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The Overexpansion of the Communications Decency Act Safe Harbor

Joey Ou

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The Overexpansion of the Communications Decency Act Safe Harbor

by JOEY OU*

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I. Introduction

On January 18, 2012, an estimated 75,000 websites coordinated a protest against two United States bills, the Stop Online Piracy Act (“SOPA”) and the Protect IP Act (“PIPA”), introduced to crack down on Internet copyright and intellectual property violations.¹ Proponents of the bills assert that the Digital Millennium Copyright Act (DMCA), the current Internet copyright protection law, lacks the

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1. Chenda Ngak, *SOPA and PIPA Internet Blackout Aftermath, Staggering Numbers*, CBS NEWS (Jan. 19, 2012), http://www.cbsnews.com/8301-501465_162-57361906-501465/sopa-and-pipa-Internet-blackout-aftermath-staggering-numbers/.

necessary enforcement tools to protect copyrights.² On the other hand, opponents claim that the proposed legislation threatens free speech and innovation, while bypassing the designed DMCA safe harbor.³ In the face of such staunch opposition, Congress postponed voting on the proposed bills.⁴

However, the proposed bills and the public backlash have neglected another safe harbor afforded to Internet Service Providers (“ISPs”) and websites. Section 230 of the Communications Decency Act of 1996 (“CDA”) provides a safe harbor for websites and ISPs for any content that they do not create or develop.⁵ Therefore, the CDA shelters ISPs from defamation, tort, and civil rights laws that apply to traditional print, radio, or television.⁶

Congress enacted the CDA as part of the Telecommunications Act of 1996, due to concerns over pornography on the Internet.⁷ Section 230 was added to support and encourage the proliferation of information on the Internet.⁸ However, this section of the CDA has since developed into one of the most influential cyberspace laws protecting websites and ISPs from liability.⁹ State and federal courts have interpreted section 230 protection expansively, conferring broad immunity upon websites,¹⁰ including immunity for violations of the Fair Housing Act (“FHA”).¹¹ This is especially significant because “the Internet has become ‘a unique and wholly new medium of worldwide human communication’” in the two decades since the CDA’s enactment.¹²

2. Stephanie Condon, *SOPA, PIPA: What you need to know*, CBS NEWS (Jan. 18, 2012), http://www.cbsnews.com/8301-503544_162-57360665-503544/sopa-pipa-what-you-need-to-know/2.

3. *Id.*

4. *Id.*

5. 47 U.S.C. § 230(c)(1) (2012) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

6. James D. Shanahan, *Rethinking the Communications Decency Act: Eliminating Statutory Protections of Discriminatory Housing Advertisements on the Internet*, 60 FED. COMM. L.J. 135, 139 (2007).

7. See 141 CONG. REC. 3203 (1995) (statement of Sen. Exon).

8. 47 U.S.C. § 230(a)(4) (2012)

9. David Lukmire, *Can the Courts Tame the Communications Decency Act?: The Reverberations of Zeran v. America Online*, 66 N.Y.U. ANN. SURV. AM. L. 371, 373 (2010).

10. *Id.*

11. See Chi. Lawyers’ Comm. for Civil Rights Under the Law, Inc., v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. 2006).

12. Pavlovich v. Super. Ct., 127 Cal. Rptr. 2d 329, 332 (2002).

This note contends that Congress needs to implement equivalent sanctions for websites and traditional media, and is organized as follows: Part II of this note will explain common law defamation and the section 230's departure from it. Part III will explore the history of the CDA and how it has evolved into an all-encompassing liability shield for online entities. Part IV will describe the current problems created by the court's application of the CDA and the unfair advantage websites have over traditional print media. Part V will analyze previous proposed solutions, and Section six recommends a new approach to this problem.

II. Defamation Law

“Common law defamation typically requires a showing of a defamatory statement concerning the plaintiff, publication to a third-party, and damages,” as well as some showing of fault on behalf of the publisher.¹³ There are three categories of liability: (1) primary publisher and original author, (2) distributor liability, and 3) mere conduits.¹⁴ There are different levels of scrutiny for each level.¹⁵ Publishers are in the same category as original authors because publishers amplify the damages created by the author through lack of supervision and oversight.¹⁶ Distributors are somewhere in between the first two categories and require a heightened showing of fault to impose liability.¹⁷ Mere conduits are at the other end of the spectrum because they have little to no culpability in facilitating defamation.¹⁸

Therefore, it was significant that prior to the CDA, the court in *Stratton-Oakmont v. Prodigy* held that ISPs were publishers under common law defamation.¹⁹ In *Stratton-Oakmont*, a Prodigy Services, an Internet company that operated an online bulletin board, faced a defamation suit.²⁰ The court held that Prodigy implemented “control

13. Virginia A. Fitt, *Crowdsourcing the News: News Organization Liability For iReporters*, 37 WM. MITCHELL L. REV. 1839, 1849 (2011).

14. *Id.* at 1849–50.

15. Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TEC. 569, 588–90 (2001) (citing the Restatement (Second) of Torts (1997)).

16. *Id.*

17. *Id.*

18. *Id.* at 589 (holding that conduits maintain “too tenuous a connection to the harmful conduct to be held liable,” because they have no have “no opportunity to prevent the publication through their normal business practices”).

19. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *6-7, *10 (1995) (inferring that ISPs can be held to the same liability as the writers).

20. *Id.* at *2.

through its automatic software screening program.”²¹ It was “Prodigy’s affirmative action to police or attempt to control content published on its [website] that gave rise to this tort liability.”²² Therefore, according to one commentator, “[u]nder *Stratton*, any attempts to monitor the hundreds of thousands of postings could potentially lead to liability for claims in which being defined as a ‘publisher’ is an essential element.”²³ Fearing that ISPs and websites would stop monitoring third party posts to avoid liability for defamation claims, Congress enacted the CDA.²⁴

III. History of the Communications Decency Act

The congressional intent for the CDA was to “remove the disincentive to police content and to encourage the dissemination of words and ideas on the Internet.”²⁵ Congress feared that the holding from *Stratton* would discourage “the development and utilization of blocking and filtering technologies” to restrict children’s access to inappropriate online material.²⁶ Congress also meant to “avoid the chilling effect upon Internet free speech that would be occasioned by the imposition of . . . liability upon companies that do not create potentially harmful messages but are simply intermediaries for their delivery.”²⁷ Therefore, Congress enacted section 223 of the CDA to criminalize the transmission of obscene, indecent, or offensive material to minors,²⁸ and section 230 to provide immunity to ISPs for their attempts to restrict access.²⁹ Congress especially noted that ISPs cannot be “treated as the publisher or speaker.”³⁰ However, the court in *ACLU v. Reno* struck down section 223, holding that it was not

21. *Id.* at *10 (“By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and bad taste . . . Prodigy is clearly making decisions as to content.”).

22. *See* Shanahan, *supra* note 6, at 137–38.

23. *Id.* at 138.

24. Section 230 was specifically drafted to overrule *Stratton-Oakmont v. Prodigy*, which treated ISPs as publishers, and to protect freedom of speech “in the new and burgeoning Internet medium.” *Zeran v. AOL*, 129 F.3d 327, 330 (4th Cir. 1997).

25. *See* Shanahan, *supra* note 6, at 138.

26. 47 U.S.C. § 230(b)(4) (2012).

27. *Delfino v. Agilent Techs., Inc.*, 145 Cal.App. 4th 790, 802–03 (Cal. Ct. App. 2006).

28. 47 U.S.C. § 223 (2012).

29. 47 U.S.C. § 230(c)(1) (2012).

30. *Id.*

narrowly tailored enough.³¹ Even though section 230 was meant as a counterpart to section 223, it was left intact by the court.³²

Section 230 provides ISPs with immunity for their attempts to restrict access to indecent material³³ and provides that ISPs cannot be treated as the publisher or speaker of any distributed material.³⁴

Namely, there are three elements that are required for immunity under the CDA: the defendant must be a provider or user of an interactive computer service, the asserted claims must treat the defendant as a publisher or speaker of the information and the information must be provided by another information content provider.³⁵

Therefore, a website is not liable for any content posted by an independent third party.

IV. Broad Expansion of the CDA and Lack of Liability for Tort Claims

By granting websites broad immunity, courts have deviated from Congress's objective of encouraging websites to self-regulate.³⁶ Courts have relied upon the "anti-regulatory, pro-market findings" of the statute to develop an expansive interpretation of section 230.³⁷ This has relieved ISPs and websites of any incentive to self monitor because "websites and ISPs know that . . . complaints from aggrieved parties will be to no avail, even after notice."³⁸ Therefore, "courts have given these provisions outsized significance, distorting rather than furthering section 230's original purpose."³⁹

A year after the CDA went into effect, the Fourth Circuit set the precedent for the expansive reading of section 230 in *Zeran v.*

31. *ACLU v. Reno*, 929 F. Supp. 824, 879 (E.D. Pa. 1996).

32. 47 U.S.C. § 230 (2012).

33. Section 230(c)(1) states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker provided by another information content provider." *Id.*

34. *Id.*

35. *See Shanahan, supra* note 6, at 139 (citing 47 U.S.C. § 230(f)).

36. *See Lukmire, supra* note 9, at 381.

37. *Doe v. Myspace, Inc.*, 474 F. Supp. 2d 843, 847 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413 (5th Cir. 2008).

38. *See Lukmire, supra* note, at 403.

39. *Id.* at 383.

America Online.⁴⁰ The court held that “[n]o provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider,”⁴¹ and that section 230(c)(2) conferred immunity on websites and ISPs for non-defamation-based claims.⁴² In David Lukmire’s incisive critique of *Zeran*, he argues that the court’s holding that the statute granted immunity to websites and ISPs for other tort claims has “virtually no support in the text or history of the statute.”⁴³

In *Zeran*, the plaintiff received a large number of threatening and angry calls due to a third party post on an America Online (“AOL”) bulletin board.⁴⁴ *Zeran* contacted AOL, but AOL refused to retract the posting, and further postings were placed on the board.⁴⁵ *Zeran* sued for negligence based on the theory of distributor liability, claiming that once notified, AOL had a duty to remove the defamatory postings promptly and to screen defamatory material in the future, just as a bookstore would be obligated to act as a distributor of defamatory content.⁴⁶ On appeal, *Zeran* claimed that “distributor” liability is different from the “publisher” liability, and therefore is not covered by the section 230 safe harbor.⁴⁷ However, the Fourth Circuit upheld the dismissal of the case on the basis that the section 230 immunity includes all state law defamation claims, even for distributors.⁴⁸

In *Patentwizard, Inc. v. Kinko’s, Inc.*, the District Court of South Dakota followed the *Zeran* precedent and held that, even though Kinko’s would be responsible for the allegedly defamatory content published by its users under distributor liability, section 230 grants them immunity.⁴⁹ Therefore, *Patentwizard* cemented the idea that distributor liability is a derivative of publisher liability.⁵⁰

40. *Zeran v. AOL*, 129 F.3d 327 (4th Cir. 1997); *Zeran* has been “cited over 1,400 times, virtually every subsequent opinion regarding section 230 references.” *Id.* at 384.

41. *Zeran*, 129 F.3d at 328–32.

42. *Id.* at 330.

43. *See*, Lukmire, *supra* note 9, at 385.

44. *Id.* at 329.

45. *Id.*

46. *Id.* at 330.

47. *Id.* at 331.

48. *Id.* at 334.

49. *Patentwizard, Inc. v. Kinko’s, Inc.*, 163 F. Supp. 2d 1069, 1072 (D.S.D. 2001).

50. *Id.*

Courts have also relied on the *Zeran* holding to immunize ISPs and websites on a broad range of other claims.⁵¹ The District Court for the Eastern District of Pennsylvania held in *Parker v. Google, Inc.*, that section 230 barred the claim that Google facilitated the invasion of plaintiff's privacy by generating an unauthorized biography when a user enters his name in a search query.⁵² Since *Parker*, the court has extended section 230 immunity to breach of contract claims,⁵³ held that ordinary negligence was unrecoverable,⁵⁴ and extended immunity all the way to the distribution of child pornography.⁵⁵ These holdings distort the original intent of the CDA to eliminate indecent materials from the Internet.

V. No Liability for Civil Rights Violations

The courts' reliance upon the anti-regulatory, pro-market⁵⁶ comments of section 230 has even led to immunity for ISPs and websites against federal civil rights claims.⁵⁷ Courts have granted immunity to ISPs and websites under section 230 against both Title II of the Civil Rights Act of 1964⁵⁸ and the FHA.⁵⁹

In *Noah v. AOL Time Warner Inc.*, Noah, a Muslim, claimed that AOL "wrongfully refused to prevent participants in an online chat room from posting or submitting harassing comments that blasphemed and defamed plaintiff's Islamic religion" in violation of

51. See *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003) (holding that computer matchmaking services are immune from claims arising out of false content in a dating profile provided by someone posing as another person; *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003) (asserting that a service provider does not need to take reasonable care to prevent injury to third parties); *Schneider v. Amazon.com*, 31 P.3d 37 (Wash. App. 2001) (broadening section 230 to include negligent misrepresentation and tortious interference).

52. *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500 (E.D. Pa. 2006).

53. *Jane Doe One v. Oliver*, 755 A.2d 1000, 1002 (Conn. Sup. Ct. 2000).

54. *Optinrealbig.com, LLC v. Ironport Systems, Inc.*, 323 F. Supp. 2d 1307 (N.D. Cal.).

55. *Doe v. Bates*, No. 5:05-CV-91DF-CMC, 2006 WL 3813758, at 2, 5 (E.D. Tex. Dec. 27, 2006).

56. *Doe v. Myspace, Inc.*, 474 F. Supp. 2d 843, 847 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413 (5th Cir. 2008).

57. The immunity provided by the CDA has even led to a "reduction in the effectiveness of the prohibition on discriminatory housing advertisements under the Fair Housing Act (FHA)." Shanahan, *supra* note 7 at 146 (referring to *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 534 (E.D. Va. 2003)). Shanahan, *supra* note 6 at 146 (citing to *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 534 (E.D. Va. 2003)).

58. *Noah*, 261 F. Supp. 2d at 534.

59. *Chicago Lawyers' Comm. For Civil Rights Under the Law, Inc., v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 682 (N.D. Ill. 2006).

Title II of the Civil Rights Act of 1964.⁶⁰ Noah asserted that the other users were in direct violation of the Member Agreement and Community Guidelines established by AOL, thus creating a duty for AOL to enforce the agreement.⁶¹ However, the court held that section 230 protects ISPs from liability for third-party content and that statutory immunity is not restricted to actions for monetary damages.⁶²

Furthermore, in 2006, the Chicago Lawyers' Committee for Civil Rights Under the Law ("CLC") filed suit against Craigslist for violations of the FHA for allowing discriminatory advertisement on its website.⁶³ The FHA was enacted in 1968 to prohibit discrimination in most residential dwellings on the bases of race, color, religion, and country of origin.⁶⁴ The two primary reasons for enacting the FHA were to protect and increase housing choices for individuals who may otherwise be discriminated against based on their status⁶⁵ and to eliminate prejudice of race, religion, sex, familial status, handicap, or ethnicity in the housing market.⁶⁶ Section 3604(c) of the FHA provides that it is unlawful to make, print, or publish any discriminatory advertisement, notice or statement, with respect to the sale or rental of a dwelling unit.⁶⁷ Liability has been extended to those who publish discriminatory statements, notices, or advertisements.⁶⁸

Despite these holdings, the Seventh Circuit held that ISPs cannot be liable under FHA because of section 230 immunity.⁶⁹ Therefore, ISPs have a monopoly in the market for discriminatory housing advertisements.⁷⁰

However, in a more recent case, *Fair Housing Council v. Roommates.com*, the Ninth Circuit, sitting en banc, held that there is no liability for transmitting user-created additional comments, but

60. Noah, 261 F. Supp. 2d at 534.

61. *Id.*

62. *Id.* at 538, 540.

63. *Craigslist*, 461 F. Supp. 2d at 682.

64. 42 U.S.C. §§ 3603, 3607 (2012).

65. 42 U.S.C. §§ 3604 (a),(d),(f) (2012).

66. *Fair Housing Council of Bergen County, Inc. v. E. Bergen County Multiple Listing Services, Inc.*, 422 F. Supp. 1071, 1075 (D.N.J. 1976).

67. 42 U.S.C. § 3604(c) (2012).

68. *United States v. Space Hunters, Inc.*, 429 F. 3d 416, 424–25 (2d Cir. 2005)(citing 42 U.S.C. §§ 3604(c)(1998)).

69. *Craigslist, Inc.*, 461 F. Supp. 2d at 682.

70. Shanahan, *supra* note 6, at 149.

also no immunity for creating and developing the alleged illegality.⁷¹ Here, the defendant, Roommates.com, faced three areas of potential liability: the question and answers sections, the profile pages, and the “Additional Comments” section.⁷² The Ninth Circuit held that Roommates.com was liable for the contents in the question and answers section as well as the profile page, but not liable for the user created “Additional Comments” section.⁷³

The Ninth Circuit found that Roommates.com induced third parties to express illegal preferences in the question and answer section.⁷⁴ Roommates.com, created the questions and the choices in the drop-down menus for answers, including sexual orientation of a roommate.⁷⁵ Therefore, by soliciting answers from users that violate the FHA, Roommates.com could not use section 230 to escape liability.⁷⁶

The profile section provides information about a subscriber’s own protected statuses as well as roommate preferences.⁷⁷ By prompting this information and using it as a filtering system for searches, Roommates.com is outside the protection of section 230.⁷⁸ However, the court held that the “Additional Comments” section was covered by the CDA immunity because Roommates.com does not provide any specific guidance as to what the comments should pertain to.⁷⁹ Therefore, a third-party provided the information independently and Roommates.com was under the shelter of section 230’s safe harbor. The court concluded that “asking questions certainly can violate the Fair Housing Act and analogous laws in the physical world”, but left content provider immunity intact.⁸⁰

71. Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162–63 (9th Cir. 2008) (en banc).

72. *Id.* at 1164–73.

73. *Id.* at 1162 (holding that section 230 “immunizes providers of interactive computer services against liability arising from content created by third parties” but? “this grant of immunity applies only if the interactive computer service provider is not also an ‘information content provider’”).

74. *Id.* at 1165.

75. *Id.*

76. *Id.* at 1165–66.

77. *Id.*

78. *Id.* at 1167.

79. *Id.* at 1173–74.

80. *Id.* at 1164.

VI. The Aftermath

The lack of liability for websites and ISPs is now threatening long established civil rights statutes and is intruding upon constitutionally protected rights.⁸¹ Section 230 has immunized ISPs and websites from racially discriminatory comments⁸² and discrimination in housing.⁸³ By allowing discriminatory housing advertisements, the court in *Fair Housing Council of San Fernando Valley* undermined the spirit of section 3604(c) of the FHA, and consequently gave websites and ISPs a monopoly in discriminatory advertisements. Section 230 has gone completely against its original intent and is now discouraging self-policing by taking away any incentive to self-monitor, since monitoring could lead to waiver of section 230 immunity, and created a safe haven for inappropriate content.⁸⁴

VII. Proposals

A. Reestablishing Common Law Distributor Liability

In *Global Royalties v. Xcentric Ventures*, the District Court of Arizona suggested simply reestablishing the common law distributor liability and characterizing ISPs and websites as distributors.⁸⁵ However, the court ultimately decided against it, finding it unworkable without congressional amendment to the CDA.⁸⁶ This solution is not viable because the typical distributor liability would be too hard to administer due to the thousands of third-party postings on websites.⁸⁷ It could possibly put some useful websites out of operation.⁸⁸ Therefore, others have suggested a notice and take down regime similar to that in the United Kingdom.⁸⁹

81. See *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532 (E.D. Va. 2003) (explaining that section 230 immunity covers ISPs for Title II violations); *Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157 (9th Cir. 2008) (holding that Roommates.com was immune from FHA violations).

82. *Noah*, 261 F. Supp. 2d 532.

83. *Fair Housing Council of San Fernando Valley*, 521 F.3d 1157.

84. Lukmire, *supra* note 9, at 402.

85. *Global Royalties v. Xcentric Ventures*, No. 07-956-PHX-FJM, 2007 WL 2949002 (D. Ariz. Oct. 10, 2007).

86. *Id.*

87. *Chi. Lawyers' Comm. For Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668-89 (7th Cir. 2008) (Finding that requiring a website to vet millions of postings would be impractical)

88. *Id.*

89. DARIO MILO, *DEFAMATION AND FREEDOM OF SPEECH* 216 (2008).

B. Notice and Take Down Statute Modeled on the Digital Millennium Copyright Act.

The DMCA provides that websites and ISPs are immune from liability for copyright-infringing content posted by third parties if they do not have actual knowledge and are not aware of the infringement.⁹⁰ However, websites and ISPs must, “upon obtaining [knowledge or awareness of the infringement], [act] expeditiously to remove, or disable access to, the material.”⁹¹ The notification procedures require plaintiffs to verify copyright ownership as well as authority to act on behalf of the owner.⁹² Once notified, the website or ISP could incur liability for noncompliance.⁹³

However, copyright infringement is very different from common law actions. Common law actions, such as defamation, have different applications depending on the jurisdiction, unlike the federal copyright statutes. Therefore, in order to comply, websites and ISPs may be required to vary their approach from claim to claim. With the Internet’s wide breath and reach it would be crippling to e-commerce “if it is subject to multiple conflicting procedural and substantive ground rules.”⁹⁴ Furthermore, it is much “easier to establish who holds a copyright than whether a statement is defamatory.”⁹⁵ Therefore, the notice and take down model would be overly burdensome on Internet usage.

C. Carve Out FHA Compliance from Section 230 Immunity

Commentators have differed on their proposed method of FHA compliance in the context of section 230 immunity. Jennifer Chang asserts that the CDA does not explicitly state that it overrides the FHA, and therefore courts must give effect to both statutes.⁹⁶ Chang recommends a change in how courts interpret the immunity by giving

90. Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

91. 17 U.S.C. § 512 (c)(1)(A)(i)-(iii) (2012).

92. *Id.* at § 512 (C)(3)(A)(vi).

93. *Id.* at §§ 512(c)(1); 512(c)(3)(A)(vi).

94. Michael L. Rustad & Thomas H. Koenig, *Harmonizing Internet Law: Lessons from Europe*, 9 NO.11 J. INTERNET L. 3, 7 (2006).

95. Jason C. Miller, *Who’s Exposing John Doe? Distinguishing Between Public and Private Figure Plaintiffs in Subpoenas to ISPs in Anonymous Online Defamation Suits*, 13 J. TECH. L. & POL’Y 229, 239 (2008) (describing the ineffectiveness of the first round of subpoenas in revealing actual identities of Internet posters).

96. Jennifer C. Change, *In Search of Fair Housing in Cyberspace: The Implication of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN L. REV. 969, 1010 (2002).

more weight to the FHA.⁹⁷ Rachel Kurth also favors this approach, but differs in her interpretation of the CDA.⁹⁸ She claims that, because of the repeated use of the phrase “protection for blocking and screening” in section 230, the statute was only intended to provide immunity for removal of third-party content.⁹⁹ Therefore, under Kurt’s view, courts should eliminate immunity for materials posted on the sites.¹⁰⁰

An additional approach suggested by commentators is to amend the CDA to carve out FHA compliance from section 230 immunity.¹⁰¹ These methods suggest barring the section 230 immunity from any FHA violation claims.¹⁰² While commentators have differed on how and what to amend, each proposal focuses on the FHA’s advertising provision and not the other civil rights statutes or broader torts claims.¹⁰³

The problem with these approaches is that they are too narrowly tailored. These proposals neglect other claims thwarted by the CDA and would necessitate an onslaught of carve-outs for different violations. Furthermore, the judicial construction proposals are ill equipped to solve the section 230 problem because they have not been endorsed by any court.¹⁰⁴

D. Bad Faith Exception

One commentator recommended a “Judicially-Created Objective Bad Faith Exception.”¹⁰⁵ The proposal asserts that courts should bar ISPs and websites from using the section 230 immunity if “they acted unreasonably in either posting or failing to remove defamatory

97. *Id.* at 1111–12. R16.9

98. Rachel Kurth, Note, *Striking a Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. the Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805, 835-36 (2007). R16

99. *Id.*

100. *Id.*

101. See Shanahan, *supra* note 6, at 154; J. Andrew Crossett, *Unfair Housing on the Internet: The Effect of the Communications Decency Act on the Fair Housing Act*, 73 MO. L.REV. 195, 211 (2008). (asserting that Congress should enact legislation to clarify the discrepancy between the CDA and FHA).

102. *Id.*

103. *Id.*

104. Matthew T. Wholey, Note: *The Internet Is for Discrimination: Practical Difficulties and Theoretical Hurdles Facing the Fair Housing Act Online*, 60 CASE W. RES. L. REV. 491, 524 (2010).

105. Lukmire, *supra* note 9, at 407.

content.”¹⁰⁶ The author argues that judicial action would be easier to implement than an amendment to the CDA, and by focusing on apparent awareness of offending materials, courts can apply a flexible standard based on the totality of circumstances.¹⁰⁷

This proposal is problematic because it would deter ISPs and websites from self-monitoring in order to avoid liability. This was the exact reason for the creation of section 230 immunity. One commentator states that under the bad faith model, “a website or ISP acts unreasonably if it either allows defamatory content posting or fails to remove them once notified.”¹⁰⁸ Additionally, the author fails to illustrate how websites and ISPs can prevent or monitor defamatory postings without significant costs. This model is akin to distributor liability under common law defamation and eliminates any incentive to self monitor.

E. Liability as Content Creator or Developer and Liability Under Rebroadcast Theories.

Section 230 immunity is only available if the information is “provided by another content provider.”¹⁰⁹ Virginia Fitt posits that websites and ISPs could be liable if they give special status to members who post or solicits creation by “actively encouraging and instructing a consumer to gather specific detailed information.”¹¹⁰ She theorizes that if a website solicits information and gives special status to members who post content, it could be held as a creator or developer, and thus lies outside the scope of section 230 immunity.¹¹¹

Moreover, Fitt claims that websites and ISPs that repost information from another ISP or website could be held liable under rebroadcast theory.¹¹² Under this theory, if website B republishes a third party statement from website A, it would not be covered by section 230 immunity, even though website A is in the CDA safe harbor.

However, both of these solutions would only apply to websites that solicit and rebroadcast information. Websites and ISPs like Craigslist or Roommates.com would still be under CDA protection.

106. *Id.*

107. *Id.* at 407–409. *Id.* at 407–09.

108. Lukmire, *supra* note 9, at 409.

109. See Shanahan, *supra* note 6, at 139 (citing 47 U.S.C. §230(f)).

110. Fitt, *supra* note 13, at 1863 (citing Ken S. Myers, *Wikimmunity: Fitting the Communication Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 163, 202 (2006)).

111. Fitt, *supra* note 13, at 1863–64.

112. *Id.* at 1859–60. R16.9

VIII. Stop Online Piracy Act/Protect IP Act (“SOPA”/“PIPA”)

The purpose of the proposed SOPA and PIPA bills is to prevent the illegal distribution of copyrighted materials on the Internet.¹¹³ After years of suing individual users and suing websites under the DCMA to no avail, media companies lobbied Congress for these proposed bills to protect their intellectual property.¹¹⁴

As written, SOPA enforcement includes barring online advertising networks and payment facilitators from conducting business with websites in violation.¹¹⁵ It also bars search engines from linking to such sites, and requires ISPs to block access to such sites.¹¹⁶ PIPA applies to the same parties. In addition, it can be served on “information location tools to require them to stop financial transactions with the rogue site and remove links to it.”¹¹⁷

Opponents of the bills argue that they would hinder innovation,¹¹⁸ do not do enough to protect against false accusations,¹¹⁹ and threaten free speech.¹²⁰ Therefore, voting on the PIPA bill was postponed and an alternative is being drafted as of February 2012.¹²¹ Even without the obvious differences between copyright and defamation, civil rights infringements, and other torts, the proposed actions in PIPA and SOPA are not viable solutions for limiting section 230 as evidenced by all the opposition against these bills.

IX. Proposed Solution

One solution is to treat ISPs and websites that conduct business through the Internet as distributors. The determination of whether a website or ISP qualifies for immunity would be similar to the personal jurisdiction test for websites in *Zippo Manufacturing Company v.*

113. Larry Magid, *What Are SOPA and PIPA And Why All The Fuss?*, FORBES (Jan. 18, 2012), <http://www.forbes.com/sites/larrymagid/2012/01/18/what-are-sopa-and-pipa-and-why-all-the-fuss/>.

114. *Id.*

115. Jared Newman, *SOPA and PIPA: Just the Facts*, PC WORLD (Jan. 17, 2012, 6:00 p.m.), http://www.pcworld.com/article/248298/sopa_and_pipa_just_the_facts.html.

116. *Id.*

117. *Protect IP Act*, WIKIPEDIA (Feb. 5, 2012), http://en.wikipedia.org/wiki/PROTECT_IP_Act#cite_note-10.

118. Condon, *supra* note 2.

119. Newman, *supra* note 115 (stating that payments to websites accused of violation could be cutoff before validity of claims are assessed).

120. *Protect IP Act*, *supra* note 116.

121. *Id.*

*Zippo Dot Com, Inc.*¹²² There, the District Court for the Western District of Pennsylvania held that there were three levels of Internet connectivity:¹²³ (1) websites that clearly does business over the Internet;¹²⁴ (2) websites where a user can exchange information with the host;¹²⁵ and 3) websites that simply post information.¹²⁶ For our purposes, the first category will not qualify for CDA protection. The second category will also not qualify for immunity if there is enough interactivity and the exchanged information is of a commercial nature. Finally the third category will only qualify if the information was not solicited or where the ISPs or websites knew or should have known the information was defamatory or against protected civil rights.

Thus, if applied to *Roommates.com*, the defendant Roommates.com would not qualify for section 230 immunity because it would be classified as a website clearly doing business on the Internet. The same applies to websites such as Craigslist, where the whole purpose is to generate business. Therefore, if a website generates income through user provided content or if its revenue is based on viewership of third party content, then it does not qualify for section 230 immunity and would be required to self-monitor. These websites are profitable, and the additional cost imposed by distributor liability would not cripple their growth. This would eliminate the competitive advantage created by the expansive reading of section 230 immunity for ISPs and websites over traditional media and protect constitutionally protected rights.

X. Conclusion

In 1997, the United States Supreme Court realized that the Internet has become “a unique and wholly new medium of worldwide human communication.”¹²⁷ Twenty-five years later, we are still dealing with the repercussions of their decision to leave section 230

122. 952 F. Supp. 1119 (W.D. Pa. 1997).

123. *Id.* at 1124.

124. *Id.* (involving the knowing and repeated transmission of computer files over the Internet) 16.9

125. *Id.* (determining whether there is enough “business” depends on the balancing of the level of interactivity and commercial nature of the exchange of information that occurs on the website).

126. *Id.*

127. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849–850 (1997).

immunity intact.¹²⁸ The idea that the Internet will organically self regulate has past. As the ninth circuit held in *Batzel v. Smith*, “there is no reason inherent in the technological features of cyberspace why First Amendment and defamation law should apply differently in cyberspace than in the brick and mortar world.”¹²⁹

Congress must reign in the expansive section 230 immunity. When *Zeran* was decided, the Internet was at its infancy, now with twenty-five years of experience, it must be overturned. ISPs and websites must be held as distributors and cannot violate the FHA. In order not to hinder growth or innovation, such designations can be limited to those websites that garner financial benefits from third-party content. However, action must be taken.

128. Since then courts have expanded the section 230 immunity to cover civil rights violations, torts, contracts, and defamation cause of actions. *See supra* Part IV-V.

129. *Batzel v. Smith*, 333 F.3d 1018, 1020 (9th Cir. 2003).