Hastings Communications and Entertainment Law Journal

Volume 35 | Number 2 Article 2

1-1-2013

Imposing a Duty in an Online World: Holding The Webhost Liable for Cyberbullying

Elizabeth M. Jaffe

Imposing a Duty in an Online World: Holding The Webhost Liable for Cyberbullying

by
ELIZABETH M. JAFFE*

Abstract

In light of fettle attempts by state legislatures to subdue the growing cyberbullying epidemic, the time has come to create a civil duty upon those who can control the problem—web hosts and webservers. While the general "foreseeable plaintiff" duty set forth by then-Chief Judge Cardozo in Palsgraf v. Long Island Railroad Co.[1] has controlled the duty of care owed to the person of another for the last century, Judge Andrews' dissent may hold the key to unlock this new societal problem: "Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. . . . Not only is he wronged to whom harm, might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone."[2] By imposing a duty to prevent harm upon web hosts and webservers where cyberbullying harm continues to occur—mainly Facebook—the law is able to adapt to the new source of harm to address the growing, unsolved problem.

This article explores the depths of the current liability imposed upon web hosts and webservers, while advancing that the general tort duty owed to third parties needs to be expanded to include the

* Associate Professor of Law, Atlanta's John Marshall Law School. Emory University (B.A., *magna cum laude*, 1992); Washington University School of Law (J.D., 1995). The author would like to thank Thomas O. Rainey, IV and Noel Le for their assistance with this article. This article is dedicated to Michael S. Fineman.

1. Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).
2. *Id.* at 103 (Andrews, J., dissenting).

aforementioned group. By expanding a duty to prevent cyberbullying harm upon those who can act—those who have the constitutional ability to control speech—web hosts and webservers are best positioned to cure the surmounting issue of online abuse upon the person of another. At the end, by proactively monitoring, and when necessary, chilling the private speech of those who inflict the greatest blows, online hosts such as Facebook not only have the moral duty, but upon the creation of a legal duty, the obligation to address the cyberbullying problem. Thus, the cyberbullying issue may be resolved by revisiting Andrews' dissenting view that everyone owes a duty to the person of another to prevent harm from a third person, including Facebook.

I. Introduction

In *Palsgraf v. Long Island Railroad. Co.*,[3] Justice Cardozo set forth the general rule that a defendant only owes a duty to foreseeable plaintiffs.[4] While Cardozo's "foreseeable plaintiff" rule has become the standard, Justice Andrews' dissent in *Palsgraf* articulated a contrasting standard to measure civil duties, noting that "[e]very one owes to the world at large the duty of refraining from those acts which unreasonably threaten the safety of others."[5] Currently, web hosts are immune from liability for cyberbullying, yet the they provide the medium through which the cyberbully attacks. While the thrust of this article does not advocate overturning the long established principles set forth by Justice Cardozo, perhaps the time

3. *Id.*
4. *Id.* at 101.
5. *Id.* at 103 (Andrews, J., dissenting).

has come to reconsider Andrews' dissent and extend liability to the web host themselves.

It is a well-settled principle in tort law that a defendant does not have a duty to control the conduct of a third person, such as to prevent the third person from engaging in conduct that results in harm to a would-be plaintiff.[6] Over time, however, the courts have carved out various exceptions to this general rule, focusing on the special relationship between the parties and the control the third party exercises over instruments capable of inflicting harm.[7] In addition, the formula for imputing civil liability to prevent harm to the person of another has developed by comparing control with the foreseeability of harm resulting. Of these exceptions to the general rule, for the purposes of this discussion, this article focuses on duties that arise between: the special relationship between the primary defendant and the third party defendant, the context of a defendant that permits a third party to use his personal property, and the relationships where the defendant becomes aware that a third person intends to harm the victim.

Part I of this article will demonstrate how shifting the cost for online tort liability between web hosts, third parties, and victims of injurious content can deter harmful Internet activity. Part II will show that curbing some kinds of online speech does not impede the Internet's potential as a communications medium because not all speech contributes to the "marketplace of ideas." Part III will survey factors that determine and allocate the cost of injurious online speech, including personal jurisdiction, statutory web host immunity, and preliminary injunction for online defamation. Part IV will demonstrate how courts can consider the particular characteristics of Internet speech while applying the traditional tort of public disclosure of private facts, as well as the refusal of courts to recognize a form of negligence online. Finally, Part V concludes with recommendations

6. *E.g.*, PROSSER AND KEETON ON THE LAW OF TORTS, § 53 (W. Page Keeton et al. eds., 5th ed. 1984) ("But it should be recognized that 'duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.").

7. "The rule that you are to love your neighbor becomes in law, you must not injure your neighbor; and the lawyer's question, Who is my neighbor? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law is my neighbor? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in questions." *Id.* (quoting Donoghue v. Stevenson, 11 Q.B.D. 503, 509 (1883)).

on how to make the cost of online tort claims more equitable between third parties, victims, and web hosts.

II. Web host Liability: The Law and Economics of Online Tort Claims

Over the last decade, the Internet has become a new frontier, replacing traditional notions of means of communicating, sharing information, and fostering relationships.[8] Despite the advancements the modern digital world has had on society as a whole, unfettered and unrestricted access produces not only healthy, but injurious exchanges.[9] The ability to communicate digitally and anonymously has fostered an online-world where accountability for one's comments and statements has disappeared.[10] Specifically, the cyberbully epidemic has not only consumed the news media[11] and political agendas,[12] but legal scholars have also joined in the debate.[13] Yet the question remains as to who should bear the duty to prevent and control cyberbullying.

Similar to public parks, street corners, and courthouse steps, the protections afforded by the First Amendment limit the extent of government regulation of online speech.[14] But private web hosts are free to limit the manner, mode, and method of online speech. Web

8. Danielle Keats Citron & Helen Norton, *Justice: What's the Right Thing to Do? A Public Lecture and Symposium on Michael J. Sandel's Recent Book*, 91 B.U. L. REV. 1435, 1444 (2011) (advancing "[o]nline activity can facilitate civic engagement and political participation").

9. *Id.* at 1438.

10. *Id.* at 1447–48.

11. *E.g.*, Gracie Bonds Staples, *Cobb middle school student files suit alleging cyberbullying*, ATLANTA J. CONST., (Apr. 27, 2012, 11:14 AM), http://www.ajc.com/news/news/local/cobb-middle-school-student-files-suit-alleging-cyb/nQTMb/; Anderson Cooper, *Video: Holding Teen Bullies Accountable*, CNN, (Sept. 28, 2011, 3:00 PM), http://ac360.blogs.cnn.com/2011/09/28/video-holding-teen-bullies-accountable/.

12. *See generally* NAT'L CON. OF STATE LEG., *Cyberbullying, Cyberbullying Enacted Legislation: 2006-2010*, http://www.ncsl.org/issues-research/educ/cyberbullying.aspx (listing cyberbullying legislation enacted by the individual states).

13. *E.g.*, Joe Dryden, *It's a Matter of Life and Death: Judicial Support for School Authority Over Off-Campus Student Cyber Bullying and Harassment*, 33 U. LA VERNE L. REV. 171 (2012); Jamie Wolf, Note, *The Playground Bully has Gone Digital: The Dangers of Cyberbullying, the First Amendment Implications, and the Necessary Responses*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 575, 576 (2012).

14. William H. Freivogel, *Does the Communications Decency Act Foster Indecency?*, 16 COMM. L. & POL'Y 17, 39 (2011).

services providers like Google, Microsoft, and Yahoo! have the ability to leverage content created by third parties. For example, a private Internet service provider can pre-screen speech or remove speech from the web—actions which would not pass muster if engaged in by any state actor. As such, a tradeoff of the private business of providing Internet service enables these private actors to address harmful content as a cost of doing business. But absent an incentive—or a duty—to act, these private individuals are free to make discretionary judgments regarding what speech they will allow and what speech they will chill.

III. The Nature of Online Speech

Oliver Wendell Holmes recognized that "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out . . . It is an experiment, as all life is an experiment."[15] This test has become known as the marketplace of ideas theory.[16] But in the context of cyberbullying, should the marketplace control the truth? One method for controlling behavior is to raise the cost associated with pursuing the activity associated with the behavior.[17] As such, recent judicial activity suggests courts are able to influence the demand for wrongful online activity by raising the cost for third parties and by encouraging web hosts and web servers to take—or forgo—certain actions.[18]

A. Personal Jurisdiction

As with any civil action, personal jurisdiction is the threshold issue, and as applied to online tort claims, a critical issue arises because of the multi-jurisdictional nature of online speech.[19] Due to personal jurisdiction functioning as a gatekeeper in civil litigation, reform of personal jurisdiction issues may deter the creation of

15. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

16. *Id.*

17. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 140, 278 (Vicki Been et al. eds., 8th ed. 2011).

18. *See* Discussion *infra*. [this FN should refer to a specific section, even if it's this section –MT]

19. *E.g.*, Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND.. L.J. 1113 (2010).

wrongful online content. While outside the scope of this discussion, the personal jurisdiction bearer is an important issue because defining the means of how an aggrieved party is able to seek redress helps to define the actions that are necessary of third parties (like web hosts) to prevent harm.

B. Webhost Liability Under the Communication Decency Act

The Communication Decency Act ("CDA") provides immunity from liability for providers and users of online services who publish information provided by others.[20] According to Professor Mark Lemley, tort immunity for web hosts exists only in the early judicial interpretation of section 230(c) of the CDA.[21] In fact, Lemley discovered that courts apply no other statute as a shield of absolute immunity for web hosts and webservers.[22]

Moreover, no other statute has been interpreted by courts to confer absolute immunity for web hosts.[23] After its inception, courts interpreting the CDA's safe harbor granted web sites absolute immunity, harboring them from liability even after receiving notice of

20. 47 U.S.C. § 230 (2006).

21. Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101, 112 (2007). *See also* 47 U.S.C. § 230(c) (2006):

> (c) Protection for "good samaritan" blocking and screening of offensive material
>
> (1) Treatment of publisher or speaker
>
> 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.
>
> (2) Civil liability
>
> No provider or user of an interactive computer service shall be held liable on account of--
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

22. Lemley, *supra* note 21, at 112.

23. *Id.*

wrongful content if they failed or refused to remove the content at issue.[24] One research article stated:

> Congress recognized that websites could not feasibly monitor the accuracy of the huge volume of information that their users may choose to post. If the law permitted an angry plaintiff to hold a website liable for information that the website did not create, such liability would stifle free speech as fewer and fewer sites would be willing to permit users to post anything at all. Xcentric Ventures, LLC, which operates the website Ripoff Report, one of the websites most frequently sued for defamation, has successfully defended more than twenty lawsuits because of the safe harbor provisions in the CDA.[25]

Judicial interpretation of the safe harbor provision after passage of the Act is relatively broad compared to the Congressional intent in drafting the safe harbor provision.[26] According to Lemley, by rendering section 230 of the CDA as providing web hosts absolute immunity, web hosts were left with no incentive to exercise control over third party content.[27] As such, the effect of granting web hosts absolute immunity under the CDA distorts the economic incentives Congress meant to confer to web hosts—as opposed to encouraging web hosts to enforce terms of use, absolute immunity induces web hosts to turn a blind eye to obvious and foreseeable harms.[28]

In theory, section 230 of the CDA[29] serves an economizing function by immunizing web hosts from liability for content created

24. *See* Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997); Ben Ezra, Weinstein & Co. v. Am. Online, Inc., 206 F.3d 980 (10th Cir. 2000); Green v. Am. Online, 318 F.3d 465 (3d Cir. 2003); Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003).

25. Kraig J. Marton et al., *Protecting One's Reputation—How To Clear A Name In A World Where Name Calling Is So Easy*, 4 PHOENIX L. REV 53, 63 (2010).

26. Lemley, *supra* note 21, at 112.

27. *Id.* at 112–13.

28. *Id.* at 113.

29. 47 U.S.C. § 230(c) (West 2006). Protection for "good samaritan" blocking and screening of offensive material:

(1) Treatment of publisher or speaker

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.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

by third parties.[30] But without such immunity, web hosts face prohibitive costs in maintaining online services open to millions of Internet users.[31] Despite this, lawmakers and courts were not always clear on how to provide web hosts with the incentive to operate on the mainstream Internet, while simultaneously addressing any harmful content created by third parties.[32] As case law interpreting section 230 of the CDA developed, courts learned that granting absolute immunity may have the very opposite effect of giving web hosts the incentive to police their sites that Congress had hoped for in passing the CDA.[33] While the theoretical role of web host immunity is straightforward, the extent of optimal immunity was not.[34]

In a perfect world, the right level of immunity serves the interest of web hosts, third parties and potential victims concurrently.[35] One possible means to strike a balance between all parties, and serve greater public good, is through qualified immunity.[36]

Prior to the CDA, the New York Supreme Court decided in *Stratton Oakmont v. Prodigy Services* that a web service could be held liable when it failed to take down content created by a third party because the web service monitored content from third parties and claimed it would delete content that violated its terms of service.[37] Congress enacted the CDA in 1996 in part to overturn the *Stratton* opinion.[38]

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

30. *See* Freivogel, *supra* note 14, at 45.

31. *Id*.

32. *See* 141 CONG. REC. H8469-70 (daily ed. Aug. 4, 1995) (statement by Rep. Cox) (without absolute immunity web hosts would discard terms of service to avoid liability altogether, thereby allowing third parties to publishing anything on their web sites). *See also* Chi. Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668 (7th Cir. 2008) (holding limited immunity, rather than absolute immunity, will induce web hosts to be accountable for harmful content created by third parties).

33. Lemley, *supra* note 21, at 113.

34. *Id*. at 102 (describing safe harbors that grant absolute and partial immunity).

35. *See id*. at 101–02.

36. *Id*. at 113.

37. Stratton Oakmont, Inc. v. Prodigy Services Corp, 1995 WL 323710 (N.Y. Sup. Ct. May 25, 1995).

38. 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (statement by Rep. Cox).

> The *Stratton* decision provided part of the impetus for Section 230; Congress worried that the decision would discourage online computer services from removing obscene content from their sites because they would conclude that the only way to avoid publisher liability was to eschew responsibility and allow everything to be posted. So *Stratton* threatened both to open the door to indecency and to interfere with the robustness of the fast developing Internet.[39]

In one of the first interpretations of the CDA safe harbor in 1997, the United States Court of Appeals for the Fourth Circuit interpreted the CDA in *Zeran v. America Online* as giving the webhost absolute immunity: Section 230 "creates 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."[40] The *Zeran* court rationalized this conclusion in economic terms, holding "it would be impossible for service providers to screen each of their millions of postings for possible problems."[41]

For a decade following *Zeran*, federal courts followed suit in applying CDA section 230 as conferring absolute immunity for web hosts for content created by third parties.[42] In 2002, Congress issued the Committee Report to the Dot Kids Implementation and Efficiency Act, in which it approved of the *Zeran* line of cases.[43]

Professor Mark Lemley asserts that the absolute immunity under the CDA granted by the *Zeran* court would result in more harm than good.[44]

> ISPs have no incentive to police their sites even for content that obviously does not belong there, or to take down even material that is clearly false or injurious. Nor are they even obligated to aid the plaintiff in finding the wrongdoer by disclosing the identity of their clients. As a

39. Freivogel, *supra* note 14 at 21–22.

40. Zeran , 129 F.3d at 330.

41. *Id.* at 331.

42. *See* Universal Commc'n. Sys. v. Lycos, Inc., 478 F.3d 413 (1st Cir. 2007); Almeida v. Amazon.com, Inc., 456 F.3d 1316 (11th Cir. 2006); *Ben Ezra*, 206 F.3d 980.

43. H.R. REP. No. 107-449 at 13 (2002) (stating "courts have correctly interpreted section 230(c)").

44. Lemley, *supra* note 21 at 113–14.

> result, absolute immunity may lead to plaintiffs being unable to remove objectionable material or to find the tortfeasor in order to recover damages from her, and therefore remaining uncompensated even for egregious harms.[45]

Zeran protected the web host from traditional secondary liability, and appeared to create an Internet specific form of tort immunity that did not exist outside the Internet.[46] Even before the *Zeran* decision in 1997, Judge Frank Easterbrook expressed doubts on such an approach to online liability.

> Judge Easterbrook's skepticism about the *Zeran* approach may have been foreshadowed in a talk in 1996 at the University of Chicago. Judge Easterbrook taught there earlier in his career and was a prominent advocate of a law and economics school of thought that favors legal solutions consistent with free market realities. In his 1996 talk, Judge Easterbrook recalled that a former dean of the University of Chicago Law School, Gerhard Casper, had once remarked that the school didn't have a course on "The Law of the Horse." By this, Casper meant that a lot of cases deal with horses—people kicked by horses, licensing race horses, veterinarian care of horses, prizes at horse shows—but it would be absurd to teach a course on the law of the horse. The same is true for cyberspace, Judge Easterbrook said. It would be better for judges to develop a sound set of laws for intellectual property and then apply them to cyberspace, he said.[47]

In recent years, courts departed from the early line of CDA section 230 cases granting web hosts absolute immunity.[48] In *Jones v. Dirty World Entertainment*, one federal district court determined that web host immunity is not absolute.[49] Web hosts fall outside the reach of the CDA's safe harbor when they no longer act as passive hosts by

45. *Id.* at 113.

46. *E.g.*, Joseph Monaghan, *Social Networking Websites' Liability For User Illegality*, 21 SETON HALL J. SPORTS & ENT. L. 499, 505 (2011).

47. Freivogel, *supra* note 14, at 25.

48. *See* Jones v. Dirty World Entm't, 840 F.Supp.2d 1008, 1011 (E.D. Ky. 2012).

49. *Id*. at 1009.

encouraging and soliciting wrongful content from third parties or creating such content.[50] In *Jones*, Sarah Jones, a Cincinnati Bengals cheerleader and part time teacher, sued the operator of thedirty.com for state law claims of defamation and invasion of privacy for content posted by a third party that she argued the site encouraged and therefore rendered itself in part liable.[51] Owners of thedirty.com, Dirty World Entertainment, filed a motion for judgment as a matter of law for absolute immunity under the CDA.[52] The Federal District Court for the Eastern District of Kentucky dismissed the motion for judgment as a matter of law.[53] The court ruled that CDA section 230 immunity is not absolute, and only applies when the webhost is not "responsible, in whole or in part, for the creation or development of" the offending content.[54]

In departing from the *Zeran* line of cases, the Federal District Court for the Eastern District of Kentucky cited persuasive authority from the Ninth and Tenth Circuit Courts of Appeals in finding Dirty World outside the reach of the CDA's safe harbor for web hosts.[55] Relying on *Fair Housing Council of San Fernando Valley v. Roommates.com*,[56] and *Federal Trade Commission v. Accusearch*,[57] the *Jones* court determined that a web host is not immune from tort liability under the CDA if the host takes action beyond that of a passive service provider.[58] The web host can become responsible for offensive content by specifically encouraging or soliciting wrongful content.[59] Immunity for web hosts under the CDA, however, is not absolute.[60] Applying the principles from the Ninth and Tenth Circuits, the court found that Dirty World "specifically encourag[ed]" development of the wrongful content.[61] The facts cited by the court in finding Dirty World as a non-passive web host that encouraged or helped develop wrongful content include the site's name, the editor's

50. *Id*.

51. *Id*.

52. *See* Jane Doe v. Dirty World Entm't Recordings LLC, 2010 WL 4018629 (E.D. Ky. 2010).

53. *Jones*, 840 F.Supp.2d at 1009.

54. 47 U.S.C. § 230(f)(3) (2006).

55. *Jones*, F.Supp.2d at 1011.

56. Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008).

57. Federal Trade Comm'n v. Accusearch, 570 F.3d 1187 (10th Cir. 2009).

58. *Jones*, 840 F.Supp.2d at 1011.

59. *Id*.

60. *Id.*

61. *Id.* at 1012.

discretion in removing content after notification from the plaintiff, the editor's own comments on postings made by third parties, and the editor's interactions with third parties regarding the wrongful content.[62]

A law and economics perspective of the District Court's denial of Dirty World's motion for judgment as a matter of law under the CDA considers the opinion's effect on webhost's conduct. The CDA's qualified safe harbor, as interpreted in *Jones*, serves an economizing function. Victims of tortious online content face steep costs in pursuing private settlement.[63] Perpetrators are often anonymous and unwilling parties.[64] When costs are prohibitive in the market, the next recourse is litigation.[65] In litigation, the ability of victims to claim against web hosts increases their chances to collect court judgments, while pursuing private third parties could only render awards dwarfed by the cost of litigation.[66] In online tort suits, the plaintiff has incentives to pursue big-pocketed web sites rather than unwilling, individual parties who may not be able to fulfill judgment awards.[67] Providing web hosts absolute immunity under the CDA is not socially optimal when those web entities have a financial incentive to host wrongful content, yet are immune regardless of their conduct.[68]

The CDA's safe harbor provision is the functional equivalent of a subsidy to web hosts from Internet users, decreasing the costs for web hosts to publish without need for pre-publication verification of content for accuracy and other legal compliance.[69] The subsidy quickens online publishing, allowing web hosts to take advantage of instantaneous Internet communications. In legal terms, the CDA's limited safe harbor is simply an issue of proximate cause.[70] In economic terms, removing safe harbor protection is a way for courts to cancel the subsidy that injured Internet users pay to web hosts and

62. *Id*.

63. *See Who Pays for Tort Liability Claims?*, WHITE HOUSE COUNCIL OF ECONOMIC ADVISORS (Apr, 2002), *available at* http://www.policyalmanac.org /economic/archive/ torts.shtml (last visited August 20, 2012).

64. David S. Ardia, *Free Speech Savior or Shield For Scoundrels: An Empirical Study Of Intermediary Immunity Under Section 230 Of The Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 486 (2010).

65. POSNER, *supra* note 17, at 935.

66. *See* Ardia, *supra* note 64, at 486.

67. *Id.*

68. *Id.*

69. *See* POSNER, *supra* note 17, at 936

70. *See id.*

make web hosts internalize the externalities of their actions.[71] In essence, courts are saying to web hosts—don't look a gift horse in the mouth. Publishers who allow or incite others to produce harmful content create externalities that provide an economic argument for speech regulation.[72] Providing private parties actionable claims against web hosts for publishing harmful content about them reduces the demand, and hence the incentives, for the publishing of such content.[73] Contributory liability for web hosts from content authored by private parties may reduce the cost of online tort enforcement.[74] As such, to not allow private parties to make tort claims against web hosts equates to making Internet use an assumption of risk, which would deter Internet use and render the Internet's communications capabilities less valuable.[75]

The *Jones* court's reliance on persuasive authority from other circuits is salient. Even though tort claims for invasion of privacy, defamation, and intentional infliction of emotional distress reside in state law, interpretation of the CDA is a matter of federal law, rendering precedent in one circuit susceptible to serve as persuasive authority in other federal circuits.[76] In the Sixth, Seventh, Ninth, and Tenth Circuit Courts of Appeal, facts that determined the outcome of the CDA safe harbor analysis may render interactive sites liable under section 230 qualified immunity.[77] But in the Third and Fourth Circuits, web hosts may still enjoy absolute immunity.[78]

C. Judicial Trend Away From Absolute Immunity

The basis for the gradual trend away from reading CDA section 230 as providing web hosts with absolute immunity finds its roots in the realization of economic incentives resulting from such an

71. See *id.*

72. *Id.* at 937.

73. *Id.* at 936.

74. *See id.*

75. *See Craigslist*, 519 F.3d at 670 (stating "to appreciate the limited role of § 230, remember that 'information content providers' may be liable for contributory infringement if their system is designed to help people steal music or other material in copyright")

76. *See Jones*, 840 F.Supp.2d at 1011.

77. *E.g.*, *Smith*, 333 F.3d 1018; *Roommates.com*, 521 F.3d 1157; *Accusearch*, 570 F.3d 1187; *Ben Ezra*, 206 F.3d 980. In contrast, the Seventh Circuit may not extend absolute immunity under CDA § 230. *See Craigslist*, 519 F.3d at669.

78. *See Am. Online, Inc*., 129 F.3d at 327; *Green*, 318 F.3d at 465.

interpretation of the CDA.[79] In *Doe v. GTE Corp.*, Judge Frank Easterbrook recognized that absolute immunity induces web hosts "to take the do-nothing option and enjoy immunity" under the CDA.[80] Judge Easterbrook noted that the incentives provided by absolute immunity conflict with the basis of the CDA: "[T]he 'Communications Decency Act' bears the title 'Protection for "Good Samaritan" blocking and screening of offensive material,' hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services."[81]

Along these same lines, in *Chicago Lawyers' Committee For Civil Rights Under Law v. Craigslist*, Judge Easterbrook reiterated that the CDA "as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts."[82] Easterbrook suggested that a web host "causing a particular statement to be made" or causing the injurious "content of a statement" might render that web host susceptible to liability.[83] In causing particular statements or the injurious content of statements, web hosts become vulnerable to liability.[84] Legal commentators praised Easterbrook's approach to the CDA:

> Judge Easterbrook's interpretation of Section 230 persuasively demonstrates that *Zeran* has interpreted the law in a way that provides computer services little incentive to monitor their sites for offensive content. As a result, Judge Easterbrook is correct in arguing that in this way the *Zeran* interpretation is contrary to the title and purpose of the law.[85]

Subsequently, the Ninth Circuit Court of Appeals in *Fair Housing Council of San Fernando Valley v. Roommates.com* interpreted CDA section 230 with the background of the Seventh Circuit's dicta in *GTE* and *Craigslist* "in mind."[86] *Roommates.com* concerned an online roommate-matching website that allowed visitors to choose

79. Doe v. GTE Corp., 347 F.3d 655 (7th Cir 2003).
80. *Id.* at 660.
81. *Id.*
82. *Craigslist*, 519 F.3d at 669.
83. *Id.* at 671–72.
84. *Id.* at 670.
85. Freivogel, *supra* note 14, at 28.
86. *Roommates.com*, 521 F.3d at 1164.

from drop down menus criteria for roommates, which may violate the federal Fair Housing Act.[87] Applying the *Craigslist* analysis of causation and distinction between direct and third party content providers, the *Roommates.com* court determined that the defendant "created" discriminatory questions and choice of answers, and "designed" its website registration around them.[88] Roommates.com's actions in causing the injurious content rendered it an "information content provider."[89] The *Roommates.com* court found that section 230 "provides immunity only if the interactive computer service does not "creat[e] or develop[ ] the information "in whole or in part."[90] The nexus between "causation" and the designation of roommates.com rendering itself an "information content provider" was salient.[91] The *Craigslist* court stated: "The critical question is whether Roommates.com is itself an "information content provider," such that it cannot claim that the information at issue was "provided by another information content provider." In other words, the court decided that roommates.com fell out of reach of the section 230 immunity by no longer acting as a passive content publisher and becoming a content provider itself rather than relaying information from third party information content providers.[92] According to the Court, this interpretation of the CDA comported with the initial economic basis of the CDA rather than early judicial interpretation of the statute:

> In passing section 230, Congress sought to spare interactive computer services . . . to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn't edit or delete. In other words, "Congress sought to immunize the *removal* of user-generated content, not the *creation* of content."[93]

This reading of the CDA is contrary to that in *Zeran*, which found that the CDA immunized web hosts from any kind of liability from

87. *Id.* at 1162.
88. *Id*. at 1164.
89. *Id*.
90. *Id*. at 1166 (citing 47 U.S.C. § 230(f)(3)).
91. *Id.* at 1181–82.
92. *Id*. at 1166.
93. *Id*. at 1163 (emphasis in original).

third party content by not distinguishing between content creation and content removal.[94]

In *Accusearch*, the Tenth Circuit Court of Appeals cited the Court's decision in *Roommates.com*, adopting both the causation and "content provider" aspects of the *Roommates.com* decision.[95] *Accusearch* concerned a web host who collected and sold confidential information to third parties, including private phone records, the acquisition of which could violate the Telecommunications Act or circumvent it by fraud or theft.[96] Applying the holding from *Roommates.com*, the *Accusearch* court determined that the web host "solicited" requests for confidential information protected by law and "knew" the information would be obtained through "fraud or illegality."[97] Further, the court determined that offensive postings resulting from the wrongful collection of confidential information was *Accusearch's* raison d'etre.[98] The *Accusearch* decision incorporated the Court's analysis from *Roommates.com* by focusing on the causation inquiry. The *Accusearch* court stated the immunity for the defendant hinged on whether the web host was "responsible for the development of the specific content that was the source of the alleged liability."[99] If the web host defendant was responsible as the cause for the injurious content, the web host becomes an information content provider in his own right: "an information content provider of certain content is not immune from liability arising from publication of that content."[100]

Limitations to web host immunity under the CDA may arise through creative legal arguments.[101] In *Barnes v. Yahoo!*, the Ninth Circuit Court of Appeals addressed negligent undertaking and promissory estoppel claims in a case where an ex-boyfriend created a fake Yahoo! profile of the victim, Barnes.[102] The profile included intimate photos, private information and a fake solicitation for sex.[103] After several failed attempts to contact Yahoo! by mail to take down the profile, a Director of Communications for Yahoo! contacted

94. *Id.* at 1164.
95. *Accusearch*, 570 F.3d at1197.
96. *Roommates.com*, 521 F.3d at 1157; *see also Accusearch*, 570 F.3d at1191–92.
97. *Accusearch*, 570 F.3d at 1199.
98. *Id*. at 1200.
99. *Id*. at 1198.
100. *Id*. at 1187.
101. *See* Barnes v. Yahoo!, 570 F.3d 1096 (9th Cir. 2009).
102. *Id*. at 1098.
103. *Id*.

Barnes and asked the victim to fax Yahoo! a copy of the letters. In reponse, the Yahoo! director told the victim she would "personally walk the statements over to the division responsible for stopping unauthorized profiles and they would take care of it."[104] The victim relied on these statements and took no further action to remove the profiles.[105] Notwithstanding this representation by the director at Yahoo!, the profile remained in place for two months until the initiation of the suit against Yahoo!.[106]

In *Barnes*, the court rejected the victim's argument on the negligent undertaking claim by noting that receiving notice of the injurious content and by initiating steps to remove that content, Yahoo! acted "not as a publisher, but rather as one who undertook to perform a service and did it negligently."[107] Under this theory, Yahoo! would be liable not for publishing or failing to take down the content, but for initiating but withdrawing from its undertaking to remove the content.[108] As Yahoo! would not be held liable as a publisher, the CDA's section 230 safe harbor would not protect the web host.[109] The court squarely rejected this theory noting:

> We are not persuaded. As we implied above, a plaintiff cannot sue someone for publishing third-party content simply by changing the name of the theory from defamation to negligence. Nor can he or she escape section 230(c) by labeling as a "negligent undertaking" an action that is quintessentially that of a publisher. The word "undertaking," after all, is meaningless without the following verb. That is, one does not merely undertake; one undertakes *to do* something. And what is the undertaking that Barnes alleges Yahoo failed to perform with due care? The removal of the indecent profiles that her former boyfriend posted on Yahoo's website. But removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove.[110]

104. *Id*. at 1099
105. *Id*.
106. *Id*.
107. *Id*. at 1102.
108. *Id*.
109. *Id*.
110. *Id*. at 1102–03.

While the *Barnes* court rejected the negligent undertaking claim as merely rephrasing arguments under different legal doctrines, it distinguished the promissory claim as standing on sufficiently independent grounds: "liability for breach of promise is different from, and not merely a rephrasing of, liability for negligent undertaking."[111]

On the promissory estoppel claim, the victim referred to Yahoo!'s "promise" to address the situation and the fact that this promise caused "reliance" that created "detriment."[112] The court construed the victim's language as alleging a cause of action for promissory estoppel under section 90 of the Restatement (Second) of Contracts.[113] The Court determined that the victim, through her promissory estoppel claim, sought to hold Yahoo! liable as a promisor who breached contract rather than as a publisher of third party content.[114] The court defined the promisor obligation of Yahoo! as arising when Yahoo! made a promise it intended, actually or constructively, to induce reliance by Barnes that the fake profile created by her ex-boyfriend would be taken down.[115]

The promissory estoppel holding in *Barnes* by the Ninth Circuit Court of Appeals simply allowed the victim to survive a motion to dismiss by Yahoo!.[116] The court was careful to address why the promissory estoppel claim could survive while the negligent undertaking claim could not. The court also limited its holding, stating that it "cannot simply infer a promise" to take down content.[117] Such promises must "be as clear and well defined."[118] Hence, a "general monitoring policy, or even an attempt to help a particular person, on the part of an interactive computer service such as Yahoo! does not suffice for contract liability."[119] Therefore, a web host making general statements about take downs in a terms of service provision may not necessarily be making a promise sufficient for a claim of promissory estoppel.[120] Further, web hosts like Yahoo! can

111. *Id*. at 1106.
112. *Id*. at 1099.
113. *Id*.
114. *Id*. at 1107.
115. *Id*. at 1107–08.
116. *Id*. at 1109.
117. *Id*.
118. *Id*.
119. *Id*.
120. *Id*.

simply disclaim their intention not to be bound in terms of service provisions on take downs and avoid a promissory estoppel claim.[121]

The trend away from absolute immunity for web hosts under section 230 of the CDA originated in the 2003 Seventh Circuit's dicta in *GTE*.[122] This trend continued in other circuits. Specifically, in 2008, the Seventh Circuit reiterated dicta in *Craigslist*,[123] that was later adopted by the Ninth Circuit Court of Appeals holding in *Roommates.com*,[124] which was readopted in the 2009 holding by the Tenth Circuit in *Accusearch*.[125] The Seventh Circuit Court of Appeals decisions in *GTE* and *Craigslist* formulated rules qualifying immunity under CDA section 230, however, the facts in those cases did not render the defendant web hosts liable even without absolute immunity.[126] Yet, the Seventh Circuit's interpretation of CDA section 230 as providing only qualified immunity became part of the essential holdings in *Roommates.com* and *Accusearch* due to the facts in those cases.[127] Had facts similar to those in *Roommates.com* and *Accusearch* been present before the Seventh Circuit in *GTE* and *Craigslist*, those cases may well have turned out differently, with liability against the web hosts.[128] In view of this history of a chain reaction among the federal circuits of interpreting only qualified immunity for web hosts under the CDA, the Ninth Circuit's decision in *Barnes* suggests that web hosts may begin to face liability as these cases permeate through the courts.[129]

Despite court decisions supporting the rights of victims, the broad sweep of qualified immunity for web hosts under the CDA suggests that courts have interpreted the statute to supersede traditional secondary liability analysis under proximate cause.[130] Under the traditional analysis, entities can incur liability for "knowledge of, promotion of, refraining to control, or profiting from illegal activity."[131] Interestingly, the profiting of web activity for monetary

121. Id.
122. *GTE Corp.*, 347 F.3d at 660.
123. *Craigslist*, 519 F.3d at 669.
124. *Roommates.com*, 521 F.3d at 1164.
125. *Accusearch*, 570 F.3d at 1198.
126. *Compare GTE Corp.*, 347 F.3d at 660; with *Craigslist*, 519 F.3d at 669.
127. *See, e.g., id.*
128. *GTE Corp.*, 347 F.3d at 660; *Craigslist*, 519 F.3d at 669; *Roommates.com*, 521 F.3d at 1164; *Accusearch*, 570 F.3d at 1198.
129. *See Barnes*, 570 F.3d 1096.
130. Monaghan, *supra* note 46, at 506.
131. Id.

gain may invoke personal jurisdiction for a web host in a foreign forum yet not allow victims to claim tort actions against the web host. The court in *Jones* wrote:

> The facts alleged here indicate that Dirty World, LLC, through thedirty.com, intentionally reaches beyond the boundaries of its home state to conduct business and interact with residents of other states. It is a fair assumption that the defendants are not in this business as a hobby, but rather to make money, as do most web sites, by advertising. The defendants publish invidious and salacious posts by visitors to the web site (known on the site as "THE DIRTY ARMY"), they respond to those posts with their own comments, and they thereby encourage and generate further posts by readers. In effect, a dialogue is created. It is also a fair inference that the salacious posts will invite hits from residents of the region where the subject of the posts lives and/or works.[132]

Interpretations of the CDA, even decisions taking contrary views on absolute and qualified immunity, protect web hosts from traditional secondary liability.[133] Under secondary liability analysis, web hosts would be liable if they served as the proximate cause under common law tort analysis.[134] One commentator compared the language of the CDA and found it consistent with court decisions finding secondary liability in non-Internet cases and Internet cases involving intellectual property (which is statutorily exempt under CDA section 230(c)'s safe harbor provision).[135]

132. Jones, 766 F.Supp.2d 828, 833 (E.D. Ky. 2011)

133. Monaghan, *supra* note 46 at 507.

134. *Id*.

135. *Id*. at 533 n.46. *Compare* § 230(c)(2) ("No provider or user of an interactive computer service shall be held [civilly] liable on account of ... (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."); *with* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996) (holding operators of a swap meet liable where they allowed vendors to sell counterfeit goods and they had knowledge of, control of, and profited from the infringing activity); MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 938, 941 (2005) (holding plaintiffs liable because they knew their software was used for copyright infringement, they promoted its use for copyright infringement, did not attempt to prevent the infringement, and profited from their users' copyright infringement).

Web hosts are immune to tort liability when they simply refuse to remove online content even after notification from victims.[136] Even after notification of injurious content, immunity enables web hosts to ignore patently unlawful speech with impunity.[137] As such, this immunity for web hosts under the CDA contrasts with the take down rules of the DMCA, which sets out takedown procedures for web hosts following notice of content that infringes a copyright.[138] The CDA does not preempt the DMCA, but preempts tort laws such as defamation and privacy.[139] Further, web hosts do not incur liability after notification that injurious content violates their own privacy policies and terms of use.[140] Social networking sites like Facebook and MySpace have various schemes that allow users to report injurious content. But the effectiveness of these reporting schemes is questionable if the sites face no liability when they fail to take action.[141]

IV. Online Tort Claims

The internet magnifies the importance of lowering costs for victims because the free nature of publication online enables injurious activity at little to no cost to the wrongdoer.[142] Further complicating the problem is the fact that pursuing claims for online tort actions can be costly. These costs not only affect an aggrieved party's ability to file suit,[143] but are also considered by web hosts when drafting user agreements.[144] Moreover, seeking recovery for an online tort can be a costly and time consuming process. To add to this difficulty, as much as forty-one percent of Internet tort claims involve anonymous

136. *See Barnes*, 570 F.3d at 1103; Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 420 (1st Cir. 2007).

137. *See id.*

138. 17 U.S.C. § 512 (2006).

139. *See id.*

140. *See* Terence J. Lau, *Towards Zero Net Presence*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 237, 269 (2011).

141. Monaghan, *supra* note 46 at 526–27.

142. Marton, *supra* note 25, at 60.

143. *See, e.g.*, David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261 (2010) (arguing for the refinement of judicial common law as a beneficial way for online victims to seek redress).

144. *See genearlly* Allyson W. Haynes, *Virtual Blinds: Finding Online Privacy in Offline Precedents*, 14 VAND. J. ENT. & TECH. L. 603 (2012) (proposing solutions for online privacy disputes by incorporating user agreements that benefit all parties).

content and users.[145] As such, what is the best way to curb this going concern? This part will explore the effectiveness of the claims of defamation, invasion of privacy based on a public disclosure of private facts, and refusing to remove injurious content after publication, as these claims have become a great concern in the context of Internet-based torts as opposed to their usage in traditional mediums.[146]

A. Defamation

The law of defamation treats the written word more harshly than the spoken word. Based on the nature of libelous acts, as compared to slander, libel is a more deliberate activity—there is more time to contemplate what one memorializes on paper or online, as opposed to speaking the same harmful content. Hence, in liability for libel, as set forth in *Jones*, there is less of a danger involved in deterring socially valuable communications than there is in imposing liability for slander. By way of comparison, as discussed above, personal jurisdiction and CDA immunity for web hosts' jurisprudence involves claims for defamation. Despite the courts treating personal jurisdiction over Internet claims in a favorable light with regard to victims of online defamation, the viability of any defamation action expanded only after courts removed the absolute immunity for web hosts. Currently, the CDA's absolute immunity may be the highest obstacle to transferring defamation to the Internet environment. This begs the question: Should any web host immunity exist?

The relationship between defamation claims and the CDA illustrates a function of economic incentives. Prior to the CDA, web hosts bore the cost of injurious third party content entirely because the potential for harm was endless. With the passing of CDA section 230, Congress—in theory—sought to remove this burden for web hosts, while intending to encourage the hosts to enforce online terms of use without fear of liability.[147] This new burden threatened not only the potential growth of online services, but also the development of Internet technologies. Shortly after codification, courts interpreted section 230 to grant absolute immunity to web hosts, thereby passing

145. Marton, *supra* note 25, at 60; Ardia, *supra* note 64 at 487.

146. *See generally* Ardia, *supra* note 143 at 261.

147. *See generally* David Lukmire, *Can Courts Tame the Communications Decency Act?: The Reverberations of Zeran v. America Online*, 66 N.Y.U. ANN. SURV. AM. L. 371, 373–85 (2010) (outlining the legislative history of the CDA).

the cost of injurious online content onto the victims.[148] These early rulings imposed steep costs on victims who were required to locate the third parties who created content, while leaving the web hosts shielded from liability. The effect of these initial rulings resulted in the victims becoming the subsidizers of both third parties engaged in defamatory acts and the web hosts that not only provided the medium for the harm to occur, but continued to publish the defamatory content.

As such, absent regulation of web hosts under the CDA, there is no incentive to absorb the cost of policing online content or taking affirmative steps to prevent the harm from occurring in the first place.[149]

B. Invasion of Privacy – Public Disclosure of Private Facts

William Prosser outlines the four basic rights of privacy to include: intrusion; disclosure of private facts; false light; and appropriation of name or likeness.[150] Following Prosser's lead, the Restatement (Second) of Torts adopted this basic outline for individual privacy rights. At the inception of the Internet and online interactions, courts applied these four basic rights, construing online activity to mirror offline tortious conduct. Over time, however, courts have either abridged or effectively discarded the privacy tort of public disclosure of private facts. In fact, the Supreme Court of the United States has all but rendered this tort a nullity. To that end, scholars cite the need to strengthen the tort for disclosure of private facts to meet news dangers to privacy posed by online content and interactions. Yet, what is puzzling about this sequence of events is that the privacy tort for disclosure of private facts provides the very foundation for many civil and criminal statutes.

The Restatement (Second) of Torts, section 652D set forth the privacy tort for public disclosure of private facts:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for

148. Lemley, *supra* note 21, at 112.

149. *E.g.*, Jonathan D. Bick, *Why Should the Internet Be Any Different?*, 19 PACE L. REV. 41, 45 (1998) (stating that intentional and unintentional communication are widely available to "a vast number of people").

150. *See* William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960).

> invasion of his privacy, if the matter publicized is of a kind that: (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.[151]

In jurisdictions applying section 652D, courts separate the tort of public disclosure of private facts into four parts: (1) publicity given to a matter that; (2) concerns the private life of another; (3) the matter would be highly offensive to a reasonable person; and (4) is not of legitimate public concern.[152]

Under the Restatement (Second), "publicity" entails communicating a matter in such a way as to make it available to the public at large rather than merely a few individuals.[153] With regard to online content, information posted on a website is sufficient to meet the publicity requirements. Moreover, a private fact concerns the private matter, as opposed to a public fact, of an individual, and does not entail information that is already known or easily ascertainable in the public marketplace. Element three, "highly offensive," is defined by the Restatement to refer to "customs of the time and place." Here, personal facts—such as the identify of someone with whom a party has had sexual relations—may constitute highly offensive information. Lastly, the Restatement requires the matter not be one in which the public has a "proper interest" in discovering.

V. Duty Owed to Third Parties

In *Palsgraf v. Long Island Railroad*,[154] Chief Judge Cardozo set forth the element of duty as being a relational concept by explaining:

> The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not

151. RESTATEMENT (SECOND) TORTS § 652D (1977).

152. *See* Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, fn. 38 (1996) (citing forty-one states that parallel the Restatement's elements for the public disclosure tort).

153. § 652D, cmt. A.

154. *Palsgraf*, 162 N.E. at 99.

> actionable unless it involves the invasion of a legally protected interest, the violation of a right. Proof of negligence in the air, so to speak, will not do.[155]

By way of an example:

> Suppose A engages in an activity that results in foreseeable harm to B. Because the harm was foreseeable, A had it within his power to avoid causing it; even if there were no precautions he could have taken to reduce the risk, he could have forgone the activity altogether. He thus had a certain measure of control over the situation, and . . . it seems reasonable to ascribe to him a special responsibility for the outcome that, in general, other persons do not have.[156]

In recent history, victims of drunk drivers have been able to successfully file suit against the establishments that provided the driver with the alcohol that caused the accident.[157] Georgia's dram shop law states: "the victims of these crashes can sue if bar staff serves a noticeably intoxicated person who they know will soon be driving."[158] What is the difference between an intoxicated person behind the wheel of a vehicle and a person online posting injurious conduct? Focusing on the end result—nothing. The victim of the drunk driver is either permanently injured or killed as a result. The victim of the online injurious content is either permanently injured or believes there is no other option than to take their own life.[159]

The thrust of any dram shop law[160] is that a provider of alcohol has the ability to observe the nature of individual consuming alcohol

155. *Id.*

156. Stephen R. Perry, *Tort Law*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 57, 72 (Dennis Patterson ed., 1996).

157. Craig Schneider, *Crash Victims Can Sue Taversn*, ATL. J-CONST. (Aug. 31, 2012, 7:33 pm), http://www.ajc.com/news/news/crime-law/wrong-way-crash-raises-liability-questions /nRSDC/.

158. *Id.*

159. *See, e.g.*, A.O. Scott, *Behind Every Harassed Child? A Whole Lot of Clueless Adults*, N.Y. TIMES, Mar. 30, 2012, C10, *available at* http://movies.nytimes.com/2012/03/30/movies/bully-a-documentary-by-lee-hirsch.html?_r=0 (providing review of the movie *Bully*). While the Author notes physical bullying is not the functional equivalent of online bullying—as a result of the missing physical contact—as online interactions increase, has the time come to treat an individual's online "space" the same as the individual's physical "space"?

160. *E.g.*, Ga. Code Ann. § 51-1-40 (2012). Georgia's Dram Shop Act takes a position against the common law by imposing liability to providers of alcohol where injury results

before they are provided with another drink. Again, this is not much different than a web host's ability to review the content that is posted online. As a private actor, a web host is able to review—and censor if necessary—speech before it is published.[161] As the effects of online speech cannot be erased by simply removing the harmful content, reviewing the speech for content that has the intended effect of harming a third party appears to be a necessity in the fight against online injurious speech.

VI. Conclusion

The Internet and social media are now integral parts of everyday life, and the growth of each in recent history has been nothing less than explosive. Along with the increased use and accessibility comes the possibility of abuse and a marked increase in its harmful effects. Mainly, cyberbullying has become so prevalent in our society that the time has come to place some responsibility on the web host. Just as the publisher can be held liable for publishing defamatory material,[162] the web host should be liable for doing the same because "[e]veryone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others."[163]

to a third person, and the acting causing the harm was either under the age of twenty-one and was provided with alcohol or was provided with alcohol when in a noticeably intoxicated state. *See id.*

161. *But see* 4 WILIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *151–52 ("[T]he liberty of the press is, indeed, essential to the nature of free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published.").

162. *E.g.*, Lilian Edwards, *Defamation and the Internet: Name-calling in Cyberspace*, *in* LAW & THE INTERNET: REGULATING CYBERSPACE 183 (Lillian Edwards & Charlotte Waelde eds., 1997) (asserting that "users of the Internet are more likely than ordinary citizens to be found publishing comments which are actionable as defamatory"). *See generally* Gary L. Gassman, *Internet Defamation: Jurisdiction in Cyberspace and the Public Figure Doctrine*, 14 J. MARSHALL J. COMPUTER & INFO. L. 563 (1996).

163. *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).