
THE COLUMBIA
SCIENCE & TECHNOLOGY
LAW REVIEW

VOL. XX

STLR.ORG

FALL 2018

NOTE

SECTION 230(C)(1) OF THE COMMUNICATIONS DECENCY ACT AND
THE COMMON LAW OF DEFAMATION: A CONVERGENCE THESIS[†]

Julio Sharp-Wasserman*

Section 230 of the Communications Decency Act (CDA), codified in the early days of the Internet, immunizes online intermediaries, such as operators of websites, from liability for the speech or conduct of their users. The impact of this provision has been not only profound, but also controversial, partly because it has been applied with rigid consistency in a wide variety of legal contexts, from defamation to housing discrimination to false advertising to human trafficking. This Note proposes that the judicial application of CDA § 230 to defamation liability is unique, in that defamation law would not be measurably different if Congress had not passed this provision. This thesis has a doctrinal component: courts applying the common law of defamation, which incorporates First Amendment law, likely would reach similar conclusions to courts applying CDA § 230 to defamation liability. This thesis also incorporates a comparison of legal realities in defamation cases against online intermediaries. First, there likely would be a comparable degree of legal uniformity in defamation law across jurisdictions. Second, and especially relevant from the standpoint of litigation costs, pre-trial dismissal would be available under the same circumstances. The implications of this thesis are debatable: this Note might undermine the wisdom of other applications of CDA § 230 that do not implicate freedom of speech

[†] This article may be cited as <http://www.stlr.org/cite.cgi?volume=20&article=Sharp-Wasserman>. This work is made available under the Creative Commons Attribution–Non-Commercial–No Derivative Works 3.0 License.

* J.D. Candidate 2019, Columbia Law School. I would like to thank Professor David Pozen for his guidance on all aspects of this note and for his generosity with his time, Professor Eric Goldman for his review of my initial draft, Professor Sherman Clark for the best torts class of all time, and the board of the *Columbia Science and Technology Law Review* for its careful and extensive work editing this piece over the course of eighteen months.

concerns; however, it certainly bolsters the constitutional legitimacy of CDA § 230's application to speech torts.

I. Introduction.....	197
II. The Text and Purposes of CDA § 230	201
A. The Text of CDA § 230	201
B. The Purposes of CDA § 230	203
III. Common Law Doctrine Concerning Defamation Liability for Intermediaries.....	206
A. Pre-Internet Case Law on Publisher and Distributor Liability	206
B. <i>CompuServe</i> -era Case Law on Publisher and Distributor Liability	208
IV. CDA § 230 is Unnecessary from a Pro-Freedom of Speech Perspective.....	211
A. <i>Stratton Oakmont</i> Was Not as Significant as the Drafters Might Have Believed	211
B. Some Jurisprudence Interpreting CDA § 230(c)(1) Merely Assesses Editorial Control.....	215
1. <i>Batzel v. Smith</i>	216
2. <i>Fair Housing Council of San Fernando Valley</i> <i>v. Roommates.com</i>	217
3. <i>Jones v. Dirty World Entertainment</i>	219
C. The Historical Parallel of Internet Trespass Doctrine...	221
1. The Development of Internet Trespass Doctrine.....	222
2. <i>Intel Corp. v. Hamidi's</i> Accommodation of First Amendment Concerns	224
3. <i>Hamidi</i> Should Allay CDA § 230 Defenders' Concerns About the Consequences of Repeal.....	226
V. CDA § 230(c)(1) Does Not Afford Exceptional Immunity to Online Intermediaries	227
A. Preventing a “Heckler’s Veto”: Exempting Online Intermediaries from Notice-Based Liability	227
B. Making “Users” Immune from Liability as Re- publishers.....	229
VI. CDA § 230(c)(1) Has Failed to Provide Uniformity and Certainty	233

A. Lack of Uniformity Across Jurisdictions	234
B. Standard-like Norms at the Heart of CDA § 230 Jurisprudence.....	236
VII. In the Absence of CDA § 230, Dismissal Would Be Possible Under the Same Circumstances	236
VIII. Rules/Standards Convergence	237
IX. Conclusion.....	240

I. INTRODUCTION

Section 230 of the Communications Decency Act (CDA), codified in 1996, is the only remaining section of what was originally an anti-obscenity statute.¹ Ironically, in light of this history, the law has become an important tool for protecting freedom of speech on the Internet. Section 230(c)(1) shields entities that provide access to the Internet or services on the Internet from liability for unlawful conduct by third-party Internet users. This immunity preserves the function of those intermediaries as loci for third-party speech.

Section 230(c)(1) of the CDA states, “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 Section 230(f) 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;” and defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information”³ Thus, for instance, while one could hold a YouTube video uploader (an information content provider) liable for defamation, one could not hold YouTube (an interactive computer service) liable as a “publisher or speaker” of that video, because, under CDA § 230(c)(1) the video is “information provided by another information content provider”—i.e. the video uploader.

CDA § 230(c)(1) has been applied to many areas of civil and criminal liability. For example, federal legislation has been passed⁴

1. See *Reno v. ACLU*, 521 U.S. 844 (1997).

2. 47 U.S.C. § 230(c)(1) (2018).

3. *Id.* § 230(f).

4. Tom Jackman, *House Passes Anti-Online Sex Trafficking Bill, Allows Targeting of Websites Like Backpage.com*, WASH. POST (Feb. 27, 2018),

partly in response to concerns that the operators of Backpage.com used CDA § 230 to shield themselves from liability for conspicuous sex trafficking by users of the site. Others have objected to the immunity afforded under the statute to websites that host “revenge pornography.”⁵ Other applications of the statute include immunity against the causes of action of false advertising⁶ and housing discrimination.⁷

This Note offers a convergence thesis, specifically with respect to defamation law under CDA § 230: without CDA § 230(c)(1), courts applying pre-Internet common law defamation principles to the Internet would reach similar conclusions to those reached by courts applying § 230(c)(1). The purpose of this Note is not to suggest a convergence thesis with respect to all applications of the statute. Rather, in consideration of criticisms of the statute’s application to, for example, legal liability for sex trafficking and housing discrimination, this Note argues that if § 230(c)(1) were repealed in reaction to those applications, intermediaries’ exposure to defamation liability, in particular, would not change measurably.

CDA § 230(c)(1) precludes the development of the common law of defamation in an online context, in the specific area of intermediary liability for third-party speech. Prior to the passage of the statute, courts applied a set of common law principles in determining the liability of offline intermediaries, such as bookstores and newsstands, for the defamatory speech of third parties, such as book authors and newspaper publishers. Courts had barely begun to apply these principles to online intermediaries, such as America Online, when CDA § 230(c)(1) replaced those evolving common law norms with statutory rules.

This Note challenges a shared premise of a chorus of scholarship (most recently, an article by Danielle Keats Citron and Benjamin Wittes)⁸ characterizing CDA § 230 as a grant of exceptional

https://www.washingtonpost.com/news/true-crime/wp/2018/02/27/house-passes-anti-online-sex-trafficking-bill-allows-targeting-of-websites-like-backpage-com/?utm_term=.38458b1fa2c9.

5. Jenna K. Stokes, Note, *The Indecent Internet: Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn*, 29 BERKELEY TECH. L.J. 929 (2014); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 413 n.94 (2017).

6. *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1195 (N.D. Cal. 2009).

7. *Fair Hous. Council v. Roommate.com, LLC*, 666 F.3d 1216, 1218-19 (9th Cir. 2012).

8. Citron & Wittes, *supra* note 5, at 419-20 (“Broad-sweeping immunity for online platforms is not required by the First Amendment. Section 230 involves a

immunity to online intermediaries, at least to the extent that those scholars' arguments address defamation liability. This Note argues that, as far as defamation liability is concerned, whether one opposes the expansive immunity afforded to online intermediaries under CDA § 230 or seeks to preserve it, one should be indifferent about the repeal of CDA § 230(c)(1). First, courts applying the common law would likely be more speech-protective in the context of online defamation liability than both defenders and critics of the statute believe. Further, CDA § 230 has been no better than a common law alternative either in nurturing a marketplace of ideas with predictable and nationally uniform legal standards for speech-based harms, or in providing a cost-saving benefit to intermediaries and third parties by supplying a method for dismissing claims before trial.

The convergence postulated by this Note has both a doctrinal and a practical aspect. First, the common law would provide a roughly equivalent degree of predictability to defendants. If CDA § 230 was supposed to provide uniformity across jurisdictions and relatively unchanging legal standards over time, it has failed in these respects in the same ways that a common law solution might be supposed to fail. Second, assuming that the doctrinal convergence thesis is correct, pre-trial dismissal would be granted under the same circumstances as it is now.

policy layer on top of the First Amendment”); David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 42 LOY. L.A. L. REV. 373, 411 (2010) (“Section 230 belies its significance with rather modest-sounding provisions. Yet it upended a set of principles enshrined in common law doctrines that had been developed over decades, if not centuries, in cases involving *offline* intermediaries.”); Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 137-38 (2008) [hereinafter Ciolli, *Chilling Effects*] (“Congress, declaring that ‘it is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services,’ included a provision in the Communications Decency Act of 1996 (CDA) to alter centuries of common-law precedent to grant the owners of such private online forums unprecedented immunity from liability for defamation and related torts committed by third-party users.”); Anthony Ciolli, *Bloggers as Public Figures*, 16 B.U. PUB. INT. L.J. 255, 274 (characterizing *Stratton Oakmont* as correctly decided: “The court did not wrongly decide this case, though in tension with the ruling in *Cubby*, because the ruling was not a departure from defamation law precedents, which attached defamation liability to publishers who assumed an editorial role.”); Vanessa S. Browne-Barbour, *Losing Their License to Libel: Revisiting § 230 Immunity*, 30 BERKELEY TECH. L.J. 1505, 1551-52 (2015) (characterizing the holding of *Zeran v. America Online*, a pillar of CDA § 230 immunity, as a departure from the common law).

Thus, this Note is in disagreement not only with defenders of the statute who fear that, in its absence, courts would impose a harsher standard of defamation liability on online intermediaries than that traditionally applied to offline intermediaries, but also with opponents of the statute who characterize CDA § 230 immunity in a defamation context as a form of Internet exceptionalism. Those who characterize CDA § 230 as overvaluing freedom of speech relative to reputational interests in the context of defamation liability are truly in disagreement with constitutional values deeper and older than the statute. And those who broadly defend CDA § 230(c)(1) immunity should consider more appropriate arguments for applications of the statute that have a more tenuous connection to freedom of speech. Defamation liability deserves individual consideration in the context of public debate over this law and should not be lumped together with all other applications as part of categorical criticism or defense of CDA § 230.

Part II of this Note discusses the text and purposes of CDA § 230. Part III details common law jurisprudence regarding defamation liability for intermediaries. Part IV introduces the “convergence thesis” with an argument that courts applying the common law of defamation, in light of both certain features of common law defamation doctrine and the tendencies of modern courts, are likely to establish a balance between speech and reputational interests similar to that maintained by courts under CDA § 230. Part V addresses another subset of this “convergence thesis,” arguing that certain elements of CDA § 230(c)(1) jurisprudence that appear to provide exceptional immunity to online intermediaries actually produce a result justifiable under the common law framework. Part VI argues that because jurisprudence interpreting CDA § 230(c)(1) has produced both varied interpretations across circuits and inherently unpredictable standard-like norms, the CDA has not provided certainty and uniformity beyond what the common law would provide. Part VII argues that, in the absence of CDA § 230, motions to dismiss and anti-SLAPP motions would be granted in the same circumstances as they are now. Part VIII explains some of the resemblances between CDA § 230 jurisprudence and the common law by reference to scholarship on rules or standards convergence. Part IX concludes.

II. THE TEXT AND PURPOSES OF CDA § 230

A. *The Text of CDA § 230*

Section 230(c)(1) of the Communications Decency Act states, “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.”⁹ “Interactive computer service” is defined to include “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”¹⁰ “Information content provider” is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information”¹¹ Thus, while one could sue a YouTube video uploader (an information content provider) for defamation, one could not hold YouTube (an interactive computer service) liable under any cause of action that treats YouTube as a “publisher or speaker” of that video.

Section 230(c)(2) states:

No provider or user of an interactive computer service shall be held liable on account of 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 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).¹²

According to the prevailing judicial interpretation of § 230(c)(1) and (c)(2), each individual subclause stipulates distinct rules.¹³

9. 47 U.S.C. § 230(c)(1) (2018).

10. *Id.* § 230(f)(2).

11. *Id.* § 230(f)(3).

12. *Id.* § 230(c)(2).

13. The alternative judicial interpretation, the “definitional” approach, has been rejected by the Seventh Circuit, the only circuit that has considered it. Ryan French, Comment, *Picking up the Pieces: Finding Unity After the Communications Decency Act Section 230 Jurisprudential Clash*, 72 LA. L. REV. 443, 466-67 (2012). According to the definitional approach, (c)(1) merely serves to define terms used in (c)(2). In other words, under this interpretation, both provisions advance a congressional intent to encourage private censorship. See *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (“Why not read § 230(c)(1) as

Section (c)(1) confers on all “providers or users of interactive computer services” immunity against causes of action premised on the defendant being characterized as a “publisher or speaker” of third-party content, unqualified by any requirement that they have taken efforts to filter out objectionable material. Section (c)(2) applies only to “providers of interactive computer services” that have taken actions to screen out objectionable content, and it serves to protect defendants from theories of liability that regard the defendant’s voluntary filtering of objectionable material as a basis for imposing liability, as well as from other sorts of claims.¹⁴ Section (c)(2) does not, however, limit immunity based on whether the plaintiff’s cause of action is premised on the defendant being a “publisher or speaker” of third-party content, or on whether the defendant is an “information content provider” with respect to that content.¹⁵

According to this reading, the provisions theoretically overlap partly in their application. If, for example, an intermediary is sued on a cause of action that characterizes the defendant as a “publisher or speaker” of third-party content because it has engaged in voluntary censorship, the defendant is protected by (c)(1) and (c)(2)

a definitional clause rather than as an immunity from liability, and thus harmonize the text with the caption? On this reading, an entity would remain a ‘provider or user’—and thus be eligible for the immunity under § 230(c)(2)—as long as the information came from someone else; but it would become a ‘publisher or speaker’ and lose the benefit of § 230(c)(2) if it created the objectionable information.” (citation omitted)).

14. See IAN C. BALLON, E-COMMERCE AND INTERNET LAW, § 37.05(4)(A) (2017) (“While section 230(c)(1) provides an exemption based on the nature of the claim asserted and the conduct of a provider or user of an interactive computer service in publishing or speaking content originating with a third party (and is self-executing), section 230(c)(2)(A) provides the same exemption for publishing or speaking, failing to block publication or speech or intentionally blocking publication or speech, all of which could otherwise result in liability in the physical world based on monitoring or screening content—but only where action is taken, in good faith, to restrict access to or the availability of certain objectionable content . . .”).

15. *Id.*; see also *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009) (“[T]he persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but *any* provider of an interactive computer service. Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue, can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable. Additionally, subsection (c)(2) also protects Internet service providers from liability not for publishing or speaking, but rather for actions taken to restrict access to obscene or otherwise objectionable content.” (citations omitted)).

simultaneously. But according to (c)(1), even if an intermediary has taken no effort to censor content, as long as it is not the information content provider with respect to the content at issue, it cannot be held liable specifically as a “publisher or speaker.”

The statute leaves open the possibility that a “provider or user of an interactive computer service” might be held liable when that provider or user is also the “information content provider” with respect to the content at issue. In other words, the statute does not squarely address how to treat, for example, YouTube, when YouTube itself authors or co-authors a video. As we will see, courts have used this gap in the statute to develop standards that limit the immunity of online intermediaries.¹⁶

B. *The Purposes of CDA § 230*

CDA § 230 as a whole advances three purposes: protecting freedom of speech on the Internet, removing disincentives to voluntary private censorship, and encouraging the development of Internet commerce generally. This Note focuses on the first and third purposes, both of which are advanced by (c)(1). The second purpose is advanced by (c)(2).¹⁷

According to the prevailing judicial interpretation, (c)(1) provides online intermediaries with broad protection against liability, with immunity based simply on the third-party origin of content. Under current judicial doctrine, this immunity applies whether or not a defendant has taken any steps to censor objectionable content. It also applies regardless of whether a defendant has specific notice of unlawful content.¹⁸

In defense of this interpretation, CDA § 230 could be interpreted as a reaction to *Stratton Oakmont v. Prodigy Services Co.*, a New

16. See *infra* Section IV.B.

17. See BALLON, *supra* note 14, § 37.05(4)(A) (quoting *Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1103 (N.D. Cal. 2011) (“[Section 230(c)(2)]’s ‘principal purpose . . . is to encourage ISPs [and other interactive computer service providers] to engage in effective self-regulation of certain content.”); see also *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (“Section 230(c)(2) tackles this problem [of web hosts or other intermediaries providing service to people who use the service for illegal purposes] not with a sword but with a safety net. . . . 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.”); see also *Green v. America Online (AOL)*, 318 F.3d 465, 472 (3d Cir. 2003) (“Section 230(c)(2) does not *require* [an intermediary] to restrict speech; rather it allows [intermediaries] to establish standards of decency without risking liability for doing so.” (emphasis added)).

18. See *infra* Section V.A.

York trial court case decided shortly before the enactment of the statute that had speech-restrictive implications.¹⁹ The legislative history expresses an intention to overrule *Stratton Oakmont*.²⁰ In that case, the court held a provider of online fora liable for a defamatory post by a subscriber, reasoning that it was straying from the general rule of immunity for similar online intermediaries only because Prodigy had a practice of thoroughly enforcing editorial guidelines.²¹ *Stratton Oakmont* threatened the prospect that a strict liability standard would be imposed on online intermediaries for defamatory speech buried within vast amounts of third-party content.²² The latter legal change would have upset the traditional pro-speech balance between freedom of speech and reputational interests in common law, established through the principle that “distributors”— entities that traffic large amounts of third-party speech— are liable only for defamatory third-party speech of which they have specific knowledge.²³

That the drafters were reacting to this aspect of *Stratton Oakmont* is not obvious from the legislative history or historical context.²⁴ Nevertheless, for purposes of this Note—to compare the existing statutory regime to a hypothetical common law alternative—it is essential only to point out that this pro-free speech reading of the statute is the reading that actually prevails among courts.

The reason Congress actually gave in the legislative history for wanting to overrule *Stratton Oakmont* was that they sought to eliminate a disincentive against intermediaries’ “Good Samaritan” voluntary censorship of third-party content.²⁵ As the legislative history notes, *Stratton Oakmont* perversely threatened to expose intermediaries that enforced content standards to a limited degree to greater liability than intermediaries that did not maintain any content standards at all. In reaction, the statute gives online

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

20. See *infra* Section V.A.

21. See *infra* Section III.C.

22. See *infra* Section III.B.

23. See *infra* Part III.

24. Citron & Wittes, *supra* note 5, at 407 n.51 (noting that while Section 230(b)(2), which states a policy objective of “preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services,” is sometimes cited as evidence that the drafters sought to preserve a free marketplace of ideas, the provision in fact referred to a free market in services and was motivated by opposition to Internet access fees); see also H.R. REP. No. 104-458, at 194 (1996) (Conf. Rep.).

25. H.R. REP. No. 104-458, at 194.

intermediaries the legal breathing room to offer private censorship as a product voluntarily purchased on the market. According to the current judicial consensus, the “Good Samaritan” purpose is advanced mainly by § 230(c)(2).

Additionally, the statute explicitly states the drafters’ intention to “promote the continued development of the Internet and other interactive computer services.”²⁶ The drafters apparently viewed the direction of the common law with respect to intermediary liability for third-party speech as uncertain and unpredictable. One can infer that the drafters sought to provide predictability to entrepreneurial Internet service providers through the creation of a legal standard, which, in contrast to a common law regime, would be uniform across the nation and relatively immune to future change. This predictability would serve not only to prevent a chilling effect on speech, but also to cultivate a favorable environment for Internet commerce more broadly.

In summary, according to the dominant reading of the statute, CDA § 230 is motivated by and advances two speech-related purposes and one more general purpose. First, (c)(1) protects online intermediaries from certain forms of liability for unlawful third-party content. Second, (c)(2) removes disincentives against voluntary private censorship. Third, the statute as a whole fosters the emergence and growth of Internet commerce more generally.

The two speech-related objectives are compatible. The freedom of providers to choose what content and content standards they provide is a necessary corollary of the freedom of consumers to access the content they choose. CDA § 230’s free market approach may thus be seen as an accommodation of two objectives—a way to reduce obscenity on the Internet while precluding government censorship.

In addition to permitting a free market of ideas and preferences for ideas, the statute is supposed to foster a free market in a commercial sense. One of the stated policies of the statute is to “preserve the vibrant and competitive free market that currently exists for . . . interactive computer services, unfettered by Federal or State regulation.”²⁷ Some non-First Amendment-related activity, such as renting apartments or advertising products or gambling, merits immunity under the statute, if at all, under this more general objective of fostering the emergence and growth of the Internet medium.

26. 47 U.S.C. § 230(b)(1) (2018).

27. *Id.* § 230(b)(2).

III. COMMON LAW DOCTRINE CONCERNING DEFAMATION LIABILITY FOR INTERMEDIARIES

A. *Pre-Internet Case Law on Publisher and Distributor Liability*

According to the prevailing judicial interpretation, part of the purpose of (c)(1) is to foster a free marketplace of ideas.²⁸ Specifically, as explained below, (c)(1) is intended to protect freedom of speech on the Internet by preventing collateral censorship. The common law theory of collateral censorship posits that imposing standard defamation liability on an entity that serves as a conduit for large quantities of third-party speech will cause that entity to overzealously censor out of caution, catching even lawful content in its net. Thus, as the volume of third-party content increases and the feasibility of editorial control over content correspondingly decreases, the legal responsibility of an intermediary for ascertaining the defamatory nature of third-party content should be relaxed.²⁹ In accordance with this logic, the common law traditionally has protected bookstores and newsstands from liability for defamatory content in books and newspapers, except where the plaintiff can show that an intermediary specifically knew of the defamatory speech at issue.³⁰ Newspapers, by contrast, traditionally have been held liable by the same standard as the

28. See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009) (“The statute is designed at once to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.”); *Batzel v. Smith*, 333 F.3d 1018, 1027-28 (9th Cir. 2003) (“Consistent with these provisions, courts construing § 230 have recognized as critical in applying the statute the concern that lawsuits could threaten the ‘freedom of speech in the new and burgeoning Internet medium.’ . . . Making interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet. Section 230 therefore sought to prevent lawsuits from shutting down websites and other services on the Internet.” (citations omitted) (quoting *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997))); *Zeran*, 129 F.3d at 330 (“The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.”).

29. See Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 296-97, 300 (2011).

30. RESTATEMENT (SECOND) OF TORTS § 581 cmt. d, e (AM. LAW INST. 1977).

authors of articles.³¹ The former group of speech intermediaries are classified as “distributors,” and the latter as “publishers.”

Wariness of the danger of collateral censorship has long been a central component of the common law of defamation, underlying the traditional distinction between publisher and distributor liability. In *Smith v. California*, the Supreme Court invalidated a Los Angeles ordinance that made it unlawful “for any person to have in his possession any obscene or indecent writing, . . . in any place of business where . . . books . . . are sold or kept for sale.”³² The ordinance imposed strict criminal liability—that is, the law did not require knowledge of the contents of written material in one’s possession. The owner of a bookstore was convicted under this statute in municipal court after obscene material was found in his shop.³³ The court held that, even though obscene material is not legally protected, the ordinance constituted an unconstitutional interference with freedom of the press, because it encouraged booksellers to over-censor out of caution, censoring even legal content:

By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public’s access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . “Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience.”³⁴

While this case concerned a criminal statute, its logic has also been applied in the context of tort law.³⁵

A comparison to the ordinary standard for defamation liability illuminates the significance of this protection. Liability of an original

31. *Id.* § 578 cmt. b.

32. *Smith v. California*, 361 U.S. 147, 148, 155 (1959).

33. *Id.* at 148-49.

34. *Id.* at 153 (footnote omitted) (quoting *The King v. Ewart*, (1905) 25 NZLR 709 (CA) at 729).

35. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277-79 (1964)

speaker for defamation against a private person requires negligence either in ascertaining a statement's veracity or in ascertaining its tendency to harm another's reputation. Establishing negligence requires showing that the defendant did not check on the false or defamatory nature of a statement to an extent that a reasonable person would.³⁶ The same standard is applied to someone who republishes that statement—for instance, someone who spreads a defamatory rumor through gossip,³⁷ or a newspaper publisher that prints an author's defamatory writing.³⁸

A bookseller or newsstand owner, by contrast, is subjected only to what might be called notice-based liability. If they know or have reason to know that a specific book or newspaper contains defamatory content, perhaps because they have been directly informed or because a particular author has a reputation for defamatory speech, booksellers and newsstand owners in theory may be held liable for that content. But they have no obligation to make an affirmative effort to examine the content they sell for falsehood or for a tendency to cause reputational harm. In practice, this is a very high standard for liability: there has never been a successful suit against a bookseller for defamation committed by an author of a book.³⁹

B. CompuServe-era Case Law on Publisher and Distributor Liability

If the drafters of CDA § 230(c)(1) were concerned about the fate of a nascent online marketplace of ideas, they were most likely concerned that courts would treat Internet intermediaries that have as little knowledge of and involvement in generating third-party content as do booksellers (i.e. “distributors”) as if they were book authors or publishing companies (i.e. “publishers”). The drafters were presumably familiar with this common law distinction between distributors and publishers. However, they may have concluded that courts would analogize incorrectly.

Congress would have made this prediction on the basis of one state trial court decision, out of a limited sample of only two cases addressing defamation liability for online intermediaries. *Stratton Oakmont*, a New York trial court case, treated the host of a collection of online forums as a publisher of the content produced

36. RESTATEMENT (SECOND) OF TORTS § 580(b) cmt. g (AM. LAW INST. 1977).

37. *Harris v. Minvielle*, 48 La. Ann. 908 (La. 1896).

38. RESTATEMENT (SECOND) OF TORTS § 581 (AM. LAW INST. 1977).

39. See *Ardia*, *supra* note 8, at 398 n.104.

by a third party on one of the forums. A 1991 federal district court case with essentially similar facts, *Cubby, Inc. v. CompuServe, Inc.*, by contrast, came to the opposite conclusion. *Stratton Oakmont*, as discussed in Section II.B, might have raised a concern that Internet providers of the model represented by Prodigy Communications Services and CompuServe were doomed to a “publisher” classification, despite handling large amounts of third-party content over which they were capable of exercising only limited control.

In *Cubby, Inc. v. CompuServe*, CompuServe Information Service (CIS), an online service provider that predates America Online (AOL), offered access to an assortment of online fora and was sued for defamation over content published by a third party within one of those fora. As part of the Journalism Forum, subscribers had access to Rumorville, a daily newsletter published by a separate company. Cubby, Inc. (“Cubby”), which developed a computer database called Skuttlebut, alleged that Rumorville had published defamatory content regarding Skuttlebut and the people who created it, and Cubby sued CIS for libel.⁴⁰ Cubby argued that CIS was a publisher of the statements within Rumorville, while CIS argued that it was a distributor of Rumorville, and thus only liable for the statements in question if CIS had specific knowledge of their defamatory character.⁴¹

A federal district court held that CIS was a distributor of Rumorville, and that it was not liable for defamation. The court analogized CIS to a traditional distributor:

CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so.⁴²

The court granted summary judgment in favor of CIS because the plaintiffs had not made anything other than “conclusory allegations” regarding specific evidence of knowledge.⁴³

The court concluded that CIS was a distributor, based on its lack of editorial control over the content published in Rumorville.

40. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 137 (S.D.N.Y. 1991).

41. *Id.* at 138.

42. *Id.* at 140.

43. *Id.* at 141.

Cameron Communications, Inc. (CCI), an independent contractor that managed the Journalism Forum, had contracted with CIS to manage the Journalism Forum and to “edit and otherwise control” its content “in accordance with editorial and technical standards and conventions of style” established by CIS. CCI, in turn, had entered into a contract with Don Fitzpatrick Associates of San Francisco (DFA), under which DFA agreed to supply Rumorville’s content, and CCI agreed to limit access to Rumorville to those CIS subscribers who had bought Rumorville subscriptions directly from DFA. Under this contract, DFA uploaded the text of Rumorville directly into CIS’s system, whereupon it became instantaneously available to any CIS user who had purchased their Rumorville subscription from DFA.⁴⁴ In other words, not only did CIS not directly manage Rumorville, CIS did not even directly manage the larger Journalism Forum within which Rumorville was published. Thus, whether or not CCI maintained sufficient control over Rumorville’s content to qualify as a publisher, CIS did not, despite the fact that CIS maintained and promised to enforce certain editorial guidelines. This structural lack of control over content, the court noted, was compounded both by the technical lack of control stemming from the instantaneous speed with which online content can be made available, and by the practical lack of control stemming from the large quantity of content involved.⁴⁵

In *Stratton Oakmont*, Prodigy was sued for defamation over content posted on one of its forums. The “Money Talk” forum was managed by an independently-contracted “board leader” who was obligated by contract to, among other things, remove content that violated Prodigy’s content guidelines. These guidelines prohibited, for example, “insulting” posts, and posts that “harass other members or are deemed to be in bad taste or grossly repugnant to community standards, or are deemed harmful to maintaining a harmonious online community.”⁴⁶ Prodigy also employed an automatic software screening program that supplemented enforcement by board leaders. In fact, Prodigy’s marketing director had, in newspaper articles, explicitly touted Prodigy’s enforcement of content guidelines as a distinguishing positive feature of the service, partly in order to attract users seeking a “family-oriented” computer service.⁴⁷

44. *Id.* at 140.

45. *Id.*

46. *Stratton Oakmont v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *5 (N.Y. Sup. Ct. May 24, 1995).

47. *Id.* at *5, *13.

The court, distinguishing the facts of the case from those in *CompuServe*, held that Prodigy was a publisher for defamation purposes. According to the court, CIS “held itself out to the public and its members as controlling the content of its computer bulletin boards,” while Prodigy actually exercised such control both through an automatic screening program and by contracting with board leaders to enforce content guidelines. Thus, while “[c]omputer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates[,] . . . Prodigy’s own policies, technology and staffing decisions . . . have altered the scenario and mandated the finding that it is a publisher.”⁴⁸

IV. CDA § 230 IS UNNECESSARY FROM A PRO-FREEDOM OF SPEECH PERSPECTIVE

There are three reasons to believe that CDA § 230 was, in retrospect, unnecessary to maintain the traditional balance between freedom of speech and reputational concerns. First, *Stratton Oakmont v. Prodigy Services Co.* was, for several reasons, unlikely to have had a speech-restrictive influence on future CDA § 230 jurisprudence. Second, at least some jurisprudence interpreting CDA § 230(c)(1), in effect, engages in a common law inquiry into editorial control, which suggests that those same courts would come to similar conclusions if left to apply the common law. Third, as a matter of judicial mood, the contemporary development of Internet trespass law suggests the inclination of courts adjudicating private tort claims in an Internet context to preserve pre-Internet boundaries between freedom of speech and the interests of tort claimants.

A. Stratton Oakmont Was Not as Significant as the Drafters Might Have Believed

To the extent that *Stratton Oakmont* provoked free speech concerns among the drafters of CDA § 230, drafters were most likely concerned that courts, similarly to the court in *Stratton Oakmont*, would analogize incorrectly from pre-Internet cases that classified certain institutional relationships to actionable speech as “publisher” relationships and others as “distributor” relationships. However, three facts suggest that *Stratton Oakmont*’s reasoning would not have been followed by courts in New York or elsewhere. First, needless to say, decisions by state trial courts do not bind higher courts within the state, courts of other states, or federal courts.

48. *Id.* at *10, *12-13.

Second, the court in *Stratton Oakmont* did not merely analogize incorrectly to online facts; the court's holding also turned partly on a principle it invented without citing any authority concerning the relevance of public relations claims in determining the degree of an intermediary's editorial control. Such theoretical creativity is especially unlikely to influence jurisprudence when generated by a trial court. Further, and most importantly, *Stratton Oakmont* was decided shortly before dramatic changes in the nature and size of the Internet, as well as a revolutionary increase in public access to computers and Internet service. The character and magnitude of these changes has affected the factual context of Internet defamation law in a manner that has made the applicability of collateral censorship theory more obvious.

By the metric of *Cubby*, upon whose persuasive authority *Stratton Oakmont* heavily relied, the court in *Stratton Oakmont* analogized incorrectly both in emphasizing the fact that Prodigy maintained an automatic content screening system and in emphasizing the fact that Prodigy had codified editorial guidelines. That Prodigy maintained an automatic screening system that scanned for the F-word, but could not have been capable of the more complex task of scanning for defamatory content, was irrelevant to the logic of collateral censorship. As the court noted in *Cubby*, the fact that third-party Internet content is made available to the public instantly upon being uploaded compounds the unreasonableness of requiring scrutiny of a large volume of content. Although Prodigy's automatic filter screened this content for factors other than falsehood and tendency to injure reputation, content was otherwise instantaneously uploaded. Furthermore, aside from the presence of an automatic screening system, the defendants in these two cases exercised a similar degree of editorial control. CIS and Prodigy both maintained editorial guidelines. And CIS, like Prodigy, required an independent contractor to enforce those guidelines. Both online service providers, in short, handled large volumes of content over which they exercised similarly limited degrees of control through a similar contractual structure. If CIS was found to be a distributor, Prodigy should have been so classified as well.

But even if other courts followed *Stratton Oakmont's* treatment of Prodigy's editorial activities, they would have been less likely to follow the court's principle that whether an intermediary advertises editorial control affects the standard of defamation liability to which that intermediary is exposed. The traditional common law distinction between distributor and publisher is based on the degree of actual editorial control, not on the degree that one claims in public

relations materials to exercise editorial control. The court cited no authority for the conclusion that the existence of this type of marketing strategy is relevant to a defamation claim. The court cited no case, for instance, holding that a bookseller that advertises itself as family-friendly exposes itself to publisher liability for defamatory content in books—i.e. the argument the *Stratton Oakmont* court made with respect to defamatory third-party posts. The one case that the court did cite in the course of this argument, *Auvil v. 60 Minutes*, hinges on actual editorial control and makes no mention of advertisement of editorial control.⁴⁹ Especially given the limited precedential effect of state trial court opinions, the lack of any precedential basis for the principle articulated in this case likely would have prevented its widespread adoption.

Furthermore, even a court that did not perceive the applicability of distributor liability to online service providers in the mid-1990s might have perceived it over the following decade. In the early 2000s, a combination of events, including the advent of high-speed Internet, dramatic increases in public access to computers and the Internet, and the emergence of a generation of websites processing vastly more user-generated content than CIS and Prodigy, transformed the Internet into both a more commonly used and more user-driven medium. Some have referred to this growth as a transformation from Web 1.0 to Web 2.0.⁵⁰ The “walled garden” Internet model, exemplified by CIS and Prodigy, in which Internet service providers offered access to a specific collection of websites only to subscribers, gave way to the open Internet model prevailing today.⁵¹ Additionally, web services oriented around instantaneously and continuously user-generated content, such as Facebook, YouTube, and Reddit, now dominate the Internet. These contemporary intermediaries are much larger hubs of online activity than were Prodigy and CIS, and there are more practical obstacles to scrutinizing all third-party generated content for defamatory speech. Admittedly, we have the benefit of hindsight in characterizing CDA § 230 as an overreaction to *Stratton Oakmont*. Nevertheless, we can observe that the drafters overestimated the relevance of early 1990s Internet defamation case law to the factual

49. *Id.* at *11.

50. William L. Hosch, *Web 2.0*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Web-20> (last visited Feb. 5, 2018); *Web 2.0 Definition*, PC MAGAZINE, <https://www.pcmag.com/encyclopedia/term/56219/web-2-0> (last visited Feb. 5, 2018).

51. Ciolli, *Chilling Effects*, *supra* note 8, at 169-70.

setting of common law decisions that would have taken place even a few years afterward.

One might object that while the scale of user-driven Internet services undoubtedly has increased, there has been a corresponding evolution in content screening procedures and screening technology. For instance, many major online intermediaries utilize algorithmic screening to prevent copyright infringing material from being uploaded by users.⁵² This type of technology can supplement and partially replace notice-and-takedown procedures, which pertain to the removal of infringing content upon notice from a copyright owner. Some scholars have argued that this legal model should be applied to defamation liability under CDA § 230(c)(1).⁵³

But defamation differs fundamentally from copyright infringement in that the latter involves a comparatively cut-and-dry determination of fact, with the exception of evaluating fair use defenses.⁵⁴ Under the Digital Millennium Copyright Act (DMCA), a notice collectively identifies the copyrighted work claimed to have been infringed and the material that is claimed either to be infringing or to be the subject of infringing activity.⁵⁵ Importantly, in addition to involving comparatively straightforward determinations, all of these elements are potentially verifiable entirely through the use of online sources.

By contrast, in order to provide an intermediary with sufficient information to ascertain whether a violation had occurred, a notice of defamation would often have to both allege facts available only from offline sources and establish inevitably subjective judgements. Take, for example, an allegedly defamatory statement in a YouTube video authored by person A that person B keeps racist memorabilia in his home. Given that A is making a claim about the contents of B's home and not the contents of a webpage, supplying a URL, as one might do in DMCA notice, will most likely be insufficient. Additionally, even if YouTube received unmistakable documentary evidence from A that the memorabilia in question is located in B's home, YouTube would have to make the subtle determination of whether the statement that the memorabilia is racist is one of opinion—in which case it would mostly likely be protected—or one

52. Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473, 478-81 (2016).

53. See, e.g., Browne-Barbour, *supra* note 8, at 1554-55.

54. See Taylor B. Bartholomew, *The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID*, 13 DUKE L. & TECH. REV. 66 (2015).

55. 17 U.S.C. § 512(c)(3) (2018).

of fact.⁵⁶ Furthermore, because defamation requires showing not just falsehood but at least negligence as to falsehood, a defamation notice would have to allege facts, most likely not available from online sources, about A's knowledge or state of mind at the time of the alleged violation, or about other circumstances surrounding A's decision to utter the statement in question. Given these fundamental differences between the types of evidence required by these causes of action, even if we assumed for the sake of argument that notice-and-takedown and algorithmic screening are efficient and targeted methods of enforcement in the context of intellectual property rights, this success would not imply that online intermediaries would enforce defamation law efficiently.

B. Some Jurisprudence Interpreting CDA § 230(c)(1) Merely Assesses Editorial Control

One major locus of ostensibly interpretive jurisprudence is truly a continuation of pre-Internet disputes from the common law of defamation. Specifically, controversy over the definitions of “development of information” and “information content provider” is a disguised disagreement over what sorts of actions by Internet service providers amount to sufficient editorial control that imposing liability does not implicate the concerns underlying the common law theory of collateral censorship. In other words, post-CDA § 230, courts are still applying the publisher/distributor distinction, at least in this particular jurisprudential controversy.

CDA § 230(c)(1) states that “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*.”⁵⁷ “Information content provider” is defined as “any person or entity that is responsible, in whole or in part, for the creation or *development* of information”⁵⁸ Several cases have wrestled with the question of how to distinguish between a “provider or user” of an online service, and an “information content provider,” who actually “creates” or “develops” the content. For courts, this distinction has come to turn on the degree of editorial control that the party in question exercises over the content. These cases address a continuum of intermediary editorial control, from disinterested conduit, to restrained editor, to co-speaker.

56. RESTATEMENT (SECOND) OF TORTS § 566 (AM. LAW INST. 1977).

57. 47 U.S.C. § 230(c)(1) (2018) (emphasis added).

58. *Id.* § 230(f)(3) (emphasis added).

1. *Batzel v. Smith*

In *Batzel v. Smith*, defendant Ton Cremers ran the Museum Security Network, which both maintained a website and distributed an email newsletter via Listserv software. Both of these services distributed content concerning museum security and stolen art. The plaintiff sued Cremers for defamation over an email, written by a third party, that Cremers both posted on the website and published on the Listserv. Among other content regularly shared on the site and via the Listserv was a compilation of emails sent to him, usually from subscribers. He typically omitted emails that either were not related to museums or stolen art or were otherwise not fit for distribution. In this case, Cremers posted an email in which a third party, Smith, accused someone of possessing art that had been stolen from Jews by Nazis during World War II, but only after Cremers made some wording changes to the email.⁵⁹

Among other questions, the court examined whether Cremers was merely a “provider or user” of the Listserv, or rather an “information content provider,” who “created” or “developed” the actionable content as much as did Smith. The majority held that the “development of information” “means something more substantial” than merely making “minor alterations” to emails and “selecting [emails] for publication.”⁶⁰ The dissent disagreed, arguing that immunity should not apply where a defendant has taken “an active role in selecting” information, and that Cremers had done so in this case. In other words, while the majority and the dissent offered different interpretations of what characterizes editorial control, they agreed that the relevant question in distinguishing “provider or user” from “information content provider” was the degree of editorial control exercised.

The disagreement between the majority and dissent over whether immunity should turn on a passive/active distinction could have easily taken place between judges constrained by a common law framework. The majority and the dissent diverged over what qualities essentially characterize a publisher, and thus qualify an intermediary as a co-developer or co-creator of content: is the active selection of content, as opposed to passive rejection of content, the unique province of a publisher? Surely, a newspaper, for instance, both rejects stories pitched by outsiders and actively fashions an

59. *Batzel v. Smith*, 333 F.3d 1018, 1021-22, 1027-28 (9th Cir. 2003).

60. *Id.* at 1031.

overall style and purpose.⁶¹ One could also argue, analogously, that a bookstore, even if not intimately familiar with all content, both declines to sell certain books and actively selects books according to the tastes of the store owner or of the clientele the owner seeks to attract. One could even argue, as did the majority, that this distinction “is one of degree, not substance.”⁶² Indeed, selecting and declining to select are often simultaneous decisions, two sides of the same act. In any case, this entire debate takes place within the confines of the common law assumption that the degree of editorial control is the appropriate criterion for distinguishing those who should be subjected to liability as publishers from those who should not.

While on its face, the majority and the dissent are engaged in a disagreement over the intent of the drafters of the statute and not directly over whether the logic of collateral censorship justifies immunity, that common law logic, according to the court, informed that very statutory intent. And while the majority speaks of the intent of the drafters both to cultivate a free marketplace of ideas and to remove disincentives to private censorship,⁶³ both are independently sufficient justifications for the majority’s conclusion. Providing immunity to online intermediaries that exercise the inevitable responsibility of choosing which content to provide removes the disincentives that *Stratton Oakmont* would create against both voluntarily filtering only some obscene content and voluntarily providing content that may risk provoking defamation lawsuits.

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

While not a defamation case, *Fair Housing Council of San Fernando Valley v. Roommates.com*⁶⁴ advanced the jurisprudence interpreting “information content provider” and “development of information” in a manner that has had important implications for defamation liability under CDA § 230. *Roommates.com* suggested

61. See *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974) (“The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment.”).

62. *Batzel*, 333 F.3d at 1032.

63. *Id.* at 1027-28.

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

a conclusion novel at the time within CDA § 230 jurisprudence but perfectly consistent with traditional defamation law principles: if an intermediary is actually a co-author of third-party content, that intermediary should be held liable by the same standard as that third party.

Roommates.com, an online roommate-matching service, required users to specify both their own sex and their sex preferences for roommates, displayed those preferences in user profiles, and limited the results of searches for roommates based on those parameters.⁶⁵ The court held that because Roommates.com had “materially contributed” to the unlawfulness of the content under the Fair Housing Act, it had “developed” that content within the meaning of CDA § 230(c)(1).⁶⁶ This company was not merely permitting third-party providers of content to discriminate, but rather was requiring third parties to discriminate by giving them no choice but to specify sex-based preferences for roommates.⁶⁷ The court distinguished between types of editing that would not deprive an intermediary of immunity, such as removing obscenity or trimming for length, from types of editing that “contribute[] to the alleged illegality,” like removing the word “not” from a user message reading “[Name] did *not* steal the artwork”⁶⁸

Roommates.com, while seemingly representing a limitation on the immunity provided to online intermediaries under CDA § 230, does not impose any restrictions that the common law would not impose in the specific context of defamation. The common law “distributor” classification refers to a role, not to a type of entity. A newsstand owner does not enjoy *general* immunity from ordinary defamation liability. For example, an owner is not immune regarding defamatory speech that he knowingly nails to the side of the newsstand. Rather, a newsstand owner enjoys *distributor* immunity, that is, only with respect to third-party speech to which he has a relationship characterized by a lack of editorial control. Likewise, the conclusion reached by many courts that online intermediaries should be held to the ordinary standard of defamation liability for their own speech and for speech generated in concert with third parties is perfectly consistent with common law principles.⁶⁹ Such an intermediary exercises the utmost editorial control, as does the party who utters the speech.

65. *Id.* at 1161, 1167.

66. *Id.* at 1167-68.

67. *Id.* at 1169.

68. *Id.*

69. *See* Wu, *supra* note 29, at 330-31.

3. *Jones v. Dirty World Entertainment*

The leading case applying *Roommates.com*'s "material contribution" standard to defamation liability, *Jones v. Dirty World Entertainment*,⁷⁰ granted immunity to the particular defendant in that case but generated a refinement of the "material contribution" standard that has been applied by lower courts both to grant and to deny immunity. The defendant owned and operated a website, *The Dirty*, that served as a forum for anonymous submitters to post comments and observations about people they encountered, impliedly soliciting comments of a gossipy nature. Of the thousands of submissions that the site received every day, 150-200 were chosen; edited to remove nudity, obscenity, threats of violence, profanity, and racial slurs; and posted with an accompanying humorous or satirical comment by the website's operator. The plaintiff was defamed in a series of several posts received, edited, and presented in this way.⁷¹ The lower court had withheld immunity on the grounds that *The Dirty*'s operator "intentionally encourages illegal or actionable third-party postings to which he adds his own comments ratifying or adopting the posts."⁷²

On appeal, the Sixth Circuit both narrowed the district court's concept of "encouragement" and rejected the notion that "ratifying" third-party content invites liability. The Court of Appeals disagreed with the "encouragement" standard proposed by the district court, both because the muddiness of the concept of "encouragement" as a basis for censorship would imperil the robust Internet freedom envisioned by the statute, and because a website may encourage users to post content that turns out to be unlawful without participating in the unlawfulness itself. Any website that solicits customer reviews, for instance, inevitably generates some risk of defamation by encouraging third parties to post negative factual claims about businesses. However, by the court's logic, such a website does not thereby solicit defamatory claims per se.⁷³ The Court of Appeals also criticized the "ratification" standard proposed by the district court, reasoning that it "abuses the concept of responsibility" by imputing the prior unlawful speech of one

70. *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398 (6th Cir. 2014).

71. *Id.* at 403.

72. *Id.* at 406.

73. *Id.* at 414-15.

individual to another individual who responds to that speech afterward.⁷⁴

The court granted immunity to The Dirty, finding that the defendant had merely provided neutral tools for third parties to post their speech, without encouraging unlawful aspects of the speech.⁷⁵ The operator of The Dirty was an “information content provider” with respect to his own comments in reaction to third-party submissions, but not with respect to those third-party submissions themselves.⁷⁶

Some critics have decried this decision as an exemplar of CDA § 230 immunity run amok in the defamation context. Citron and Wittes, for example, have characterized The Dirty as a site “designed for the express purpose of hosting defamation and privacy invasions”⁷⁷ and the outcome of the case as solidifying “blanket immunity” for websites that encourage the illegal behavior of third parties.⁷⁸ They advocate, alternatively, that Congress amend CDA § 230 to provide immunity only to intermediaries that have made reasonable efforts to address unlawful action by third parties, or that courts re-interpret this qualification into the statute.

But Citron and Wittes fail to notice that the “material contribution” standard inaugurated in *Roommates.com* and refined in *Jones* does not in practice provide “blanket immunity”: it has been applied by lower courts to withhold as well as to grant immunity in defamation cases. Federal district courts have denied immunity under this standard where a party who would otherwise qualify as a “user or provider of an interactive computer service” posted content herself,⁷⁹ incorporated quotes from third parties in her own editorial writing,⁸⁰ made defamatory factual representations about third-party content,⁸¹ and conspired with a third-party submitter to defame a plaintiff.⁸²

74. *Id.* at 415.

75. *Id.* at 416.

76. *Id.* at 416-17.

77. Citron & Wittes, *supra* note 5, at 417.

78. *Id.* at 416.

79. *AMCOL Sys. v. Lemberg Law, LLC*, No. 3:15-3422-CMC, 2016 U.S. Dist. LEXIS 18131, at *25-26 (D.S.C. Feb. 16, 2016). The Seventh Circuit reached a similar conclusion in *Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016).

80. *Diamond Ranch Acad., Inc. v. Filer*, No. 2:14-CV-751-TC, 2016 U.S. Dist. LEXIS 19210, at *60-63 (D. Utah Feb. 17, 2016).

81. *Consumer Cellular, Inc. v. ConsumerAffairs.com*, No. 3:15-CV-1908-PK, 2016 U.S. Dist. LEXIS 72573, at *38-40 (D. Or. Feb. 29, 2016).

82. *Tanisha Sys. v. Chandra*, No. 1:15-CV-2644-AT, 2015 U.S. Dist. LEXIS 177164, at *22-25 (N.D. Ga. Dec. 4-6, 2015).

Additionally, even if the “material contribution” standard strikes the wrong balance between reputational interests and speech, the common law likely would strike a similar balance. It is perhaps for this reason that, even while Citron and Wittes suggest that CDA § 230 jurisprudence departs from the common law,⁸³ they do not advocate a return to the common law. It may be that the legal puzzle presented by intermediary institutions that can act, in different circumstances, as either speakers or conduits of speech is unique to the Internet. But courts applying pre-Internet common law principles to the Internet would address this puzzle with the same tools used by courts applying the statute. A plaintiff who successfully defeats a CDA § 230 defense still must prove the elements of a standard defamation claim. This combination of tasks is equivalent to the task that courts would face in applying the common law—that of establishing that an entity is acting as a speaker, not a mere conduit of speech, before applying standard defamation analysis.

Not only would the theoretical task in the common law be similar, but so too would the nature of the process—i.e. incremental judicial lawmaking. “Material contribution” is not derived from the statute at all; it is a standard invented by judges to address a gap in the statute—the question of what types of actions make an “interactive computer service” simultaneously an “information content provider.” This is similar in form to a common law process, in that it involves the judicial creation from scratch of a standard-like norm, “material contribution,” to address what would otherwise be a legal void.

C. *The Historical Parallel of Internet Trespass Doctrine*

The parallel development of Internet trespass doctrine should allay the fear that courts applying the common law of defamation in an Internet context would stray from the precise balance between freedom of speech and reputational interests recognized in pre-Internet tort law. Simultaneously with courts developing diverging interpretations of various terms in CDA § 230, courts have also been adapting the common law doctrine of trespass to chattels to an online context. Trespass to chattels has been applied in situations in which the violation of a private corporation’s property right in its Internet server caused harm but was not a serious enough interference with possession to qualify as conversion. In an influential Internet trespass case, *Intel Corp. v. Hamidi*, the Supreme Court of California resolved a conflict between the First Amendment

83. See Citron & Wittes, *supra* note 5.

right to speech and the use of the trespass cause of action against a spammer.⁸⁴ *Intel Corp.* and the larger body of case law consistent with its principles exemplify the capability and tendency of courts developing Internet tort law to observe subtle First Amendment limitations. The balance struck between speech and reputational interests in Internet trespass doctrine, in which freedom of speech is limited only when the speaker commits a non-consensual physical invasion of private property, is equivalent to the pre-Internet balance between these interests.

1. The Development of Internet Trespass Doctrine

Courts have treated intentional non-consensual contact via electronic signals with a physical computer server, such as hacking or spamming, as trespass to chattels. In 1996, the California Court of Appeals created a foundation for later Internet trespass law in *Thrifty-Tel, Inc. v. Bezenek*.⁸⁵ The court found the defendants—the parents of two teenage boys who hacked into the personal telephone accounts of customers of a long-distance telephone carrier—liable for trespass to chattels against the company.⁸⁶ The majority defined trespass to chattels as “intentional interference with the possession of personal property [that] proximately cause[s] injury.”⁸⁷ The court characterized the cause of action, in both electronic and non-electronic contexts, as enabling “recovery . . . for interferences with the possession of chattels which are not sufficiently important to be classed as conversion”⁸⁸ Citing Prosser’s recommendation to use remedies other than conversion to categorize such harms, the court applied trespass to chattels doctrine. The court adopted Prosser’s traditional, pre-Internet account of trespass to chattels, as covering not just the “asportation” of property, but “even the unauthorized use of personal property.”⁸⁹ “Unauthorized,” in this context, appears to refer to a lack of authorization by the injured property owner and thus is synonymous with “non-consensual.” Drawing an analogy to a line of cases classifying harmful invasion of land via microscopic particles as physical trespass rather than nuisance, the court concluded that “the electronic signals generated

84. *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342 (Cal. 2003).

85. *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559, 1566 (Cal. Ct. App. 1996)

86. *Id.* at 1566.

87. *Id.*

88. *Id.* at 1566 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 14, at 85-86 (5th ed. 1984)).

89. *Id.* at 1566.

by the Bezenek boys' activities were sufficiently tangible to support a trespass cause of action."⁹⁰ Thus, intentional non-consensual electronic contact constitutes a trespass.

Later cases also support a classification of electronic contact as trespass, and as a tangible, or physical, invasion. In *eBay, Inc. v. Bidder's Edge*, a California federal district court found an auction aggregation site liable for trespass to chattels for continuing to post eBay auction listings on its site after being expressly denied permission to do so, thus acting outside of the scope of initially granted consent.⁹¹ Following *Thrifty-Tel*, the court held that the use of eBay's servers outside of the terms of eBay's consent was a physical invasion and thus a trespass, reasoning that "electronic signals [are] . . . sufficiently tangible to support a trespass action."⁹² In *CompuServe Inc. v. Cyber Promotions*, a case involving Internet trespass via unauthorized spam, an Ohio federal district court cited *Thrifty-Tel* to support a holding that electronic contact via unsolicited email advertisements constituted a tangible invasion sufficient to establish trespass.⁹³ A California federal district court tackled a related issue in *Ticketmaster v. Tickets.com*, a case in which a private company had extracted data from the internal web pages of the plaintiff's site without consent.⁹⁴ While denying the plaintiff's trespass claim due to a lack of actual harm, the court embraced the same understanding of non-consensual electronic contact as a tangible invasion:

The computer is a piece of tangible personal property. It is operated by mysterious electronic impulses which did not exist when the law of trespass to chattels was developed, but the principles should not be too different. If the electronic impulses can do damage to the computer or to its function in a comparable way to taking a hammer to a piece of machinery, then it is no stretch to recognize that damage as trespass to chattels and provide a legal remedy for it.⁹⁵

90. *Id.* at 1566 n.6.

91. *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1070 (N.D. Cal. 2000).

92. *Id.* at 1069.

93. *CompuServe Inc. v. Cyber Promotions*, 962 F. Supp. 1015, 1021 (S.D. Ohio 1997).

94. *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV99-7654-HLH, 2000 LEXIS 12987 (C.D. Cal. 2000).

95. *Id.* at *15-16.

In other words, invasive and harmful contact made by electronic signals with physical computer equipment is analogous to the type of physical invasion traditionally recognized as a trespass.

To establish liability for trespass to chattels, a plaintiff has to show actual harm, in addition to unauthorized use. The court in *CompuServe*, citing Restatement (Second) of Torts § 218(b), stated that in addition to unauthorized use, liability for trespass to chattels requires that the unauthorized use be “harmful to the possessor’s materially valuable interest in the physical condition, quality, or value of the chattels;” “deprive[] [the possessor] of the use of the chattels for a substantial time;” or affect “some other legally protected interest of the possessor”⁹⁶ Among the harms that have been recognized are a negative impact on business reputation or customer goodwill due to inconvenience and cost imposed on customers⁹⁷ and the diminishment of a company’s ability to serve customers through the occupation of bandwidth or storage space or through the impairment of the processing power of computer equipment.⁹⁸

2. *Intel Corp. v. Hamidi’s* Accommodation of First Amendment Concerns

Courts have applied trespass to chattels doctrine to spamming cases, and in doing so have established unambiguous First Amendment limitations. In *Intel Corp. v. Hamidi*, former employees of Intel sent numerous emails criticizing management to current employees using the company’s intranet system.⁹⁹ Intel sued for trespass to chattels on the ground that the emails constituted an unauthorized use of the company’s email system and caused harm in the form of loss of employee productivity. The court held that spamming constitutes a trespass only if it damages or impairs the functioning of an intranet system.¹⁰⁰

The majority acknowledged that the suit implicated sensitive First Amendment concerns but found that the invasion at issue was not sufficiently serious to justify overriding free speech interests. The court noted that, just as much as use of legislative power, “the use of government power . . . by an award of damages or an injunction in

96. *CompuServe*, 962 F. Supp. 1015 at 1023.

97. *Id.*

98. *Id.* at 1022; *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058, 1071 (N.D. Cal. 2000); *Hotmail Corp. v. Van Money Pie, Inc.*, No. C98-20064 JW, 1998 U.S. Dist. LEXIS 10729, at *20 (N.D. Cal. Apr. 16, 1998).

99. *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1346 (Cal. 2003).

100. *Id.* at 1347.

a private lawsuit, is state action that must comply with First Amendment limits.”¹⁰¹ Because he had not damaged the intranet system or impaired its functioning, the defendant “no more invaded Intel’s property than does a protester holding a sign or shouting through a bullhorn outside corporate headquarters, posting a letter through the mail, or telephoning to complain of a corporate practice.”¹⁰²

The court was concerned that recognizing distraction caused by an email as sufficient harm to show trespass would permit recovery in a multitude of cases in which a recipient suffered no harm beyond receiving an offensive message without prior consent.¹⁰³ Favorably quoting the dissent, which cited Prosser, the majority distinguished between the type of harm addressed by the trespass to chattels tort—which affects possession—and the type of harm claimed by the plaintiff:

“Damage” of this nature—the distraction of reading or listening to an unsolicited communication—is not within the scope of the injury against which the trespass-to-chattel tort protects, and indeed trivializes it. After all, “[t]he property interest protected by the old action of trespass was that of possession; and this has continued to affect the character of the action.”¹⁰⁴

The court argued that even cases such as *CompuServe* that find harm in the impact on business reputation or goodwill—somewhat less concrete harms than using up storage or bandwidth—premiered this harm on the impaired functioning of the email system caused by a large quantity of emails, rather than on the content of messages. In other words, the court set a threshold on the level and type of harm that a litigant must show in order to screen out lawsuits attempting to censor speech simply because the recipient finds the message objectionable.

While other cases have argued that unsolicited spam is not protected by the First Amendment, those cases merely affirm the right of private companies to use self-help to block spam sent to their servers. Because the owner of a private server is not a state actor,¹⁰⁵

101. *Id.* at 1364.

102. *Id.* at 1365.

103. *Id.* at 1359.

104. *Id.*

105. *CompuServe Inc. v. Cyber Promotions*, 962 F. Supp. 1015, 1026 (S.D. Ohio 1997).

private companies do not violate the First Amendment when they block emails, regardless of whether a claim for trespass to chattels can be shown.¹⁰⁶ *CompuServe* cited several pre-Internet cases affirming the principle that the First Amendment does not sanction invasions that would otherwise violate private property rights.¹⁰⁷ In other words, there is a right to communicate messages via email, but not at the expense of a private property owner's right to exclude, which can be exercised even without showing that a trespass to chattels has occurred.

3. *Hamidi* Should Allay CDA § 230 Defenders' Concerns About the Consequences of Repeal

In applying the common law tort doctrine of trespass to chattels in an Internet context, courts have generally favored speech interests, except where there has been a tangible and harmful invasion of physical property. This is a well-established balance in offline trespass case law. New Jersey and California jurisprudence on trespass to land represents a unique exception to the general rule that freedom of speech in an offline context is limited by the right of property owners to exclude others from physically entering their land.¹⁰⁸ Because these pre-Internet cases generally concern trespass to land, no requirement of actual harm applies.¹⁰⁹ However, New Jersey and California case law present odd exceptions illustrative at least of the general rule that freedom of speech is limited by a right against physical invasion.

Thus, to the extent that one can predict the mood of courts in one area of Internet tort law based on that which prevails in another, Internet trespass law should be encouraging to those who defend the generous immunities granted to online intermediaries under CDA § 230(c)(1) but who are hesitant to embrace the perceived uncertainties of a common law solution. The manner in which Internet trespass doctrine has developed suggests that courts applying pre-online defamation principles to the Internet would preserve pre-online boundaries between freedom of speech and reputational interests.

106. *Id.* at 1023; *Cyber Promotions v. America Online*, 948 F. Supp. 436, 456 (E.D. Pa. 1996).

107. *CompuServe*, 962 F. Supp. at 1027.

108. Julian N. Eule, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1564-65 (1998).

109. RESTATEMENT (SECOND) OF TORTS § 158 (AM. LAW INST. 1977).

Admittedly, there is a possibility that the pro-speech tendency of Internet trespass law is partly a product of endogeneity, making such law an imperfect control group for testing the effect of CDA § 230. That is, CDA § 230 might have had not just an immediate effect on CDA § 230 jurisprudence, but also an indirect effect on Internet law outside of the technical domain of the statute, such as Internet trespass law. As a law credited by some with having produced the modern Internet,¹¹⁰ CDA § 230 and the judicial discourse it has generated likely have affected the way judges think about the role of online intermediaries in the ecosystem of a free press, in contexts outside of CDA § 230.

V. CDA § 230(C)(1) DOES NOT AFFORD EXCEPTIONAL IMMUNITY TO ONLINE INTERMEDIARIES

A. Preventing a “Heckler’s Veto”: Exempting Online Intermediaries from Notice-Based Liability

Zeran v. America Online held that CDA § 230(c)(1) protects online intermediaries from any form of liability for content provided by third parties, including the notice-based liability associated with distributors under the common law,¹¹¹ an interpretation now universally followed by federal courts.¹¹² While this holding was based primarily on a semantic argument about the definition of “publisher” in the statute, the holding can alternatively be justified on the basis of common law collateral censorship theory.

In fact, the court in *Zeran* detailed this common law justification as gratuitous support for its conclusion, albeit during a consideration of legislative intent that was ultimately rendered extraneous by the essentially textualist reasoning of the opinion. The court reasoned that requiring scrutiny of a large number of “notices” of defamation from potential plaintiffs would incentivize collateral censorship in the

110. Derek Khanna, *The Law That Gave Us the Modern Internet—And the Campaign to Kill it*, ATLANTIC (Sept. 12, 2013), <https://www.theatlantic.com/business/archive/2013/09/the-law-that-gave-us-the-modern-Internet-and-the-campaign-to-kill-it/279588/>; *CDA 230: The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUNDATION, <https://www EFF.org/issues/cda230> (last visited Mar. 20, 2018); Alan Rozenshtein, *It’s the Beginning of the End of the Internet’s Legal Immunity*, FOREIGN POLICY (Nov. 13, 2018), <http://foreignpolicy.com/2017/11/13/its-the-beginning-of-the-end-of-the-Internets-legal-immunity/>.

111. *Zeran v. America Online, Inc.*, 129 F.3d 327, 328, 332 (4th Cir. 1997).

112. The Seventh Circuit has considered abandoning this interpretation, but no alternative interpretation has acquired precedential effect. *See infra* Section VI.A.

same way as requiring scrutiny of a large volume of content. This requirement, in the memorable words of a later Sixth Circuit opinion, would create a “heckler’s veto”¹¹³ that would enable individuals to intimidate intermediaries into censoring third-party speech by merely alleging claims, whether frivolous or reasonable. Risk-averse intermediaries would respond to innumerable allegations of defamation by erring toward avoiding liability.

The plaintiff in *Zeran* conceded that AOL was not a publisher of the defamatory content at issue, but argued that AOL should be held liable as a distributor of defamatory content of which AOL had been made specifically aware. In the wake of the bombing of a government building in Oklahoma City by Timothy McVeigh, an unidentified person on an AOL bulletin executed the particularly insidious prank of advertising t-shirts featuring distasteful commentary on the event, and directing interested buyers to contact the home phone number of an entirely uninvolved third party, Zeran. Zeran subsequently called AOL and was assured by a company representative that the post would be removed. According to Zeran, AOL failed to remove the post. When a similar message was posted again, Zeran again informed an AOL representative, but the post was not promptly removed. Zeran argued that CDA § 230 left distributor liability intact and that AOL therefore could be held liable for failing to remove the anonymous third party’s post after being informed by telephone that it was defamatory.¹¹⁴

The court disagreed with Zeran, reasoning that the term “publisher” as used in the statute referred to a broader legal category including both publishers and distributors as the latter terms are defined in the context of defamation law.¹¹⁵ The court cited a treatise by Prosser and Keeton that offered such a definition, and claimed that the definition in this treatise, not the one employed in defamation law, constituted the “traditional definition” of “publisher.”¹¹⁶ The court argued further that Prosser and Keeton’s definition, as the “traditional” definition, was the one the drafters of CDA § 230 unambiguously invoked in using the word “publisher.”¹¹⁷

113. *Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014).

114. *Zeran*, 129 F.3d at 329-32.

115. *Id.* at 331-32.

116. *Id.* at 332.

117. *Id.* This is a reasonable interpretation of an ambiguous text. On the one hand, if Congress had meant for the statute to apply to causes of action other than defamation, one would expect that the legislature would not have used a term of art specific to defamation law. On the other hand, the only cases at the time of

The court argued, however, that even if the statutory term were ambiguous, this ambiguity could be resolved by reference to the intention of the drafters to prevent collateral censorship. In illuminating legislative intent, the court detailed what it believed to be a straightforward application of the drafters' concerns to the facts of the present case:

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information Although this might be feasible for the traditional print [distributor], the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification¹¹⁸

This is common law reasoning with a novel conclusion warranted by the realities of the Internet. The court is applying the logic of collateral censorship theory to support a conclusion that a traditional distributor should be exempted not just from ordinary defamation liability but also from notice-based liability.

B. Making “Users” Immune from Liability as Re-publishers

In two oft-cited opinions, the Ninth Circuit and the Supreme Court of California held that individual Internet “users” and institutional “providers” are equally immunized against defamation liability under CDA § 230(c)(1) when they share content generated by third parties, a conclusion that, on its face, contradicts the common law standard for re-publisher liability. *Batzel*, as discussed, held that both active and passive screening of content is covered by CDA § 230 immunity. *Batzel* also held that the plain meaning of

drafting that involved the liability of online intermediaries for third-party speech, *Cubby* and *Stratton Oakmont*, were defamation cases; thus, one could argue, alternatively, that the law was not meant to apply to other causes of action. In any case, the drafters did not make explicit whether they intended a narrower or broader definition of “publisher,” or even demonstrate in the text or legislative history that they considered this distinction at all.

118. *Zeran*, 129 F.3d at 333 (citation omitted).

(c)(1) dictates that the same protections should apply to “users” as to “providers” of “interactive computer services.”¹¹⁹ *Barrett v. Rosenthal* agreed with these dual holdings and drew from them the logical conclusion that “users” of Internet services are immunized from liability for actively re-publishing content.¹²⁰ Courts applying the common law in an offline context, by contrast, have traditionally found that the re-publication of defamatory statements, as through gossip, is subject to the same standard of liability as is applied to original speakers.¹²¹ This conclusion, however, like the conclusion of the court in *Zeran*, is only apparently in contradiction with the common law. Granting immunity to “users” comports with the theory of collateral censorship. In light of the large volume of third-party content that “users” transmit to one another, requiring that “users” scrutinize third-party content would incentivize censorship out of risk aversion.

In *Rosenthal*, the court held that an individual who had posted on a news website a defamatory article written by somebody else was immunized as an individual “user” of that website.¹²² The court argued that while the policy considerations underlying the protection of institutional intermediaries do not apply to individual “users,” the plain meaning of (c)(1) nonetheless dictates extending the same immunity to the latter.¹²³ “Individual Internet ‘users’ like Rosenthal,” the court observed, “are situated differently from institutional service providers with regard to some of the principal policy considerations . . . reflected in the Congressional Record.”¹²⁴ The court noted, as one example of such a policy consideration, that “individuals do not face the massive volume of third-party postings that providers encounter.”¹²⁵ This, of course, is an allusion to the common law theory of collateral censorship said to have been embraced by the drafters of the provision.

The court’s concession that the policy judgment embodied in collateral censorship theory does not apply to individual Internet users is incorrect as a categorical statement, but theoretically correct with respect to certain users—users who, for example, do not share a large volume of content. *Rosenthal’s* statutory interpretation

119. *Batzel v. Smith*, 333 F.3d 1018, 1030 (9th Cir. 2003).

120. *Barrett v. Rosenthal*, 40 Cal. 4th 33, 58 (Cal. 2006). “Publishing,” in this context, refers to the act of communicating a defamatory statement to a third party. See RESTATEMENT (SECOND) OF TORTS § 577 (AM. LAW INST. 1977).

121. See *Harris v. Minvielle*, 48 La. Ann. 908 (La. 1896).

122. *Rosenthal*, 40 Cal. 4th at 40-41.

123. *Id.* at 59, 62.

124. *Id.* at 58.

125. *Id.*

entails, in theory, the extension of CDA § 230(c)(1) immunity to any individual who shares content created by others, such as a news article, regardless of how much content they share or of any other situational factors relevant to the logic of collateral censorship theory.

But while this distinction among users is theoretically relevant to the logic of collateral censorship, it is largely academic in the age of social media and cell phones with Internet connections. In the age of Facebook and Twitter, citizens play dual roles as consumers of information and as distributors analogous to a traditional newsstand. Every day, millions of Americans share or re-tweet news articles or posts by prominent Internet personalities, or effectively share such articles or posts by communicating to other social media users that they have “liked” or otherwise “reacted” to those articles or posts. Many people, enabled by iPhones and similar products, do so continuously throughout a day, perhaps dozens of times. In fact, newsstands largely have been supplanted by the service we all perform for one another of sharing news articles multiple times per day over the Internet.

To understand the dramatic impact of treating “users” of the Internet as publishers for purposes of defamation liability, one must appreciate the practical implication that every social media user, upon threat of legal liability, would be required before sharing a news article or a post written by a third party to evaluate it for veracity and for tendency to cause reputational harm. While a higher standard of intentionality with respect to falsehood would apply to content concerning public officials and public figures,¹²⁶ much shared content at least partly discusses individuals who do not qualify under those categories. And while the negligence element of falsehood would incorporate a contextual reasonableness standard limiting the amount of effort that would have to be exerted in vetting shared content, legally requiring any amount of effort would radically alter social media norms. Furthermore, applying any such reasonableness standard would be impractical, as application would require a determination of how much of an article someone must read before posting it, and of how extensive a Google search one must conduct in checking an article’s sources before pressing the return key.

In theory, one could develop a legal standard that distinguishes between high-volume sharers and low-volume sharers, but any such standard is unlikely to be administrable. The impossibility of

126. See RESTATEMENT (SECOND) OF TORTS § 580A (AM. LAW INST. 1977).

administering such a standard in the context of amateur distributors, in contrast with institutional distributors, is that the “reasonable” effort required to ascertain the falsehood of shared content would, in fairness, have to vary with the details of personal lifestyle: surely the unemployed full-time denizen of YouTube comment sections, who has more time to vet his own shared content, cannot be held to the same standard as a commuter accessing Facebook during the hour-long train ride home from work. One could imagine applying a more lenient standard to amateur social media users than to professional Internet commentators, but in reality there is a blurred spectrum between the amateur and the professional in Internet journalism. Many ostensibly professional commentators are themselves largely conduits of content written by others, different from other social media users only in the size of their following; and many online commentators write for free or as a pastime, even if their readership is significant. In sum, while it is correct to characterize the *Batzel/Rosenthal* standard as improperly categorical in theory, a more nuanced alternative poses daunting practical obstacles.

This radical change not only would be unreasonable based on common sense and administrability considerations, but also would violate the First Amendment as applied in pre-CDA § 230 defamation case law. The likely practical effect of enforcing defamation liability on social media users for shared third-party content would be that few would share content written by others. It is much easier to verify one’s own statements than to verify others’ before casually uploading a social media post, because one is automatically aware of one’s own sources or lack thereof. This effect, in turn, would prevent the emergence of new online news sources, because new outlets would not be able to use social media shares to acquire name recognition. Thus, there most likely would be a decrease in defamatory online speech, but only at the cost of a decrease in speech generally. That the former benefit does not justify the latter cost is the fundamental value judgment baked into the common law distinction between publishers and distributors.

Those who decry the proliferation of “fake news,” the lack of consequences for social media users who generate viral hoaxes, and the erosion of editorial integrity in the context of semi-professional online journalism, may welcome the chilling effect of re-publisher liability for “users” of “interactive computer services.” But this sentiment is inconsistent with the values undergirding the immunity traditionally extended to newsstands and bookstores. Neither our courts nor our society at large have traditionally regarded the

defamatory tendencies of tabloid journalism, for instance, as a justification for enforcing standards of editorial integrity on newsstands. This is despite the fact that doing so likely would engender a culture of heightened personal responsibility for reputational harm and choke off the flow of defamatory speech. This societal preference reflects the significant weight that our society and our courts assign to freedom of speech, and the policy judgement that a proper balance between speech and reputational interests is most effectively achieved by freeing distributors of speech, but not generators of speech, from personal responsibility for reputational harm.

VI. CDA § 230(C)(1) HAS FAILED TO PROVIDE UNIFORMITY AND CERTAINTY

CDA § 230 lists as one of its purposes encouraging the development of the then-emergent Internet medium.¹²⁷ One way of understanding this statement is that CDA § 230 was supposed to provide security to entrepreneurial online intermediaries by ensuring both predictability with respect to the future development of the law and the sort of legal uniformity throughout the country that a succinct federal statute might be thought best suited to deliver. The latter form of security is especially important for commerce on the Internet because of its inherently cross-jurisdictional nature.

This Part challenges the premise underlying the congressional intention to provide uniformity over time and across U.S. jurisdictions. One might assume that a federal statutory approach would be inherently more likely to provide uniformity than a state common law approach. But CDA § 230 has, in reality, generated some interpretive differences among circuits, and CDA § 230 jurisprudence is centrally preoccupied with the standard-like “material contribution” test, which at best will provide predictability over time. This creates unpredictability for litigants analogous to that which might result from the application of the common law distinction between publishers and distributors: the rules might vary by jurisdiction and beget a process of gradually clarifying an inherently flexible norm.

127. 47 U.S.C. § 230(b)(1) (2018).

A. Lack of Uniformity Across Jurisdictions

Ian Ballon has highlighted several doctrinal differences among circuits.¹²⁸ First, in *FTC v. Accusearch*, the Tenth Circuit employed an arguably broader conception of “information content provider” than that employed by the Ninth Circuit in *Roommates.com* and embraced by the Sixth Circuit in *Jones v. Dirty World*. In *Accusearch*, the defendant sold access to confidential phone records it had acquired from third-party “researchers.”¹²⁹ The court held the defendant liable for “solicit[ing]” illegal content through payments to third parties,¹³⁰ even though the defendant had not contributed to the creation of the content.¹³¹ This holding was based on a definition of the term “develop” in (c)(1) that encompasses making content “visible.”¹³² Under one interpretation, the impact of the holding is restricted to an unusual set of facts, in which the intermediary defendant purchased from third-party vendors information that was invariably illegal.¹³³

Second, aside from establishing a broader interpretation of an exception to CDA § 230 immunity that arguably has various applications, this case highlights a more specific divergence over the issue of whether “payment plus solicitation” amounts to “development” of content. In the Tenth Circuit, under *Accusearch*, the combination of soliciting and purchasing content that one knows to be illegal makes a defendant an “information content provider” with respect to that content. This rule is unique to the Tenth Circuit.¹³⁴

Third, the Seventh Circuit has, in dicta in several cases, rejected the *Zeran* rule that intermediaries cannot be held liable for any

128. See BALLON, *supra* note 14, § 37.05 (1)(B) (2017).

129. *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1191 (10th Cir. 2009).

130. *Id.* at 1201.

131. BALLON, *supra* note 14, § 37.05(3)(C) (“Although the majority in *Accusearch* emphasized both the terms *development* and *responsible*, the fact is that the phone records at issue existed independently of anything Accusearch had done.”).

132. *Accusearch*, 570 F.3d at 1198.

133. See *id.* at 1201 (“Accusearch solicited requests for confidential information protected by law, paid researchers to find it, knew that the researchers were likely to use improper methods, and charged customers who wished the information to be disclosed.”); see also BALLON, *supra* note 14, at § 37.05(3)(C); *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 558 (N.C. Ct. App. 2012) (“In concluding that the website was not immune from liability under 47 U.S.C. § 230, the Tenth Circuit emphasized the fact that obtaining the personal phone records of third parties is almost always unlawful.”).

134. BALLON, *supra* note 14, at § 37.05(3)(C).

content that originates with third parties, albeit without clearly articulating an alternative doctrine. In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist*, the Seventh Circuit held that CDA § 230(c)(1) “cannot be understood as a general prohibition on civil liability for website operators and other online content hosts,” but rather only for claims that treat online intermediaries as “publishers or speakers” of content provided by third parties.¹³⁵ In *Chicago v. Stubhub*, the Seventh Circuit elaborated on that distinction (although not with great clarity), stating that CDA § 230 merely “limit[s] who may be called the publisher of information that appears online. That might matter to liability for defamation, obscenity, or copyright infringement,” but not for some other causes of action.¹³⁶ In that case, the court held that CDA § 230 did not protect an online ticket broker from liability for its users' failure to pay a local tax imposed on the incremental value of resold tickets. “Chicago’s amusement tax,” in the court’s view, “does not depend on who ‘publishes’ any information or is a ‘speaker’”—Stubhub was being held liable for its own failure to collect taxes on certain transactions, as required by law.¹³⁷ As Ballon points out, however, this application of that conceptual distinction overlooks the fact that no taxes would have been owed but for the activity of third-party ticket buyers and sellers.¹³⁸ Later cases in the jurisdiction do not explain or develop this unclear distinction any further.

Arguably, limiting CDA § 230 immunity to claims that treat a defendant as a “publisher or speaker” also could be interpreted to permit distributor liability. Neither this nor other possible implications of the language in *Craigslist* have been explored in later cases in the jurisdiction, except in cursory comments in dicta and footnotes.¹³⁹ Thus, the Seventh Circuit has distinguished itself from

135. Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F. 3d 666, 669-70 (7th Cir. 2008).

136. City of Chi. v. StubHub!, Inc., 624 F.3d 363, 366 (7th Cir. 2010).

137. *Id.* at 366.

138. BALLON, *supra* note 14, § 37.05(3)(B)(iii).

139. See, e.g., Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 965-66 (N.D. Ill. 2009) (“Craigslist contends that § 230(c)(1) ‘broadly immunizes providers of interactive computer services from liability for the dissemination of third-party content.’ That appears to be the majority view, but our Court of Appeals has not adopted it. The Court has concluded, however, that § 230(c)(1) may foreclose liability in the appropriate case.” (citations omitted)); Backpage.com, LLC v. Dart, 127 F. Supp. 3d 919, 923 n.3 (N.D. Ill. 2015) (“Under The Communications Decency Act, the provider of an “interactive computer service” such as Backpage.com cannot be held liable as a publisher. The Seventh Circuit has taken the position that § 230(c) ‘cannot be understood as a general prohibition of civil

other circuits in rejecting the *Zeran* approach, but has not yet given clear guidance on the implications of that rejection. But this is, if nothing else, a potential source of uncertainty for litigants.

B. Standard-like Norms at the Heart of CDA § 230 Jurisprudence

Disputes over whether an intermediary “materially contributed” to unlawful third-party conduct is the most significant area of CDA § 230 litigation. As discussed,¹⁴⁰ application of the “material contribution” standard for distinguishing “information content providers” from “interactive computer services” has led to an incremental process of defining fixed points within an inherently open-ended norm. This process is inherently unpredictable, although the predictability this rule provides may increase as those fixed points are determined. But this process in lower courts is still in its early stages, as *Jones* was a recent decision.

VII. IN THE ABSENCE OF CDA § 230, DISMISSAL WOULD BE POSSIBLE UNDER THE SAME CIRCUMSTANCES

The applicability of CDA § 230(c)(1) immunity is typically determined in the context of a motion to dismiss. Even if there were a convergence in substantive doctrine in the absence of the statute, a difference in the stage at which intermediary immunity was typically determined would mark a significant difference from the perspective of collateral censorship theory.¹⁴¹ If, in the absence of the statute, intermediary immunity were typically adjudicated at trial, this would entail greater costs imposed on online intermediaries; and the greater the potential legal costs intermediaries face, the greater the incentive to preemptively censor third-party speech.

But if the hypothesis of doctrinal convergence is true, dismissal would be available under the same circumstances in the absence of the statute. In order to defeat immunity under the statute, a plaintiff must allege that the defendant has materially contributed to third-party illegality. Even under the “*Twiqbal*” plausibility pleading

liability for web-site operators and other online content hosts,’ but it does preclude liability premised on treating the online information system as the publisher or speaker of any information provided by someone else. The statute is not implicated in this case because Dart made no effort to impose liability on Backpage for the content of users’ advertisements.” (citations omitted)).

140. See *supra* Section IV.B.2.

141. Interview with Eric Goldman, Professor, Santa Clara University School of Law, in Santa Clara, CA (Aug. 21, 2018).

standard,¹⁴² plaintiffs often can circumvent a Rule 12(b)(6) motion by merely alleging that a defendant has authored or co-authored content.¹⁴³ In state courts with pleading standards laxer than “*Twiqbal*,” this tactic may be even more likely to succeed.¹⁴⁴ In the context of anti-SLAPP motions, which require a slightly more substantial showing, a similar tactic also works. Anti-SLAPP statutes permit the expedited dismissal of meritless lawsuits that threaten the exercise of speech, often with costs.¹⁴⁵ In order to defeat an anti-SLAPP motion, a plaintiff typically must establish that he has a “probability of prevailing on the claim” or some other preliminary showing that the claim has merit,¹⁴⁶ which she can do in a CDA § 230 context by making a minimal showing that a defendant has materially contributed to illegality.¹⁴⁷

In the hypothesized parallel common law scenario, establishing an intermediary’s authorship or co-authorship would remain the only way to defeat CDA § 230 immunity. Under the common law, one would thus have to show or demonstrate material contribution to whatever degree required by the applicable pleading standards or anti-SLAPP rules in a jurisdiction.

VIII. RULES/STANDARDS CONVERGENCE

CDA § 230 jurisprudence focusing on the interpretive task of distinguishing between “interactive computer services” and “information content providers,” a significant area of current controversy, is an apt example of the tendency of rules to devolve

142. This standard was developed in the cases of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

143. See Jeff Kosseff, *The Gradual Erosion of the Law That Shaped the Internet: Section 230’s Evolution Over Two Decades*, 18 COLUM. SCI. & TECH. L. REV. 1, 25-26 (2016); see also *Tanisha Sys. v. Chandra*, No. 1:15-CV-2644-AT, 2015 U.S. Dist. LEXIS 177164, at *22-25 (N.D. Ga. Dec. 4, 2015); *AMCOL Sys. v. Lemberg Law, LLC*, No. 3:15-3422-CMC, 2016 U.S. Dist. LEXIS 18131, at *25-26 (D.S.C. Feb. 16, 2016).

144. See Jeff Hermes, *Section 230 as Gatekeeper: When is an Intermediary Liability Case Against a Digital Platform Ripe for Early Dismissal?*, 43 LITIGATION 34, 36 (2017).

145. Aaron Smith, Note, *SLAPP Fight*, 68 ALA. L. REV. 303, 309-310 (2016).

146. Robert T. Sherwin, *Evidence? We Don’t Need No Stinkin’ Evidence! How Ambiguity in Some States’ Anti-SLAPP Laws Threatens to Defang a Popular and Powerful Weapon Against Frivolous Litigation*, 40 COLUM. J.L. & ARTS 431, 455-56 (2017).

147. See *Diamond Ranch Acad., Inc. v. Filer*, No. 2:14-CV-751-TC, 2016 U.S. Dist. LEXIS 19210, at *60-63 (D. Utah Feb. 17, 2016); *Consumer Cellular, Inc. v. ConsumerAffairs.com*, No. 3:15-CV-1908-PK, 2016 U.S. Dist. LEXIS 72573, at *38-40 (D. Or. Feb. 29, 2016).

into standards over time. Courts defining “material contribution” have replicated the quintessentially standard-like concept from the common law of editorial control. And pre-Internet defamation law exhibited the opposite tendency to transform standards into rules: the common law has long worked with certain rules of thumb, such as that bookstores and newsstands are distributors.

The convergence of CDA § 230 jurisprudence and the common law has several explanations, some of which stem from the contingent character of the statute and some of which are inherent in at least many rule-like legal norms. As discussed,¹⁴⁸ two areas of this jurisprudence—the *Zeran* line of cases and the *Batzel/Rosenthal* interpretation of “user”—arrived at a result justifiable under the common law by coincidence. Major current controversies over the definition of “information content provider” have tended toward solutions justifiable under the common law partly because these interpretive disagreements are animated by a common law inquiry to begin with.

But the character of the debate over what constitutes an “information content provider” is also illuminated by a general hypothesis that, over time, rules tend to transform into standards, and standards into rules. There is a body of scholarship¹⁴⁹ proposing that rule-like norms, chosen for their simplicity, certainty, and concomitant ability to provide ex ante guidance, often morph over time into standards, characterized by capacious terms such as “reasonable” or “material,” which can be applied flexibly to fact patterns as they arise. Certainty, such as promised by CDA § 230, can be deceptive, as it can sometimes be achieved only by externalizing uncertainty outside of the specific category of situations to which tidy concepts refer. Standard-like norms, on the other hand, can crystalize into specific rule-like norms over time, as a result of efforts both to simplify decision-making and to constrain future decision-makers.

Professor Schauer has suggested various causes of the standards-to-rules phenomenon as a general matter. Judges often seek to limit their own choices because reasoning “from the ground up” in every case is wasteful of time and energy.¹⁵⁰ Courts also may wish to

148. See *supra* Part V.

149. See, e.g., Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Frederick Schauer, *The Convergence of Rules and Standards*, 2003 NZ Law Review 303 (2003) [hereinafter Schauer, *Convergence*]; Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803 (2005) [hereinafter Schauer, *Tyranny of Choice*].

150. Schauer, *Convergence*, *supra* note 149, at 316.

restrict the range of choice in particular cases in order to prevent what they would perceive to be mistakes by future courts. In particular, appellate courts often issue rule-like norms in order to influence policy by binding lower courts to a narrower range of choices.¹⁵¹

CDA § 230(c)(1) jurisprudence exemplifies the opposite tendency of rules to transform into standards. As Professor Schlag has observed, “rules can be said to provide more certainty or stability, for instance, than standards, but this is correct only in one part of the universe, *here*, where certainty and stability are served by rules which provide uncertainty and instability *elsewhere*.”¹⁵² The crisp certainty of (c)(1) is made possible by the externalization of uncertainty onto the category of situations in which it is unclear whether a defendant is an “interactive computer service” or an “information content provider” in relation to specific content. That is precisely what has happened with CDA § 230. In a gap within the statute’s coverage—the category of situations in which an interactive computer service is also a publisher or speaker, the standard of “material contribution” has developed, producing a variety of contextual judgements in individual cases.

The “material contribution” line of CDA § 230 cases grasps for a common law-like standard in wrestling with this gap in the statute, and has begun to refine that standard into a cluster of specific rules. *Batzel* created rules of thumb to guide the application of the vague term “develop”—for instance, that the mere act of selecting third-party content for publication does not make a website a publisher of content.¹⁵³ *Jones* established that the particular act of ratifying third-party speech by responding to it does not constitute “material contribution.”¹⁵⁴

In a parallel manner, pre-Internet defamation law itself exhibited a tendency to concretize the publisher/distributor standard into categorical rules. Courts naturally have arrived at unchanging categorical rules, such as that bookstores and newsstands are not distributors, which narrows the range of issues that need to be litigated in defamation suits against intermediaries.

Whether or not one accepts Schlag’s hypothesis as an empirical generalization about rules and standards, one can still appreciate the accuracy of that hypothesis in the present setting. In fact, the

151. Schauer, *Tyranny of Choice*, *supra* note 149, at 809-12.

152. Schlag, *supra* note 149, at 414.

153. *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

154. *Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398, 415 (6th Cir. 2014).

terseness and vagueness of the text of CDA § 230 might make this a particularly apt context for illustrating Schlag's hypothesis that rules transform over time into standards and standards into rules.

IX. CONCLUSION

In the context of defamation liability, § 230(c)(1) of the Communications Decency Act marks a less significant departure from the common law baseline than both critics and proponents of the provision tend to assume. In one sense, this Note aims to establish the legitimacy of CDA § 230 in the context of defamation law: impenetrable immunity in this context for the operators of user-driven websites is required by the First Amendment, as interpreted in the common law. At the same time, this Note suggests that CDA § 230 is redundant in the context of defamation, as both the doctrinal and the practical results of repealing CDA § 230 would be negligible.

In addition to challenging the assumptions of both supporters and critics of the statute, this Note potentially provides ammunition to both sides. On the one hand, critics might rely on this Note to support the argument that some other applications of CDA § 230, especially those with more tenuous connections to First Amendment concerns, stray from the statute's purpose or justification. The Wisconsin Court of Appeals recently has suggested that CDA § 230(c)(1) immunity should apply only in the context of defamation.¹⁵⁵ Critics of the law may prefer this interpretation to the

155. See *Daniel v. Armslist, L.L.C.*, 913 N.W.2d 211, 214, 216 (Wis. Ct. App. 2018) (permitting a claim premised on a theory of liability that “*through its design and operation of website features*, [defendant website operator’s] actions were a cause of the injuries to [the plaintiff],” because such a claim does not treat the defendant website operator as “a publisher or speaker,” under a “plain meaning” interpretation of the latter language); *Id.* at 223 (“We note that our interpretation of the Act does not deprive it of value to defendants in tort cases, but instead provides concrete, if narrow, immunity. For example, websites cannot be held liable under the Act merely because they allow the posting of third-party defamatory comments, because that would treat the websites as the publishers or speakers of the comments.”) (citing *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016) for the proposition that “defamation provides a ‘clear illustration’ of the intent of the shall-not-be-treated clause [of CDA § 230(c)(1)]”); see also Eric Goldman, *Wisconsin Appeals Court Blows Open Big Holes in Section 230—Daniel v. Armslist*, TECH. & MARKETING L. BLOG (Apr. 25, 2018), <https://blog.ericgoldman.org/archives/2018/04/wisconsin-appeals-court-blows-open-big-holes-in-section-230-daniel-v-armslist.htm> (“[T]his opinion could embolden plaintiffs . . . : Plaintiffs could argue that Section 230 only applies when the word ‘publisher’ or ‘speaker’ appears in the claim’s elements. If true, this would functionally narrow Section 230 into a defamation-only defense . . .”).

prevailing one. On the other hand, this Note provides a particularly strong argument for broad immunity, in a variety of contexts (e.g. consumer review websites and user-driven gossip websites), from liability for defamation and other causes of action that target speech and threaten collateral censorship.

But recognizing the special place of defamation law under the umbrella of CDA § 230(c)(1) immunity does not in itself denigrate applications of the law that have a more tenuous connection to freedom of speech. The argument in this Note is consistent with the position that some other applications of CDA § 230(c)(1) are justifiable for different reasons. Should the recent “Allow States and Victims to Fight Online Sex Trafficking Act” portend future efforts to narrow CDA § 230 immunity with respect to specific causes of action or criminal charges, defenders of CDA § 230(c)(1) might have to provide unique justifications for certain applications of the statute.