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THE GRADUAL EROSION OF THE LAW THAT SHAPED THE
INTERNET: SECTION 230'S EVOLUTION OVER TWO DECADES[†]

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I. INTRODUCTION

In 1996, Congress enacted a statute obliquely entitled the Communications Decency Act (CDA). Although the Supreme Court struck down much of the statute a year after its passage,¹ one provision that remains—Section 230—has had more of an impact on the development of the modern Internet than perhaps any other law that Congress has ever passed. Its impact primarily stems from the twenty-six words in Section 230(c)(1) of the Communications Decency Act:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.²

While seemingly innocuous, this single sentence has significantly altered the legal landscape for the Internet. Those twenty-six words mean that websites, applications, Internet service providers (ISPs), social media companies, and other online service providers should not be held liable for defamation, invasion of privacy, and virtually any other lawsuit that arises from user-provided content.

Section 230 has become such an integral feature of Internet law that it is often easy to overlook the revolutionary growth that it has helped spur in the past two decades. It is difficult to imagine modern

^{1.} Reno v. ACLU, 521 U.S. 844 (1997).

^{2.} 47 U.S.C. § 230 (1998).

social media and crowdsourced sites in a world without Section 230. Imagine if Facebook and Twitter were responsible for every user comment, or if Yelp was responsible for every restaurant review. Most likely, these sites could not exist, at least not in their current forms.

Section 230 only has a few exceptions that allow interactive computer services to be treated as publishers or speakers of content.³ Those narrow exceptions cover violations of federal criminal law, intellectual property law, and the Electronic Communications Privacy Act.⁴

Despite the lack of large exceptions to Section 230, courts have slowly eroded the once-absolute immunity by concluding that some online service providers encouraged or contributed to the user content, and therefore the user content was not “provided by another information content provider.” This trend began with a 2008 en banc opinion from the United States Court of Appeals for the Ninth Circuit, *Fair Housing Council of San Fernando Valley v. Roommates.com*,⁵ in which the court held that a roommate-matching website was not immune for allegations that its users violated federal fair housing laws. The *Roommates.com* decision opened the door to lawsuits against online service providers arising from user content.

In this Article, I review all Section 230-related court opinions published between July 1, 2015 and June 30, 2016 to determine the extent of immunity. The review finds that in approximately half of the cases, courts refused to fully grant Section 230 immunity. Most commonly, the courts concluded that the online service provider actually created and published the content.

To be sure, twenty years after Congress enacted Section 230, and eight years after the *Roommates.com* decision, Section 230 remains a strong shield for online service providers in many cases. However, as the amount of user-generated content has exponentially increased in recent years, courts have struggled with what was once viewed as bullet-proof immunity for online intermediaries, and are slowly enlarging the loopholes that allow plaintiffs’ lawsuits against intermediaries to survive.

Part I of this Article explores the history of Section 230, Congress’s reasoning for passing the law, and Section 230’s structure.

3. See Part I.C *infra*.

4. 18 U.S.C. §§ 2510-22 (2002).

5. Fair Hous. Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1158 (9th Cir. 2008) (en banc).

Part II reviews how courts have interpreted the immunity and its enactment in 1996, with a focus on the *Roommates.com* opinion and the aftermath of that decision. Part III provides the results of the July 1, 2015-June 30, 2016 court opinion review, and concludes that, although Section 230 remains a strong shield in many types of cases, courts do not apply Section 230 immunity as broadly as they did during Section 230's first decade.

II. HISTORY AND STRUCTURE OF SECTION 230

Although Section 230 provides unprecedented legal immunity to online service providers, Congress initially passed the statute in an effort to encourage providers to prevent objectionable user-generated content. This Section examines the problem that Congress sought to address and its eventual solution—Section 230's broad immunity.

A. Pre-Section 230: *Cubby* and *Stratton Oakmont*

To understand the origins of Section 230, it is necessary to review two Internet liability cases decided in the years before Section 230's enactment. These cases—*Cubby, Inc. v. CompuServe, Inc.*⁶ and *Stratton Oakmont, Inc. v. Prodigy Services Co.*⁷—prompted Congress to set the boundaries for Internet service provider liability.

Cubby involved CompuServe, a predecessor to the modern Internet service provider.⁸ CompuServe offered access to a limited number of online bulletin boards and other information services.⁹ CompuServe provided users access to a number of online forums, including Rumorville, a journalism industry newsletter that was edited by an independent contractor.¹⁰ Although the contract with the company that compiled the newsletter required it to be edited “in accordance with editorial and technical standards and conventions of style as established by CompuServe,” CompuServe did not review or edit the newsletter before it was uploaded.¹¹ The plaintiffs in this case developed a computer database intended to

6. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

7. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995).

8. *Cubby*, 776 F. Supp. at 137.

9. *Id.*

10. *Id.*

11. *Id.*

distribute journalism news and compete with Rumorville.¹² They alleged that Rumorville published defamatory statements about them, including a suggestion that the plaintiffs accessed Rumorville information “through some back door” and that one of the plaintiffs was “bounced” from his former employer.¹³ The plaintiffs sued CompuServe and the newsletter’s publisher for libel, business disparagement, and unfair competition.¹⁴ The district court granted CompuServe’s motion to dismiss the libel claim, reasoning that under New York law, book stores, libraries, and other neutral distributors are not liable if they do not know—and have no reason to know—of the defamatory content in the materials that they are distributing.¹⁵ The court reasoned CompuServe should have the same standard of liability as brick-and-mortar news distributors:

Technology is rapidly transforming the information industry. A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, bookstore, or newsstand would impose an undue burden on the free flow of information. Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorville statements.¹⁶

Four years later, a New York state trial court issued *Stratton Oakmont*, which eliminated the *Cubby* liability standard for online service providers that edited content. The case involved Prodigy, an online bulletin board system similar to CompuServe.¹⁷ The plaintiff sued over allegedly defamatory statements made by an anonymous Prodigy user on Prodigy’s Money Talk bulletin board.¹⁸ The court reasoned that, unlike CompuServe in the *Cubby* case, Prodigy had

12. *Id.* at 138.

13. *Id.*

14. *Id.*

15. *Id.* at 140-41.

16. *Id.* at 140.

17. *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, at *2.

18. *Id.* at *1.

publicly stated that it controls the content of its bulletin boards, and that it used automated screening software to filter offensive language.¹⁹ Additionally, the court noted, it contracted with “Bulletin Board Leaders” who enforced community content guidelines and had the ability to delete user content.²⁰ Prodigy, the court wrote, “has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards” and therefore is a publisher and not a mere distributor.²¹

Combined, the *Cubby* and *Stratton Oakmont* decisions had the odd impact of immunizing online service providers from liability if they take an entirely hands-off approach to user-generated content, but holding them liable if they take some steps to moderate content.²² Just as online services and the Internet were becoming increasingly common, not only in workplaces but in homes, courts appeared to be creating a legal incentive for service providers to *avoid* creating community guidelines for user content.²³

B. Congressional Response: Section 230

The publicity over these decisions led to a great deal of wrangling in Congress. Prodigy, along with grassroots groups, aggressively lobbied Congress for broad immunity to end this disparity.²⁴ These arguments prevailed, and the conference report for the Communications Decency Act cited *Stratton Oakmont* as motivating Section 230:

^{19.} *Id.* at *3-4.

^{20.} *Id.* at *3.

^{21.} *Id.* at *10.

^{22.} See Mary Jane Fine, *Mom Wants AOL to Pay in Child's Sex Ordeal, She Calls Service Liable, Despite Law*, BERGEN REC., Apr. 19, 1998.

^{23.} See, e.g., R. Hayes Johnson, Jr., *Defamation in Cyberspace: A Court Takes a Wrong Turn on the Information Superhighway in Stratton Oakmont, Inc. v. Prodigy Services Co.*, 49 ARK. L. REV. 589, 623 (1996) (“Adoption of a Prodigy-like standard for cyberspace defamation would be deleterious to free speech in cyberspace. Beyond its implications on constitutional rights, Prodigy also could hamper consumers and the computer industry. If computer companies must face legal liability if they make some efforts to monitor computer communications, they most likely will stop all monitoring or simply stop providing communication services. Either way, the public will be harmed, and a valuable, emerging technology will be stifled.”).

^{24.} Press Release, Prodigy Services Company, Supported by its Competitors and in Congress, Prodigy Presses its Case in Online Libel Suit (July 26, 1995) (on file with author).

One 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.²⁵

Rather than merely repealing *Stratton Oakmont's* narrow holding regarding Internet content moderation, Congress used this opportunity to provide broad immunity that it believed could spur growth and innovation on the Internet. Congressman Bob Goodlatte, a co-sponsor of the bill, stated that immunity is a better way to promote moderation than requiring service providers to always moderate content. A requirement to moderate user content, he reasoned, would be impractical:

There is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong.²⁶

These two goals—free-market innovation and voluntary content moderation—are codified in the “Policy” portion of Section 230, which briefly lists Congress’s reasons for enacting the law. Of the five enumerated goals for Section 230, the first two involve

^{25.} H.R. REP. NO. 104-458, at 174 (1996) (Conf. Rep.).

^{26.} 141 CONG. REC. H8471 (1995); *see also* Statement of Congressman Christopher Cox (co-author of Section 230), 141 Cong. Rec. H8460 (1995) (“The message today should be from this Congress we embrace this new technology, we welcome the opportunity for education and political discourse that it offers for all of us. We went to help it along this time by saying Government is going to get out of the way and let parents and individuals control it rather than Government doing that job for us.”).

promotion of the growth of the Internet.²⁷ The three remaining policy goals involve the ability of individuals to block objectionable and illegal content.²⁸

In short, Section 230 represents a remarkably effective alliance of two very different interest groups: those that wanted the nascent commercial Internet to thrive with minimal regulation, and those that wanted to ensure individuals and service providers had the tools to filter pornography and similar content from the Internet.

C. Structure of Section 230

To address these twin goals—innovation and voluntary content moderation—Section 230 has two key provisions, Section 230(c)(1) and Section 230(c)(2).

Section 230(c)(1) consists of the twenty-six words that prohibit any provider of an interactive computer service from being treated as the publisher or speaker of any content that is provided by another information content provider.²⁹ The statute defines “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”³⁰ This definition covers not only ISPs and 1990s-era bulletin board services such as Prodigy, but also websites, apps, and other platforms that host user content. The statute defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of

^{27.} See 47 U.S.C. § 230(b)(1) (“to promote the continued development of the Internet and other interactive computer services and other interactive media”) and 47 U.S.C. § 230(b)(2) (“to preserve the vibrant and competitive free market that presently exists for the Internet and other computer services, unfettered by Federal or State regulation”).

^{28.} See 47 U.S.C. § 230(b)(3) (“to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services”); 47 U.S.C. § 230(b)(4) (“to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material”); and 47 U.S.C. § 230(b)(5) (“to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”).

^{29.} 47 U.S.C. § 230(c)(1).

^{30.} 47 U.S.C. § 230(f)(2).

information provided through the Internet or any other interactive computer service.”³¹

Section 230(c)(2) does not receive as much attention as Section 230(c)(1), but it was the primary reason that Congress passed the broad immunity. This subsection emphasizes that operators of interactive computer services do not lose their immunity when they make a good faith effort to edit or delete content that the provider deems objectionable.³² This provision allows websites, apps, and other online service providers to set and enforce user-generated content standards without being held responsible for the user content that they allow on their services. This prevents a repeat of the *Stratton Oakmont* decision, in which the service provider lost its immunity because it enforced content standards.

Section 230 contains three limited exceptions. First, it does not immunize service providers from user content that violates federal criminal law.³³ Accordingly, the federal government can—and does³⁴—require service providers to report apparent violations of child pornography laws. Second, Section 230 does not immunize intermediaries for their users’ violations of copyright and other intellectual property laws.³⁵ Indeed, the Digital Millennium Copyright Act establishes a notice-and-takedown procedure that requires intermediaries to remove copyright-infringing material if they receive a notice, and if they do not remove that material, they could face a lawsuit from the copyright holder.³⁶ Third, Section 230

^{31.} 47 U.S.C. § 230(f)(3).

^{32.} 47 U.S.C. § 230(c)(2) (“No provider or user of an interactive computer service shall be held liable on account of – (a) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).”). See Part III.E *infra*.

^{33.} 47 U.S.C. § 230(e)(1) (“Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.”).

^{34.} 18 U.S.C. § 2258A (2008).

^{35.} 47 U.S.C. § 230(e)(2) (“Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.”).

^{36.} 17 U.S.C. § 512 (2010).

immunity does not apply to violations of federal wiretap laws, or other provisions of the Electronic Communications Privacy Act.³⁷

III. COURTS' EARLY APPLICATION OF SECTION 230 TO INTERMEDIARIES

The relative simplicity of Section 230—and its very narrow explicit exceptions—left a great deal of leeway for courts to determine how broadly they would apply the immunity to online intermediaries. In general, the immunity was quite broad in the first decade of the statute, as discussed below.

A. *The Early Days of Section 230: Zeran and Seemingly Limitless Immunity*

Soon after Congress passed Section 230, courts recognized that the immunity is quite broad. A year after Section 230 was passed, the United States Court of Appeals for the Fourth Circuit issued an opinion in *Zeran v. America Online*.³⁸ The case arose from an anonymous post on an America Online (AOL) bulletin board, alleging that an individual named “Ken” was selling offensive t-shirts related to the 1995 Oklahoma City bombing.³⁹ The post included a phone number, which was the home phone number of the plaintiff, Kenneth Zeran.⁴⁰ After the post, Zeran alleged, he received a number of angry calls and some death threats.⁴¹ At Zeran’s request, AOL removed the post, but an anonymous user posted more messages, leading to many more phone calls.⁴² Zeran sued AOL, seeking to hold it liable for the anonymous poster’s allegedly defamatory speech.⁴³

The district court dismissed the lawsuit, concluding that the recently enacted Section 230 barred the claim against AOL. Zeran appealed, and the Fourth Circuit affirmed the district court’s dismissal. The Fourth Circuit reasoned that the “plain language” of Section 230(c)(1) “creates a federal immunity to any cause of action

^{37.} 47 U.S.C. § 230(e)(4) (“Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.”).

^{38.} *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997).

^{39.} *Id.* at 329.

^{40.} *Id.*

^{41.} *Id.*

^{42.} *Id.*

^{43.} *Id.* at 329-30.

that would make service providers liable for information originating with a third-party user of the service.”⁴⁴ This immunity, the court concluded, means that “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”⁴⁵ Section 230, the court determined, is Congress’s recognition of “the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.”⁴⁶

The *Zeran* opinion was the first time that a federal appellate court interpreted the scope of Section 230. Therefore, the court’s defendant-friendly reading of the statute soon caught the attention of litigants, courts, and legal scholars. As one commentator wrote in 1999, “[t]he broad ruling in *Zeran* would indicate that service providers are immune from all tort-based claims for the publication of third-party statements on the Internet because of Section 230 of the CDA”⁴⁷ and urged courts to read *Zeran* narrowly and only apply Section 230’s immunity to defamation claims.⁴⁸ Nonetheless, *Zeran* soon became the dominant interpretation of Section 230, with one commentator in 2002 describing it as “the most influential interpretation of Section 230(c).”⁴⁹

Courts across the nation quickly adopted *Zeran*’s broad reading of Section 230. For instance, in 1998, Sidney Blumenthal, a Clinton White House staffer, sued AOL for defamation arising from an allegation on the Drudge Report that Blumenthal had abused his wife.⁵⁰ America Online had a licensing agreement with Drudge Report, which allowed AOL to post the website’s reports on its online service.⁵¹ America Online moved for summary judgment,

44. *Id.* at 330.

45. *Id.*

46. *Id.*

47. David Wiener, Comment, *Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran?*, 39 SANTA CLARA L. REV. 905, 928 (1999).

48. *Id.* at 930 (“Immunizing a system operator who knowingly and willfully transmits inaccurate content on an electronic bulletin board does not promote the ‘vibrant speech’ policy behind the CDA. Some bulletin boards, such as technical support sites, are not intended to be a forum for exchanging ‘ideas’ at all. Rather, individuals accessing these sites specifically rely on the content found on the electronic bulletin board in order to maintain and service a product purchased from the company operating the technical support site.”).

49. Paul Ehrlich, *Communications Decency Act Section 230*, 17 BERKELEY TECH. L.J. 401, 406 (2002).

50. *Blumenthal v. Drudge*, 992 F. Supp. 44, 46 (D.D.C. 1998).

51. *Id.* at 47.

arguing that Section 230 immunized it from the defamation claim. The U.S. District Court for the District of Columbia agreed with America Online and granted summary judgment. Adopting the *Zeran* holding, the Court reasoned that America Online “was nothing more than a provider of an interactive computer service on which the Drudge Report was carried.”⁵² The court was sympathetic to Blumenthal, noting that AOL contracts with Drudge Report for the content and has the ability to change or delete the content, and therefore “[i]t would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor.”⁵³ However, the court concluded, “Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.”⁵⁴

Courts have applied the immunity not only to service providers such as AOL, but also to websites and other online platforms that host user-generated content. For instance, in 2003, the United States Court of Appeals for the Ninth Circuit in *Carafano v. Metrosplash.com* ruled that Matchmaker.com, an online dating service, was immune from a lawsuit arising from a user’s false posting of a profile that used photographs of the plaintiff, who was an actress.⁵⁵ The plaintiff soon received sexually explicit and threatening messages.⁵⁶ A few days after the plaintiff’s representative contacted Matchmaker.com, the company removed the profile.⁵⁷ The plaintiff sued for invasion of privacy, misappropriation of the right of publicity, defamation, and negligence.⁵⁸ The district court granted summary judgment to Matchmaker.com, concluding that the plaintiff failed to state viable claims on the merits, but also noted that Matchmaker.com was not immune under Section 230. The plaintiff appealed, and the Ninth Circuit concluded that Matchmaker.com was, in fact, immune under Section 230.⁵⁹ The court reasoned that “so long as a third-party willingly provides the essential published content, the interactive service provider receives

52. *Id.* at 50.

53. *Id.* at 51.

54. *Id.* at 52.

55. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121 (9th Cir. 2003).

56. *Id.* at 1121-22.

57. *Id.* at 1122.

58. *Id.*

59. *Id.* at 1123.

full immunity regardless of the specific editing or selection process.”⁶⁰ The Ninth Circuit held that Matchmaker.com was immune, even though the person who posted the content was responding to the website’s online questionnaire, because the actual information “consisted of the particular options chosen and the additional essay answers provided.”⁶¹ The opinion suggested that Section 230’s immunity has few limits, as the court immunized the website even though it provided questions that allowed the anonymous user to provide the allegedly illegal content.

That same year, the Ninth Circuit issued its opinion in *Batzel v. Smith*, which extended Section 230 immunity to online intermediaries that made a voluntary and affirmative decision to display user content. In that case, handyman Robert Smith alleged that when he was doing work on lawyer Ellen Batzel’s home, Batzel told him that she was the granddaughter of “one of Adolph Hitler’s right-hand men” and he noticed old European artwork on the walls that he suspected was “looted” from Jewish people during World War II.⁶² He sent an email describing his suspicions to the Museum Security Network, a website and email listserv about stolen artwork. The Museum Security Network’s operator, Ton Cremers, received the email, made minor wording changes, and published the letter on the listserv and website.⁶³ Batzel sued Smith, the Museum Security Network, Cremers, and a sponsor of the website for defamation, in California federal court.⁶⁴ Cremers moved to dismiss the lawsuit, relying primarily on Section 230.

The majority on the three-judge Ninth Circuit panel concluded that Section 230 immunized Cremers, Museum Security Network, and the sponsor from liability for the defamatory content. “Obviously, Cremers did not create Smith’s e-mail,” the majority reasoned, “Smith composed the e-mail entirely on his own.”⁶⁵

Despite the majority’s apparent ease at resolving the case, *Batzel* was a much more difficult case to resolve than cases such as *Zeran* because it did not merely involve content that was generated and posted by a third party and then automatically published on the intermediary. Rather, the individual who ran the intermediary took *affirmative* steps to review, edit, and determine whether to post the

60. *Id.* at 1124.

61. *Id.*

62. *Batzel v. Smith*, 333 F.3d 1018, 1020-21 (9th Cir. 2003).

63. *Id.* at 1022.

64. *Id.*

65. *Id.* at 1031.

content on the listserv and website. In a partial concurrence and partial dissent, Judge Gould reasoned that by selecting and editing certain content, Cremers (and Museum Security Network) were no longer passive intermediaries entitled to Section 230 immunity. “A person's decision to select particular information for distribution on the Internet changes that information in a subtle but important way: it adds the person's imprimatur to it,” Judge Gould wrote.⁶⁶

This distinction was irrelevant to the majority in *Batzel*. The majority concluded that one of the key motivations for Section 230 was to enable intermediaries to screen content that they do not believe should be published on their services:

Such a distinction between deciding to publish only some of the material submitted and deciding not to publish some of the material submitted is not a viable one. The scope of the immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance.

A distinction between removing an item once it has appeared on the Internet and screening before publication cannot fly either. For one thing, there is no basis for believing that Congress intended a one-bite-at-the-apple form of immunity. Also, Congress could not have meant to favor removal of offending material over more advanced software that screens out the material before it ever appears. If anything, the goal of encouraging assistance to parents seeking to control children's access to offensive material would suggest a preference for a system in which the offensive material is not available even temporarily.⁶⁷

The *Batzel* opinion is among the most expansive readings of Section 230, as it allows immunity not merely for passive publication, but for intermediaries that have taken *active* steps to place the content on their services. Indeed, it has been cited in more than 200 court opinions in the past 13 years, often for the proposition that Section 230 immunity is broad.⁶⁸ *Batzel* and *Carafano* are

^{66.} *Id.* at 1038 (Gould, J., concurring in part and dissenting in part).

^{67.} *Id.* at 1032 (majority opinion).

^{68.} *See Jones v. Dirty World Entm't Recordings LLC*, 755 F. 3d 398, 415-16 (6th Cir. 2014).

particularly influential because they were decided by the Ninth Circuit, which includes California, the home to a number of large online intermediaries such as Google, Facebook, and Yahoo!. For that reason, the Ninth Circuit's Section 230 opinions often are relied upon by courts in other circuits.

Indeed, in the early years of Section 230, the immunity appeared to be nearly impenetrable. In 2001 and 2002, courts issued 10 written opinions in which civil defendants claimed Section 230 immunity. Of those 10 opinions, eight opinions held that the defendant online intermediaries were immune from claims arising from third-party content.⁶⁹ The only two cases in which a court declined to immunize an online intermediary involved trademark infringement claims,⁷⁰

^{69.} *Carafano v. Metrosplash.com Inc.*, 207 F. Supp. 2d 1055 (C.D. Cal. 2002), *aff'd* *Carafano v. Metrosplash.com Inc.*, 339 F.3d 1119, 1121 (9th Cir. 2003) (discussed above); *PatentWizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069 (D.S.D. 2001) ("For now, the § 230 of the Communication Decency Act errs on the side of robust communication, and prevents the plaintiffs from moving forward with their claims."); *Morrison v. American Online, Inc.*, 153 F. Supp. 2d 930 (N.D. Ind. 2001) ("The wisdom of Congress in providing such immunity is well taken considering the myriad of constitutional and other legal issues that could be raised by various parties without giving such interactive computer service providers the ability to regulate without fear of legal action."); *Smith v. Intercosmos Media Grp.*, No. 02-1964 SECTION "C", 2002 U.S. Dist. LEXIS 24251, at *10-11 (E.D. La. Dec. 17, 2002) ("The defendant is immunized from liability for this state claim of negligence because the defendant meets the three requirements of the CDA immunity. First, the defendant qualifies as an interactive service provider. Second, the defendant is not the source of the alleged defamatory statements. Third, the claim against the defendant treats the defendant as publisher of the alleged defamatory statements."); *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 715 (Cal. Ct. App. 2002) ("The substance of appellants' allegations reveal they ultimately seek to hold eBay responsible for conduct falling within the reach of section 230, namely, eBay's dissemination of representations made by the individual defendants, or the posting of compilations of information generated by those defendants and other third parties."); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. Ct. App. 2001) ("There is no allegation that Amazon was responsible for creating or developing the negative comments. Amazon was not a content provider under the allegations in Schneider's complaint. Because all three elements for § 230 immunity are satisfied, the trial court properly concluded § 230 bars Schneider's claims against Amazon."); *Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772, 780 (Cal. Ct. App. 2001) ("[W]e conclude that the application of section 230(c)(1) immunity to bar appellant's state law causes of action is fully consistent with the purpose as well as the letter of section 230."); *Doe v. America Online, Inc.*, 783 So. 2d 1010, 1018 (Fla. 2001) ("We specifically concur that section 230 expressly bars 'any actions' and we are compelled to give the language of this preemptive law its plain meaning.")

^{70.} *Gucci America, Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409 (S.D.N.Y. 2001); *Ford Motor Co. v. GreatDomains.com, Inc.*, No. 00-CV-71544-DT, 2001 U.S. Dist. LEXIS 24780 (E.D. Mich. Sept. 25, 2001).

which are intellectual property claims that Section 230 explicitly exempts from immunity. In summary, online intermediaries appeared to be entirely immune to any claims arising from user content, unless the claims arose from the three narrow exceptions explicitly stated in Section 230.

B. Roommates.com and the Emergence of Modest Limits on Section 230 Immunity

However, this certainty in strong Section 230 immunity did not endure. Five years after the Ninth Circuit decided *Carafano* and *Batzel*, it issued the *Roommates.com* 2008 en banc opinion,⁷¹ which presented the most significant threat to Section 230 immunity in the statute's twelve-year history. Roommates.com matched people who had a room to rent with those looking for housing. To list a room, subscribers created profiles via an automated questionnaire. Among the information that they provided were sexual orientation, sex, and whether children would live in the home.⁷² The site also allowed subscribers to add "Additional Comments" in an open-ended essay section.⁷³ The Fair Housing Council of the San Fernando Valley and San Diego brought a lawsuit against Roommates.com under federal and state housing discrimination laws, which prohibit housing discrimination based on family status, sexual orientation, and sex.⁷⁴ The district court granted Roommates.com's motion to dismiss, concluding that it was immune under Section 230.⁷⁵

On appeal, the Ninth Circuit, sitting en banc, reversed the district court and concluded that Section 230 did not immunize the website from the discrimination claims. The gravamen of the court's ruling was that although Roommates.com is an interactive computer service, it also is an "information content provider" because it *required* users to answer questions about familial status, sex, and sexual orientation.⁷⁶ Writing for the majority, Judge Kozinski acknowledged that although the site *was* immune for claims arising from the content that users provided, the site was not immune from claims arising from the questions that it asked to solicit that information:

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

72. *Id.* at 1161.

73. *Id.*

74. *Id.* at 1162 & n.4.

75. *Id.* at 1162.

76. *Id.* at 1164.

Here, the part of the profile that is alleged to offend the Fair Housing Act and state housing discrimination laws—the information about sex, family status and sexual orientation—is provided by subscribers in response to Roommate's questions, which they cannot refuse to answer if they want to use defendant's services. By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information. And [S]ection 230 provides immunity only if the interactive computer service does not “creat[e] or develop[]” the information “in whole or in part.”⁷⁷

The central holding of *Roommates.com* was its definition of “development” for the purposes of Section 230. An interactive computer service “develops” third-party content—and therefore loses Section 230 immunity—“if it contributes materially to the alleged illegality of the conduct.”⁷⁸ As an illustration of the “material contribution” test, the court provided an example:

A website operator who edits user-created content—such as by correcting spelling, removing obscenity or trimming for length—retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner that contributes to the alleged illegality—such as by removing the word “not” from a user's message reading “[Name] did not steal the artwork” in order to transform an innocent message into a libelous one—is directly involved in the alleged illegality and thus not immune.⁷⁹

Still, Judge Kozinski recognized that Congress intended the immunity to be broad, and apparently attempted to caution that the opinion was not intended to erode Section 230. He warned that “there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality,” and that such cases “must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by

77. *Id.* at 1166 (quoting 47 U.S.C. § 230(f)(3)).

78. *Id.* at 1167-68.

79. *Id.* at 1169.

ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties.”⁸⁰

Nonetheless, in a stinging dissent, Judge McKeown argued that the opinion “threatens to chill the robust development of the Internet that Congress envisioned.”⁸¹ In Judge McKeown’s view, the website does not create or develop the allegedly discriminatory information. Rather, she wrote, the site merely provides “a form with options for standardized answers. Listing categories such as geographic location, cleanliness, gender and number of occupants, and transmitting to users’ profiles of other users whose expressed information matches their expressed preferences, can hardly be said to be creating or developing information.”⁸²

The en banc opinion received significant media attention, and commentators questioned whether the opinion would make it easier for plaintiffs to bring lawsuits against online intermediaries. Soon after the Ninth Circuit issued the en banc opinion, legal scholars branded it “the most significant deviation from the *Zeran* line of cases.”⁸³ This deviation, some argued, was out of line with the clear congressional intent that courts had recognized for more than a decade.⁸⁴ Professor Eric Goldman wrote at the time that he was “fairly confident that lots of duck-biting plaintiffs will try to capitalize on this opinion and they will find some judges who ignore the philosophical statements and instead turn a decision on the opinion’s myriad of ambiguities.”⁸⁵

Indeed, some other courts began to carve out exceptions to Section 230. For instance, the United States Court of Appeals for the

^{80.} *Id.* at 1174.

^{81.} *Id.* at 1176 (McKeown, J., dissenting).

^{82.} *Id.* at 1182.

^{83.} Diane J. Klein & Charles Doskow, *Housingdiscrimination.com.?: The Ninth Circuit (Mostly) Puts Out the Welcome Mat for Fair Housing Act Suits Against Roommate-Matching Websites*, 38 GOLDEN GATE U.L. REV. 329, 377 (2008).

^{84.} See Varty Defterderian, *Fair Housing Council v. Roommates.com: A New Path for Section 230 Immunity*, 24 BERKELEY TECH. L.J. 563, 592 (2009) (“Despite over a decade of precedent and clear congressional intent, Roommates.com paved a new path to [online service provider] liability. The bright line test demarcating information content providers from online service providers is gone. Though perhaps well intentioned, the majority not only created a hazier test for immunity under section 230, but also overstepped its bounds.”).

^{85.} Eric Goldman, *Roommates.com Denied 230 Immunity by Ninth Circuit En Banc (With My Comments)*, Tech. & Mktg. L. Blog (April 3, 2008), http://blog.ericgoldman.org/archives/2008/04/roommatescom_de_1.htm.

Sixth Circuit held that Section 230 did not immunize an online dating service from a civil suit by an adult plaintiff who was arrested after having sexual relations with a fourteen-year-old female whom he met on the site, and the minor claimed to be eighteen.⁸⁶ Although the Sixth Circuit affirmed the district court's dismissal of the case for failure to state a claim, it rejected the district court's dismissal based on Section 230, concluding that such a reading "abrogate[d] all state- or common-law causes of action brought against interactive Internet services."⁸⁷ Indeed, such preemption precisely was the intent of Congress when it enacted Section 230.⁸⁸

A year after the *Roommates.com* decision, the United States Court of Appeals for the Tenth Circuit allowed a lawsuit filed by the Federal Trade Commission to proceed against a website operator that allegedly sold illegally obtained personal information.⁸⁹ The defendant asserted that it was immune under Section 230 because it merely connected third-party researchers with customers who request information. The Tenth Circuit refused to immunize the defendant, concluding that the site "was responsible for the development of that content—for the conversion of the legally protected records from confidential material to publicly exposed information."⁹⁰ The Tenth Circuit relied on the *Roommates.com* holding for the proposition that an interactive computer service that also acts as an information content provider "is not immune from liability arising from publication of that content."⁹¹ Applying the *Roommates.com* test, the Tenth Circuit concluded that the website was "responsible for the development of the specific content that was the source of the alleged liability."⁹² Acknowledging that the defendant website operator "made nothing new nor brought anything into existence," the Tenth Circuit reasoned that the website operator nonetheless "developed" the content because it facilitated the transaction.⁹³ The Tenth Circuit, therefore, built on the unprecedented *Roommates.com* holding by imposing liability on an

86. *Doe v. SexSearch.com*, 551 F.3d 412 (6th Cir. 2008).

87. *Id.* at 415.

88. *See supra* Section I.B.

89. *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009).

90. *Id.* at 1199.

91. *Id.* at 1197.

92. *Id.* at 1198.

93. *Id.* ("Land is developed by harnessing its untapped potential for building or for extracting resources (citation omitted). Likewise, when confidential telephone information was exposed to public view through *Abika.com*, that information was 'developed.'").

online service provider that did not actually develop the content that was the basis of the litigation. This expansive definition of “development” was perhaps an even greater challenge to a broad reading of Section 230 than *Roommates.com*.

Also in 2009, the Ninth Circuit again issued an opinion that denied complete Section 230 immunity to a website. In *Barnes v. Yahoo!, Inc.*, Yahoo! allegedly had promised to remove a defamatory posting about the plaintiff and failed to do so. Because that claim arises not from the publication of the user posting, but from Yahoo!’s allegedly broken promise, the Ninth Circuit concluded that Section 230 did not protect the website from a promissory estoppel claim.⁹⁴

Around this time, it was becoming clear that Section 230 did not present the bullet-proof defense for intermediaries that commentators had predicted in the *Zeran* era. In 2010, David Ardia published an empirical analysis of Section 230 cases, and concluded that roughly one-third survived Section 230 defenses, though many of the cases were dismissed on other grounds. Ardia concluded that “[w]hile section 230 has largely protected intermediaries from liability for third-party speech, it has not been the free pass many of its proponents claim and its critics lament it to be.”⁹⁵

This is not to say that Section 230 has been rendered toothless in recent years. In fact, courts have continued to apply Section 230 immunity, even in cases in which the defendants are entirely unsympathetic. Most notably, in 2014, the United States Court of Appeals for the Sixth Circuit in *Jones v. Dirty World Entertainment Recordings LLC* concluded that Section 230 immunized a website, TheDirty.com, from a defamation lawsuit arising from anonymous comments about the plaintiff.⁹⁶ TheDirty.com, a gossip website, instructed its readers to “[t]ell us what’s happening. Remember to tell us who, what, when, where, why[,]”⁹⁷ and the anonymous submissions all appeared under the authorship of “THE DIRTY ARMY.”⁹⁸ The website published photographs of the plaintiff, a

^{94.} *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009) (“Promising is different because it is not synonymous with the performance of the action promised.”).

^{95.} David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 493 (2010).

^{96.} *Jones v. Dirty World Entm’t Recordings LLC*, 755 F. 3d 398 (6th Cir. 2014).

^{97.} *Id.* at 402.

^{98.} *Id.* at 403.

Cincinnati Bengals football cheerleader, with a male companion, along with an anonymous comment alleging that the plaintiff had “slept with every other Bengal Football player.”⁹⁹ Nik Richie, the operator of the website and a defendant in the suit, added editorial comments.¹⁰⁰ The Sixth Circuit concluded that, for the purposes of Section 230, “development” must mean that the defendant did something more than “merely displaying or allowing access to content created by a third party,” because such an expansive definition of the term would render Section 230 “meaningless.”¹⁰¹ Adopting the Ninth Circuit’s *Roommates.com* “material contribution” test, the Sixth Circuit concluded that the website operator did not materially contribute to the third-party content that formed the basis of the defamation claim:

Unlike in *Roommates*, the website that Richie operated did not require users to post illegal or actionable content as a condition of use. . . . Nor does the name of the website, *www.TheDirty.com*, suggest that only illegal or actionable content will be published. Unlike in *Accusearch*, Richie or Dirty World did not compensate users for the submission of unlawful content. . . . The website's content submission form simply instructs users to “[t]ell us what's happening. Remember to tell us who, what, when, where, why.” The form additionally provides labels by which to categorize the submission. These tools, neutral (both in orientation and design) as to what third parties submit, do not constitute a material contribution to any defamatory speech that is uploaded.¹⁰²

The *Jones* case demonstrates that, despite *Roommates.com* and its progeny, many courts continue to shield online intermediaries from liability arising from user-generated content, even in cases in which the defendants’ hands are not entirely clean.

In short, the two decades of Section 230 litigation have yielded mixed results regarding the strength of the immunity provided to intermediaries. The immunity surely is not as strong as many anticipated after the Fourth Circuit issued *Zeran* in 1997, yet *Roommates.com* and its progeny have not entirely abrogated the

99. *Id.*

100. *Id.*

101. *Id.* at 410.

102. *Id.* at 416 (citations omitted).

immunity over the past decade. Indeed, the strength of Section 230 often is very fact-specific and therefore can vary significantly by case.

IV. THE GRADUAL EROSION: ANALYSIS OF RECENT SECTION 230 DECISIONS

To understand the current state of Section 230 immunity, I examined every written opinion, issued between July 1, 2015 and June 30, 2016, in which courts ruled whether online intermediaries were immunized under Section 230. In all, I identified twenty-seven federal and state opinions in which courts reached a decision about Section 230 immunity.¹⁰³

In short, the analysis suggests that Section 230 immunity is not as definite as it once was. Of the twenty-seven court decisions, approximately half—fourteen—declined to provide full immunity to online intermediaries. In all but one of the fourteen cases, the courts declined to grant immunity due to the possibility that the defendant had somehow contributed to the user content. The remaining case involved a copyright infringement claim, which falls under Section 230's explicit exception for intellectual property litigation.¹⁰⁴ A chart listing all of the cases considered in the analysis is provided in the Appendix. This is a remarkable uptick from the Section 230 cases of 2001-02, in which the majority of defendants received full immunity.¹⁰⁵ My analysis demonstrates that the erosion that began with the 2008 *Roommates.com* decision has accelerated, to a point where platforms have little certainty that they will be immune from claims arising from user content.

This section reviews some of the key Section 230 rulings over this period to illustrate the gradually evolving limits on Section 230 immunity. To be sure, Section 230 remains a robust defense for online intermediaries in many cases involving user-generated content. However, the review confirms that courts have increasingly resisted defendants' efforts to use Section 230 as a bar to all claims, particularly early in the litigation.

A. *The Claim Did Not Arise from Third-Party Content*

¹⁰³. The analysis does not include cases in which courts mentioned Section 230 in passing or otherwise failed to decide whether an online intermediary was immunized.

¹⁰⁴. *Malibu Media, LLC v. Weaver*, No. 8:14-cv-1580-T-33TBM, 2016 U.S. Dist. LEXIS 47747 (M.D. Fla. April 8, 2016).

¹⁰⁵. See cases cited *supra* note **Error! Bookmark not defined.**

Among the most publicized cases in the past year was *Doe v. Internet Brands*, in which the Ninth Circuit refused to immunize a modeling networking website from claims arising from an alleged rape of the plaintiff by two individuals who she met on the website. She alleged that two men found her profile on the website, Model Mayhem, lured her to a fake audition, used a date rape drug on her, raped her, and filmed the crime.¹⁰⁶ The plaintiff sued the website's owner, Internet Brands, for negligent failure to warn.¹⁰⁷

The Ninth Circuit panel refused to immunize Internet Brands, concluding that the claims did not arise from the website's publication of third-party content.¹⁰⁸ Rather, the court reasoned, the claims arose from the plaintiff's allegations that the website operators knew that criminals were using its website and negligently failed to warn her of this danger. The court concluded that immunizing Internet Brands "would stretch the CDA beyond its narrow language and its purpose."¹⁰⁹ Such a ruling is contrary to the Section 230 precedent described in Part II, which stands for the clear proposition that Section 230 is to be construed broadly.

The court acknowledged that by hosting the plaintiff's modeling profile, Internet Brands was the "publisher or speaker" of third-party content, and that content "could be described as a 'but-for' cause of her injuries."¹¹⁰ However, the court reasoned, "that does not mean the failure to warn claim seeks to hold Internet Brands liable as the 'publisher or speaker' of user content."¹¹¹

The court reasoned that its holding was merely an application of its earlier ruling in *Barnes* that Section 230 "does not provide a general immunity against all claims derived from third-party content."¹¹² Indeed, *Internet Brands* relies on similar reasoning as *Barnes*, though it stretches the *Barnes* reasoning considerably. In *Barnes*, an employee of the intermediary allegedly failed to honor a promise that the employee communicated to the plaintiff. In *Internet Brands*, there was no additional relationship between the plaintiff and defendant that was independent of the user-generated content. The harm arose entirely out of allegations that the defendant failed to properly handle user-generated content.

^{106.} *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 848 (9th Cir. 2016).

^{107.} *Id.* at 849.

^{108.} *Id.* at 852-54.

^{109.} *Id.* at 853.

^{110.} *Id.*

^{111.} *Id.*

^{112.} *Id.*

To be sure, this case does not present the defamation or privacy claims that are typical of Section 230 cases. However, its limited reading of Section 230 is surprising and unique. Consider, for instance, the Fifth Circuit's opinion in *Doe v. MySpace*, in which a minor provided profile information to MySpace, falsely indicating that she was an adult, and later was sexually assaulted by a man whom she met on the social networking site.¹¹³ The minor's mother sued MySpace for fraud, negligent misrepresentation, negligence, and gross negligence.¹¹⁴ The Fifth Circuit concluded that Section 230 requires the dismissal of all of these claims:

Their claims are barred by the CDA, notwithstanding their assertion that they only seek to hold MySpace liable for its failure to implement measures that would have prevented [the minor] from communicating with [the alleged assaulter]. Their allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content.¹¹⁵

It is difficult to square the Fifth Circuit's ruling in *MySpace* with the Ninth Circuit's recent opinion in *Internet Brands*. Both involve third-party content that is a but-for cause of physical harm to the plaintiff. The Ninth Circuit in *Internet Brands* briefly acknowledged the Fifth Circuit's holding and distinguished MySpace only on the grounds that the *Internet Brands* plaintiff "alleges actual knowledge by Internet Brands from an outside source of information about criminal activity."¹¹⁶ While such a distinction may be accurate, there is no basis in the statute's text or case law for this factor to determine whether an online intermediary is immune from lawsuit under Section 230.

Internet Brands is an exceptionally narrow reading of Section 230 that creates a new loophole for Section 230 plaintiffs—asserting that the claim does not *directly* arise from user-generated content. By creating the specter that courts, on a whim, could determine that content is not generated by users, the opinion discourages platforms from allowing user content. Such a ruling likely will have a chilling

113. *Doe v. MySpace, Inc.*, 528 F.3d 413, 416 (5th Cir. 2008).

114. *Id.*

115. *Id.* at 420.

116. *Internet Brands*, 824 F.3d at 853.

effect on intermediaries that Congress intended to prevent when it passed Section 230.

B. Possibility that the Defendant Developed the Content

Perhaps the most common reasons for courts to deny immunity to intermediaries is that the plaintiff has alleged that the defendant played some role in the creation of the harmful third-party content. This claim, if true, would convert the defendant from a passive intermediary to a developer of the content that is not immune.

As described below, during the year of our analysis, a number of courts accepted the mere possibility that a defendant may have contributed to the content based on nothing more than an allegation that the defendant may have created the content. Although courts must accept the plaintiff's factual claims while deciding motions to dismiss, the Supreme Court in *Ashcroft v. Iqbal* stated that complaints must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"¹¹⁷

In some recent Section 230 cases, courts have bent over backwards to avoid granting motions to dismiss, even if it appears highly unlikely that the plaintiff will ultimately prevail. Such rulings go against the general post-*Iqbal* trend of granting motions to dismiss.¹¹⁸

For instance, in *AMCOL Systems, Inc. v. Lemberg Law, LLC*, plaintiff AMCOL, a company that provides debt collection and other services, sued a law firm that litigates against debt collectors, arising from statements that the law firm allegedly made in its online advertising and in comments on websites and on a YouTube channel. Any comments that the defendant made in its online advertising clearly would not be immune under Section 230. The district court acknowledged that any claims arising from the online comments "may ultimately fail" under Section 230.¹¹⁹ However, the court refused to dismiss the claims at the motion-to-dismiss stage, reasoning that "it is not clear at this stage whether the comments were posted by third parties."¹²⁰ Its only support for this conclusion was an allegation in the complaint that "several aliases or

¹¹⁷. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

¹¹⁸. See Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 RICHMOND L. REV. 603 (2012).

¹¹⁹. *AMCOL Sys., Inc. v. Lemberg Law, LLC*, No. 3:15-3422-CMC, 2016 U.S. Dist. LEXIS 18131, at *25-26 (D.S.C. Feb. 16, 2016).

¹²⁰. *Id.* at *26.

commentators are in fact alter egos of and/or under the control or influence of Defendant Lemberg.”¹²¹ At minimum, the court should have required some sort of explanation as to how the plaintiff came to the conclusion that the defendant was the author of the online comments.

Similarly, in *Congoo v. Revcontent*, the plaintiff filed a false advertising lawsuit against its competitor, Revcontent, which distributes online native advertising to news and information sites.¹²² Although the court acknowledged—and the plaintiff did not dispute—that Revcontent is an interactive computer service provider (ICSP) under Section 230,¹²³ the court nonetheless refused to dismiss the case because the plaintiff “ha[d] sufficiently pled that Revcontent was responsible in part for the development of the subject advertisements,” and therefore, “Revcontent ha[d] not established that it is entitled to immunity under § 230 of the CDA.”¹²⁴ The court based this conclusion on the following statements in the complaint:

Defendants have published or caused to be published many impression of native advertising unit ads (“Defendants Ads”) with various Published Websites, including Publisher Websites that were previous clients of Plaintiff[.]

Many, if not most of Defendants’ Ads and the Advertisement Websites to which the Ads redirect unsuspecting customers, employ false and misleading advertising intended to deceive innocent consumers out of the significant monies by charging their debit cards or credit cards.

Defendants have employed the above stated false and misleading representative in advertising to generate greater income from their Ads and those of Defendants’ Advertisers.¹²⁵

Even accepting these allegations as entirely true, they do not provide a factual basis for the conclusion that Revcontent created or developed the content. Revcontent may have passively distributed the allegedly false advertisements, but the complaint does not allege

121. *Id.*

122. *Congoo, LLC v. Revcontent, LLC*, No. 16-401 (MAS) (TJB), 2016 U.S. Dist. LEXIS 51051, at *1-2 (D.N.J. April 15, 2016).

123. *Id.* at *7-8.

124. *Id.* at *9.

125. *Id.* at *8 (emphasis removed).

that the defendant played any role in creating or developing the content.

Such holdings are contrary to the policy behind both the Supreme Court's pleading requirements *and* Section 230. As discussed in Section I.B., Congress passed Section 230, in part, to avoid a chilling effect on the innovation and services of online intermediaries. By accepting unsubstantiated claims that an intermediary contributed to third-party content—and denying a motion to dismiss—a court requires a defendant to undergo costly discovery, summary judgment proceedings, and, possibly, trial. Such costly and time-consuming endeavors surely have a chilling effect on online intermediaries.

C. Defendant Repeated Statements of Others and Is Not Immune

In some recent cases, courts have declined to immunize intermediaries that have taken active steps to republish third-party content. These opinions undercut *Batzel* and other case law that immunizes intermediaries even if they select only some user content for publication or make minor alterations to the content.

Among the most noteworthy recent departures from the *Batzel* precedent is *Diamond Ranch Academy v. Filer*, a defamation lawsuit against Chelsea Filer, the operator of a website that allowed the former residents of a residential treatment facility to share their stories.¹²⁶ The website alleged, among other things, that the facility abused the children who lived there, provided inadequate medical care, and caused the death of at least one person.¹²⁷ Relying on *Batzel*, Filer sought to dismiss the case under Section 230, arguing that she is an “exempt publisher because she either simply posted others' statements or made minor edits to those statements before posting.”¹²⁸

The district court swiftly rejected Filer's request for Section 230 immunity, largely because her website summarized and made editorial changes to some of the third-party content:

Ms. Filer's posts do not lead a person to believe that she is quoting a third party. Rather, Ms. Filer has adopted the statements of others and used them to create her comments on the website. Instead, Ms. Filer adds her own comments

^{126.} *Diamond Ranch Acad., Inc. v. Filer*, No. 2:14-CV-751-TC, 2016 U.S. Dist. LEXIS 19210, at *2 (D. Utah Feb. 17, 2016).

^{127.} *Id.* at *6.

^{128.} *Id.* at *59.

to the website, posts her own articles, and summarizes the statements of others.¹²⁹

This reasoning is perplexing. Nothing in Section 230 suggests that an intermediary should be liable for content because a reader “believes” that the intermediary created the content. By its very terms, Section 230 imposes liability if the intermediary *created* or *developed* the content. The subjective views of an outside party are irrelevant. Under *Batzel* and much of the other Section 230 precedent, Filer would be liable for any of the content that she *added* along with the third-party content, but she would be immune from claims arising from the third-party content that she posted on the website.

The district court also noted that Filer used surveys to solicit stories from former residents and “selectively chose some statements and rejected others.”¹³⁰ Such selective placement of user content is precisely what Congress intended to encourage when it passed Section 230. The district court failed to distinguish this case from *Batzel*, and instead relied on the district courts’ opinions in *Carafano* and *Dirty World* (and failed to acknowledge that both opinions were reversed by the Ninth Circuit and Sixth Circuit, respectively, in favor of broad intermediary immunity).¹³¹

Similarly, in *General Steel Domestic Sales v. Chumley*, a Colorado federal judge refused to immunize the operator of a website that summarized and excerpted allegedly defamatory third-party content about the plaintiff’s court proceedings and linked to the full source.¹³² To be sure, Section 230 immunity is a relatively close call in this case. What is remarkable about the opinion, however, is the court’s reasoning for denying Section 230 immunity for the webpage content:

To the extent the defendants chose certain summaries and quotations describing the referenced court proceedings, failed to accurately describe the proceedings as a whole, and posted those quotations and summaries on [the webpage], the defendants developed the information they posted on that page. These editorial choices can be seen as a choice to emphasize unflattering allegations made against General

129. *Id.* at *60.

130. *Id.* at *62.

131. *Id.* at *60-61.

132. *Gen. Steel Domestic Sales v. Chumley*, No. 14-cv-01932-REB-CBS, 2015 U.S. Dist. LEXIS 108789, at *26-27 (D. Colo. Aug. 18, 2015).

Steel without summarizing or quoting information which reflects the nature and outcome of the court proceeding described.¹³³

The district court would have had much stronger grounds for denying immunity based solely on the fact that the defendants searched the Internet for content and were not provided the material by a third-party—though that still would be a close call. However, the court focused instead on the defendants' emphasis of unflattering allegations without quoting portions of the court documents that are favorable to the plaintiffs. Such considerations are irrelevant to Section 230 immunity, making this opinion a notable departure from Section 230 case law.

D. Defendant Induced Illegal Content

Courts also have followed the cue of the Ninth Circuit in *Roommates.com* and have denied Section 230 immunity to intermediaries that induce third parties to create and develop illegal content.

In *People v. Bollaert*, the California Court of Appeal, Fourth Appellate District affirmed a jury verdict that defendant Kevin Christopher Bollaert was guilty of the crimes of unlawful use of personal identifying information and extortion.¹³⁴ The charges arose from his operation of two websites: UGotPosted.com, which enabled users to post private photos, names, locations, and other personal information of victims, and ChangeMyReputation.com, which enabled users to pay for the removal of the information.¹³⁵ Because state criminal law violations are not explicitly exempt from Section 230, Bollaert sought to claim Section 230 immunity.

Relying primarily on *Roommates.com*, the state appellate court rejected his request for immunity, reasoning that the defendant “created UGotPosted.com so that it forced users to answer a series of questions with the damaging content in order to create an account and post photographs.”¹³⁶ The court reasoned that, as in the *Roommates.com* case, UGotPosted.com was “designed to solicit” illegal content and that Bollaert’s operation of the website was “not neutral, but rather materially contributed to the illegality of the

133. *Id.* at *22-23.

134. *People v. Bollaert*, 248 Cal. App. 4th 699, 705 (Cal. Ct. App. 2016).

135. *Id.*

136. *Id.* at 721.

content and the privacy invasions suffered by the victims.”¹³⁷ In light of *Roommates.com*, the *Bollaert* decision is not particularly surprising, but it is further evidence of the enduring legacy of the *Roommates.com* opinion’s focus on whether an intermediary website is *designed* to solicit illegal content.

Similarly, in *J.S. v. Village Voice Media Holdings*, the plaintiffs brought various state law claims against the operator of Backpage.com (Backpage), a website that allows users to post advertisements for sexual services.¹³⁸ The plaintiffs, three minor girls, alleged that they were sexually trafficked via advertisements on the website.¹³⁹ The defendant moved to dismiss, citing Section 230 immunity. The Washington Supreme Court affirmed the trial court’s denial of the motion to dismiss, concluding that the website was not immune. The court reasoned that Backpage contributed to the development of the website. Although the plaintiffs did not allege that Backpage actually drafted the advertisements, they made the following assertions about Backpage that were sufficient to convince the court to allow the lawsuit to proceed:

- Backpage “intentionally developed its website” and content requirements to require users to enter information that “allows and encourages” illegal sex trafficking of minors.¹⁴⁰
- The website operator knows that its content requirements “are a fraud and a ruse” designed to help criminals evade law enforcement.¹⁴¹
- The website’s content requirements are “specifically designed” to control the content of the advertisements and enable sex trafficking.¹⁴²
- Backpage has a “substantial role in creating the content and context of the advertisements on its website.”¹⁴³

If true, the court concluded, these allegations “would show that Backpage did more than simply maintain neutral policies

137. *Id.*

138. *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 715 (Wash. 2015).

139. *Id.* at 715-16.

140. *Id.* at 717-18.

141. *Id.*

142. *Id.* at 718.

143. *Id.*

prohibiting or limiting certain content.”¹⁴⁴ Of course, not even *Roommates.com* limited Section 230 to cases in which intermediaries maintain “neutral policies.” The *J.S.* opinion is an example of another extension of *Roommates.com*, likely due to highly sympathetic plaintiffs and a highly unsympathetic defendant. Indeed, in a strong dissent in *J.S.*, Justice McCloud noted that although *Roommates.com* was liable for the *questions* that violated housing laws, the Ninth Circuit held that Section 230 immunized the site for user responses to its open-ended questions.¹⁴⁵

E. Defendant Failed to Act in Good Faith

Section 230 cases typically focus on the scope of Section (c)(1), which immunizes online intermediaries for claims arising from content posted by others. However, some cases also implicate Section(c)(2), which prevents interactive computer services from being held civilly liable for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected[.]”¹⁴⁶ Indeed, this provision addresses the reason that many members of Congress initially sought to enact Section 230: the desire to encourage and allow intermediaries to freely set and enforce standards for user-generated content.¹⁴⁷

A recent federal district court opinion from Florida, however, called into question the breadth of Section (c)(2)’s immunity. In *E-Ventures Worldwide v. Google*, Google designated the plaintiff search engine optimization company’s websites as “pure spam” and

^{144.} *Id.* at 717.

^{145.} *Id.* at 733 (McCloud, J., dissenting) (“Thus, the defendant in *Roommates* was immune from liability for claims based on nonmandatory content even if this content showed roommate selection on a discriminatory basis. But it was not immune for alleged violations of housing discrimination laws based on the comments that *Roommates.com* elicited with mandatory illegal questions about race, sex, or sexual preferences.”).

^{146.} 47 U.S.C. § 230(c)(2)(A).

^{147.} *See Doe v. GTE Corp.*, 347 F. 3d 655, 659 (7th Cir. 2003) (“Section 230(c)(2) tackles this problem not with a sword but with a safety net. A web host that does filter out offensive material is not liable to the censored customer. Removing the risk of civil liability may induce web hosts and other informational intermediaries to take more care to protect the privacy and sensibilities of third parties.”).

automatically de-indexed the sites from its search engine.¹⁴⁸ The plaintiff sued Google for unfair competition, defamation, and tortious interference with business relationships.¹⁴⁹

Google's decision to de-index content that it views as "pure spam" seemingly would fall within Section (c)(2)'s immunity. However, the district court rejected Google's motion to dismiss under Section 230, concluding that the plaintiff's complaint adequately alleged "that Google failed to act in good faith when removing its websites from Google's search results."¹⁵⁰ To be sure, good faith is an explicit requirement of Section (c)(2) (and not of Section (c)(1)), but rejecting a motion to dismiss—and requiring discovery and further litigation—should, at minimum, require an examination of the strength of the plaintiff's allegations that the defendant did not act in good faith.

Rather than examine the plaintiff's claims, the court summarily concluded in one sentence and, in a parenthetical, cites nine paragraphs of the plaintiff's second amended complaint.¹⁵¹ Among the allegations in the cited paragraphs:

- "In sum, Google has an anticompetitive, economic motivation to eliminate the visibility of e-ventures' websites on its search engine."¹⁵²
- A 2012 FTC investigation (in a case separate from this litigation), revealed that "Google used anticompetitive tactics in connection with its Internet search results, and abused its monopoly power in ways that harmed Internet users and rivals."¹⁵³
- Google acknowledged that it has removed, without individually reviewing, 365 websites affiliated with e-ventures from its search results.¹⁵⁴

¹⁴⁸. E-Ventures Worldwide v. Google, No. 2:14-cv-646-FtM-29CM, 2016 U.S. Dist. LEXIS 62855, at *4 (M.D. Fla. May 12, 2016).

¹⁴⁹. *Id.* at *10.

¹⁵⁰. *Id.* at *15.

¹⁵¹. *Id.*

¹⁵². Second Amended Complaint at ¶ 18, E-Ventures Worldwide v. Google, No. 2:14-cv-646-FtM-29CM, Dkt. No. 75.

¹⁵³. *Id.* at ¶ 54.

¹⁵⁴. *Id.* at ¶¶ 57-58.

- Google has stated that it removes websites from search results if it believes “it appropriate to deter bad behavior[.]”¹⁵⁵
- Without providing any factual allegation, the plaintiffs claim that “[u]pon information and belief,” Google “has a history” of categorizing websites as pure spam if they “negatively impact Google’s bottom line” and that it “acted against e-ventures for anti-competitive reasons[.]”¹⁵⁶

Because the court did not elaborate on its reasoning, it is unclear precisely why these allegations survived the *Iqbal* dismissal standard and convinced the court that the case should proceed. However, even viewed in the light most favorable to the plaintiff, these allegations are the kind of “conclusory” allegations that the Supreme Court has adamantly warned will not survive a motion to dismiss.¹⁵⁷ The complaint did not provide a single concrete factual allegation supporting its conclusory claim that Google unfairly discriminated against the plaintiff and violated any of the laws at issue in this lawsuit.

Accordingly, the *E-Ventures* decision is particularly concerning to online intermediaries that have developed and enforce codes of conduct for user-generated content. If adopted by other courts, this reasoning could undercut the protection of Section (c)(2), which for two decades has enabled online service providers to freely delete or modify user content. Although the denial of a motion to dismiss is not the end of litigation—and it still could be resolved in the defendant’s favor on summary judgment or at trial, such rulings increase the costs and time burdens on intermediaries. The likely long-term effect of such denials of motions to dismiss will be to discourage intermediaries from publishing any user content, as they will see legal risk in editing and removing content that they believe is objectionable. Such a result is precisely contrary to the intent of Congress when it enacted Section 230.

F. What Remains of Section 230 Immunity

So far, this analysis has focused on recent cases in which courts have refused to immunize online intermediaries. Many of these cases

155. *Id.* at ¶ 59.

156. *Id.* at ¶¶ 60-62, 68.

157. *See Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”).

demonstrate the slow abrogation of Section 230's immunity, which in its early years appeared to be nearly impenetrable. However, in approximately half of the written opinions released between July 1, 2015 and June 30, 2016, courts dismissed claims against intermediaries arising from third-party content.

Indeed, some of the cases involved difficult fact patterns and defendants whose hands did not appear to be entirely clean. Nonetheless, the courts remained faithful to the plain text of Section 230 and concluded that the intermediaries were immune for user content-related claims.

For instance, the United States Court of Appeals for the First Circuit held that Section 230 required the dismissal of claims against Backpage, the site accused of enabling sex trafficking in the *J.S.* case described above. In *Jane Doe No. 1 v. Backpage.com*,¹⁵⁸ three women who claim to have been trafficked as minors via the site's "Escorts" section sued the site under state and federal anti-human trafficking laws, a state consumer protection law, and intellectual property laws.

Unlike the Washington Supreme Court, which issued the ruling in *J.S.*, the First Circuit concluded that Section 230 required dismissal of the trafficking claims (it dismissed the consumer protection and intellectual property claims on other grounds). That is not to say that the First Circuit easily disposed of the case. Indeed, in the introduction to the opinion, Judge Selya wrote that "[t]his is a hard case—hard not in the sense that the legal issues defy resolution, but hard in the sense that the law requires that we, like the court below, deny relief to plaintiffs whose circumstances evoke outrage."¹⁵⁹ Nonetheless, Judge Selya noted the "near-universal agreement that [S]ection 230 should not be construed grudgingly,"¹⁶⁰ and that Section 230 immunity depends not on the cause of action in the litigation, but on "whether the cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another."¹⁶¹

It is difficult to square the First Circuit's ruling in *Doe* with the Washington Supreme Court's ruling in *J.S.* The differing results—with strikingly similar fact patterns—evinces the difficulty that courts have in applying Section 230's rigid immunity to cases with highly sympathetic plaintiffs. While early cases, such as *Zeran*, involved

¹⁵⁸. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).

¹⁵⁹. *Id.* at 15.

¹⁶⁰. *Id.* at 18.

¹⁶¹. *Id.* at 19.

harm to individuals' reputation, the plaintiffs in these cases sought to recover damages for incredibly horrific crimes committed by third parties. The First Circuit clearly recognized the tragedy and inequity in its opinion; nonetheless, the court recognized that dismissal of the trafficking claims is the only result permitted under Section 230.

Courts also have encountered a number of claims against intermediaries arising from revenge pornography, and similar cases in which individuals' sexually explicit content is posted without their consent. As seen in the *Bollaert* case, discussed above, if intermediaries encourage users to post such content, some courts may conclude that they are not entitled to Section 230 immunity.¹⁶² However, if the website or other platform has not encouraged such sexually explicit content, it likely will continue to receive immunity under Section 230.

For instance, in *Caraccioli v. Facebook*, the plaintiff alleged that an anonymous individual posted sexually explicit images and videos of him on Facebook.¹⁶³ The plaintiff sued Facebook, alleging that the social media site failed to adequately respond to his request to remove the content.¹⁶⁴ The plaintiff alleged that Facebook initially refused to delete the content, but did so after he threatened legal action.¹⁶⁵ The district court dismissed his state law claims against Facebook, concluding that all of the claims arose from information that had been provided by other information content providers, and that the plaintiff sought to hold Facebook liable as the publisher or speaker of that content.¹⁶⁶ The court rejected the plaintiff's claim that "Facebook should be deemed responsible for the account because it reviewed and decided not to remove it."¹⁶⁷ Such liability, the court reasoned, "is exactly what § 230(c) seeks to avoid."¹⁶⁸

Revenge pornography, like sex trafficking, is a relatively new issue for lawsuits against online intermediaries. The varying results in such cases are the byproducts of courts' struggles to balance the often tragic circumstances with Section 230's broad immunity.

^{162.} As discussed in Section III.D, however, imposing liability based on mere "encouragement" is a relatively new reading of Section 230 that is not faithful to the plain text of the statute.

^{163.} *Caraccioli v. Facebook*, No. 5:15-cv-04145-EJD, 2016 U.S. Dist. LEXIS 29021, at *3 (N.D. Cal. Mar. 7, 2016).

^{164.} *Id.* at *4.

^{165.} *Id.*

^{166.} *Id.* at *19.

^{167.} *Id.* at *16.

^{168.} *Id.* at *17.

Even in cases in which Section 230 clearly bars plaintiffs' claims, the cases are not dismissed with prejudice, allowing the plaintiff to file a new complaint that seeks to avoid the immunity. For instance, in *AdvanFORT Company v. Maritime Executive*, the plaintiff sued a website operator for publishing an allegedly defamatory article that the plaintiffs conceded was not authored by the defendant.¹⁶⁹ The district court dismissed the first complaint, but granted the plaintiff leave to amend.¹⁷⁰ The plaintiff filed a second complaint, and the defendant again moved to dismiss, based on Section 230. Seeking to overcome Section 230, the plaintiff alleged that the website has an editorial staff that reviews and edits articles before posting.¹⁷¹ Under even the narrowest reading of Section 230, such claims would not deprive websites of immunity. However, the court concluded that, though not alleged in the complaint, it "seems plausible" that the article appeared in print format, and that there may be a "reasonable inference that [the defendant] was at least partly responsible for the creation or development of the Article, rendering [Section 230] inapplicable."¹⁷² Based on these entirely unsupported assumptions, the court dismissed the complaint *without* prejudice and granted the plaintiff leave to file a *third* complaint.

The *AdvanFORT* case is a stunning example of a court bending over backwards to attempt to circumvent Section 230. Even after drafting a second complaint, the plaintiff failed to provide any credible allegations that the defendants developed the allegedly defamatory article. Yet the district court, on its own volition, developed new, speculative arguments in an effort to allow the claim to proceed.

G. *The Implications of the Gradual Erosion*

This analysis has shown that courts gradually have carved out more exceptions to the once-robust Section 230 immunity. Increasingly, courts are accepting plaintiffs' claims—even if unsubstantiated—that the online intermediary has somehow contributed to third-party content.

To be clear, Section 230 is alive and well. In approximately half of the cases reviewed in this analysis, courts declined to impose *any* liability on online intermediaries because of Section 230. Moreover,

¹⁶⁹. *AdvanFORT Co. v. Maritime Exec.*, No. 1:15-cv-220, 2015 U.S. Dist. LEXIS 99208, at *6 (E.D. Va. July 28, 2015).

¹⁷⁰. *Id.* at *7.

¹⁷¹. *Id.* at *27-28.

¹⁷². *Id.* at *29-30.

some plaintiffs, knowing of courts' relatively broad interpretation of Section 230, may be discouraged from ever bringing a lawsuit against online intermediaries. Accordingly, it would be ill-advised to downplay the role that Section 230 continues to play in promoting growth and innovation on the Internet. Even with the slow move away from *Zeran's* absolute immunity, Section 230 remains critical for online service providers.

Standing alone, no single court opinion issued from July 1, 2015 to June 30, 2016 represents a significant downfall of Section 230. These opinions did not create a new avenue for intermediary liability, as *Roommates.com* did in 2008.

Rather, these opinions, when taken together, reflect a growing reluctance of courts to apply Section 230 in the broad manner of the *Zeran* days. The analysis reveals a general hesitance to dismiss cases, and to instead allow them to proceed through discovery, summary judgment, and trial, on the off-chance that the intermediary may have contributed to the third-party content. In other words, courts are increasingly reluctant to dismiss cases under Section 230, even when the complaint does not credibly allege that the online intermediaries developed or created the content.

Courts' newfound aversion to the clear-cut (and often cold-hearted) immunity of Section 230 is understandable in light of the technological changes over the past two decades. Compare, for instance, the allegedly defamatory AOL bulletin board posting in *Zeran* with the alleged sex trafficking advertisements in the two recent Backpage cases. The posting in *Zeran* was available only to AOL subscribers, and caused the defendant to receive harassing phone calls. The advertisements in Backpage, however, were available to the world and allegedly led to the physical and sexual exploitation of the plaintiffs when they were minors. Clearly, it is more difficult to immunize Backpage than AOL because the allegations in the Backpage cases are far more troubling.

Courts' reluctance to faithfully apply Section 230, however, discourages companies from innovating new technologies that rely on user-generated content. As courts continue to carve new exceptions to Section 230—and enlarge existing exceptions—websites, apps, and other online service providers will be increasingly reluctant to transmit user-generated content. A single lawsuit could ruin a small start-up. Imagine if months after its founding in 2004, Facebook faced a viable defamation lawsuit arising from the posts of one of its handful of users. Facebook likely would have shut down and would not have grown to the multi-billion-dollar company that it is today.

In addition to threatening the development of new services, the gradual erosion of Section 230 will threaten existing services, such as social media. According to one estimate, Twitter transmits approximately 200 billion tweets annually.¹⁷³ It would be impractical to expect Twitter—and other social media providers—to assume liability for their users’ posts.

Although the courts have faced legitimately difficult decisions in recent Section 230 cases, the text of Section 230 provides no basis for them to impose new limits to the immunity. Although Section 230 was written in the nascent days of the modern Internet, Congress intentionally drafted the statute to cover not only AOL and Prodigy bulletin boards, but also future technology that was not conceived at the time. This can be seen by its extraordinarily broad definition of “interactive computer services” that are entitled to the immunity. Such technology neutrality establishes general principles that are designed to endure, regardless of technological developments.

Because the broad and technologically neutral scope of Section 230 has enabled such robust online growth, it would be short-sighted to amend Section 230 to explicitly allow the loopholes that courts gradually are creating, as some have proposed over the years.¹⁷⁴ Adding explicit exemptions that address highly fact-dependent situations will create great uncertainty and threaten the neutrality that has been the foundation of Section 230.

This is not to say that plaintiffs should be without recourse in these increasingly high-stakes disputes over third-party content. Plaintiffs can sue the original creator of the allegedly harmful content. If the third party was anonymous, courts often will allow plaintiffs to use the discovery process to unmask the anonymous

¹⁷³. Kevin Lynch, *10 Years of Twitter: Five Key Tweets that Made Record-Breaking History*, Guinness World Records (Mar. 21, 2016), <http://www.guinnessworldrecords.com/news/2016/3/10-years-of-twitter-five-key-tweets-that-made-record-breaking-history-421461>.

¹⁷⁴. See, e.g., Casey Martinez, *An Argument for States to Outlaw ‘Revenge Porn’ and for Congress to Amend 47 U.S.C. 230: How Our Current Laws Do Little to Protect Victims*, 14 PGH. J. TECH. L. & POL’Y 236, 246 (2014) (“47 U.S.C. § 230 should specifically be amended to deprive websites of legal protection for conduct that constitutes the posting of revenge porn.”); Bradley M. Smyer, *Interactive Computer Service Liability for User-Generated Content After Roommates.com*, 43 U. MICH. J.L. REFORM 811, 811 (2010) (“Congress should amend § 230 to limit immunity in circumstances where the ICSP is an ‘information content provider’ with respect to an objectionable housing advertisement and specifically redefine ‘information content provider’ to include the use of ICSP created dropdown answers to ICSP required questions.”).

individual, assuming that the plaintiff has stated a credible claim.¹⁷⁵ Moreover, if the third party's behavior is exceptionally egregious and troubling, Congress could criminalize it, and that act would not be immune under Section 230, due to the existing exception for federal crimes.¹⁷⁶

Any additional limits on Section 230 pose the serious risk of creating the chilling effect that Congress intended to avoid twenty years ago. Section 230's market-based approach to law is consistent with the First Amendment and encourages decentralized and robust speech on the Internet.¹⁷⁷ As judges consider the increasingly difficult Section 230 cases, they should keep in mind the fundamental First Amendment values that the statute has protected for two decades. The twenty-six words that shaped the first two decades of the modern Internet should remain in full effect.

V. CONCLUSION

From Facebook to Yelp to Snapchat, platforms that rely on user-generated content have been among the greatest Internet success stories. Section 230 has allowed that innovation to flourish and thrive. Unfortunately, courts in recent years have developed an increasing number of end-runs around Section 230, imposing liability on intermediaries for content that was created by third parties. Although Section 230 continues to immunize online intermediaries in a wide range of cases, the recent court opinions demonstrate a clear trend toward a narrower reading of Section 230. If continued, this trend likely will discourage intermediaries from distributing third-party content online.

^{175.} See, e.g., *Hadley v. Doe*, 34 N.E.3d 549, 556 (Ill. 2015) (“[A] court must balance the potential plaintiff's right to redress for unprotected defamatory language against the danger of setting a standard for disclosure that is so low that it effectively chills or eliminates the right to speak anonymously and fails to adequately protect the chosen anonymity of those engaging in nondefamatory public discourse.”) (quotation marks and citations omitted).

^{176.} 47 U.S.C. § 230(e)(1).

^{177.} See Jeff Kosseff, *Defending Section 230: The Value of Intermediary Immunity*, 15 J. TECH. L. & POL'Y 123, 136 (2010) (“Although Section 230's immunity extends beyond intermediary protections provided by the First Amendment, the reasoning behind Section 230 is supported in many First Amendment decisions from the past century.”).

VI. APPENDIX

Written Opinions Regarding Section 230 Immunity, July 1, 2015-
June 30, 2016*A. Opinions in Which Online Intermediaries Were Not Fully Immune*

Amcol v. Lemberg Law, LLC	No. 3:15-3422-CMC, 2016 U.S. Dist. LEXIS 18131	D.S.C.	Feb. 16, 2016	Trademark, unfair competition, and defamation
Congoo v. Revcontent	Civil Action No. 16-401 (MAS) (TJB), 2016 U.S. Dist. LEXIS 51051	D.N.J.	Apr. 15, 2016	False advertising
Consumer Cellular v. ConsumerAffairs.com	3:15-CV-1908-PK	D. Or.	Feb. 29, 2016	Unlawful trade practice, economic relations, RICO, and defamation
Diamond Ranch Academy v. Filer	Case No. 2:14-CV-751-TC, 2016 U.S. Dist. LEXIS 18131	D. Utah	Feb. 17, 2016	Defamation, economic advantage
Doe v. Internet Brands, Inc.	PENDING CITATION	9th Cir.	May 31, 2016	Negligence
E-Ventures Worldwide, LLC v. Google	Case No. 2:14-cv-646-FtM-29CM, 2016 U.S. Dist. LEXIS 62855	M.D. Fla.	May 12, 2016	Unfair competition, defamation, tortious interference
General Steel Domestic Sales v. Chumley	Civil Action No. 13-cv-00769-MSK-KMT	D. Colo.	Sept. 15, 2015	Cybersquatting, defamation, and other state law claims
Giveforward v. Hodges	Civil No. JFM-13-1891, 2015 U.S. Dist. LEXIS 102961	D. Md.	Aug. 6, 2015	Declaratory judgment
J.S. v. Village Voice Media Holdings	359 P.3d 714	Wash.	Sept. 3, 2015	Various state law claims including negligence, and sexual exploitation
Malibu Media v. Weaver	Case No. 8:14-cv-1580-T-33TBM, 2016 U.S. Dist. LEXIS 47747	M.D. Fla.	Apr. 8, 2016	Copyright
People v. Bollaert	No. D067863, 2016 Cal. App. LEXIS 517	Cal. Ct. App.	June 28, 2016	Criminal privacy invasion
Tanisha Systems v. Chandra	CIVIL ACTION NO. 1:15-CV-2644-AT	N.D. Ga.	Dec. 4, 2015	Defamation and tortious interference with contract
Trump Village Section 4 v. Bezvoleva	Docket No. 509277/2014, 2015 N.Y. Misc. LEXIS 4848	Sup. Ct. (NY)	Aug. 10, 2015	Libel
Xcentric Ventures v. Smith	No. C15-4008-MWB, 2015 U.S. Dist. LEXIS 109965	D.N.D.	Aug. 19, 2015	Invasion of privacy

B. Opinions in Which Online Intermediaries Were Fully Immune

Advanfort v. The Maritime Executive, LLC	Civil Action No. 1:15-cv-220, 2015 U.S. Dist. LEXIS 99208	E.D. Va.	July 28, 2015	Defamation and tortious interference with contract and business expectancy
Brennerman v. Guardian News & Media	Civ. No. 14-188-SLR/SRF, 2016 U.S. Dist. LEXIS 42923	D. Del.	Mar. 30, 2016	Defamation
Caraccioli v. Facebook	Case No. 5:15-cv-04145-EJD, 2016 U.S. Dist. LEXIS 29021	N.D. Cal.	Mar. 7, 2016	Defamation, privacy, contract, negligent supervision, and unfair business practices
Despot v. The Baltimore Life Insurance Co.	Civil Action No. 15-1672	W.D. Pa.	June 28, 2016	IIED, defamation, unfair trade practices, misrepresentation, negligence, and privacy
Doe v. Backpage	817 F.3d 12	1st Cir.	Mar. 14, 2016	Trafficking Victims Protection Reauthorization Act of 2008
Fakhrian v. Google	No. B260705, 2016 Cal. App. Unpub. LEXIS 3004	Cal. Ct. App.	Apr. 25, 2016	Defamation
Free Kick Master LLC v. Apple	Case No. 15-cv-03403-PJH	N.D. Cal.	Oct. 19, 2015	Trademark and unfair trade practices
Nail v. Schrauben	Case No. 1:15-CV-177, 2016 U.S. Dist. LEXIS 17987	W.D. Mich.	Jan. 22, 2016	Various state tort law claims
Roca Labs v. Consumer Opinion Corp.	140 F. Supp. 3d 1311	M.D. Fla.	Oct. 21, 2015	Unfair trade practices, tortious interference, and defamation
Rose v. Facebook	Civil Action. No. 16-2075, 2016 U.S. Dist. LEXIS 67111	E.D. Pa.	May 23, 2016	Defamation
Ross v. Elightbars LLC	Case No. 3:14 CV 2610, 2016 U.S. Dist. LEXIS 82448	N.D. Ohio	June 24, 2016	Defamation
Sikhs for Justice v. Facebook Inc.	Case No. 15-CV-02442-LHK	N.D. Cal.	Nov. 13, 2015	Civil rights, breach of contract, and breach of implied covenant
Silver v. Quora	No. CV 15-830 WPL/KK	D.N.M.	Jan. 25, 2016	Libel