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SECTION 230 OF THE COMMUNICATIONS DECENCY ACT: THE TRUE CULPRIT OF INTERNET DEFAMATION

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This Note highlights the growing concern of Internet defamation and the lack of viable legal remedies available to its victims. Internet defamation is internet speech with the purpose to disparage another's reputation. At common law, a victim of alleged defamation has the right to file suit against not only the original speaker of the defamatory statements, but the person or entity to give that statement further publication as well. In certain cases even the distributor, such as a newspaper stand, can be held liable for a defamation claim. However, liability due to defamatory speech on the Internet is quite different. Due to the anonymity offered by the Internet, a victim of Internet defamation, more often than not, is unable to file suit against the original speaker. As a result, the victim attempts to file suit against the website that published the defamatory statement the original speaker created. However, the victim often finds that such a website is immune from liability under section 230 of the Communications Decency Act of 1996, which provides, "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." This sweeping statute can effectually eliminate all viable defendants for a victim of Internet defamation to seek a legal remedy for the harm caused to him or her.

At the time of the Act's creation, the Internet was in its primal years and was nothing like it is today. The question is then raised, how could the drafters of the Act been able to predict the nature and dominance of the Internet as it exists twenty years later? Today, there are websites dedicated entirely to providing a forum for unsupported and unchecked gossip.

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Specifically, TheDirty.com even goes so far as to screen every submission from their third-party users in order to select for publication only those most egregious and damaging. Moreover, the website publishes all submissions under the same pseudonym, thus claiming the statements as its own and further protecting the anonymity of the original speaker. Despite the exorbitant amount of editorial control exerted by TheDirty.com, a federal appellate court recently found the website to be immune to defamation claims under section 230.

The Internet is far more reaching than its print counterpart, and defamatory statements are forever archived and accessible via general search engines. With such great exposure and potential for irreparable harm, this Note proposes that section 230 should be amended so as to properly distinguish a passive website entitled to immunity (the type of website the Act's drafters had confronted and contemplated) and those of a more culpable nature, such as TheDirty.com. Furthermore, Internet defamation should revert back to being treated the same as it would at common law. If a website provides a forum for legally actionable activities, actively exercises editorial control of users' content, and protects the anonymity of their users, then the website should be held liable for said actions as well.

I. INTRODUCTION

Online shaming—Internet¹ speech with the purpose to disparage another's reputation—has become an ever-growing concern in today's society.² Offline, such slanderous speech is considered defamation and is subject to legal ramifications under common law.³ Defamatory statements

1. For the purpose of this Note, the term "Internet" shall be referred to in the general sense of all inter-web activity taking place online. However, it should be noted that the Internet is really the vast infrastructure that connects millions of computers to one another world-wide and stems from the invention of the modem dating back to 1958. This is not to be confused with the World Wide Web, which is a system of interlinked hypertext documents accessible to all on the Internet. See Kim Lachance Shandrow, *10 Fascinating Facts About the World Wide Web on Its 25th Birthday*, ENTREPRENEUR (Mar. 12, 2014), [www.entrepreneur.com/article/232149](http://perma.cc/RR24-653L) [http://perma.cc/RR24-653L].

2. Jason C. Miller, Article, *Who's Exposing John Doe? Distinguishing Between Public and Private Figure Plaintiffs in Subpoenas to ISPs in Anonymous Online Defamation Suits*, 13 J. TECH. L. & POL'Y 229, 230 (2008); see Craig J. Marton et. al., *Protecting One's Reputation—How to Clear a Name in a World Where Name Calling Is So Easy*, 4 PHOENIX L. REV. 53, 66 (2010).

3. See RESTATEMENT (SECOND) OF TORTS § 559 (1977) (defining defamation and outlining the elements supporting a cause of action).

made online are technically afforded the same protection.⁴ However, due to federal circuit courts' interpretation of section 230 ("Section 230") of the Communications Decency Act of 1996 ("CDA") and the anonymity of defamers, victims of Internet defamation are left with limited or non-existent opportunities to litigate their claims.⁵ Section 230 states in part that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁶ Section 230, as it stands today, effectually bestows upon web hosts, or Internet service providers ("ISPs"), a near limitless protection against claims arising out of their online users' actions.⁷

Consider the following illustration: on a popular online shaming site, an anonymous person posted that Sarah Jones, a high school English teacher and Cincinnati Bengals cheerleader, slept with every member of the Bengals football team and contracted an array of STDs.⁸ One of her students soon came across the posting—in no time, the post was brought to the attention of the entire student body, faculty members, and parents of the high school students.⁹ Ms. Jones pleaded repeatedly with the owner and creator of the website to remove the defamatory post but, her efforts proved futile.¹⁰ Others soon began adding their own commentary and allegations against Ms. Jones, such as her regularly engaging in sexual activities in her

4. See Marton, *supra* note 2, at 65 ("Regardless of the medium in which a publisher disseminates defamatory information, a plaintiff must plead and prove the traditional elements of defamation to prevail.").

5. See David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 379 (2010).

6. 47 U.S.C. § 230(c)(1) (2012).

7. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (barring the plaintiff's otherwise legitimate claim because the only available defendant held immunity under Section 230 of the Communications Decency Act).

8. *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 403 (6th Cir. 2014); see also Kashmir Hill, *Bengals Cheerleader Who Sued The Dirty for Ruining Her Reputation Now Facing Reputation-Ruining Charges*, FORBES (Mar. 30, 2012, 1:49 PM), <http://www.forbes.com/sites/kashmirhill/2012/03/30/bengals-cheerleader-who-sued-the-dirty-for-ruining-her-reputation-now-facing-reputation-ruining-charges> [<http://perma.cc/A35M-WF7R>].

9. Hill, *supra* note 8; see *Jones*, 755 F.3d at 404.

10. *Jones*, 755 F.3d at 404.

classroom.¹¹ In an interview, Ms. Jones explained the gravity of the reputational harm caused to her, recounting:

I don't teach elementary school, I teach high school. These kids Google me. They see things. If it's on the Internet, it's real to them. They believe it.

. . . .

One day I was this credible teacher that they looked up to and listened to

The next day I was a slut to them. I had a student come in and say "I cannot come into my classroom and learn because you had sex in here and you're a slut."¹²

The foregoing scenario describes the actual facts that led to the recent Sixth Circuit decision in *Jones v. Dirty World Entertainment Recordings LLC*.¹³ The *Jones* decision helped solidify the growing consensus among circuit courts that ISPs must actually be the creators of the defamatory content to be held liable under the CDA.¹⁴ In other words, for a website to be held liable for defamation, the defamatory statement must have been written by the website provider itself and not by one of its users.¹⁵ It is important to note that the ISP in *Jones* not only encouraged such defamatory statements, but also screened all of its third-party postings, selected only the most scandalous submissions for publication, and added its own commentary to the chosen submissions.¹⁶

Jones powerfully illustrates why a statute dating back two decades can no longer adequately serve the purpose for which it was created, unless properly modified to address issues arising out of the prevalent use of interactive online media. The fact that the active editorial role of the ISP in

11. *Id.* at 403–04.

12. *Hill*, *supra* note 8.

13. *Jones*, 755 F.3d. 398.

14. Bill Donahue, *6th Circ. Gossip Site Ruling a Relief for Web Hosts*, LAW360 (June 17, 2014, 8:52 PM), <http://www.law360.com/articles/548946/6th-circ-gossip-site-ruling-a-relief-for-web-hosts> [<http://perma.cc/N2W7-Z5QG>] (discussing the Sixth Circuit *Jones* opinion).

15. *See id.* (“[S]o long as the user-generated content is not materially altered, [Section 230] immunity will still attach . . .”).

16. *Id.*

Jones still failed to disqualify the immunity afforded to the ISP under Section 230 indicates the unreasonably high standard of proof that a plaintiff must overcome in order to establish ISP liability. This is especially troublesome given that equivalent defamatory statements made offline, such as in a newspaper, constitute grounds to hold the publisher of such content liable.¹⁷ Considering the societal role the Internet plays today, it is difficult to comprehend why the Internet, which has the potential to cause considerably more damage, should be treated more leniently than its printed counterparts.

Is the owner of an illegal brothel house responsible for facilitating and profiting from the illegal practices that occur on such property? Is the owner of a bar whose regulars commonly partake in illegal gambling on his premises liable? The answer to both questions is yes—the owners are held accountable for providing the forum for others to partake in illegal activities, and their encouragement, facilitation, and profit constitute an illegality of their own.¹⁸ So why do ISPs, who design the forums that are entirely dedicated to illegal practices such as defamation, public disclosure of private facts, and copyright infringement, face zero liability?¹⁹

This Note will highlight the illogical reasoning behind the policy justifications for upholding the twenty-year-old, overly broad ISP immunity granted by the CDA. In 1996, the internet was nothing like it is today—the CDA’s applicability must adapt to the times.²⁰ The courts contend that limiting the applicability of Section 230 will have a chilling

17. See Bryant Storm, Comment, *The Man Behind the Mask: Defamed Without a Remedy*, 33 N. ILL. U. L. REV. 393, 394 (2013) (illustrating the disparate treatment and unequal protection amongst claims made on the Internet versus those that still fall under common law through his discussion of John Doe cases).

18. CAL. PENAL CODE § 318 (West 2015) (“[W]hoever, through invitation or device, prevails upon any person to visit any room, building, or other places kept for the purpose of illegal gambling or prostitution, is guilty of a misdemeanor, and, upon conviction thereof, shall be confined in the county jail not exceeding six months, or fined not exceeding five hundred dollars (\$500), or be punished by both that fine and imprisonment.”).

19. See generally Zac Locke, Comment, *Asking for It: A Grokster-Based Approach to Internet Sites That Distribute Offensive Content*, 18 SETON HALL J. SPORTS & ENT. L. 151 (2008).

20. See Matthew G. Jeweler, Note, *The Communications Decency Act of 1996: Why § 230 Is Outdated and Publisher Liability for Defamation Should Be Reinstated Against Internet Service Providers*, 8 U. PITT. J. TECH. L. & POL’Y 3, 3 (2007) (arguing Section 230’s application to the Internet is outdated and unfair as it overlooks the dominant medium the Internet has become since the CDA’s enactment).

effect on the freedom of expression afforded under the First Amendment because ISPs would become overly cautious in order to protect themselves from liability.²¹ Liability for defamatory statements in printed materials has not come at the cost of the freedom of speech guarantees, so why should Internet defamation be any different?²²

Internet defamation has a far greater potential to harm than defamation in printed materials.²³ Speech published on the Internet is archived instantly, not only making it accessible to the world at that moment, but forever memorializing the association with the defamed name—the content will continue to pop-up on search engines for decades.²⁴ Internet-based defamatory speech, therefore, is more far-reaching than common law defamation.²⁵ And yet, while common law avails the victim the opportunity to seek legal remedies against the defamer, victims are left with little to no chance of establishing a prima facie case in defamation.²⁶ Nevertheless, doing away with Section 230 entirely, or criminalizing internet-based torts,²⁷ is not an adequate solution. This Note proposes a means to an end that will simultaneously protect free speech and deter the egregious online behaviors that are becoming increasingly prevalent in online social media.

21. Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 273–74 (2005).

22. See Locke, *supra* note 19, at 153.

23. See Robert D. Richards, *Sex, Lies, and the Internet: Balancing First Amendment Interests, Reputational Harm, and Privacy in the Age of Blogs and Social Networking Sites*, 8 FIRST AMEND. L. REV. 176, 198 (2009) (“With technological advancements also comes the opportunity—indeed the greater likelihood, given the expansive system—for more widespread distribution of misinformation . . .”).

24. See Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Credibility?: Lessons from the DMCA Applied to Online Defamation*, 25 CARDOZO ARTS & ENT. L.J. 237, 265 (2007) (noting print publications are limited in reach to a finite audience, whereas the Internet extends to an infinite audience).

25. See *id.* at 247.

26. See Storm, *supra* note 17, at 394 (illustrating the disparate treatment and unequal protection amongst claims made on the Internet versus those that still fall under common law through his discussion of John Doe cases).

27. See generally Jonathan D. Bick, *Why Should the Internet Be Any Different?*, 19 PACE L. REV. 41 (1998) (arguing it is not necessary “to criminalize what is already criminal activity or make a special tort for what is already tortious conduct”); Jeweler, *supra* note 20 (proposing Section 230 should be amended to dictate a common law approach).

Part II of this Note provides further background information regarding: (1) how anonymity on the Internet further exacerbates the problem, (2) defamation laws at common law, and (3) the creation of the CDA and its intended purpose and policy justifications. Part III illuminates the negative implications of Section 230 by comparing defamation cases prior to the enactment of the CDA with cases decided post-CDA enactment, with a particular focus on the *Jones* decision. Part IV introduces the proposed amendment to the CDA that would maintain a high level of speech protection while concurrently providing a viable legal remedy to the defamed. Finally, Part V summarizes the pros and cons of the current legal standard and the proposed remedy.

II. BACKGROUND

Prior to the enactment of the CDA, online speech was regulated in the same manner as any other speech.²⁸ Under common law, liability was placed not only on the original defamer, but also on any person who reprinted an already-published defamatory statement.²⁹ Today, due to the anonymity provided by the Internet, victims of defamation are rarely able to identify the author.³⁰ As a result, victims of Internet defamation have gone after the websites that either published the libelous statement or provided the forum for its publication.³¹ However, courts have struggled to define the scope of immunity afforded ISPs under Section 230 of the CDA. Section 230 provides, “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.”³² Section 230 essentially grants ISPs a near limitless protection against causes of action arising out of statements posted by their online users unless the ISPs

28. Robert D. Richards, *Sex, Lies, and the Internet: Balancing First Amendment Interests, Reputational Harm, and Privacy in the Age of Blogs and Social Networking Sites*, 8 FIRST AMEND. L. REV. 176, 184 (2009).

29. RESTATEMENT (SECOND) OF TORTS § 578 (1977) (defining the republisher’s scope of liability attached to the defamation cause of action).

30. See David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 487 (2010).

31. *Id.*

32. 47 U.S.C. § 230(c)(1) (2012).

created the defamatory speech.³³

A. Anonymity and Freedom of Expression as It Relates to Section 230

While Section 230 protects ISPs from lawsuits arising out of third-party content, the third-party individuals themselves remain completely liable and subject to litigation.³⁴ For example, if someone posts a defamatory statement about someone on an AOL message board, AOL is protected, but the person who created the defamatory statement is subject to liability. Due to the anonymity offered by the Internet however, plaintiffs, more often than not, struggle to identify who authored the defamatory speech against them, which explains why they go after the ISP for retribution.³⁵

The Internet is an entity with “few checks and balances and no due process.”³⁶ Establishing the credibility of a claim arising from Internet interactions is no easy feat.³⁷ Studies have shown that the anonymity of the Internet encourages people to say things that they normally would not.³⁸ Such anonymity is arguably one of the leading causes of cyberbullying and Internet defamation.³⁹ Perpetrators no longer need to come into physical contact with the people they set out to harm, nor do they need to see the actual effects of their actions upon the victim.⁴⁰

Since anonymity has traditionally been associated with the freedom of expression, courts require a rather high threshold to be met in order to

33. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (barring the plaintiff’s otherwise legitimate claim because the only available defendant held immunity under Section 230 of the Communications Decency Act).

34. Richards, *supra* note 28, at 197.

35. See *id.*

36. Jessica Bennett, *The Dark Side of Web Fame*, NEWSWEEK MAG. (Feb. 21, 2008, 7:00 PM), <http://www.newsweek.com/dark-side-web-fame-93505> [<http://perma.cc/ZT4T-JN88>].

37. *Id.*

38. *Id.*

39. See *id.*

40. See Jay M. Zitter, Annotation, *Liability of Internet Service Provider for Internet or E-Mail Defamation*, 84 A.L.R. 5TH 169 (2005) (collecting CDA cases where plaintiffs alleged injury due to defamatory third-party statements made online).

compel the ISP to disclose the initial author's identifying information.⁴¹ In *Dendrite International, Inc. v. Doe*, the court set forth the following standard for courts to consider when a plaintiff requests to compel the disclosure of an anonymous wrongdoer:

The court held that when a plaintiff makes a request of this kind, (1) the plaintiff must provide notice to the anonymous posters and provide them an opportunity to oppose the disclosure request; (2) the plaintiff must set out the statements that allegedly constitute defamatory speech; (3) the plaintiff must establish a prima facie case against the anonymous person(s); (4) the plaintiff must set forth evidence to support each element of the cause of action; and (5) the court must balance the anonymous defendant's free speech rights against the strength of the plaintiff's claim.⁴²

Even if the plaintiff is able to compel the ISP to disclose such information, it will be in the form of an IP address.⁴³ Given that many people share IP addresses through common public networks or Wi-Fi hotspots, the likelihood that such information would be of any great value is slim.⁴⁴

B. Defamation at Common Law

The most common cause of action involving immunity granted under the CDA is defamation.⁴⁵ The Restatement (Second) of Torts states, "A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."⁴⁶ Defamation laws are

41. Richards, *supra* note 28, at 198–201.

42. Bryant Storm, Comment, *The Man Behind the Mask: Defamed Without a Remedy*, 33 N. ILL. U. L. REV. 393, 402–03 (2013) (citing *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001)).

43. See Bennett, *supra* note 36.

44. *Id.*

45. Ardia, *supra* note 30, at 394 & n.83 (discussing the findings of his empirical study, in which he found, "Defamation claims, including libel, slander, trade libel, and disparagement, occurred in 50.5% of the decisions").

“implemented to strike a balance between the First Amendment speech rights of the speaker and the rights of the defamed to protect their reputation and to be compensated for injuries to it.”⁴⁷ The traditional elements of defamation are: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third-party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.⁴⁸

The last element, which relates to proof of harm, is usually the most difficult element for a plaintiff to establish. It can be established by either proof of specific harm, i.e., harm that can be quantified and shown to be a direct cause of the statement (such as the loss of one’s job), or the statement may be defamatory on its face.⁴⁹ A statement is defamatory on its face, “per se,” if the statement pertains to a matter that so negatively stigmatized by society that harm may be presumed.⁵⁰ While facially defamatory statements may vary by jurisdiction, common law has generally recognized four categories of such statements: (1) criminal conduct; (2) loathsome diseases; (3) sexual misconduct; and (4) lack of professional competency.⁵¹

Prior to the CDA, liability was not only placed upon the original defamer; any person that republished defamatory speech was subject to the same degree of culpability.⁵² Imagine that Magazine A falsely reported that Company B was involved in money laundering, and Newspaper C—relying on Magazine A’s story—republished a subsequent article to the same effect. In such a case, both A and C would be subject to liability. However, the scope of liability differs depending on how significant a role the defendant C played in making the defamatory statement.⁵³

46. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

47. See Storm, *supra* note 42, at 396.

48. *Id.* at 395.

49. See 128 MALLA POLLACK, AM. JUR. TRIALS § 3 (2013).

50. *Id.* § 4.

51. *Id.*

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

53. See Storm, *supra* note 42, at 396–98 (distinguishing the role of the original publisher,

At common law, there are three categories of involvement for which liability may extend.⁵⁴ First, the publisher is the original speaker or author of the defamatory statement(s) and is subject to complete liability.⁵⁵ The author of an article in a newspaper, for example, is considered the publisher. Publication to a third-party could be the simple utterance of a defamatory statement to another, or the providing of access to the written defamatory speech for another to read.⁵⁶ Second, the republisher is the entity that re-publishes the defamatory content, and it is treated as if it were the original author of the statement in question, such as a newspaper.⁵⁷ Third, the distributor disseminates the defamatory material through something like a bookstore or a newsstand, and it is held liable only if it has reason to know of the defamatory content.⁵⁸

Stratton v. Prodigy is an early Internet defamation case that is said to have largely contributed to the creation of Section 230 of the CDA.⁵⁹ There, Stratton filed suit against Prodigy, a computer network, for its publication of defamatory statements posted by a third-party on a message board on Prodigy's website.⁶⁰ The New York state court found that Prodigy's liability should be analyzed under its role as a publisher, not as a distributor.⁶¹ In reaching this conclusion, the court noted that Prodigy staff regulated the speech on their message boards, screened for outright offensive material and edited such content, and thereby assumed a publishing role.⁶² Thus Prodigy's liability was equivalent to that of the original author of the libelous speech.⁶³ *Stratton* illustrates that prior to the

republisher, and/or distributor in an Internet defamation suit).

54. *Id.*

55. *Id.* at 396.

56. *Id.*

57. *Id.* at 396–97.

58. *Id.* at 397.

59. *Storm*, *supra* note 42, at 398.

60. *Id.*

61. *Id.*

62. *See id.*

enactment of the CDA, courts generally analyzed Internet defamation under the same guidelines that govern all libelous speech.⁶⁴

C. *The Creation of the CDA*

The CDA was initially created to criminalize known users who post offensive or inappropriate content in a manner easily accessible to minors over the internet.⁶⁵ The new law applied to material that is “in context, patently offensive, and depicts or describes sexual or excretory activities or organs.”⁶⁶ Although the CDA was originally created to address a very narrow issue, it appears the Act has had a consequential effect applicable to all Internet activities because of the way Section 230 has been interpreted by the courts.⁶⁷

Prior to looking closer at the CDA and Section 230, it is imperative to note some of the terminology utilized throughout the Act. Subsection (f) defines the term “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access . . . to a computer server.”⁶⁸ The term “information content provider” refers to “any person or entity that is responsible . . . for the creation or development of information provided through the Internet or any other interactive computer service.”⁶⁹

Section 230 further states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁷⁰ It

63. *Id.*

64. *Id.*

65. Jim Exon, Commentary, *The Communications Decency Act*, 49 FED. COMM. L.J. 95, 96 (1996).

66. *Id.*

67. *See, e.g.,* Jones v. Dirty World Entm’t Recordings LLC, 755 F.3d 398, 406–09 (6th Cir. 2014) (discussing how courts have interpreted Section 230 as it applies to internet defamation); *Zeran*, 129 F.3d at 327 (barring the plaintiff’s otherwise legitimate claim because the only available defendant held immunity under Section 230).

68. 47 U.S.C. § 230(f) (2012).

69. *Id.*

70. *Id.* § 230(c).

continues to suggest that no interactive service provider shall be liable for any editorial actions it takes in good faith to restrict access to inappropriate material, such as screening submissions prior to publication.⁷¹ The CDA states that the policy justifications for such immunity is “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools” and to “remove disincentives for . . . blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.”⁷²

Another objective of the creation of Section 230 was to promote the growth and development of the Internet.⁷³ While legal scholars today believe that objective has been met since the CDA’s creation two decades ago, there is concern that the courts’ interpretations of Section 230 have overly extended the protections afforded under the section.⁷⁴

III. THE EVOLUTION OF SECTION 230’S BROAD SCOPE OF IMMUNITY

The Internet has become such an integral part of our society that it is difficult to imagine a time without it. The idea of what would become the World Wide Web was proposed merely twenty-seven years ago in 1989.⁷⁵ The Internet’s first website launched on August 6, 1991.⁷⁶ In 1996, at the time of the CDA’s creation, only an estimated seventy-seven million individuals were using the Internet.⁷⁷ By the end of 2014, there were roughly three billion Internet users worldwide.⁷⁸ The Internet was such a

71. *Id.*

72. *Id.* § 230(b).

73. *Id.*

74. Matthew G. Jeweler, Note, *The Communications Decency Act of 1996: Why § 230 Is Outdated and Publisher Liability for Defamation Should Be Reinstated Against Internet Service Providers*, 8 U. PITT. J. TECH. L. & POL’Y 3, 37 (2007); Storm, *supra* note 42, at 415–16.

75. Kim Lachance Shandrow, *10 Fascinating Facts about the World Wide Web on Its 25th Birthday*, ENTREPRENEUR (Mar. 12, 2014), www.entrepreneur.com/article/232149 [<http://perma.cc/RR24-653L>].

76. *Id.*

77. INTERNET LIVE STATS, www.internetlivestats.com/internet-users/ [<http://perma.cc/6WRG-JFAZ>].

78. *Id.*

new concept in 1996 that one could infer that the CDA creators could not have possibly imagined the Internet as it exists today.⁷⁹ As a result, courts have struggled to interpret the scope of Section 230 as it applies to Internet activities today.⁸⁰ While the statute's initial purpose was to protect anonymity in the hopes of fostering robust free speech, Section 230 has created a lawless land for individuals to freely commit wrongs that would otherwise have been actionable.⁸¹

A. *The Passive ISP Typical of Early Section 230 Cases*

In order to adequately highlight how the courts today have erroneously overextended the scope of Section 230, it is necessary to look at how it was first applied to cases near the time of the CDA's creation. Earlier courts interpreting the protections afforded under Section 230 dealt primarily with passive ISPs that merely created a forum for third-party Internet speech not subject to editorial review. In *Zeran v. America Online, Inc.*, an anonymous user posted on one of America Online's ("AOL") message boards, offering for sale t-shirts with offensive slogans relating to the April 19, 1995 Oklahoma City bombing and instructing interested buyers to call "Ken" at Zeran's telephone number.⁸² Zeran received a myriad of calls from people outraged by the exploitation of such a

79. Matthew G. Jeweler, Note, *The Communications Decency Act of 1996: Why § 230 Is Outdated and Publisher Liability for Defamation Should Be Reinstated Against Service Providers*, 8 U. PITT. J. TECH. L. & POL'Y 3, 36 (2007) ("At the time Congress enacted § 230, the Internet was a relatively new, developing technology and was very limited in its content. Providing online encyclopedias, dictionaries, bulletin boards and chat rooms were some of the small number of functions the Internet performed at the time. Indeed, at the time Congress enacted § 230 it is unlikely that it knew that within a few years almost every newspaper and print medium would have a website publishing the same material.").

80. *See id.* at 10–18 (discussing post-CDA cases that have interpreted Section 230 immunity very broadly).

81. *See* Zac Locke, Comment, *Asking for It: A Grokster-Based Approach to Internet Sites That Distribute Offensive Content*, 18 SETON HALL J. SPORTS & ENT. L. 151, 153 (2008) ("The fact that torts and crimes such as defamation, predation, and child pornography happen in cyberspace instead of on a street corner does not shield speakers from liability for their actions. However, under the current federal framework, [interactive computer services] are shielded from liability for speech posted on their networks by third parties. While a traditional newspaper would probably face liability if it printed a photograph depicting child pornography in any section of the paper, an internet service provider . . . would not be liable for allowing the same photograph to be posted by a third-party on a chat room it controlled.").

82. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997).

devastating event; some even threatened his life.⁸³ An Oklahoma radio station further aggravated the situation when it read the AOL posting on-air and urged listeners to call Zeran's telephone number to voice their disgust with him.⁸⁴

Zeran sued AOL for defamatory speech initiated by a third-party, but the district court held, and the Fourth Circuit later affirmed, that the CDA provision barred Zeran's claims.⁸⁵ In support of the judgment, the Fourth Circuit interpreted Congress's intent behind the immunity of Section 230:

The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.⁸⁶

The court continued its rationale by pointing out that notice-based liability, like that imposed upon a distributor under common law, was too high of a burden to place upon ISPs as well.⁸⁷ "In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability."⁸⁸ The *Zeran* decision, in effect, eliminated both common law publisher and distributor liability with respect to ISPs and defamatory speech stemming from their third-party users.⁸⁹

83. *Id.*

84. *Id.*

85. *Id.* at 328.

86. *Id.* at 330.

87. *Id.* at 333.

88. *Zeran*, 129 F.3d at 333.

89. Jeweler, *supra* note 79, at 22.

Most scholars agree that *Zeran* illustrates the proper context in which Section 230 should apply.⁹⁰ For an ISP that is “merely the medium through which millions of third-parties post messages,” it seems unreasonable to hold it responsible for those third-party communications when an ISP does not serve in any type of editorial capacity.⁹¹ To do so would place an excessive burden upon such passive ISPs⁹² and would likely result in the automatic removal of flagged postings, thus threatening the right to freedom of speech.⁹³ However, where an ISP reserves editorial control over a third-party’s speech (such as deciding whether or not to publish the speech), the ISP is effectively assuming the same duties as a publisher under common law and should be held accountable as such.⁹⁴ As courts continue to expand the scope of Section 230, ISPs will soon have an absolute and automatic immunity to any legal claims arising from the actions of their third-party users.⁹⁵

B. The Broadening Scope of Section 230

As the Internet progressed in to a dominant medium of communication, almost every print medium began publishing the same material both in print and on the Internet.⁹⁶ This is where the interpretation of Section 230 immunity gradually became less clear and more problematic.⁹⁷ The United States District Court for the District of Columbia applied Section 230 to defamatory content arising from an Internet article in *Blumenthal v. Drudge*, the outcome of which contributed

90. *Id.* at 22–23.

91. *Id.* at 22.

92. *Id.* at 12.

93. *See id.* at 20–21

94. *See id.* at 20.

95. *See Jeweler, supra* note 79, at 37 (maintaining that, despite Congress’s intent to promote the Internet’s growth without government interference, courts have interpreted Section 230 to afford “such broad immunity that people are left with little chance to recover if they are defamed through the Internet”).

96. *Id.* at 36.

97. *See id.* (finding it unlikely that Congress intended to immunize ISPs for performing the same functions as their print counterparts).

to the broadening scope of immunity under Section 230.⁹⁸

In *Blumenthal*, White House employees brought a defamation claim against the columnist of an electronically-published gossip column⁹⁹ and the ISP that contracted for the column, America Online, Inc. (“AOL”).¹⁰⁰ The columnist reported, “New White House recruit Sidney Blumenthal has a spousal abuse past that has been effectively covered up.”¹⁰¹ This rumor was especially harmful to the White House since the column was published the day before Sidney Blumenthal began his new role as Assistant to the President under President Bill Clinton, who had recently signed into law the Violence Against Women Act.¹⁰² The Blumenthals filed suit and AOL moved for summary judgment on the basis that Section 230 granted it immunity from claims arising from its third-party content.¹⁰³

In response to AOL’s summary judgment motion, the plaintiffs asserted that AOL was not afforded Section 230 immunity because AOL contracted for the column, paid the columnist \$36,000 per year, reserved editorial rights to the content, and regularly promoted the column.¹⁰⁴ In addition, shortly after contracting with the columnist, AOL had issued a press release describing the new column as “gossip and rumor” material and urged potential subscribers to sign up with AOL so as to not miss out.¹⁰⁵ The plaintiffs argued, “Why should AOL be permitted to tout someone as a gossip columnist or rumor monger who will make such rumors and gossip ‘instantly accessible’ to AOL subscribers, and then claim immunity when that person, as might be anticipated, defames another?”¹⁰⁶

The court agreed with plaintiffs’ argument but contended that such

98. *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *see also Jeweler*, *supra* note 79, at 36–37.

99. *Blumenthal*, 992 F. Supp. at 46.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 50.

104. *Id.* at 51.

105. *Blumenthal*, 992 F. Supp. at 51.

106. *Id.*

agreement was irrelevant due to the statutory language of Section 230 and how previous courts had interpreted and enforced it.¹⁰⁷ The court acknowledged that AOL was not a passive conduit (such as the ISP in *Zeran*), and even went so far as to admit that “it would seem only fair to hold AOL to the liability standards applied to a publisher.”¹⁰⁸ Nevertheless, because “Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others,” the court felt bound to find statutory immunity and grant summary judgment in favor of AOL.¹⁰⁹

Zeran and *Blumenthal*, though only a year apart, concern two very distinct types of ISPs.¹¹⁰ *Zeran* concerns the type of ISP in existence at the time of the CDA’s enactment, one that merely provided a forum for third-parties to post messages freely.¹¹¹ While not without its critics, most courts and scholars agreed that immunity for these ISPs under Section 230 was reasonable in that case.¹¹² In contrast, *Blumenthal* involved the next generation of ISPs whose role in the creation of the statement resembled that of a traditional print medium, such as a newspaper.¹¹³ The *Blumenthal* court itself was uncomfortable extending Section 230 immunity to an ISP that not only performed traditional editorial duties, but actually sought out and publicized the particular columnist in the hope that the scandalous content would encourage individuals to subscribe to their service.¹¹⁴ One would expect that if courts were having difficulty justifying the application of such a broad immunity, they would evolve the law so as to better serve justice.¹¹⁵ Be that as it may, eighteen years have passed since *Blumenthal*

107. *Id.* at 51–53.

108. *Id.* at 51.

109. *Id.* at 52–53.

110. *See Jeweler, supra* note 79, at 22–24.

111. *See id.* at 22.

112. *Id.*

113. *See id.* at 23.

114. *Blumenthal*, 992 F. Supp. at 51–53.

115. *See Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1025 (Fla. 2001) (Lewis, J., dissenting) (commenting on the erroneous applications of Section 230 and how courts’

and instead of limiting the scope of Section 230's immunity, courts have actually expanded the scope even broader.¹¹⁶

*C. Section 230 Today: Analysis of
Jones v. Dirty World Entertainment Recordings LLC*

The court in *Blumenthal* recognized that the Internet, although revolutionary and highly beneficial to society, has presented unprecedented challenges for which the “legal rules that will govern this new medium” had yet to be developed.¹¹⁷ However, as case law suggests, subsequent courts have adopted the *Blumenthal* philosophy in maintaining the status quo and have left the “shaping” of Internet law to their successors.¹¹⁸ The district court in *Jones* broke away from this philosophy and developed a legal standard that properly limited the scope of Section 230 to only apply to the passive ISPs that existed at the time of the CDA's enactment.¹¹⁹ The district court therefore found distinct those ISPs of a more pervasive nature that have enjoyed the benefits of Section 230 for far too long.¹²⁰ However, the appellate court was quick to return the ISP absolute immunity back to its expanding state.¹²¹

As of the writing of this Note, it has been twenty-seven years since the conception of the Internet.¹²² Today's courts are now dealing with a

interpretation of ISP absolute immunity is “absurd”).

116. See, e.g., *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398 (6th Cir. 2014).

117. *Blumenthal*, 992 F. Supp. at 49.

118. See generally David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373 (2010) (providing an empirical study of Section 230 case law and examining the 184 Section 230 cases that have taken place since the CDA's creation). As case law developed, courts have continued to interpret Section 230 immunity as all encompassing, yet a notable few mention the need to reevaluate the scope of immunity because of dramatically different circumstances surrounding the Internet and the role of ISPs today, as compared to those present at the time of the CDA's creation. *Id.*

119. See *Jones v. Dirty World Entm't Recordings, LLC*, 840 F. Supp. 2d 1008, 1010–11 (E.D. Ky. 2012).

120. See *id.*

121. See *Jones*, 755 F.3d at 417 (vacating the district court's judgment in favor of plaintiff and ordering the judgment be entered in favor of defendant).

new generation of ISPs increasingly involved in the creation of allegedly defamatory statements.¹²³ The 2014 Sixth Circuit Court of Appeals decision in *Jones* overturned the district court's decision and instead found that an ISP still retains its privileged immunity under Section 230,¹²⁴ even where it (1) provides a forum dedicated entirely to unconfirmed gossip submitted by third-parties;¹²⁵ (2) screens each and every submission and selects only those most scandalous in nature to post;¹²⁶ (3) claims the defamatory statement as its own by subsequently publishing those selected submissions under a single, universal anonymous author ("THE DIRTY ARMY");¹²⁷ and (4) adds its own commentary to the post.¹²⁸ This decision has virtually bestowed upon ISPs a near absolute immunity.¹²⁹ The only way an ISP could be any more involved in the creation of alleged defamatory speech would be if the ISP itself was the sole creator of the gossip.¹³⁰

122. Shandrow, *supra* note 75.

123. *See, e.g., Jones*, 755 F.3d 398.

124. *See id.* at 409–17 (discussing the rationale behind preserving immunity for the ISP and ruling in favor of defendant).

125. *See id.* at 401–02 ("In short, the website is a user-generated tabloid primarily targeting non-public figures. . . . The vast majority of the content appearing on www.TheDirty.com is comprised of submissions uploaded directly by third-party users."); *see also* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1271 (11th ed. 2004) (defining "tabloid" as "of, relating to, or resembling tabloids; *especially*: featuring stories of violence, crime, or scandal presented in a sensational manner").

126. *See Jones*, 755 F.3d at 403 ("The site receives thousands of new submissions each day. Richie or his staff selects and edits approximately 150 to 200 submissions for publication each day."). Taking the data provided in *Jones* (that, of the thousands of daily submissions only a small number get published) together with the observations of published submissions on the website, one can infer that those published are of a perverse or scandalous nature.

127. *Id.* ("Submissions appear on the website as though they were authored by a single, anonymous author— 'THE DIRTY ARMY.' This eponymous introduction is automatically added to every post that Richie receives from a third-party user.").

128. *Id.* ("Richie typically adds a short, one-line comment about the post with 'some sort of humorous or satirical observation.'").

129. *See id.* at 409–11 (elaborating on the term "development" as it is read in Section 230).

130. *See id.*

1. The District Court Properly Found TheDirty.Com’s Involvement Too Egregious to be Privileged to Section 230 Immunity

The district court correctly found that the ISP in *Jones* concerned exactly the type of ISP that should not be privileged to the immunity of Section 230.¹³¹ As stated in Part I, Sarah Jones was the subject of several anonymous posts on www.TheDirty.com.¹³² “The website enables users to anonymously upload comments, photographs, and video, which Richie [the website creator and operator] then selects and publishes along with his own distinct, editorial comments.”¹³³ The posts that get selected for publication are of the scandalous variety typical of a tabloid.¹³⁴

Despite Jones’s many pleas for removal, the defamatory posts remained online and actually received even more attention from Richie, as well as the media.¹³⁵ Jones filed suit against the website for defamation, libel per se, false light publicity, and intentional infliction of emotional distress.¹³⁶ Although the defendants admitted that “facially defamatory and privacy-violating posts were made to their website concerning the plaintiff,” they also asserted that such claims were barred by Section 230.¹³⁷

The district court rejected defendants’ arguments, stating that Section 230 immunity “applies only if the interactive computer service provider is not also an ‘information content provider,’ which is defined as someone who is ‘responsible, in whole or in part, for the creation or development of the offending content.’”¹³⁸ At that time, the Sixth Circuit had yet to decide

131. *See Jones*, 840 F. Supp. 2d at 1012 (“This Court holds by reason of the very name of the site, the manner in which it is managed, and the personal comments of defendant Richie, the defendants have specifically encouraged development of what is offensive about the content of the site.”).

132. *Jones*, 755 F.3d at 401.

133. *Id.*

134. *See id.*

135. *Id.* at 404.

136. *Id.* at 401–02.

137. *Jones*, 840 F. Supp. 2d at 1009–10.

138. *Id.* at 1010 (citing 47 U.S.C. § 230(f)(3) (2012); *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008)).

what actions by a website operator would constitute “creation or development of the offending content.”¹³⁹ For guidance, the court looked to the rationale of *Fair Housing Council v. Roommates.com, LLC* (“*Roommates*”).¹⁴⁰ In *Roommates*, the Ninth Circuit held that the defendant was not entitled to Section 230 immunity because the “defendant required subscribers to the site as prospective landlords or tenants to include information that was illegal under the Fair Housing Act.”¹⁴¹ The *Roommates* court held that by imposing that requirement, the website becomes “much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information.”¹⁴² The district court in *Jones* continued its analysis by referencing *FTC v. Accusearch, Inc.* (“*Accusearch*”), in which a website operator sold the personal data of its users and the Tenth Circuit enunciated the controlling test for determining the applicability of Section 230 immunity: “We therefore conclude that a service provider is ‘responsible’ for the development of offensive content only if it in some way specifically encourages the development of what is offensive about the content.”¹⁴³ Under the guiding principles of *Roommates* and *Accusearch*, then, the *Jones* district court held that the defendant website does in fact “specifically encourage development of what is offensive about the content” in controversy.¹⁴⁴

2. The Appellate Court Reversed Any Progress Made in Section 230 Case Law

The district court’s decision in *Jones* had the potential to develop Section 230 case law from a “one size fits all” bestowal of immunity towards a narrower, modern application of a twenty-year old statute. The court progressed the case law by holding that a “website owner who intentionally encourages illegal or actionable third-party postings to which

139. *Jones*, 840 F. Supp. 2d at 1010.

140. *Id.*

141. *Id.* (discussing *Fair Hous. Council*, 521 F.3d 1157).

142. *Id.*

143. *Jones*, 840 F. Supp. 2d at 1010–11 (citing *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009)).

144. *Id.* at 1012.

he adds his own comments ratifying or adopting the posts becomes a ‘creator’ or ‘developer’ of that content and is not entitled to immunity.”¹⁴⁵ Unfortunately, the district court’s approach of differentiating between passive and active ISPs was rejected on appeal at one fell swoop.¹⁴⁶ The Sixth Circuit Court of Appeal, like many before it, acknowledged the behavior of the ISP was “regrettable” yet upheld the consensus among circuits that ISPs do not void their protection under Section 230 unless they themselves were the creators of what makes the content illegal.¹⁴⁷

The appellate court justified its interpretation of Section 230 immunity with respect to the ISP in *Jones* by quoting *Roommates*:

A website operator who edits user-created content—such as by correcting spelling, removing obscenity or trimming for length—retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner that contributes to the alleged illegality—such as by removing the word “not” from a user’s message reading “[Name] did *not* steal the artwork” in order to transform an innocent message into a libelous one—is directly involved in the alleged illegality and thus not immune.¹⁴⁸

The Sixth Circuit rejected the district court’s “encouragement test” stating that such a test would “inflate the meaning of ‘development’ to the point of eclipsing the immunity from publisher-liability that Congress established.”¹⁴⁹ The court held that the lower court relied on *Roommates* yet omitted the “crucial distinction” between ISPs taking actions “that are necessary to the display of unwelcome and actionable content” and those actually responsible for the creation of the illegality or actionable aspect of

145. *Jones*, 755 F.3d at 413 (citing *Jones v. Dirty World Entm’t Recordings, LLC*, 965 F. Supp. 2d 818, 821 (E.D. Ky. 2013) (supplemental memorandum opinion)).

146. *See id.* at 414.

147. *See generally* Bill Donahue, *6th Circ. Gossip Site Ruling a Relief for Web Hosts*, LAW360 (June 17, 2014, 8:52 PM), <http://www.law360.com/articles/548946/6th-circ-gossip-site-ruling-a-relief-for-web-hosts> (discussing the Sixth Circuit *Jones* opinion).

148. *Jones*, 755 F.3d at 411 (citing *Fair Hous. Council*, 521 F.3d at 1169).

149. *Id.* at 414.

the content.¹⁵⁰ To highlight this misrepresentation, the court pointed out that in *Roommates*, the website operator was found responsible for the illegal content because he required users to submit protected characteristics and hid listings based on those submissions.¹⁵¹ Here lies the fault within the appellate court's logic. The appellate court failed to sufficiently distinguish the actions of the ISP in *Roommates* from those of the ISP in *Jones*.¹⁵²

In *Roommates*, the ISP essentially required its users to participate in housing discrimination by forcing those wishing to post on its website to include protected characteristics such as race, gender, or age to be used as search criteria for future roommates.¹⁵³ This barred immunity under Section 230.¹⁵⁴ Likewise, in *Jones*, the ISP effectively required its users to create submissions of scandalous gossip if they wished for their submissions to be published.¹⁵⁵ If thousands of submissions came through TheDirty.com daily, and of those only a few hundred got published,¹⁵⁶ one might wonder what criteria was used in selecting those particular submissions. As the *Jones* ISP admitted, selections certainly were not based on whether or not the allegations had been factually confirmed.¹⁵⁷

Observation of the website reasonably leads to the conclusion that the level of atrocity within the allegations is a criteria for publication.¹⁵⁸

150. *Id.*

151. *Id.*

152. Author's opinion based on the appellate court's finding that "[u]nlike in *Roommates*, the website that Richie operated did not require users to post illegal or actionable content as a condition of use." *Id.* at 416.

153. *Id.* at 414.

154. *Jones*, 755 F.3d at 414.

155. *See id.* at 403.

156. *Id.*

157. *Id.* (stating Richie does not "fact-check submissions for accuracy").

158. Author's opinion based on observation of recent submissions published on the TheDirty.com, all of which involved unconfirmed allegations that have the ability to destroy reputations. The footnotes following are postings taken directly from the site's Los Angeles County listing, accessed on November 8, 2014. The postings referred to in this Note are not curated to illustrate only the most egregious found on the site, but are simply a sample taken directly from the most recent postings that day. Los Angeles Gossip, THE DIRTY (Nov. 8, 2014),

For example, recent postings in the Los Angeles section of TheDirty.com included the following allegations against named individuals: (1) insinuating a woman was an escort or prostitute because she wore expensive eyeglasses,¹⁵⁹ (2) accusing a local sober living facility of false advertising, sexual exploitation and slander against its clients, tampering with U.S. Mail, public disclosure of private facts, procurement of prostitution, and allowing on-going drug use within the sober living home,¹⁶⁰ (3) accusing a woman of promiscuity, adultery, soliciting casual sex on the Internet, and contracting a sexually transmitted disease,¹⁶¹ and (4) accusing a woman of being a “money hungry butter-faced hermaphrodite.”¹⁶² Notably, these postings all share common criteria: they each identify the accused by name, allege claims that have the potential to destroy reputations, and, in some cases, subject the accused to potential criminal investigation. Additionally, all submissions are posted anonymously under the pseudonym “THE DIRTY ARMY,” which the ISP gives to all of the submissions it *decides* to publish.¹⁶³

Assuming that these sensationally scandalous postings were (at a minimum) lured by the ISP, how then, are the factual circumstances of *Jones* different from those of *Roommates*? The ISP’s actions in *Jones* arguably caused far more direct, immediate, and irreparable harm than the harm caused by the ISP in *Roommates*.¹⁶⁴ To partake in the ISP’s services in *Roommates*, users had to self-identify certain characteristics (e.g., sex, family status, sexual orientation), as well as declare preferences regarding potential roommates (e.g., “I will live with children” or “I will not live with

www.thedirty.com/category/los-angeles/ [<http://perma.cc/4W6N-V6TK>].

159. The Dirty Army, *Whats Her Secret*, THE DIRTY (Nov. 4, 2014, 10:06 AM), <http://www.thedirty.com/gossip/toronto/whats-her-secret/> [<http://perma.cc/3RSA-S82F>].

160. The Dirty Army, *Beachside Sober Living*, THE DIRTY (Nov. 3, 2014, 1:48 PM), <http://www.thedirty.com/gossip/los-angeles/beachside-sober-living/> [<http://perma.cc/K4S2-WDBG>].

161. The Dirty Army, *Susan Hien*, THE DIRTY (Oct. 30, 2014, 6:39 AM), <http://www.thedirty.com/gossip/los-angeles/susan-hien/> [<http://perma.cc/5RAD-427H>].

162. The Dirty Army, *Beware of Mankofit*, THE DIRTY (Oct. 29, 2014, 7:00 AM), <http://www.thedirty.com/gossip/hollywood/beware-of-mankofit/> [<http://perma.cc/2GBC-J5Q2>].

163. See sources cited *supra* notes 159–62.

164. Compare *Jones*, 755 F.3d 398 (requiring unlawful defamatory speech), with *Fair Hous. Council*, 521 F.3d 1157 (requiring unlawful discriminatory speech).

children”)—all of which are protected characteristics under the Fair Housing Act.¹⁶⁵ At a maximum, the resulting harm would be an individual finding less housing options due to his or her sex, family status, or sexual orientation being in conflict with the preferences stated by other users seeking a roommate.¹⁶⁶ Despite receiving less housing options, the individual would not be aware of any discrimination against him or her because his or her search results would show just those housing listings for which the preferences of both parties matched.¹⁶⁷ Surely, the ISP does not force any individual to cohabitate nor does it force cohabitation with a particular person.¹⁶⁸ It is not illegal to have preferences for who you share a space with, only to publicize those preferences as means of housing discrimination.¹⁶⁹ Make no mistake, the *Roommates* court properly found the ISP “responsible, at least in part, for developing that [unlawful] information.”¹⁷⁰ Yet the ISP provided a search service, albeit based on discriminatory criteria, designed for mere efficiency and agreeable housing; the resulting harm, if any, would be a lack of compatible housing results.¹⁷¹

The ISP’s conduct in *Jones*, on the other hand, contributed to a great deal of harm.¹⁷² In order for a user to have his or her submissions published, the submissions had to be publish-worthy—in other words, the user needed to submit gossip that would shock and appall readers.¹⁷³ As

165. *Fair Hous. Council*, 521 F.3d at 1165–66.

166. *See id.* at 1165.

167. *See id.* at 1167.

168. *See id.* at 1166.

169. *See id.* at 1165–67.

170. *See id.* at 1166.

171. *See Fair Hous. Council*, 521 F.3d at 1165 (“This information is obviously included to help subscribers decide which housing opportunities to pursue and which to bypass. In addition, Roommate itself uses this information to channel subscribers away from listings where the individual offering housing has expressed preferences that aren’t compatible with the subscriber’s answers.”).

172. *See Jones*, 840 F. Supp. 2d at 1009 (“The defendants admit that facially defamatory and privacy-violating posts were made to their website concerning the plaintiff Sarah Jones.”).

173. *See id.* at 1012 (finding, among other things, that “the name of the site in and of itself encourages the posting only of ‘dirt,’ that is material which is potentially defamatory or an invasion of the subject’s privacy”); *see also supra* text accompanying notes 155–63.

this Note has illustrated, the *Jones* ISP postings inquire into the most intimate details of one's private life, including accusations over finances, sexual health, and substance abuse and relapse. False accusations related to such private matters would directly, immediately, and irreparably harm one's reputation. Since TheDirty.com does not require the gossip to be confirmed, nor does it conduct its own factual investigation, every post published by the ISP is subject to defamation claims.¹⁷⁴ However, since the TheDirty.com publishes every submission under the same anonymous pseudonym, the victims of these defamatory allegations are left with no viable remedy for the harm done upon them, no matter how severe the damage. Comparable to the ISP in *Roommates* that required its users to partake in illegal or actionable conduct as part of its service, the ISP in *Jones* extracted illegal defamatory information from its users as a condition of being published. Yet unlike the ISP in *Roommates* that was correctly denied Section 230 protection, the *Jones* court allowed the defendant ISP to cloak itself in the statute's overextended immunity.¹⁷⁵

IV. THE PROPOSED SOLUTION

Although the initial policy justifications surrounding Section 230 immunity serve a particular important purpose, courts today have grossly overextended its applicability. Should Facebook per se be held accountable for all cyberbullying that takes place on their website? No. Generally, Facebook acts as a silent facilitator for social networking that does not edit postings, *nor encourage or solicit* any particular type of speech.¹⁷⁶

174. See RESTATEMENT (SECOND) OF TORTS § 559 (1977) (outlining the elements supporting a defamation cause of action, including the publication of false statements due to at least negligence on the part of the publisher).

175. See *Jones*, 755 F.3d at 417.

176. Compare Daniel R. Anderson, Note, *Restricting Social Graces: The Implications of Social Media for Restrictive Covenants in Employment Contracts*, 72 OHIO ST. L.J. 881, 889 (describing Facebook's content-sorting algorithms), and Andrew Tutt, *The New Speech*, 41 HASTINGS CONST. L.Q. 235, 275–79 (critiquing Facebook's content-censoring algorithms), with *Asia Econ. Inst. v. Xcentric Ventures LLC*, No. CV 10-01360 SVW (PJWx), 2011 WL 2469822, at *19 (C.D. Cal. 2011) (“Increasing the visibility of a statement is not tantamount to altering its message.”). But see *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802–03 (N.D. Cal. 2011) (denying Section 230 immunity because grouping users' content in a particular way with third-party logos transformed the speech into a commercial endorsement, such that Facebook's actions went beyond a publisher's traditional editorial functions); Elizabeth M. Jaffe, *Imposing a Duty in an Online World: Holding the Web Host Liable for Cyberbullying*, 35 HASTINGS COMM. & ENT. L.J. 277 (arguing that webhosts such as Facebook are in the best position to prevent cyberbullying).

Furthermore, Facebook allows images and posts to be flagged for removal if they are offensive or inappropriate. In contrast, a website (1) designed for the sole purpose of destroying the reputations of another, (2) that screens each and every submission, (3) with the aim of publishing only the most demonizing postings, should not be afforded the same protections as passive service providers.¹⁷⁷

In general, online defamatory statements should revert back to the standards of common law.¹⁷⁸ Section 230 should be amended so as to explicitly distinguish between passive ISPs and those soliciting depraved behavior.¹⁷⁹ An ISP that serves in a traditional editorial capacity, resembling that of a newspaper, should be subject to the same liability as a publisher at common law.¹⁸⁰ Section 230 immunity should only extend to those ISPs that make no editorial publication decisions and either: (1) require its third-party users register with valid identifying information such as a driver's license number or (2) protect the anonymity of its users but offer a good-faith review system for content that has been flagged as offensive or damaging so that it may respond in an appropriate manner. Therefore, an ISP who provides a forum for anonymous publication but reserves no editorial control over publication would be subject to liability similar to that of a distributor at common law.¹⁸¹ That is to say, such an ISP would only be liable for illegal or actionable content that had been flagged for removal as offensive or damaging but had remained accessible to the public or otherwise was not removed within a reasonable time.¹⁸²

If the aforementioned proposed legal standard had been applied to *Jones*, the court would have reached a much more just result. Since the ISP in *Jones* screened every third-party user's posting and decided which ones to publish, the ISP acted in an editorial capacity (just as a newspaper), and

177. See Jessica Bennett, *The Dark Side of Web Fame*, NEWSWEEK MAG. (Feb. 21, 2008, 7:00 PM), <http://www.newsweek.com/dark-side-web-fame-93505> [<http://perma.cc/ZT4T-JN88>].

178. See Matthew G. Jeweler, Note, *The Communications Decency Act of 1996: Why § 230 Is Outdated and Publisher Liability for Defamation Should Be Reinstated Against Internet Service Providers*, 8 U. PITT. J. TECH. L. & POL'Y 3, 21–31 (2007).

179. See *id.* at 22.

180. *Id.* at 32.

181. *Id.* at 30.

182. See *id.* at 32–34.

it therefore would have lost its privilege to Section 230 immunity. Thus, just as in common law, a defamed individual would have the option of filing suit against the third-party user who created the material and/or the ISP for deciding to publish the alleged defamatory statement. If the ISP in *Jones* wished to retain its Section 230 immunity in the future, it would need to relinquish its editorial rights and allow its users to post freely. In addition, the ISP would also need to require its users to register with the site using a valid name and address, driver's license number, or some other official form of identification. If the ISP wished to continue to protect its users' anonymity, it could do so while also establishing a system of good faith review, where an individual could flag a post as being offensive or defamatory and the ISP could then remove any posts found to be actionable at law.

This proposal not only offers the same freedom of speech protection the creators of the CDA set out to uphold, but it also offers additional benefits to society.¹⁸³ Setting explicit guidelines and parameters regarding ISP liability will actually further promote free speech.¹⁸⁴ ISPs will have a better understanding of what their legal obligations are and thus will be less likely to be overly conservative in their editorial practices.¹⁸⁵ Additionally, ISPs could still assume zero liability so long as they require adequate identification from their third-party posters. Holding the initial authors accountable will deter users from partaking in criminal or actionable behavior. Freedom of speech protects an individual's right to voice his or her concerns or opinions; it does not, however, allow for the destruction of another's reputation by way of false accusations.¹⁸⁶ Finally, this proposal allows victims of Internet defamation to have a fighting chance at recovering for the harm done to them just as they would if the defamatory statements were published in a print medium.

183. *See id.* at 33.

184. *See Jeweler, supra* note 178, at 29 ("Potential defamation liability may actually promote speech on the Internet because the fear of being verbally attacked without the opportunity for redress is a disincentive for people to speak their minds on the Internet.").

185. *See id.* at 27–28 (maintaining that ISPs are incentivized not to implement overly-aggressive content screening because doing so would cause the "Internet marketplace" to view the business in a negative light).

186. *See id.* at 28 (emphasizing that the First Amendment does not allow all speech to go unregulated).

V. CONCLUSION

When Congress enacted the Communications Decency Act of 1996, the Internet was very limited in its content and in the kinds of functions it provided, which primarily consisted of encyclopedias, dictionaries, and chat rooms.¹⁸⁷ With the Internet being a relatively new, developing technology at that time, it is incredibly unlikely Congress could have predicted the dominance and capabilities of the Internet today.¹⁸⁸ The Internet and digital media have become such a staple in modern everyday life that it is said to be quickly making physical print products obsolete.¹⁸⁹ Books are now commonly offered in digital form and some newspapers and magazine entities have decided to offer their content solely online.¹⁹⁰ Holding Internet speech to a different standard than that governing print speech is an antiquated distinction.¹⁹¹ The current state of Internet defamation law makes it possible for newspapers and other print mediums, although exposed to liability for publishing slanderous content in print, to evade all legal recourse against them by simply using their Internet counterpart to publish the defamatory material under an anonymous author.¹⁹²

Higher courts are wary to limit or eliminate Section 230 civil immunity out of fear that to do so would “impose the full social costs of harm from third-party postings on intermediaries” and as a result, intermediaries “will respond by inefficiently restricting the uses that third parties can make on the Internet.”¹⁹³ The resulting overextended immunity

187. Matthew G. Jeweler, Note, *The Communications Decency Act of 1996: Why § 230 Is Outdated and Publisher Liability for Defamation Should Be Reinstated Against Internet Service Providers*, 8 U. PITT. J. TECH. L. & POL'Y 3, 36 (2007).

188. *Id.*

189. Jeff Jarvis, *The Print Media Are Doomed*, BUSINESSWEEK, http://www.businessweek.com/debateroom/archives/2008/12/the_print_media.html [<http://perma.cc/8F89-QC4L>].

190. *Id.*

191. See Jeweler, *supra* note 187, at 31 (“The Internet allows for cheap, fast and far-reaching dissemination of defamatory material . . .”).

192. *Id.* at 18–19.

193. Mark A. Lemley, *Digital Rights Management: Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101, 112 (2007); see also Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 274 (2005) (“[A]

has left victims of Internet defamation or privacy violations with little to no opportunity to litigate their claims unless the original author can actually be identified.¹⁹⁴ By reverting back to common law standards as applied to defamatory speech in the context of ISPs, speech on the Internet would be given the opportunity to flourish.¹⁹⁵ The protection of defamation causes of action at common law has not come at the expense of the First Amendment; Internet defamation should be no different.

Someone who makes a defamatory statement regarding another in the “real” world is subject to liability, as is the source that published or disseminated it.¹⁹⁶ It logically follows then, that liability should also attach where an individual anonymously posts the very same defamatory statement on the Internet (where the exposure is far greater and more damaging) through an ISP playing an editorial role. A statute dating back twenty years can no longer be used to cast a near-limitless net of protection in a medium that has drastically evolved since the statute’s inception, with no signs of slowing. Society is harmed when the very laws that govern it are outdated in purpose and application. It is time to amend Section 230 so that once again, First Amendment protections are balanced with the rights of the defamed to protect their reputations and their livelihood.

risk always exists that imposing additional burdens on intermediaries will chill the provision of valuable goods and services. That will be especially problematic in cases where considerable risk of chilling legal conduct that is adjacent to the targeted conduct exists.”).

194. Bryant Storm, Comment, *The Man Behind the Mask: Defamed Without A Remedy*, 33 N. ILL. U. L. REV. 393, 401 (2013).

195. See Jeweler, *supra* note 187, at 29.

196. See *id.* at 4.