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## NOTE

### CRACKS IN THE ARMOR?: THE FUTURE OF THE COMMUNICATIONS DECENCY ACT AND POTENTIAL CHALLENGES TO THE PROTECTIONS OF SECTION 230 TO GOSSIP WEB SITES

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## I. INTRODUCTION

Juicy Campus was founded on August 1, 2007.<sup>2</sup> The website claimed to have “the simple mission of enabling online anonymous free speech on college campuses.”<sup>3</sup> College student Jane Smith, whose name has been changed to protect her privacy, became a victim of the website’s defamatory content.<sup>4</sup> She lost weight, had trouble sleeping, and became suspicious of those around her.<sup>5</sup> She stated that this experience ruined her freshman year and would likely taint her entire college experience.<sup>6</sup> The website’s defamatory content victimized a number of students, which led to several lawsuits against the website and its ban from universities across the country.<sup>7</sup> However, before any lawsuits reached court, Juicy Campus shut down because it lacked revenue.<sup>8</sup>

This note will address the growing problem of defamation on the Internet. With the rise of social networking sites such as Facebook, MySpace, and Twitter, the opportunity for the average person to broadcast defamatory content across the Web has increased greatly. As of January 2010, there were more than 350 million active users on Facebook,<sup>9</sup> twenty-six million users on Twitter,<sup>10</sup> and one hundred million U.S. users on MySpace.<sup>11</sup> In addition to these incredibly popular websites, a number of lesser known online “message boards” allow users to post anonymous comments. With the popularity of such websites continuing to increase, the chance that someone will be defamed in

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<sup>2</sup> Sunny Hostin, *Online Campus Gossips Won’t Show Their Faces*, CNN, (Apr. 4, 2008), <http://www.cnn.com/2008/CRIME/03/17/sunny.juicy/index.html>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Travis Winkler, *Juicy Campus Signs off for the Last Time*, THE DAILY PENNSYLVANIAN, (Feb. 6, 2009), <http://thedp.com/node/58338>.

<sup>8</sup> *Id.*

<sup>9</sup> Facebook Press Room Statistics, <http://www.facebook.com/press/info.php?statistics> (last visited Feb. 28, 2010).

<sup>10</sup> Tech Crunchies - Internet Statistics and Numbers, Number of Twitter Users in USA, <http://techcrunchies.com/number-of-twitter-users-in-usa/> (last visited Feb. 28, 2010).

<sup>11</sup> MySpace Press Room Fact Sheet, <http://www.myspace.com/pressroom/fact-sheet/> (last visited Mar. 5, 2011).

the same manner as Jane Smith is becoming more likely. Unfortunately, those who are defamed on the Internet may not have the same options for legal recourse as those defamed through more traditional types of media, such as newspapers and magazines. This is due to the protections Congress gave providers of online content through Section 230 of the Communications Decency Act of 1996 (“CDA”).<sup>12</sup> These protections allow website operators to escape liability for defamatory content posted by third parties.<sup>13</sup> Victims of online defamation have not had the same options for legal recourse as victims of defamation through more traditional media, as Section 230 of the CDA has prevented victims of online defamation from obtaining relief.<sup>14</sup>

While the Internet has changed significantly since the CDA was first passed in 1996, the legal standard for determining whether a website can be held liable for defamatory material posted by a third party remains the same from when the Fourth Circuit first interpreted the CDA in *Zeran v. America Online, Inc.* in 1997.<sup>15</sup> When Section 230 of the CDA was passed as part of the Telecommunications Act, there were major policy implications behind the legislation. As the Internet was just beginning to show its potential as a method of commerce, Congress wanted to ensure that the CDA would “promote the continued development of the Internet and other interactive computer services and other interactive media”<sup>16</sup> and “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>17</sup> In December 1996, there were an estimated thirty-six million regular Internet users, or only 0.9% of the world’s population.<sup>18</sup> As of December 2009, there were an estimated 1.8 billion regular Internet users, or 26.6% of the world’s population.<sup>19</sup> The increase in Internet use has been even more dramatic within the United States. As of 1996, approximately 16.7% of the United States

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<sup>12</sup> 47 U.S.C. § 230 (2006).

<sup>13</sup> David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 149 (1997).

<sup>14</sup> *Id.* at 149-50.

<sup>15</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).

<sup>16</sup> 47 U.S.C. § 230(b)(1) (2006).

<sup>17</sup> 47 U.S.C. § 230(b)(2) (2006).

<sup>18</sup> *Internet Growth Statistics*, INTERNET WORLD STATS USAGE AND POPULATION STATISTICS, <http://www.internetworldstats.com/emarketing.htm> (last visited Apr. 16, 2011).

<sup>19</sup> *Id.*

population used the Internet.<sup>20</sup> By 2008, this number had increased to 75.8% of the population.<sup>21</sup> While such regulations may have been necessary to protect the Internet during its developing stages, the need for such regulations is no longer as apparent.

Following the passage of the CDA, courts quickly began to dismiss lawsuits brought by online defamation victims. Beginning with *Zeran*, those who were victims of online defamation faced a difficult uphill battle in obtaining any redress through the legal system.<sup>22</sup> Under *Zeran*, a print newspaper's publisher could be liable for publishing a defamatory letter to the editor, while an electronic newsletter's publisher would not be liable for the same act.<sup>23</sup> However, courts have recently started to recognize that the protections given by Section 230 are no longer as necessary as when the legislation was passed. *Fair Housing Council of San Fernando Valley v. Roommates.com* is an example of a recent case where the protections of Section 230 were not extended to a provider of online content.<sup>24</sup> While this case dealt with a violation of the Fair Housing Act and not online defamation, courts can certainly use this case as precedent to narrow the previously broad protections provided by Section 230.

This note will begin by providing a brief history of the law of defamation in Part II. Part II will also explain the different circumstances that victims of online defamation face, as compared to victims of defamation through more traditional forms of media. Part III will explain how courts decided online defamation cases before the passage of the CDA in 1996. Part IV will describe how courts interpreted Section 230 of the CDA and applied it to cases dealing with online defamation, beginning with *Zeran*. It will also explain the manner in which courts began to broaden the protections given to online content providers by the CDA in cases following *Zeran*. Part V will describe the rulings in recent cases, particularly *Fair Housing Council of San Fernando*

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<sup>20</sup> *World Bank, World Development Indicators*, GOOGLE, [http://www.google.com/publicdata?ds=wb-wdi&met=it\\_net\\_user\\_p2&idim=country:USA&q=internet+users+in+the+united+states](http://www.google.com/publicdata?ds=wb-wdi&met=it_net_user_p2&idim=country:USA&q=internet+users+in+the+united+states) (last visited Feb. 28, 2010).

<sup>21</sup> *Id.*

<sup>22</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 329-31 (4th Cir. 1997). In refusing to subject AOL to liability under Section 230 even after AOL received notice that potentially defamatory were present, similar plaintiffs will have a difficult time in obtaining relief as long as *Zeran* remains good law.

<sup>23</sup> See Sheridan, *supra* note 13, at 149.

<sup>24</sup> See *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F. 3d 1157 (9th Cir. 2008).

*Valley v. Roommates.com*, and will argue that these rulings have weakened the protections courts have given to providers of online content through interpretation of Section 230 of the CDA. Part V will also argue that these rulings should extend to cases involving online defamation. Numerous victims of online defamation have been unable to recover any damages due to the protections courts have given through Section 230. Because the Internet is no longer in its early stages of development and will continue to thrive as a center of commerce and communication regardless of liability for content providers, courts must decrease the level of protections given to providers of online services and content.

The final part of this note will examine potential challenges to Section 230 as it is applied to defamation cases. This note will argue that courts should begin to treat online defamation cases as they did prior to the passage of the CDA in 1996, by narrowly interpreting who qualifies as a “provider or user of an interactive computer service” under Section 230.<sup>25</sup> This note will argue that these websites do not deserve protection under Section 230 of the CDA, as they encourage defamatory postings. In addition, their owners are aware that a great deal of the content on their websites will likely be unlawful.

## II. BACKGROUND ON THE LAW OF DEFAMATION

The law of defamation in the United States can be traced back to the British crime of seditious libel, which allowed an individual to take private action in the court system to vindicate his good name.<sup>26</sup> Defamation is defined as “the act of harming the reputation of another by making a false statement to a third person.”<sup>27</sup> While the Framers of the Constitution guaranteed the freedoms of the press and speech through the First Amendment of the Constitution,<sup>28</sup> defamation suits were allowed by early courts to protect against attacks on an individual’s character or reputation.<sup>29</sup>

The law of defamation in the United States was squared with the freedoms of press and expression granted by the First Amendment in the landmark

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<sup>25</sup> 47 U.S.C. § 230(c)(1) (2006).

<sup>26</sup> Allison E. Horton, Note, *Beyond Control?: The Rise and Fall of Defamation Regulation on the Internet*, 43 VAL. U. L. REV. 1265, 1290 (2009).

<sup>27</sup> “defamation.” BLACK’S LAW DICTIONARY 479 (9th ed. 2009).

<sup>28</sup> U.S. CONST. amend. I. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

<sup>29</sup> See 1 F. HARPER & F. JAMES, THE LAW OF TORTS 349-50 (1956).

Supreme Court case *New York Times Co. v. Sullivan*.<sup>30</sup> Four of the Commissioners of the City of Montgomery, Alabama sued the New York Times for libel.<sup>31</sup> The complaint alleged that on March 29, 1960, the New York Times published libelous statements about the Commissioners in a full-page advertisement.<sup>32</sup> The advertisement was entitled “Heed Their Rising Voices” and listed a number of indiscretions by City of Montgomery officials that were intended to harass and intimidate those supporting the Civil Rights Movement.<sup>33</sup> A jury in the Circuit Court of Montgomery County awarded respondent L.B. Sullivan damages of \$500,000, and the Supreme Court of Alabama affirmed.<sup>34</sup> In its opinion, the United States Supreme Court cited the importance of a free press in ensuring “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>35</sup> The Court viewed free political discussion as necessary to ensure that the government be “responsive to the will of the people, and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”<sup>36</sup>

The Supreme Court realized that uninhibited and robust debate on public issues might sometimes include “vehement, caustic, and sometimes unpleasantly sharp attacks of government and public officials.”<sup>37</sup> Prior to *New York Times v. Sullivan*, the truth of a defamatory statement was irrelevant to liability.<sup>38</sup> The Court rejected a rule requiring a critic of a public official to prove the truth of his statements, reasoning that such a burden would lead to “self-censorship” in the media.<sup>39</sup> This rule would deter potential critics of officials from making true statements because of fear of having to prove the truth of their statements in the courtroom.<sup>40</sup>

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<sup>30</sup> See Horton, *supra* note 26, at 1291.

<sup>31</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (citing *New York Times Co. v. Sullivan*, 144 So. 2d 25 (Ala. 1962)).

<sup>35</sup> *Id.* at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

<sup>36</sup> *Id.* (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

<sup>37</sup> *Sullivan*, 376 U.S. at 270.

<sup>38</sup> See, e.g., *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942) (holding that it “is not actionable to publish erroneous and injurious statements of fact and injurious comment or opinion regarding the political conduct and views of public officials, so long as no charge of crime, corruption, gross immorality or gross incompetence is made”).

<sup>39</sup> *Sullivan*, 376 U.S. at 279.

<sup>40</sup> *Id.*

The holding in *Sullivan* drastically altered defamation law by requiring that a public official must prove a false defamatory statement was made with “actual malice” or that the speaker knew the statement was false or made the statement with a reckless regard for the truth.<sup>41</sup> This decision demonstrated the Supreme Court’s intent to support open debate on a candidate’s stance on the issues as well as personal character through protecting the First Amendment rights of free speech and free press.<sup>42</sup> Similarly, when Congress passed the CDA, it made the policy decision that liability protection was necessary under Section 230 to ensure that the Internet could become a viable medium for such open and robust political and social debate.<sup>43</sup>

### III. LIABILITY BEFORE THE PASSAGE OF THE CDA

In the early 1990’s, important court decisions suggested that Internet defamation liability might follow the traditional print model.<sup>44</sup> One of the earliest cases to deal with defamatory third-party statements online is *Cubby v. CompuServe*. CompuServe provided a variety of online services, including a “Journalism Forum.”<sup>45</sup> The Journalism Forum featured “Rumorville USA,” a daily newsletter that published articles about journalists and broadcast journalism.<sup>46</sup> CompuServe did not have a chance to review Rumorville’s content before it was uploaded because Rumorville was published independently by Don Patrick Associates (“DPA”), a co-defendant in the case.<sup>47</sup>

Skuttlebut was designed in 1990 by Plaintiffs Cubby, Inc. and Robert Blanchard as a computer database for publishing and distributing Internet gossip.<sup>48</sup> Skuttlebut was intended to compete with Rumorville.<sup>49</sup> Plaintiffs alleged that on separate occasions in April 1990, Rumorville published false and defamatory statements relating to Skuttlebut and Blanchard, and that

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<sup>41</sup> *Id.* at 279-80.

<sup>42</sup> *See id.* at 270.

<sup>43</sup> 47 U.S.C. § 230(b)(2) (2006).

<sup>44</sup> Walter Pincus, *The Internet Paradox: Libel, Slander & The First Amendment in Cyberspace*, 2 GREEN BAG 279, 281 (1999). While the author listed this as a possible option for courts to follow, the article advocated for a different standard of liability.

<sup>45</sup> *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 137 (S.D.N.Y. 1991).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 138.

<sup>49</sup> *Id.*

CompuServe carried these statements as part of the Journalism Forum.<sup>50</sup> CompuServe did not dispute that the statements about Blanchard and Skuttlebut were defamatory, but argued that it acted as a distributor, and not a publisher of the statements, and could not be held liable for the statements because it did not know and had no reason to know of the statements.<sup>51</sup> By labeling Cubby a “publisher,” the court imposed the same standard of primary publisher liability as newspapers and book publishers.<sup>52</sup>

By comparing CompuServe’s Journal Forum to an electronic library, the court came to the conclusion that it would be no more feasible for CompuServe to closely examine its content for defamatory statements than it would be for a bookstore or newsstand to do so.<sup>53</sup> The court stated that “the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment.”<sup>54</sup> Because plaintiffs had not set forth any specific facts showing that there was a genuine issue of whether CompuServe knew or had reason to know of Rumorville’s contents, CompuServe was granted summary judgment on the libel claim.<sup>55</sup>

The court in *Stratton Oakmont Inc. v. Prodigy Services Co.* reached a far different result with regards to liability for publishing defamatory third-party content online.<sup>56</sup> Prodigy was an Internet service provider that operated a message board known as “Money Talk.”<sup>57</sup> An anonymous poster on the board made defamatory statements about Stratton Oakmont, an investment banking firm, and Daniel Porush, the company’s president, in connection with the initial public offering of Solomon Page, Ltd.<sup>58</sup>

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<sup>50</sup> *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 138 (S.D.N.Y. 1991) (“The allegedly defamatory remarks included a suggestion that individuals at Skuttlebut gained access to information first published by Rumorville ‘through some back door;’ a statement that Blanchard was ‘bounced’ from his previous employer, WABC; and a description of Skuttlebut as a ‘new start-up scam.’”).

<sup>51</sup> *Id.* at 138.

<sup>52</sup> Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH 569, 592 (2001).

<sup>53</sup> *Cubby, Inc.*, 776 F. Supp. at 140.

<sup>54</sup> *Id.* (quoting *Lerman v. Flynt Distributing Co.*, 745 F.2d 123, 139 (2d Cir. 1984)).

<sup>55</sup> *Cubby, Inc.* 776 F. Supp. at 141.

<sup>56</sup> See *Stratton Oakmont Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

<sup>57</sup> *Id.* at \*1.

<sup>58</sup> *Id.* (Statements included that Stratton was a “cult of brokers who either lie for a living or get fired”; “Porush was a soon-to-be-proven criminal”; and the Solomon-Page offering



Prodigy had held itself out as a family-oriented computer network that exercised editorial control over the content of messages posted on its computer bulletin boards.<sup>59</sup> The court distinguished Prodigy from CompuServe on the ground that Prodigy held itself out to the public and its members as controlling the content of its computer bulletin boards and that it implemented its control over the bulletin boards through an automatic software screening program.<sup>60</sup> These editorial decisions clearly showed that Prodigy made decisions as to content and such decisions constitute editorial control.<sup>61</sup> In contrast to *CompuServe*, Prodigy created a staff of Board Leaders who had the ability to continually monitor incoming transmissions and spend time censoring bulletin board posts.<sup>62</sup> The court was apparently aware that its ruling could deter service providers from performing any type of self-regulation, however, the court believed that the market would compensate service providers who regulated content to account for any exposure to liability.<sup>63</sup> The court also acknowledged that harsh penalties for defamation could have a “chilling effect” on online communication.<sup>64</sup> Due to Prodigy’s decision to censor the content on its bulletin board, it had opened itself up to greater liability than content providers who had made no attempt to censor their content.<sup>65</sup> Under *Stratton-Oakmont*, an online service provider becomes liable for any potentially defamatory messages by third parties once the online service provider begins to exercise censorship over published material.<sup>66</sup> This standard punishes the operator who makes an effort to keep defamatory speech off its service, but allows the operator who makes no such effort to escape liability.<sup>67</sup>

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was “major criminal fraud” and “100% criminal fraud.”).

<sup>59</sup> *Id.* at \*2.

<sup>60</sup> *Id.* at \*4.

<sup>61</sup> *Stratton Oakmont Inc. v. Prodigy Services Co.*, 1995 WL 323710, at \*4 (N.Y. Sup. Ct. May 24, 1995) (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

<sup>62</sup> *Id.* at \*5.

<sup>63</sup> Neil Fried, *Dodging the Communications Decency Act When Analyzing Libel Liability of Online Services*, 1 COLUM. SCI. & TECH. L. REV. 1, 26 (1999).

<sup>64</sup> Scott Sterling, *International Law of Mystery: Holding Internet Service Providers Liable for Defamation and the Need for a Comprehensive International Solution*, 21 LOY. L.A. ENT. L. REV. 327, 334 (2001).

<sup>65</sup> *Stratton Oakmont Inc. v. Prodigy Services Co.*, 1995 WL 323710, at \*5 (N.Y. Sup. Ct. May 24, 1995).

<sup>66</sup> *See Sheridan*, *supra* note 13, at 158.

<sup>67</sup> *Id.*

Following the *Stratton-Oakmont* decision, legal scholars began to suggest methods for courts to encourage the further development of the Internet while still providing redress for defamation victims. One commenter suggested steps that online service providers could take to avoid liability as a publisher: making public the identity of the individual making the defamatory post, promptly removing the post, and giving the defamed party an opportunity to reply to the post.<sup>68</sup> Scholars began to realize that allowing absolute immunity for third-party posters would be problematic as the Internet continued to expand and new types of message boards surfaced.<sup>69</sup>

#### IV. COMMUNICATIONS DECENCY ACT OF 1996 AND FOLLOWING DECISIONS

Following the *Stratton Oakmont* decision, Congress passed the CDA in 1996. While Congress considered telecommunications reform, the *Stratton Oakmont* decision received a great deal of criticism, especially from the online community.<sup>70</sup> The CDA took effect on February 8, 1996. While some commentators saw the CDA as giving unlimited liability to Internet service providers, others believed it could cause future problems if it provided disincentives for self-regulation.<sup>71</sup> The underlying policy considerations behind the CDA also included a commitment to “promote the continued development of the Internet and other interactive computer services and other interactive media”<sup>72</sup> and “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>73</sup> Section 230(c)(1) 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.”<sup>74</sup> The CDA also addresses the civil liability for online publishers in Section 230(c)(2), stating that:

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<sup>68</sup> Kean J. DeCarlo, *Tilting at Windmills: Defamation and the Private Person in Cyberspace*, 13 GA. ST. U. L. REV. 547, 572 (1997).

<sup>69</sup> *Id.* at 573-74.

<sup>70</sup> Jonathan A. Friedman & Francis M. Buono, *Limiting Tort Liability for Online Third-Party Content Under Section 230 of the Communications Decency Act*, 52 FED. COMM. L.J. 647, 653 (2000).

<sup>71</sup> Stephanie Blumstein, *The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act and the Libelous “Re-Poster,”* 9 B.U. J. SCI. & TECH. L. 407, 413 (2003).

<sup>72</sup> 47 U.S.C. § 230(b)(1).

<sup>73</sup> 47 U.S.C. § 230(b)(2).

<sup>74</sup> 47 U.S.C. § 230(c)(1).

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, 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).<sup>75</sup>

This section of the CDA encourages publishers of online material to self-regulate what they publish. However, it fails to impose liability for a lack of or failure of self-regulation. After passage of the CDA, the major decisions that followed reflect the idea of a lack of liability for publishers, regardless of whether any self-regulation measures have been taken. Under the CDA, parties seeking damages from providers for defamatory messages that are posted using the providers' servers will only be successful if the providers knew or had reason to know about the defamatory messages.<sup>76</sup> Since the passage of the CDA, Courts have misinterpreted the underlying reasons for its creation. Congress's reasons for passing the CDA included protecting children from inappropriate communications over the Internet and protecting individuals from electronic stalking.<sup>77</sup> Thus, Congress's primary purpose in enacting the CDA was not so much to allow Internet Service Providers ("ISPs") to escape liability, but to "prevent the Internet from becoming a 'red light district' and to 'extend the standards of decency which have protected users to new telecommunications districts.'"<sup>78</sup> Congress could not be certain that these goals would be achieved until the courts interpreted the CDA.<sup>79</sup>

A. *Zeran v. America Online*

On April 25, 1995, an unknown individual created a posting on an AOL

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<sup>75</sup> 47 U.S.C. § 230(c)(2).

<sup>76</sup> Michael H. Spencer, *Defamatory E-mail and Employer Liability: Why Razing Zeran v. America Online is a Good Thing*, 6 RICH. J.L. & TECH. 25, 9 (2000).

<sup>77</sup> See Sheridan, *supra* note 13, at 159-60 (quoting 141 CONG. REC. S1953 (daily ed. Feb. 1, 1995)).

<sup>78</sup> Christopher Butler, *Plotting the Return of an Ancient Tort to Cyberspace: Towards a New Federal Standard of Responsibility for Defamation for Internet Service Providers*, 6 MICH. TELECOMM. & TECH. L. REV. 247, 251-52 (2000) (quoting 141 CONG. REC. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon)).

<sup>79</sup> Sterling, *supra* note 64, at 336.

message board offering “Naughty Oklahoma” T-Shirts.<sup>80</sup> The posting offered shirts for sale that had offensive remarks relating to the Oklahoma City bombing printed on them.<sup>81</sup> Those who wished to purchase a shirt were directed to call “Ken” at plaintiff Kenneth Zeran’s home phone number in Seattle, Washington.<sup>82</sup> As a result, Zeran received many calls, which included angry and derogatory messages and death threats.<sup>83</sup> Zeran could not change his home phone number because he ran a small business out of his home so customers contacted him at that number.<sup>84</sup> Zeran immediately contacted AOL and informed a company service representative of the problem. The employee told Zeran that the posting would be deleted from the bulletin board; however, AOL refused to post a retraction as a matter of policy.<sup>85</sup>

On the next day, April 26, a similar anonymous post appeared offering similar offensive shirts referencing the Oklahoma City bombing.<sup>86</sup> This post also contained Zeran’s home phone number, and said to “please call back if busy” due to the high demand.<sup>87</sup> Zeran began to receive an increasing number of threatening phone calls.<sup>88</sup> The anonymous poster continued to make similar posts containing Zeran’s personal information for four days.<sup>89</sup> Zeran contacted AOL a number of times, and company representatives ensured him that AOL would shut down the account posting the messages.<sup>90</sup> Zeran also reported his case to the Seattle office of the FBI.<sup>91</sup>

On April 23, 1996, Zeran filed suit against AOL in the United States District Court for the Western District of Oklahoma.<sup>92</sup> Zeran did not sue the party who posted the messages.<sup>93</sup> AOL used an affirmative defense based on Section 230 of the CDA.<sup>94</sup> AOL then made a motion for judgment on the pleadings under

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<sup>80</sup> Zeran v. America Online, Inc., 129 F.3d 327, 329 (4th Cir. 1997).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Zeran v. America Online, Inc., 129 F.3d 327, 329 (4th Cir. 1997).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Zeran v. America Online, Inc., 129 F.3d 327, 329 (4th Cir. 1997).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

Federal Rule of Civil Procedure 12(c).<sup>95</sup> The district court granted AOL's motion and Zeran appealed.<sup>96</sup>

The Court of Appeals for the Fourth Circuit described Zeran's case as seeking "to hold AOL liable for defamatory speech initiated by a third party."<sup>97</sup> Zeran argued that once he told AOL about the anonymous third party's prank, AOL had a duty to remove the posting promptly, to alert its subscribers of the posting's falsity, and to screen future defamatory material.<sup>98</sup> While the court in *Zeran* recognized that one of Section 230's purposes was to "encourage service providers to self-regulate the dissemination of offensive material over their services,"<sup>99</sup> it also forbade holding a service provider liable for "the exercise of its editorial and self-regulatory functions."<sup>100</sup> The Fourth Circuit found that "Congress had chosen to protect the 'new and burgeoning Internet medium' from the 'specter of tort liability' over providing legal redress for the victims of serious defamation."<sup>101</sup>

Zeran argued, however, that Section 230 applies only to publishers and leaves distributor liability intact.<sup>102</sup> Zeran argued that providers like AOL are usually regarded as distributors, akin to traditional book sellers.<sup>103</sup> In order for distributors to be held liable for defamatory statements, complainants must prove they had actual knowledge of the defamatory statements in the distributed materials.<sup>104</sup> Zeran argued that his calls to customer services had provided AOL with sufficient notice of the presence of the defamatory statements.<sup>105</sup> Following the decision, it appeared that a plaintiff could succeed on a claim for defamation by an anonymous party only if the Internet provider, once alerted, maliciously refused to take down the defamatory

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<sup>95</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997).

<sup>96</sup> *Id.* at 330.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 331.

<sup>100</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

<sup>101</sup> Jae Hong Lee, *Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH L.J. 469, 476 (2004).

<sup>102</sup> *Zeran*, 129 F.3d at 331.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 811 (5th ed. 1984) (explaining that distributors are not liable "in the absence of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published)).

<sup>105</sup> *Zeran*, 129 F.3d at 331.

statement.<sup>106</sup>

The Fourth Circuit rejected Zeran's argument when it stated that "liability upon notice would defeat the dual purposes advanced by § 230 of the CDA."<sup>107</sup> Like the strict liability imposed by the *Stratton Oakmont* court, liability upon notice would also give ISPs an incentive to censor speech and refrain from regulating themselves.<sup>108</sup> Because of the high number of postings, investigating every possible instance of defamation would impose an extremely heavy burden on providers.<sup>109</sup> The court found that "the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes," and stated that it would not assume that Congress intended to leave liability upon notice intact.<sup>110</sup>

Several legal commentaries have criticized the broad holding in *Zeran*, claiming that it provides service providers with greater immunity than Congress intended.<sup>111</sup> Critics also argued that the *Zeran* decision does not promote the policy goals of Section 230 because it does not encourage service providers to police their sites for offensive conduct.<sup>112</sup> Conversely, the *Zeran* holding allowed providers who take no action to escape liability even if they knew defamatory content had been posted.<sup>113</sup>

*B. Blumenthal v. Drudge*

The United States District Court for the District of Columbia also addressed the protections of Section 230 in *Blumenthal v. Drudge*. Defendant Matt Drudge operated an online political gossip column known as the Drudge Report, which was made available to all of AOL's Internet service customers through a licensing agreement between AOL and Drudge. On Sunday, August 10, 1997, Drudge wrote and published an allegedly defamatory statement

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<sup>106</sup> Pincus, *supra* note 44, at 285.

<sup>107</sup> *Zeran*, 129 F.3d at 333.

<sup>108</sup> *Id.*

<sup>109</sup> Sarah Beckett Boehm, *A Brave New World of Free Speech: Should Interactive Computer Service Providers Be Held Liable for the Material They Disseminate?*, 5 RICH J.L. & TECH 7, 16 (1998).

<sup>110</sup> *Zeran* 129 F. 3d at 333.

<sup>111</sup> See Friedman & Buono, *supra* note 70, at 660.

<sup>112</sup> *Id.* at 661.

<sup>113</sup> Aaron Jackson, *Cyberspace... The Final Frontier: How the Communications Decency Act Allows Entrepreneurs to Boldly Go Where No Blog Has Gone Before*, 5 OKLA. J.L. & TECH. 45, 49 (2009).

about plaintiffs Sidney and Jacqueline Blumenthal in an edition of the Drudge Report.<sup>114</sup> Drudge later posted a retraction after receiving a letter from the Blumenthals' counsel on August 11, 1997.<sup>115</sup>

Plaintiffs brought a defamation action against Drudge in the United States District Court for the District of Columbia.<sup>116</sup> Plaintiffs argued that AOL should be held liable with Drudge because it played a role in the writing and editing of the Drudge Report.<sup>117</sup> AOL countered that there was no evidence that it played any role in creating or developing the Drudge Report.<sup>118</sup> The court agreed and held that AOL was merely a provider of an interactive computer service that carried the Drudge Report, and noted further that Congress made clear that "such a provider shall not be treated as a 'publisher or speaker' and therefore may not be held liable in tort."<sup>119</sup> The court did not find that AOL was behaving as a "passive conduit" of information, such as a telephone company that has no control over what is said over its wires.<sup>120</sup> While AOL had the right to exercise editorial control over Drudge's content, the court reasoned that Congress made the policy decision to provide immunity to interactive service providers even when they play an active role in making content available that has been prepared by others.<sup>121</sup> The court stated that Congress provided this immunity to Internet service providers as an incentive for self-regulation of obscene or offensive content.<sup>122</sup> The court followed the statutory language of Section 230 holding that AOL was immune from suit and granting its motion for summary judgment.<sup>123</sup> Appearing to disagree with precedent, the court stated that "if it were writing on a clean slate, [it] would have agreed with the Plaintiffs."<sup>124</sup> The opinion mentioned that while an individual may suffer defamation on the Internet that can be read by countless

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<sup>114</sup> Blumenthal v. Drudge, 992 F. Supp. 44, 47 (D.D.C. 1998) (The headline read: "Charge: New White House Recruit Sidney Blumenthal Has Spousal Abuse Past.").

<sup>115</sup> *Id.* at 48.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 50.

<sup>118</sup> *Id.*

<sup>119</sup> Blumenthal v. Drudge, 992 F. Supp. 44, 50 (D.D.C. 1998) (citing 47 U.S.C. § 230(c)(1)).

<sup>120</sup> *Id.* at 51.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 52.

<sup>123</sup> *Id.* at 53.

<sup>124</sup> Lee, *supra* note 101, at 477 (quoting *Drudge*, 992 F. Supp. at 51.).

people, that individual has the opportunity to post an immediate response.<sup>125</sup> However, the court noted that the ability of a victim to reply online is a “highly questionable assumption.”<sup>126</sup>

*Blumenthal v. Drudge* represents a further expansion of the immunity given to service providers under Section 230 of the CDA. It has been argued that the *Blumenthal* court “failed to understand . . . Congress’ purpose behind the CDA, which was much narrower than the reasoning espoused” by the *Blumenthal* and *Zeran* courts.<sup>127</sup> The provider should have been held liable if “the provider knew or should have known of the defamatory material” because the CDA’s purpose was “to encourage the filtering of information that may be placed on the Internet.”<sup>128</sup> Critics of these decisions argued that the courts improperly expanded the scope of Section 230 beyond the intent of Congress, thereby creating a “gaping hole in ISP accountability.”<sup>129</sup>

C. *Batzel v. Smith & Barrett v. Rosenthal*

The courts continued to uphold broad immunity under the CDA in more recent cases. In the summer of 1999, Robert Smith was working as a handyman at the North Carolina home of attorney Ellen Batzel.<sup>130</sup> Smith recalled that Batzel had told him that she was “the grand-daughter” of one of Adolf Hitler’s right-hand men.<sup>131</sup> He also claimed that Batzel told him a number of the paintings in her house that looked old and European had been inherited.<sup>132</sup> Smith became suspicious that the artwork could be stolen, began investigating online, and discovered a website named the Museum Security Network.<sup>133</sup> Smith sent an email to the Network that gave Batzel’s name and suggested that some of the paintings in her house may have been looted from

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<sup>125</sup> Robert M. O’Neil, *The Drudge Case: A Look at Issues in Cyberspace Defamation*, 73 WASH L. REV. 623, 631 (1998) (citing Jeremy Stone Weber, Note, *Defining Cyber Libel: A First Amendment Limit for Libel Suits Against Individuals Arising from Computer Bulletin Board Speech*, 46 CASE W. RES. L. REV. 235, 268 (1995)).

<sup>126</sup> *Id.* at 632.

<sup>127</sup> Spencer, *supra* note 76, at 14.

<sup>128</sup> *Id.* (citing 47 U.S.C. § 230(b)(4) (Supp. 1998)).

<sup>129</sup> Blumstein, *supra* note 71, at 417-18 (citing Carl S. Kaplan, *How is Libel Different in Cyberspace?*, NY TIMES ON THE WEB, (Aug. 9, 2001), <http://www.nytimes.com/2001/08/09/technology/10CYBERLAW.html>).

<sup>130</sup> *Batzel v. Smith*, 333 F.3d 1018, 1020 (9th Cir. 2003).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1021.

<sup>133</sup> *Id.*



Jewish people during World War II.<sup>134</sup> The Museum Security Network then posted the message with minor changes.<sup>135</sup> Batzel discovered the message several months after its initial posting and complained to the Network.<sup>136</sup> Smith later told a representative of the Network that he never intended his message to be posted online.<sup>137</sup> Batzel disputed Smith's account of their conversations, and denied making any statements regarding her relation to Nazi officials or inheriting art.<sup>138</sup> Batzel denied that any of these statements were true and alleged that Smith made them up after Batzel refused to pass his screenplay to her Hollywood contacts.<sup>139</sup> The court applied Section 230 to the Museum Security Network and found that while a representative of the Network edited Smith's email, those actions did not rise to the level of "development."<sup>140</sup> The "development of information" is therefore a more significant contribution to content than editing portions of an e-mail and selecting material for publication.<sup>141</sup>

The Ninth Circuit refused to focus primarily on the information provider's intentions because it did not want to chill free speech or thwart Congress's purpose.<sup>142</sup> The dissent criticized the majority's analysis, arguing that the focus should be on the defendant's conduct.<sup>143</sup> The dissent argued that the ruling would encourage the spread of harmful lies and provide incentives for providers to not regulate content.<sup>144</sup> The court recognized that Section 230's broad immunity could lead to troubling results in certain situations and would not give a content provider any incentives to take down a defamatory post even if there was notice.<sup>145</sup> The court suggested the approach taken by Congress in

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<sup>134</sup> *Id.*

<sup>135</sup> *Batzel v. Smith*, 333 F.3d 1018, 1022 (9th Cir. 2003).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Andrea L. Julian, Comment, *Freedom of Libel: How an Expansive Interpretation of 47 U.S.C. § 230 Affects the Defamation Victim in the Ninth Circuit*, 40 IDAHO L. REV. 509, 510 (2004).

<sup>140</sup> *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

<sup>141</sup> *Id.*

<sup>142</sup> Lee, *supra* note 101, at 481.

<sup>143</sup> Jackson, *supra* note 113, at 53.

<sup>144</sup> *Id.*

<sup>145</sup> Note, *Badging: Section 230 Immunity in a Web 2.0 World*, 123 HARV. L. REV. 981, 986 (2010) (quoting *Batzel v. Smith*, 333 F.3d 1018, 1031 n.19 (9th Cir. 2003)).

the Digital Millennium Copyright Act (DMCA) as a possible solution.<sup>146</sup> The DMCA, unlike the CDA, “provides specific notice, take-down, and put-back procedures that carefully balance the First Amendment rights of users with the rights of potentially injured copyright holders.”<sup>147</sup> Although Congress has yet to pass such measures that would apply to the CDA, the court said that a service provider would be liable if it should have reasonably concluded that a user did not intend to have his e-mail published.<sup>148</sup> The Congressional objectives in passing Section 230 are not furthered by providing immunity in instances where the posted material was clearly not meant for publication.<sup>149</sup>

Some courts followed *Zeran*’s blanket immunity standard, but others were openly reluctant to deny such immunity to ISPs who had been put on notice that defamatory material was on their websites.<sup>150</sup> *Barrett v. Rosenthal* marked the first time that a court rejected *Zeran*’s blanket immunity standard and used a different standard for distributor liability.<sup>151</sup> The plaintiffs operated a website to expose frauds in the health care industry.<sup>152</sup> Defendant Ilena Rosenthal operated an Internet discussion group related to the Humantics Foundation for Women.<sup>153</sup> Plaintiffs argued that Rosenthal and others maliciously wrote defamatory emails and Internet postings that impugned “plaintiffs’ character and competence and disparag[ed] their efforts to combat fraud.”<sup>154</sup> Rosenthal published an article containing these defamatory statements on her website, even though she had allegedly been warned that the article had those statements.<sup>155</sup> Rosenthal moved to strike the complaint arguing her immunity under Section 230.<sup>156</sup> Examining Section 230’s legislative history, the California Supreme Court concluded that Section 230

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<sup>146</sup> *Batzel*, 333 F.3d at 1031 n.19.

<sup>147</sup> *Id.* (citing 17 U.S.C. §§ 512(c) and (g)).

<sup>148</sup> *See Batzel*, 333 F.3d at 1035.

<sup>149</sup> *See id.*

<sup>150</sup> Julian, *supra* note 139, at 521.

<sup>151</sup> *Id.*

<sup>152</sup> *Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* (The complaint summarizes the defamatory statements as follows: “Dr. Barrett is an arrogant, bizarre, close-minded; emotionally disturbed, professionally incompetent, intellectually dishonest, sleazy, unethical, a quack, a thug, a Nazi, a hired gun for vested interests, the leader of a subversive organization, and engaged in criminal activity.” Similar statements were also made pertaining to Dr. Polevoy. *Id.* at n.2).

<sup>155</sup> *Id.* at 514.

<sup>156</sup> *Id.*

“reflect[ed] the intent to promote active screening by service providers of online content provided by others.”<sup>157</sup> The *Barrett* court refused to apply Section 230 immunity to the case.<sup>158</sup>

*D. Carafano v. Metrosplash*

In *Carafano v. Metrosplash*, the Ninth Circuit held that an online dating website was immune under Section 230 for a false profile submitted by an imposter.<sup>159</sup> Metrosplash operated Matchmaker.com, a commercial Internet dating service.<sup>160</sup> The service allowed Matchmaker’s members to post anonymous profiles and contact other members through the Matchmaker server.<sup>161</sup> Members posted pictures and answered a detailed questionnaire to complete their profiles.<sup>162</sup> On October 23, 1999, an unidentified user in Berlin posted a “trial” profile for Christianne Carafano in Matchmaker’s Los Angeles section.<sup>163</sup> Carafano is a well-known actress and her pictures could be easily found over the Internet and were posted as part of the profile.<sup>164</sup> The profile also contained a number of sexually suggestive statements, along with Carafano’s home address and an email address that would generate an automated response with more of her personal information.<sup>165</sup> Soon after the profile was posted, Carafano began to receive sexually explicit and threatening messages.<sup>166</sup> Concerned for her and her son’s safety, Carafano and her son stayed in hotels or at other locations outside of Los Angeles for several months.<sup>167</sup>

A representative for Carafano contacted Matchmaker.com on November 6, 1999, and demanded that the profile be removed.<sup>168</sup> After Matchmaker removed the profile, Carafano sued Matchmaker in California state court for invasion of privacy, defamation, and negligence.<sup>169</sup> After the defendants

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<sup>157</sup> *Barrett v. Rosenthal*, 146 P.3d 510, 522 (Cal. 2006).

<sup>158</sup> Julian, *supra* note 139, at 521.

<sup>159</sup> *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1120-21 (9th Cir. 2003).

<sup>160</sup> *Id.* at 1121-22.

<sup>161</sup> *Id.* at 1121.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121 (9th Cir. 2003).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 1121-22.

<sup>167</sup> *Id.* at 1122.

<sup>168</sup> *Id.*

<sup>169</sup> *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).

removed the case to federal court, the District Court for the Central District of California granted the defendants' motion for summary judgment.<sup>170</sup> However, the district court found that Matchmaker had provided some of the profile's content and so could not qualify for Section 230 immunity.<sup>171</sup> The district court granted summary judgment to Matchmaker, finding that Matchmaker had not disclosed Carafano's address with reckless disregard to her privacy.<sup>172</sup>

When Carafano appealed to the Ninth Circuit, America Online, eBay, and a number of other online businesses intervened to challenge the district court's ruling on Section 230 of the CDA.<sup>173</sup> The Ninth Circuit held that Matchmaker could not be considered an "information content provider" under the CDA, because no profile has any content until a user actively creates it.<sup>174</sup> Matchmaker had left creation of content entirely to the user.<sup>175</sup> Carafano's personal information, such as her address, phone number, and personal phone number were sent, unchanged by Matchmaker, to profile viewers.<sup>176</sup> Consequently, Matchmaker did not play a significant enough role in "creating, developing or transforming" Carafano's information.<sup>177</sup> In addition, the court noted that the website had done "nothing to enhance the defamatory sting of the message, to encourage defamation or to make defamation easier."<sup>178</sup> Despite the serious harm and consequences Carafano suffered, the court concluded that Congress intended that service providers such as Matchmaker be afforded immunity from suit under Section 230.<sup>179</sup>

## V. RECENT DECISIONS WHICH MAY WEAKEN SECTION 230

### A. *Fair Housing Council of San Fernando Valley v. Roommates.com*

As the Internet continued to grow and develop, courts finally began to recognize that the Internet no longer needed the special protections it had

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003).

<sup>175</sup> Julian, *supra* note 139, at 528.

<sup>176</sup> *Carafano*, 339 F.3d at 1125.

<sup>177</sup> *Id.*

<sup>178</sup> Hattie Harman, *Drop-Down Lists and the Communications Decency Act: A Creation Conundrum*, 43 IND. L. REV. 143, 157 (2009).

<sup>179</sup> *Carafano*, 339 F.3d at 1125.

previously been given. Courts began to scale back the broad protections they gave ISPs beginning with the *Zeran* decision. The decision in *Fair Housing Council of San Fernando Valley v. Roommates.com* discussed whether protection is given under Section 230 for violations of the Fair Housing Act.<sup>180</sup> Defendant Roommates.com operated a matchmaking service for individuals searching for roommates.<sup>181</sup> When creating a profile on the website the user had to indicate certain preferences in a roommate with respect to three criteria: sex, sexual orientation, and whether the roommate would bring children to the household.<sup>182</sup> The Fair Housing Council sued Roommates, alleging that Roommates' business violated the Fair Housing Act (FHA).<sup>183</sup> The district court ruled that Section 230 immunity applied and dismissed the claims.<sup>184</sup>

The Court of Appeals stated that a website operator can be both a service provider and a content provider under Section 230 "as to content that it creates itself, or is 'responsible, in whole or in part' for creating or developing, the website is also a content provider."<sup>185</sup> Thus, a provider may be liable for certain content but the immunity may apply to other content.<sup>186</sup> Since Roommates created the questions and answer choices for the questions regarding roommate preferences, it is undoubtedly the "information content provider" as to the questions and can claim no immunity for posting them on its website.<sup>187</sup> The Ninth Circuit distinguished the case from *Carafano* because the person who created the prank profile in *Carafano* had disobeyed the website's instructions.<sup>188</sup> By distinguishing *Carafano*, the court reasoned that a different standard may be necessary when a website has more involvement in soliciting the illegal content.<sup>189</sup> Because Roommates was partly responsible for creating and developing the discriminatory content on its website, the Ninth Circuit held that "[t]he CDA does not grant immunity for

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<sup>180</sup> *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1161 (9th Cir. 2008).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 1162.

<sup>184</sup> *Id.*

<sup>185</sup> *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1162 (9th Cir. 2008).

<sup>186</sup> *Id.* at 1163.

<sup>187</sup> *Id.* at 1164.

<sup>188</sup> Seth Stern, *Fair Housing and Online Free Speech Collide in Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 58 DEPAUL L. REV. 559, 569-70 (2009).

<sup>189</sup> *Id.* at 570.

inducing third parties to express illegal preferences. Roommates' own acts – posting the questionnaire and requiring answers to it – are entirely its doing and thus Section 230 of the CDA does not apply to them. Roommates is entitled to no immunity.”<sup>190</sup> Roommates was “responsible” at least “in part” for each subscriber’s profile page, because both the user and Roommates contributed to the content on each profile page.<sup>191</sup> Section 230 excepts a website if it helps to develop unlawful content and materially contributes to the conduct’s alleged illegality.<sup>192</sup>

This change in liability in Section 230 case law is a direct consequence of the Ninth Circuit’s view of how the Internet has evolved since the CDA was passed in 1996.<sup>193</sup> The *Roommates.com* majority no longer thought it was necessary to provide the Internet with the protections that the CDA originally intended.<sup>194</sup> Instead it considered the Internet as comparable to any other medium of communication, and that it did not deserve special protections not accorded to traditional print and broadcast media.<sup>195</sup> The court also noted that the Internet no longer needed to be coddled and catered to by courts because it had become the most dominant means through which commerce was conducted.<sup>196</sup> The ruling shows that the court did not allow Section 230 to give “online organizations an unfair advantage over their offline competition.”<sup>197</sup>

*B. Federal Trade Commission v. Accusearch*

The Court of Appeals for the Tenth Circuit adopted a similar stance regarding Section 230 in *Federal Trade Commission v. Accusearch*.<sup>198</sup> The Federal Trade Commission (“FTC”) sued Accusearch and its owner to halt the company’s sale of confidential personal data, including telephone records.<sup>199</sup> Accusearch operated Abika.com, which could be used as a search engine to

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<sup>190</sup> *Roommates.com*, 521 F.3d at 1165.

<sup>191</sup> *Id.* at 1167.

<sup>192</sup> *Id.* at 1168.

<sup>193</sup> Varty Defterderian, Note, *Fair Housing Council v. Roommates.com: A New Path for Section 230 Immunity*, 24 BERKELEY TECH L.J. 563, 583 (2009).

<sup>194</sup> *Roommates.com*, 521 F.3d at 1168.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 1164 n.15.

<sup>198</sup> Fed. Trade Comm’n v. Accusearch, 570 F.3d 1187 (10th Cir. 2009).

<sup>199</sup> *Id.* at 1190.

view documents such as court records and sex offender reports.<sup>200</sup> There were also other search categories such as “[r]omantic [p]references” and “[r]umors.”<sup>201</sup>

The district court granted the FTC summary judgment, and Accusearch appealed on the grounds that its business activity in selling this information was protected under Section 230 of the CDA.<sup>202</sup> Accusearch argued that the search services Abika.com offered were primarily services provided by third-party researchers and that the website was only an intermediary between the researchers and the customers.<sup>203</sup> A customer paid an administrative search fee to place an order.<sup>204</sup> Accusearch would then forward the search request to a researcher, who completed it.<sup>205</sup> The researcher sent the results to Accusearch and billed it.<sup>206</sup> Accusearch then emailed the results to the customer and billed them for the researcher’s fee and Accusearch’s administrative search fee.<sup>207</sup> However, the customer did not know that a researcher was involved without reading all of the boilerplate language on Accusearch’s website.<sup>208</sup> In addition, Accusearch did not provide the customer with any contact information for the researcher.<sup>209</sup>

From February 2003 to January 2006, Abika.com provided customers a service through which they could obtain a person’s private phone records.<sup>210</sup> The website advertised that customers could access “details of incoming or outgoing calls from any phone number, prepaid calling card or Internet Phone,” and customers could purchase both cell phone and landline calling records.<sup>211</sup> To acquire this information, Abika.com would almost certainly need to violate the Telecommunications Act or engage in theft or fraud.<sup>212</sup> The Telecommunications Act bars disclosure of this information absent customer

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<sup>200</sup> *Id.* at 1191.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 1190.

<sup>203</sup> Fed. Trade Comm’n v. Accusearch, 570 F.3d 1187, 1191 (10th Cir. 2009).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* (citing Aplt’s. App., Vol. 4 at 1246).

<sup>208</sup> Fed. Trade Comm’n v. Accusearch, 570 F.3d 1187, 1191 (10th Cir. 2009).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 1191-92.

<sup>212</sup> *Id.* at 1192.

consent.<sup>213</sup> Although the Telecommunications Act barred carriers from disclosing these telephone records, Accusearch maintained that it relied in good faith on its third-party researchers' adherence to the law in acquiring this information.<sup>214</sup> In January 2006, Accusearch learned that this information may have been obtained through fraud.<sup>215</sup> In response, Accusearch stopped providing its customers with personal telephone records.<sup>216</sup>

Accusearch countered the FTC's lawsuit with the defense that it was immunized by the CDA because it was a publisher of telephone records that others provided.<sup>217</sup> The district court issued an injunction restricting the ability of Accusearch to engage in the business of selling telephone records and other personal information.<sup>218</sup> In addition to the injunction, the district court also ordered disgorgement of nearly \$200,000 in profits from the sale of telephone records.<sup>219</sup> Accusearch appealed and argued that it was immune from liability under the CDA, and that the purpose of the CDA was to make using and developing the Internet easier by making certain services immune from civil liability when defamatory content was provided by others.<sup>220</sup> The Tenth Circuit held that Accusearch was an "information content provider" under the CDA because it took part in the development of the illegally obtained telephone records.<sup>221</sup> An "information content provider" of certain content that is also an interactive computer service will not be given immunity under the CDA for publication of that content.<sup>222</sup> The definition of the term "information content

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<sup>213</sup> Fed. Trade Comm'n v. Accusearch, 570 F.3d 1187, 1192 (10th Cir. 2009) (quoting 47 U.S.C. § 222(c)(1) ("Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories")).

<sup>214</sup> *Accusearch*, 570 F.3d at 1192.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 1193.

<sup>218</sup> *Id.*

<sup>219</sup> Fed. Trade Comm'n v. Accusearch, 570 F.3d 1187, 1193 (10th Cir. 2009).

<sup>220</sup> *Id.* at 1195 (citing *Zeran v. America Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997)).

<sup>221</sup> *Accusearch*, 570 F.3d at 1198.

<sup>222</sup> *Id.* at 1197 (citing *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1162 (9th Cir. 2008); *Ben Ezer, Weinstein & Co., Inc. v. America Online*



provider” is a broad one, covering those who are responsible for the development of content only in part.<sup>223</sup> Under this definition, there may be several information content providers with respect to a single item of information.<sup>224</sup>

Accusearch also attempted to argue that because the information at issue originated with telecommunications providers, Accusearch itself did not take part in the creation or development of any new information.<sup>225</sup> In interpreting the Congressional intent behind the words in Section 230 of the CDA, the Tenth Circuit reached the conclusion that a service provider is “responsible” for the development of offensive content only if it has participated in or specifically encouraged the development of the offensive aspects of the content.<sup>226</sup> In this case, the defamatory content was the illegal disclosure of confidential information.<sup>227</sup> The decision draws support from the Ninth Circuit’s holding in *Roommates.com*, which held “a website helps to develop unlawful content, and thus falls within the exception to Section 230, if it contributes materially to the alleged illegality of the conduct.”<sup>228</sup> Because Accusearch was aware that the records’ confidentiality was protected by law when it paid researchers to acquire them, Accusearch had specifically encouraged the development of the offensive content.<sup>229</sup> Accusearch’s actions were not those of a neutral part, but rather its actions were done with the intention of generating the offensive content.<sup>230</sup> The court considered Accusearch’s motivations in soliciting and acquiring the information at issue and determined that Accusearch did not act in good faith.<sup>231</sup> Had the content provider sought out such information in good faith, there is a greater likelihood that it would have received immunity under the CDA, as the content provider would not have been “responsible, in whole or in part . . . for the development

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Inc., 206 F.3d 980, 985 n.4 (10th Cir. 2000)).

<sup>223</sup> Fed. Trade Comm’n v. Accusearch, 570 F.3d 1187, 1197 (10th Cir. 2009) (citing *Universal Commc’ns Sys. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007)).

<sup>224</sup> *Accusearch*, 570 F.3d at 1197 (citing 47 U.S.C. §230(f)(3)).

<sup>225</sup> *Accusearch*, 570 F.3d at 1198.

<sup>226</sup> *Id.* at 1199.

<sup>227</sup> *Id.*

<sup>228</sup> Fed. Trade Comm’n v. Accusearch, 570 F.3d 1187, 1200 (10th Cir. 2009) (citing *Fair Housing Council of San Fernando Valley v. Roommate.com*, 521 F.3d at 1167-68 (9th Cir. 2008)).

<sup>229</sup> *Accusearch*, 570 F.3d at 1200.

<sup>230</sup> *Id.* at 1201.

<sup>231</sup> *Id.*

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of that information.”<sup>232</sup> However, when a content provider does not solicit or develop the information in good faith, it will be considered an information content provider and immunity under Section 230 will not be available.<sup>233</sup> The district court concluded that Congress would not have intended to give Accusearch’s active solicitation of information it knew to be offensive immunity under Section 230.<sup>234</sup>

VI. POTENTIAL CHALLENGES TO SECTION 230 MOVING FORWARD

A. *Defamation in Online Gossip Blogs*

As the Internet itself has expanded and changed since *Zeran* was decided in 1996, so have the ways in which individuals are defamed over the Internet. The message boards created by massive Internet providers such as AOL from the *Zeran* era have evolved into interactive blogs that anyone with Internet access and a basic knowledge of web design can create. Facebook and MySpace profiles, IM icons and online blogs are the new Internet phenomena on which defamatory statements are posted.<sup>235</sup> JuicyCampus was an example of such a blog, which was marketed as an interactive gossip blog for college students.<sup>236</sup> While the technology involving online defamation has advanced significantly since 1996, the *Zeran* standard remains good law.<sup>237</sup>

Fortunately for the website’s victims of defamation, but unfortunately for a number of anxious legal commentators, JuicyCampus was shut down before any lawsuits could be ruled on by a court.<sup>238</sup> As of February 5, 2009, the original website was no longer in operation and all Internet traffic was redirected to the college gossip blog collegeacb.com.<sup>239</sup> The “acb” stands for

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<sup>232</sup> *Id.* at 1204 (quoting 47 U.S.C. §230(f)(3)).

<sup>233</sup> Fed. Trade Comm’n v. Accusearch, 570 F.3d 1187, 1204 (10th Cir. 2009).

<sup>234</sup> *Internet Law – Communications Decency Act—Federal District Court Denies § 230 Immunity to Website That Solicits Illicit Content*, 121 HARV. L. REV. 2246, 2248 (2008) (citing *Accusearch*, 2007 WL 4356786 at \*4).

<sup>235</sup> See Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210, 252 (2009).

<sup>236</sup> OFFICIAL JUICY CAMPUS BLOG, <http://juicycampus.blogspot.com/> (last visited Mar. 30, 2011).

<sup>237</sup> See *Nemet Chevrolet v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (quoting *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

<sup>238</sup> *Consumeraffairs.com*, 591 F.3d at 255.

<sup>239</sup> *Id.*

“Anonymous Confession Board.”<sup>240</sup> The website stated that JuicyCampus was shut down due to the fact that the site’s growth “outpaced our ability to muster the resources needed to survive the economic turndown and the current level of revenue generated is simply not sufficient to keep the site alive.”<sup>241</sup> The site also states that the decision to shut down was not influenced by any charges filed by state Attorneys General or other lawsuits.<sup>242</sup> While JuicyCampus was not able to survive the recent economic crisis, similar websites are likely to appear in the near future.

The website collegeacb.com has recently appeared and is attempting to take the place of JuicyCampus as a gossip board for colleges and universities.<sup>243</sup> The website states its purpose as: “The College ACB or College Anonymous Confession Board seeks to give students a place to vent, rant, and talk to college peers in an environment free from social constraints and about subjects that might otherwise be taboo.”<sup>244</sup> The website’s release also states, “[i]t is the campus center, the dorm room, the cafeteria, and the lecture hall, all combined into a single, easily accessible forum where everyone is invited to converse openly, without fear of reprisal or reprimand.”<sup>245</sup> If a defamed individual decides to sue this website for liability, the court will have to decide whether this site is entitled to protection under Section 230 of the CDA. I believe the court should begin to scale back the protections given to this type of website, and move away from the broad protections given to providers of Internet content and the notion that “liability upon notice reinforces service providers’ incentives to restrict speech and abstain from self-regulation.”<sup>246</sup> In regards to anonymous gossip boards, the operators of anonymous gossip board sites are often aware and even encourage third parties to post content that may be defamatory. An example of such a website is Campus Gossip, which advertises

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<sup>240</sup> *College ACB: College ACB Press Release* (Feb. 5, 2009), <http://collegeacb.blogspot.com/2009/02/collegeacb-press-release.html>, (last visited Feb. 28, 2010).

<sup>241</sup> Official Juicy Campus Blog, <http://juicycampus.blogspot.com/> (last visited Feb. 28, 2010).

<sup>242</sup> *Id.*

<sup>243</sup> *College ACB: College ACB Press Release* (Feb. 5, 2009), <http://collegeacb.blogspot.com/2009/02/collegeacb-press-release.html>, (last visited Feb. 28, 2010).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).

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itself as the world's leading college gossip website.<sup>247</sup> In *Zeran*, the message board at issue was a primitive Internet bulletin board operated by America Online, which did not in any way encourage the type of defamatory posting that was created about Kenneth Zeran.<sup>248</sup> Today's online message boards have become far more technologically advanced, and there are websites that cater to almost any subject for discussion. I do not believe Congress intended to extend this protection to websites that encourage third parties to post defamatory material "without fear of reprisal or reprimand."<sup>249</sup> It is difficult to imagine that Congress in 1996 could have envisioned the Internet growing into what it is today.

*B. Proposal #1: A New Interpretation of Section 230*

In order to protect victims of online defamation on websites such as JuicyCampus and collegeacb, courts should begin to follow the Ninth and Tenth Circuits in scaling back the protections of Section 230, and apply this to defamation cases as well. Websites such as JuicyCampus and collegeacb.com are "information content providers," in the same sense that Roommates.com and Accusearch were held to be information content providers by the Ninth and Tenth Circuits.<sup>250</sup> In *Roommates.com*, the website asked users to select from certain preferences, and the user's answers to some of these required questions may have been in violation of the Fair Housing Act.<sup>251</sup> Similarly, Accusearch facilitated transactions between their customers and third parties with the knowledge that the procurement of certain information may have been in violation of the Telecommunications Act.<sup>252</sup> According to the Tenth Circuit, a service provider that specifically encourages the development of what is offensive about certain content will be considered "responsible" for the

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<sup>247</sup> Home Page-Campus Gossip, <http://campusgossip.com/index.php> (last visited Mar. 30, 2011).

<sup>248</sup> *Zeran*, 129 F.3d at 329.

<sup>249</sup> *College ACB: College ACB Press Release* (Feb. 5, 2009), <http://collegeacb.blogspot.com/2009/02/collegeacb-press-release.html>, (last visited Feb. 28, 2010).

<sup>249</sup> *Id.*

<sup>250</sup> See *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1165 (9th Cir. 2008); *Fed. Trade Comm'n v. Accusearch*, 570 F.3d 1187, 1199 (10th Cir. 2009).

<sup>251</sup> *Roommates.com*, 521 F.3d at 1161.

<sup>252</sup> *Accusearch*, 570 F.3d at 1199.

development of that content.<sup>253</sup> A website that is dedicated to college campus gossip certainly “encourages development” of illegal defamation, at least to a certain degree. Also, similar to *Roommates.com*, gossip websites are often a “collaborative effort between the website and its user.”<sup>254</sup> The Ninth Circuit took a position similar to that of the Tenth Circuit, holding that if a content provider “contributes materially” to the development of offensive content, it will not be given immunity under Section 230.<sup>255</sup> Both decisions suggest that courts are no longer willing to extend such broad protection under Section 230 of the CDA as was given in the line of cases following *Zeran* and *Barrett v. Rosenthal*.

Such an interpretation of Section 230 would greatly improve the protection that courts will be able to provide to victims of online defamation. Online gossip blogs that solicit defamatory postings by third parties will no longer fall under Section 230’s protection. Rather than face the difficult task of tracking down anonymous third parties, under this interpretation of Section 230, victims would have a right to action against the Internet service providers as well. Instead of facing liability, websites that function solely for gossip, such as *collegeACB.com*, will likely shut down, while websites that serve other purposes will closely monitor their sites to ensure they do not do anything to encourage defamatory content.

*C. Proposal #2: Amendment of Section 230*

Another method of restoring options of legal recourse for victims of online defamation would be through an amendment to Section 230. Other commentators have argued for Congress to modify the CDA, in order to address situations in which distributors have actual knowledge of the offensive conduct and hold them liable.<sup>256</sup> Another possible solution would be for Congress to provide a much clearer definition of the phrase “information content provider” than currently available in the statute.<sup>257</sup> Doing so would enable courts to distinguish between websites that do nothing to encourage the illegal content, such as *Matchmaker.com* in *Carafano*, from websites such as *Roommates*, *Accusearch*, and *JuicyCampus*, that encourage and are aware of

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<sup>253</sup> *Id.*

<sup>254</sup> *Roommates.com*, 521 F.3d at 1167.

<sup>255</sup> *Id.* at 1168.

<sup>256</sup> Annemarie Pantazis, *Zeran v. America Online, Inc.: Insulating Internet Service Providers from Defamation Liability*, 34 WAKE FOREST L. REV. 531, 555 (1999).

<sup>257</sup> 47 U.S.C. § 230(c)(2) (2006).

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the illegal content being generated on the websites they operate.<sup>258</sup> Such a measure would likely return the standard of liability to the pre-CDA system of notice present in the *Stratton-Oakmont* decision.<sup>259</sup> This would allow such websites to continue to operate, but only if they censor postings and immediately remove defamatory postings. As the *Stratton-Oakmont* court reasoned, while such censoring of messages “may have a chilling effect on freedom of communication in Cyberspace, . . . it appears that this chilling effect is exactly what [offending content providers] want, but for the legal liability that attaches to such censorship.”<sup>260</sup> Applying the standard of liability created by *Stratton-Oakmont* to gossip web sites would not only encourage the site’s operators to closely monitor content, but it would also impose liability on the website for any defamatory message which is not immediately removed.<sup>261</sup>

An amendment to Section 230 would have advantages over a new judicial interpretation of the law as it would provide website operators with a definitive standard of how they must act in order to avoid liability. Amending Section 230 should be done because the concerns about the Internet’s development when the CDA was passed are no longer as relevant. Because the Internet has become a dominant channel for the exchange of information over the past decade, it should no longer be entitled to special protections that more traditional forms of communications are not afforded.

VII. CONCLUSION

The Internet has changed a great deal since the Telecommunications Act was passed in 1996. When the Telecommunications Act was passed, and along with it Section 230 of the Communications Decency Act, Congress could not accurately predict the crucial role that the Internet would soon play as a center for communication and commerce. As the number of Internet users worldwide has multiplied by over twenty-five times since 1996,<sup>262</sup> the policy reasons behind Section 230 of the CDA are no longer as vital to the development of the Internet. Because of the Internet’s facilitation of free

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<sup>258</sup> See *infra* Part V.

<sup>259</sup> *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at \*3 (N.Y. Sup. Ct. May 24, 1995).

<sup>260</sup> *Id.* at \*5.

<sup>261</sup> *Id.*

<sup>262</sup> *Internet Growth Statistics*, INTERNET WORLD STATS, <http://www.internetworldstats.com/emarketing.htm> (last visited Apr. 11, 2011). As of 1996, roughly 0.9% of the world’s population had regular access to the Internet. As of 2009, this figure had skyrocketed to 25.6%. *Id.*

speech, totalitarian societies have closely monitored and even restricted Internet use.<sup>263</sup> While the Internet is certainly an excellent medium that allows many viewpoints to be widely disseminated, the supply of free press may well outweigh the demand for such information, due to the relative ease with which information can be published over the Internet.<sup>264</sup> One commentator mentioned that Internet users now are “more willing to pay for pornography or real-time stock quotes than for Internet news and commentary,” which suggests that the demand for political discourse over the Internet today may not be as great as previously thought.<sup>265</sup>

Victims of online defamation have lacked any legal recourse since the Telecommunications Act was passed in 1996. Because the Internet has outgrown the protections given to it by Congress through the CDA, Section 230 must be altered either by an act of Congress or through court rulings in order to protect the many victims of defamation.

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<sup>263</sup> Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1226 (2000).

<sup>264</sup> *Id.* at 1225.

<sup>265</sup> *Id.*