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Josh Slovin*

I. INTRODUCTION

In 1989, the "world wide web" launched in the public domain, creating what we call today the "internet."[1] However, the internet was slow to catch on. In 1996, there were only 20 million American users on the internet.[2] As the adoption of the internet by Americans slowly increased so did the development of internet websites and internet services. The United States Congress quickly began to see the pitfalls of the internet unfolding before its own eyes.[3] In effect, the internet created a new venue for the dissemination of defamatory and elicit content.[4]

Beginning in 1991, litigation commenced when individuals sought to hold internet website providers liable for content created or posted by third-parties.[5] Courts seemingly struggled in assessing liability on the part of the internet website provider, which led to courts offering

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1. Cern, *Where the Web Was Born*, CERN, https://home.cern/science/computing/birth-web/short-history-web (last visited Jan. 21, 2022).

2. Farhad Manjoo, *The Internet of 1996 is almost unrecognizable compared with what we have today*, SLATE (Feb. 4, 2009), https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html.

3. 141 Cong. Rec. H8470–72 (daily ed. Aug 4, 1995).

4. *See id.*

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

conflicting approaches and judgments.[6] The spreading of false and elicit content online, in combination with contrasting court judgments, led Congress to pass the Communications Decency Act (CDA)[7] as part of the Telecommunications Act of 1996[8]. Included within the CDA are several provisions now referred to as "Section 230," codified at 47 U.S.C. § 230,[9] which grants immunity to providers of interactive computer services (ICSP) from liability as "publishers" with respect to third-party content appearing on their websites. While Congress envisioned § 230 as a way to promote the continued development of the Internet by giving "Good Samaritan" ICSPs the authority to self-regulate third-party content posted on its websites and immunity from any resulting liability, in effect "Bad Samaritan" ICSPs have also benefited from § 230's immunity.[10] As such, courts have struggled to balance the legislative purpose of § 230 with the legislative text, which has often created differing and controversial judgments.[11]

With respect to the controversy surrounding § 230, this Comment focuses on the legislative history leading to § 230's enactment, the legislative text itself, and the differing interpretations of § 230 by the United States Court of Appeals for the Fourth and Ninth Circuits.

The Comment is organized as follows: Part II begins with a brief explanation of defamation at common law and its relation to common law "publisher" and "distributer" liability. Part II also addresses two significant, early internet liability cases in which the courts made differing interpretations and rulings with respect to assessing ICSP liability for allegedly defamatory third-party content posted on their respective websites. Part III discusses the legislative backdrop leading to § 230's enactment, along with a review of the legislative text of § 230. Part IV discusses and evaluates the interpretations of § 230(c)(1) adopted by various United States Federal Circuit Courts along with an analysis as to which Federal Circuit's interpretation best effectuates Congress's purpose for enacting § 230. Part V concludes by offering a proposed modification to § 230(c)(1) to conditionally limit its grant of

6. *Compare Cubby, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), *with* Stratton Oakmont v. Prodigy Services Co., No. 31063-94, 1995 N.Y. Misc. LEXIS 229 (Sup. Ct. May 24, 1995).

7. Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 113 (to be codified at 47 U.S.C. §§ 230, 560–61).

8. Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (to be codified at 47 U.S.C. § 609 et. seq.)

9. 47 U.S.C. § 230 (2021).

10. 141 Cong. Rec. H8470 (daily ed. Aug 4, 1995) (statement of Rep. Cox); 47 U.S.C. § 230(b); *see* Doe v. Backpage.com, LLC, 817 F.3d 12, 22 (1st Cir. 2016).

11. *Compare* Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997), *with* Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003).

immunity to ICSPs under specific situations in order to better achieve the legislative purpose and policies of § 230.

II. BACKGROUND OF DEFAMATION AT COMMON LAW AND ITS RELATION TO PUBLISHER AND DISTRIBUTOR LIABILITY

A. Common Law Defamation

Defamation is a communication that tends to damage the plaintiff's reputation, to diminish the respect, good will, confidence, or esteem in which the plaintiff is held, or to excite adverse or unpleasant feelings about the plaintiff.[12]

Under common law, to sustain a defamation claim, a plaintiff must demonstrate that the defendant published, either by spoken (slander) or written words (libel), defamatory material which concerned the plaintiff and was directed to a third person. Further, the plaintiff must prove that the statement was false, that the defendant was guilty of fault equivalent to negligence or something greater, and that the plaintiff suffered actual damages.[13]

First, the plaintiff must show that the defendant "published" the allegedly defamatory material. Publication means "'communication, by any method, to one or more persons who can understand the meaning.'"[14] Interestingly, defamation law may allow for liability to be imposed on publishers and distributors, depending on their actions, who disseminate allegedly defamatory material. A publisher, like a newspaper publishing company, exercises "traditional editorial functions . . . such as deciding whether to publish, withdraw, postpone or alter content," while a distributor, like a newsstand, plays no role in the formatting or creating of the work and rather merely disseminates the content.[15]

Because of the difference in roles played by a publisher and distributor, courts have treated those who publish content different than those who distribute content. Traditionally, courts have been less willing to impose liability on distributors than publishers. At common law, publishers "can be held liable for defamatory statements contained in their works even absent proof that they had specific knowledge of the statement's inclusion," while "distributors are not liable 'in the absence

12. Peter Tiersma, *The Language of Defamation*, 66 Tex. L. Rev. 303, 307 (1987).

13. E. Alex Murcia, *Developments in the Law: Section 230 of the Communications Decency Act: Why California Courts Interpreted It Correctly and What That Says About How We Should Change It*, 54 LOY. L.A. L. REV. 235, 239 (2020).

14. *Id.*

15. *Zeran*, 129 F.3d at 330.

of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published.'"[16]

B. Publisher Liability versus Distributor Liability–Common Law

A publisher is a person or business who prints or broadcasts material themselves which has been submitted by others, like a book publisher, newspaper publisher, and broadcast stations.[17] Under standard common law principles, a person who publishes a defamatory statement by another is held liable for such statement as if he or she had initially created it.[18] Liability is further extended if another person reprints and sells a defamatory statement already published by another. That person would then become a publisher and subject to liability to the same extent as if the person had originally published the defamatory statement.[19] Thus, a book publisher or a newspaper publisher can be held liable for anything that appears within its pages. The theory behind "publisher" liability is that a publisher has the knowledge, opportunity, and ability to exercise editorial control over the content of its publications.[20]

Distributors, such as bookstores, newsstands, and libraries, distribute copies that have been printed by others. Distributor liability is much more limited than that of a publisher, as distributors are generally not liable for the content of the material that they distribute. Moreover, a distributor, such as a bookseller, is under no duty to examine the various publications offered for sale to ascertain whether they contain any defamatory items, absent notice of the tortious content.[21] The concern is that it would be impossible for distributors to read every publication, and ascertain the publications truth or falsity, prior to selling or distributing it, and that as a result, distributors would engage in excessive self-censorship.[22]

The key distinction at common law between a publisher and distributor is that a publisher inherently has knowledge of the content it is publishing, while a distributor does not. As a result, the law does not impose liability on distributors unless they have knowledge or

16. *Zeran*, 129 F.3d at 331.
17. *See* Restatement (Second) of Torts § 581 (1977).
18. Restatement (Second) of Torts § 578 (1977).
19. Restatement (Second) of Torts § 578 cmt. b (1977).
20. Restatement (Second) of Torts § 581 cmt. c (1977).
21. Restatement (Second) of Torts § 581 cmt. d-e (1977).
22. *See id.*

reason to know that the information they are distributing is tortious or unlawful.[23]

C. The Rise of the Internet and the Blurring of the Distinction Between a "Publisher" and a "Distributor"

At common law, there was a clear distinction between a publisher and a distributor, and the subsequent intermediary liability imposed upon such actors. However, in the early 1990s, with the rise of the internet came "internet intermediaries," namely, websites containing third-party content, which blurred this distinction.

In 1991, the first internet intermediary was sued for defamation in the United States District Court for the Southern District of New York in *Cubby, Inc. v. CompuServe Inc.*,[24] and unsurprisingly, the internet intermediary attempted to argue that it was a distributor and not a publisher of the content appearing on its website.[25] In *Cubby, Inc.*, the defendant, CompuServe was the owner and developer of an "electronic library" containing over 150 special interests forums, "comprised of electronic bulletin boards, interactive online conferences, and topical databases."[26] The electronic library included a journalism forum, which CompuServe contracted out to Cameron Communication, Inc. (CCI), an entity independent of CompuServe, to "manage, review, create, delete, edit and otherwise control the [Journalism Forum's] contents."[27] Included within the Journalism Forum was Rumorville USA, a daily newsletter which reported on broadcast journalism. Rumorville USA newsletters were created and uploaded by another entity and then approved by CCI.[28]

The plaintiffs owned "Skuttlebut," a computer database which electronically published and distributed news and gossip regarding the television and radio industries. Plaintiffs alleged that Rumorville USA had published false and defamatory statements relating to Skuttlebut and made it available on the journalism forum hosted by CompuServe. The plaintiffs asserted that CompuServe should be held liable as a publisher of the content developed by Rumorville USA because it made Rumorville USA available to its subscribers and thus "published" the material.[29] The district court disagreed and found CompuServe to be a

23. Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 14 (2020).
24. *Cubby, Inc.*, 776 F. Supp. 135.
25. *Cubby, Inc.*, 776 F. Supp. at 138.
26. *Id.* at 137.
27. *Id.*
28. *Id.*
29. *Id.* at 137–38.

"distributor" of content posted on Rumorville USA.[30] In doing so, the court concluded that CompuServe had the same minimal editorial control over the publication of Rumorville USA as does a library, bookstore, or newsstand, "and [that] it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so."[31]

A few years later, in 1995, the same question regarding an internet intermediary's categorization as a publisher or distributor was analyzed in the Supreme Court of New York, Nassau County in *Stratton Oakmont, Inc. v. Prodigy Services Co.*[32] In *Prodigy Services Co.*, Stratton Oakmont, a securities investment banking firm, brought a defamation action against Prodigy Services Co. (Prodigy), the owner and operator of an online website that allowed its users to exchange messages on its bulletin boards.[33] The alleged defamatory statement was posted by a unanimous user on Prodigy's "Money Talk" bulletin board. The post included a statement that the president of Stratton Oakmont committed criminal and fraudulent acts in connection with an initial stock public offering.[34] Stratton Oakmont was attempting to hold Prodigy as the "publisher" of the allegedly defamatory bulletin post.[35] Prodigy argued similar to that of CompuServe in *Cubby, Inc*, but the Supreme Court of New York distinguished Prodigy's role in the publication process from that of CompuServe.[36] In doing so, the court relied upon evidence that Prodigy promulgated content guidelines, used "Board Leaders" to enforce the guidelines by allowing them to remove messages that violated such guidelines, and used a software screening program which automatically prescreened all bulletin board postings for offensive language.[37] The court found that, unlike CompuServe which had little or no editorial control of the content posted on its database, Prodigy retained editorial control because of the aforementioned systems and guidelines it had in place.[38] Therefore, the

30. *Id.* at 140.
31. *Id.*
32. *Prodigy Services Co.*, 1995 N.Y. Misc. LEXIS 229.
33. *Id.* at *2.
34. *Id.* at *1–2.
35. *Id.* at *3–6.
36. *Id.* at *7–11.
37. *Id.* at *5–6.
38. *Id.* at *11.

court determined Prodigy to be the publisher of the contents posted on its bulletin boards.[39]

The court in *Prodigy Services Co.* emphasized that it agreed with *Cubby, Inc.*, and that it was "[Prodigy's] conscious choice, to gain the benefits of editorial control, [which] opened it up to a greater liability than CompuServe and other computer networks that make no such choice."[40] However, instead of encouraging and empowering internet intermediaries to self-regulate third-party content posted on its internet sites, the court in *Prodigy Services Co.* seemingly incentivized an entirely "hands-off" approach by internet intermediaries.[41] In taking both the *Prodigy Services Co.* and *Cubby, Inc.*, decisions together, an internet intermediary that restricted or edited third-party content on its website faced a much higher risk of liability if it failed to eliminate all defamatory material than if it simply did not try to control or edit the content of third parties at all. Commentators then began to fear that internet intermediaries would do just that and would stop monitoring content entirely in order to retain its distributor shield from defamation liability.[42]

III. THE COMMUNICATIONS DECENCY ACT

A. Overview

The Communications Decency Act (CDA) was originally proposed not for the purpose of protecting internet providers from defamation liability, but rather was motivated out of a concern for the proliferation of pornography and indecency on the internet and the easy access to that material by the youth of America.[43] On June 9, 1995, Senator James Exon proclaimed that "[t]he fundamental purpose of the Communications Decency Act [was] to provide much-needed protection for children."[44] It was the first time in which the legislature sought to regulate speech on the internet.

The CDA, which was passed by the Senate on June 15, 1995, and was added to the Senate's telecommunications bill, S. 652, (which later became the Telecommunications Act of 1996), amended 47 U.S.C.

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39. *Id.*

40. *Id.* at *13.

41. James P. Jenal, *When Is a User Not a "User"? Finding the Proper Role for Republication Liability on the Internet*, 24 LOY. L.A. ENT. L. REV. 453, 459 (2004).

42. *See id.*

43. 141 Cong. Rec. S8089 (daily ed. June 9, 1995) (statement of Sen. Exon).

44. 141 Cong. Rec. S8088 (daily ed. June 9, 1995) (statement of Sen. Exon).

Section 223[45] extending the antiharassment, indecency, and anti-obscenity restrictions currently placed on telephone calls to "telecommunications devices" and "interactive computer services."[46] Specifically, Senator Exon's amendment to § 223(d) made it illegal to use an interactive computer service to knowingly send to or display in any manner available to a person under 18 years of age, any comment, image, or other communication that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication."[47] Thus, the internet content provider, the person posting the article or image that was unsuitable for minors, as well as the internet intermediary who transmitted the unsuitable article or image, would face criminal liability. Senator Exon's amendment did provide a good faith defense to protect internet intermediaries who took "reasonable, effective, and appropriate" actions to prevent access to offensive material by minors.[48] Exon's intent was for the CDA to target internet content providers; however, he misunderstood the immensity of the internet and the infeasibility of an internet intermediary to self-monitor the content on its internet website.[49]

Around the same time, United States House of Representatives members Christopher Cox and Ron Wyden introduced a freestanding bill in the House in June 1995, as H.R. 1978, the Internet Freedom and Family Empowerment Act.[50] It was intended as an alternative to the CDA.[51] It was then offered as a standalone Cox-Wyden amendment on the House floor during consideration of the Telecommunications Act of 1996 on August 4, 1995.[52] In the words of Representative Cox during a House hearing, the amendment's purpose was twofold:

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45. 47 U.S.C. § 223 (2021).

46. Communications Decency Act of 1996, Pub. L. No. 104-104, sec. 502, §§ 223(d)(1)-(B), (h)(2), 110 Stat. 133, 134–135 (to be codified at 47 U.S.C. §§ 223(d)(1)(B), (h)(2)); 141 Cong. Rec. S8570 (daily ed. June 16, 1995)).

47. Communications Decency Act of 1996, Pub. L. No. 104–104, sec. 502, § 223(d)(1)(B).

48. Communications Decency Act of 1996, Pub. L. No. 104–104, sec. 502, § 223(e)(5).

49. 142 Cong. Rec. S714 (daily ed. Feb. 1, 1996) (remarks of Sen. Exon, stating "[i]n general, the legislation is directed at the creators and senders of obscene and indecent information.").

50. Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong., 1st Sess. (1995).

51. 141 Cong. Rec. H8468 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

52. H.R. Rep. No. 104–223, Amendment No. 2–3 (1995) (proposed to be codified at 47 U.S.C. § 230).

> First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem. Second, it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government.[53]

Therefore, the amendment employed a more "hands-off" approach in ensuring that online platforms regulated third-party content.[54] As described by Representative Cox, "[w]e can go much further [] than blocking obscenity or indecency . . . [w]e can keep away from our children things not only prohibited by law, but prohibited by parents."[55] The amendment protected providers of ICSPs from being held as a "publisher" of defamatory or otherwise tortious third-party content, if the ICSP, similar to *Prodigy Services Co.*, moderated content.[56] As such, the amendment employed a strategy quite opposite to that of Senator Exon who advocated for punishing ICSPs who incidentally provided users with access to inappropriate content, essentially mandating that ICSPs moderate user content. While not intentionally directed at Senator Exon and his CDA, House member Bob Goodlatte, a co-sponsor of the Cox-Wyden amendment, described the impracticality of requiring internet providers to moderate user content, reasoning that,

> "[t]here is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong."[57]

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53. 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

54. Alex E Murcia, *Developments in the Law: Section 230 of the Communications Decency Act: Why California Courts Interpreted It Correctly and What That Says About How We Should Change It*, 54 LOY. L.A. L. REV. 235, 243 (2020).

55. 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

56. *Id.*

57. 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte).

The House then proceeded to pass its version of the Telecommunications Act with the Cox-Wyden amendment and without Exon's CDA, which was a resounding rebuke to the Exon's increasingly outdated approach.[58]

The Telecommunications Act, including the Cox-Wyden amendment, would not be enacted until the following year. During that time members of Congress continued to voice their opposition to Exon's CDA and instead encouraged the adoption of the Cox-Wyden Amendment.[59] However, on February 1, 1996, Congress passed the Telecommunications Act of 1996 which, as recommended by the conference committee, folded the Cox-Wyden Amendment into the CDA.[60] On February 8, 1996, President Clinton signed into law the Telecommunications Act of 1996.[61] The Cox-Wyden Amendment was then codified as 47 U.S.C. § 230. Therefore, the CDA now contained two competing visions of the emerging internet medium. Exon's amendment to 47 U.S.C. § 223 saw the internet as a new threatening medium in which it was essential for the central government to implement harsh monitoring standards in order to protect societies youth. On the other side, the Cox-Wyden amendment saw the internet as an amplified way to exchange information and sought to encourage ICSPs to step in and determine which values portrayed on the internet were appropriate for citizens.

It did not take long after the Telecommunications Act of 1996 was passed for Exon's amendment to be held unconstitutional.[62] This conclusion was not unforeseen. In 1995, the new House Speaker Newt Gingrich was quoted in a New York Times article stating that Exon's amendment was "clearly a violation of free speech, and it's a violation of the right of adults to communicate with each other" and further adding that Exon's amendment would limit the internet to what censors believed was acceptable for children to read.[63] Unsurprisingly, on the

58. The Communications Act of 1995, H.R.1555, was approved in the House by a vote of 305-117 on August 4, 1995; 141 Cong. Rec. 22084 (1995).

59. 142 Cong. Rec. S715 (daily ed. Feb. 1, 1996).

60. *See* H.R. Rep. No. 104–458 (1996). Section 502 of the final legislation contained the Senate's additions to 47 U.S.C. § 223. Section 509 contained of the final legislation contained the House's new Section 230.

61. The White House, *President Clinton Signs the Telecommunications Act of 1996*, THE WHITE HOUSE (February 8, 1996), https://clintonwhitehouse4.archives.gov/WH/EOP/OP/telecom/signing.html.

62. Reno v. American Civil Liberties Union, 521 U.S. 844, 849 (1997).

63. Edmund L. Andrew, *Gingrich Opposes Smut Rule for Internet*, *NEW YORK TIMES* (June 22, 1995), https://www.nytimes.com/1995/06/22/us/gingrich-opposes-smut-rule-for-internet.html.

same day President Clinton signed the Telecommunications Act of 1996, twenty plaintiffs filed suit against the U.S. Attorney General and U.S. Department of Justice challenging 47 U.S.C. § 223(d) (Exon's amendment).[64] Multiple federal court actions were consolidated, and by the summer of 1997 the issue made its way to the Supreme Court of the United States.[65] On June 26, 1997, the Supreme Court in *Reno v. American Civil Liberties Union*, with the opinion authored by Supreme Court Justice John Paul Stevens, held that § 223 violated the First Amendment and therefore was unconstitutional. Specifically, Justice Stevens concluded that § 223(d), Exon's amendment, was unduly vague, overly broad as to the breadth of its content-based restriction on speech, and that other less restrictive means could have similarly advanced the government's interest of protecting youth from the prohibited communications under § 223(d).[66] The Supreme Court's judgment ended with Justice Stevens stating the speech restriction in the Exon amendment amounted to "burning the house to roast a pig" and that "[t]he CDA, cast[ed] a far darker shadow over free speech, threaten[ing] to torch a large segment of the Internet community."[67] With that, § 223(d), was severed from the CDA, leaving the Cox-Wyden amendment, § 230, to take the forefront on how internet content was to be regulated.

B. Section 230 of the Communications Decency Act of 1996

Section 230 of the CDA, entitled "Protection for private blocking and screening of offensive material," is the main form of legal protection afforded to online platforms from lawsuits over content posted by their users.[68] The main purpose, as previously described above, was to establish a uniform federal policy applicable across the internet to avoid the absurd results, under the common law scheme, as seen in *Prodigy Services Co.*[69] In *Prodigy Services Co.*, Prodigy, an ICSP which ran an internet bulletin board, was treated as a "publisher" of content that was not their own simply due to the fact that Prodigy implemented systems

64. *Reno*, 521 U.S. at 861.

65. *American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996); *Shea ex rel. American Reporter v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996); *ApolloMedia Corp. v. Reno, 19 F. Supp. 2d 1081 (N.D. Cal. 1998).*

66. *Reno*, 521 U.S. at 870–79.

67. *Id.* at 882.

68. 47 U.S.C. § 230.

69. *Prodigy Services. Co.*, 1995 N.Y. Misc. LEXIS 229, at *10–11.

to restrict access to objectionable content.[70] Due to the fact that Prodigy was deemed a "publisher," it was exposed to liability for defamation.[71] As one commentator put it, § 230 sought to garnish the contrasting interests and viewpoints of two groups, "those that wanted the nascent commercial Internet to thrive with minimal regulation, and those that wanted to ensure individuals and service providers had the tools to filter pornography and similar content from the Internet."[72]

C. Structure of Section 230

Section 230 is broken into six provisions. Section 230(a) sets forth Congress's preliminary finding, describing the benefits of the Internet, its rapid development with limited government regulation, and its increasing cultural significance. Congress's finding are as follows:

> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
>
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
>
> (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
>
> (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
>
> (5) Increasingly, Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.[73]

Further, § 230(b), lays out the Congress's policy aims of § 230 in which Congress sought to allow the internet to develop based on the

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70. 141 Cong. Rec. H8470–71 (daily ed. Aug 4, 1995) (statement of Rep. Cox); *Prodigy Services Co.*, 1995 N.Y. Misc. LEXIS 229, at *10–11.

71. *Prodigy Services Co.*, 1995 N.Y. Misc. LEXIS 229, at *10–11.

72. Jeff Kossef, *The Gradual Erosion of the Law That Shaped the Internet: Section 230's Evolution Over Two Decades*, 18 COLUM. SCI. & TECH. L. REV. 1, 8 (2016).

73. 47 U.S.C. § 230(a).

principles of free market enterprise, rather than through immense state and federal regulation. Congress' policy aims for § 230 are as follows:

> (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.[74]

The next provision, § 230(c), entitled "Protection for 'Good Samaritan' blocking and screening of offensive material," addresses and attempts to harmonize the two competing viewpoints as stated above. Section 230(c) is divided into two parts. Section 230(c)(1) states that the "[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." In other words, § 230(c)(1) overrules *Prodigy Services Co.*[75] Section 230(c)(2) affirms that ICSPs who make a good faith effort to voluntarily edit or remove objectionable content provided by others will be immune from liability.[76]

The statute goes on to clarify the meaning of an "interactive computer service" (ICS) and an "information content provider."[77] Section 230(f)(2) defines an ICS as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or

74. 47 U.S.C. § 230(b).

75. *Prodigy Services Co.*, 1995 N.Y. Misc. LEXIS 229, at *10–11.

76. *See* 47 U.S.C. § 230(c)(2).

77. 47 U.S.C. § 230(f)(2).

system that provides access to the Internet."[78] This definition covers internet service providers (ISPs), like AT&T, companies who provide internet hosting services, like Amazon Web Services, and websites, apps, platforms, and other internet intermediaries that host user content, like Facebook or Prodigy. Collectively, such actors are all encompassed within the general term, provider of ICSPs. In order to distinguish an ICSP who acts as an internet intermediary from an individual or business who provides content to such intermediary, § 230(f)(3) defines an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[79]

Notably, and important to the below discussion, § 230(e) clarifies the statutes effect on other law. Specifically, § 230(e)(3) states that, "[n]othing in this [Statute] shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."[80] Therefore, § 230, as applied to, for example, defamation, which is a state law cause of action, ensures that providers of internet computer services are provided immunity from defamation claims, where state law provides a remedy not permitted by § 230.[81]

In recapping, § 230 provides two functions as laid out in § 230(c)(1) and (c)(2). First, § 230(c)(1) protects ICSPs from liability when they act only as intermediaries for the dissemination of third-party content.[82] Second, § 230(c)(2) immunizes actions taken by ICSPs who in good faith restrict user's access to objectionable online material.[83]

For purposes of the remainder of the Comment, it will focus specifically on § 230(c)(1) and the competing court interpretations that followed after the statute's enactment. In discussing the varying interpretations of § 230(c)(1), pay close attention to the text's plain language along with how the courts seek to incorporate and utilize

78. *Id.*

79. 47 U.S.C. § 230(f)(3).

80. 47 U.S.C. § 230(e)(3).

81. Alex E Murcia, *Developments in the Law: Section 230 of the Communications Decency Act: Why California Courts Interpreted It Correctly and What That Says About How We Should Change It*, 54 LOY. L.A. L. REV. 235, 244–45 (2020).

82. Thomas D. Huycke, *Licensed Anarchy: Anything Goes on the Internet - Revisiting the Boundaries of Section 230 Protection*, 111 W. VA. L. REV. 581, 587 (2009).

83. *Id.*

§ 230(a)'s congressional findings and § 230(b)'s policy aims into its interpretation of § 230(c)(1).[84]

IV. SECTION 230(C)(1) INTERPRETATIVE APPROACHES USED BY FEDERAL CIRCUIT COURTS

A. The Overly Broad Interpretation of Section 230

The congressional intent and legislative history of § 230 reveal an overall purpose of incentivizing ICSP self-regulation. However, soon after § 230's inception, confusion arose regarding who exactly qualified for § 230's immunity.[85]

In 1997, shortly after § 230 was enacted, the United States Court of Appeals for the Fourth Circuit was the first federal court to interpret the breadth of immunity under § 230(c)(1) applied to ICSPs in *Zeran v. Am. Online, Inc.*[86] The plaintiff, Kenneth Zeran, brought an action against America Online, Inc (AOL) claiming that AOL "unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter."[87] The plaintiff's claims were pled as negligence, but the appellate court found plaintiff's claims to be indistinguishable from a defamation action because the publication of a statement is a necessary element in a defamation action.[88]

The plaintiff's claims arose as a result of an unidentified person posting messages on an AOL bulletin board advertising the sale of t-shirts and other items which featured offensive slogans related to a 1995 Oklahoma City bombing.[89] The ad went on to instruct those wanting to purchase the items for sale to call "Ken" and further listed the plaintiff's home phone number. As a result, the plaintiff received countless threatening phone calls. Multiple times the plaintiff contacted AOL to remove the offensive posts to which he received assurances from AOL that the posts would be soon removed. However, AOL failed to remove the posts. The plaintiff's suit against AOL was dismissed by the United States District Court for the Eastern District of Virginia after AOL responded to the Plaintiff's complaint by asserting § 230 as an

84. Mark D Quist, *"Plumbing the Depths" of the CDA: Weighing the Competing Fourth and Seventh Circuit Standards of ISP Immunity under Section 230 of the Communications Decency A*ct, 20 GEO. MASON L. REV. 275, 284 (2012).

85. 141 Cong. Rec. H8469–H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

86. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997).

87. *Id.* at 328.

88. *Id.* at 332.

89. *Id.* at 329.

affirmative defense. The district court granted AOL's motion and the Plaintiff appealed.[90]

On appeal, the Plaintiff argued that § 230(c)(1)'s bar against treating an ICSP as the "publisher" did not bar suit against, and provide immunity for, an ICSP as the "distributor" of the defamatory content.[91] However, the Fourth Circuit disagreed, holding that the term "publisher" historically encompassed "distributors" and "publishers."[92] The court reasoned that if ICSPs were subject to distributor liability under the common law notice approach, they would face potential liability each time they receive notice of a potentially defamatory statement, amounting to an impossible burden on such providers.[93] The court stated that the "notice-based liability would deter service providers from regulating the dissemination of offensive material over their own services," which in and of itself would be against Congress' § 230 policy aim of encouraging ICSPs to self-regulate the dissemination of offensive material over their services.[94] The court further alluded to the fact that liability upon notice would have a "chilling effect" on the freedom on internet speech.[95]

In affirming the judgement of the district court, the court concluded that § 230's plain language created a federal immunity to any cause of action seeking to hold ICSPs liable for content originating from a third-party user of the service.[96] Therefore, "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions[,] such as deciding whether to publish, withdraw, postpone or alter content[,] are barred [by § 230]."[97]

B. Zeran's Section 230 Broad Immunity Interpretation Becomes the Dominant Interpretation Across the Nation

Following *Zeran*, federal circuit courts quickly began adopting, and even extending, *Zeran*'s broad reading of § 230(c)(1).[98] For example, in *Jones v. Dirty World Entm't Recording LLC*,[99] the United States Court

90. *Id.* at 329–30.

91. *Id.* at 331.

92. *Id.* at 332.

93. *Id.* at 333.

94. *Id.* at 331, 333.

95. *Id.* at 333.

96. *Id.* at 331, 333.

97. *Id.* at 330.

98. Danielle K Citron and Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 460 (2018).

99. 755 F.3d 398, 401 (6th Cir. 2014).

of Appeals for the Sixth Circuit held that, in general, an ICSP was immune from liability under § 230, even if the provider partially developed content which was the subject of a cause of action.[100] In that case, the plaintiff brought a defamation claim against the owner and operator (the defendant) of www.TheDirty.com (The Dirty) after several posts about the plaintiff appearing on the website.[101] The Dirty, an ICSP, is a website which allows users to anonymously upload comments, photographs, and videos which the defendant then selects, edits and publishes along with the defendant's own editorial comments. The district court denied the defendant's motion for judgement as a matter of law which was premised on the defendant's argument that the plaintiff's claims were barred by § 230(c)(1).[102] On appeal at the Sixth Circuit, the plaintiff asserted that the defendant was not immune under § 230(c)(1) because the defendants were "information content providers with respect to the information underlying Jones's defamation claims because they *developed* that information."[103] However, the Sixth Circuit held that the defendant did not materially contribute to the tortious content and was thus immune from liability under § 230(c)(1).[104]

In *Doe v. Backpage.com, LLC*,[105] which was later superseded by a 2018 amendment to the CDA, the United States Court of Appeals for the First Circuit affirmed a district court's motion to dismiss, based on § 230(c)(1)'s immunity, even though the plaintiffs' claim alleged that the defendant, Backpage, an internet provider of online classified advertising, facilitated and encouraged illegal conduct through its structuring of its website.[106] In *Backpage.com*, the plaintiffs, victims of sexual assault as a result of being sex trafficked through the use of defendants' website, brought suit claiming that Backpage engaged in the sex trafficking of minors in violation of the Trafficking Victims Protection Reauthorization Act of 2008[107] and that Backpage engaged in unfair and deceptive acts in violation of Massachusetts consumer protection laws. The Plaintiffs alleged that Backpage selectively removed certain postings made in the "Escorts" section of the website which were posted by victim support organizations and tailored its

100. *Id.* at 415.
101. *Id.* at 401.
102. *Id.* at 405.
103. *Id.* at 409.
104. *Id.* at 415.
105. 817 F.3d 12 (1st Cir. 2016).
106. *Id.* at 15.
107. 18 U.S.C. § 1591 (2021).

posting requirements to make sex trafficking easier. Also, the plaintiffs alleged that Backpage's rules and requirements governing the posting and contents of advertisements were designed to encourage sex trafficking, citing that Backpage did not require phone or email verification and employed a faulty age verification system.[108] The First Circuit noted that third-party content, the advertisements of escort services, appeared as an essential component of each of the Plaintiffs claims.[109] In explaining the issue that results from the above premise, the court explained that the plaintiffs are attempting to treat Backpage as the publisher or speaker of content supplied by third parties, which is exactly what § 230 set out to resolve by granting ICSPs immunity. In affirming the judgment of the district court, the First Circuit held that "[s]howing that a website operates through a meretricious business model is not enough to strip away [§ 230(c)(1)] protections."[110]

In addition to the above federal circuit rulings which construed § 230's immunity broadly, many other circuits courts did just the same. For example, the United States Court of Appeals for the Fifth Circuit, in *Doe v. Myspace Inc.*,[111] affirmed the district court's dismissal of plaintiffs' claims finding that they were barred by § 230.[112] The Fifth Circuit held that the defendant, MySpace, an early internet social media provider, was immune from liability for allegedly failing to implement safety measures that would have prevented a minor, the plaintiffs' daughter, from being contacted by a sexual predator.[113] Further, the court concluded that the plaintiffs' "allegations [were] merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content."[114] Additionally, in *Obado v. Magedson*,[115] the United States Court of Appeals for the Third Circuit affirmed that § 230 barred plaintiff's claims against numerous internet service providers and search engines for allegedly republishing defamatory content.[116] Moreover, in *Chi. Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc.*,[117] the United State Court of

108. *Backpage.com*, 817 F.3d at 16–17.
109. *Id.* at 21.
110. *Id.* at 29.
111. 528 F.3d 413 (5th Cir. 2008).
112. *Id.* at 415.
113. *Id.* at 417–18.
114. *Id.* at 420.
115. 612 F. App'x 90 (3d Cir. 2015).
116. *Id.* at 91–4.
117. 519 F.3d 666 (7th Cir. 2008).

Appeals for the Seventh Circuit, affirmed the dismissal, based on § 230 immunity, of the plaintiff's claim which alleged that Craigslist, an internet advertisement posting website, violated the Fair Housing Act because certain housing and rental postings on its site were discriminatory.[118] In affirming that the plaintiff's cause of action was bared by § 230(c)(1), the Seventh Circuit stated that "given § 230(c)(1)[, the plaintiff] cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination."[119]

Since the Fourth Circuit's Ruling in *Zeran*, which held that § 230 gave broad sweeping immunity from liability to ICSPs, many other federal circuit courts have followed as summarized above, even in situations where granting immunity to ICSPs clearly went against Congress' policy aims of preserving the vibrant and competitive free market of the internet and eliminating disincentives for internet providers to remove objectionable material.[120] As such, *Zeran*'s broad interpretation of § 230(c)(1) has been extended in many federal circuit courts beyond defamation cases to a wide variety of disputes, thus providing immunity to ICSPs who allegedly designed policies to enable illegal activity, partially developed third-party content, allowed users to post illegal content, republished third-party content, etc.[121] In effect, federal circuit courts, as seen in the First, Third, Fourth, Fifth, Six, and Seventh Circuits, have provided unconditional, blanket immunity to ICSPs against claims which relate to third-party content.[122]

C. Interpretive Shift in the Ninth Circuit

Other federal circuit courts have adopted *Zeran*'s Fourth Circuit ruling in 1997 broadly interpreting § 230 immunity. However, the United States Court of Appeals for the Ninth Circuit has continually provided a differing interpretation.[123] The Ninth Circuit has recognized

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118. *Id.* at 668.

119. *Id.* at 672.

120. 47 U.S.C. §§ 230(b)(1), (b)(4).

121. *See Chi. Lawyers' Comm. for Civil Rights Under Law, Inc.,* 519 F.3d 666; *see also Magedson*, 612 F. App'x 90; *MySpace Inc.*, 528 F.3d 413; *Backpage.com*, 817 F.3d 12; *Dirty World Entm't Recordings LLC*, 755 F.3d 398; Danielle K Citron and Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 460 (2018).

122. *See Zeran*, 129 F.3d 327; *see also Chi. Lawyers' Comm. for Civil Rights Under Law, Inc.,* 519 F.3d 666; *Magedson*, 612 F. App'x 90; *MySpace Inc.*, 528 F.3d 413; *Backpage.com,* 817 F.3d 12; *Dirty World Entm't Recordings*, 755 F.3d at 401; Citron, *supra* note 121, at 460.

123. *See* Jeff Kossef, *The Gradual Erosion of the Law That Shaped the Internet: Section 230's Evolution Over Two Decades*, 18 COLUM. SCI. & TECH. L. REV. 1, 23 (2016).

a number of fact-specific, narrow exceptions to § 230(c)(1) that have not been recognized by other federal circuits.[124]

For example, in 2003, the United States Court of Appeals for the Ninth Circuit in *Batzel v. Smith*,[125] was presented with the question of under what circumstances a moderator of a listserv and operation of a website who posted allegedly defamatory third-party content could be held liable.[126] A handyman, Smith, was doing work in a person's house when he noticed old European style paintings hung on the walls.[127] In thinking that the paintings may be stolen, Smith then sent an email to the Museum Security Network, which maintains a website and email newsletter about museum security and stolen art, notifying the organization of his alleged beliefs.[128] The director of the Museum Security Network, after receiving Smith's email, published the email message with some minor word changes on the Museum Security Network's listserv and website.[129] However, Smith maintained that "he never 'imagined his message would be posted on an international message board or he would never have sent it in the first place.'"[130] The plaintiff, the owner of the house which was worked on by Smith, later found the published messages and sued the Museum Security Network for defamation. The district court denied the operator's motion to strike, declining to extend § 230's grant of immunity to the defendant.[131] On appeal, the Ninth Circuit, while remanding the case back to the district court for additional fact-finding, carved out a narrow exception to § 230(c)(1)'s immunity.[132] The Ninth Circuit held that an internet service provider is not immune from liability under § 230(c)(1) when a third person or entity that created or developed the information in question furnished it to the ICSP under circumstances in which a reasonable person in the position of the ICSP could not conclude that the information was provided for publication on the internet or other interactive computer services.[133] In carving out the narrow § 230 exception, the court reasoned that "[t]he congressional objectives in

124. Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003); Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009); Doe v. Internet Brands, Inc., 824 F.3d 846 (9th Cir. 2016); Lemmon v. Snap, Inc., 995 F.3d 1085 (9th Cir. 2021).

125. 333 F.3d at 1018.

126. *Id.* at 1020.

127. *Id.* at 1020–1.

128. *Id.* at 1021.

129. *Id.* at 1022.

130. *Id.* at 1032.

131. *Id.* at 1020.

132. *Id.* at 1035.

133. *Id.* at 1034.

passing § 230 [] are not furthered by providing immunity in instances where posted material was clearly not meant for publication."[134]

Then, in 2008, in *Fair Hous. Council v. Roommates.com, LLC*,[135] the Ninth Circuit, in applying its reasoning consistent with *Batzel*, concluded that a website which helps develop unlawful content by materially contributing to the alleged illegality of the conduct is barred from receiving § 230(c)(1)'s grant of immunity.[136] In *Roommates.com*, the plaintiffs (The Fair Housing Council of San Fernando Valley and San Diego) alleged that the defendant (Roommates) violated the Federal Fair Housing Act by creating discriminatory questions asking for sex, family status, and sexual orientation, along with the choice of answers which a user was required to select. Plaintiffs also claimed that Roommates designed a discriminatory search filtering process to limit listing available to user's based on sex, family status, and sexual orientation.[137] In reversing the district court's dismissal of plaintiffs' claim based on § 230(c)(1) immunity, the Ninth Circuit reasoned that the defendant did more than provide a framework that could be utilized for an illegal purpose. The court stated that "Roommate's work in developing the discriminatory questions, discriminatory answers and discriminatory search mechanism [was] directly related to the alleged illegality of the site."[138] Thus, the Ninth Circuit held that the defendant was an "information content provider" because it made material contributions to the development of the illegal content on the website.[139] Therefore, the defendant, as an information content provider, was not given § 230(c)(1) immunity from liability.[140]

Next, in 2009, the Ninth Circuit, in *Barnes v. Yahoo!, Inc.*,[141] held that § 230(c)(1) grant of immunity would not cover an ICSP sued for promissory estoppel if it voluntarily undertook to do something that the CDA otherwise would not require, such as removing user content.[142] In *Yahoo!*, the plaintiff alleged claims of negligent undertaking and breach of contract under a promissory estoppel theory against Yahoo!, Inc. (Yahoo). Yahoo, among many other things, ran a website in which Yahoo members could create a public profile page with information and

134. *Id.*
135. 521 F.3d 1157 (9th Cir. 2008).
136. *Id.* at 1165, 1168.
137. *Id.* at 1162.
138. *Id.* at 1172.
139. *Id.* at 1169–70, 1172.
140. *Id.* at 1170.
141. 570 F.3d 1096.
142. *Id.* at 1107.

photos about themselves which was viewable by other Yahoo members. The plaintiff's ex-boyfriend, after a breakup, created a profile for the plaintiff without her authorization. The profile page included nude photos of the plaintiff and the plaintiff's private contact information. The plaintiff repeatedly sent letters by mail to Yahoo asking for the profile to be removed. Eventually, a high-level communications director at Yahoo called the Plaintiff and stated that she would "'personally walk the statements over to the division responsible for stopping unauthorized profiles and they would take care of it.'"[143] The plaintiff allegedly relied on this statement and took no further action. However, the profile was not removed for two months until the plaintiff filed the lawsuit.[144]

In *Yahoo!*, the district court held that both claims were barred by § 230(c)(1). On appeal, the Ninth Circuit agreed that § 230(c)(1) barred the negligent undertaking claim holding that failing to remove content necessarily involves treating the liable party as a publisher of the content it failed to remove, which is exactly what § 230 sought to prevent.[145] As to the promissory estoppel claim, the court concluded that it was not barred by § 230(c)(1) and remanded it back to the district court.[146] The court reasoned that Yahoo's contract liability would not come from Yahoo's publishing conduct, like the negligent undertaking claim, but rather "from Yahoo's manifest intention to be legally obligated to do something, which happen[ed] to be removal of material from publication."[147]

Then, in 2016, the Ninth Circuit, in *Doe v. Internet Brands, Inc.*,[148] applied the court's reasoning in *Yahoo!* that § 230(c)(1)'s immunity only applies to causes of action which require the court to treat the defendant as the publisher or speaker of third-party content provided by another and does not apply to causes of action which are not premised on the publication of third party-content to a different cause of action.[149] In *Internet Brands*, the plaintiff alleged that two rapists used a modeling website, Model Mayhem, which defendant owned, to lure her to a fake audition. Further, the plaintiff alleged that the

143. *Id.* at 1098–9.
144. *Id.* at 1099.
145. *Id.* at 1103.
146. *Id.* at 1109.
147. *Id.* at 1107.
148. 824 F.3d 846.
149. *See Yahoo!*, 570 F.3d at 1107; *see also Internet Brands*, 824 F.3d at 851

defendant knew about the rapists and failed to warn her or other users.[150]

In *Internet Brands*, the district court dismissed the plaintiff's negligent failure to warn claim after concluding plaintiff's claim was barred by § 230(c)(1).[151] The plaintiff appealed the district court's dismissal. The Ninth Circuit ruled that the plaintiff's claim was not bared by § 230(c)(1) because the plaintiff "[was not seeking] to hold [defendant] liable as a 'publisher or speaker' of content someone posted on the Model Mayhem website, or for [defendant's] failure to remove content posted on the website."[152] Additionally, the court explained that its ruling was furthered by the premise that the duty to warn would not require the defendant "to remove any user content or otherwise affect how it publishes or monitors such content."[153]

Again, in 2021, the Ninth Circuit, in *Lemmon v. Snap, Inc*,[154] continued their approach of limiting § 230(c)(1)'s grant of immunity to causes of action solely seeking to hold the defendant as the publisher or speaker of third-party content provided by another.[155] In *Lemmon*, the plaintiff sued Snap, Inc, a social media app provider, for its negligent design of its smartphone application, Snapchat. Specifically, the plaintiff claimed the "Speed Filter" encouraged users to drive at dangerous speeds.[156] In reversing the district court's dismissal of plaintiff's claim based on giving the defendant § 230(c)(1) immunity, the Ninth Circuit concluded that plaintiff's negligent design lawsuit treated defendant as a products manufacturer, namely, the creator of the speed filter, and was not predicated on information provided by another information content provider.[157] Therefore, the court held that plaintiff's negligent design claim was not barred by § 230(c)(1).[158]

Since § 230 was enacted in 1996, two approaches as to the extent to which § 230(c)(1) should provide immunity from liability to ICSPs took the forefront. The Fourth Circuit in *Zeran*, which has been followed by many federal circuits, opted for a broad interpretation, providing ICSPs

150. *Internet Brands*, 824 F.3d at 484.

151. *Id.*

152. *Id.* at 851.

153. *Id.*

154. 995 F.3d 1085.

155. *See id.* at 1092–3; *see also Yahoo!*, 570 F.3d at 1107; *Internet Brands*, 824 F.3d at 851.

156. *Lemmon*, 995 F.3d at 1087.

157. *Id.* at 1087, 1093.

158. *Id.*

with seemingly unlimited and unconditional immunity from liability.[159] On the other hand, the Ninth Circuit approach demonstrates an interpretative shift from that of *Zeran*.[160] The Ninth Circuit has refused to apply § 230(c)(1)'s immunity to ICSPs unless the cause of actions relate directly to the publication of user or third-party generated content.[161] In effect, the Ninth Circuit's interpretation sets limits on the kinds of claims covered by § 230(c)(1).[162] Additionally, the Ninth Circuit, has denied § 230(c)(1) immunity to those who, by their actions, materially contribute to the development of illegal content, deeming those actors to be "information content providers."[163] Therefore, in deciding whether the Fourth Circuit or Ninth Circuit approach is the correct interpretation of § 230(c)(1), the question becomes whether Congress intended to give ICSPs blanket immunity, even if that meant extending § 230(c)(1) immunity to "Bad Samaritans" or whether Congress intended to give ICSPs conditional immunity, thus limiting § 230(c)(1) immunity to only "Good Samaritans"?[164]

D. Fourth Circuit Unlimited Immunity or Ninth Circuit's Conditional Immunity

When determining if a statute is working or being administered the way in which legislatures intended, the legislative history will usually reveal such anticipated framework of the statute. With regards to § 230, the purpose of it is quite easy to ascertain. As previously mentioned above, the purpose of § 230, as stated by Senator Cox in a 1995 hearing, is to "protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers."[165] Senator Cox clearly intended for "Good Samaritan" providers of interactive computer services to be given certain protection from liability.[166] Additionally, in interpreting Senator Cox's statement, it seems as though a "Good Samaritan" ICSP is one that takes certain

159. *See Zeran*, 129 F.3d 327; *see also Dirty World Entm't Recordings LLC*, 755 F.3d 398; *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc.*, 519 F.3d at 668; *Backpage.com*, 817 F.3d at 16.

160. *See Batzel*, 333 F.3d at 1018; *see also Roommates.com*, 521 F.3d at 1157; *Yahoo!*, 570 F.3d at 1096; *Internet Brands*, 824 F.3d at 846; *Lemmon*, 995 F.3d at 1085.

161. *Yahoo!*, 570 F.3d at 1096; *Internet Brands*, 824 F.3d at 846; *Lemmon*, 995 F.3d at 1085.

162. *See, e.g.*, *Internet Brands*, 824 F.3d at 851.

163. *See, e.g.*, *Roommates.com,* 521 F.3d at 1169–70.

164. Citron, *supra* note 121, at 468.

165. 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

166. *Id.*

steps to "screen indecency and offensive material for their customers."[167] This notion is further supported by the title of § 230(c), "Protection for 'Good Samaritan' blocking and screening of offensive material."[168] In sum, it seems logical that certain conditions must be met in order for such ICSPs to be immune from liability.

However, the Fourth Circuit in *Zeran*, concluded that the defendant, AOL, a provider of interactive computer services did not have to take any steps in order to be deemed a "Good Samaritan" and granted § 230 immunity. In other words, the Fourth Circuit gave AOL "unconditional immunity" from liability.[169] In *Zeran*, an unknown actor posted defamatory messages on an AOL bulletin board, which because of the content of the messages caused the plaintiff to receive endless threatening phone calls. The plaintiff contacted, on multiple occasions, AOL representatives, and on multiple occasions received assurances that the posts would be removed. However, the posts were not removed, prompting the plaintiff to sue AOL for its unreasonable delay in removing the defamatory messages.[170] The Fourth Circuit affirmed the district court's dismissal of the case based on AOL's § 230 immunity, holding that "notice-based liability would deter service providers from regulating the dissemination of offensive material over their own services."[171]

In countering the Fourth Circuit's ruling in *Zeran*, it is important to note that the plaintiff's causes of action were separate from and had nothing to do with the content of the messages posted on AOL's bulletin board. [172] The causes of action were focused on the steps taken, or lack thereof, by AOL in removing the defamatory posts, after giving assurances that the posts would be removed. The Fourth Circuit's opinion focused solely on "notice-based liability," and how ICSPs should not be subject to "notice-based liability."[173] While this notion is correct, the Fourth Circuit failed to mention or discuss the "reasonability" of AOL's actions after receiving notice and affirmatively, through its representative, agreed to take action by removing the defamatory posts on the online bulletin board. While not mentioned in § 230 itself, but implicit in Congress' intent, "reasonability" of an ICSPs' action should be the foundation in determining whether an ICSP receives § 230

167. *Id.*
168. 47 U.S.C. § 230(c).
169. *Zeran,* 129 F.3d at 333.
170. *Id.* at 329.
171. *Id.* at 333.
172. *Id.*
173. *Id.*

immunity. In essence, and along with Congress' policy at stated in § 230(b)(1), the actions of an ICSPs should be "reasonable" in order to promote the continued development of the internet.[174]

The Ninth Circuit, in cases such as *Roommates.com* and *Yahoo!*, while not directly mentioning this self-termed, "reasonability" approach, did appear to be basing their judgements in part on the actions taken by the ICSPs prior to and subsequent of the third-party content being posted, published, or created on their respective websites.[175] For example, in *Roommates.com,* where the Fair Housing Councils of the San Fernando Valley and San Diego sued Roommates alleging that Roommate's business violates the federal Fair Housing Act (FHA), the claim arose out of third-party content, namely, listings seeking to find roommates posted by individuals, on Roommates' website.[176] Instead of halting the discussion there, as did the court in *Zeran*, and granting § 230 immunity to Roommates, the Ninth Circuit took a step back to dive into how such discriminatory third-party content came about.[177] The Ninth Circuit determined that Roommate's work in developing the discriminatory questions, the discriminatory answers, and the discriminatory search mechanism amounted to a material contribution to the alleged illegality of the listings posted on Roommates' website.[178] Because of the material contributions to the contents of the illegal listings, the court held Roommates to be an information content provider and not immune from liability.[179]

The *Roomates.com* holding articulates an important concept that "[t]he Communications Decency Act was not meant to create a lawless no-man's-land on the Internet."[180] This concept is consistent with § 230's policy of promoting the continued development of the internet.[181] With the aforementioned concept in mind, along with Congress' purpose of enacting § 230 as demonstrated in the congressional records, the Ninth Circuit's approach of granting immunity conditionally is the most correct approach to administering § 230(c)(1) immunity.

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174. *See* Batzel, 333 F.3d at 1033; 47 U.S.C. § 230(b)(2).
175. *See Roommates.com*, 521 F.3d at 1169; see *also Yahoo!*, 570 F.3d at 1107.
176. *See Roommates.com*, 521 F.3d at 1165.
177. *Id.* at 1166–9.
178. *Id.* at 1165.
179. *Id.*
180. *Id.* at 1164.
181. *See* 47 U.S.C. § 230(b)(1).

V. PROPOSED MODIFICATION TO SECTION 230(C)(1)

In order to effectuate the Ninth Circuit's approach that § 230(c)(1) immunity should only apply conditionally to ICSPs, this Comment seeks to propose a modification to § 230(c)(1). The proposed modification will (1) create a "reasonability" requirement which must be met for an ICSP to receive immunity, (2) clarify the extent to which an ICSP can republish, select, edit, and add content without being deemed the internet content provider, and (3) clarify and limit § 230(c)(1) immunity to only those claims which arise out of the publication of content by a third-party content providers.

The proposed modification to § 230(c)(1) changes the language from, "[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"[182] to the following:

> A provider or user of an interactive computer service that materially induces, develops, contributes to, or in combination of the like, information provided by another, or that does not take reasonable steps to address unlawful uses of its service that created actionable harm to others shall be treated as the publisher or speaker of any such information provided by another information content provider in any action arising out of the publication of content by that information content provider.

The proposed modification reverses the current format of § 230(c)(1) by stating the conditions which an ICSP must meet in order to be granted § 230 immunity. In effect, the proposed modification limits the scope of § 230(c)(1) immunity. The modification ensures that defendant ICSPs, such as Roommates in *Roommates.com*, must prove, as a condition to receiving § 230(c)(1) immunity that the content in question was not materially induced, developed, contributed, or in combination thereof by, the defendant. By including this within § 230(c)(1), all federal circuit courts will have ample guidance through the legislative text to ensure a similar analysis of the ICSP's conduct similar to that of the Ninth Circuit's opinion in *Roommates.com*. Further, hopefully this modification will eliminate results, such as in *Dirty World Entm't Recordings*, where the Sixth Circuit surprisingly held that the owner and operator of The Dirty, an ICSP, who selected, edited, added commentary, and published content provided by another, did not become the information content provider, and thus eligible for § 230 immunity.[183] With the text of the proposed modification the way it is, a

182. 47 U.S.C. § 230(c)(1).

183. *But see Dirty World Entm't Recordings LLC*, 755 F.3d at 403, 415–7.

court should have ample guidance to access whether an ICSP's actions amounted to that of an information content provider.

The proposed modification also implements a reasonableness standard with respect to whether a defendant ICSP employed reasonable content moderation practices when its internet website is confronted with unlawful activity that creates or effectuates actionable harm to other individuals. With the implementation of a reasonableness standard, courts will assess, as a condition prior to granting § 230 immunity, whether the defendant provided adequate safety measures or adequate content take-down policies. As a result, the implementation of a reasonableness standard prevents "Bad Actors," such as Backpage in *Backpage.com* who faced allegations that its online classified advertising website facilitated and encouraged illegal conduct through the structuring of its website, from receiving unfettered § 230 immunity.[184] With the proposed modification, Backpage, for example, would have had to provide evidence that it implemented reasonable safety, take-down, and user verification policies in order to address the known unlawful uses occurring on its website, namely, sex trafficking of underage victims. Backpage would likely not have been able to prove that it had reasonable policies in place, and thus would not have been granted § 230 immunity.

The likely pull back by dissenters to a reasonableness approach would be that such a standard is too vague or not well defined as to what conduct by an ICSP is reasonable or unreasonable. In countering the likely argument, it should be noted that courts have assessed the reasonableness of practices in a multitude of varying fields and contexts ranging from negligence law to criminal law, as seen by the "reasonable care" standard, "reasonable prudent person" standard, "reasonable consumer" standard, and the "reasonable person" standard.[185] Further, similar to the way in which a court applies the "reasonable prudent person" standard, here the court would have to tailor its analysis of reasonability based on the alleged harmful conduct in question.[186]

The last part of the proposed modification resolves the struggle faced by all federal circuit courts in deciding whether or not a plaintiff's claim is covered within § 230(c)(1)'s grant of immunity. As such, the proposed modification clarifies that § 230(c)(1) immunity applies "in any action arising out of the publication of content by that information content provider." In the alternative, this means that any action not arising out

184. *But see Backpage.com*, 817 F.3d at 22.

185. Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 PENN. L. REV. 2131, 2161 (2015).

186. Zipursky, *supra* note 184.

of an ICSP's publication of third-party content is not barred by § 230 immunity. By including this addition to § 230(c)(1), a court no longer has to make the difficult determination, as demonstrated by both the Fourth and Ninth Circuits of whether the claim is premised on and involves treating the ICSP as the publisher of the content in question.[187] Now, the court has to answer a far simpler question of whether the plaintiff's claim is based on underlying third-party content. If the plaintiff's claim is not based on underlying third-party content and rather, for example, as correctly concluded by the Ninth Circuit in *Yahoo!*, a negligent undertaking by an ICSP to take some action which is relied on by the plaintiff, then the claim is not barred by § 230(c)(1) immunity.[188] In addition to the *Yahoo!* judgement, the added "arising out of" language should amount to judgements, going forward, consistent with Ninth Circuit holdings in both *Internet Brands* and *Lemmon* where the Ninth Circuit did not award immunity to "Bad Samaritans" when the claims were premised solely on the ICSP's actions, conduct, and decisions.[189]

Additionally, the proposed modification increases the burden, as in the elements to satisfy, on ICSPs who assert § 230(c)(1) as an affirmative defense to claims alleged by a plaintiff.[190] Under the proposed modification, an ICSP who claims immunity from liability by asserting § 230(c)(1) as affirmative defense will need to establish, by a preponderance of the evidence, that the defendant, (1) is a provider of an interactive computer service, (2) is being treated as the publisher or speaker of speech provided by another information content provider, (3) that the action is arising out of the publication of content by that information content provider, (4) if applicable, that the provider of interactive computer services did not materially induce, develop, contribute to, or in combination of the like to, information provided by that information content provider, and (5) if applicable, that the provider of interactive computer services took reasonable steps to address unlawful uses of its service that created actionable harm to others. Ideally, the proposed modification will make it more difficult for ICSPs to have a plaintiff's case dismissed at the outset of litigation, and thus will lead to further litigation of the facts underlying a plaintiff's claim.

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187. *See Backpage.com*, 817 F.3d at 20; *See Internet Brands*, 824 F.3d at 851.

188. *See Yahoo!*, 570 F.3d at 1108.

189. *See Internet Brands*, 824 F.3d at 851; *see also Lemmon*, 995 F.3d at 1093.

190. Eric Taubel, *The ICS Three-Step: A Procedural Alternative for Section 230 of the Communications Decency Act and Derivative Liability in the Online Setting*, 12 MINN. J.L. SCI. & TECH. 365, 376 (2011).

In sum, the proposed modification balances the underlying purposes of § 230's enactment while balancing the policies as listed in § 230(b). The proposed modification effectuates § 230's purpose of "protect[ing] computer Good Samaritans, online service providers who takes steps to screen indecency and offensive material for their customers" and the like, as well as effectuating § 230's policy of promoting the continued development of the Internet.[191] The proposed modification, unlike the current § 230(c)(1) provision, now protects and grants conditional immunity to "Good Samaritan" providers of interactive computer services, while allowing "Bad Samaritan" providers of interactive computer services to be held accountable for their actions.

VI. CONCLUSION

After the court's rulings in both in *Prodigy Services Co.* and *Cubby, Inc.*, which saw the lower courts' struggle to apply common law publisher and distributor liability in the context of content disseminated on an ICSP's website, Congress made an attempt to eliminate an ICSP's liability for content provided by a third-party as a way to ensure the continued advancement of the internet.[192] However, § 230(c)(1) immunity, in theory, was intended to apply only to "Good Samaritan" ICSPs. The Fourth Circuit, beginning with *Zeran*, interpreted § 230(c)(1) as providing broad and nearly unlimited § 230(c)(1) immunity to virtually all ICSPs facing claims related to content provided on its website.[193] Unlike the Fourth Circuit's interpretation of § 230(c)(1), the Ninth Circuit, in cases such as *Roommates.com*, *Batzel*, *Yahoo!*, *Internet Brands*, and *Lemmon*, took a different stance, holding that § 230(c)(1) only provides ICSPs with conditional immunity in certain claims and fact specific circumstances.[194] The Ninth Circuit's approach of conditionally granting § 230(c)(1) immunity better effectuates the purpose of § 230's enactment by protecting and thus granting immunity to "Good Samaritan" ICSPs, while allowing for plaintiffs to hold accountable "Bad Samaritan" ICSPs.

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191. 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox); 47 U.S.C. § 230(b)(1).

192. *See* Prodigy Services. Co., 1995 N.Y. Misc. LEXIS 229, at *10–11; *see also* Cubby, Inc., 776 F. Supp. at 140.

193. *Accord Zeran*, 129 F.3d at 330; 331–3.

194. *See Batzel*, 333 F.3d at 1018; *see also Roommates.com*, 521 F.3d at 1157; *Yahoo!*, 570 F.3d at 1096; *Internet Brands*, 824 F.3d at 846; *Lemmon*, 995 F.3d at 1085.

The proposed modification seeks to alter the text of § 230(c)(1) to mirror the approach taken by the Ninth Circuit.[195] In doing so, the proposed modification only grants immunity when the content in question was not materially induced, developed, contributed, or in combination thereof by the defendant ICSP. Further, the proposed modification requires that in certain circumstances, an ICSP would have to demonstrate that it employs reasonable content moderation practices when its internet website is confronted with unlawful activity that creates or effectuates actionable harm to other individuals. Finally, the proposed modification clarifies that § 230(c)(1) immunity does not apply to ICSPs when the cause of action does not arise out of the publication of content provided by an information content provider.

195. *See id.*