The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation

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Abstract

As internet businesses started to emerge in the 1990s, online content distributors were taken to court for material they published or republished. While one court found in *Cubby v. CompuServe* (1991) that the internet-based company was not liable, a second court trying *Stratton Oakmont v. Prodigy* (1995) arrived at the opposite conclusion. Congress resolved the ambiguity by enacting the Communications Decency Act of 1996, of which Section 230 established a broad liability shield for online content distributors. Two decades later, Section 230 has come under scrutiny, and many critics and lawmakers characterize it as a drastic deviation from common law that should be corrected. We take exception to that critique because the legal precedent we examine herein shows that courts had instead narrowed liability for publishers, republishers, and distributors for decades culminating in the *Cubby* decision. Section 230 only accelerated this process, establishing a regime that would have likely emerged in common law, albeit more gradually. Based on this legal history, we discuss the circumstances under which mandated online content takedown could be prudent and practicable and also under which continuing Section 230 protections may prove necessary.

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Introduction

We are more than two decades into the era of "cheap speech."[1] The relatively limited media world of newspapers, pamphlets, and three broadcast networks has given way to media abundance from cable and satellite television and—most significantly—internet distribution. Online content distributors (who act as "intermediaries" between content producers and consumers by providing a platform for content but not directly creating such content themselves) such as social media sites, app stores, search engines, and internet service providers (ISPs) often use intentional, semi-automated, and iterative processes to decide what content to omit and transmit. Consequently, as media theorist Clay Shirky notes, the centuries-old formula of "Filter, then publish," has been reversed in the internet age: "Publish, then filter."[2] This rapid shift in editing from "selection" to "curation" put immense stress on traditional publication law and liability.

To expressly protect online content distributors from punitive liability lawsuits over users' posts, Congress created a broad liability shield in Section 230 of the 1996 Communications Decency Act. In recent years, this liability shield has come under scrutiny from lawmakers and advocates across the political spectrum. One primary criticism is that Section 230 is a radical departure from traditional publication law. This legal reversal, critics say, makes harassing or antisocial behavior profitable and is abused by tech companies to discriminate

[1] Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).
[2] CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATION 81, 98 (2008). This is of course a simplification of the actual process of content moderation that often engages in multiple rounds of publication and filtering for various content.

against political opponents or to censure unpopular viewpoints. The proposed solution often offered is to repeal Section 230 or narrow its coverage in order to increase the liability of online content distributors for their users' behavior and content.[3]

This paper explores the debate over online content distributors' liability. In particular, we draw on decades of legal trends and defamation cases to show that Section 230 is not the deviation from common-law liability that it is often characterized as. Strict liability for distribution of defamatory content is rarely recognized by courts.[4] In fact, many courts have recognized and endorsed "conduit liability," and the related "wire service defense," which represent powerful protections for newspapers, cable operators, and broadcasters.

Second, much as the Supreme Court "constitutionalized" defamation law in *New York Times v. Sullivan*,[5] which protected direct publishers from liability, First Amendment considerations would likely lead courts to a Section 230–like liability protection for republishers such as online distributors, even in the absence of the law.[6] While a conduit liability regime would have gradually emerged for online content distributors in the absence of Section 230, we conclude the law had—and continues to have—a salutary effect on the development of online services. Section 230 provided protection to the nascent internet industry at a critical time, and a top-to-bottom reformulation today would create significant transition costs as courts settled on the appropriate liability regime.

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[3] *See, e.g.*, Press Release, Josh Hawley, Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies (Jun. 19, 2019).

[4] *See* Lewis v. Time, Inc., 83 F.R.D. 455, 463 (E.D. Cal. 1979) ("The common thread in these cases is that there can be no liability absent scienter. The requirement of scienter comports with the traditional rule that a republisher cannot be held liable unless he had knowledge of the defamatory content, and satisfies the federal constitutional rule against liability without fault.").

[5] New York Times v. Sullivan, 376 U.S. 254 (1965). *See* Marc A. Franklin and Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825 (1984).

[6] *See, e.g.*, Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2032 (2018) (arguing that "imposing defamation liability on internet intermediaries is unconstitutional" because of the collateral censorship).

Section I introduces cases in which strict liability for tortious content distribution was narrowed for media distributors in the decades before Section 230 of the Communications Decency Act of 1996. This history suggests that the codification of broad publisher liability in Section 230 simply accelerated the prevailing trend in common law and in state courts. Section II describes the two cases that prompted Congress to enact Section 230, as well as cases in the aftermath of this law that further shaped the liability of online content distributors. The section closes by documenting the increasing public pressure to repeal or modify Section 230. Finally, in section III we discuss the circumstances in which statutory departures from both Section 230 and conduit liability might be prudent and practicable while preserving free expression online.

I. The Erosion of Publisher and Distributor Liability

There is a popular view that Section 230 "upended a set of principles enshrined in common law doctrines" developed for the offline world.[7] The notion that, absent Section 230, as Senator Cruz quipped, online platforms would be "liable like the rest of us"[8] is a common one that reflects the traditional view of publisher liability.[9] Traditionally, as with other torts,[10] there was strict liability for what was published even if the publisher did not know the statement was defamatory

[7] 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 LOYOLA L. REV. 373, 411 (2010). *See also* Mike Masnick, *Nancy Pelosi Joins Ted Cruz and Louis Gohmert in Attacking CDA 230*, TECHDIRT (Apr. 12, 2018), *available at* https://www.techdirt.com/articles/20190411/18521741986/nancy-pelosi-joins-ted-cruz-louis-gohmert-attacking-cda-230.shtml (House Speaker Nancy Pelosi characterizing Section 230 as "a gift" to tech companies).

[8] Mark Sullivan, *The 1996 Law That Made the Web Is in the Crosshairs*, FAST COMPANY (Nov. 29, 2018), *available at* https://www.fastcompany.com/90273352/maybe-its-time-to-take-away-the-outdated-loophole-that-big-tech-exploits.

[9] Gonzalez v. Google, Inc., 282 F. Supp. 3d 1150, 1157 (N.D. Cal. 2017). Dicta: "In the absence of the protection afforded by section 230(c)(1), one who published or distributed speech online 'could be held liable for defamation even if he or she was not the author of defamatory text, and . . . at least with regard to publishers, even if unaware of the statement'" (quoting *Batzel v. Smith*, 333 F.3d 1018, 1026–1027).

[10] LAURENCE H. ELDREDGE, MODERN TORT PROBLEMS 28 (1941).

or otherwise tortious.[11] However, courts had been eroding this traditional strict liability regime for more than six decades before Section 230 was enacted in 1996.[12]

In this section, we trace that legal development away from strict liability and toward fault-based liability, not just for online intermediaries, but for distributors and publishers more generally. Before Section 230, courts were granting even non–common carriers and media outlets broad liability protection for content they republished or transmitted.[13]

The traditional legal standard is that "every repetition of a defamatory statement is considered a publication,"[14] and republishers were as liable as the original author.[15] The first Restatement of Torts, published in 1939, still articulated this traditional strict liability rule.[16] "Publisher" was interpreted broadly, and courts hewing to this traditional view held liable

[11] *See, e.g.*, Robert A. Leflar, *Radio and TV Defamation: "Fault" or Strict Liability?*, 15 OHIO ST. L.J. 252, 254 (1954) ("The law of libel and slander . . . is ordinarily thought of as a body of law grounded on 'absolute liability.'"). In the early formation of the law, as far back as pre-Norman England, as one commentator puts it, "There is no doubt that all of the liability in those days was absolute liability." ELDREDGE, *supra* note 10, at 28.

[12] Today, even an online "book publisher" will be found not liable for the content of published material if that publisher has only a "minute level of involvement with the author of the alleged defamatory material." Sandler v. Calcagni, 565 F. Supp. 2d 184, 194 (D. Me. 2008). We're grateful to an anonymous reviewer for making note of this case.

[13] Our analysis focuses on liability for distribution of defamatory and libelous materials, but negligence and fault-based liability also undermined strict liability for copyright infringement. *See, e.g.*, Religious Tech. Ctr. v. Netcom, 907 F. Supp. 1361 (N.D. Cal. 1995) (acknowledging that the copyright statutes impose strict liability but declining to hold an internet access provider liable for the copying and distribution of copyrighted content). *See also* Patrick R. Goold, *Is Copyright Infringement a Strict Liability Tort?*, 30 BERKELEY TECH. L.J. 305 (2015). *But see* Playboy v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993) (granting partial summary judgment for plaintiff where defendant online bulletin board operator distributed plaintiff's copyrighted content).

[14] Zeran v. America Online, 129 F.2d 327, 332 (4th Cir. 1997) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113 (5th ed. 1984)).

[15] Henry H. Perritt Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH 77, 95 (1992). *See also Zeran*, 129 F.2d at 332 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113 (5th ed. 1984)). *See*, *e.g.*, Leflar, *supra* note 11, at 254 ("The law of libel and slander . . . is ordinarily thought of as a body of law grounded on 'absolute liability.'"). Such standards apply widely not only to standard reporting, but also to opinion pieces and even fictional works. *See* Milkovich v. Lorain Journal, 497 U.S. 1 (1990); John Preston, *The Murky World of Literary Libel*, THE TELEGRAPH (Jul. 14, 2013), *available at* http://www.telegraph.co.uk/culture/books/booknews/10172292/The-murky-world-of-literary-libel.html.

[16] RESTATEMENT OF THE LAW, TORTS § 580 (1938). *See also* ELDREDGE, *supra* note 10, at 51 ("The nature of liability for defamation is set forth in Section 580 of the Restatement of Torts where it definitely imposes an absolute liability.").

bulletin board owners,[17] business partners of a publisher,[18] and even tavern owners who tolerated defamatory writing on the walls.[19]

Over time, however, many courts found that a republisher was more like a distributor and could not be held liable for content created by others, absent a showing of fault.[20] A sliding scale for liability developed, based on the amount of editing the transmitter or publisher engaged in. Courts have even recognized liability protection for "wire service liability" or "conduit liability" to non–common carriers like broadcasters and newspapers. Two considerations drove this legal trend toward more liability protection for distributors and publishers: a desire for practical legal rules and free speech norms.

A. Practical Considerations Limiting Publisher and Distributor Liability

Even in the latter part of the 19th century, the emerging law of negligence was undercutting strict liability for torts.[21] The erosion of strict liability was premised on practical considerations and potential for economic harm.[22] This negligence law trend away from strict liability was then extended to defamation publication and republication lawsuits.

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[17] Fogg v. Boston & Lowell R.R., 20 N.E. 109, 110 (Mass. 1889) (defendant railroad published defamatory statement placed on company bulletin board because company was aware of its existence and failed to remove it from the board).

[18] Woodling v. Knickerbocker, 17 NW 387, 388 (Minn. 1883) (failure by defendant to remove defamatory placard placed by a business partner was sufficient evidence for jury to conclude that the defendant published the defamatory material).

[19] Hellar v. Blanco, 244 P.2d 757, 759 (Cal. 1952) (republication occurred when defendant tavern had reason to know of the existence of defamatory message on a bathroom wall and failed to remove the message).

[20] *See, e.g.*, Church of Scientology of Minn. v. Minn. State Med. Ass'n, 264 N.W.2d 152, 156 (Minn. 1978) (requiring that republisher either knew or should have known of defamatory nature of the statements transmitted protects libraries and vendors of books, magazines, and newspapers).

[21] *See* ELDREDGE, *supra* note 10, at 32 ("There is practically no law of negligence prior to the nineteenth century. The greatest development has been since 1875."); *see* Summit Hotel Co. v. Nat'l Broad. Co., 8 A.2d 302, 304 (1939).

[22] One motivation of this legal development was that strict liability was too punitive to young industries. Scholars like Professor Laurence H. Eldredge tied the growth of negligence legal theories to the need to protect "infant industries" and the development of an industrial sector:

1. The wire service defense. With the emergence of news services like the Associated Press in the telegraph era, courts recognized that earlier liability theories needed to be modified for republication.[23] For instance, in 1933, the Florida Supreme Court in an influential case, *Layne v. Tribune Co.*, declined to hold a newspaper strictly liable for republishing a defamatory dispatch from a news service,[24] a case regarded later as creating the "wire service defense."[25] The court found that a paper is liable only if "the publisher must have acted in a negligent, reckless or careless manner in reproducing" the story.[26] The court grounded this holding in the practical and economic realities of distributing the news and the public need for efficient and low-cost delivery of news:[27]

> No newspaper could afford to warrant the absolute authenticity of every item of its news, nor assume in advance the burden of specially verifying every item of news reported to it by established news gathering agencies, and continue to discharge with efficiency and promptness the demands of modern necessity for prompt publication, if publication is to be had at all.

The *Layne* court also drew upon earlier legal principles for this defense:[28]

> Another aspect of the developing negligence law, was the thought that undue burdens should not stifle infant industries, so that any theory of absolute liability was deemed inconsistent with this developing industrial community.

ELDREDGE, *supra* note 10, at 32.

[23] *See, e.g.*, Layne v. Tribune Co., 108 Fla. 177, 183 (1933) (citations omitted):

> [C]ourts can, and must, take judicial notice of the fact that in printing an associated press, or other press service dispatch, of a purported news happening, emanating from other places or localities, the article or news item, as reproduced and published locally, is not considered as the original or voluntary composition of the newspaper publisher, who merely reproduces it in his daily news columns in the form in which it has been received, but is rather regarded by the public as a mere repetition of a publication that has already been made by its real authors in their course of disseminating the news.

[24] *Id*. at 186.

[25] *See, e.g.*, Rakofsky v. Washington Post, 971 N.Y.S.2d 74 (N.Y. Sup. Ct. 2013) (recognizing wire service defense for a plaintiff who published summaries of news stories); Nelson v. Associated Press, Inc., 667 F. Supp. 1468, 1476 (S.D. Fla. 1987) (holding that *Newsweek* magazine was entitled to the wire service defense); Accord Appleby v. Daily Hampshire Gazette, 478 N.E.2d 721, 725 (1985); MacGregor v. Miami Herald Pub. Co., 119 So. 2d 85 (Fla. Dist. Ct. App. 1960).

[26] *Layne*, 108 Fla. at 186.

[27] *Id*. at 188.

[28] *Id.* at 183 (citations omitted).

> Those are numerous authorities, most of them of early date, which are to the effect that one who hears a slander has a legal right to repeat it, if he does so in the same words, and at the same time gives his authority for the statement, because of the rebuttal of any presumption of malice in such cases.

The *Layne* decision and its "practicality argument" gained currency as mass media and broadcast developed. Within the first few decades of TV and radio, legal commentators were, according to contemporary accounts, evenly split as to whether strict liability should apply, or whether broadcasters were more analogous to "disseminators" like bookstores, newsstands, and libraries, where fault was needed to impose liability.[29]

2. Other republication defenses. Layne jump-started a trend in American law, buttressed by state laws, away from the traditional view of strict publisher liability in the context of republication. For instance, only two years after *Layne*, the Pennsylvania Supreme Court announced a similar negligence rule for radio broadcast, citing the practical burdens of strict liability.[30] In *Summit Hotel v. NBC*, a Pennsylvania hotel brought a defamation lawsuit in state court against radio broadcaster NBC.[31] On one of NBC's sponsored programs, the host extemporaneously remarked to an interview guest that a certain hotel was "a rotten hotel."[32] The lower court instructed the jury that the statement was slanderous per se and held NBC absolutely liable.[33]

On appeal, the Pennsylvania Supreme Court reversed and created a new tort—radio defamation[34]—that deviated from strict liability for publishers of libel or slander and created a

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[29] *See*, *e.g.*, Kelly v. Hoffman, 61 A.2d 143, 145–46 (1948) ("There are two schools of thought as to the act of publishing the defamatory statement by the broadcasting medium—one of so-called absolute liability . . . and the other of liability based upon negligence."); Leflar, *supra* note 11, at 257 n.22. The first Restatement of Torts, promulgated in 1938, acknowledged the broadcast issue but refused to take a position on it. RESTATEMENT OF THE LAW, TORTS, *supra* note 16, §§ 577 (caveat), 581, comment f.
[30] *Summit Hotel Co.*, 8 A.2d at 310–11.
[31] *Id*. at 303.
[32] *Id*.
[33] *Id*.
[34] *Id*.; Leflar, *supra* note 11, at 262.

negligence standard. The court held that a broadcaster that leases airtime cannot be held liable for an impromptu defamatory statement if the broadcaster has exercised due care in selecting the lessee, as "there was no possible way in which [NBC] could have anticipated or prevented the remark."[35]

The *Summit Hotel* court, like the *Layne* court, cited the economic difficulties if strict liability were imposed: "A rule should be applied which will not impose too heavy a burden on the industry, and yet will secure a high measure of protection to the public or those who may be injured."[36]

The court discussed the fact that publication law was trending away from strict liability[37] and toward a negligence standard: "A tort today implies fault or wrong. Tort liability must be founded upon some blameworthy conduct, or lack of due care resulting in the violation of a duty owing to others."[38]

Two decades later, legal commentators noted that "the current trend is strongly away from strict liabil[i]ty as the governing rule in the field of radio and television defamation."[39] A national campaign by broadcasters in the early 1950s led most states to pass laws eliminating strict liability for on-air defamation,[40] typically absolving broadcasters from liability if they exercised due care.[41] "Due care" in choosing what to transmit came to be interpreted broadly, thus adding another layer of protection to media intermediaries. This legal trend and these

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[35] *Summit Hotel Co.*, 8 A.2d at 312.
[36] *Id*. at 310.
[37] *Kelly*, 61 A.2d at 147 (finding that broadcasters are "disseminators"—thus no absolute liability—and must exercise reasonable care to avoid liability for on-air defamatory statements).
[38] *Summit Hotel Co.*, 8 A.2d at 304.
[39] Leflar, *supra* note 11, at 267.
[40] *Id*. at 267–71.
[41] *Id*. at 267–70. Judge Learned Hand defined due care in this way:

> The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk.

Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940).

statutes proved to be quite useful at limiting costly litigation over rebroadcasts of tortious material—a federal court decades later couldn't find a single case where broadcasters were held liable for on-air content.[42]

3. The expansion of the wire service defense to speakers. Other state and federal courts recognize a wire service defense that is broader than the rule in *Layne*, not limited to republishing wire services and news outlets.[43] The republication defense in Minnesota, New York, North Carolina, and other states, for instance, is not limited to wire services when the source relied on is clear.[44] The justification for broader coverage, as the Massachusetts appellate court said in a wire defense case, is that "[i]t would pose an impermissible burden upon the media and the courts to force them to make subtle distinctions between published material that must be independently verified and that which does not."[45]

Even speakers—those who curate and edit content[46]—could avail themselves of the "wire service defense" in the publication of defamatory content. For instance, in the 1980s in *Nelson v. Associated Press*, the plaintiff brought a defamation lawsuit against several media outlets, including *Newsweek*, for publishing damaging stories about her professional psychic business.[47]

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[42] Merco Joint Venture v. Kaufman, 923 F. Supp. 924, 927 (W.D. Tex. 1996).
[43] Jewell v. NYP Holdings, 23 F. Supp. 2d 348, 369–70 (S.D.N.Y. 1998) ("The New York rule, on its face, is not so limited [as *Layne*] and, indeed, has been applied in a number of cases where the republished material was originally published by a source other than a wire service."); Brown v. Courier Herald Pub. Co., 700 F. Supp. 534 (S.D. Ga. 1988).
[44] *Jewell*, 23 F. Supp. 2d at 370–71; McKinney v. Avery Journal, 99 N.C. App. 529 (N.C. Ct. App. 1990) (granting wire service defense to a journalist who relied on daily newspapers for a story in addition to wire services); Van Straten v. Milwaukee Journal Newspaper-Publisher, 151 Wis. 2d 905, 920 (Wis. 1989) (granting wire service defense to newspaper journalists who relied on statements from jail personnel); *Church of Scientology of Minn.*, 264 N.W.2d (holding that a medical association magazine was a conduit, protected from a defamation suit). *See also* Cole v. Star Tribune, 581 N.W.2d 364 (Minn. 1998).
[45] Reilly v. Associated Press, 59 Mass. App. Ct. 764, 780–81 (Mass. App. Ct. 2003).
[46] *See* Los Angeles v. Preferred Communications, 476 U.S. 488, 494 (1986) (finding that "exercising editorial discretion over which stations or programs to include in its repertoire" is speech by cable operators).
[47] Nelson v. Associated Press, Inc., 667 F. Supp. 1468, 1470 (S.D. Fla. 1987).

The *Newsweek* story at issue was not a wire service story; the magazine had contracted with and published a story from a journalist who had written an original story based on defamatory statements in wire service and news reports.[48] Despite the fact this was an original story, not a "mere reproduction" like the one at issue in *Layne*,[49] the court held that *Newsweek* was protected by the wire service defense to libel.[50]

4. Conduit liability for mass media. This wire service defense was later extended to TV stations with the ability to edit, curate, and kill programs.[51] In these circumstances, it was renamed "conduit liability," akin to the liability of common carriers like telephone and telegraph operators.[52] Courts very rarely impose liability on conduits, even when the conduit operator has knowledge that tortious material is being transmitted.[53] As one scholar puts it, "In practical terms, conduits almost never face liability for third-party speech."[54] Though it has traditionally been reserved for common carriers, courts have applied conduit liability to non–common carriers such as newspapers and broadcasters. As courts have recognized in other TV programming cases, so long as TV broadcasters have "absolute non-involvement with the underlying

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[48] *Id.*
[49] *Layne*, 108 Fla. at 183.
[50] *Nelson*, 667 F. Supp. at 1476–77. This case bears close resemblance to the circumstances in *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998). In that case, the court dismissed a defamation case against AOL, despite the fact that AOL had commissioned the underlying story. 992 F. Supp. at 50–51.
[51] *See* Kapetanovic v. Stephen J. Cannell Productions, Inc., No. 97 C 2224, 2002 U.S. Dist. LEXIS 5489 (N.D. Ill. Mar. 26, 2002) (extending wire service defense to a TV station).
[52] RESTATEMENT (SECOND) OF TORTS § 612, comment g (1977). According to the Restatement,

> A public utility under a duty to transmit messages is privileged to do so, even though it knows the message to be false and defamatory, unless
> (a) the sender of the message is not privileged to send it, and
> (b) the agent who transmits the message knows or has reason to know that the sender is not privileged to publish it.

Id. at § 612 (2). *See also* Anderson v. New York Tel. Co., 320 N.E.2d 647, 649 (N.Y. 1974) (finding telephone company not liable for a recorded defamatory answering machine message even when the company knew about the defamatory message).
[53] RESTATEMENT (SECOND) OF TORTS § 612 (2).
[54] Ardia, *Free Speech Savior or Shield for Scoundrels*, *supra* note 7.

broadcast," they can avail themselves of the conduit defense to liability.[55] Complaints against conduits are typically dismissed at the summary judgment stage.[56]

In the 1992 Washington state case *Auvil v. CBS 60 Minutes*, for instance, the plaintiff alleged defamation against three local CBS affiliates for running a *60 Minutes* program about chemicals in the apple-growing industry.[57] As in *Layne* and its progeny, the court declined to impose liability because of the burden it would impose on outlets. The plaintiff's theory, if accepted, the court said,

> [w]ould force the creation of full time editorial boards at local stations throughout the country which possess sufficient knowledge, legal acumen and access to experts to continually monitor incoming transmissions and exercise on-the-spot discretionary calls or face $75 million dollar lawsuits at every turn. That is not realistic. [58]

Critically, the court recognized that the CBS affiliates "had the power" to exercise editorial control over the broadcast and "in fact occasionally do censor programming for one reason or another" when the affiliate "believes the content unsuitable for local consumption."[59] Despite having the power to edit the underlying content and, in fact, occasionally exercising that editorial control over content, media companies like broadcasters are still subject to mere "conduit liability."[60]

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[55] *See* Med. Lab. Mgmt. Consultants v. ABC, 931 F. Supp. 1487, 1492 (D. Ariz. 1996); *Merco Joint Venture*, 923 F. Supp. at 929–30 (recognizing conduit liability in granting summary judgment to defendant TV station for broadcasting a program with defamatory content).
[56] *See* 923 F. Supp. at 929–30.
[57] Auvil v. CBS 60 Minutes, 800 F. Supp. 928, 930 (E.D. Wash. 1992).
[58] *Id*. at 931.
[59] *Id*. Courts also recognize free speech norms in Section 230 cases. *See, e.g.*, Jane Doe No. 1 v. Backpage.com, 817 F.3d 12, 29 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017) (noting that "First Amendment values . . . drive" Section 230's creation).
[60] *Auvil*, 800 F. Supp at 931–32. Similarly, a federal district court recognized the wire service defense to the Associated Press (AP), even though the AP made edits before transmitting a defamatory story. Winn v. Associated Press, 903 F. Supp. 575, 577–80 (S.D.N.Y. 1995).

B. First Amendment Considerations Limiting Publisher and Distributor Liability

Concern for practicality was not the only factor in the erosion of strict liability for republishers and the move toward distributor or conduit liability. A coinciding legal trend was court protection of intermediaries and publishers on First Amendment grounds, because liability chilled the free exchange of ideas and criticism.[61]

This "constitutionalizing" of defamation and republication law occurred in the latter half of the 20th century. As Leflar noted in 1954, with the rise of broadcast radio and TV, even liability for broadcasters could lead to chilling of speech:

> If, however, no amount of care could guard against the threatened harm, the preventive significance [of negligence liability] is lessened; it is limited to the possibility of forgoing the dangerous activity altogether. When the dangerous activity is the dissemination of ideas and information, and the effect in practice of forgoing it would be that certain speakers might be cut off the air altog[e]ther, thus barring legitimate speech in order to take no chances on the possibility of something illegitimate being said, the virtue of this pressure toward prevention fades rapidly and almost disappears. [62]

This liability protection for media intermediaries emerged because of practical concerns regarding the difficulty in ascertaining the lawfulness of contributors' speech and the chilling effect on speech if such standards were employed too broadly. In *Farmers Educational and Cooperative Union v. WDAY*, the Supreme Court held in 1959 that a broadcaster was immune from liability for defamation made by a political candidate on the air:

> Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question, involving as it does, considerations of various legal defenses. . . . Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution. [63]

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[61] Ardia, *supra* note 7. Eric Goldman makes a compelling case for why Section 230 is superior to common law and constitutional protection of online providers. However, many of his points deal with the increased liability providers would face under distributor liability (scienter, commercial speech, constitutional avoidance, etc.). Conduit liability is more protective than distributor liability and resembles Section 230 in that nearly every complaint can be dismissed. Eric Goldman, *Why Section 230 is Better than the First Amendment*, NOTRE DAME L. REV. ONLINE (forthcoming 2019).

[62] Leflar, *supra* note 11, at 265.

[63] Farmers Educ. & Coop. Union of Am. v. WDAY, 360 U.S. 525, 530–31 (1959).

That same year, in *Smith v. California*, the Supreme Court found that strict liability for obscene materials in bookstores is unconstitutional because it would deprive the public of protected material.[64] Recognizing the deleterious effect a strict liability standard could have, the court wrote, "If the contents of bookshops and periodical stands were restricted to material of which their proprietors had inspected, they might be depleted indeed."[65]

In *Manual Enterprises*, a 1962 Supreme Court case, that trend continued. The Court found the publisher of an erotic homosexual magazine not civilly liable for "obscene advertising" under the Comstock Act when it published and distributed ads for companies being prosecuted for distributing obscene material.[66] The Court relied on both the practicality justification and the free speech justification for striking down the law:[67]

> Since publishers cannot practicably be expected to investigate each of their advertisers, and since the economic consequences of an order barring even a single issue of a periodical from the mails might entail heavy financial sacrifice, a magazine publisher might refrain from accepting advertisements from those whose own materials could conceivably be deemed objectionable by the Post Office Department. This would deprive such materials, which might otherwise be entitled to constitutional protection, of a legitimate and recognized avenue of access to the public.[68]

Two years later, in *New York Times v. Sullivan*,[69] the Supreme Court imposed a fault requirement in "media defendant" cases in order to protect "robust and uninhibited" public communication.[70] Public officials and public figures must prove that defendants acted with

[64] Smith v. California, 361 U.S. 147, 153 (1959).
[65] *Id*.
[66] Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962).
[67] *Id.* at 492.
[68] *Id*.
[69] 376 U.S. 254 (1964).
[70] *Id*. at 254. *See* Gerald R. Smith, *Of Malice and Men: The Law of Defamation*, 27 VAL. U. L. REV. 39 (1992).

"actual malice."[71] In later cases, the Court expanded the fault requirement to cases involving nonmedia defendants[72] and even private plaintiffs.[73]

The First Amendment has also been cited for the recognition of the wire service defense in mass media. In *Medical Lab Consultants v. ABC*, the plaintiff sued the local broadcast station for airing a defamatory story. The federal district court dismissed the claim because of the wire service defense and cited the First Amendment purposes of the defense.[74] In short, laws that effectively require impractical content moderation practices for distributors and republishers run against these trends in First Amendment law.

II. Section 230 and the Creation of Modern Internet Law

The traditional view is that publishers are assumed to know the contents of what they are publishing, and therefore they can be held strictly liable for violations such as libel and defamation[75] or copyright violations.[76] In the 1990s, legal scholars still debated whether the publication liability of internet intermediaries resembled that of "print publishers, broadcasters, bookstores, libraries, physical bulletin board operators, [or] common carriers."[77] Section 230 brought some certainty and resembles the conduit liability that protects common carriers.

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[71] 376 U.S. at 254.
[72] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 n.9 (1985) (plurality opinion declined to address distinction between media and nonmedia defendants, making it likely that the distinction wouldn't be significant in future cases).
[73] Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 n.10 (1974). A private figure plaintiff, operating under the prevailing negligence standard, need only show that the republisher's effort is less than reasonable. *See* Brown v. Kelly Broad., 771 P.2d 406, 424 n.26 (Cal. 1989).
[74] *Med. Lab. Mgmt. Consultants*, 931 F. Supp. at 1492 ("The wire service defense is consistent with modern First Amendment jurisprudence.").
[75] Cianci v. New Times Pub. Co., 639 F.2d 5, 61 (1980); Smith v. Utley, 65 N.W. 744, 744 (Wis. 1896) (managing editor of newspaper was liable for publication of libelous article whether or not he actually knew of publication; matter is constructively under editor's supervision).
[76] Buck v. Jewell-La Salle Realty Co., 283 U.S. 191, 198–99 (1931) (holding that copyright infringement is a strict liability tort).
[77] Kean J. DeCarlo, *Tilting at Windmills: Defamation and the Private Person in Cyberspace*, 13 GA. ST. U. L. REV. 547, 551 (1997). Even these analogues cannot answer the question of liability exposure for internet intermediaries,

A. Divergent Liability Regimes for the Early Internet

In the 1990s, two courts in New York, a federal court and a state court, were presented with a question: are online intermediaries liable for defamatory content posted by their users? The courts arrived at divergent opinions, and before other courts could develop a consensus on the issue in a common-law manner, Congress intervened in order to bring legal certainty for young internet companies and the broader World Wide Web.

In *Cubby v. CompuServe*,[78] a 1991 federal case, the plaintiff sued CompuServe for libel, the publication of defamatory statements. CompuServe served as a host for many internet forums and bulletin boards, and on one of CompuServe's gossip forums, a user denigrated the plaintiff's business practices.[79] After the lawsuit was filed under New York libel laws, CompuServe moved for summary judgment on the grounds that it was a distributor, and not a publisher, of the statements.[80] Even though CompuServe had taken down posts and suspended users previously,[81] the court agreed that CompuServe was a distributor and, because CompuServe "neither knew nor had reason to know of the allegedly defamatory . . . statements," granted summary judgment in favor of CompuServe.[82]

The facts in *Stratton Oakmont v. Prodigy*,[83] an unpublished decision from a New York state court in 1995, were very similar to *Cubby*, yet the court reached a very different conclusion. In *Stratton Oakmont*, plaintiffs sued Prodigy, an online operator of bulletin boards and forums, for publishing libelous statements posted by a user on a Prodigy forum.[84] The court distinguished

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as there was an additional sliding scale of liability for distributors of content, based on the amount of curation and editorial control the intermediary exercised. *Id.* at 552.

[78] Cubby v. CompuServe, 776 F. Supp. 135 (S.D.N.Y. 1991).

[79] *Id*. at138.

[80] *Id*.

[81] This content management was contracted out to another party.

[82] *Cubby*, 776 F. Supp. at 141.

[83] Stratton Oakmont v. Prodigy, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1995).

[84] *Id*. at 1–2.

the case from *Cubby* on the grounds that Prodigy exercised more editorial control of user posts than CompuServe exercised at the time of *Cubby*.[85] Since the Prodigy operators engaged in moderation of user content, the court ruled, they were liable for users' content.[86]

After *Stratton Oakmont*, online companies were potentially faced with two undesirable options to limit their liability for their users' content: engage in costly, constant monitoring of user content and take down questionable content; or abandon all editorial control, like a common carrier, and leave all content online, no matter how offensive.

To eliminate this dilemma, Congress intervened in 1996 as part of the creation of the Communications Decency Act (CDA). The CDA was originally developed as an attempt to limit access to pornography and obscene material online, with the emphasis on safeguarding children.[87] Representatives Cox and Wyden proposed the Freedom and Family Empowerment Act in direct response to concerns that the potential evolution of *Stratton Oakmont* would cripple then-nascent internet technology.[88] That new act was incorporated into the CDA as part of the larger 1996 Telecommunications Act during conference and was codified and known as Section 230.[89]

Section 230 was distinct from the anti-indecency regulatory framework underlying the rest of the CDA. First, Section 230 announced a national policy to "encourage the unfettered and unregulated development of free speech on the Internet."[90] Second, Section 230's drafters sought to allow a diverse set of online service providers to develop and enforce their own standards and

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[85] *Id*. However, Prodigy's general counsel flatly denies that they were screening postings: Prodigy merely had software that blocked posts containing one of the "seven dirty words." Marc Jacobson, *Prodigy: It May Be Many Things to Many People, but, It Is Not a Publisher for Purposes of Libel, and Other Opinions*, 11 ST. JOHN'S J. LEGAL COMMENT. 673, 676–77 (1996).
[86] *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, 12–13.
[87] *See* Steven Levy, *No Place for Kids*, NEWSWEEK (Jul. 2, 1995), *available at* http://www.newsweek.com/no-place-kids-184766.
[88] *CDA 230: Legislative History*, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/issues/cda230/legislative-history (last accessed Feb. 14, 2018).
[89] *Id*.
[90] *Id*.

allow consumers to select the appropriate standards for their needs.[91] Therefore, Section 230 granted civil immunity to internet intermediaries for the actions of their user-generated content generators so long as they notified users of parental control options available.[92] Critically, the law expressly established that internet intermediaries should not "be treated as the publisher or speaker of any information provided" by a third party; generally, only content creators are exposed to liability.[93]

B. Broad Coverage of Section 230 Liability Protection

In *Reno v. ACLU*, the Supreme Court struck down nearly all of the CDA but left the Section 230 liability protection untouched.[94] This protection would not go unchallenged, and in the following years courts interpreted the liability protection broadly, allowing a variety of online moderation standards and additional products for consumers to develop.

1. Defamation. The first major challenge to Section 230 liability protection was *Zeran v. America Online* in 1997.[95] A prankster posed as Kenneth Zeran on an America Online (AOL)–affiliated message board and advertised products with tasteless slogans about the Oklahoma City bombing.[96] The imposter posted Zeran's phone number, and Zeran began receiving media attention as well as harassing and threatening phone calls.[97] Zeran contacted AOL to request that the posts be removed.[98] Some posts were removed, but the harassment continued, and Zeran filed

[91] *Id*.
[92] 47 U.S.C. §§ 230(c)(2)-(d) (1996).
[93] *See* 47 U.S.C. § 230(c)(1) (1996). As discussed below, the law also required compliance with relevant federal criminal laws, such as those governing child pornography, sex trafficking, and copyright law. 47 U.S.C. § 230(e).
[94] *See* Reno v. ACLU, 521 U.S. 844 (1997).
[95] 129 F.2d 327 (4th Cir. 1997).
[96] *Id*. at 329.
[97] *Id*.
[98] *Id*.

suit against AOL.[99] Zeran's argument was that while Section 230 immunized AOL from publisher liability, the law did not immunize AOL from distributor liability.[100]

After losing in federal district court,[101] Zeran appealed the decision to the Fourth Circuit.[102] The Fourth Circuit found that AOL properly asserted Section 230 liability protection and that such a protection was to "create[] a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service," in order "to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."[103] Distributor liability, the court held in this influential case, "is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230."[104]

2. Product authentication. The CDA text did not limit Section 230 liability protection to defamation claims, and courts recognized immunity for intermediaries from other types of liability associated with user-generated content. For instance, in *Gentry v. eBay*, a California court found that Section 230 liability protection protected the auction website eBay from liability for failing to authenticate autographed sports and entertainment memorabilia.[105] Because the website did not create the descriptions of the items, select the categories they were placed in, or confirm or deny the authenticity of such items, they could not be held liable for the actions of third-party sellers regarding the authenticity of the memorabilia.[106]

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[99] *Id*.
[100] *Id.* at 331.
[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *Id*. at 332.
[105] Gentry v. eBay, 121 Cal. Rptr. 2d 703 (Cal. Ct. App. 2003).
[106] *Id*.

3. Bad actors on social networks. Early social networking sites also quickly became involved in debates over where the line between intermediary and content creator should be drawn. This question was especially prominent in *Doe v. MySpace*. In the *MySpace* case, the social networking site was accused of not doing enough to protect minors from the sexual predators it knew or should have known were using its services.[107] The 13-year-old minor bringing suit in the case had evaded MySpace age restrictions by claiming that she was 18 when signing up for the social media service and was later sexually assaulted by a 19-year-old she had met via the online platform.[108] The plaintiff did not allege that MySpace was negligent in failing to remove her profile, but rather that it had failed to take sufficient security measures to prevent bad-actor users from taking predatory actions against herself and other minors.[109] The Fifth Circuit, however, refused to impose liability on an intermediary when the minor had violated the intermediary's terms of service and risked her safety by "wrongfully stating her age, communicating with an adult, and publishing her personal information."[110]

C. Establishing the Limits of Section 230

While most of the early cases established that Section 230 is a broad liability protection for internet intermediaries from user misbehavior, other cases as well as subsequent legislation have established limits to its application. Still, the courts have generally recognized that any limitations placed on liability protection need to be narrowly tailored to ensure that the law continues to serve its intended purpose.

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[107] John Ottaviani, *MySpace Suit for Liability for Sexual Assault Dismissed*, TECHNOLOGY & MARKETING LAW BLOG (Feb. 16, 2007), http://blog.ericgoldman.org/archives/2007/02/myspace_suit_fo.htm.
[108] Doe v. MySpace, 528 F.3d 413 (5th Cir. 2008).
[109] *See id.*
[110] *Id*.

1. Copyright. One notable exception to liability protection under Section 230 is copyright violation. In fact, subsection (e)(2) specifically states that the liability protection should not "be construed to limit or expand any law pertaining to copyright."[111] In 1998, Congress passed the Digital Millennium Copyright Act (DMCA) to address concerns that intermediaries were not adequately addressing violations of copyright rights and that Section 230 liability removed the incentives for them to address those violations. The DMCA incorporated the Online Copyright Infringement Liability Limitation Act (OCILLA) to provide a compromise that created liability upon notice—operators must take down offending content once they've received notice—and clarified when intermediaries could be held liable for copyright violations.

Under the OCILLA provisions, intermediaries or storage providers would not be held liable for a user's copyright violations so long as they did not receive a direct financial benefit from the infringement and complied with requests for removal of copyrighted material. This is one of the first carve-outs from Section 230.[112] The statute refrained from requiring constant monitoring for violations, but did require an intermediary or storage provider to remove material that a reasonable person would know was infringing on copyrights without a request.[113]

2. Intermediaries and illegal behavior. Occasionally, courts have found that intermediaries crossed the line from "service provider" to "content provider." Content providers under Section 230 who "develop, in part" the content can be liable for the underlying content.[114]

[111] 47 U.S.C. § 230(e)(2).
[112] *See id.*
[113] *Id.*
[114] 47 U.S.C. § 230(f)(3).

One of the most notable examples of this distinction and its subsequent denial of liability protection is *Fair Housing Council v. Roommates.com*.[115] The case involved a roommate-matching website where users created profiles. The website required users to enter various demographic information including race, gender, and sexual orientation.[116] Users were also able to select, via a drop-down menu, the sex and sexual preference they'd like in potential roommates.[117] The Fair Housing Council alleged that these drop-down menus required users to make statements and roommate preferences in violation of federal housing discrimination laws.[118]

Initially, the district court dismissed the case on the basis that Section 230 liability protection applied to the website's actions because it was an intermediary.[119] The housing authorities appealed to the Ninth Circuit, which reversed the district court and found that Section 230 did not protect a website in this circumstance.[120] The court stated that if an intermediary itself "contributes materially to the alleged illegality of the conduct," then it is not entitled to liability protection under Section 230.[121]

This distinction between merely allowing content to be posted and actively encouraging behavior has been an issue in multiple cases, but most notably in concerns over sex trafficking or complicity in allowing potentially illegal content related to terrorism, violence, or child abuse and pornography. In general, however, courts have found that Section 230 protects intermediaries from liability, even when state law might attach a tort violation, so long as the

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[115] Fair Housing Council v. Roommates.com, 521 F.3d 1157 (9th Cir. 2007).
[116] *Id*. at 1165.
[117] *Id*.
[118] *Id*.
[119] Fair Housing Council of San Fernando Valley v. Roommate.com, 33 Media L. Rep. 1636 (C.D. Cal. 2004).
[120] Fair Housing Council of San Fernando Valley v. Roommate.com, 489 F.3d 921 (9th Cir. 2007).
[121] 521 F.3d at1168. The case was then remanded back to the lower court, which actually found Roommates.com had not engaged in discrimination or other illegal housing activity, and the website won the case on the merits. *See* Fair Housing Council of San Fernando Valley v. Roommate.com, LLC, 2012 WL 310849 (9th Cir. Feb. 2, 2012).

online provider was acting in a conduit capacity.[122] Similarly, Section 230 provides protection for intermediaries who engage in good-faith filtering efforts to remove such content but who may fail in a specific case.[123]

The courts have generally upheld liability protection for advertisements that might include questionable or even illegal activities, such as prostitution, provided that the intermediary's terms did not encourage such activity and that it was not engaged in the drafting or placement of the advertisement beyond the financial transaction.[124] In recent cases, such as those against the website Backpage.com, more questions have been raised about how far the liability protection extends when the intermediary may be assisting in or modifying the wording of ads as part of the approval process.[125]

In general, federal prosecutors have been able to secure convictions for intermediaries who crossed the line and engaged in an illegal activity or transaction, as such scenarios are not covered by Section 230 liability protection. For example, as Cary Glynn details in describing a potential case against Backpage.com under Section 230 as was then currently written, prosecutors asserted that MyRedbook took revenue to feature certain ads, despite knowing that prostitution was likely to be illegal in the jurisdiction or that such ads were being used to facilitate sex with minors, and failed to adequately respond to law enforcement requests.[126] Similarly, a plea deal was struck with the owner of the website RentBoy when it was found that

[122] *See* Barnes v. Yahoo!, 570 F.3d 1096 (9th Cir. 2009).
[123] 47 U.S.C. § 230.
[124] *See* Dart v. Craigslist, 665 F. Supp. 2d 961 (N.D. Ill. 2009).
[125] *See* Doe No. 1 v. Backpage.com, 2018 WL 1542056 (D. Mass. Mar. 29, 2018); Florida Abolitionist v. Backpage.com, 2018 WL 1587477 (M.D. Fla. Mar. 31, 2018).
[126] Government's Sentencing Memorandum, United States v. Omuro, No. 3:14-cr-00336 (N.D. Cal. May 14, 2015), ECF No. 70; Cary Glynn, *The DoJ's Bust of MyRedbook and Rentboy Show How Backpage Might Be Prosecuted*, TECHNOLOGY & MARKETING LAW BLOG (Sep. 28, 2017), https://blog.ericgoldman.org/archives/2017/09/the-dojs-busts-of-myredbook-rentboy-show-how-backpage-might-be-prosecuted-guest-blog-post.htm.

website employees reviewed ads and told advertisers how to rephrase ads to not mention sexual acts or otherwise avoid the attention of law enforcement.[127]

D. Law, Policy, and Changes to Section 230

Over the years, as internet-based companies have moved from small startups to some of the largest companies in the world, the movement to modify or repeal Section 230 has grown. Section 230 liability protection is often characterized as a radical departure from traditional publication law.[128] Section 230 is, according to lawyer Joshua M. Masur, "an exception to the rule of common-law liability for republication."[129] As UNC law professor David S. Ardia put it, Section 230's creation "[u]pended a set of principles enshrined in common law doctrines that had developed over decades, if not centuries, in cases involving offline intermediaries. . . . [I]t halted judicial attempts to adapt the common law to the changing technology."[130] And as another advocate for modifying the current system argued, Section 230 is "special treatment" that makes "harassing, destructive content [] profitable" for internet intermediaries.[131]

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[127] Glynn, *supra* note 126.
[128] *See, e.g.*, Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 137–38 (2008) (characterizing Section 230 as a provision altering "centuries of common-law precedent [in order] to grant the owners of such private online forums unprecedented immunity from liability for defamation and related torts committed by third-party users"); Ardia, *supra* note 7. *See also* Masnick, *supra* note 7 (House Speaker Nancy Pelosi characterizing Section 230 as "a gift" to tech companies).
[129] Joshua M. Masur, *A Most Uncommon Carrier: Online Service Provider Immunity against Defamation Claims in Blumenthal v. Drudge*, 40 JURIMETRICS 217, 218 (2000).
[130] Ardia, *supra* note 7, at 411.
[131] Arthur Chu, *Mr. Obama, Tear Down This Liability Shield*, TECHCRUNCH (Sep. 29, 2015), *available at* https://techcrunch.com/2015/09/29/mr-obama-tear-down-this-liability-shield/. *See also* Ann Bartow, *Section 230 Keeps Platforms for Defamation and Threats Highly Profitable*, THE RECORDER (Nov. 10, 2017), *available at* https://www.law.com/therecorder/sites/therecorder/2017/11/10/section-230-keeps-platforms-for-defamation-and-threats-highly-profitable/?slreturn=20181030153646.

Journalists, legal scholars, and advocates have suggested that Section 230 contributed to the spread of conspiracy theories,[132] protected child predators,[133] has generally been abused by powerful online platforms as an easily manipulated tool to evade local laws,[134] and favored a system that is disproportionately used to censor conservative viewpoints online.[135] A law professor similarly stated that large internet platforms are able to "launder the proceeds of hate speech, and happily cash the checks"[136] because of their protection from liability.

Even Senator Ron Wyden, who drafted Section 230 while in the House, wrote for a popular tech publication in August 2018 that tech companies' "ineptitude" in filtering indecent content is undermining congressional faith in the law.[137] This frustration with Section 230 even seems to have penetrated the courts.[138]

The "reform or repeal Section 230" movement is increasingly gaining traction in both legislative action and policymakers' rhetoric. In 2018, Congress amended Section 230 to increase intermediaries' liability for sex trafficking activity conducted via an online platform in the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA). Many civil-society advocates and lawmakers would like to go further, and similar carve-outs have been suggested

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[132] Chu, *supra* note 131.
[133] *See*, *e.g.*, Elizabeth P. Stedman, *MySpace, but Whose Responsibility - Liability of Social-Networking Websites When Offline Sexual Assault of Minors Follows Online Interaction*, 14 VILL. SPORTS & ENT. L.J. 363 (2007).
[134] Christopher Zara, *The Most Important Law in Tech Has a Problem*, WIRED (Jan. 3, 2017), *available at* https://www.wired.com/2017/01/the-most-important-law-in-tech-has-a-problem/.
[135] James Altschul, *It's Time for Congress to Treat Twitter as a Publisher*, THE FEDERALIST (Nov. 29, 2018), *available at* https://thefederalist.com/2018/11/29/time-congress-treat-twitter-publisher/.
[136] Ann Bartow, *Online Harassment, Profit Seeking, and Section 230*, 95 B.U. L. REV. ANNEX 53 (2015).
[137] Ron Wyden, *The Consequences of Indecency*, TECHCRUNCH (Aug. 28, 2018), *available at* https://techcrunch.com/2018/08/23/the-consequences-of-indecency/.
[138] *See, e.g.*, Eric Goldman, *Ten Worst Section 230 Rulings of 2016 (Plus the Five Best)*, TECH. & MARKETING LAW BLOG (Jan. 4, 2017), https://blog.ericgoldman.org/archives/2017/01/ten-worst-section-230-rulings-of-2016-plus-the-five-best.htm (listing cases that undermine earlier conceptions of Section 230 protection).

for a variety of ills including opioid sales[139] and hate speech.[140] Legal scholar Ann Bartow, for instance, has called for reforming Section 230 by introducing a more conditional liability protection, along the lines of the DMCA's notice-and-takedown system.[141]

As shown above, even before the creation of Section 230, many courts had shifted from the strict liability regime toward conduit liability protections and fault-based requirements.[142] In many circumstances, liability would not have attached even if the distributor had known of the tortious material, because the social and judicial norms favoring practicable moderation practices and free speech had eroded the traditional liability standards.[143] Section 230, in effect, codified the conduit liability protection that was being applied to traditional media distributors and was sometimes applied even after 1996.

As one federal district court noted in 1994, conduit liability "[p]rotection for republication . . . has not been rigorously circumscribed within the wire service context."[144] In its 1999 *Lunney v. Prodigy* decision, the highest court in New York expressly classified an internet bulletin board operator as a common-law conduit.[145] An internet service provider and bulletin board operator, the court held, "like a telephone operator, is merely a conduit."[146] It made no difference to the court, and the "conduit designation" was still applied, even when the bulletin

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[139] Samantha Cole, *Senator Suggests the Internet Needs a FOSTA/SESTA for Drug Trafficking,* MOTHERBOARD (Sep. 5, 2018), https://motherboard.vice.com/en_us/article/8xbwvp/joe-manchin-fosta-sesta-law-for-drug-trafficking-senate-intelligence-committee-hearing. Many conservatives, for instance, would like to remove the intermediary liability because of perceived unfair censoring of conservatives. Sullivan, *supra* note 8.

[140] *See* Wyden, *supra* note 137 ("There are real consequences to social media hosting radically indecent speech, and those consequences are looming.").

[141] Bartow, *Online Harassment, Profit Seeking, and Section 230*, *supra* note 136.

[142] A similar trend can be observed in copyright. *See, e.g.*, *Religious Tech. Ctr.*, 907 F. Supp. 1361. *See also* Goold, supra note 13. *But see Frena*, 839 F. Supp. 1552.

[143] *See also* Julio Sharp-Wasserman, Note, *Section 230(c)(1) of the Communications Decency Act and the Common Law of Defamation: A Convergence Thesis*, 20 COLUM. SCI. & TECH. L. REV. 195, 199 (2018).

[144] Nicholson v. Promoters on Listings, 159 F.R.D. 343, 356 (D. Mass. 1994).

[145] Lunney v. Prodigy, 94 N.Y.2d 242 (N.Y. 1999) (applying *Anderson*, 320 N.E. 2d 647). We are grateful to an anonymous reviewer for bringing this case to our attention.

[146] *Id.* at 249.

board operator "reserves for itself broad editorial discretion to screen its bulletin board messages" and occasionally exercises that discretion.[147] The court explained that even if Prodigy "exercised the power to exclude certain vulgarities from the text of certain [bulletin board] messages, this would not alter its passive character in the millions of other messages in whose transmission it did not participate, nor would this, in our opinion, compel it to guarantee the content of those myriad messages."[148]

Cubby was decided four years before *Stratton Oakmont*. Despite tens of millions of Americans interacting online in 1995,[149] we are aware of no case from 1991 to 1996—save *Stratton Oakmont*—where an online distributor was liable for republishing tortious material from a user. At least some courts already viewed *Cubby* as establishing persuasive precedent that in the area of defamation, an internet intermediary was not strictly liable as a publisher of such statements.[150] In other words, *Cubby*'s distributor liability, and even the more protective conduit liability, would have been extended to online distributors by state courts in the absence of Section 230.[151] *Stratton Oakmont* was the anomaly.[152]

This history suggests that the passage of Section 230 simply accelerated the regime of liability protection for online content distributors that otherwise would have been established by common law, custom, and state legislatures. A 2010 study by David S. Ardia, for example, found that most cases would have arrived at the same conclusion regarding intermediary liability under

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[147] *Id.* at 250.
[148] *Id.* (internal quotation marks omitted).
[149] Kara Swisher, *Internet's Reach in Society Grows, Survey Finds*, WASH. POST (Oct. 31, 1995), at A01 (describing a Nielsen poll finding 37 million internet users in the United States and Canada).
[150] *See*, *e.g.*, *Religious Tech. Ctr.*, 907 F. Supp. 1361.
[151] *See Lunney*, 94 N.Y.2d 242 (the highest court in New York applying conduit liability to an internet bulletin board operator after Section 230 creation).
[152] *See* Matthew C. Siderits, *Defamation in Cyberspace: Reconciling Cubby, Inc. v. Compuserve, Inc. and Stratton v. Prodigy*, 79 MARQUETTE L. REV. 1065 (1996).

common law.[153] As Ardia states in a discussion of his empirical work, "Many of the intermediaries that invoked section 230 likely would not have faced liability under the common law because they lacked knowledge of and editorial control over the third-party content at issue in the cases."[154]

Still, Section 230 had a salutary effect at a critical time. A report by Engine estimated that without Section 230, the costs of litigation might be prohibitive for many startups even if they might win the case.[155] According to the in-house and external attorneys consulted for the report, having to respond to a user-generated content liability claim through a motion to dismiss could cost $15,000 to $80,000, and having to take such a case through discovery could cost a firm $100,000 to more than half a million dollars.[156]

As Ardia points out, the statutory protection provided a "breathing space" and legal certainty after *Stratton Oakmont* when online providers made decisions regarding third-party content.[157] *Stratton Oakmont* derailed the legal trend represented by *Cubby* and the conduit liability cases. A period of uncertainty—and massive "collateral censorship"—would have ensued because online providers do not know in advance where their users are located. Any provider with users in New York would have been potentially subject to liability for users' posts under the *Stratton Oakmont* decision. Section 230 precluded that turn of events.

In short, wholesale changes to Section 230 could create a *Stratton Oakmont* situation, where online providers would be compelled to follow the strictest state trial court decision. In the long term, conduit liability would likely gain judicial acceptance for online providers for the

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[153] Ardia, *supra* note 7.
[154] *Id.*
[155] Engine, *Section 230: Cost Report*, *available at* https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5c8168cae5e5f04b9a30e84e/1551984843007/Engine_Primer_230cost2019.pdf (last accessed Jul. 4, 2019).
[156] *Id*.
[157] Ardia, *supra* note 7.

reasons discussed previously. However, that common-law development would likely take a few years because the traditional view is that the "conduit" designation is limited to common carrier or public utility services,[158] and online services are not common carrier services.[159]

III. The Next Era of Publishing and Curation

Section 230 minimized the costs for online content distributors to engage in content distribution and removed some possible fears about making moderation part of their business model. Section 230 also provides certainty for online content distributors to conduct their business without risk of protracted litigation. While our examination of the legal precedent leads us to believe that the courts would likely establish a similar liability regime in common law, repealing Section 230 would impose costs in the transition period.

If Section 230 is modified to make online intermediaries liable for more types of content, any transition to such additional liability standards should be narrowly tailored and focused on cases where (1) there is general agreement that the content at issue has minimal speech value, (2) it is reasonably possible for intermediaries to enforce the additional standards, and (3) there would be a limited impact on legitimate speech. The massive amount of internet content to be screened, however, means that notice liability to date only seems effective when certain conditions hold and is likely narrow in its application.

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[158] RESTATEMENT (SECOND) OF TORTS § 612, comment g (1977). According to the Restatement,

> A public utility under a duty to transmit messages is privileged to do so, even though it knows the message to be false and defamatory, unless
> (a) the sender of the message is not privileged to send it, and
> (b) the agent who transmits the message knows or has reason to know that the sender is not privileged to publish it.

Id. at § 612 (2).

[159] *See* 47 U.S.C. § 157 (1994).

A. Curation Standards and User-Generated Content Communities under Liability Protection

Section 230 provided breathing room that encouraged the development of a wide range of standards for intermediaries to develop best practices in curation and moderation.[160] In the United States, this statutory regime has allowed norms to develop without the need for regulatory enforcement and has also allowed communities to determine for themselves what is and is not appropriate.[161] Section 230 let a thousand flowers bloom.

Critics of Section 230 are concerned about the high concentration of online speech in a few companies whose rules govern moderation and redistribution of content. They do not necessarily disagree with the fact that the internet in the United States came to have so many different flowers, or that heterogeneity in the garden is good, but they point out that such goodness is cold comfort when the market of ideas is controlled by only a few players. This criticism is often tied to arguments regarding the nature of the online marketplace and the ability of large platforms to silence certain voices.[162] Critics argue that a wide variety of methods of moderation and republication is of little importance when most online traffic is governed by a handful of methods as decided by technology giants such as Facebook, Twitter, Google, and Apple. They turn the debate to the question of how good or bad are the rules of online hegemons. When it comes to the broader question of whether large platforms are or are not monopolies,[163]

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[160] *See* Jason Koebler & Joseph Cox, *The Impossible Job: Inside Facebook's Struggle to Moderate Two Billion People*, MOTHERBOARD (Aug. 23, 2018), *available at* https://motherboard.vice.com/en_us/article/xwk9zd/how-facebook-content-moderation-works.

[161] *See* Tarleton Gillespie, *How Social Networks Set the Limits of What We Can Say Online*, WIRED (Jun. 26, 2018), *available at* https://www.wired.com/story/how-social-networks-set-the-limits-of-what-we-can-say-online/; Charlie Warzel, *"A Honey Pot for Assholes": Inside Twitter's 10-Year Failure to Stop Harassment*, BUZZFEED (Aug. 11, 2016), *available at* https://www.buzzfeed.com/charliewarzel/a-honeypot-for-assholes-inside-twitters-10-year-failure-to-s?utm_term=.gipx7zY0E#.ubRQYWjyA.

[162] *See* David Sherpardson, *Facebook, Google Accused of Anti-conservative Bias at U.S. Senate Hearing*, REUTERS (Apr. 10, 2019), *available at* https://www.reuters.com/article/us-usa-congress-socialmedia/facebook-google-accused-of-anti-conservative-bias-at-u-s-senate-hearing-idUSKCN1RM2SJ.

[163] *See* Geoff Manne & Alec Stapp, *This Too Shall Pass: Unassailable Monopolies That Were, in Hindsight, Eminently Assailable*, TRUTH ON THE MARKET (Apr. 1, 2019), *available at* https://truthonthemarket.com/2019/04/01

we suggest that such decisions should be properly examined through antitrust law and are beyond the scope of this paper. We will simply assert here that Section 230 allowed for the emergence of a wide variety of moderation rules, and in many instances, online communities set their own rules. However marginal the number of those self-governed communities, they would likely not exist without Section 230, nor they would be able to afford existence if this policy were replaced by regulation that mandates expensive algorithms of moderation and republication. Section 230 applies to both large and small platforms, and its applicability to allowing large platforms to set standards does not place a judgment on whether the standards set by those platforms are good or bad.

While the general norm is to limit interference with user content, the terms of what content will be deemed inappropriate vary widely, even among large players.[164]

Other critics of Section 230 allege that by curating or moderating content, intermediaries should lose the protection of Section 230 as the defendant did in the *Stratton Oakmont* case. For example, conservative critics have argued that Section 230 requires a degree of neutrality in implementing these moderation decisions.[165] Yet Section 230 never was about neutrality. As Senator Wyden, one of its original authors, stated in an interview, "Section 230 is not about neutrality. Period. Full stop."[166]

/this-too-shall-pass-unassailable-monopolies-that-were-in-hindsight-eminently-assailable/ (discussing similar claims of monopoly power for giants in the past that turned out to be untrue).

[164] *See* Subramaniam Vincent, *Why Facebook Left Up the "Drunk Pelosi" Video but YouTube Took It Down*, SLATE (Jun. 17, 2019), *available at* https://slate.com/technology/2019/06/facebook-twitter-pinterest-youtube-content-moderation-rules-guide.html.

[165] *See, e.g.*, Cat Zakerewski, *The Technology 202: This Is Ted Cruz's Playbook to Crack Down on Big Tech for Alleged Anti-conservative Bias*, WASH. POST (Apr. 11, 2019), *available at* https://www.washingtonpost.com/news/powerpost/paloma/the-technology-202/2019/04/11/the-technology-202-this-is-ted-cruz-s-playbook-to-crack-down-on-big-tech-for-alleged-anti-conservative-bias/5cae7278a7a0a475985bd3d3/?utm_term=.ec797e19ad22.

[166] Emily Stewart, *Ron Wyden Wrote the Law That Built the Internet. He Still Stands by It—And Everything It's Brought with It*, RECODE (May 16, 2019), *available at* https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulations-neutrality.

Instead of neutrality, the courts have distinguished between moderation decisions and those cases where more controls are exercised via editing or encouragement of certain behavior. This includes cases where the websites were encouraging behavior that could violate existing laws. For example, in *Roommates.com*, when the website created content in apparent violation of the Fair Housing Act's antidiscrimination policy, the Ninth Circuit found that the site was not entitled to Section 230 protection.[167] Similarly, before the enactment of FOSTA and its sex trafficking–related carve-outs from Section 230 protection, law enforcement indicted top officials from Backpage.com for conspiracy, facilitating prostitution, and money laundering after their involvement in and failure to take appropriate steps to prevent the use of their website's ads for such crimes.[168] This distinction between mere moderation and more active engagement has allowed courts and law enforcement to go after bad actors while enabling a wide variety of content moderation decisions.

In fact, Section 230 actually encourages intermediaries to develop and enforce their own standards through a Good Samaritan safe harbor and, as such, has become essential for the growth of the wide variety of services relying on user-generated content.[169] This intrinsic element is core to a wide variety of platforms beyond social media and has been illustrated in the variety of platforms that have been the subject of cases involving Section 230, including review sites, internet and mobile service providers, and search engines.[170] Far from discouraging intermediaries from engaging in moderation, Section 230 has provided a way for each individual

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[167] Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1174–76 (9th Cir. 2008).
[168] Tom Jackman & Mark Berman, *Top Officials at Backpage.com Indicted After Classifieds Site Taken Offline*, WASH. POST (Apr. 9, 2018), *available at* https://www.washingtonpost.com/local/public-safety/top-officials-at-backpagecom-indicted-after-classifieds-site-taken-offline/2018/04/09/0b646f36-39db-11e8-9c0a-85d477d9a226_story.html?utm_term=.227623710afd.
[169] 47 U.S.C. § 230(c).
[170] *See*, *e.g.*, Nemet Chevrolet v. Consumeraffairs.com, 591 F.3d 250 (4th Cir. 2009) (involving a review site); Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003) (involving a mobile and ISP provider); Parker v. Google, 422 F. Supp. 2d 492 (E.D. Pa. 2006) (involving a search engine).

intermediary to select curation norms without fear that an occasional mistake might open the floodgates to far broader liability.[171]

Allowing intermediaries to develop their own standards for user-generated content has also allowed specialized communities to restrict or allow content. Communities have developed a variety of norms depending on their users' acceptance of various content, and these can vary even within platforms as norms emerge from interaction both within and between communities on the platforms.[172] For example, as a study of Reddit communities noted, while there were universal norms applied to moderation across the entire online community, more specific norms applied to and were developed by individual subreddits and also at times shared across related groups of subreddits.[173]

This diversity of options is the type of environment for consumers that Section 230 intended to develop.[174] Without a need for regulatory intervention, most platforms favor the exclusion of obscene and graphic material to expand or maintain a user base and community, as well as to make it easier to engage with potential advertisers or other financial supporters for the platform.[175] Yet individual platforms and even individual communities within those platforms may still arrive at different decisions on contentious content such as what might be considered harassment, hate speech, or what is deserving of a warning.[176] Additionally, particularly for parental controls, a wide range of options from highly restrictive to mere monitoring has

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[171] *See How Social Media Platforms Dispense Justice*, THE ECONOMIST (Sep. 6, 2018), *available at* https://www.economist.com/business/2018/09/06/how-social-media-platforms-dispense-justice.
[172] *See* Eshwar Chandrasekharan et al., *The Internet's Hidden Rules: An Empirical Study of Reddit Norm Violations at Micro, Meso, and Marcro Scales*, PROCEEDINGS OF THE ACM ON HUMAN-COMPUTER INTERACTION, VOL. 2 (Nov. 2018).
[173] *Id*.
[174] *See CDA 230: Legislative History*, *supra* note 88.
[175] *See* Tarleton Gillespie, *Governance of and by Platforms*, *in* SAGE HANDBOOK OF SOCIAL MEDIA 13 (Jean Burgess et al. eds., 2017).
[176] *See* Chandrasekharan et al., *supra* note 172.

developed separately from intermediaries and technological hegemons to provide a variety of choices in the market for content blocking.[177]

The organic development of terms of service and norms within online communities, rather than top-down regulation, has enabled the formation of a wide variety of online communities. Often the formation of these communities and the interactions of users are affected by content moderation decisions.[178] In general, many active communities create a global marketplace for both goods and ideas that would be unimaginable without an open internet. Even in the early internet age, before the rise of social media, online communities arose that were organized by shared interests such as professional groups, hobbies, and sports teams, and that maintained or expanded existing local communities.[179] These self-organizing groups and communities may become increasingly insular as people tend to interact with like-minded individuals or see only information and advertisements reinforcing the community's parochialism.[180] Yet, in general, the internet has been a powerful force around the world in providing a platform with low barriers to entry that can empower marginalized individuals to become involved in commerce or speech in ways they traditionally could not. For example, microwork platforms can improve the ability of individuals who were previously excluded from

[177] *See* Jennifer Huddleston, *Technology Is Not Your Parent: But Innovation Can Be a Parent's Best Friend*, PLAIN TEXT (Jan. 16, 2018), *available at* https://readplaintext.com/technology-is-not-your-parent-4fc6d2df99ff.
[178] *See* Yuqing Ren & Robert E. Kraut, *A Simulation for Designing Online Community: Member Motivation, Contribution, and Discussion Moderation* 12–15 (Working Paper, 2011), *available at* https://pdfs.semanticscholar.org/b15b/603c3f4460439a7f6f868adf868bad4929fb.pdf.
[179] Jenny Preece et al., *History and Emergence of Online Communities*, *in* ENCYCLOPEDIA OF COMMUNITY (B. Wellman ed., 2003).
[180] *See* Dimitar Nikolov et al., *Measuring Online Social Bubbles*, PEERJ COMPUTER SCIENCE (Dec. 2015), *available at* https://peerj.com/articles/cs-38/.

the workforce.[181] Similarly, online platforms have amplified voices in a variety of social movements that might otherwise have gone unheard.[182]

In summary, Section 230 provides a blanket liability shield for big and small firms. Change that cuts down the liability protection will thus impose compliance costs on all firms. Such change should be explicit about those social costs and also explicit about the advantage it will grant larger firms that have the resources to become compliant. In other words, going from a blanket to a tailored shield, however well intended, must account for the chilling effect it will have on innovation by startups and small firms, and for the artificial barrier to entry in the market that will grant additional protection to incumbent firms.

B. Notice Liability for Online Distributors

Section 230 anticipated the Supreme Court's liability maxim in *Bartnicki v. Vopper*, a 2001 decision about (offline) intermediary liability: "The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."[183]

Legislative changes to intermediary liability should keep that maxim in mind, and any modifications to Section 230 must take into account the huge amount of content that social media and online distributors transmit. In a single internet minute, more than 87,500 tweets and 2.1 million snaps are sent, and over 3.8 million searches are conducted.[184] As the *Zeran* court noted,[185]

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[181] *See Empowering Women Through the Internet*, INTERNATIONAL DEVELOPMENT RESEARCH CENTRE (accessed Jul. 3, 2019), https://www.itu.int/en/Lists/consultationOct2017/Attachments/56/Empowering%20women%20through%20the%20Internet_Jan2018.pdf.
[182] *See* David Meek, *YouTube and Social Movements: A Phenomenological Analysis of Participation, Events, and Cyberspace*, ANTIPODE (Sep. 21, 2011) (discussing one example of the use and impact of social media on social movements via analysis of Invisible Children).
[183] Bartnicki v. Vopper, 532 U.S. 514, 529 (2001).
[184] Jeff Desjardis, *What Happens in an Internet Minute in 2019?*, VISUAL CAPITALIST (Mar. 13, 2019), *available at* https://www.visualcapitalist.com/what-happens-in-an-internet-minute-in-2019/.
[185] *Zeran*, 129 F.3d at 333.

"[L]iability upon notice has a chilling effect on the freedom of Internet speech. . . . Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification."

Given the scale and increasing number of products that rely on user-generated content, such as review sites and messaging services, even with improving artificial intelligence options and increasing numbers of moderators, content moderation at scale remains an incredible challenge for platforms.[186]

1. When notice liability succeeds. Section 230 reform proposals would create more categories for which intermediaries are subject to notice liability. Exposing intermediaries to additional notice liability, however, undermines the purposes of Section 230. As the *Zeran* court recognized, "[L]iability upon notice reinforces service providers' incentives to restrict speech."[187]

However, there are some circumstances where notice liability, or automated or semi-automated rejection of antisocial content, could be effective: (1) there is a social consensus that the content has minimal speech value, and (2) the content is easily identified as impermissible by basic software or nonexpert curators.

As the Court pointed out in *Bartnicki*, possible suppression of "third party" speech can be sustained when "the speech at issue is considered of minimal value."[188] This idea is implied in Section 230 since it does not provide protection from content that is obscene or otherwise

[186] *See, e.g.*, Nemet Cheverolet v. Consumeraffairs.com, 591 F.3d 250 (4th Cir. 2009) (involving a review site); Doe v. GTE Corp., 347 F.3d 655 (2003) (involving an internet service provider); Parker v. Google, 422 F.Supp. 2d 492 (E.D. Penn. 2006) (involving a search engine),
[187] *Zeran*, 129 F.2d at 333.
[188] *Bartnicki*, 532 U.S. at 530 n.13 (citing Osborne v. Ohio, 495 U.S. 103 (1990); New York v. Ferber, 458 U.S. 747, 762 (1982)).

violates criminal law.[189] In some cases, notice liability for this antisocial content has been effected by statute[190] and supplemented through an industry-wide best practice or unified stance.

Perhaps the best illustration of censoring minimally valuable speech has been the identification and removal of child pornography and similar child abuse content. Child abuse content is clearly antisocial. As the Supreme Court noted in *New York v. Ferber*, the value of "performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."[191] As a result, intermediaries have been generally willing to cooperate with federal investigations of such material.[192] This willingness stems not only from the establishment of potential criminal liability, but also from general agreement about what material is a violation and why the violation is harmful.[193]

Not only has notice liability assisted in the removal of such detrimental material, it has also created a market for new screening technology for the identification and removal of such material.[194] The general acknowledgment of the harm has also encouraged intermediaries to share technologies and research with one another.[195] Notice liability is successful when there is a clearly stated harm, an easily established violation in user content, and a reasonable screening mechanism. Unfortunately, such generally-agreed-upon norms of harm are few.

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[189] 47 U.S.C. § 230(e)(1).
[190] *See, e.g.*, 47 U.S.C. § 230(e).
[191] *Ferber*, 458 U.S. at 762.
[192] *See Weakening Section 230 Won't Prevent Sex Trafficking*, TECHFREEDOM (Aug. 3, 2017), *available at* http://techfreedom.org/weakening-section-230-wont-prevent-sex-trafficking/.
[193] *See* Jemima Kiss, *How Microsoft, Google, and ISPs Aim to Halt Child Abuse Images*, THE GUARDIAN (Nov. 18, 2013), *available at* https://www.theguardian.com/technology/2013/nov/18/microsoft-google-summit-halt-child-abuse-images.
[194] *See id.*
[195] *See id.*

In summary, proposals to amend Section 230 with notice liability should be limited to a narrow set of content that is widely recognized to be offensive and harmful, as is the case of child pornography.

2. When notice liability is less successful. As for other suggested content takedowns such as hate speech or cyberbullying, the consensus is less clear, and such law enforcement takedown requirements could limit legitimate and protected speech. Even defamation and other intentional torts are not always easily spotted or agreed upon, even by courts considering the issues.[196] This lack of consensus on other issues supports a diverse market for content moderation.

While notice liability has succeeded in reducing images of child pornography and abuse, it has had more mixed results in copyright and other intellectual property violations. Notably, the DMCA has resulted in numerous false positives (i.e., falsely characterizing some content as violating copyrights) and easy-to-navigate loopholes that prevent identifying all possible infringing material.[197] There are several reasons why the DMCA has been less successful in changing the behavior of either users or intermediaries than the liability for child pornography.

First, it is often not as clear what a copyright violation looks like. As a result, basic software and nonexpert moderators have a hard time identifying and screening such violations with a high degree of reliability. For example, fan videos and fanfiction that involve characters and images from copyrighted material are typically not considered violations, but the same clips or quotes in other contexts may be.[198] As users and commentators have observed, parodies and

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[196] *See Farmers Educ. & Coop. Union of Am.*, 360 U.S. at 530–31 ("Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question").
[197] *See* Brad Stone, *The Inexact Science Behind DMCA Takedown Notices*, BITS (Jun. 5, 2008), *available at* https://bits.blogs.nytimes.com/2008/06/05/the-inexact-science-behind-dmca-takedown-notices/.
[198] *See, e.g.*, Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PENN. L. REV. 1869 (2009).

creative uses may also change what is and isn't a violation but require greater consideration of context to determine whether or not such uses constitute a violation.[199]

Second, notice liability results in an "act first, question second" mentality for the intermediary, causing the potential for abuse and false positives when no harm has actually occurred. For example, YouTube has removed a singer's own concert video based on DMCA complaints and removed a video of a *Star Wars* clip without John Williams's score for violating the score's copyright by not having it there.[200] While these examples may seem extreme, a significant number of DMCA takedown requests are deficient.[201]

Third, the notice-and-takedown requirements related to the DMCA make it more difficult for new entrants because the statute requires repeated investigation.[202] A small company with limited resources engaged in user-generated content must dedicate at least some of its staff to responding to such requests, even if they turn out to be false, or risk crippling liability by not removing the allegedly infringing material. As a result, the DCMA's notice-and-takedown requirements can deter investment in innovative resources that could better solve the problem for fear that the intermediary might not properly respond to every request.[203]

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[199] *See* Jeremy Paton, *3D Printing Pokémon Fan Project Attracts Nintendo's Darker Side*, MEDIUM (Aug. 19, 2014), *available at* https://medium.com/@JiPaton/3d-printing-pokemon-fan-project-attracts-nintendos-darker-side-7caf2614ca8b.

[200] Tim Cushing, *Warner/Chappell Issues Copyright Claim over YouTube Video Deliberately Containing None of Its Music*, TECHDIRT (Aug. 10, 2017), *available at* https://www.techdirt.com/articles/20170810/10140137975/warner-chappell-issues-copyright-claim-over-youtube-video-deliberately-containing-none-music.shtml; Mike Masnick, *YouTube Takes Down Ariana Grande's Manchester Benefit Concert on Copyright Grounds*, TECHDIRT (Jun. 7, 2017), *available at* https://www.techdirt.com/articles/20170606/17500637534/youtube-takes-down-ariana-grandes-manchester-benefit-concert-copyright-grounds.shtml.

[201] *See* Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice* 93 (Univ. Cal. Berkeley Pub. Law Research Paper No. 2755628, 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628 (finding that for 13.3 percent of takedown requests in a sample, the underlying infringing content cannot be located, and for another 6 percent, the allegedly infringed work cannot be identified); Jeffrey Cobia, Note, *The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process*, 10 MINN. J.L. SCI. & TECH. 387, 391 (2009).

[202] *See* Cobia, *supra* note 201.

[203] *See Catalog of Missing Devices Illustrates Gadgets That Could and Should Exist*, ELECTRONIC FRONTIER FOUNDATION (Feb. 1, 2018), https://www.eff.org/press/releases/catalog-missing-devices-illustrates-gadgets-could-and-should-exist.

Finally, notice liability ignores the potential benefits of modification and reproduction of copyrighted material, such as parody and fair use. Overbroad DMCA takedown requests limit the set of ideas that can be spread without necessarily improving veracity or quality by creating strict limitations for the sharing of copyrighted material.[204] The experience of the DMCA illustrates that such increased liability has costs in both the requirements for enforcement as well as the social and litigation costs associated with false positives.[205]

We underscore the importance of limiting notice liability to a clearly defined set of material that is egregiously offensive. At the same time, we highlight the inevitable difficulties and social costs—in terms of false positives—of expanding that set to content that by its nature resists clear, technical characterization. The significant size of false takedown notices generated under the DMCA should serve as a cautionary tale when considering expanding notice liability to other areas.

3. Potential applications based on this framework. With the above framework in mind, we consider "revenge porn" as one potential policy area where notice liability might be more effective and practicable than the DMCA's imperfect notice-and-takedown provisions, and where there is sufficient agreement about the harm or potential for harm.

According to the Cyber Civil Rights Initiative, 46 states and the District of Columbia have laws concerning revenge porn, the nonconsensual distribution of sexually explicit images of an individual.[206] Some platforms, including Google and Microsoft search engines, Reddit, and Twitter, have already enacted policies that they will remove such content on request or that

[204] *See* Joseph P. Liu, *The DMCA and the Regulation of Scientific Research*, 18 BERKLEY TECH. L.J. 501 (2013).
[205] Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319 (2013).
[206] *46 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER CIVIL RIGHTS INITIATIVE, https://www.cybercivilrights.org/revenge-porn-laws/ (last accessed Jul. 3, 2019).

posting such content violates the site's terms of service.[207] These policies illustrate an emerging custom that such content does not hold speech value that outweighs its potential harm.

Laws criminalizing revenge porn could face First Amendment speech challenges, if such laws are overbroad and thus criminalize legitimate speech.[208] As a result, imposing notice liability might represent a compromise between reducing harmful and harassing content and protecting legitimate First Amendment speech. Requiring removal only upon notice would allow harmed individuals to request a takedown of the information in a nonconsensual situation similar to a copyright violation. As in the case of copyright violations under the DMCA, such requests could be subject to a review process or have a method of appeal. But in this case, false positives seem less problematic because the value of the speech restricted is generally considered low, yet the risk of and often intent for harm from nonconsensual distribution is patent.

If notice liability were applied to this content, safe harbor provisions should be created to limit liability when it is not reasonable that a platform could keep pace with a novel violation or the quantity of content. Additionally, encouraging the development of tools to identify and deal with such content, similar to existing tools to identify and remove child pornography, should accompany such a policy to make dealing with such increased liability feasible for a wide variety of intermediaries regardless of size.

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[207] Jacqueline Beauchere, *"Revenge Porn": Putting Victims Back in Control*, MICROSOFT ON THE ISSUES (Jul. 22, 2015), https://blogs.microsoft.com/on-the-issues/2015/07/22/revenge-porn-putting-victims-back-in-control/; Jennifer Golbeck, *Google to Remove Revenge Porn from Search Results*, SLATE (Jun. 19, 2015), *available at* https://slate.com/technology/2015/06/google-announces-plan-to-remove-revenge-porn-from-search-results.html; Amanda Hess, *Reddit Has Banned Revenge Porn. Sort Of*, SLATE (Feb. 25, 2015), *available at* https://slate.com/news-and-politics/2015/02/reddit-bans-revenge-porn-victims-advocates-and-the-aclu-react-to-the-new-rule-against-nonconsensual-porn.html; Lily Hay Newman, *Twitter Moves to Prohibit Revenge Porn*, SLATE (Mar. 12, 2015), *available at* https://slate.com/technology/2015/03/twitter-updates-its-privacy-policy-against-revenge-porn-and-rep-katherine-clark-discusses-online-harassment.html.

[208] *See, e.g.*, *Ex parte* Jordan Bartlett Jones, 12-17-00346-CR (Tex. Crim. App. Apr. 8, 2018) (finding that Texas's revenge porn law was overly broad and violated the First Amendment). *See* Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 661–72 (2016).

To reiterate: there appear to be few circumstances where notice-based liability works well. Even a notice liability regime can invite opportunistic use of notice.[209] It's foreseeable that politically controversial speech and business product reviews would be the most likely targets in most notice liability regimes.[210] Exceptions to the broad protections of Section 230 and conduit liability should be designed with the expectation that takedown notices will be abused. Lawmakers must carefully weigh the harm to individuals, the efficacy of a notice liability regime for the type of content at issue, the risk and extent of collateral censorship, and the culpability of the online intermediary.

Conclusion

The Section 230 reform movement is growing, and many of the reform arguments complain that online intermediaries receive a special dispensation regarding publisher liability. The truth is more complicated. Starting in 1931 and for six subsequent decades, courts gradually chipped away the regime of strict liability for publishers and content distributors owing to the practical difficulties of screening all tortious content and to the potential for restricting First Amendment rights. Those courts found that mass media distributors warranted extensive liability protections, including an important protection for conduit liability. The anomalous 1995 *Stratton Oakmont* decision risked reversing that legal precedent. Yet Congress solved the dissonance by enacting a law that affirmed the precedent and its rationales—the impracticality of holding online content distributors liable and the potential violations of freedom of speech that would ensue from strict liability. Section 230 established a regime of liability protection for online content distributors

[209] *See* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 86, n.238 (2006).
[210] *See* Note, *Section 230 as First Amendment Rule*, *supra* note 6.

just when it was needed—at the time internet firms had started to reach audiences of tens of millions—and still provides liability protection for large and small distributors alike. For all the foregoing reasons, we have argued that Section 230 is good policy. Nevertheless, we also argue that it could be amended to narrowly suspend the protections for egregiously offensive or patently harmful material, which would be taken down upon the online distributor's receiving a notice of liability. Any such amendments to Section 230 should be enacted thoughtfully in ways that codify the free-speech and pragmatic concerns that courts have recognized in decades of publisher and conduit liability cases.