in several concurring and dissenting opinions.<sup>152</sup> Justice Kruger concurred with the plurality but contended that the injunction could not stand because it violated the principle that injunctions do not

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145. Respondents’ Answer to Yelp’s Petition for Review at 18, *Hassell III*, 420 P.3d 776 (Cal. 2018) (No. S235968).

146. *Hassell III*, 420 P.3d at 791. The plurality also concluded that Hassell’s briefs fundamentally understated the scope of section 230’s protection. *Id.* at 791. The court noted that Congress’s chief intent in passing section 230 was to provide providers and users of interactive computer services with broad immunity from suit in order to protect them from “the burdens associated with defending against . . . claims . . . and from compelled compliance with [orders that] . . . assign[ed] them the . . . responsibilities of . . . publisher[s] . . . .” *Id.* This injunction, the plurality claimed, implicated Congress’s concerns about overburdening these providers because injunctive relief could be “at least as burdensome to the service provider as damages,” *id.* (quoting *Noah v. AOL Time Warner Inc.*, 261 F. Supp. 2d 532, 540 (E.D. Va. 2003)), and might “generate substantial litigation over matters such as . . . validity or scope, or the manner in which it [was] implemented.” *Id.* The plurality also noted that Hassell could not be allowed to prevail because its lawsuit against Bird was essentially an attempt to subvert the purpose of section 230. *Id.* In other words, suing Bird allowed Hassell to obtain an order against Yelp that it could not have obtained by suing Yelp directly. *Id.* at 788.

147. *Id.* at 790–91.

148. *Id.* at 791.

149. *Id.* at 793.

150. *Id.*

151. *Id.*

152. *Id.* at 794–825.

bind nonparties.<sup>153</sup> Her decision did not turn on the section 230 analysis but on a more fundamental principle—due process.<sup>154</sup>

Justice Liu, in a dissent, argued that the plurality’s opinion improperly expanded section 230.<sup>155</sup> First, he contended, *Zeran* and *Barrett* were inapplicable because they involved suits directly against the interactive computer service provider; this case did not.<sup>156</sup> Second, he found that Congress’s concern that providers of interactive computer services would be subject to the burdens of litigation concerning defamatory material did not apply to this case because the injunction did not impose a significant burden on Yelp.<sup>157</sup> Third, he contended that requiring Yelp to comply with the injunction did not amount to treating Yelp as a publisher under section 230 because the injunction was not concerned with an editorial decision by Yelp.<sup>158</sup>

Justice Cuéllar also penned a dissent.<sup>159</sup> Justice Cuéllar first focused on the issue of Yelp’s liability and whether Yelp was in fact held “liable” under section 230 by the injunction.<sup>160</sup> He contended that section 230(e)(3) was not even implicated by the injunction because liability was a narrow term that included only “financial or legal obligation[s], such as a duty of care under tort law, the breach of which gives rise to a tort lawsuit—that treats a service provider or user as the publisher . . . of third party content.”<sup>161</sup> In support of this, he noted that Congress wrote section 230 with the concern that “tort-based” lawsuits would create “tort liability” for interactive computer service providers and users.<sup>162</sup> He claimed that this “support[ed] [his] definition of liability [only] as a financial obligation, like damages.”<sup>163</sup>

Lastly, Justice Cuéllar addressed several dangers and inconsistencies he believed stemmed from the plurality opinion.<sup>164</sup> Most importantly, he pointed out that the plurality’s opinion effectively terminated any remedies for defamation victims where the

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153. *Id.* at 794 (Kruger, J., concurring).

154. *Id.*

155. *Id.* at 802 (Liu, J., dissenting).

156. *Id.*

157. *Id.* at 802–03.

158. *Id.* at 806.

159. *Id.* (Cuéllar, J., dissenting).

160. *Id.* at 810.

161. *Id.* at 811.

162. *Id.* (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

163. *Id.*

164. *Id.* at 816–24.

content provider was unavailable “like in circumstances of absentia or death.”<sup>165</sup> Justice Cuéllar found this problem particularly difficult to reconcile with section 230, given that one of Congress’s aims in drafting the statute was to reduce objectionable content online.<sup>166</sup>

### *F. The Lay of the Land*

The case law discussed in sections A and B of Part II explains what entities are immunized by section 230 and to what extent those entities are immunized.

As discussed in section A, section 230 provides immunity from defamatory content online to providers and users of interactive computer services. Under the *Zeran* and *Barrett* decisions, this protection applies regardless of whether the provider or user of interactive computer services qualifies as a publisher or distributor.<sup>167</sup>

As addressed in section B, courts also interpret the statute to protect the providers and users of interactive computer services, i.e., the class protected by the statute, from claims for damages and injunctions when the damages and injunctions are sought directly against providers and users of interactive computer services.<sup>168</sup> In addition, under *Hassell*, providers and users of interactive computer services are protected from injunctions that are obtained in proceedings against third-party information content providers.<sup>169</sup>

## III. DISCUSSION

### *A. Courts Correctly Interpreted Section 230 by Applying Its Immunity to Publishers and Distributors*

The first question that must be answered before proposing changes to section 230 is what its current text means, and whether courts have interpreted it correctly. With respect to section 230 as it has been interpreted in California, an analysis of this question begins

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165. *Id.* at 819.

166. *See id.* at 819–20. Justice Cuéllar also addressed the question of whether the Due Process Clause granted the trial court authority to issue the injunction against Yelp under these circumstances had section 230 not been not on the books. He concluded that the answer to this question was not clear and that the case should be remanded to the trial court to determine whether it was permissible to subject Yelp to the injunction. *Id.* at 824.

167. *See infra* Part III.A.

168. *See infra* Part III.B.

169. *See Hassell III*, 420 P.3d at 779 (declining to uphold the injunction against Yelp on the grounds that section 230 immunized Yelp from injunctive relief).

with inquiries into the legislative history of the statute and the case law that has determined who is protected by it.<sup>170</sup>

The question presented in *Zeran* and *Barrett* was whether section 230 protected distributors from treatment as distributors, for the purposes of defamation liability, even though the word “distributor” does not appear in the statute. The *Zeran* and *Barrett* courts found that section 230 protects distributors.<sup>171</sup> However, the court of appeal in *Barrett* adopted a different view. In addition, a number of academic commentators criticized *Zeran* and argued that it reached the wrong conclusion.<sup>172</sup> One scholar contended that the legislative history and text of section 230 show that the statute should be read narrowly—as not protecting distributors.<sup>173</sup> Another scholar argued that when Congress wrote section 230, it deliberately excluded the word distributor.<sup>174</sup> The scholar contended that this fact shows that the statute’s protections only apply to true publishers of content.<sup>175</sup> If these commentators are correct, then courts misconstrued section 230 and used it to immunize too large of a class of providers and users of interactive computer services.<sup>176</sup>

There are compelling reasons to believe that the *Zeran* and *Barrett* courts correctly interpreted section 230. For instance, the

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170. Emily K. Fritts, Note, *Internet Libel and the Communications Decency Act: How the Courts Erroneously Interpreted Congressional Intent with Regard to Liability of Internet Service Providers*, 93 KY. L.J. 765, 775 (2004–2005) (stating that *Zeran* was the first case to interpret section 230).

171. Mark D. Quist, Comment, “*Plumbing the Depths*” of the CDA: *Weighing the Competing Fourth and Seventh Circuit Standards of ISP Immunity Under Section 230 of the Communications Decency Act*, 20 GEO. MASON L. REV. 275, 287 (2012).

172. See, e.g., Patricia Spiccia, Note, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VAL. U. L. REV. 369, 393–96 (2013); Michael H. Spencer, *Defamatory E-Mail and Employer Liability: Why Razing Zeran v. America Online Is a Good Thing*, 6 RICH. J.L. & TECH. 25, 92 (2000) (referring to the conclusion in *Zeran* that distributors were protected by section 230 and stating “this is not what Congress meant by enacting the CDA”); Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1457 (2006); Lee, *supra* note 87, at 476; Fritts, *supra* note 170, at 779.

173. See Spiccia, *supra* note 172, at 386 (“[T]he legislative history and text of section 230 suggests that the statute’s scope is narrow—applying only to defamation claims and good faith efforts to self-regulate—[and that] the Fourth Circuit in *Zeran v. America Online, Inc.* rejected such a narrow reading of the statute and instead broadly construed the scope of section 230’s immunity to apply to claims other than defamation.”).

174. Sheridan, *supra* note 80, at 162.

175. *Id.* at 165.

176. The Seventh Circuit also criticized the *Zeran* court’s broad interpretation of section 230 and suggested that, were it to be confronted with the same question, it might read section 230 differently. See *Doe v. GTE Corp.*, 347 F.3d 655, 659–60 (7th Cir. 2003).

*Zeran* court accurately pointed out that distributors are often treated as a subcategory of publishers, and therefore they fit within the class of “publishers” that Congress meant to immunize under section 230.<sup>177</sup> Furthermore, one could plausibly argue that immunity from treatment as, or liability as, a publisher means immunity from the act of publication (making content available to a third party who can understand it) regardless of a publishing party’s status as a “publisher” or “distributor.”

The findings and policy statements of section 230, particularly subsection (a)(3) and (a)(4), which state that “the [i]nternet . . . offer[s] a forum for a true diversity of political discourse” and that “the [i]nternet . . . ha[s] flourished . . . with a minimum of government regulation” also support the *Zeran* and *Barrett* interpretation.<sup>178</sup> These passages suggest that Congress aimed to ensure the protection of the Internet as a “forum for a true diversity of political discourse” by preserving an environment free of burdensome liability and regulations.<sup>179</sup>

A desire to keep the internet free of regulation indicates an intent to convey significant protections to providers and users of interactive computer services in order to ensure that the government does not play a significant role in monitoring content online. If immunity were limited to the class of entities that qualify as true publishers, i.e., the class of entities that makes editorial adjustments to content, then the statute’s protections would be very limited. As a result, the statute would probably not provide the extensive protections that Congress envisioned were necessary to protect small businesses online.

Most significantly though, statements made by Christopher Cox and Ron Wyden, the drafters of section 230, also show that *Zeran* and *Barrett* correctly interpreted the statute. In 2017, when asked whether section 230 was intended to convey immunity like that described in *Zeran*, Wyden answered, “[a]bsolutely . . . . [W]e said very bluntly

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177. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997).

178. *See* 47 U.S.C. § 230(a)(3)–(4) (2018).

179. *See id.* § 230(a)–(b); *see also* 141 CONG. REC. 22045 (1995) (statement of Rep. Cox) (“[Section 230] will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government.”). *But see* Lukmire, *supra* note 66, at 383–85 (arguing that the primary purpose of section 230 was to protect minors online, not to create an open market for expression on the internet).



that we thought it would freeze innovation if someone who owned a website could be personally liable.”<sup>180</sup> Moreover, Christopher Cox has been described as having said that “when he wrote Section 230, he intended to protect companies such as America Online, Prodigy, CompuServe, and other services that handle large volumes of traffic and allow users to post content.”<sup>181</sup> These statements by now Senator Ron Wyden and former U.S. Representative Christopher Cox directly support the *Zeran* and *Barrett* interpretations of the statute.

These considerations provide a legitimate basis to conclude that *Zeran*, and later *Barrett*, correctly interpreted section 230 and that the statute, as written, protects both publishers and distributors.

*B. Courts Correctly Interpreted Section 230 by Applying It to Block Enforcement of Injunctions Against Providers and Users of Interactive Computer Services*

The next interpretive question with respect to section 230 is whether courts properly interpreted it to provide immunity from injunctions. The scope of immunity provided by section 230, shown by the case law discussed in Part II, has largely been determined under a combination of subsection (c)(1), which prohibits courts from treating providers and users of interactive computer services as publishers and distributors; subsection (c)(2), which provides that “[n]o provider or user of an interactive computer service shall be held liable on account of . . . [action taken to restrict access to content]”; and subsection (e)(3), which states that “[n]o cause of action may be brought and no liability may be imposed under any . . . law that is inconsistent with this section.”<sup>182</sup>

One line of reasoning supporting the conclusion that the statute does bar *some* injunctions was addressed by the court in *Kathleen R.* In that case, the court looked to subsections (c)(1) and (e)(3) to conclude that section 230 does immunize defendants from injunctive relief if the injunctive relief is obtained through a state law cause of action that treats a defendant protected by subsection (c)(1) as a publisher or distributor.<sup>183</sup>

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180. KOSSEFF, *supra* note 3, at 95.

181. *Id.* at 114.

182. 47 U.S.C. § 230(c)(1)–(2), (e)(3).

183. *Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772, 780–81 (Ct. App. 2001).

The basis for this conclusion is that subsection (e)(3), by its terms, immunizes defendants from all state law actions that are inconsistent with section 230.<sup>184</sup> This immunity includes actions inconsistent with subsection (c)(1), which protects defendants from treatment as “publisher[s] or speaker[s] of any information.”<sup>185</sup> Thus, an injunction relating to the removal of content online that is obtained through a state law cause of action is by definition inconsistent with section 230 because it treats a provider or user of an interactive computer service protected by subsection (c)(1) as a publisher or speaker of information provided by another information content provider.

This position makes sense, given the linguistic and logical construction of the statute. It also provides a clear answer to the question of whether section 230 can be used to immunize a defendant from an injunction in certain cases.

However, as addressed in Part II, the *Kathleen R.* analysis of the statute also leaves one question unanswered: whether section 230 immunity protects against *all* injunctions or whether it just protects against injunctions obtained under state law causes of action alleged against defendants protected by subsection (c)(1).<sup>186</sup> The *Kathleen R.* court even noted this remaining ambiguity. In dicta it suggested that defendants protected under subsection (c)(2) of the statute might only be protected from claims for damages because, unlike subsection (c)(1), subsection (c)(2) includes the limiting title “civil liability” and the limiting phrase “no provider or user of an interactive computer service shall be held liable.”<sup>187</sup> According to the court, this suggested that subsection (c)(2) “refer[ed] only to damage claims.”<sup>188</sup>

In *Hassell*, a plurality of the California Supreme Court resolved this remaining ambiguity and found that the phrase “no liability may be imposed” in section (e)(3) was broad enough to bar injunctions.<sup>189</sup> While the judgment in *Hassell* is binding on California courts, because this Note is concerned with determining the most logically sound interpretation of section 230, this Note considers whether the court was correct to interpret the phrase “no liability may be imposed” as immunizing defendants from injunctive relief.

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184. See 47 U.S.C. § 230(e)(3).

185. *Id.* § 230(c)(1).

186. See *supra* Part III.B.

187. *Kathleen R.*, 104 Cal. Rptr. 2d at 780–81; see 47 U.S.C. § 230(c)(2).

188. *Kathleen R.*, 104 Cal. Rptr. 2d at 780–81.

189. *Hassell III*, 420 P.3d 776, 792 (Cal. 2018); see 47 U.S.C. § 230(e)(3).

To determine whether the California Supreme Court accurately interpreted the statute, the most important arguments to consider are those addressed by the California Court of Appeal, which concluded that the injunction did not violate section 230, and those offered by the dissenting supreme court justices in *Hassell*.

In reaching its conclusion that the injunction against Yelp was not barred by section 230, the court of appeal focused on two points. First, it considered whether Hassell had brought a cause of action against Yelp.<sup>190</sup> If it had, then the injunction was plainly barred by *Kathleen R.*, which correctly interpreted subsection (e)(3) to block causes of action inconsistent with section 230.<sup>191</sup> However, the court concluded that Hassell had not brought a cause of action against Yelp because the injunction was not a cause of action but a remedy.<sup>192</sup> The only cause of action brought in the case was the one brought directly against Bird.<sup>193</sup> This is a plausible view on its face. However, the supreme court disagreed. Picking up on an important point, the supreme court observed that subsection (e)(3) never actually specifies that a cause of action inconsistent with section 230 must be alleged against the provider or user of interactive computer services in order for immunity to apply.<sup>194</sup> Instead, the statute provides only that “[n]o cause of action may be brought and no liability may be imposed . . . that is inconsistent with this section.”<sup>195</sup>

Section 230 does not say that a cause of action must be alleged against the provider or user of interactive computer services protected by the statute for immunity to apply. Instead, subsection (e)(3) says that immunity applies to providers and users of interactive computer services if a cause of action is brought against *anyone* so long as that cause of action also imposes liability inconsistent with section 230 on a provider or user of interactive computer services.

In sum, the supreme court got it right. By its plain meaning, the phrase “no cause of action may be brought” does not support the view that subsection (e)(3)’s immunity is limited to cases in which a cause of action is alleged directly against a provider or user of an interactive computer service.

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190. *Hassell I*, 203 Cal. Rptr. 3d 203, 225–26 (Ct. App. 2016), *rev’d*, 420 P.3d 776 (Cal. 2018).

191. *See supra* Part III.B.

192. *Hassell I*, 203 Cal. Rptr. 3d at 226–27.

193. *Id.* at 226.

194. *Hassell III*, 420 P.3d at 790–91.

195. 47 U.S.C. § 230(e)(3) (2018).

The second point that the court of appeal considered in determining whether section 230 immunized Yelp from an injunction was whether the order issued in the default judgment against Bird imposed liability on Yelp that was inconsistent with the statute and thus whether Yelp was immunized under the “no liability may be imposed” clause of subsection (e)(3).<sup>196</sup> It found that the order neither qualified as an imposition of liability on Yelp nor an imposition of liability inconsistent with section 230.<sup>197</sup>

In support of the first conclusion the court stated, “[if] an injunction is itself a form of liability, that liability was imposed on Bird, not Yelp.”<sup>198</sup> To support its second finding, that even if this was liability it was not inconsistent with section 230, the court contended that if Yelp violated the injunction, the violation would not result in Yelp being treated as a publisher or distributor under subsection (c)(1).<sup>199</sup> The court justified this second position by stating that the consequence of a violation of the order was a contempt proceeding, which is not a civil action pertaining to publisher liability for defamatory content, but a criminal penalty that stems from the violation of a civil order.<sup>200</sup> Accordingly, the court concluded that Yelp was not immunized by either of the clauses in subsection (e)(3).<sup>201</sup>

Both positions seem plausible. However, the first issue with these arguments is that they likely misconstrue the meaning of the word liability. To understand why this is the case, one can look to the Justice Cuéllar’s dissent in *Hassell*. Like the court of appeal, Justice Cuéllar argued that the term “liability” was narrow and that Congress only intended it to mean “financial obligation[s], such as the responsibility to pay damages.”<sup>202</sup> As support, Justice Cuéllar cited a case listed in Black’s Law Dictionary that defined liability as “‘legally obligated or accountable,’ or a ‘financial or pecuniary obligation in a specified amount.’”<sup>203</sup> The plurality took the opposite position. They concluded

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196. *Hassell I*, 203 Cal. Rptr. 3d at 225–26.

197. *Id.* at 226.

198. *Id.* at 227.

199. *Id.* at 226.

200. *Id.* at 227 (quoting *Freeman v. Superior Ct.*, 282 P.2d 857, 859 (Cal. 1955)).

201. *Id.*

202. *Hassell III*, 420 P.3d 776, 811 (Cal. 2018) (Cuéllar, J., dissenting).

203. *Id.* (quoting *Liability*, BLACK’S LAW DICTIONARY (10th ed. 2014)). In addition, Justice Cuéllar pointed to Congress’s concern with “tort liability,” not liability generally, in support of his argument that section 230 immunity extended only to financial obligations. *See id.*

that the term liability included “almost every character of hazard or responsibility, absolute, contingent, or likely.”<sup>204</sup>

These conflicting definitions of liability suggest that there is a genuine controversy over the meaning of the term liability, and therefore, ambiguity in the statute that the court of appeal picked up on, but that was never considered by the plurality in the supreme court opinion. However, Justice Cuéllar’s argument, and by analogy the argument made by the court of appeal, are not based on solid ground. There is not much support for the view that liability, in any context, is limited to financial obligations.

Intriguingly, the lack of support for Justice Cuéllar’s argument and for the court of appeal’s position is evidenced by the source Justice Cuéllar cites in support of his view, Black’s Law Dictionary. Almost every example in Black’s Law Dictionary describes liability as a term that extends beyond financial obligations.<sup>205</sup> In fact, only two of the thirty plus cases cited to in Black’s Law Dictionary Sixth Edition that define the word “liability” suggest that the term is limited to damages.<sup>206</sup> Interestingly, even one of the definitions Justice Cuéllar points to, that liability means “legally obligated,”<sup>207</sup> does not limit the meaning of “liability” to financial obligations because an “obligation” need not be an obligation to pay a debt.<sup>208</sup>

The court of appeal’s second position—that the second clause of subsection (e)(3) did not immunize Yelp from the injunction because even if liability were imposed that liability was not inconsistent with section 230<sup>209</sup>—is also problematic. As addressed above, the court of appeal stated that if Yelp violated the injunction, the penalty would be

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204. *Id.* at 791 (plurality opinion) (quoting *Liability*, BLACK’S LAW DICTIONARY (6th ed. 1990)).

205. *See, e.g., Liability*, BLACK’S LAW DICTIONARY (6th ed. 1990) (citing to cases defining liability as “a broad legal term . . . [that] has been referred to as of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely”; “[the] condition of . . . potentially [being] subject to an obligation”; “[a] legal responsibility”).

206. *Id.* (first citing *State v. Fischl*, 20 P.2d 1057, 1059 (Mont. 1933), *overruled in part* by 44 P.2d 747 (Mont. 1935); then citing *Erickson v. Grande Ronde Lumber Co.*, 92 P.2d 170, 174 (Or. 1939)).

207. *Hassell III*, 420 P.3d at 811 (Cuéllar, J., dissenting).

208. Another important point to consider is that one of the next terms in Black’s Sixth Edition is the term “Liability for damages.” This suggests that liability for damages is generally distinct from liability that is limited to damages. *See Liability for damages*, BLACK’S LAW DICTIONARY (6th ed. 1990).

209. *Hassell I*, 203 Cal. Rptr. 3d 203, 226–27 (Ct. App. 2016), *rev’d*, 420 P.3d 776 (Cal. 2018).

a contempt proceeding, which is a criminal penalty, not a civil penalty.<sup>210</sup> Because of this, the court concluded that contempt would not treat Yelp as a publisher and, therefore, would be consistent with the statute.<sup>211</sup> This interpretation misses a significant point. Subsection (c)(1) prevents courts from treating providers and users of interactive computer services as publishers and distributors of content provided by a third party.<sup>212</sup> Unlike subsection (c)(2), it makes no mention of the word “civil liability.”<sup>213</sup> Accordingly, even if we grant that a contempt proceeding is a criminal penalty, it is still a penalty that “treats” Yelp as a publisher or distributor by virtue of the fact that it penalizes Yelp for failure to comply with a defamation judgement. In fact, contempt for failure to comply with a court order is the exact kind of legal obligation that publishers face when they refuse to remove defamatory content.<sup>214</sup>

Given the problems with the argument that section 230 does not create the immunity described in *Hassell*, there is a good reason to believe that the supreme court’s plurality opinion properly interpreted the term “liability” to encompass obligations stemming from injunctions. Accordingly, the *Hassell* plurality’s approach to section 230 offers the most logical understanding of the protections provided by section 230.<sup>215</sup>

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210. *Id.* at 227 (stating that contempt is not a civil penalty).

211. *Id.*

212. 47 U.S.C. § 230(c)(1) (2018).

213. *See id.*

214. *See* Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 353 (Cal. 2007) (enjoining defendant from repeating statements previously found to be defamatory). Another problem with the court of appeal’s interpretation of section 230 in *Hassell* is that, logically speaking, it means that an injunction can never amount to liability under section 230. *See* Application of Change.org, Engine, Github, Inc., A Medium Corporation, Patreon, Inc., Sitejabber, and Wikimedia Foundation, Inc. for Leave to File Amici Curiae Brief and Amici Curiae Brief in Support of Appellant at 32, *Hassell III*, 420 P.3d 776 (Cal. 2018) (No. S235968) (stating that if the supreme court adopted the holding of the court of appeal, then “direct injunctions against named parties would also fail to constitute ‘liability’ because they . . . [would] only create a duty to act or face contempt-of-court charges”).

215. Although the plurality in *Hassell* was largely correct in their interpretation of section 230, their interrogation of the question of what “liability” meant could have been bolstered by further analysis. Instead of using Black’s Law Dictionary as their lone source of authority, the plurality might have made a more convincing case for their point of view if they had supplemented their opinion by looking to other statutes that use the term “liability” to confer immunity from suit. This would have elicited a broader survey of case law and provided substantially more support for the plurality’s conclusion. Multiple statutes rely on the phrase “immunity from liability” to establish immunity from suit. For example, the California state nuisance statute provides that “a person who operates or uses a sport shooting range in this state shall not be subject to civil liability . . . in any matter relating to noise or noise pollution,” and that certain noise rules and regulations do not apply

### C. *The Unwanted Effects of the Logical Interpretation of Section 230*

In light of the considerations discussed above, the most well-reasoned interpretations of section 230 are probably the ones that currently control in California courts. *Zeran*, *Barrett*, *Kathleen R.*, and *Hassell* track the language of the statute effectively and are not subject to the objections that weaken the interpretations of section 230 offered by the lower courts in *Hassell* and *Barrett*.<sup>216</sup>

With that said, the *Zeran*, *Barrett*, *Kathleen R.*, and *Hassell* opinions also have some negative consequences. They leave courts in the difficult position of being unable to enforce valid court orders when a third-party content provider, like Bird, refuses to comply with court orders or cannot be identified.<sup>217</sup> In other words, under the combined protections of *Zeran*, *Barrett*, *Kathleen R.*, and *Hassell*, courts must set aside legitimate findings of defamation because of a statute that conveys seemingly limitless immunity.<sup>218</sup>

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to “shooting range exempted from liability under this section.” CAL. CIV. CODE § 3482.1(b)(1), (3) (Deering 2020). Because the remedy for nuisance may in certain circumstances be an injunction, *see, e.g.*, *Estancias Dall. Corp. v. Schultz*, 500 S.W.2d 217, 217 (Tex. Civ. App. 1973), this statute must be read to immunize shooting ranges from injunctions. 47 CAL. JUR. 3D *Nuisances* § 87, Westlaw (database updated Nov. 2020) (stating that “a court will not enjoin the use or operation of a range, on the basis of noise or noise pollution”). Therefore, California Civil Code § 3482.1(b)(1), (b)(3) treats injunctions as an imposition of “liability.” Another similar example is the Protection of Lawful Commerce in Arms Act (PLCAA), which protects weapons manufacturers from qualified “civil liability” for injuries caused by their products. 15 U.S.C. § 7902(a) (2018). The PLCAA expressly defines “civil liability” as including “injunctive or declaratory relief.” *Id.* § 7903(5)(A). With this said, there is one case that, on its face, appears to present an exception to the rule that the term “liability” includes the obligations stemming from injunctions. However, when analyzed closely it does not disagree with this generally held view. In section 402A of the Restatement Second of Torts, a seller of a defective product is “subject to *liability* for physical harm thereby caused to the ultimate user.” RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965) (emphasis added). Courts typically do not interpret the term “liability” in section 402A to allow plaintiffs to obtain an injunction in products liability cases. *See* Jill Wieber Lens, *Product Recalls: Why Is Tort Law Deferring to Agency Inaction?*, 90 ST. JOHN’S L. REV. 329, 338 n.40 (2016) (discussing the fact that most courts refuse to grant injunctive relief in product liability cases). However, it would not be accurate to describe this as an exception to the general rule that the term “liability” includes injunctive relief because courts do not categorically bar injunctions under section 402A and do not construe it to limit plaintiffs to recovery for monetary damages. Instead, when interpreting this provision, courts have repeatedly found that injunctions are not categorically barred, but rather that they are not the most appropriate remedy in such cases. *Id.* (first citing *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 266 (D.D.C. 1990); and then *Rhynes v. Stryker Corp.*, No. 10-5619 SC, 2011 WL 2149095, at \*3 (N.D. Cal. May 31, 2011)).

216. *See supra* Parts III.A, III.B (discussing the California Supreme Court opinions in *Hassell* and *Barrett*, which overturned the California Court of Appeal in both cases and provided persuasive justifications for doing so).

217. *See supra* Parts II.D, II.E.

218. *See supra* Part II.

While the harm done in *Hassell* was minimal, a relatively tame Yelp review stayed online, other similar cases have had more tragic results. For example, in *Batzel v. Smith*,<sup>219</sup> the plaintiff, Batzel, was accused by a disgruntled contractor of possessing art stolen by the Nazis in World War II and of being a descendant of Heinrich Himmler.<sup>220</sup> The contractor provided this false information to an art theft website that then published the allegation.<sup>221</sup> The post, despite being demonstrably false, severely damaged Batzel's personal and professional reputation.<sup>222</sup> However, Batzel was barred from recovering from the art theft website despite its active role in publishing the unverified and malicious post.<sup>223</sup>

In another disturbing case, an individual created a fake dating profile on Matchmaker.com posing as the actress Christianne Carafano (more commonly known by her stage name Chase Masterson).<sup>224</sup> The profile featured Carafano's home address and some personal information about her.<sup>225</sup> It also included a fake "Q&A" in which the imposter, posing as Carafano, wrote that she "was looking for a 'hard and dominant' man with 'a strong sexual appetite' and that she 'liked sort of be[ ]ing controlled by a man, in and out of bed.'"<sup>226</sup> When other users sent private messages to the profile, they received automated responses that included Masterson's home phone number.<sup>227</sup> Masterson received various threatening messages on her phone as well as the following fax:

CHASE, GOOD NEWS HORNY BITCH! I WILL GIVE  
YOU THE FUCK OF YOUR LIFE! BUT FIRST I WILL  
ELIMINATE YOUR CHILD THAT GETS YOUR WET  
PUSSY IN HEAT. I KNOW WHERE YOU ARE. I'LL  
FIND YOU. IF YOU TRY TO ESCAPE. A PERSON LIKE

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219. 333 F.3d 1018 (9th Cir. 2003), *superseded in part by statute on other grounds*, S.B. 515, 2003–2004 Sess. (Cal. 2003), CAL. CIV. PROC. CODE § 425.17(e) (Deering 2020).

220. KOSSEFF, *supra* note 3, at 105–06.

221. *Batzel*, 333 F.3d at 1022.

222. KOSSEFF, *supra* note 3, at 106–08.

223. *Batzel*, 333 F.3d at 1030–31 (court finding that the art theft website qualified as a provider or user of an interactive computer service); *see Doe v. GTE Corp.*, 347 F.3d 655, 655 (7th Cir. 2003).

224. KOSSEFF, *supra* note 3, at 115–16.

225. *Id.* at 116.

226. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121 (9th Cir. 2003) (alteration in original).

227. KOSSEFF, *supra* note 3, at 116–17.



YOU IS EASY PREY FOR ME. . . IT'S HUNT SEASON!<sup>228</sup>

Deeply disturbed by the threat, Carafano fled her home to protect herself and her son.<sup>229</sup> She then tried to have the profile deleted, but the website initially refused to remove it.<sup>230</sup> Carafano sued.<sup>231</sup> But section 230 barred her cause of action from proceeding, and the website prevailed on summary judgment.<sup>232</sup>

These sorts of cases are far from rare,<sup>233</sup> and they expose a drawback of section 230's protections. The cost of a vibrant, unfettered marketplace of ideas and entrepreneurship online fostered by section 230 is that it leaves persons targeted by malicious actors online without remedy or recourse for trauma and irreparable harm.

#### D. Proposed Modifications to Section 230

Given the downsides of section 230's immunity, there has been no shortage of proposals to modify the statute. For example, academic commentators suggest various legislative changes to address some of the problems section 230 created.<sup>234</sup> One such proposal is to repeal section 230 and apply the common-law principles of defamation law to online defamation.<sup>235</sup>

Proponents of this approach argue that the common law provides better remedies for plaintiffs and places the internet on a level playing field with radio, TV, and print news.<sup>236</sup> However, these arguments do not take into account the concern that companies, subject to the

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228. *Id.* at 115–16 (quoting Appellant's Opening Brief at 5–6, *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003) (No. 02-55658)).

229. *Id.* at 117.

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

231. *Id.*

232. *Id.* at 1125.

233. *See, e.g.*, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 17–29 (1st Cir. 2016) (denying plaintiff recovery against Backpage.com when plaintiff demonstrated that she was trafficked through an advertisement posted on the Backpage website); *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (immunizing GTE Corp. from liability for hosting a website that contained surreptitiously recorded videos of male athletes changing in a locker room); *Doe v. MySpace, Inc.*, 528 F.3d 413, 415 (5th Cir. 2008) (dismissing plaintiff's claim against defendant MySpace.com which alleged that MySpace.com was negligent because it failed to verify plaintiff's age before she joined the site).

234. *See, e.g.*, Heather Saint, Note, *Section 230 of the Communications Decency Act: The True Culprit of Internet Defamation*, 36 LOY. L.A. ENT. L. REV. 39, 66 (2015) (recommending return to the common law approach to defamation liability online); Spiccia, *supra* note 172, at 413.

235. *See* Saint, *supra* note 234, at 66; Jeweler, *supra* note 65, at 1, 3.

236. Jeweler, *supra* note 65, at 23 (noting that “the common law framework would best serve the . . . Internet . . . without totally precluding recovery for defamation [online]”).

uncertain boundaries of judge-made law, would, as experts in the 1990s predicted, either completely discontinue monitoring content to hide behind distributor protections or, in the alternative, engage in massive censorship.<sup>237</sup> Another risk that might stem from this approach is that it might not even expand remedies for plaintiffs because providers and users of interactive computer services that refuse to moderate, the most natural areas for malicious actors to congregate online, would still be protected from liability as they would qualify as “distributors” under the common-law framework.<sup>238</sup>

Another problem with eliminating section 230 protections is that doing so would likely pose a significant danger to internet commerce. In fact, one study estimated that a reduction in intermediary protections online, like section 230, would destroy hundreds of thousands of jobs and billions of dollars in value.<sup>239</sup>

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237. Matt Laslo, *The Fight Over Section 230—and the Internet as We Know It*, WIRED (Aug. 13, 2019, 3:18 PM), <https://www.wired.com/story/fight-over-section-230-internet-as-we-know-it/> (explaining that one of the arguments put forth in support of enacting section 230 was that without it “companies could be held responsible for *all* the content . . . users posted simply because they moderated some of it” and that if they were held liable, “they wouldn’t moderate anything at all”); cf. KOSSEFF, *supra* note 3, at 272 (explaining that a “knowledge” based view of liability under section 230 would result in either mass censorship or a dialing down of moderation). Most significantly, the hypothesis that eliminating immunity protections under section 230 would result in censorship was tested and largely proved true in 2016 following the passage of the Stop Enabling Sex Traffickers Act and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA-SESTA). FOSTA-SESTA created a carveout to immunity under section 230 for providers of interactive computer services that “knowingly assist[ed], support[ed], or facilitate[ed]” sex trafficking online. KOSSEFF, *supra* note 3, at 270. The result was that even large platforms like Craigslist, Reddit, Tumblr, Microsoft and Google shut down pages, deleted material, and put in place auto-detection filters to ban *legal* sexual content because of the risk that they could be held liable for sex trafficking under the carveout. See Paris Martineau, *Tumblr’s Porn Ban Reveals Who Controls What We See Online*, WIRED (Dec. 4, 2018, 2:07 PM), <https://www.wired.com/story/tumblrs-porn-ban-reveals-controls-we-see-online/> (explaining why Tumblr responded to FOSTA-SESTA by barring pornography); see also Samantha Cole, *Craigslist Just Nuked Its Personal Ads Section Because of a Sex-Trafficking Bill*, VICE (Mar. 23, 2018, 5:18 AM), [https://www.vice.com/en\\_us/article/wj75ab/craigslist-personal-ads-sesta-fosta](https://www.vice.com/en_us/article/wj75ab/craigslist-personal-ads-sesta-fosta) (stating that Craigslist eliminated its “Personals” section in response to FOSTA-SESTA); Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (July 2, 2018, 1:08 PM), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom> (addressing Reddit’s decision to delete multiple subreddits, Google’s choice to delete content directly from Drive accounts, and Microsoft’s addition of auto-deletion features to Skype in response to FOSTA-SESTA).

238. See *supra* Part II.B (explaining that publisher liability does not apply to parties that publish but do not exercise editorial control over content); see also Jonathan A. Friedman & Francis M. Buono, *Limiting Tort Liability for Online Third-Party Content Under Section 230 of the Communications Act*, 52 FED. COMM’NS L.J. 647, 651 (2000) (noting that distributors are not liable unless they know or have reason to know that content is defamatory).

239. Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections*, INTERNET ASS’N 2 (June 5, 2017), <https://internetassociation.org/wp->

Another concern with returning to the common-law framework is that doing so would impose a heavy burden on providers and users of interactive computer services to moderate content. Facebook, for example, already hires over ten thousand people to police and delete material on its platform.<sup>240</sup> If sites like Facebook could be sued for all defamatory content posted by users, they might struggle to sustain themselves in their current forms.

Given the problems with a return to the common-law framework, others argue that the proper strategy to better protect plaintiffs under section 230 is to leave the statute in place but add a “notice and takedown provision,” like that included in the Digital Millennium Copyright Act (DMCA).<sup>241</sup> These commentators argue that such a provision would provide better remedies for victims of online defamation as it would permit them to petition providers and users of interactive computer services to remove content that petitioners find objectionable.<sup>242</sup>

While this proposal probably creates fewer risks than a return to the common law, it is also problematic. Under the existing DMCA takedown provisions, providers of internet services must comply with “valid” removal requests by rights holders in order to retain protection from copyright lawsuits.<sup>243</sup> This leads to the removal of allegedly infringing content by technology platforms and websites without any formal adjudication as to whether the content actually infringes upon intellectual property.<sup>244</sup> Accordingly, the DMCA significantly impacts

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content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf.

240. Anita Balakrishnan, *Facebook Pledges to Double Its 10,000-Person Safety and Security Staff by the End of 2018*, CNBC (Oct. 31, 2017, 7:59 PM), <https://www.cnbc.com/2017/10/31/facebook-senate-testimony-doubling-security-group-to-20000-in-2018.html> (last updated Nov. 1, 2017, 9:26 AM).

241. See David E. Hallett, Article, *How to Destroy a Reputation and Get Away With It: The Communication Decency Act Examined: Do the Policies and Standards Set Out in the Digital Millennium Copyright Act Provide a Solution for a Person Defamed Online?*, 41 IDEA 259, 279–80 (2001); Alison Virginia King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 878 (2010); see also Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C. and 28 U.S.C.).

242. King, *supra* note 241, at 878.

243. Jonathan Band & Matthew Schruers, *Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act*, 20 CARDOZO ARTS & ENT. L.J. 295, 304–05 (2002); see 17 U.S.C. § 512(c)(1)(C) (2018).

244. Wendy Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 173–74 (2010). For a concrete example of this kind of violation, the McCain/Palin campaign, see *id.* at 174.

speech online, particularly in areas where First Amendment law is unclear, and service providers must make a difficult judgment as to whether to take down content.<sup>245</sup>

A similar provision in section 230 would likely result in the same problem emerging again, but in an area of the law, defamation, where litigious plaintiffs have a strong incentive to eliminate speech that they find objectionable or critical. The result of this approach would be that the duty of adjudicating defamation online would fall into the hands of providers and users of interactive computer services who, confronted with the unenviable task of making difficult determinations about the legality of purportedly defamatory content, would almost certainly overcensor and cave to the demands of well-resourced plaintiffs.<sup>246</sup> Accordingly, this solution, although appealing in its ability to protect plaintiffs, poses a threat to free expression online.

Another proposed solution is to adopt the proposal above but with the caveat that takedown requests be subject to government oversight.<sup>247</sup> For example, one commentator proposed that section 230 should include, in addition to a provision authorizing takedown of content, a section requiring the Federal Communications Commission to review takedown requests.<sup>248</sup> Those supporting this position argue that this extra layer of protection for online speech would ensure that aggressive plaintiffs could not remove legitimate but unpopular online content because an independent adjudicator, not subject to pressures easily foisted on providers and users of interactive computer services, would be required to review removal requests and delete material only if the adjudicator finds that the material could “*reasonably* be deemed defamatory.”<sup>249</sup> This proposal is also an appealing approach. However, it runs contrary to one of the foundational aims of section 230—to ensure freedom of expression online and to guarantee that federal officials do not determine what constitutes legitimate speech.<sup>250</sup> This proposal might also run into a constitutional gray area

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245. *Id.* at 177–78 (arguing that the DMCA operates as a “prior restraint by proxy” under which rights holders are often able to obtain the removal of allegedly infringing content even in cases where the content is not infringing on intellectual property).

246. *See supra* note 237.

247. Spiccia, *supra* note 172, at 413.

248. *Id.*

249. *Id.*

250. *See* 141 CONG. REC. 22045 (1995) (statement of Rep. Cox).

because it could result in removal of speech without any adjudicative proceeding beforehand.<sup>251</sup>

In addition to the academic commentators who have proposed changes to section 230, some politicians also advocate for significant adjustments to the statute. For example, Senator Josh Hawley of Missouri introduced a bill in the Senate in 2019 that seeks to eliminate section 230 immunity for large providers of interactive computer services, unless government audits find their content-removal practices to be “politically neutral.”<sup>252</sup>

Although this approach appears to work to ensure that content online is not defamatory, it may also be a problematic solution in light of section 230’s intent and has run into significant opposition from free speech advocates as well as industry groups.<sup>253</sup> By leveraging immunity against a determination of political neutrality established by government audits, it is also at odds with the spirit of section 230, which was written, in part, to keep government regulators from policing content online.<sup>254</sup> Another point to flag is that, because this solution retains immunity for “neutral” platforms, it still does not enhance the remedies for plaintiffs defamed on platforms that fit within the government’s definition of neutrality.

### E. *An Alternative Solution*

The discussion in section D of various proposals to modify section 230 suggests that many of the proposed changes to the statute

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251. Seltzer, *supra* note 244, at 175 (discussing why the DMCA take-down provisions (which this proposal mirrors) may be an illegal prior restraint on speech because it allows removal of content online without a “judicial determination of its infringing nature”).

252. *Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, JOSH HAWLEY U.S. SENATOR FOR MO. (June 19, 2019), <https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies>.

253. Peter Suderman, *The Moral Scolds of the New Illiberal Rights Are Coming for Your Internet*, REASON (June 25, 2019, 10:44 AM), <https://reason.com/2019/06/25/the-moral-scolds-new-illiberal-right-internet-hawley-230/>; Elizabeth Nolan Brown, *Josh Hawley Introduces Bill to Put Washington in Charge of Internet Speech*, REASON (June 19, 2019, 12:05 PM), <https://reason.com/2019/06/19/josh-hawley-introduces-bill-to-put-washington-in-charge-of-internet-speech/>.

254. 141 CONG. REC. 22045 (1995) (statement of Rep. Cox) (“Some have suggested . . . that we take the Federal Communications Commission and turn it into the Federal Computer Commission, that we hire even more bureaucrats and more regulators who will attempt, either civilly or criminally, to punish people by catching them in the act of putting something into cyberspace. Frankly, there is just too much going on on the Internet for that to be effective. No matter how big the army of bureaucrats, it is not going to protect my kids because I do not think the Federal Government will get there in time.”).

are “big picture” solutions that propose major modifications to the statute. As a result, these solutions create substantial risks in terms of their ability to impact the internet’s commercial ecosystem that forms an integral part of the American economy.<sup>255</sup> Accordingly, this Note proposes a modification to section 230 that is more modest than those described above. This proposal incorporates the lessons learned from case law discussed in this Note.

This proposal provides plaintiffs who have prevailed in court on defamation claims the right to enforce their legitimately obtained remedies. It also requires that the claims endure the scrutiny of formal court proceedings before any liability may be imposed. These features allow this proposal to avoid infringing upon speech rights online and to avoid subjecting providers and users of interactive computer services to burdensome litigation. Unlike some of the other proposals discussed in this Note, this proposal also averts the danger of governmental overreach in the regulation of speech online—one of the fundamental policy objectives of section 230.<sup>256</sup>

The proposal suggests adding the following provision to section 230. For reasons of convenience, the added provision assumes a position near the bottom of the statute, below the current subsection (e) but in place of the current subsection (f). The current subsection (f) would become subsection (g).

**(f) Removal of Content Posted by a Third Party**

(1) **Injunctive Relief:** 42 U.S.C. § 230 shall not be read to prevent a plaintiff that brings a cause of action for defamation against an information content provider from, in that action, obtaining injunctive relief against a provider or user of an interactive computer service when the provider or user of the interactive computer services has been given reasonable notice of the action against the information content provider, and the injunctive relief requires the provider or user of the interactive computer services to remove—

(A) content adjudged to be defamatory in a proceeding described in section (f)(1); or

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255. See Dippon, *supra* note 239.

256. See *supra* note 254.

(B) content substantially identical to content already adjudged to be defamatory in a proceeding described in section (f)(1).

(2) **Limits on Relief:** The injunctive relief described in subsection (f) shall have no force against a provider or user of interactive computer services, unless—

(A) the party that obtained the injunction takes reasonable steps to obtain removal of the defamatory content by the third-party information content provider and

(B) demonstrates, after taking reasonable steps to procure removal by the information content provider, that the information content provider is unable or unwilling to remove the content or that the information content provider removed it and reposted it.

(3) **Right to Appeal:** Should a provider or user of an interactive computer service wish to challenge the validity of the injunctive relief obtained in a proceeding described in subsection (f)(1), the provider or user shall have the privilege to do so and may exercise that privilege only by filing an appropriate motion with the appropriate court within 30 days of notice of the order demanding removal of the content.

This additional subsection, subsection (f), enhances plaintiffs' abilities to enforce a judgment that content is defamatory. It also ensures that providers and users of interactive computer services are not pressured to overmoderate content online. By providing appellate rights to providers and users of interactive computer services under (f)(3), it also guarantees that the due process rights of providers and users of interactive computer services are protected, and that the statute does not operate as an unconstitutional prior restraint.

### 1. Subsection (f)(1) Explained

Subsection (f)(1) of the proposed amendment encapsulates, in large part, the court of appeal's decision in *Hassell*. Although the court of appeal may have misconstrued the text of section 230 as it is currently written, the result of the *Hassell* supreme court decision, as well as cases like *Carafano*, *Batzel*, and numerous others show the statute creates dangerously broad immunity for malicious persons posting content online. An adjustment to the statute, like the one suggested here, averts the problematic consequences of the *Hassell*

decision by allowing plaintiffs to obtain orders against providers and users of interactive computer services demanding that they take down content when a court makes a finding, in an action against a third-party information content provider, that the content is defamatory. This rule better balances the need for immunity for providers and users of interactive computer services with the needs of individual plaintiffs to be protected from malicious actors. Moreover, it provides remedies for plaintiffs like *Batzel* and the *Hassell* without subjecting providers and users of interactive computer services to burdensome litigation that stems from actions seeking damages.

Another important component to this subsection is the clause requiring notice to the provider or user of interactive computer services as to the existence of the action against the third-party information content provider. This provision ensures that these providers are protected from unexpected orders with which they cannot quickly comply. It also works to assail some of the concerns raised by the dissenting and concurring justices in *Hassell* who worried that allowing injunctions to run to non-parties might be a violation of due process.<sup>257</sup> By giving providers and users of interactive computer services notice and an opportunity to be heard, this subsection protects providers and users of interactive computer services from judgments that might unfairly obligate them to remove content. It also serves to safeguard judgments from collateral and direct attack.

Subsection (f)(1)(B) protects plaintiffs in cases where bots or other users post hundreds or thousands of similar messages—and those messages are adjudged defamatory or otherwise illegal—or where third-party information content providers continue to post new but similar defamatory content despite a judgment against them. Bots and other automated posts, by way of their ability to proliferate content quickly, pose significant challenges to persons seeking to remove illegal defamatory content once it has been released. This provision gives victims of defamation broader rights against providers and users of interactive computer services and would hopefully give judicial

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257. See *Hassell III*, 420 P.3d 776, 794 (Cal. 2018) (Kruger, J., concurring) (stating that due process bars an injunction from binding a nonparty); *id.* at 824–25 (Cuéllar, J. dissenting) (recommending that the case be remanded to the trial court so that it might determine whether the injunction should run to Yelp).



findings of defamation increased force in their ability to protect people targeted online.

To protect First Amendment rights, subsection (B) also specifies that additional content, posted after a defamation suit, cannot be removed unless it is “substantially identical” to content adjudged to be defamatory. By including the language “substantially identical,” subsection (B) subverts potential criticism under the prior restraint doctrine. In *Balboa Island Village Inn, Inc. v. Lemen*,<sup>258</sup> the California Supreme Court permitted an injunction against a defendant’s defamatory speech that prohibited the defendant from repeating additional statements that “were determined at trial to be defamatory.”<sup>259</sup> By providing that the statements must be “substantially identical” to content previously adjudged to be defamatory, subsection (B) remains within the purview of relief permitted by the *Balboa Island Village Inn, Inc.* court and thus remains constitutionally sound.

## 2. Subsection (f)(2) Explained

Section (f)(2) bars plaintiffs from enforcing an injunction obtained against a provider or user of an interactive computer service before first taking reasonable steps to obtain compliance with the removal order by an information content provider. By placing a barrier between the providers and users of interactive computer services and successful plaintiffs, this provision helps ensure that providers and users of interactive computer services are not subject to burdensome demands—a concern raised by the drafters of section 230.<sup>260</sup>

## 3. Subsection (f)(3) Explained

Subsection (f)(3) serves two purposes. First, it provides protections, in addition to those included in subsection (f)(1), for the due process rights of providers and users of interactive computer services that end up subject to injunctions under the statute. Second, it protects against the concern, raised in *Hassell*, that allowing plaintiffs to sue posters of content to obtain injunctions against providers or users of interactive computer services incentivizes plaintiffs with substantial resources to sue content providers who cannot afford to

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258. 156 P.3d 339 (Cal. 2007).

259. *Id.* at 353.

260. *See supra* Part III.A.

defend their truthful comments and, because of their lack of resources, take default judgments.<sup>261</sup> The provision stating that an information content provider may “challenge the validity of the injunctive relief . . . by filing an appropriate motion with the appropriate court within 30 days of notice of the order demanding removal of the content”<sup>262</sup> operates to ensure that third-party information content providers are protected by an additional set of resources, those of the provider or user of interactive computer services.

#### IV. CONCLUSION

Much of this Note focused on the argument that California courts correctly construed section 230’s protections—an important insight for those seeking to enforce and understand the statute as it currently exists. However, a sizeable portion also focused on the problems posed by this interpretation of the statute—namely that it creates too large of an impediment to the rights of people targeted by bad actors online. Many of the proposals to correct this problem do not give enough deference to the importance of section 230’s protections and instead advise repeal of the statute in favor of common-law principles or propose a substantial overhaul of the statute. These approaches create serious risks to industry and commerce online, which are vital economic forces in the twenty-first century. Instead of arguing that we should rewrite section 230, this Note advocated for a different approach that proposed only slight tweaks to the statute in order to bring it into line with the ideals that it was written to achieve.

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261. This provision would likely produce the specified result by allowing third-party information content providers to request that providers or users of an interactive computer services defend information content providers’ posts. If a provider or user of an interactive computer service agreed to defend the post, the information content provider might then share with the provider or user of the interactive computer service evidence relevant to a defense on appeal. The provider or user of interactive computer services would then have the right to make an independent determination as to whether to involve itself in the litigation and assert its own due process rights to protect the content on its website. If a judgment appears problematic, a company like Yelp or Twitter would have an incentive to appeal in order to protect the integrity of reviews and other valuable content that brings traffic to its platform.

262. *See supra* Part III.E.