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Notes

Caught in the Web: Enjoining Defamatory Speech that Appears on the Internet

JOSEPH G. MARANO*

Courts have consistently interpreted section 230 of the Communications Decency Act (“CDA”) as shielding internet service providers from liability for defamatory content posted by users. This is a significant departure from traditional defamation law where publishers may be held liable for defamation upon reprinting defamatory material originally written or spoken by third parties. As this Note explains, the courts’ interpretations of section 230 are in direct conflict with the Act’s legislative history. Indeed, Congress made clear that the goal of section 230 was to protect websites that engaged in editorial self-regulation by deleting obscene and inappropriate content posted by users.

*Because of this immunity, plaintiffs who are defamed on the internet have little recourse, largely due to the practical limitations inherent in litigating online defamation claims. The California Court of Appeal has attempted to fashion a remedy for this situation. In *Hassell v. Bird*, a case pending before the California Supreme Court, the California Court of Appeal issued an injunction ordering Yelp to remove a defamatory review. This Note supports the Court of Appeal’s decision, and argues that the evolving nature of the internet, along with the overbroad immunity courts have read into section 230 of the CDA, necessitate a remedy. This Note suggests that to protect First Amendment rights, and to overcome the traditional presumption against injunctions in defamation cases, courts should design third-party injunctions to require websites to remove only language that a court has found to be defamatory, and to also afford websites the opportunity to try the case on the merits in the event of a default judgment.*

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INTRODUCTION

A consistent problem over the last twenty years relates to defamatory statements that appear on review websites and other internet service providers such as Yelp.¹ Until recently, recourse for internet defamation victims was virtually non-existent due to section 230 of the Communications Decency Act of 1996 (“section 230” and “CDA,” respectively).² Congress promulgated the CDA as a response to what was known to some legislators as the Great Internet Sex Panic of 1995.³ The burgeoning internet was—and still is—home to a lot of pornography. The law’s purpose was primarily related to censorship and protecting children from encountering pornography online.⁴

Although the United States Supreme Court held unconstitutional a majority of the censorship provisions of the CDA in *Reno v. ACLU*, the Court left section 230 intact.⁵ Section 230 is largely concerned with defamation, stating that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information

1. Associated Press, *Yelp Is Not Liable for Bad ‘Star’ Ratings of Businesses, Court Rules*, L.A. TIMES (Sept. 12, 2016, 4:10 PM), <http://www.latimes.com/business/technology/la-fi-tn-yelp-ruling-20160912-snap-story.html>.

2. See *Kimzey v. Yelp!, Inc.*, 836 F.3d 1263, 1265 (9th Cir. 2016).

3. *The Communication Decency Act (CDA) of 1996*, OFFENDER WATCH INITIATIVE, <http://offenderwatchinitiative.org/Resources/CDA-Act> (last visited Apr. 21, 2018).

4. *Id.*

5. *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

provided by another information content provider.”⁶ Thus, unlike publishers of traditional media such as books and newspapers, civil liability for defamatory content created by third parties may not be imposed on internet service providers such as Yelp.⁷ Case law over the past twenty years has reflected this trend, and continues to this day.⁸ Unsurprisingly, section 230 has hardly been able to keep pace with the multitude of breakthroughs that the technology sector innovates for the internet on a daily basis.⁹ As a result, courts are presented with a very important issue: how to protect and provide recourse for individuals and businesses defamed online, while still allowing the internet to function as a media platform where First Amendment rights are of paramount importance.

Most recently, California courts have encountered this issue in *Hassell v. Bird*.¹⁰ In *Hassell*, a disgruntled client (“Bird”) allegedly defamed her lawyer (“Hassell”) by posting several unfavorable Yelp reviews under the pseudonym “Birdzeye B.”¹¹ Only one of the reviews remains on Yelp.¹²

6. 47 U.S.C. § 230(c)(1) (2011).

7. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008).

8. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997); *Kimzey v. Yelp!, Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016).

9. See generally Ali Grace Zieglowsky, Note, *Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act*, 61 HASTINGS L.J. 1307 (2010) (arguing that courts should adopt a “totality of circumstances” standard of review and abandon section 230 immunity); Patricia Spiccia, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VAL. U. L. REV. 369 (2013).

10. *Hassell v. Bird*, 247 Cal. App. 4th 1336 (Cal. Ct. App. 2016).

11. *Id.* at 1343.

12. The review reads,

well, here is another business that doesn't even deserve one star. basically, dawn hassell made a bad situation much worse for me. she told me she could help with my personal injury case from falling through a floor, then reneged on the case because her mom had a broken leg, or something like that, and that the insurance company was too much for her to handle. and all of this after i met with her office (not her personally, she was nowhere to be found) signed paperwork to 'hire' them and gained confidence in her office (due mostly to yelp reviews) so, in all fairness, i have to share my experience so others can be forewarned. she will probably not do anything for you, except make your situation worse. in fact, after signing all the paperwork with her office, like a broken record, they repeated 'DO NOT TALK TO THE INSURANCE COMPANY' over and over and over. and over and over. so i honored that and did not speak to them. but, the hassell law group didnt ever speak with the insurance company either, neglecting their said responsibilities and not living up to their own legal contract! nor did they bother to communicate with me, the client or the insurance company AT ALL. then, she dropped the case because of her mother and seeming lack of work ethic. (a good attorney wont do this, in fact, they arent supposed to) to save your case, STEER CLEAR OF THIS LAW FIRM! and research around to find a law firm with a proven track record of success, a good work ethic, competence and long term client satisfaction.

Hassell filed her complaint in the San Francisco County Superior Court, and Bird, for whatever reason, never answered.¹³ As a result, Hassell obtained a default judgment in which the court imposed liability on Bird and enjoined Yelp, requiring the website to remove the reviews and disallow “Birdzeye B.” from posting additional reviews for Hassell’s law firm.¹⁴ Yelp appealed the decision on the basis that the CDA bars the court from issuing an injunction against a non-party.¹⁵ Nevertheless, the Court of Appeal largely upheld the trial court’s decision, invalidating only the portion of the injunction relating to Bird’s potential future reviews.¹⁶

Consistent with section 230, the California Court of Appeal did not impose any liability on Yelp.¹⁷ Instead, the court attempted to solve the recurring problem of online defamation by fashioning a remedy that imposed liability only on the defaming party, while merely enjoining Yelp, a non-party to the lawsuit.¹⁸ The injunction requires Yelp to remove the defamatory review.¹⁹ Despite Yelp’s challenge to the contrary, the injunction is not actually an imposition of liability.²⁰

This remedy, though certainly an innovative solution, raises a host of legal questions. These include two interrelated issues: whether the law permits a court to issue an injunction against a non-party, and, if so, whether the remedy violates the First Amendment in the context of internet speech. As of December 2017, *Hassell* is on appeal before the California Supreme Court.²¹ This Note argues that the California Court of Appeal has fashioned a reasonably effective remedy for online defamation, but that the California Supreme Court should modify and narrow the remedy in order to better ensure protection of the First Amendment’s guarantee of freedom of expression.

I. THE CDA, SECTION 230 CASE LAW, AND NON-PARTY INJUNCTIONS

An examination of section 230 and the CDA’s legislative history and subsequent case law is necessary to properly contextualize the Court of Appeal’s decision in *Hassell* and analyze the injunction remedy.

there are many in the bay area and with some diligent smart interviewing, you can find a competent attorney, but this wont be one of them.

Birdzeye B., *Yelp Review*, YELP (Jan. 28, 2013), <https://www.yelp.com/biz/hassell-law-group-san-francisco-2?start=20>.

13. *Hassell*, 247 Cal. App. 4th at 1343.

14. *Id.* at 1341.

15. *Id.*

16. *Id.*

17. *Id.* at 1363.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Hassell v. Bird*, 381 P.3d 231 (Cal. 2016).

A. SECTION 230 OF THE CDA

In 1996, Congress promulgated section 230 of the CDA to permit and encourage freedom of expression on the internet.²² Congress also intended to protect websites and internet service providers, which include websites that allow users to post reviews, online forums and message boards, social media services, and other online channels of communication, from liability for third-party content produced by users of such websites.²³

Prior to the enactment of section 230, while Congress was drafting and debating the law, the Supreme Court of New York decided *Stratton-Oakmont, Inc. v. Prodigy Services Company*.²⁴ Indeed, section 230 was, in part, a response to *Stratton-Oakmont* and served to overturn the court's decision in that case.²⁵ In *Stratton-Oakmont*, the key issue before the court was whether Prodigy, an online forum with subscribers who posted content and messages to the forum, should be considered a publisher for purposes of defamation law.²⁶ In *Stratton*, an individual posted certain defamatory statements on the forum, alleging that Stratton-Oakmont and the company's president committed criminal fraud in connection with a number of securities offerings.²⁷ The court held that because Prodigy had policies in place regarding permissible user content, and also because Prodigy routinely edited and moderated offensive content that users posted, Prodigy should be considered a publisher similar to a newspaper.²⁸ Importantly, the court emphasized that it was Prodigy's policies and editorial actions relating to third-party content that were the key considerations in holding that Prodigy was a publisher, rather than the online equivalent to something more like a library or bookstore.²⁹ The court also expressed the public policy concern that by editing users' posts, Prodigy was restricting freedom of speech and expression on the internet.³⁰

While Congress certainly shared those First Amendment concerns, it disagreed with the court's decision in *Stratton-Oakmont*.³¹ As a result, Congress passed the CDA the following year, with section 230 effectively

22. 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, 378–79 (2010).

23. *Id.* at 379.

24. *Stratton-Oakmont Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1995).

25. H.R. Rep. No. 104-458, at 194 (1996). "One of the specific purposes of [section 230] is to overrule *Stratton-Oakmont v. Prodigy* . . ."

26. *Stratton-Oakmont, Inc.*, 1995 N.Y. Misc. LEXIS 229, at *2.

27. *Id.*

28. *Id.* at *3–4.

29. *Id.* at *12–13.

30. *Id.* at *12.

31. H.R. Rep. No. 104–458, at 194 (1996) (Conf. Rep.).

overturning *Stratton-Oakmont*.³² Congress intended for section 230 to provide a safe harbor for websites that were “Good Samaritans”—those that took reasonable steps to screen content posted by third parties and remove content that was considered indecent or offensive.³³ The idea was that by providing this safe harbor, Congress would encourage websites to self-regulate.³⁴ Specifically, subsection (c) of section 230 states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”³⁵ Subsection (c) also provides that websites will not be held liable for “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.”³⁶

Rather than reading section 230(c) as a narrow safe harbor affording immunity to websites that self-regulate, courts have instead read the law as one that provides blanket, absolute immunity to all websites for any and all content produced by third parties.³⁷ In this way, courts have essentially ignored the legislative intent behind section 230, opting instead for a close textual reading of the statute.³⁸ As of this writing, Congress has done nothing to correct the courts’ misguided interpretations.

32. *Id.*

33. See Lukmire, *supra* note 22, at 378–80.

34. Lukmire, *supra* note 22, at 378–80. Specifically, Congress hoped that section 230 would incentivize internet service providers to censor offensive and indecent material that third parties might post. Indeed, Representative Christopher Cox stated during a hearing regarding the amendment to the CDA that would eventually become section 230, “We want to encourage [internet service providers] to do everything possible for us . . . to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see.” 141 CONG. REC. H. 8460 (1995). In addition, the House Committee Report on the bill further supports this contention. Specifically, the report states that “[o]ne of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.” H.R. Rep. No. 104-458, at 194 (1996). Thus, legislative history indicates that Congress envisioned the Good Samaritan safe harbor to serve the narrow purpose of shielding from liability internet service providers that edit obscene and inappropriate content posted by users. This purpose is further supported by the statute itself, which invokes language related to pornography and violence. 47 U.S.C. § 230(c)(2)(A) (2011). Clearly, Congress’s purpose in enacting the bill is squarely at odds with the courts’ broad interpretation of the statute’s language affording websites blanket liability for user content.

35. 47 U.S.C. § 230(c)(1).

36. 47 U.S.C. § 230(c)(2)(A).

37. See *Kimzey v. Yelp!, Inc.*, 836 F.3d 1263, 1265 (9th Cir. 2016); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

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

For the foregoing reasons, there is presently no recourse for those harmed by third-party content on websites. As *Hassell* demonstrates, suing individuals who write defamatory statements often leads nowhere—such persons are loath to respond to complaints, resulting in default judgments that, due to the absence of the defendant, preclude the plaintiff from recovering.³⁹ Furthermore, because internet anonymity often makes it impossible for plaintiffs to identify those who defame them in the first place,⁴⁰ filing a lawsuit can become an impossibility. Due to section 230, defamed individuals have been precluded from recovering damages from websites that host defamatory statements.⁴¹ However, now that the California courts have attempted to fashion a remedy for individuals damaged by defamatory material on the internet,⁴² it is useful to examine a line of cases from *Zeran v. America Online, Inc.*, the first case to render websites immune under section 230, to *Hassell*. Doing so reveals the nuances of section 230 and sheds light on the legal permissibility of the California Court of Appeal’s non-party injunction, along with its First Amendment implications.

B. SECTION 230 CASE LAW

Section 230 was first interpreted in *Zeran v. America Online, Inc.*⁴³ In *Zeran*, the United States Court of Appeals for the Fourth Circuit interpreted the language of section 230 quite broadly, holding that the statute immunizes internet services providers from liability for information originating from third parties.⁴⁴ The facts of *Zeran* involved an anonymous individual who posted on AOL message boards that Zeran was selling distasteful shirts with offensive slogans related to the Oklahoma City bombing that occurred in 1995.⁴⁵ The post included Zeran’s home phone number and invited other AOL users to call him in order to purchase the shirts.⁴⁶ Unsurprisingly, this caused Zeran to receive abusive phone calls and death threats.⁴⁷ AOL relied on part of section 230⁴⁸ as a defense, and the court agreed, stating that “[b]y its plain language, [section] 230 creates federal immunity to any cause of

39. *Hassell v. Bird*, 247 Cal. App. 4th 1336, 1343 (Cal. Ct. App. 2016).

40. *Zeran*, 129 F.3d at 329.

41. *Id.* at 330.

42. *Hassell*, 247 Cal. App. 4th at 1341.

43. *Zeran*, 129 F.3d at 327.

44. *Id.* at 330.

45. *Id.* at 329.

46. *Id.*

47. *Id.*

48. 47 U.S.C. § 230(c)(1) (2011). That section of the statute reads as follows: “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.”

action that would make service providers liable for information originating with a third-party user of the service . . . preclud[ing] courts from entertaining claims that would place a computer service provider in a publisher's role."⁴⁹

Zeran also attempted to argue that even if the court held that AOL was immune from liability because it was a publisher, it could still be found liable for the defamatory statements as a distributor with knowledge of those statements.⁵⁰ The court rejected this argument on the grounds that distributor liability is essentially equivalent to publisher liability. Specifically, the court stated that a distributor is necessarily a publisher and that, because the language of section 230 makes AOL a publisher, AOL could not be held liable.⁵¹ The court also discussed the *Stratton-Oakmont* decision, and Congress's purpose of enacting section 230 in order to create an incentive to self-regulate.⁵² The court's textualist reading of the statute in *Zeran* was consistent with the part of the CDA's legislative history promoting free communications on the internet. However, by granting blanket immunity to websites, the court effectively disincentivized the self-censorship that Congress intended when it passed section 230 and overturned *Stratton-Oakmont*. Absent the potential of liability for what their users write, websites might not have any reason to expend any resources regulating and censoring user content.

Other federal courts have followed the *Zeran* decision. For example, in 2016, the United States Court of Appeals for the Ninth Circuit held in *Kimzey v. Yelp!, Inc.* that the statutory bar against website liability for user-generated content remained intact and could not be circumvented merely by way of "creative pleading."⁵³ That case, like *Hassell*, involved allegedly defamatory reviews posted on Yelp.⁵⁴ *Kimzey* argued that even if Yelp was granted immunity under section 230, consistent with the interpretation in *Zeran*, the website could still be held liable because it allegedly had a hand in creating and developing the content.⁵⁵ *Kimzey* further argued that by causing the defamatory review to appear as a promotion or ad on Google's search engine, Yelp was also an "information content provider" as defined under subsection (f)(3) of section 230—someone "responsible, in whole or in part, for the creation

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

50. *Id.* at 331.

51. *Id.* at 332.

52. *Id.* at 331.

53. *Kimzey v. Yelp!, Inc.*, 836 F.3d 1263, 1265 (9th Cir. 2016).

54. *Id.* at 1265–66.

55. *Id.*

or development of information.”⁵⁶ In other words, if Yelp played a role in the development of the content, it could be held liable for defamation just as the person who wrote the review could be held liable.⁵⁷ The court rejected this argument on the grounds that it was merely artful pleading designed to circumvent section 230’s safe harbor, and that promoting the review as an ad on Google did not meet the threshold of creating or developing content.⁵⁸

Kimzey illustrates two important points. First, courts continue to interpret section 230 as providing blanket immunity in the context of defamation law. Second, *Kimzey*’s argument about Yelp’s role in promoting the review presages an argument critical to the validity of the court’s injunction in *Hassell*—that because Bird acted through Yelp to write her reviews, the court was permitted to enjoin Yelp, despite its status as a non-party.⁵⁹

Barrett v. Rosenthal is the most recent case involving a section 230 defense that the California Supreme Court has decided.⁶⁰ While the decision is consistent with prior California and federal decisions regarding section 230, the court, in dicta, also addressed the problem that the plaintiff in *Kimzey* raised—websites that are actively involved in the creation of user content.⁶¹ In a footnote, the court stated that at a certain point a website’s active involvement in the creation of a defamatory statement would cause the website to suffer liability.⁶² The court did not address what sort of actions a website would have to take in order to share liability with a user, and acknowledged that “many courts have reasoned that participation going no further than the traditional editorial functions of a publisher cannot deprive a defendant of section 230 immunity.”⁶³ Thus, a website would have to do something more than act merely as a publisher in order to be subject to liability. Pursuant to *Kimzey*, actively promoting a defamatory statement on a search engine would not meet the court’s undetermined threshold.⁶⁴

Compare these cases to *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, a case in which the United States Court of Appeals for the Ninth Circuit held that the website defendant did *not*

56. *Id.* at 1266; 47 U.S.C. § 230(f)(3) (1996).

57. *Kimzey*, 836 F.3d at 1267.

58. *Id.*

59. *Hassell v. Bird*, 247 Cal. App. 4th 1336, 1355–56 (Cal. Ct. App. 2016).

60. *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006).

61. *Id.* at 527 n.19.

62. *Id.*

63. *Id.*

64. *Kimzey v. Yelp!, Inc.*, 836 F.3d 1263, 1267 (9th Cir. 2016).

enjoy section 230 immunity.⁶⁵ In *Roommates.com*, several governmental housing organizations sued Roommate.com LLC and alleged that the website's questionnaires related to users' gender, race, sexual orientation, etc., violated the Fair Housing Act ("FHA").⁶⁶ The court agreed, holding that Roommate.com LLC *developed* users' answers to the questions by taking the answers and using them to match users with one another.⁶⁷ The court provided some guidance as to what, precisely, "develop" means in the context of section 230, interpreting "the term 'development' as referring not to merely augmenting the content generally, but to materially contributing to its alleged unlawfulness."⁶⁸

While this guidance is useful in the context of FHA claims, no similar interpretations of section 230 have been put forth in relation to defamation claims. If nothing else, *Roommates.com* shows that courts are still working through the level of involvement required of a website to break the immunity that section 230 imposes. Indeed, for FHA claims that bar appears to be high. Furthermore, given that the case is ten years old as of this writing, modern advances in computing technology and search engine algorithms beget the issue of whether, today, a seemingly lower level of "development" might pass muster with courts as to breach the broad scope of section 230 immunity.

While it does not appear that Yelp's role in *Hassell* rises to the level of involvement the court mentions in *Barrett* or *Roommates.com*, it is reassuring that the California Supreme Court, albeit only in dicta, has finally acknowledged that the blanket immunity created by section 230 is problematic.⁶⁹ The court also appears to be cognizant of the fact that individuals who are defamed require guidance as to what extent a website must develop user content in order to lose section 230 immunity and, thus, provide defamed parties with recourse.⁷⁰ The remedy applied in *Hassell* similarly requires website involvement, but to a much lower degree than the hypothetical liability thresholds discussed in *Barrett* or *Roommates.com*. Considering the background and history of the remedy the Court of Appeal ordered in *Hassell* highlights the benefits and detriments of the remedy, as well as the First Amendment issues implicated.

65. Fair Hous. Council of San Fernando Valley v. Rommates.com, LLC, 521 F.3d 1157, 1175 (9th Cir. 2008).

66. *Id.* at 1162.

67. *Id.* at 1168.

68. *Id.* at 1167–68.

69. *Barrett v. Rosenthal*, 146 P.3d 510, 527 n.19 (Cal. 2006).

70. This notion is evident in the mere fact that the Court of Appeal upheld the trial court's injunction in *Hassell v. Bird*. 247 Cal. App. 4th 1336 (Cal. Ct. App. 2016).

C. INJUNCTIONS THAT RUN TO A NON-PARTY

The history of injunctions that run to a non-party goes back over a century.⁷¹ The earliest case in which the United States Supreme Court issued such an injunction was *In re Lennon*, where the Court ruled that an injunction imposed on a railroad company was enforceable against one of its employees.⁷² Justice Brown wrote that “[t]o render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have actually been served with a copy of it, so long as he appears to have had actual notice.”⁷³ *In re Lennon* establishes actual notice as a critical element required for a non-party injunction to be enforceable.⁷⁴ Importantly, only actual notice, as opposed to formal notice, is required.⁷⁵

Two decades after *In re Lennon* was decided, the California Supreme Court in *Berger v. Superior Court* issued a decision that foreshadowed the link between non-party injunctions and freedom of expression issues embodied in the First Amendment.⁷⁶ *Berger* established a limitation on how wide non-party injunctions may be cast.⁷⁷ In *Berger*, a group of individuals was enjoined from picketing a theater.⁷⁸ Upon learning of the injunction, a new group of picketers began a demonstration of their own.⁷⁹ Although the theater attempted to persuade the court that the injunction applied to the new group of picketers, the court disagreed with that argument.⁸⁰ The court affirmed that it is common to have injunctions “run to classes of person through whom the enjoined party may act, such as agents, servants, employees, aiders, abettors, etc., though not parties to the action.”⁸¹ Because the new group of picketers was in no way related to the original group against which the theater obtained an injunction, the court held that the injunction could not apply to the new group of picketers.⁸²

Berger is important for three reasons. First, it illustrates how delicately courts must consider the relationship of the enjoined parties

71. *In re Lennon*, 166 U.S. 548 (1897).

72. *Id.* at 554.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Berger v. Superior Court*, 167 P. 143 (Cal. 1917).

77. *Id.* at 143.

78. *Id.* at 143–44.

79. *Id.* at 144.

80. *Id.*

81. *Id.*

82. *Berger v. Superior Court*, 167 P. 143, 144 (Cal. 1917).

when crafting a non-party injunction.⁸³ Presumably, if the theater proved that the picketers were two subsets of members of a civic organization, or merely that the two groups were in communication with one another, the court may have reached the opposite conclusion. Second, the case exemplifies the level of scrutiny courts use in cases of non-party injunctions that relate to free speech and the First Amendment. Finally, the case sets forth several classes of persons that may be enjoined despite their non-party status.⁸⁴ These classes include, most significantly for purposes of *Hassell*, individuals “through whom the enjoined party may act.”⁸⁵

A more recent case involving non-party injunctions is *Ross v. Superior Court*.⁸⁶ *Ross* arose in the aftermath of *Cooper v. Obledo*.⁸⁷ In *Obledo*, the California Supreme Court invalidated several provisions of a state welfare statute, and issued an injunction requiring the retroactive payment of benefits.⁸⁸ One group of county supervisors refused to comply, arguing that the injunction only ran to the California Department of Health and Welfare, not the supervisors themselves.⁸⁹ Despite the fact that the supervisors were not parties to the original lawsuit, the court held that they were agents of the state agency and, thus, the injunction applied to them.⁹⁰ Indeed, the trial court’s injunctive order was drafted such that it applied to the “defendants, their successors in office, *agents* and employees.”⁹¹

Ross provides three additional points about non-party remedies. First, the court clarified the concept of an “agent,” and what types of individuals constitute agents for the purposes of non-party injunctions.⁹² Specifically, the court confirmed that an individual or entity through which the enjoined party may act can be subject to a non-party injunction.⁹³ Second, *Ross* established that non-party injunctions may require the enjoined party to act in a manner that has a retroactive effect.⁹⁴ Finally, the court added the element of ability to comply with the requirements for issuing non-party injunctions.⁹⁵

83. *Id.*

84. *Id.*

85. *Id.*

86. *Ross v. Superior Court*, 569 P.2d 727 (Cal. 1977).

87. *Id.* at 729–30; *Cooper v. Swoap*, 524 P.2d 97 (Cal. 1974). The case was originally titled *Cooper v. Swoap*.

88. *Ross*, 569 P.2d at 730.

89. *Id.* at 729–31.

90. *Id.* at 733.

91. *Ross*, 569 P.2d at 731.

92. *Id.*

93. *Id.*

94. *Id.* at 738.

95. *Id.*

Overall, *Ross* identifies the broad range of classes of persons to which such an injunction can apply, and undercuts arguments a petitioner such as Yelp might raise to argue that such an injunction cannot apply to them. The retroactivity discussion in *Ross* is significant because it would not preclude a court from requiring a petitioner to remove defamatory user content from a website, such as in *Hassell*. *Ross* also reaffirms the requirement of actual notice, as opposed to formal notice, while adding ability to comply with the elements that must be met in order to issue non-party injunctions.⁹⁶

With sufficient background on the CDA and section 230, numerous courts' interpretations of section 230, and the remedy that the court ordered in *Hassell*, it is necessary to turn to the actual application of said remedy. In doing so, two interrelated problems become apparent: whether the court's imposition of the injunction against Yelp is permitted under the law, and whether the remedy, in the context of Yelp, violates the First Amendment.

II. HOW THE CALIFORNIA SUPREME COURT SHOULD DECIDE *HASSELL V. BIRD*

The California Supreme Court should partially affirm the lower court's ruling by narrowing the scope of the injunction to preclude removal of future posts by Bird, and giving Yelp a chance to defend in court against the defamation claim. It is important that Yelp have the opportunity to do this given the sensitivity of First Amendment issues that the case raises, and due to *Hassell*'s receipt of a default judgment. In order to understand why the court should rule this way, consider first the consequences should the court reverse the Court of Appeal's injunction entirely.

A. THE CONSEQUENCES OF UPHOLDING THE LOWER COURT'S DECISION

Currently, most individuals who are the subject of defamatory statements posted on review websites, or anywhere on the internet for that matter, have essentially no recourse. A primary reason for this is internet anonymity. For example, in *Zeran* the plaintiff was forced to endure death threats, have his home placed under protective surveillance, and nearly shut down his business.⁹⁷ Due to section 230 immunity, *Zeran* did not recover any damages whatsoever.⁹⁸ One might suggest that *Zeran* should have sued the person who wrote that he was selling t-shirts making light of the Oklahoma City bombings, but doing

96. *Id.* at 731–32.

97. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 (9th Cir. 1997).

98. *Id.* at 330.

so would have been impossible. Internet message boards, such as the one on which someone defamed the plaintiff in *Zeran*,⁹⁹ along with review websites, comments on news articles, and a multitude of other internet service providers all permit users—that is, content providers, which include individuals who post on the internet—to remain anonymous.

Theoretically, it might be possible for a website to use an Internet Protocol address (“IP address”) to cooperate with lawsuits and track down names and addresses of third-party content providers.¹⁰⁰ This kind of cooperation, however, might burden websites. Indeed, the burden is likely higher than that brought on by the remedy ordered in *Hassell*, as websites would have to expend far more time and resources tracking down users via their IP addresses than they would by simply removing defamatory content.

Identifying users is only the first in a long line of hurdles plaintiffs would have to jump to sue their defamers. Once identified, plaintiffs must serve defendants in order to recover. Service of process itself could be especially challenging, given the fact that identifying a plaintiff by way of his or her IP address would not necessarily yield a physical address at which to serve them.¹⁰¹

In addition, getting the defendants to answer the complaint would be another challenge entirely. As *Hassell* illustrates, some defendants simply will not respond to the complaint.¹⁰² There are a number of reasons that a defendant might ignore the complaint. For example, perhaps a hacker used a random IP address to post defamatory statements online. Alternatively, perhaps an identified defendant does not care enough to respond to the complaint and would be perfectly happy if a court ordered the website to remove the language. For reasons unknown, Bird ignored *Hassell*’s complaint, resulting in a default judgment.¹⁰³ The challenge of identifying the defamer, combined with the challenge of hauling him or her into court, are two prime reasons why the solution of simply suing the individual behind defamatory writings is simply impractical.

A broader policy implication of not allowing recourse for victims of defamation becomes evident by way of analogy to other types of claims in which websites are deemed liable for their actions. In one such situation, websites—in reality, the operators of such websites—have

99. *Id.* at 329.

100. See Louise Story, *How Do They Track You? Let Us Count the Ways*, N.Y. TIMES: BITS (Mar. 9, 2008, 11:19 PM), <https://bits.blogs.nytimes.com/2008/03/09/how-do-they-track-you-let-us-count-the-ways/>.

101. *Id.*

102. *Hassell v. Bird*, 247 Cal. App. 4th 1336, 1343 (Cal. Ct. App. 2016).

103. *Id.*

been held liable for acting as a conduit for criminal activity.¹⁰⁴ Perhaps the most infamous example is Silk Road, an online marketplace via the darknet where users could purchase illicit drugs, among other contraband.¹⁰⁵ For several years, and with little success, law enforcement worked to prosecute individuals who purchased or sold drugs on Silk Road.¹⁰⁶ The marketplace was finally shut down, at least temporarily until other parties created successor marketplaces such as Silk Road 2.0 and Silk Road 3.0.¹⁰⁷

The story of Silk Road might be viewed as a microcosm of the larger issue of internet defamation. While prosecutors were unable to solve the problem of Silk Road by prosecuting its users, they prosecuted the person who ran Silk Road and succeeded in shutting down the marketplace.¹⁰⁸ Similarly, internet defamation cannot be addressed by targeting individual users, as explored at length above and exhibited perfectly by the problems presented by *Hassell*. If Congress refuses to update the language of section 230 to better reflect the innovative nature of the internet, along with their original goal of encouraging websites to self-censor, and if courts continue to interpret the poorly-written statute as granting blanket immunity to websites, the problem of internet defamation will never be solved. Thus, unless courts and Congress are determined to leave defamation victims with no recourse, a creative remedy involving the websites themselves, such as that of non-party injunctions, demands implementation.

B. THE CONSEQUENCES OF IMPLEMENTING THIS SOLUTION

Due to the significant consequences of maintaining the status quo regarding section 230's grant of total immunity, it is necessary to consider the problems that might arise should the California Supreme Court decide to partially affirm the Court of Appeal's injunction by disallowing removal of future posts by Bird, and giving Yelp a chance to defend against the defamation claim. This remedy begs the question: can a court issue a non-party injunction ordering a website to remove arguably protected speech?

104. Benjamin Weiser, *Ross Ulbricht, Creator of Silk Road Website, Is Sentenced to Life in Prison*, N.Y. TIMES (May 29, 2015), <https://www.nytimes.com/2015/05/30/nyregion/ross-ulbricht-creator-of-silk-road-website-is-sentenced-to-life-in-prison.html>.

105. Adrian Chen, *The Underground Website Where You Can Buy Any Drug Imaginable*, GAWKER (June 1, 2011, 1:14 PM), <http://gawker.com/5805928/the-underground-website-where-you-can-buy-any-drug-imaginable> [<http://web.archive.org/web/20110603015735/>].

106. *Id.*

107. Joseph Bradley, *Silk Road 3.0 Is Back . . . Will It Last?*, CRYPTOCOINS NEWS (May 14, 2016, 2:01 AM), <https://www.cryptocoinsnews.com/silk-road-3-0-back-will-last/>.

108. *Supra* note 104.

1. *The Presumption Against Injunctions in Defamation Cases*

As a threshold issue, it is important to consider the long-standing rule that equitable remedies, such as injunctions, are not permitted in defamation cases because, functionally, they violate the Prior Restraint Doctrine.¹⁰⁹ Professor Chemerinsky, a constitutional law scholar, has argued against the recent trend involving some courts that have departed from the aforementioned rule.¹¹⁰ Although the United States Supreme Court has never decided the question of whether injunctions are permissible in defamation cases,¹¹¹ the California Supreme Court, in *Balboa Island Village Inn, Inc. v. Lemen* held that “following a trial at which it is determined that the defendant defamed the plaintiff, the court may issue an injunction prohibiting the defendant from repeating . . . statements determined to be defamatory.”¹¹² In addition, the court noted that such injunctions must be drawn in an extremely narrow manner as to avoid violating the Prior Restraint Doctrine.¹¹³ Nevertheless, in his article, Professor Chemerinsky argues that crafting narrow injunctions prohibiting defamatory speech would ultimately be useless and serve no functional purpose.¹¹⁴ On the other hand, a broader injunction that covers future speech would be an unconstitutional prior restraint.¹¹⁵

While these are valid arguments for purposes of traditional defamation law, in cases of internet defamation, an individual’s defamatory speech can remain accessible for many years. People often consult Yelp when deciding to eat at a certain restaurant, use a particular business, or, as in *Hassell*, choose a personal injury lawyer. Indeed, in *Hassell*, the Court of Appeal’s injunction only applied to the existing reviews that Bird posted on Yelp.¹¹⁶ As mentioned above, the Court of Appeal remanded the case so that the trial court could reframe the injunction and eliminate the portion that requires Yelp to delete future reviews of Hassell’s law firm posted by the same user that posted the initial defamatory review—Birdzeye B.¹¹⁷

109. See generally Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157 (2007) (discussing, in general, the rule against injunctions in defamation cases, and why courts should continue following that rule). The Prior Restraint Doctrine holds unconstitutional court orders that censor speech before it takes place. See generally *N.Y. Times Co. v. United States* (The “Pentagon Papers” Case), 403 U.S. 713 (1971).

110. Chemerinsky, *supra* note 109, at 157–58.

111. See *Tory et al. v. Cochran*, 544 U.S. 734, 738–39 (2005) (due to the plaintiff’s death, the Court decided the case on narrow grounds and did not resolve the broad question of whether injunctions are allowed in defamation cases).

112. 156 P.3d 339, 349 (Cal. 2007).

113. *Id.* at 351–52.

114. Chemerinsky, *supra* note 109, at 171.

115. Chemerinsky, *supra* note 109, at 171.

116. *Hassell v. Bird*, 247 Cal. App. 4th 1336, 1341 (Cal. Ct. App. 2016).

117. *Id.* at 1345.

An injunction requiring the removal of existing defamatory language posted to a website would be neither a prior restraint, nor futile. Although an individual who defames another on a website could, theoretically, repeat the same statement in slightly different language, that argument should not preclude injunctions for internet defamation causes of action. This is especially true in a case where the plaintiff receives a default judgment, such as in *Hassell*. In such cases, the defendant's disinterest in litigating the claim suggests that defendants will be unlikely to do anything in response to a website that removes their speech. Thus, it is unlikely that a narrow injunction covering only existing defamatory language would be ineffective and cause a defendant to defame again.

2. *The First Amendment and Enjoining Non-Parties*

Issues related to freedom of expression and the First Amendment are the most likely challenges that arise in the context of non-party injunctions that enjoin speech. Indeed, the American Civil Liberties Union ("ACLU") filed an amicus letter with the California Supreme Court on this matter and asked the court to drop the Court of Appeal's injunction altogether.¹¹⁸ The ACLU argues that a court may not issue an injunction to a non-party, even where the non-party has a close relationship with the defendant and where the injunction only prohibits actions that have been found to be illegal.¹¹⁹ Moreover, the ACLU believes that the specific injunction the Court of Appeal issued is not permissible given that it requires Yelp to remove arguably protected speech.¹²⁰ However, the cases that the ACLU presents do not support these arguments, and while the ACLU is correct that the Court of Appeal's injunction is overbroad, the injunction should not be struck down. Instead, it should be narrowed to prevent removal of future Bird posts and also to provide Yelp and Hassell with the opportunity to argue the case on the merits and determine whether Bird's review is actually protected speech.

The ACLU relies on the case *Zenith Radio Corp. v. Hazeltine Research, Inc.* to assert that the court's injunction is not permitted.¹²¹ Specifically, the ACLU argues that *Zenith Radio* supports the notion that due process prohibits such an injunction because Yelp did not participate

118. Amicus Letter, *Hassell v. Bird*, 247 Cal. App. 4th (Cal. Ct. App. 2016) (No. A143233) (supporting request for review), https://www.aclunc.org/docs/20160815-hassell_amicus_letter.pdf ("ACLU Letter").

119. *Id.* at 1.

120. *Id.*

121. *Id.* at 1 (citing *Zenith Radio v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969)).

in the lawsuit and was not an agent of Bird.¹²² However, this case is centered on issues of jurisdiction, not non-party liability. In *Zenith Radio*—a patent infringement case—the United States Court of Appeals for the Seventh Circuit affirmed an injunction against the defendant corporation, but set aside an identical injunction against a corporate subsidiary of the defendant.¹²³ The United States Supreme Court affirmed the lower court’s decision, holding that the injunction was properly set aside due to a lack of personal jurisdiction.¹²⁴ The Court wrote that “a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.”¹²⁵ The ACLU’s amicus letter overlooks the specificity of the findings in *Zenith Radio*, namely, that the injunction was invalidated for jurisdictional reasons.¹²⁶ It was not invalidated solely for non-party reasons. Indeed, there is ample authority permitting courts to enjoin parties through which a defendant might act, as set forth at length in Part II.

Perhaps in light of its selective reading of *Zenith Radio*, the ACLU seemingly clarifies its argument related to injunctions running to non-parties by noting that such orders are not permitted when they prohibit someone’s exercise of free speech.¹²⁷ This idea is supported in *Carroll v. President & Comm’rs of Princess Anne*, discussed below, and it merits consideration given that free speech is a constitutionally protected right that demands the utmost respect.¹²⁸ Despite the rule against injunctions in defamation cases, the critical failure of this argument is that the Yelp review, regardless of whether it is defamatory, is not Yelp’s speech. The ACLU acknowledges that as a distributor, Yelp has an interest in protecting the speech, like a newspaper.¹²⁹ However, section 230 shields Yelp from liability as an internet service provider, unlike in traditional defamation law where publishers are treated as speakers. Thus, the ACLU’s argument by analogy is incomplete and without merit. No authority supports the idea that a non-party injunction regarding internet speech should be under all circumstances barred. The court has enjoined Yelp as a publisher, not an original speaker. Although the injunction crafted by the Court of Appeal remains problematic,

122. Amicus Letter, *supra* note 118, at 4.

123. *Zenith Radio*, 395 U.S. at 107.

124. *Id.* at 100.

125. *Id.* at 110 (citing *Pennoyer v. Neff*, 95 U.S. 714 (1878)).

126. *Zenith Radio*, 395 U.S. at 110.

127. Amicus Letter, *supra* note 118, at 2.

128. *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175 (1968).

129. Amicus Letter, *supra* note 118, at 2.

non-party injunctions in defamation cases should not be wholly barred because a remedy at law may be unattainable.

Indeed, if the review were to be considered Yelp's speech, then Yelp would not be protected under section 230.¹³⁰ Section 230 only protects websites and internet providers when someone else's speech appears on them.¹³¹ For example, if Yelp, as a website, hired professional reviewers to critique restaurants,¹³² Yelp would not be protected if a court found language in such a review to be defamatory. The statute immunizes websites from publication and repetition liability—protections not afforded to newspapers and magazines under traditional defamation law. Of course, if traditional defamation law applied to internet speech, the argument would have merit. However, barring an injunction because it would infringe on Yelp's right to free speech contradicts the way that courts have interpreted section 230. As an internet service provider, Yelp enjoys section 230's safe harbor. Therefore, the argument that Yelp's "speech" cannot be enjoined fails because Yelp is not treated as the speaker under section 230. Thus, the injunction, in some form, must be permitted.

Nevertheless, according to *Carroll*, such orders are prohibited when the non-party has not received notice and has had no chance to participate in the court proceedings.¹³³ Yelp received notice of the injunction, is participating in the case, and satisfies the other requirement of a non-party injunction, which is the ability to comply. Whether Yelp's level of involvement meets the participation requirement set forth in *Carroll* is unclear. However, in case it does not, the solution is simple: the court should give Yelp the chance to defend the defamation claim. Indeed, because Hassell received a default judgment, the ACLU reluctantly suggests that Yelp should at least have the opportunity to defend Bird's speech.¹³⁴

Providing Yelp with the opportunity to defend the defamation claim would eliminate possible constitutional law issues related to Bird's reviews because defamatory speech is generally not protected by the First Amendment. Procedurally, litigating the defamation claim could also relieve the burden on Yelp of having to remove third-party content. When considering public policy, litigating the defamation claim appears to help both victims of defamation, who would have the opportunity to force defamatory statements to be retracted, and websites, which would have to institute standards that their users must rise to. This, in effect,

130. 47 U.S.C. § 230(c)(1) (2011).

131. *Id.*

132. The Zagat Guide is a publication that reviews and rates restaurants.

133. *Carroll*, 393 U.S. at 180.

134. Amicus Letter, *supra* note 118, at 6.

supports the very purpose of the CDA itself—it facilitates self-censorship of websites, and still grants the immunity that courts have interpreted section 230 to provide.

The ACLU's amicus letter and the *Carroll* opinion both support the idea that non-party injunctions involving arguably protected speech should be crafted narrowly as to avoid disruption of constitutional rights.¹³⁵ If the California Supreme Court narrows the Court of Appeal's injunction to only include the current Yelp reviews, and not future Yelp reviews from Bird, the injunction would satisfy the narrow standard permitted for such injunctions. If the California Supreme Court also remands the case for a new trial on the merits of the defamation claim, then Yelp would have the opportunity to defend the speech in order to determine whether it would need to comply with the narrower injunction. Yelp could try the case, or simply delete the reviews and avoid the time and expense associated with the former choice. Regardless of what Yelp does, this remedy would have the benefits of satisfying the plaintiff's claim and protecting freedom of expression under the First Amendment.

However, as a practical matter, giving Yelp and other websites a chance to defend arguably defamatory language presents a glaring problem. Because Yelp only serves as publisher, it would be quite difficult to make factual findings with any certainty as to the speech itself. Yelp is not prepared to play the role of reporter and investigate the truthfulness of reviews posted by users. A defamation claim requires a false defamatory assertion of fact concerning the plaintiff.¹³⁶ This first element of defamation can be difficult to prove due to the falsity requirement; it often requires courts to have parties testify under oath to determine the veracity of an alleged defamatory statement.¹³⁷ As a result, Yelp would be left with quite a challenge should it, on remand, have to defend Bird's review. Indeed, certain statements could be easy to verify. For example, that "the [H]assell [L]aw [G]roup didn't [sic] ever speak to [the insurance company]"¹³⁸ is an easily verified fact. Other statements, such as "[Hassell] dropped the case because of her mother,"¹³⁹ are impossible to prove absent some sort of email chain or other form of evidence between Hassell and Bird. Even with evidentiary support, the truth of the evidence might be unclear. A quick glance at Bird's review and Hassell's response

135. Amicus Letter, *supra* note 118, at 5; *Carroll*, 393 U.S. at 183.

136. RESTATEMENT (SECOND) OF TORTS § 558(a) (AM. LAW. INST. 1976).

137. Callum Borchers, *The New York Times Just Dared Donald Trump to Sue*, WASH. POST: THE FIX (Oct. 13, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/10/13/donald-trump> (quoting John Diamond).

138. Birdzeye B., *supra* note 12. **Error! Bookmark not defined.**

139. Birdzeye B., *supra* note 12.

to it illustrates this problem perfectly: both contain contradictory statements.¹⁴⁰ While it would be challenging enough for a finder of fact to determine whether Bird's statements were false if Bird were to come to court and litigate the claim herself, it would be an entirely different challenge should Yelp be subjected to that task.

The First Amendment is of principal concern in the context of enjoining a non-party for an action related to allegedly defamatory speech. Nevertheless, if the speech is judged to be defamatory, First Amendment rights can still be protected in the context of internet speech. In an action where speech has been adjudged defamatory, courts should be permitted to enjoin the internet service providers on which the speech appears and have them remove the unprotected speech—unless of course the individual who wrote the language is tried and removes it him or herself. In situations such as *Hassell*, where a default judgment was issued, courts should allow the same remedy. That said, the remedy should be stipulated to include a trial on the merits in which the website is permitted to defend the speech, should the website choose to expend the time and effort in doing so.

CONCLUSION

Due to a lack of foresight, and perhaps with unbridled optimism, members of Congress drafted section 230 of the CDA in a way that today is highly ineffective. Rather than encourage the internet self-regulation and censorship that Congress hoped section 230 would foster, section 230 has done little more than provide websites and internet service providers with blanket immunity against any claims arising out of content posted by third-party users. This safe harbor permits third parties, whether maliciously or unintentionally, to defame innocent individuals online, all the while requiring no responsibility or care from the websites on which they post. The unintended consequences of section 230 have greatly harmed victims of online defamation, while allowing the often-anonymous perpetrators, along with the websites publishing the defamatory statements, to enjoy no liability whatsoever.

Currently faced with *Hassell*, the California Supreme Court is in the unique position of devising an appropriate remedy that will allow victims of online defamation to mitigate their damages through injunctions. By permitting courts to issue non-party injunctions that would require websites and internet service providers to remove defamatory statements, individuals who are defamed online will finally begin to obtain justice against those who have defamed them. While such

140. Birdzeye B., *supra* note 12.

injunctions naturally implicate the First Amendment, these injunctions can be crafted narrowly so as to ensure that websites are only required to remove speech that a court has determined to be defamatory. Such narrow injunctions should satisfy attacks from critics who argue that injunctions in defamation cases function as prior restraints.¹⁴¹ Although these critics also point out that very narrow injunctions are functionally useless, arguments exist that show otherwise.¹⁴² Ultimately, only when a court issues a narrow injunction requiring a website to remove defamatory language will it become known with any certainty whether the injunction indeed served its purpose.

While some argue that the burden of this remedy is cost prohibitive on the websites due to the time and resources they would have to expend deleting content, these costs are a very small price to pay compared with the dangers associated with the boundless immunity from liability that section 230 grants. The California Supreme Court should modify the Court of Appeal's injunction against Yelp in a way to have it cover only speech that *currently* appears on Yelp, while also giving Yelp the opportunity to defend the speech should it choose to do so. Should the Court pursue this path, it will pave the way for section 230 to function more effectively in the modern internet era, and also encourage the sort of self-regulation that Congress originally envisioned when enacting the law.

141. See generally Chemerinsky, *supra* note 109; Jim Stewart & Len Niehoff, *Zombies Among Us: Injunctions in Defamation Cases Come Back from the Dead*, 30 COMM. LAW 28 (2014).

142. See generally Chemerinsky, *supra* note 109; Jim Stewart & Len Niehoff, *Zombies Among Us: Injunctions in Defamation Cases Come Back from the Dead*, 30 COMM. LAW 28 (2014).