



7-24-2022

Balancing Interests Under Section 230(c) of the Communications Decency Act: Using the Sword as Well as the Shield

Andrew R. Klein

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>

Recommended Citation

Andrew R. Klein, *Balancing Interests Under Section 230(c) of the Communications Decency Act: Using the Sword as Well as the Shield*, 55 Loy. L.A. L. Rev. 645 (2022).

Available at: <https://digitalcommons.lmu.edu/llr/vol55/iss3/1>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

BALANCING INTERESTS UNDER SECTION 230(C) OF THE COMMUNICATIONS DECENCY ACT: USING THE SWORD AS WELL AS THE SHIELD

*Andrew R. Klein**

Perhaps no existing law faces more scrutiny than Section 230(c) of the Communications Decency Act (“Section 230(c”). At one level, it is a simple edict: “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.” At another level, the law packs a punch. As author Jeff Kosseff put it in the title of his recent book, Section 230(c) contains “the twenty-six words that created the Internet.”

Enacted a quarter century ago to support a nascent industry, the law provides expansive immunity for internet companies that post third-party content online. The consequences have provoked strong criticism from both sides of the political aisle. Those on the left assert that Section 230(c) allows large tech companies to profit from conduct that causes harm. Those on the right argue that it gives social media companies license to engage in viewpoint discrimination. Even one of the law’s original authors, Senator Ron Wyden, recently criticized Section 230(c), calling out tech companies’ lack of interest in self-moderation and warning that if “you don’t use the sword, there are going to be people coming for your shield.”

An increasing number of commentators contend that it is time to rethink Section 230(c). This Article joins the fray by considering some of its applications that have flown under the radar, including several cases with fact patterns that have engendered frustratingly inconsistent decisions. In these cases, judges encounter situations where a defendant’s own conduct is at play—activity beyond simply republishing content. Although this would seem to take such claims outside Section 230(c)’s purview, some courts continue to apply immunity nonetheless, elevating concerns about chilling online activity above all else. The Article takes issue

* Paul E. Beam Professor of Law, Indiana University McKinney School of Law. Thanks to Professor Michael D. Green for pointing me to this topic and supporting my efforts at developing it. Thanks also to my colleagues Professors Florence Roisman and R. George Wright for reviewing earlier drafts of the paper. Finally, special thanks to Patrick Sanders (Indiana University McKinney Law ‘21) and Sloan Schafer (Indiana University McKinney Law ‘22) for their outstanding research assistance.

with those decisions, noting their conflict with analogous principles of secondary liability and expressing skepticism that broad immunity is necessary to serve the statute's policy of encouraging activity on the internet. The Article also proposes a better way for courts to balance interests, drawing parallels to well-established defamation law principles that weigh plaintiffs' ability to protect reputational interests against concerns about chilling speech.

TABLE OF CONTENTS

I. INTRODUCTION	648
II. SECTION 230(C) AND THE BREADTH OF IMMUNITY	652
A. Underlying Policy	652
B. An Example: <i>Fair Housing Council v. Roommates.com</i>	655
C. A Problem: Linking Conduct and Policy	658
1. Secondary Liability	658
2. Chilling	660
III. INCONSISTENT APPLICATIONS	663
A. The Snapchat Cases	664
B. The Ripoff Report Cases	669
C. Taking Stock	673
IV. AN ANALOGY: BALANCING INTERESTS AND THE BURDEN OF PROOF	675
V. CONCLUSION	680

I. INTRODUCTION

In his book *The Twenty-Six Words That Created the Internet*,¹ Jeff Kosseff describes a scene that seems almost quaint. The place was Washington, D.C., the year 1995. People gathered in person instead of online. Partisans “did lunch,” seeking common ground on issues where colleagues had not yet formed hardened views.² Republican U.S. Rep. Chris Cox of California and Democratic U.S. Rep. (now Senator) Ron Wyden of Oregon were prime examples.³ The pair enjoyed a friendship built on a mutual interest in leading-edge issues and a desire to find forward-looking solutions.⁴ In early 1995, their conversations turned to a recent New York state judicial opinion, *Stratton Oakmont, Inc. v. Prodigy Services Co.*,⁵ in which a court found an internet service provider responsible for defamatory statements that an anonymous user posted on its site.⁶

Cox and Wyden worried that widespread adoption of *Stratton Oakmont*'s holding would hamper growth of the nascent internet industry.⁷ They contemplated a different approach, one that would create incentives for companies to moderate online content without overregulation that might stymie innovation.⁸ The issue is familiar today, but it was not a quarter century ago. As Kosseff wrote, “[i]t was the rare type of problem that was so under the radar that Cox and Wyden could start from scratch on crafting a solution.”⁹ Even better, the pair had a window of opportunity, having identified the issue at exactly the time Congress was overhauling the Communications Act of 1934.¹⁰

Internet activity was far from the center of Congress's mid-1990s communications debate. Legislators were more concerned about long-

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

2. *Id.* at 58.

3. *Id.* at 57–59.

4. *Id.* at 58–59.

5. No. 031063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

6. *Id.* at *4–5. The court based its ruling not on Prodigy's approval of what others wrote, but rather on its failure to adequately moderate the content. *Id.*; see *infra* notes 45–47 and accompanying text; Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 *FORDHAM L. REV.* 401, 405 (2017); *infra* Section II.A.

7. KOSSEFF, *supra* note 1, at 60.

8. *Id.*

9. *Id.*

10. *Id.* Others have detailed Cox and Wyden's efforts from that time. See, e.g., 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, 378–81 (2010). This Article briefly recounts the story here simply to set the stage.

distance telephone fees than website postings.¹¹ To the extent that some were thinking about online activity, they had different concerns. Notably, Senator James Exon of Nebraska had introduced legislation aimed at imposing criminal penalties on those who knowingly made “indecent” material available to minors.¹² By contrast, Cox and Wyden sought to limit the possibility of sanctions in favor of an approach that would create space for “individuals and companies to set their own standards.”¹³

“We really were interested in protecting the platforms from being held liable for the content posted on their sites and being sued out of existence,” Wyden said. “And we were interested in allowing the platforms to take down some content that they believe shouldn’t be on their site without being held liable for all the content on the site, so that you could really encourage responsible behavior.”¹⁴

Just two weeks after the Senate added Senator Exon’s proposal to the larger telecommunications bill—and only five weeks after a New York trial court decided *Stratton Oakmont*—Cox and Wyden introduced the Internet Freedom and Family Empowerment Act in the House.¹⁵ This proposal had two components, one that shielded providers or users of online services from liability for taking good faith steps to restrict access to objectionable material,¹⁶ and another that became the twenty-six words that changed the internet¹⁷: “No provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider.”¹⁸

11. KOSSEFF, *supra* note 1, at 61 (“At the time, the primary focus of the telecommunications law debate was allowing the Baby Bell telephone companies to offer long-distance service in exchange for letting competitors use their lines to offer competing local service. The Internet was a shiny new object, but online platforms were largely an afterthought.”).

12. *Id.* at 62–64 (explaining how Exon’s proposal became the Communications Decency Act of 1995).

13. *Id.* at 63; see Citron & Wittes, *supra* note 6, at 405–06.

14. KOSSEFF, *supra* note 1, at 64.

15. *Id.*; see Citron & Wittes, *supra* note 6, at 406.

16. KOSSEFF, *supra* note 1, at 64–65; 47 U.S.C. § 230(c)(2) (2018) (“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 (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).”).

17. KOSSEFF, *supra* note 1, at 64.

18. 47 U.S.C. § 230(c)(1).

Cox and Wyden's intent was clear. They sought to encourage online activity through robust liability protection for internet service providers.¹⁹ Their bill drew little opposition and garnered scant media attention.²⁰ In the broader context of debate over the Communications Act, it "was a footnote,"²¹ relevant to an industry that was a small fraction of its size today.

During the next few months, the Senate and House worked on separate versions of a revised Communications Act. Regarding the internet proposals, the Senate version contained Exon's amendment; the House version contained Cox and Wyden's.²² Eventually, a conference committee compromised, including both proposals in the final legislation.²³ The provisions took the title of Exon's original bill and became known collectively as the Communications Decency Act.²⁴ In February of that year, both chambers of Congress passed the Telecommunications Act of 1996, including the Communications Decency Act.²⁵ A week later, President Bill Clinton signed it into law.²⁶ That same day, a group of civil rights advocates filed suit challenging Exon's provision as violating the First Amendment to the U.S. Constitution.²⁷ A lower court agreed,²⁸ and about a year later, the U.S. Supreme Court unanimously affirmed.²⁹ All that remained of the Communications Decency Act was Cox and Wyden's liability shield for a growing and dynamic group of entities.

In the intervening twenty-five years, numerous courts have interpreted the language of section 230(c) of the Communications Decency Act ("Section 230(c)"), many viewing the statute quite broadly and protecting internet companies from liability for the consequences of online postings from the mundane to the horrific.³⁰ At the same time,

19. KOSSEFF, *supra* note 1, at 67; Benjamin Volpe, Comment, *From Innovation to Abuse: Does the Internet Still Need Section 230 Immunity?*, 68 CATH. U. L. REV. 597, 600 (2019) ("[Section] 230 of the Act remains as a declaration of Congress's 1996 policy choice to make the internet free and unregulated."); see *infra* note 51 and accompanying text (listing policies behind section 230).

20. KOSSEFF, *supra* note 1, at 67.

21. *Id.* (citing interview with Jerry Berman, June 23, 2017).

22. *Id.* at 70.

23. *Id.* at 71–72.

24. *Id.* at 72.

25. *Id.* at 73.

26. *Id.*

27. *Id.* at 74.

28. *Id.* at 74–75.

29. *Reno v. Am. C.L. Union*, 521 U.S. 844, 885 (1997).

30. See *infra* notes 53–57 and accompanying text.

the internet grew in a way that few could have imagined. Today, “providers of interactive computer services” are not a collection of under-the-radar start-ups and entrepreneurs. Some are economic and cultural behemoths, with power perhaps unrivaled in history.³¹

The current political environment is different, too. Without making the mid-1990s appear as a pinnacle of bonhomie (it wasn’t),³² the degree of rancor in today’s Washington makes the possibility of bipartisanship and compromise illustrated by the run-up to the Communications Decency Act less likely. On the other hand, if one thing *has* unified politicians of different stripes in recent years, it is a belief that that the time has come to revisit section 230 of the Communications Decency Act (“Section 230”)—and particularly Section 230(c).

Critics come from different political perspectives. Those on the right argue that Section 230(c) gives social media companies license to engage in viewpoint discrimination.³³ Those on the left assert that it lets tech companies profit from conduct that harms others.³⁴ Even Senator Wyden has criticized Section 230(c), recently calling out tech companies’ apparent lack of interest in self-moderation and warning that if “you don’t use the sword, there are going to be people coming for your shield.”³⁵ Section 230(c) has few flat-out defenders,³⁶ and an

31. U.S. DEP’T OF JUST., SECTION 230—NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY?: KEY TAKEAWAYS AND RECOMMENDATIONS 2 (June 2020), <https://www.justice.gov/file/1286331/download> [<https://perma.cc/76KP-9X3Z>] (“The internet has changed dramatically in the 25 years since Section 230’s enactment in ways that no one, including the drafters of Section 230, could have predicted. Several online platforms have transformed into some of the nation’s largest and most valuable companies, and today’s online services bear little resemblance to the rudimentary offerings in 1996.”).

32. See STEVE KORNACKI, *THE RED AND THE BLUE: THE 1990S AND THE BIRTH OF POLITICAL TRIBALISM* 5 (2018).

33. Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 46–47 (“Today, politicians across the ideological spectrum are raising concerns about the leeway provided to content platforms under Section 230. . . . Although their assessments of the problem differ, lawmakers agree that Section 230 needs fixing.”); see, e.g., Abram Brown, *What is Section 230—and Why Does Trump Want to Change It?*, FORBES (May 28, 2020, 2:26 PM) <https://www.forbes.com/sites/abrambrown/2020/05/28/what-is-section-230-and-why-does-trump-want-to-change-it/> [<https://perma.cc/9368-RNAW>].

34. Citron & Franks, *supra* note 33, at 47; see Kashmir Hill, *A Vast Web of Vengeance*, N.Y. TIMES (Feb. 2, 2021), <https://www.nytimes.com/2021/01/30/technology/change-my-google-results.html> [<https://perma.cc/2HXJ-54FJJ>].

35. Brown, *supra* note 33.

36. There are some, however. See Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33 (2019).

increasing number of commentators have joined policymakers in suggesting new ways to interpret, if not revise, the law.³⁷

This Article joins the fray, though in a focused fashion. The Article does not propose repealing Section 230(c), nor does it highlight the law's most politically charged criticisms. Instead, the Article considers cases that have flown under the radar, including some that have engendered frustratingly inconsistent decisions.³⁸ In these cases, judges encounter situations where a defendant's *own conduct* is at play—activity apart from republishing others' content. Although this would seem to take such claims outside Section 230(c)'s purview, some courts continue to apply immunity nonetheless, elevating concerns about chilling online activity above all else. The Article takes issue with those decisions, noting their inconsistency with analogous principles of secondary liability and expressing skepticism that this degree of protection is appropriate to serve the statute's policy of encouraging activity on the internet.³⁹ The Article also does a bit more. Acknowledging the strong pull of the law's original purpose, the Article suggests ways for courts to better balance interests.⁴⁰ In particular, the Article draws parallels to well-established defamation law principles that balance plaintiffs' ability to protect reputational interests against concerns that imposing liability might chill speech.⁴¹

In the end, Section 230(c)'s twenty-six words changed the internet, but they will not be the final word on how the judicial systems handles online activity. Hopefully, this Article will be part of the conversation about what comes next.

II. SECTION 230(C) AND THE BREADTH OF IMMUNITY

A. Underlying Policy

As noted above, *Stratton Oakmont* provided the impetus for Section 230(c).⁴² The case involved a message board hosted by Prodigy,

37. See, e.g., Citron & Franks, *supra* note 33; Volpe, *supra* note 19; Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453 (2018); Annemarie Bridy, *Remediating Social Media: A Layer-Conscious Approach*, 24 B.U. J. SCI. & TECH. L. 193 (2018); Citron & Wittes, *supra* note 6.

38. See *infra* Part III.

39. See *infra* Section II.C.

40. See *infra* Part IV.

41. See *infra* Part IV.

42. See *supra* notes 5–7, 15 and accompanying text.

an early internet service provider.⁴³ An anonymous poster on that board accused Stratton Oakmont, a brokerage firm, of fraudulent activity.⁴⁴ Stratton Oakmont sued for libel, seeking to hold Prodigy responsible as the accusation's publisher⁴⁵ in line with the doctrine that makes traditional media responsible for disseminating third-party statements. The court accepted Stratton Oakmont's argument, noting that Prodigy, having exercised editorial control in its forums and screening for offensive language, was not a passive conduit of information.⁴⁶ Ironically, this made Prodigy liable for trying to moderate content (albeit unsuccessfully) when it would have been immune had it done nothing at all.⁴⁷

Proponents of what became Section 230(c) wanted to overturn *Stratton Oakmont*⁴⁸—and more.⁴⁹ They hoped the new law would serve not only to prevent a chilling effect on speech, but also cultivate a favorable environment for internet commerce more broadly.⁵⁰ Ultimately, subsection (b) of Section 230 set out this policy quite clearly:

43. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 031063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

44. *Id.* at *1.

45. If the court had determined that Prodigy was a distributor, rather than a publisher, it would not have been liable for harm caused by the third-party poster. *See id.* at *3 (“[D]istributors such as book stores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue. A distributor, or deliverer of defamatory material is considered a passive conduit and will not be found liable in the absence of fault.” (citations omitted)).

46. *Id.* at *6.

47. *See Citron & Wittes, supra* note 6, at 405 (“The coup de grâce was that Prodigy lost its protection as a distributor and gained liability as a publisher because it had tried to remove objectionable material but had done so incompletely.”). The *Stratton-Oakmont* court distinguished an earlier federal court decision, *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), where the court concluded that an Internet service provider that did not exercise editorial control over postings was akin to a distributor under traditional standards. *Stratton Oakmont*, 1995 WL 323710, at *4 (discussing *Cubby*, 776 F. Supp. at 139–40).

48. “One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers . . . as publishers or speakers of content that is not their own because they have restricted access to objectionable material.” H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.), as reprinted in 1996 U.S.C.C.A.N. 10 (Leg. Hist.).

49. *See Citron & Wittes, supra* note 37, at 457.

50. Kosseff notes that, while Section 230 was a direct response to *Stratton Oakmont*, “there was another reason that Cox and Wyden provided such sweeping immunity. They both recognized that the Internet had the potential to create a new industry. Section 230, they hoped, would allow technology companies to freely innovate and create open platforms for user content. Shielding Internet companies from regulation and lawsuits would encourage investments and growth . . .” KOSSEFF, *supra* note 1, at 2–3; *see also* Madeline Byrd & Katherine J. Strandburg, *CDA 230 for a Smart Internet*, 88 *FORDHAM L. REV.* 405, 407 (2019) (“Traditional publisher-style screening for actionable content would have been untenable for online services that provided forums for user-driven exchanges involving large amounts of rapidly changing content. Congress also anticipated that, if relieved of liability, online service providers would develop innovative technological ‘fixes’

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.⁵¹

From the beginning, courts put great weight on Section 230's policy statements.⁵² Indeed, courts have reached "near-universal" agreement that they must interpret the statute broadly, building a "mighty fortress protecting platforms from any accountability for unlawful activity on their systems."⁵³ This includes protecting platforms that have abetted indisputably bad actors.⁵⁴ For example, courts have applied Section 230(c) immunity in civil actions against websites that facilitate child trafficking.⁵⁵ They have insulated social media companies that failed to implement measures to protect teenagers from sexual predators.⁵⁶ They have extended immunity to operators of sites used

to the content-screening problem."); Julio Sharp-Wasserman, Note, *Section 230(c)(1) of the Communications Decency Act and the Common Law of Defamation: A Convergence Thesis*, 20 COLUM. SCI. & TECH. L. REV. 195, 203 (2018) (explaining that Section 230(c) was passed to protect freedom of speech on the Internet, remove disincentives to voluntary private censorship, and encourage the development of Internet commerce generally).

51. 47 U.S.C. § 230(b) (2018).

52. The statute does exclude certain areas, specifically stating that it has "no effect" on a variety of other laws, including those relating to intellectual property and criminal sex trafficking. *Id.* § 230(e).

53. Citron & Wittes, *supra* note 37, at 458.

54. *Id.* at 455.

55. See *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015), *aff'd sub nom. Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).

56. See *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008).

by terrorists to organize attacks.⁵⁷ One could go on, but in short, the result is immunity that some view as “far more sweeping than anything the law’s words, context, and history support,”⁵⁸ primarily in the name of preventing the chilling of activity online.

B. An Example: Fair Housing Council v. Roommates.com

To better understand this dynamic, consider *Fair Housing Council v. Roommates.com*,⁵⁹ a well-known Ninth Circuit decision from 2008. *Roommates* provides a good jumping off point because it includes vigorous majority and dissenting opinions that display the tension between addressing harmful conduct on the internet and a fear that doing so might chill online activity, in conflict with Section 230’s goals.

In *Roommates*, the defendant operated an online marketplace for individuals seeking living arrangements.⁶⁰ The site required subscribers to create profiles, disclosing information about their gender, sexual orientation, and number of children in their households.⁶¹ The defendant guided input of this information by providing a drop-down menu directing users to select these demographic criteria.⁶² The plaintiffs⁶³ sued, alleging that the defendant’s system violated the Fair Housing Act⁶⁴ (FHA). A district court judge granted the plaintiffs’ motion for summary judgment, concluding that the defendant ran afoul of the FHA by prompting subscribers to enter unlawful preferences,⁶⁵ publishing those preferences, and then matching users based on their

57. See *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964 (N.D. Cal. 2016); *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020).

58. *Citron & Wittes*, *supra* note 6, at 408; see KOSSEFF, *supra* note 1, at 65 (“[The] immunity created a new legal landscape for online services If courts were to adopt a broad reading of [Section 230(c)], the bill would create immunity that is far more expansive than the First Amendment protection for distributors under *Smith v. California*.”).

59. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

60. *Id.* at 1161.

61. *Id.*

62. *Id.* at 1165.

63. The plaintiffs in the case were the Fair Housing Councils of San Fernando Valley and the city of San Diego. *Id.* at 1161–62.

64. 42 U.S.C. §§ 3601–3619 (2018); see *Byrd & Strandburg*, *supra* note 50, at 415–16 (“Discriminatory housing advertising claims are generally evaluated based on whether an ‘ordinary reader’ of the ad would have perceived an unlawful ‘preference, limitation, or discrimination.’”).

65. *Roommates.com*, 521 F.3d at 1164. The FHA prohibits housing discrimination on the basis of “race, color, sex, familial status, or national origin” in the rental or sale of any dwelling. 42 U.S.C. § 3604(a).

answers. The defendant appealed to the Ninth Circuit, asserting Section 230(c) immunity.⁶⁶

Writing for the court's majority, Judge Alex Kozinski rejected immunity on grounds that the plaintiffs' claim focused on the defendant's own conduct rather than just re-publication of subscriber content. Kozinski reasoned: "The CDA does not grant immunity for inducing third parties to express illegal preferences. *Roommate's own acts—posting the questionnaire and requiring answers to it—are entirely its doing and thus section 230 of the CDA does not apply to them. Roommate is entitled to no immunity.*"⁶⁷

In other words, the defendant did more than passively transmit information. By directing subscribers to the preset drop-down menus, the defendant helped develop their profiles,⁶⁸ thereby becoming a "content provider" every bit as much as subscribers.⁶⁹ Despite this conclusion, Judge Kozinski was not hostile to Section 230's purposes. Indeed, toward the end of the opinion, he suggested that its breadth was quite limited. "Websites are complicated enterprises," he wrote, "and there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites" ⁷⁰

66. *Roommates.com*, 521 F.3d at 1162.

67. *Id.* at 1165 (emphasis added).

68. *Id.* at 1166 ("When a business enterprise extracts such information from potential customers as a condition of accepting them as clients, it is no stretch to say that the enterprise is responsible, at least in part, for developing that information."). The court clarified a previous ruling in *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003), which involved a user impersonating a celebrity on an online dating site. The *Carafano* court suggested that a site operator could never be liable for a profile consisting of information obtained from a third party. *Id.* at 1124. The *Roommates* court stepped back from that broad assertion: "[E]ven if the data are supplied by third parties, a website operator may still contribute to the content's illegality and thus be liable as a developer. Providing immunity every time a website uses data initially obtained from third parties would eviscerate the exception to section 230 for 'develop[ing]' unlawful content 'in whole or in part.'" *Roommates.com, LLC*, 521 F.3d at 1171 (second alteration in original) (footnote omitted).

69. *Roommates.com, LLC*, 521 F.3d at 1167. The court reached the same conclusion regarding the site's search system, which sent messages to subscribers according to unlawfully discriminatory criteria. *Id.* ("If such screening is prohibited when practiced in person or by telephone, we see no reason why Congress would have wanted to make it lawful to profit from it online."). It drew the line only when addressing the site's "additional comments" section, noting that, there, information came entirely from subscribers and was displayed passively by the defendant. *Id.* at 1173–74; *see id.* at 1175 ("The message to website operators is clear: If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune.").

70. *Id.* at 1174.

The majority's opinion drew a strong dissent from Judge Margaret McKeown, who described it as "an unprecedented expansion of liability" that "threaten[ed] to chill the robust development of the Internet."⁷¹ Judge McKeown reviewed the language of Section 230(c), agreeing with Judge Kozinski that the defendant could not claim immunity if it was an "information content provider" on its own.⁷² But Judge McKeown did not focus on whether the defendant's own actions materially contributed to potentially unlawful activity. Rather, she rested her opinion squarely on the law's purpose—shielding Internet service providers from liability for activity that transmits third-party content in any way.⁷³ In Judge McKeown's view, that included the defendant's encouragement and solicitation of subscribers in this case.⁷⁴

The consequences of the majority's interpretation are far-reaching. Its position will chill speech on the Internet and impede "the continued development of the Internet and other interactive computer services and other interactive media." § 230(b)(1). . . . Putting a lid on the sorting and searching functions of interactive websites stifles the core of their services. . . . Were the websites to face host liability for this content, they "would have no choice but to severely limit its use" and "[s]heer economics would dictate that vast quantities of valuable information be eliminated from websites."⁷⁵

One might respond—yes and no. The statute's drafters clearly wanted to encourage internet activity.⁷⁶ But nothing suggests that Congress meant immunity to be absolute, and Judge McKeown's dissent avoids engaging the majority's statement about limiting the holding's scope to serve the general goal. Looking back at the opinion with the

71. *Id.* at 1176 (McKeown, J., concurring in part and dissenting in part).

72. *Id.* at 1180. This, in turn, would require the court to treat it as a "publisher" under the terms of Section 230(c).

73. *Id.* at 1177 ("[T]he CDA unambiguously demonstrate[s] that Congress intended these activities—the collection, organizing, analyzing, searching, and transmitting of third-party content—to be beyond the scope of traditional publisher liability.").

74. *Id.* at 1185 ("Even if Roommate's prompts and drop-down menus could be construed to seek out, or encourage, information from users, the CDA does not withhold immunity for the encouragement or solicitation of information.").

75. *Id.* at 1188 (alteration in original) (quoting Brief of Amici Curiae News Organizations in Support of Roommate.com, LLC at 22, *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (Nos. 04-56916, 04-57173)); *see also id.* at 1187 ("I am troubled by the consequences that the majority's conclusion poses for the ever-expanding Internet community.").

76. *Id.* at 1179.

benefit of time, the dissent's approach raises at least two underlying concerns. First, it diverges from approaches in analogous situations involving derivative liability.⁷⁷ Second, its primary justification for the divergence (stifling online activity) has not come to pass. Indeed, the internet industry is more robust than ever, raising questions about the need to push the limits of immunity. The following section addresses both points. It then moves to a discussion of two examples demonstrating how the tension remains in play today.

C. A Problem: Linking Conduct and Policy

1. Secondary Liability

In a recent law review article, Madeline Byrd and Katherine J. Strandburg analyzed Section 230(c) in the context of smart services that employ personalized data-driven models of user behavior.⁷⁸ Byrd and Strandburg focused on a narrow range of activities, notably Facebook's online ad-targeting efforts.⁷⁹ Their discussion, however, suggests an analogy that provides a useful template for examining a broader set of fact patterns, including those that involve third-party content on Internet sites.⁸⁰ In particular, Byrd and Strandburg draw parallels to the concept of secondary liability, an intellectual property law principle that "aims to enlist the assistance of large, institutionalized, deep-pocketed players in enforcing laws when enforcement against those who are directly liable is ineffective or costly."⁸¹

77. Byrd & Strandburg, *supra* note 50, at 434–35.

78. *Id.* at 405–06.

79. *Id.* at 406.

80. As noted, Byrd and Strandburg draw this parallel from online copyright infringement cases that raise similar policy issues to Section 230(c) cases. *See id.* at 429 n.141 ("[T]he immunity framework provided by CDA 230 has been referenced in the context of the Digital Millennium Copyright Act (DMCA) and the issues with a safe harbor approach to internet service provider (ISP) copyright immunity given the state of the modern internet." (citing Katherine Burkhart, Note, *Mavrix v. LiveJournal: Unsafe Harbors in the Age of Social Media*, 33 BERKELEY TECH. L.J. 1015, 1029–33 (2018))); Michal Lavi, *Evil Nudges*, 21 VAND. J. ENT. & TECH. L. 1, 71–75 (2018).

81. Byrd & Strandburg, *supra* note 50, at 429. As Byrd and Strandburg acknowledge, framing a discussion about Section 230(c) immunity through the lens of intellectual property law and secondary liability is not common. But they make a strong case that it is useful to do so. Looking back to Section 230's inception, Byrd and Strandburg note that the statute's drafters had defamation law as a "mental model" and, from that perspective, one might view publisher liability as direct. But Byrd and Strandburg suggest that the typical paradigm of a case involving Section 230(c) involves what is "effectively a form of *secondary liability* premised on actionable third-party content." *Id.* at 430 (emphasis added). Add the fact that ISPs today engage in a range of activities that the statute's drafters never envisioned, and one is left with a problematic result. In many situations, "the statute now often immunizes [ISPs] from liability for their own directly actionable conduct." *Id.* at 433 (emphasis added). As this Article contends, that makes the secondary liability analogy a useful

Viewing Internet companies as akin to “institutionalized players” and site users as those who might be “directly liable,” one can organize the concept in four different categories⁸²:

(1) . . . “[M]onitor and control” liability, exemplified by vicarious liability for those with a right, ability, or duty to control the actions of those directly liable; (2) notice-based liability; (3) liability for inducement of a third party’s actionable conduct; and (4) contributory liability based on facilitating or contributing to actionable conduct.⁸³

The *Roommates* fact pattern, for example, fits neatly into the fourth category, with the defendant *facilitating and contributing* to user activity that potentially violated the FHA.⁸⁴ This has a strong analogue in copyright infringement cases where contributory liability turns on proof that a defendant’s technology “materially contributed” to another’s unlawful infringement.⁸⁵

Byrd and Strandburg acknowledge the importance of heeding the statute’s language in drawing this analogy.⁸⁶ In other words, courts still must be mindful of whether the imposition of liability treats defendants as “publishers” or “speakers.”⁸⁷ But, more often than not, courts confronting the issue do not dwell on the statutory language and focus instead on broader concerns.⁸⁸ In other words, these courts

part of an argument that courts should reconsider Section 230(c)’s reach where plaintiffs seek to impose liability on ISPs for their own activity.

82. *Id.* at 429.

83. *Id.*

84. See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1167–68 (9th Cir. 2008) (“[W]e interpret the [statutory] term ‘development’ as referring not merely to augmenting the content generally, but to *materially contributing* to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.” (emphasis added)); see also Byrd & Strandburg, *supra* note 50, at 434 (“*Roommates.com* essentially shoehorned a contributory liability approach into the information content provider definition. The case interpreted ‘responsibility’ for developing online information in terms of whether the website’s design ‘materially contributed’ to its users’ discriminatory advertising or was a ‘neutral tool.’ This test is, of course, familiar from contributory liability.” (footnotes omitted)). Others have described the majority’s approach as “conditional liability.” See Volpe, *supra* note 10, at 609–10 (“This approach gives interactive computer services broad immunity for torts related to third party content, but conditions that immunity on ‘minimal responsibilities implicit in Section 230.’”).

85. See Byrd & Strandburg, *supra* note 50, at 432.

86. *Id.* at 434 (“The awkwardness derives not only from the fact that the definition focuses on content but also from its statutory role in defining when defendants are directly liable.”).

87. See *infra* notes 106–111 and accompanying text.

88. See, e.g., Lavi, *supra* note 80, at 40 n.282 (citing Varty Defterderian, Note, Fair Housing Council v. Roommates.com: A New Path for Section 230 Immunity, 24 BERKELEY TECH. L.J. 563, 592 (2009)); Jeff Kosseff, *The Gradual Erosion of the Law That Shaped the Internet: Section 230’s Evolution over Two Decades*, 18 COLUM. SCI. & TECH. L. REV. 1, 37 (2016); Seth Stern, Note,

worry that if “institutionalized defendants” (like Roommates) face more litigation risk, they might overcorrect,⁸⁹ hence chilling desired activity.

2. Chilling

Commentators have discussed the chilling concern at some length.⁹⁰ Though hard to quantify, the threat seems more theoretical than real. Even at the time of *Roommates*, one could question how much the threat of liability impacted online activity.⁹¹ Today, it is difficult to find examples of companies seriously arguing that they have altered behavior because of potential litigation.⁹² Perhaps this is just Section 230(c) at work. In other words, maybe the very reason that activity is robust is *because* courts have applied immunity so broadly. More likely, however, the threat of litigation simply is not stifling innovation to any significant extent.⁹³

Think about today’s online landscape compared to when Congress enacted Section 230. In 1996, approximately seventy-seven

Fair Housing and Online Free Speech Collide in Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 58 DEPAUL L. REV. 559, 586–87 (2009)); see also Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIA. L. REV. 137, 137–38 (2008) (discussing Section 230’s goal of preserving the internet’s expansion of the marketplace of ideas).

89. Byrd & Strandburg, *supra* note 50, at 429 (“When the boundaries between legal and illegal underlying behavior are not bright, there is often fear that secondary liability defendants, who may have more to lose and more litigation risk than direct liability defendants, will overcompensate.” (footnote omitted)).

90. See, e.g., Matt C. Sanchez, *The Web Difference: A Legal and Normative Rationale Against Liability for Online Reproduction of Third-Party Defamatory Content*, 22 HARV. J.L. & TECH. 301, 312 (2008); Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 300 (2011).

91. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 n.39 (9th Cir. 2008) (“[T]he Internet has outgrown its swaddling clothes and no longer needs to be so gently coddled.”); see Citron & Wittes, *supra* note 6, at 411.

92. Certainly, tech executives do raise the *specter* of potential liability chilling activity online. See Katie Canales, *Mark Zuckerberg and Jack Dorsey Warn That Stripping Tech Firms of Section 230 Protections Would Harm Free Expression on the Internet*, BUS. INSIDER (Oct. 27, 2020, 1:19 PM), <https://www.businessinsider.com/zuckerberg-dorsey-section-230-could-harm-internet-free-speech-2020-10> [<https://perma.cc/5V57-5SXX>] (linking to Congressional testimony from Mr. Zuckerberg and Mr. Dorsey).

93. See Volpe, *supra* note 19, at 619 (“[T]ech innovation and the free market on the internet are arguably no longer in danger of being stifled in their incipiency.”); see also Andrew Bolson, *The Internet Has Grown Up, Why Hasn’t the Law? Reexamining Section 230 of the Communications Decency Act*, IAPP (Aug. 27, 2013), <https://iapp.org/news/a/the-internet-has-grown-up-why-hasnt-the-law-reexamining-section-230-of-the/> [<https://perma.cc/HRW6-UY6N>] (“[T]he Internet has evolved in ways never first imagined. Although it is possible that Section 230 assisted in the Internet’s growth and development, it seems that the Internet no longer needs to be coddled in order to thrive.”).

million internet users could visit about a quarter million websites. Today, the number of users and websites is in the *billions*.⁹⁴ Companies like Facebook, Twitter, and Google (which was not even incorporated when Congress enacted Section 230⁹⁵) are among the world's wealthiest and most powerful companies, easily able to answer allegations of wrongdoing without needing to trim back activities.⁹⁶ Even with smaller entities, one strains to find a credible argument that cases like *Roommates* have stymied innovation. A recent United States Department of Justice report emphasized this point while recommending that Congress pare back Section 230(c)'s protections.⁹⁷ Though the media covered this report through the lens of late 2020's political acrimony,⁹⁸ the report itself linked back to an earlier panel discussion of leading academics and practitioners⁹⁹ all of whom agreed that the nature of today's Internet industry calls into question at least some assumptions that led to the law's passage. The report states:

Since the enactment of Section 230 almost 25 years ago, the internet and social media ecosystems have grown exponentially. So too have the leading internet and social media companies, which today are some of the most valuable American enterprises. The transformation of a few start-up internet companies into vast transnational enterprises, boasting

94. See Andrew P. Bolson, *Flawed but Fixable: Section 230 of the Communications Decency Act at 20*, 42 RUTGERS COMPUT. & TECH. L.J. 1, 1–2 (2016) (citing *Total Number of Websites*, INTERNET LIVE STATS, <http://www.internetlivestats.com/total-number-of-websites/> [<https://perma.cc/4XGB-7L4E>]).

95. See *id.* at 24–25.

96. See Samuel Estreicher & Samantha Zipper, *Another Strike Against § 230 of the Communications Decency Act: Courts Allowing § 230 to Trump Federal and State Public Accommodations Protections*, JUSTIA: VERDICT (Dec. 29, 2020), <https://verdict.justia.com/2020/12/29/another-strike-against-§-230-of-the-communications-decency-act> [<https://perma.cc/AT9N-PBLW>] (“Since its inception, the internet industry has grown exponentially, leaving companies like Facebook, Twitter, Twitch, and more with immense power and wealth. Thus, the liability protections that were once thought necessary in 1996, would seem no longer essential to allow for growth in this sector.”); *infra* note 100.

97. U.S. DEP’T OF JUST., *supra* note 31.

98. See Brent Kendall & John D. McKinnon, *Justice Department Proposes Limiting Internet Companies’ Protections*, WALL ST. J. (June 17, 2020, 5:01 PM), <https://www.wsj.com/articles/justice-department-to-propose-limiting-internet-firms-protections-11592391602> [<https://perma.cc/U8SD-ZLZS>]; Cecilia Kang, *Justice Dept. Urges Rolling Back Legal Shield for Tech Companies*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/06/17/technology/justice-dept-urges-rolling-back-legal-shield-for-tech-companies.html> [<https://perma.cc/R2Y4-PDL7>].

99. U.S. DEP’T OF JUST., *supra* note 31, at 7 (linking to *Section 230 Workshop—Nurturing Innovation or Fostering Unaccountability?*, U.S. DEP’T OF JUST. (Feb. 19, 2020), <https://www.justice.gov/opa/video/section-230-workshop-nurturing-innovation-or-fostering-unaccountability> [<https://perma.cc/K5DU-N2LP>]).

annual revenues exceeding that of many countries, has raised valid questions of whether those large tech companies still require the blanket immunity Section 230 provided to the nascent internet industry. While it may be imprudent to repeal the immunity entirely, it seems clear that tailored changes to immunity to make the internet a safer place would not unduly burden large tech companies.¹⁰⁰

This is not to say that Section 230(c) was ill-conceived. Indeed, governments have granted protections to so-called “infant industries” for hundreds of years.¹⁰¹ But protections that policymakers deem necessary during an industry’s infancy need not stay in place forever. As Professors Danielle Keats Citron and Benjamin Wittes noted, “[t]he nature of the litigation protection that is essential in the early life of an industry is very different from the proper protection given to a mature one.”¹⁰² The automobile industry, for example, received protection from product liability suits into the 1960s. But as the industry continued to strengthen and innovate, cars became safer and the need for protection weakened.¹⁰³ The same pattern applies here. The internet industry has grown stronger, innovated, and developed greater mechanisms for protecting against abusive or harmful practices online.¹⁰⁴ At the very least, courts should focus application of Section 230(c)’s protections only on what is *truly* user-generated content. Citron and Wittes explain:

Had Congress intended to extend a broad cloak of immunity to providers beyond decisions related to the publication of content, one would expect it to have said so. Congress did

100. *Id.* at 11.

101. See *Infant Industry Argument*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/economics/infant-industry-argument/> [<https://perma.cc/MM67-VEVZ>] (discussing the theory in the context of international trade). One counterargument to the infant industry theory is that it might be politically difficult to remove protections after they are granted. *Id.* In this regard, Section 230(c) seems to be case in point.

102. Citron & Wittes, *supra* note 6, at 422.

103. *Id.*

104. Indeed, the entire nature and pace of online communication is different than what existed in the 1990s. See Nicole Phe, Note, *Social Media Terror: Reevaluating Intermediary Liability Under the Communications Decency Act*, 51 SUFFOLK U. L. REV. 99, 124 (2018) (“When Congress enacted § 230 in 1996, it operated under the belief that the Internet was meant to facilitate the free exchange of words and ideas online, and as such, should be minimally regulated. Nevertheless, twenty years have passed since Congress enacted § 230, and the Internet has evolved into something entirely different. Today, the Internet ‘facilitates almost instant communications,’ and users can easily share or distribute potentially limitless information to a large audience, uninhibited by geographical boundaries.” (footnotes omitted)).

not even prohibit holding providers liable for the dissemination of information; it merely prohibited a finding that a provider was a “publisher” or “speaker.” Courts should, at a minimum, limit the statute to those terms.¹⁰⁵

III. INCONSISTENT APPLICATIONS

Perhaps one reason that courts have resisted limiting the statute’s application is because Congress did not define the terms “publisher” and “speaker.”¹⁰⁶ Early on, courts tended to employ Section 230(c)’s language as if it referenced the conventional distinction between publishers and distributors in defamation law.¹⁰⁷ Under that distinction, courts would treat internet companies as mere “distributors,” in line with bookstores and newsstands that do not face liability unless they knowingly distribute defamatory material.¹⁰⁸ By contrast, courts would shield internet companies from treatment akin to traditional print media, characterized as “publishers” and responsible under the same standards as authors of pieces (i.e., “speakers”) in their outlets.¹⁰⁹ Although a number of early cases suggested that Section 230(c) immunity covered activity in both categories,¹¹⁰ other courts identified at least some conduct as definitively outside the section’s protection.¹¹¹ Case law in this area, however, is not consistent, including some circumstances in which it strains credulity to view the alleged misconduct as “publishing” or “speaking.” This inconsistency could chill actors every bit as much as a standard that regularly permits liability.¹¹²

105. Citron & Wittes, *supra* note 37, at 468.

106. Some view the word “speaker” as superfluous, and judicial analysis, to the extent it exists, focuses on the word “publisher.” Byrd & Strandburg, *supra* note 50, at 433 n.168 (“CDA 230’s reference to a ‘publisher or speaker’ is redundant, since a ‘speaker’ of third-party content is also generally a ‘publisher.’ The inclusion of ‘speaker’ seems to play no independent role.”).

107. Sharp-Wasserman, *supra* note 50, at 206–07.

108. *See id.*

109. *Id.*; *see also* Phe, *supra* note 104, at 103 (“Under common law, primary publishers were held to the same standard of liability as original authors because they were in the best position to monitor and control content, and as a result, could have easily avoided or mitigated the harm caused by defamation. On the other hand, a distributor is liable for the distribution of a defamatory publication only if the distributor had actual or imputed knowledge of the defamation and failed to remove the defamatory post.” (footnote omitted)).

110. *See* Byrd & Strandburg, *supra* note 50, at 408 (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997)); *Blumenthal v. Drudge*, 992 F. Supp. 44, 49–50 (D.D.C. 1998).

111. *Roommates* itself is a good example with the majority clearly viewing the plaintiffs’ claims as relating to the defendant’s own conduct and not simply third-party content on its site. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1165 (9th Cir. 2008); *see supra* note 67 and accompanying text.

112. *See* Anthony D’Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1, 5 n.11 (1983).

The following section highlights two examples, both involving cases where courts reached opposite conclusions on virtually identical facts.

A. *The Snapchat Cases*

Snap Inc. (“Snap”) is a social media company best known for its mobile application, Snapchat, which allows users to create and post digital content.¹¹³ One of Snapchat’s features is Speed Filter, which allows users to share photos or videos of activities showing their real-life speed.¹¹⁴ The filter has gained particular popularity among young people eager to demonstrate how fast they drive cars.¹¹⁵ Critics allege that Snap rewards this behavior through social media recognition, encouraging “extreme and addictive behaviors.”¹¹⁶ Unsurprisingly, the use of Speed Filter has led to tragedy, followed by lawsuits seeking to hold Snap liable for the consequences.

Maynard v. Snapchat, Inc.,¹¹⁷ a 2018 Georgia Court of Appeals decision, provides an example. In *Maynard*, the plaintiffs, a married couple, were struck by a driver using the Speed Filter.¹¹⁸ A passenger in the back seat of the car that the offending driver was operating while using Snapchat described what happened just before the accident:

I looked in the front, and saw [the driver] holding her phone. The screen had a speed on it, which was about 80 m.p.h. and climbing. I asked . . . if her phone was keeping up with the speed of the car. [She] said it was. I told her I was pregnant and asked her to slow down. [She] responded and said she was just trying to get the car to 100 m.p.h. to post it on Snapchat. She said “I’m about to post it.” I began pleading with [her] to slow down. I saw the speed on the phone hit 113 m.p.h. before she let off the gas. Just after I saw the speed of 113 m.p.h., a car pulled out of an apartment complex, and I screamed.¹¹⁹

113. *Maynard v. Snapchat, Inc.*, 816 S.E.2d 77, 79 (Ga. Ct. App. 2018) (“Snapchat is an application made for mobile devices that allows users to take temporary photos and videos, also known as ‘Snaps,’ and share them with friends.”).

114. Speed Filter is one of a number of Snapchat filters. It is a virtual speedometer “that shows the speed at which a user is moving and allows for that speed to be superimposed to a Snap before sending it out over the application.” *Id.*; *Lemmon v. Snap, Inc.*, 440 F. Supp. 3d 1103, 1105–06 (C.D. Cal. 2020), *rev’d*, 995 F.3d 1085 (9th Cir. 2021).

115. *Lemmon*, 440 F. Supp. 3d at 1106.

116. *Id.*; see *infra* notes 134–135 and accompanying text.

117. 816 S.E.2d 77 (Ga. Ct. App. 2018).

118. *Id.* at 78.

119. *Id.* at 79.

As a result of the accident, the plaintiff's baby suffered permanent brain damage. The plaintiff filed a lawsuit against both the driver and Snap, alleging the company knew that Speed Filter encouraged excessive speeding of the type that led to the accident.¹²⁰ Snap moved to dismiss, asserting immunity under Section 230(c).¹²¹ A trial court granted the motion.¹²² The Georgia Court of Appeals, however, reversed.¹²³

In evaluating Snap's argument, the court set out three elements for immunity based on the statute's language.¹²⁴ First, the defendant must be a "provider or user of an interactive computer service."¹²⁵ Second, the claim must seek to treat the defendant as a "publisher or speaker" of information.¹²⁶ Third, a third-party must have provided the information at issue.¹²⁷ The *Maynard* court acknowledged that Section 230(c) is "robust," with all doubt being resolved in favor of immunity,¹²⁸ yet concluded that this was not a situation where the protection applied.¹²⁹ The court stated they did not address the issue of whether Snap was an interactive computer service as "the parties do not address the issue . . . and appear to agree that it is." However, the court refused to characterize the plaintiff's theory as treating Snap like a publisher or speaker of third-party content.¹³⁰ Instead, the court found that the plaintiff sought "to hold Snapchat liable *for its own conduct*," principally creating Speed Filter and failing to adequately warn about the dangers of its use.¹³¹

The decision in *Maynard* makes eminent sense. As in *Roommates*, and consistent with analogous principles of secondary liability,¹³² the allegations against Snapchat were for "facilitating or contributing" to actionable conduct.¹³³ One also might describe plaintiff's

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 82.

124. *Id.* at 80.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 79.

130. *Id.* at 81.

131. *Id.* (emphasis added). The court noted that the driver failed to actually post on Snapchat before the accident occurred. *Id.* at 80. But it did not suggest that immunity would have applied had the driver been able to hit the button before the crash.

132. See *supra* notes 81–84 and accompanying text.

133. See *supra* notes 83–84 and accompanying text.

claim as alleging that Snap “induced” the driver’s dangerous driving through the lure of rewards and recognition.¹³⁴ Either way, the claim focused on Snap’s own behavior. It did not seek to impose liability for the consequences of republishing third party content, the statutory hallmark of Section 230(c) immunity.¹³⁵ In addition, despite Snap’s argument that users can deploy Speed Filter for benign activities,¹³⁶ little doubt exists that the feature lures young drivers into risky behavior. Indeed, a recent academic study in Australia found that “of all the different types of social media use while driving (e.g., Facebook, Twitter, Instagram), the use of Snapchat was clearly the most common, and almost the only, type of social media use while driving that was mentioned among participants.”¹³⁷ A key reason is “to use the Snapchat speed filter, to send a video or photo of themselves while driving” and to succeed in keeping up with incentives, such as maintaining posting “streaks” on the platform.¹³⁸

A consistent set of rulings like *Maynard* might cause Snap to think twice about Speed Filter and, in turn, save lives.¹³⁹ Consistency, however, is not a trait of Section 230(c) jurisprudence, and at least one court subsequently concluded that Section 230(c) *should* protect Snap from liability. The case is *Lemmon v. Snap, Inc.*,¹⁴⁰ a 2020 opinion from the U.S. District Court for the Central District of California.

In *Lemmon*, the driver was a seventeen year-old boy who used Speed Filter to capture his car’s speed of 123 miles per hour shortly

134. See *supra* note 83 and accompanying text.

135. See *supra* note 105 and accompanying text.

136. Snap warns people not to “Snap and drive” and maintains that users can utilize the filter to show the speed at which they, say, run or bike. See AJ Dellinger, *Snapchat’s Speed Filter Is at the Center of This Distracted Driving Lawsuit*, DAILY DOT (May 26, 2021, 8:14 PM), <https://www.dailydot.com/debug/snapchat-distracted-driving-lawsuit/> [https://perma.cc/M79L-K6YS].

137. Verity Truelove et al., “*I Snapchat and Drive!*” *A Mixed Methods Approach Examining Snapchat Use While Driving and Deterrent Perceptions Among Young Adults*, 131 ACCIDENT ANALYSIS AND PREVENTION 146, 149 (2019).

138. *Id.* at 153.

139. As discussed later in this section, it is hard to imagine that a threat to this narrow aspect of its operation would prevent Snap from maintaining a larger presence online or would deter other companies from competing in the same space. The situation today is much different than it was in 1996, and Section 230(c) immunity no longer protects a fragile ecosystem of Internet pioneers. Snap is a multi-billion-dollar business with millions of users worldwide interacting with its service in a myriad of ways. Snap, Inc., Annual Report (Form 10-K) (Feb. 4, 2022).

140. 440 F. Supp. 3d 1103 (C.D. Cal. 2020), *rev’d*, 995 F.3d 1085 (9th Cir. 2021). The opinion was very recently overturned by the Ninth Circuit, but the lower court decision remains a useful counterpoint for purposes of this discussion. It also exemplifies the possibility (perhaps a likelihood) of inconsistency in judicial application of Section 230 immunity, even in situations with nearly identical facts. See *infra* notes 117–118.

before crashing into a tree, killing himself and two passengers.¹⁴¹ The passengers' parents sued Snap, alleging that its creation and maintenance of Speed Filter caused the accident.¹⁴² Snap moved to dismiss, arguing that Section 230(c) barred the claim.¹⁴³ The *Lemmon* court began its analysis by reviewing Section 230(c)'s three-part test for immunity¹⁴⁴ and, like the *Maynard* court, focused on whether the plaintiffs sought to impose liability on Snap for re-“publishing” another's content.¹⁴⁵ The court initially looked to *Roommates* and whether Snap materially contributed to harmful activity,¹⁴⁶ but concluded that this was not the case, accepting Snap's argument that Speed Filter was a “neutral tool, which can be utilized for both proper and improper purposes”¹⁴⁷ and describing the plaintiff's allegations as seeking to impose liability merely for “enhancement by implication or development by inference.”¹⁴⁸ The court called the case a “close scenario,” but concluded that in close situations, immunity should apply.¹⁴⁹

The “close scenario” language is a reference to the *Roommates* majority's view that close cases should be resolved in favor of immunity.¹⁵⁰ *Roommates*, however, hardly foreclosed the possibility of liability in appropriate situations.¹⁵¹ Indeed, the *Lemmon* court acknowledged that similar cases had declined to apply immunity, citing specifically to *Maynard*.¹⁵² Yet the *Lemmon* court all but ignored the *Maynard* court's point that the allegations against Snap focused clearly on its own conduct rather than on the content of the user's posting.¹⁵³ The Ninth Circuit very recently came to that exact conclusion,

141. *Lemmon*, 440 F. Supp. 3d at 1105.

142. *Id.* at 1103.

143. *Id.* at 1108.

144. Citing Ninth Circuit precedent, the court articulated the test as follows: “Immunity from liability exists for ‘(1) provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.’” *Id.* at 1108–09 (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009)); see *supra* note 124 and accompanying text.

145. *Lemmon*, 440 F. Supp. 3d at 1109.

146. *Id.*

147. *Id.* at 1111; see *supra* note 136.

148. *Lemmon*, 440 F. Supp. 3d at 1112–13 (quoting *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174–75 (9th Cir. 2008)).

149. *Id.* at 1113. The court noted its inconsistency with *Maynard*, explaining it based on the *Maynard* court not examining Ninth Circuit case law relating to “neutral tools.” *Id.*

150. See *supra* note 69 and accompanying text.

151. See *supra* note 69 and accompanying text.

152. See *Lemmon*, 440 F. Supp. 3d at 1113.

153. *Maynard v. Snapchat, Inc.*, 816 S.E.2d 77, 81 (Ga. Ct. App. 2018). Using the language of secondary liability discussed above, the claims against Snap in *Lemmon* relate to facilitating,

reversing the district court's ruling¹⁵⁴ and holding that the "case presents a clear example of a claim that simply does not rest on third-party content."¹⁵⁵

Despite the Ninth Circuit's reversal, the district court opinion in *Lemmon* remains a useful counterpoint for demonstrating the extent to which some judges will go in applying Section 230(c) immunity, motivated by a desire to serve its goal of encouraging online activity—a possibility that remains open in most jurisdictions. Equally important, and beyond what the Ninth Circuit discussed in its opinion, nothing suggests that the threat of liability has chilled Snap's activity.¹⁵⁶ At the time of *Maynard*, Snap was only five years old, valued at \$16 billion.¹⁵⁷ Today, Snap's value is estimated at close to \$50 billion, with the company generating around a billion dollars of revenue each quarter.¹⁵⁸ The company boasts over 300 million daily users, including 65 percent of all U.S. internet users between the ages of 18 and 29.¹⁵⁹ Unsurprisingly, Snap does not appear to even insinuate that defending claims about Speed Filter would lead it to alter activity in any way.¹⁶⁰ Apparently, the threat of liability has been nothing more than a "speed bump" to the company's continued profitable activity.

Perhaps one might argue that while this is true for social media giants (and at this point, Snap surely qualifies), smaller website operators face different circumstances. The following section argues this

contributing, or even inducing dangerous activity every bit as much as in *Maynard*. The claims do not focus on content posted by the drivers. *Lemmon*, 440 F. Supp. 3d at 1109.

154. *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1095 (9th Cir. 2021).

155. *Id.* at 1093. More specifically, the court characterized the plaintiff's allegations about Speed Filter as one of "negligent design—a common products liability tort." *Id.* at 1092; see Gregory M. Dickinson, *Rebooting Internet Immunity*, 89 GEO. WASH. L. REV. 347, 375 (2021) ("What [the Snapchat] cases show . . . is how poorly suited Section 230 is for analyzing product-liability-type claims involving virtual products.").

156. See Bobby Allyn, *Snapchat Ends 'Speed Filter' That Critics Say Encouraged Reckless Driving*, NPR (June 17, 2021, 11:58 AM), <https://www.npr.org/2021/06/17/1007385955/snapchat-ends-speed-filter-that-critics-say-encouraged-reckless-driving> [<https://perma.cc/MJ4K-7SFF>]. And, of course, it is this possibility that has been the fundamental underpinning of courts' broad application of Section 230(c) immunity.

157. See Jason Silverstein, *Snapchat Speed Filter 'Motivated' Car Crash That Left Georgia Man with Brain Damage*, N.Y. DAILY NEWS (Apr. 26, 2016, 5:25 PM), <https://www.nydailynews.com/news/national/snapchat-speed-filter-motivated-car-crash-suit-article-1.2615208>.

158. *Snap Inc. (SNAP) Valuation Measures & Financial Statistics*, YAHOO! FIN. (Apr. 14, 2022), <https://finance.yahoo.com/quote/SNAP/key-statistics/> [<https://perma.cc/3K7T-M59J>]. Snap has recently shown robust double-digit growth year-to-year. See Salman Aslam, *Snapchat by the Numbers: Stats, Demographics & Fun Facts*, OMNICORE (Mar. 2, 2022), <https://www.omnicoreagency.com/snapchat-statistics/> [<https://perma.cc/7HXP-XFX2>].

159. Aslam, *supra* note 158.

160. Allyn, *supra* note 156.

is not true, providing an example of two contrasting cases involving a site of a different nature.

B. *The Ripoff Report Cases*

Ripoff Report is a website that invites visitors to post consumer complaints.¹⁶¹ Reminiscent of *Roommates*, the site requires users to label posts with preset descriptors.¹⁶² In addition, Ripoff Report steers subjects of complaints to a fee-based “corporate advocacy program” through which it claims to restore reputations.¹⁶³ Not surprisingly, Ripoff Report’s business model has made it the target of litigation.¹⁶⁴ Once again, however, courts have reached inconsistent conclusions in evaluating claims. Two examples follow, beginning here with a case in which Ripoff Report successfully raised Section 230(c) immunity, and then drawing a contrast with a case that came out the other way.

The first case is *Global Royalties, Ltd. v. Xcentric Ventures, LLC*,¹⁶⁵ a 2008 decision from the U.S. District Court for the District of Arizona. In *Global Royalties*, Spencer Sullivan posted a message on Ripoff Report’s site referring to plaintiff’s business as a “scam,” and placing his complaint in Ripoff Report’s preset “Con Artists” category.¹⁶⁶ Under threat of legal action from the plaintiff, Sullivan backed off his allegations in two subsequent posts.¹⁶⁷ He also asked the site’s operators to remove his complaints.¹⁶⁸ Ripoff Report refused, leading to the plaintiff’s action seeking damages for harm to its business.¹⁶⁹ In response, Ripoff Report invoked Section 230(c), asserting that the plaintiff’s lawsuit sought to hold it liable as a speaker or publisher of content provided solely by Sullivan.¹⁷⁰ The plaintiff set forth three counterarguments: first, that immunity should not apply

161. See *Glob. Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 930 (D. Ariz. 2008). The site is located at <https://www.ripoffreport.com>.

162. See *id.* at 930.

163. *Id.* at 932–33; see KOSSEFF, *supra* note 1, at 125. According to critics, Ripoff Report essentially encourages “defamatory postings from others for their own financial gain.” *Glob. Royalties*, 544 F. Supp. 2d at 930, 932.

164. See KOSSEFF, *supra* note 1, at 122 (“No single defendant has been the subject of more Section 230 court opinions than Ripoff Report.”).

165. 544 F. Supp. 2d 929 (D. Ariz. 2008).

166. *Id.* at 930.

167. *Id.* at 930–31.

168. *Id.* at 931.

169. *Id.* In fact, Ripoff Report maintains a blanket no-removal policy regardless of circumstances. See KOSSEFF, *supra* note 1, at 125–26 (“The site’s general no-removal policy applies even if a consumer posts a review and then later asks Ripoff Report to delete the post.”).

170. See *Glob. Royalties, Ltd.*, 544 F. Supp. 2d at 931.

when the content's author requests that it be removed;¹⁷¹ second, that Ripoff Report itself is an information content provider with respect to postings on its site;¹⁷² and third, that Ripoff Report coerced the subjects of complaints to pay for its "advocacy program."¹⁷³

The court, however, rejected each of the plaintiff's arguments.¹⁷⁴ With regard to Ripoff Report's refusal to remove the initial post after Sullivan's request, the court worried that doing so might lead website operators to remove postings any time someone purports to be the author of a post, whether true or not.¹⁷⁵ With regard to Ripoff Report's steering of posters toward preset categories (such as "Con Artist"), the court dismissed Ripoff Report's role as "minor" and "insufficient" to make the site operators content providers themselves.¹⁷⁶ Finally, with respect to the defendant's use of its advocacy program, the court concluded that the tactic did not relate to soliciting or altering comments about the plaintiff, leaving Ripoff Report's involvement as "passive."¹⁷⁷ In the end, the court used sweeping language to reject the plaintiff's attempt to hold Ripoff Report responsible: "Unless Congress amends the statute, it is legally (although perhaps not ethically) beside the point whether defendants refuse to remove the material, or how they might use it to their advantage."¹⁷⁸ Perhaps not surprisingly, that decision was expressly motivated by a desire to interpret immunity broadly, serving Congress's goal "to encourage development of the internet and prevent the threat of liability from stifling free expression."¹⁷⁹

Global Royalties suggests that Ripoff Report, a smaller entity than Snap, is protected, able to go about its business without concern that liability might impose costs and require the trimming of its sails. But not all courts have seen it that way. Consider *Vision Security, LLC v. Xcentric Ventures, LLC*,¹⁸⁰ a 2015 decision from the U.S. District

171. *Id.*

172. *Id.* at 932.

173. *Id.*

174. *Id.* 932–33.

175. *Id.* at 932.

176. *Id.*

177. *Id.* at 933. *Roommates* was scheduled for its en banc hearing at the time of this decision. Plaintiff sought to stay the action until the Ninth Circuit rendered its decision, but the court refused. *Id.*

178. *Id.* The court's decision was expressly motivated by a desire to interpret the immunity broadly, serving Congress's goal "to encourage development of the internet and to prevent the threat of liability from stifling free expression." *Id.* at 931.

179. *Id.* at 931.

180. No. 13-CV-00926, 2015 WL 12780892 (D. Utah Aug. 27, 2015).

Court for the District of Utah that reached the exact opposite conclusion in a very similar claim against Ripoff Report.¹⁸¹

In *Vision Security*, the court described Ripoff Report's operations just as the *Global Royalties* court did.¹⁸² However, instead of characterizing Ripoff Report's role as "minor" or "insufficient," the court viewed its alleged activities as significant enough to remove the case from the purview of Section 230(c) altogether. The court noted that, according to the complaint, the site encourages competitors, not just consumers, to post negative content on the site.¹⁸³ It emphasized Ripoff Report's refusal to remove content when an author conceded falsity and asked the site operators to delete it.¹⁸⁴ The court also highlighted the "corporate advocacy program" through which it sought profit from the very content it encouraged and refused to remove.¹⁸⁵ Unlike the *Global Security* court, the *Vision Security* court found that the program made Ripoff Report much more than a "neutral conduit"¹⁸⁶ of potentially damaging information.

[Ripoff Report] had an interest in, and encouraged, negative content. It refused to remove the content, even when told by the author that it was false and he wanted it removed. What interest would a neutral publisher have in maintaining false and harmful content against the wishes of the author unless it advanced its own commercial interests?¹⁸⁷

The court supported its conclusion with Tenth Circuit precedent stating that an internet service provider is not neutral if it "specifically encourages development of what is offensive about the content."¹⁸⁸ The Tenth Circuit precedent, in turn, cited *Roommates* for the proposition that an internet service provider cannot avail itself of immunity if it encourages offensive or illegal content.¹⁸⁹

181. *See id.* at *3.

182. *Id.* at *2–3. This case arose on the defendant's motion to reconsider an earlier motion to dismiss. *Id.* at *1.

183. *Id.* at *2. This would be contrary to the site's own tagline of "By Consumers, for consumers." *See id.*

184. *Id.* at *3.

185. *Id.* ("Indeed, it is reasonable to infer that the very *raison d'être* for the website was to commercialize on its ability to sell its program to counter the offensive content the Ripoff Report encouraged.").

186. *See id.* at *2–3.

187. *Id.* at *3.

188. *Id.* at *2 (citing and quoting *Fed. Trade Comm'n v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009)).

189. *Accusearch*, 570 F.3d at 1198 (citing *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008)).

Vision Security got it right. Similar to Snap in the situations discussed above,¹⁹⁰ Ripoff Report actively *facilitates* and *contributes* to actionable conduct, guiding users to characterizations of others' conduct in a negative light. It *induces* competitors to post negative comments about other actors in an effort to drive business to its corporate advocacy program.¹⁹¹ One could even make the case that allegations against Ripoff Report involve "notice-based liability" given that both decisions discussed above involve situations where users backed off claims and requested that the site remove their posts.¹⁹²

Not everyone agrees. Shortly after the *Vision Security* court rendered its opinion, Professor Eric Goldman criticized the outcome, calling the Tenth Circuit's "neutral publisher" approach problematic and expressing concern that a "neutrality"-based standard would become a placeholder for other norms.¹⁹³ But just as with Snap, the possibility of liability does not seem to have deterred Ripoff Report in the least. Jeff Kosseff pointed to some of the litigation against Ripoff Report and then described his interview with the site's founder, Ed Magedson: "Those who thought . . . threats would work have not spent much time talking to Magedson [who] laughs as he recounts the countless threats that he has received."¹⁹⁴ Similarly, the *New York Times* recently published an article that specifically referenced Ripoff Report's continued online presence, noting its easy accessibility and highlighting the damage it has done to those who are victims of falsehoods on the site.¹⁹⁵ And it is not just Ripoff Report. Despite uncertainty

190. See *supra* notes 132–135 and accompanying text.

191. Or at least this is what plaintiffs allege in complaints. Surely that should allow such claims to survive motions to dismiss. See *Vision Sec.*, 2015 WL 12780892, at *2–3.

192. Drawing similar parallels, Dr. Michal Lavi places Ripoff Report's conduct in the "contributory liability" category based on its design of menus, filters, and tags that steer users to negative options. See Lavi, *supra* note 80, at 82–84.

193. See Eric Goldman, *Another Tough Section 230 Ruling for Ripoff Report—Vision Security v. Xcentric, TECH. & MKTG. L. BLOG* (Sept. 20, 2015), <https://blog.ericgoldman.org/archives/2015/09/another-tough-section-230-ruling-for-ripoff-report-vision-security-v-xcentric.htm> [<https://perma.cc/N6T5-QF2U>] ("The court's legal test of 'neutral publisher' is an oxymoron and incoherent. By definition, no publisher is ever neutral. Instead, any legal standard dependent on 'neutrality' becomes a placeholder for other social norms.")

194. KOSSEFF, *supra* note 1, at 126; see *id.* ("Ripoff Report attracts so many formal complaints that it does not even maintain an official count of the number of lawsuits and litigation threats it has received over the past two decades.")

195. See Hill, *supra* note 34. As the article states:

[T]here is no fact-checking. The sites often charge money to take down posts, even defamatory ones. And there is limited accountability. Ripoff Report, like the others, notes on its site that, thanks to Section 230 of the federal Communications Decency Act, it

regarding the interpretation of Section 230(c), another recent New York Times article described a flourishing set of similar websites that it characterized as a “slander industry.”¹⁹⁶ Once again, it is hard to find so much as a suggestion that potential liability is deterring this type of activity online.

Even if one is inclined to view the proliferation of sites like Ripoff Report as a positive thing, it is hard to view inconsistent precedent as a recipe serving public policy goals. Certainly, it does not create an environment that provides those harmed by online content a clear understanding of when they can (or cannot) seek compensation.¹⁹⁷ Section 230(c) might have helped to “create the Internet” and encouraged its growth.¹⁹⁸ But times have changed, and our legal system’s interpretation of the statute should change with it.

C. Taking Stock

At this point, the Article has moved through a fair amount of material. This section takes stock of that coverage before moving forward with a proposal. Beyond reviewing the basic structure of Section 230(c), the Article has concentrated on applications of the statute that have flown a bit under the radar. Building on the better-known *Roommates* case, the Article focused on two fact patterns where courts reached inconsistent conclusions in cases with virtually identical facts. The allegations in both pairs of cases took aim at the defendants’ own conduct,¹⁹⁹ rather than content posted online by others, and the Article was not shy in endorsing the opinions that refused to apply immunity. As discussed above, these cases also fit comfortably into analogous liability structures that permit secondary liability, whether one

isn’t responsible for what its users post. . . . With that impunity, Ripoff Report and its ilk are willing to host pure, uncensored vengeance.

Id.

196. Aaron Krolik & Kashmir Hill, *The Slander Industry*, N.Y. TIMES (Apr. 24, 2021), <https://www.nytimes.com/interactive/2021/04/24/technology/online-slander-websites.html> [<https://perma.cc/P8XN-WT6F>].

197. Nor does the current state of the law do much, if anything, to deter harmful conduct. See Citron & Franks, *supra* note 33, at 54 (“Section 230 has subsidized platforms whose business is online abuse and the platforms who benefit from ignoring abuse. It is a classic ‘moral hazard,’ ensuring that tech companies never have to absorb the costs of their behavior.”); *supra* notes 195–196 and accompanying text.

198. See KOSSEFF, *supra* note 1; Citron & Franks, *supra* note 33, at 54.

199. See *supra* notes 132–134, 190–192 and accompanying text.

describes that as a defendant's "contribution to," "inducement of," or "notice of" potentially harmful conduct.²⁰⁰

The highlighted cases are good examples for discussion, but they are not the only ones that pose these types of problems. There are higher profile examples stemming from litigation against the operators of websites such as Backpage.com²⁰¹ and TheDirty.com²⁰²—again, situations where judges struggle to apply Section 230(c) consistently, even in cases with similar facts.²⁰³ The courts that hesitate to allow claims express concern that doing so would conflict with the law's goal of encouraging activity online. Or, using the mirror term, they fear that imposing liability would chill activity on the Internet.²⁰⁴ Theoretically, this is rational. Basic economics suggest that potential tort

200. See *supra* notes 132–134, 190–192 and accompanying text.

201. Compare *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 717–18 (Wash. 2015) (affirming a lower court decision denying Backpage's motion to dismiss because the facts showed that Backpage did more than just maintain neutral policies and was specifically designed to facilitate sex trafficking), with *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015), *aff'd sub nom. Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016) (granting motion to dismiss under similar circumstances).

202. Compare *Jones v. Dirty World Ent. Recordings, LLC*, 840 F. Supp. 2d 1008, 1012 (E.D. Ky. 2012) (finding that plaintiff's claims were not barred by the CDA because defendants specifically encouraged the development of the offensive conduct), with *S.C. v. Dirty World, LLC*, No. 11-CV-00392, 2012 WL 3335284, at *1 (W.D. Mo. Mar. 12, 2012) (finding that plaintiff's claims against the same defendants were barred by the CDA and that the argument that the website encouraged illegal conduct failed both legally and factually). However, the Sixth Circuit vacated the judgment in favor of Jones and reversed the denial of defendants' motion for judgment as a matter of law, so the results are no longer conflicting. See *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 417 (6th Cir. 2014).

203. Setting aside case law that conflicts on similar facts, courts have applied immunity in additional situations where plaintiffs clearly plead facts that seek to impose liability for a defendant's own conduct. See, e.g., *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x 586 (2d Cir. 2019) (applying Section 230 immunity where a plaintiff alleged that a dating app was defectively designed for lack of features to prevent impersonating profiles and other dangerous conduct); *Levitt v. Yelp! Inc.*, No. C-10-1321, 2011 WL 5079526, at *1 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014) (applying Section 230 immunity where a plaintiff alleged that Yelp unlawfully manipulated the content of business review pages to induce payment for advertising); see also *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019) (applying Section 230 immunity where a plaintiff alleged that Facebook, through its algorithms, provided terrorist organizations with support to enable attacks), *cert. denied*, 140 S. Ct. 2761 (2020). The *Force* case drew a strong dissent. See *id.* at 76–77 (Katzmann, J., dissenting) (“[I]t strains the English language to say that in targeting and recommending these writings to users—and thereby forging connections, developing new social networks—Facebook is acting as ‘the publisher of . . . information provided by another information content provider.’” (omission in original)).

204. See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1176 (9th Cir. 2008) (McKeown, J., concurring in part and dissenting in part) (“The majority's unprecedented expansion of liability for Internet service providers threatens to chill the robust development of the Internet that Congress envisioned.”).

liability deters activity,²⁰⁵ and the statute plainly identifies industry protection as a Congressional goal.²⁰⁶ It is fair to infer that the Internet might not have prospered in the same way absent Section 230(c)'s protections. But it is difficult to see the dynamic having a significant impact today.

In this environment, some commentators have called for the statute's repeal, or at least significant revision.²⁰⁷ But if that does not happen, what next? Should courts simply continue to issue "all or nothing" rulings of the sort highlighted in this Article?²⁰⁸ Or is there a better way to address claims under the law's current terms, balancing the competing goals of compensating those harmed by wrongful conduct and encouraging activity online?²⁰⁹ The following section attempts to do just that, drawing parallels to well-established tools utilized by courts that have long balanced competing interests in a different context.

IV. AN ANALOGY: BALANCING INTERESTS AND THE BURDEN OF PROOF

This section of the Article proposes that courts interpret Section 230 by balancing competing interests using rules similar to those in defamation actions that implicate free speech concerns. Courts could apply these concepts broadly, but this section focuses on the type of situations identified above—that is, cases where plaintiffs plead that a defendant's own conduct contributed to harm by facilitating or inducing third-party action, or in failing to act based on clear notice of wrongdoing.²¹⁰ The proposal is designed to acknowledge Section 230's goal of protecting the Internet industry²¹¹ while providing courts with a safe harbor to permit liability in appropriate situations, nudging

205. See Wu, *supra* note 90, at 300 ("The problem with harnessing the power of intermediaries by imposing liability on them is that the fear of liability may induce intermediaries to block or eliminate too much content, including content that may be both lawful and socially desirable.").

206. See *supra* notes 50–51 and accompanying text.

207. See *supra* note 37 and accompanying text; Lavi, *supra* note 80, at 85 n.626.

208. See Byrd & Strandburg, *supra* note 50, at 434 (Section 230 "sets up an all-or-nothing choice between 'monitor and control' liability and complete immunity.")

209. See Lavi, *supra* note 80, at 86 ("[C]ourts—without legislative changes—can set the proper boundaries of immunity. . . . According to a proper reading of section 230, intermediaries that nudge speech . . . are 'responsible' at least 'in part' for creating or developing . . . content and should not enjoy the immunity.").

210. One might even view this as akin to a pleading requirement.

211. A goal that obviously would remain in place if Congress does not repeal or change the statute.

judges away from feeling compelled to essentially say, “this outcome is wrong, but the immunity appears absolute.”²¹²

To draw the analogy, one must start with the famous case of *New York Times Co. v. Sullivan*.²¹³ This is not the place for a lengthy recitation, but briefly, the case involved an advertisement in the March 29, 1960, edition of the *New York Times* that described the conduct of local and state officials in Montgomery, Alabama, during the era’s civil rights struggle.²¹⁴ The advertisement contained minor inaccuracies,²¹⁵ and L.B. Sullivan, a Montgomery city commissioner, filed a defamation action against the newspaper claiming that the advertisement harmed his personal reputation.²¹⁶ A local jury found for Sullivan and awarded him \$500,000 in damages.²¹⁷ The Alabama Supreme Court affirmed,²¹⁸ leading the *Times* to seek certiorari in the U.S. Supreme Court on grounds that the decision violated the First Amendment to the U.S. Constitution.²¹⁹

Until *New York Times Co. v. Sullivan*, the U.S. Supreme Court had never ruled that the First Amendment limited state defamation law.²²⁰ Or, to put things in a frame that more closely connects with this Article, the Court had never articulated a standard that might limit the ability of plaintiffs to seek compensation for reputational harm in service of the First Amendment’s principle of free speech. In *New York*

212. The proposals in this section cannot guarantee doctrinal consistency, but they would help the cause.

213. 376 U.S. 254 (1964).

214. See ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 5–7 (1991). The advertisement’s headline said, “Heed Their Rising Voices,” a phrase that appeared in a *Times* editorial ten days earlier, including language that appeared in the ad: “The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable. . . . Let Congress heed their rising voices, for they will be heard.” *Id.* at 6 (omission in original). For a recent and interesting critique of *Sullivan*, see David A. Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 OHIO ST. L.J. 759 (2020).

215. The misstatements were quite minor. The ad stated that Black student leaders at Alabama State College were expelled after singing “My Country, ‘Tis of Thee” on the Alabama state Capitol steps. In reality, they were expelled because of a sit-down strike at a courthouse restaurant. LEWIS, *supra* note 214, at 10. In addition, the ad included a misstatement that state officials had padlocked students in their dining hall. *Id.* at 31. It also misstated the number of times that Martin Luther King, Jr. had been arrested. *Id.*; see *Sullivan*, 376 U.S. at 259.

216. LEWIS, *supra* note 214, at 12, 28–31.

217. *Id.* at 33.

218. *Id.* at 44–45.

219. *Sullivan*, 376 U.S. at 264.

220. See LEWIS, *supra* note 214, at 103 (“[L]ibel had always been entirely a matter of state law. No award of damages for libel, however grotesque the sum or outlandish the legal theory underlying it, had ever been held to violate the First Amendment or any other provision of the Constitution.”).

Times Co. v. Sullivan, however, the Court did just that, emphasizing “the chilling effect of the Alabama libel laws on First Amendment freedoms.”²²¹ Of course, the *Sullivan* Court could have applied complete immunity, creating an absolute shield in the name of free speech.²²² But instead, the Court chose a more nuanced approach, raising the bar for public officials in a way that left the door open to liability but minimizing the chilling of speech.²²³

The *Sullivan* Court did this in two ways. First, and most famously, it introduced a fault standard as part of the prima facie case. No longer could a state allow a public official to succeed simply by demonstrating that a defendant made a false statement damaging to her reputation. Going forward, public officials needed to prove actual malice—that the defendant knew a statement was false or that the defendant had reckless disregard for the truth.²²⁴ Second, the *Sullivan* Court required that plaintiffs establish this level of knowledge with clear and convincing clarity—a higher burden of proof than the preponderance standard normally used in civil actions.²²⁵

Both mechanisms are court-created adjustments to common law standards, designed to balance competing interests and give precedence to a societal policy goal at the expense of compensating some plaintiffs who are genuinely harmed by actors engaging in the protected activity. In the defamation context, the policy interest is encouraging speech on matters of public concern (or its mirror image—preventing the chilling of speech on matters of public concern) at the expense of compensating those whose reputations are damaged by

221. *Sullivan*, 376 U.S. at 300 (Goldberg, J., concurring in the result). Later in the opinion, the Court explained more broadly: “[E]rroneous statement is inevitable in free debate, and that . . . must be protected [to support freedom of expression]. . . . ‘The interest of the public here outweighs the interest of appellant or any other individual.’” *Id.* at 271–72 (majority opinion).

222. In concurrence, Justices Black and Douglas essentially advocated this approach, taking the position that the First Amendment should provide absolute protection against speech that is critical of public officials. *Sullivan*, 376 U.S. at 293–97 (Black, J., concurring).

223. This, of course, is similar to what Congress did in enacting Section 230, raising the bar for liability as a means to avoid chilling activity online.

224. *Sullivan*, 376 U.S. at 279–80 (“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”). Three years later, the Court extended this to cases brought by public figures, as well as public officials. See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967). In 1974, the Court extended this to private plaintiffs suing for defamation on matters of public concern, requiring that those plaintiffs prove at least negligence with respect to a defendant’s knowledge of truth or falsity. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348–49 (1974).

225. *Sullivan*, 376 U.S. at 285–86.

false and defamatory statements.²²⁶ If similar standards applied in internet cases, courts would give precedence to the societal (and statutory) goal of encouraging activity online (or its mirror image—preventing the chilling of such activity) at the expense of compensating those who suffered harm due to activity online.²²⁷ Let's briefly walk through how this might work.

The analogy applies best in fact patterns where plaintiffs seek recovery for economic harm.²²⁸ Take *Global Royalties* as an example.²²⁹ In that case, the court invoked Section 230(c) immunity, denying the plaintiff an opportunity to proceed against Ripoff Report despite pleading that the site operators' own conduct caused harm.²³⁰ Put another way, Section 230's policy of encouraging online activity completely trumped the plaintiff's interest in compensation. Under this Article's proposal, a court would not immediately foreclose the claim. Instead, it would provide a narrow path forward if the plaintiff could satisfy a *Sullivan*-like standard. More specifically, a court could premise liability on a plaintiff's proving not only that someone told Ripoff Report the postings were false, but that it *knew* the postings were false or were reckless in determining their truth.²³¹ In addition, a plaintiff would need to prove this with clear and convincing evidence, not simply by a preponderance of the evidence. This is a high bar. But it

226. See *Gertz*, 418 U.S. at 342 ("Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. . . . In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise.").

227. The Article makes no pretense that the Constitution *requires* adjustments to the burden of proof. In other words, the First Amendment does not compel a change to judicial interpretation of Section 230 in the way that the *Sullivan* court grounded its ruling on principles of free speech. But a Constitutional basis is not required for courts to alter their approach to the scope of its immunity under Section 230, nor does the lack of such basis diminish the parallels drawn in this section. Surely, both situations involve the interpretation of law in the context of significant societal change that makes the balancing of interests particularly important—the social upheaval of the civil rights movement of the 1960s in the former and the unprecedented impact of the internet on society in the latter.

228. Or even reputational, to make the parallel to defamation law even more clear.

229. See *supra* notes 165–179 and accompanying text.

230. See *supra* notes 172–179 and accompanying text.

231. Some allegations against Ripoff Report seem so far afield from "speaking" or "publishing" that they fall completely outside the scope of potential immunity under Section 230(c)'s terms, and therefore, should not require the type of balancing described here. For example, it is hard to view plaintiff's allegations relating to Ripoff Report's operation of its "corporate advocacy" as related to third-party online content. If a plaintiff can demonstrate that Ripoff Report's conduct in that realm is harmful and make a causal connection to harm, a plaintiff should have access to damages regardless of Section 230(c).

would have the benefit of reducing all-or-nothing decisions at the pleading stage,²³² allowing courts simultaneously to recognize the statute's goal while permitting a plaintiff to develop evidence and eventually prove a case that is strong enough to satisfy the elevated standard.

The proposal would work in different contexts, too. Take the Snap cases, which involved claims for personal injury.²³³ There, a court would begin by ensuring that plaintiffs pled facts that did not rely entirely on derivative liability. In other words, if a plaintiff failed to plead facts connecting harm to the defendant's *own* conduct, a court would apply immunity and dismiss the complaint.²³⁴ But if a plaintiff met the pleading hurdle, a court would give the plaintiff an opportunity to proceed using elevated standards. First, a plaintiff would need to prove Snap knew that creating and maintaining Speed Filter could lead to harm or that it was reckless in failing to ascertain this was the case.²³⁵ To succeed, a plaintiff would need to prove this with clear and convincing evidence. That would be no easy matter in cases against Snap or in similar litigation. But proving this level of knowledge would not be impossible and could serve important aspects of public policy if accomplished.²³⁶

To summarize, this section of the Article proposes that if Congress fails to repeal or significantly revise Section 230(c), courts should interpret the statute by applying rules similar to those developed by the U.S. Supreme Court in defamation actions implicating the First Amendment. Doing so would allow courts to balance interests at play in a way that current case law has not consistently done. The approach would involve three basic steps. First, courts would require plaintiffs to plead facts pointing to a defendant's own conduct as wrongful, including activity that would lead to the imposition of

232. The standard almost surely would reduce the number of cases that courts dismiss on the pleadings. But the high evidentiary bar still would allow courts latitude to end cases at the summary judgment phase when a plaintiff was unable to satisfy the burden of proof.

233. See *supra* notes 113–114, 141–142 and accompanying text.

234. Citron & Wittes, *supra* note 37, at 467–68. This would limit the application of this section's proposal to a particular type of fact pattern, though admittedly not to an extent likely to satisfy Section 230(c)'s strongest proponents. See Goldman, *supra* note 36, at 40 (“It matters a lot that Section 230(c)(1)'s prima facie elements do not reference defendant scienter. Otherwise, plaintiffs could allege that scienter—with minimal or no factual support—and often survive a motion to dismiss, get into discovery, and delay resolution of the case to summary judgment or later.”).

235. The standard here would be akin to that of an intentional tort rather than mere negligence.

236. This proposal actually is more protective of Internet companies like Snap than the Ninth Circuit's decision in *Lemmon*, which reversed the district court opinion, holding that Section 230(c) did not apply to the plaintiff's allegations. See *supra* notes 115, 154–155 and accompanying text.

secondary liability in analogous situations.²³⁷ Next, with this pleading condition met, courts would require plaintiffs to satisfy an elevated standard of proof relating to a defendants' wrongdoing. Drawing a parallel to *New York Times Co. v. Sullivan* and its progeny, plaintiffs would need to prove that a defendant had knowledge that its activity could harm others or that the defendant was reckless in this regard. Finally, courts would elevate the burden of proof, requiring plaintiffs to prove a case by clear and convincing evidence, not simply a preponderance of the evidence.

V. CONCLUSION

Congress passed section 230 of the Communications Decency Act twenty-five years ago. In some ways, though, it seems like 250 years ago. At the time, the law's advocates sought to encourage the growth of emergent entities pioneering new and exciting technology. No one foresaw then what the internet would become today—the primary communication platform for nearly all of society, dominated by some of the world's most powerful companies. Times have changed, to say the least, and it is well past time to reconsider the way we view the law.

This Article has sought to be part of that reevaluation. The Article began by examining Section 230(c)²³⁸ and discussing its application in cases involving internet service providers' own conduct and not just third-party content posted on their sites. These cases seem to fit comfortably within analogous liability structures—and some courts agree.²³⁹ Other courts, however, refuse to entertain such claims, asserting that doing so would chill online activity in conflict with Section 230's purpose.²⁴⁰ The Article then suggested a way to reduce this dissonance and better balance interests, drawing particular parallels to well-established defamation law principles that weigh plaintiffs' ability to protect reputational interests against concerns that imposing liability might chill speech.²⁴¹

237. See *supra* notes 81–83 and accompanying text.

238. See *supra* notes 48–58 and accompanying text.

239. See *supra* notes 59–70, 114–135, 180–189 and accompanying text.

240. See *supra* notes 140–149, 170–178 and accompanying text; *supra* notes 70–75 and accompanying text.

241. See *supra* notes 210–236 and accompanying text.

Jeff Koseff surely was right when he described Section 230(c) as “twenty-six words that created the Internet.”²⁴² But the internet has changed us even more. It is past time for Congress and courts to rethink their approach to the law. Hopefully, this Article will help as we look ahead and imagine what the next quarter century will bring.

242. *See supra* note 1.

