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# MALICIOUS CONTENT ON THE INTERNET: NARROWING IMMUNITY UNDER THE COMMUNICATIONS DECENCY ACT

JOANNA SCHORR<sup>†</sup>

## INTRODUCTION

One afternoon at a prestigious United States university, a new thread titled “[b]iggest slut on campus” appeared on the anonymous online gossip website JuicyCampus.com.<sup>1</sup> Those who could not resist the urge to peruse the thread were inundated with the names of female students who attended that prestigious university. Some posts included both the first and last names of the students.<sup>2</sup> Some posts included the women’s phone numbers.<sup>3</sup> All the posts libelously declared that these women were “sluts” with all the impurity and shame that the term entails. The law has long given special treatment to statements imputing impurity for a woman<sup>4</sup> because of the potentially harmful repercussions of those statements. When future employers searched the names of these female students on the Internet, posts from JuicyCampus surfaced with claims that

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<sup>1</sup> See, e.g., *Lawsuits, Weak Economy Kill JuicyCampus.com*, FOX NEWS (Feb. 5, 2009), <http://www.foxnews.com/story/0,2933,488424,00.html> [hereinafter *Lawsuits*]. The situation presented in this introduction is a hypothetical situation based on facts taken from a variety of true stories about JuicyCampus.

<sup>2</sup> See, e.g., *What You Don’t Know Can’t Hurt You*, THE DAILY BEAST (Dec. 8, 2007, 6:38 AM), <http://www.thedailybeast.com/newsweek/2007/12/08/what-you-don-t-know-can-hurt-you.html>.

<sup>3</sup> See, e.g., William Creeley, *Regarding JuicyCampus.com*, THE FIRE (Mar. 21, 2008), <http://thefire.org/article/9065.html>.

<sup>4</sup> Imputing impurity for a woman is one of four categories of defamation per se which do not require proof of special damages. See VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS: CASES AND MATERIALS 891–92 (12th ed. 2010).

everyone on campus has had sex with these women. These bright, engaging women were victims of JuicyCampus' proactive campaign inducing college students to "[g]ive us the juice."<sup>5</sup>

The sinister and malicious website grew rapidly. On Monday, October 6, 2008, JuicyCampus announced that the completely anonymous gossip website was accessible on 500 campuses.<sup>6</sup> JuicyCampus provided an anonymous forum for users to post salacious comments about their peers with no restrictions, supervision, or censure.<sup>7</sup> In addition to "[b]iggest slut on campus," topic threads on these 500 campuses included "easiest freshmen,"<sup>8</sup> "ugliest sorority girl,"<sup>9</sup> and "[g]ayest [f]rat [b]oys,"<sup>10</sup> among others. Not only could anyone create threads and post comments, anyone with access to the Internet could read the website.

Despite the impact of the vicious words circulating through JuicyCampus, the targeted students had no recourse. The reason that the targeted students had no recourse is that the Communications Decency Act of 1996 ("CDA")<sup>11</sup> immunizes websites like JuicyCampus that do not actually post the comments, but rather allow third parties to post comments. The CDA's broad immunity for website owners poses a problem for victims since action can only be taken against the individual user.<sup>12</sup> Taking action against the initial poster is small solace for

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<sup>5</sup> Dhvani Shah, *JuicyCampus Gushes Gossip*, THE DAILY PRINCETONIAN (Feb. 22, 2008), <http://www.dailyprincetonian.com/2008/02/22/20117/>. The website's slogan was "Always Anonymous . . . Always Juicy." *Does JuicyCampus Go Too Far?*, CBS NEWS (Feb. 26, 2010, 11:03 AM), [http://www.cbsnews.com/2100-500163\\_162-3968514.html](http://www.cbsnews.com/2100-500163_162-3968514.html).

<sup>6</sup> *500 Campuses!!!*, OFFICIAL JUICYCAMPUS BLOG (Oct. 6, 2008, 11:12 AM), <http://juicycampus.blogspot.com/search?updated-max=2008-10-24T14:34:00-07:00&max-results=7>.

<sup>7</sup> See generally Richard Bernstein, *The Growing Cowardice of Online Anonymity*, N.Y. TIMES (Aug. 27, 2008), <http://www.nytimes.com/2008/08/27/world/americas/27iht-letter.1.15670185.html>.

<sup>8</sup> *Lawsuits*, *supra* note 1.

<sup>9</sup> See Bella English, *Dorm Rumors*, BOSTON GLOBE, Dec. 29, 2008, at G10.

<sup>10</sup> See Jeffrey R. Young, *JuicyCampus Shuts Down, Blaming the Economy, Not the Controversy*, THE CHRONICLE (Feb. 5, 2009), <http://chronicle.com/article/JuicyCampus-Shuts-Down/1506/>.

<sup>11</sup> 47 U.S.C. § 230 (2012).

<sup>12</sup> *Immunity for Online Publishers Under the Communications Decency Act*, CITIZEN MEDIA LAW PROJECT (Feb. 18, 2011), <http://www.citmedialaw.org/legal-guide/immunity-online-publishers-under-communications-decency-act> ("Section 230 does not immunize the actual creator of content. The author of a defamatory

three reasons. First, the damage suffered is disproportionate to the amount the individual can pay.<sup>13</sup> Second, it is difficult to identify the poster because in the case of JuicyCampus, and many similar websites, users post anonymously,<sup>14</sup> and it is nearly impossible to trace those anonymous users.<sup>15</sup> Finally, litigation costs outweigh the benefit of a lawsuit because lawsuits against such individuals often provide limited, if any, financial benefit.<sup>16</sup>

The problem is that JuicyCampus is but one of many websites<sup>17</sup> that solicit malicious content. These websites target college campuses, small towns, and even business competitors.<sup>18</sup> In each of these cases the websites actively solicit defamatory content, but because of the CDA they are immune from the consequences of their actions.

This Note argues that the scope of CDA § 230, which provides immunity to Internet Service Providers in defamation suits for content posted by third-party users,<sup>19</sup> should be narrowed in circumstances where a website actively solicits

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statement, whether he is a blogger, commenter, or anything else, remains just as responsible for his online statements as he would be for his offline statements.”).

<sup>13</sup> See Richard Morgan, *A Crash Course in Online Gossip*, N.Y. TIMES, Mar. 16, 2008, at ST7.

<sup>14</sup> *Id.*

<sup>15</sup> See *JuicyCampus.com Gives Forum to Anonymous Posters*, THE UNIVERSITY DAILY KANSAN (Oct. 8, 2008), <http://kansan.com/archives/2008/10/08/juicycampus-com-gives-forum-to-anonymous-posters/>.

<sup>16</sup> See Ian C. Ballon, *The Good Samaritan Exemption and the CDA*, in E-COMMERCE AND INTERNET LAW: A LEGAL TREATISE WITH FORMS 528 (PLI Patents, Copyrights, Trademarks, & Literary Prop. Course Handbook Ser. No. 19009, 2d ed. 2009); see also Sean P. Trende, *Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem*, 44 DUQ. L. REV. 607, 631 (2006) (“While none of these major corporations are eager to expend money on litigation, they certainly have the resources to do so if necessary. For the average blogger, this is simply not the case. Given that the average associate salary at many large firms is around \$300 per hour, a motion to dismiss and reply brief that took forty hours to write, edit, and file would place the cost of litigation at \$12,000. This assumes the associate did *all* of the work, no oral argument is granted, and no discovery is served with the motion. If a partner edits the brief, her \$500 per hour rate would break the bank for most individuals.”).

<sup>17</sup> JuicyCampus has since shutdown, purportedly a result of recent “economic downturn.” See *Lawsuits*, *supra* note 1. However, JuicyCampus was but one of many of these soliciting websites, for example, [campusgossip.com](http://campusgossip.com), [collegeacb.com](http://collegeacb.com), [gossipreport.com](http://gossipreport.com), [rottenneighbor.com](http://rottenneighbor.com), and [thedirty.com](http://thedirty.com).

<sup>18</sup> See, e.g., *Shiamili v. Real Estate Grp. of N.Y. Inc.*, 17 N.Y.3d 281, 284–85, 952 N.E.2d 1011, 1014, 929 N.Y.S.2d 19, 22 (2011); Morgan, *supra* note 13; A.G. Sulzberger, *In Small Towns, Gossip Moves to the Web, and Turns Vicious*, N.Y. TIMES, Sept. 20, 2011, at A1.

<sup>19</sup> 47 U.S.C. § 230 (2012).

malicious content from its users. Part I discusses gossip websites and blogs that are currently immunized by § 230 and analyzes social issues that result from the broad interpretation of the CDA. Part II briefly discusses the law of defamation, followed by a discussion of the policies behind the CDA's enactment, and the statute's current scope in regard to defamation suits. Part III analyzes the flaws of the different approaches currently employed by the courts to determine whether a website qualifies for § 230 immunity. Part IV argues that removing websites that solicit malicious content from the scope of the CDA will better uphold the core policies behind its enactment.

## I. THE CURRENT STATE OF THE INTERNET

There is a steady trend on the Internet for websites to host anonymous threads that solicit content that has a tendency to be defamatory.<sup>20</sup> The communities most affected by this questionable behavior are college and high school campuses, small towns, and business competitors.<sup>21</sup> Despite the varied settings of these communities, one solution would suffice to remedy the problem in all of these communities.

### A. *JuicyCampus and Related Websites*

Perhaps the most notorious website to solicit defamatory content from its users is JuicyCampus.com. JuicyCampus was a website that plagued college campuses, asking its users to "C'mon. Give us the juice"<sup>22</sup> by anonymously posting gossip about their peers. *The New York Times* described JuicyCampus as a website that "allows students to participate in a collegiate version of celebrity gossip sites like TMZ.com and PerezHilton.com; it is a dorm bathroom wall writ large, one that anyone with Internet access can read from and post to."<sup>23</sup> The most prevalent topics were promiscuity, intelligence, attractiveness, and superlatives about different fraternities and

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<sup>20</sup> See *supra* Introduction.

<sup>21</sup> See *infra* Part I.A–C.

<sup>22</sup> Shah, *supra* note 5.

<sup>23</sup> Morgan, *supra* note 13.

sororities on campus.<sup>24</sup> Other threads “identified women who had gained weight and one post named a rape victim and said she ‘deserved it.’”<sup>25</sup>

Although JuicyCampus founder and Chief Executive Officer Matt Ivester shut down the website in February 2009, other similar anonymous gossip websites happily filled the void. In fact, JuicyCampus redirected all traffic to College Anonymous Confessions Board (“Collegeacb”).<sup>26</sup> Collegeacb was a similar website to JuicyCampus, soliciting anonymous collegiate gossip.<sup>27</sup> Some topic threads on Collegeacb included “Best Ass—whose got it?” and “Which Freshman girls are blackballed from houses.”<sup>28</sup> Following the sale of Collegeacb, the redirection link on JuicyCampus’ remaining blog redirects to blipdar.net, another website that purports to be “the world’s leading website for venting, sharing and being yourself” anonymously.<sup>29</sup> Other gossip websites have infiltrated high school campuses like littlegossip.com and isharegossip.com.<sup>30</sup> Littlegossip.com eclipses JuicyCampus by permeating international borders, urging its users to “[f]ind the gossip in YOUR university/college/office about someone you know, rate it, or make your own!”<sup>31</sup>

Despite suffering emotional trauma, pain, embarrassment, and potential career sabotage, victims have no form of recourse because of the courts’ broad interpretation of § 230, among other factors. First, as the courts currently interpret CDA § 230, these gossip websites are immune from liability.<sup>32</sup> Second,

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<sup>24</sup> See *id.*

<sup>25</sup> *Lawsuits*, *supra* note 1.

<sup>26</sup> *Shutdown FAQs*, OFFICIAL JUICYCAMPUS BLOG (Feb. 4, 2009, 11:41 AM), <http://juicycampus.blogspot.com>; see also Nora Sorena Casey, *Juicy Campus Folds Citing Lack of Funds, Makes Way for New Student Gossip Site*, THE CHICAGO MAROON (Feb. 10, 2009), <http://chicagomaroon.com/2009/02/10/juicy-campus-folds-citing-lack-of-funds-makes-way-for-new-student-gossip-site/>.

<sup>27</sup> See generally *JuicyCampus Closing*, COLLEGE ACB (Feb. 5, 2009), [http://collegeacb.blogspot.com/2009/02/juicy-campus-closing\\_05.html](http://collegeacb.blogspot.com/2009/02/juicy-campus-closing_05.html).

<sup>28</sup> Carolyn Witte, *Why We Should All Hate College ACB*, THE CORNELL DAILY SUN, Apr. 6, 2010, <http://cornellsun.com/node/41938>.

<sup>29</sup> Maggie McGlinchy, *Greek Life in the Post-CollegeACB Era*, ONWARD STATE, <http://onwardstate.com/2011/10/06/greek-life-in-the-post-collegeacb-era/> (last visited Mar. 21, 2013).

<sup>30</sup> See LITTLEGOSSIP, <http://www.littlegossip.com/> (last visited Mar. 21, 2013); see also *iShare Gossip Anonymous Gossip Website Targeted*, SILENT SENDER (Apr. 12, 2011), <http://silentsender.blogspot.com/2011/04/isharegossip-anonymous-gossip-website.html>.

<sup>31</sup> LITTLEGOSSIP, <http://www.littlegossip.com/> (last visited Jan. 18, 2014).

<sup>32</sup> See *infra* Part II.D.1.

JuicyCampus, in particular, was “designed to shield its users from the threat of libel claims . . . . [I]t logs the numeric Internet protocol addresses of its users, but does not associate those addresses with specific posts. That is unlike mainstream social networking sites, which do maintain such detailed logs.”<sup>33</sup> Even if the individual poster could be identified, more often than not there is minimal financial benefit to suing the individual.<sup>34</sup> However, some form of recourse against websites may help vindicate the victim and supply justice.

Moreover, granting gossip websites immunity encourages cyberbullying. Cyberbullying has become one of the most prevalent issues facing today's adolescents.<sup>35</sup> One of the contributing factors to cyberbullying is that it can be achieved anonymously.<sup>36</sup> Anonymity lowers inhibitions<sup>37</sup> and increases the feeling of freedom of expression, regardless of how hurtful, immoral, or illegal that statement may be.<sup>38</sup> While there are many ramifications of cyberbullying, the most devastating consequences are that adolescents have committed suicide<sup>39</sup> and taken violent steps against others in response to the content posted on the Internet.<sup>40</sup>

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<sup>33</sup> Justin Pope, *Students Fight Back Against Popular Juicy Campus Site*, OCALA.COM (Feb. 18, 2008, 6:30 AM), <http://www.ocala.com/article/20080218/NEWS/802180328?p=4&tc=pg>; see also Witte, *supra* note 28.

<sup>34</sup> See Ballon, *supra* note 16.

<sup>35</sup> Kaveri Subrahmanyam & Patricia Greenfield, *Online Communication and Adolescent Relationships*, 18 FUTURE CHILD. 119, 127 (2008) (“The news media are increasingly reporting that adolescents are using electronic technologies . . . to bully and victimize their peers. . . . 9 percent of young Internet users reported being harassed online in the previous year.”).

<sup>36</sup> Sameer Hinduja & Justin W. Patchin, *Cyberbullying: An Exploratory Analysis of Factors Related to Offending and Victimization*, 29 DEVIANT BEHAV. 129, 135 (2008), available at <http://dx.doi.org/10.1080/01639620701457816>.

<sup>37</sup> Dorothy E. Leidner & Sirkka L. Jarvenpaa, *The Use of Information Technology To Enhance Management School Education: A Theoretical View*, 19 MIS Q. 265, 279 (1995).

<sup>38</sup> See Hinduja & Patchin, *supra* note 36, at 134.

<sup>39</sup> Megan Meier, a thirteen-year-old girl, committed suicide after her classmate's parent posed as a thirteen-year-old boy who courted her for a week and then sent her a message that “[t]he world would be a better place without [her].” Jennifer Steinhauer, *Woman Found Guilty in Web Fraud Tied to Suicide*, N.Y. TIMES, Nov. 27, 2008, at A25. Tyler Clementi, an eighteen-year-old student at Rutgers University, committed suicide after his roommate streamed Tyler being intimate with another man over the Internet. Nate Schweber, *Parents of Student Who Committed Suicide Tell Rutgers University They May Sue*, N.Y. TIMES, Dec. 23, 2010, at A30.

<sup>40</sup> See Hinduja & Patchin, *supra* note 36, at 136.

### B. *Small Town Gossip Mills*

High school and college campuses are not the only communities harmed by the content of such gossip websites. Topix.com (“Topix”) “opened[ed] up [its] site, adding forums, to give anyone the power to discuss, edit and share the news that matters to them.”<sup>41</sup> Instead of focusing on college campuses, Topix developed a website that allowed anonymous posting on “[y]our town. Your news. Your take.”<sup>42</sup> Topix is less frequented in big cities than it is in small, rural towns.<sup>43</sup> The nature of smaller towns increases the potential for embarrassment and injured reputations as a result of contemptuous and harmful comments.<sup>44</sup>

One local town, Mountain Grove, Missouri, has been victimized by the recklessly harmful nature of the website postings.<sup>45</sup> The owner of the local diner “called Topix a ‘cesspool of character assassination.’”<sup>46</sup> One mother of two was called “a methed-out, doped-out whore with AIDS,” none of it being true.<sup>47</sup> The effects of these comments caused this mother to contemplate suicide.<sup>48</sup> Instead, she decided to move her family out of town.<sup>49</sup>

Similarly to victims of gossip websites targeting students, victims of Topix forums also have no form of recourse. After thirty state attorney generals challenged the website, Topix ceased charging for removal of defamatory comments.<sup>50</sup> Despite increasing ease in removing comments, the website is still immune from defamation suits under the CDA § 230 like the other malicious gossip sites.

### C. *Business Competitors*

The business world also falls victim to anonymous defamatory content. Some businesses host blogs seeking negative information about their competitors. Recently in New

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<sup>41</sup> *About Topix*, TOPIX, <http://www.topix.com/topix/about> (last visited Jan. 18, 2014).

<sup>42</sup> *Id.*

<sup>43</sup> *See* Sulzberger, *supra* note 18.

<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

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

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

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

<sup>49</sup> *See id.*

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



York, the Court of Appeals decided a case in which a real estate company's blog solicited malicious comments about a business competitor.<sup>51</sup> Christakis Shiamili ran a New York City rental and sales real estate company, Ardor Realty Corp.<sup>52</sup> Shiamili's competitor, Real Estate Group of New York, Inc. ("Real Estate"), operated an online blog focusing on New York City real estate.<sup>53</sup> A third-party user posted a comment making allegedly defamatory comments "under the pseudonym 'Ardor Realty Sucks.'" <sup>54</sup> The comments included accusations that "Shiamili mistreated his employees and was racist and anti-Semitic."<sup>55</sup> Real Estate's website administrator upgraded the comment by "Ardor Real Estate Sucks" to an independent post, adding the heading, "'Ardor Realty and *Those People*'"; the subheading, "'*and now it's time for your weekly dose of hate, brought to you unedited, once again, by 'Ardor Realty Sucks'. and for the record, we are so. not. afraid*'"; and an image depicting Jesus Christ with Shiamili's face and the words "Chris Shiamili: King of the Token Jews."<sup>56</sup> Beneath the post was an open thread in which anonymous users posted further allegedly defamatory content about Shiamili, including that his business was facing financial trouble and that he abused and cheated on his wife.<sup>57</sup> Shiamili asked Real Estate's website administrator to remove the comments.<sup>58</sup> His request was denied.<sup>59</sup> Like victims of the aforementioned websites, Shiamili had no form of recourse. Although he sued, the Court of Appeals upheld Real Estate's immunity under § 230.<sup>60</sup>

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<sup>51</sup> These facts originate from *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 17 N.Y.3d 281, 284–85, 952 N.E.2d 1011, 1014–15, 929 N.Y.S.2d 19, 22–23 (2011). For a full discussion of the holding and dissent of this case see *infra* Part III.A.

<sup>52</sup> *Shiamili*, 17 N.Y.3d at 284, 952 N.E.2d at 1014, 929 N.Y.S.2d at 22.

<sup>53</sup> *Id.* at 284–85, 952 N.E.2d at 1014, 929 N.Y.S.2d at 22.

<sup>54</sup> *Id.* at 285, 952 N.E.2d at 1014, 929 N.Y.S.2d at 22.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See *infra* Part III.A.1.

## II. INTERSECTION OF THE LAW OF DEFAMATION AND THE CDA

CDA § 230 was established in 1996,<sup>61</sup> and its history has ever since been intertwined with defamation litigation.<sup>62</sup> This section gives an overview of the law of defamation as it applies in CDA litigation, followed by a discussion of the evolution of CDA § 230 from its enactment through its current scope.

### A. A Brief Overview of Defamation Law

In order to comprehend the impact of § 230 immunity, one should have a basic understanding of defamation law. Originating at common law, defamation was an implacable offense.<sup>63</sup> Statements that tended to harm one's reputation were presumed false and strict liability applied.<sup>64</sup> In *New York Times Co. v. Sullivan*, the Supreme Court held that public officials and public figures are required to prove "actual malice" in order to prove that a particular statement is defamatory.<sup>65</sup> *Rosenbloom v. Metromedia, Inc.* further extended the *New York Times* actual malice test to private parties caught up in newsworthy events.<sup>66</sup> Despite these decisions, states still retain the authority to determine what constitutes defamation.<sup>67</sup> In most states, there are certain types of statements that are recognized as defamatory per se, meaning that "the publication is of such a character as to make the publisher liable for defamation although no special harm results from it."<sup>68</sup> There are four types of statements that are generally recognized as defamation per se: (1) imputing "criminal conduct or offense"; (2) imputing "a loathsome disease";

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<sup>61</sup> See 47 U.S.C. § 230 (2012).

<sup>62</sup> See SCHWARTZ, *supra* note 4, at 901.

<sup>63</sup> Pete Kennedy, *Internet Libel - The Anonymous Writer and the Online Publisher*, 52 *ADVOCATE* 59, 59 (2010), available at <http://gdhm.com/images/pdf/pdk-internet-libel-the-anonymous-writer-and-the-online-publisher.pdf>.

<sup>64</sup> *Id.*

<sup>65</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (establishing "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'").

<sup>66</sup> *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971), *abrogated by Gertz v. Welch, Inc.*, 418 U.S. 323, 343–46 (1974).

<sup>67</sup> *Gertz*, 418 U.S. at 345–46 (1974) ("For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.").

<sup>68</sup> RESTATEMENT (SECOND) OF TORTS § 569 cmt. b (1977). A minority of courts hold that a statement only qualifies as defamation per se if "its defamatory meaning is apparent on its face and without reference to extrinsic facts." *Id.*

(3) imputing “misconduct, lack of integrity or inability in a person’s trade, profession, office, or occupation”; and (4) imputing unchastity to a woman.<sup>69</sup> When § 230 immunity is triggered, however, even victims of comments that are defamatory per se have no form of recourse.

### B. *The Policy Reasons for Enactment*

CDA § 230 was enacted in response to *Stratton Oakmont, Inc. v. Prodigy Services Co.*,<sup>70</sup> a New York Supreme Court case that found liability based on the defendant’s status as a “publisher.”<sup>71</sup> In that case, Prodigy operated a “computer bulletin board” upon which third-party users could post “stock[], investment[] and other financial [information].”<sup>72</sup> One unidentified user posted comments about Stratton, a securities investment banking firm.<sup>73</sup> One of the several comments stated that “STRATTON’s president, committed criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page Ltd.”<sup>74</sup> The court held that Prodigy was liable for the defamatory statements because it was acting as a publisher.<sup>75</sup> The court labeled Prodigy a publisher because Prodigy “actively utiliz[ed] technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and ‘bad taste’ . . . PRODIGY [was] clearly making decisions as to content, and such decisions constitute editorial control.”<sup>76</sup> Thus, Prodigy “uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards.”<sup>77</sup> This decision effectively discouraged

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<sup>69</sup> 50 AM. JUR. 2D *Libel and Slander* § 137 (2012); see also N.Y. CIV. RIGHTS LAW § 77 (McKinney 2011).

<sup>70</sup> 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

<sup>71</sup> *Id.* at \*4–5.

<sup>72</sup> *Id.* at \*1.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at \*3 (“A finding that PRODIGY is a publisher is the first hurdle for Plaintiffs to overcome in pursuit of their defamation claims, because one who repeats or otherwise republishes a libel is subject to liability as if he had originally published it.” (citing *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 61 (2d Cir. 1980); RESTATEMENT (SECOND) OF TORTS § 578 (1977))).

<sup>76</sup> *Id.* at \*4 (citations omitted).

<sup>77</sup> *Id.*

website operators from self-policing and removing unsatisfactory content because they feared that they may be held liable as a publisher in tort actions, specifically defamation suits.<sup>78</sup>

In response to *Stratton*, Congress recognized the policy concerns that accompany holding website operators liable as publishers for third-party content by passing § 230.<sup>79</sup> Prior to the enactment of § 230, a website that maintained any control over the content of the website was considered a publisher.<sup>80</sup> The definition for publisher applied in print media was simply applied to the Internet.<sup>81</sup> The holding in *Stratton* highlighted the problem with applying such a broad definition of publisher to the Internet: Websites that monitored third-party content, but did not contribute content of its own, were considered liable for defamation for statements posted to their website.<sup>82</sup> Holding websites liable for third-party content would seemingly deter people from hosting websites on the Internet, which at that time was still in its infancy.

Congress explained in § 230(b) that it wanted “to promote the continued development of the Internet and other interactive computer services and other interactive media” by shielding internet publishers from tort liability.<sup>83</sup> At the time, the Internet was still a relatively new medium. It possessed the ability to quickly and efficiently disperse copious amounts of information over unlimited geographical areas and at the behest of the user, unlike any other medium.<sup>84</sup> Most importantly, the Internet opened the door for discussion between those providing the information and those receiving the information, an ability that television, the radio, and print media lacked to the same extent.<sup>85</sup> As the public’s ability to engage in interactive speech increased, controversial, derogatory, and defamatory comments were bound

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<sup>78</sup> See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

<sup>79</sup> 47 U.S.C. § 230(b) (2012); *Zeran*, 129 F.3d at 331 (citing *Stratton Oakmont, Inc.*, 1995 WL 323710) (“In this respect, § 230 responded to a New York state court decision, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*”).

<sup>80</sup> See generally *Stratton Oakmont, Inc.*, 1995 WL 323710.

<sup>81</sup> See *id.* at \*5.

<sup>82</sup> See *Zeran*, 129 F.3d at 331.

<sup>83</sup> 47 U.S.C. § 230(b)(1) (2012).

<sup>84</sup> See generally Tim Berners-Lee, *Long Live the Web: A Call for Continued Open Standards and Neutrality*, 303 SCI. AM. 80 (2010), available at <http://www.scientificamerican.com/article.cfm?id=long-live-the-web> (discussing the history and development of the World Wide Web).

<sup>85</sup> See *id.*

to grow as well. Congress recognized that in order for people to be willing to operate and establish websites that allow for third-party postings, website operators should not be deterred from monitoring and regulating "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" content posted by third parties on Internet forums.<sup>86</sup>

### C. Section 230's Definitional Distinctions

Section 230 distinguishes between two different kinds of websites, creating two categories: "Internet computer services" and "information content providers." Congress defines Internet computer services, more commonly referred to as Internet service providers ("ISPs"), as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."<sup>87</sup> These definitions were established in order to differentiate between publishers on the Internet and publishers in all other media. Under conventional defamation laws, publishers are liable for defamatory comments.<sup>88</sup> However, Congress ensured that ISPs would not be treated the same as publishers in other media under the CDA. Congress created a separate genre for websites, thereby removing ISPs from the sweeping definition of publishers because they did not post any content themselves. As a result, ISPs are immunized in defamation suits. Comparatively, information content providers ("ICPs") are essentially publishers as defined in *Stratton*. ICPs are those parties that are "responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."<sup>89</sup> ICPs, unlike ISPs, are not immune from defamation suits because they are considered publishers under the CDA.<sup>90</sup> ICPs constitute publishers because they contribute substantially to the content of the website.<sup>91</sup>

By distinguishing between ISPs and ICPs, Congress addressed the policy concern raised by *Stratton* that website operators and publishers would refrain from self-policing the

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<sup>86</sup> 47 U.S.C. § 230(b)-(c).

<sup>87</sup> *Id.* at (f)(2).

<sup>88</sup> See SCHWARTZ, *supra* note 4, at 900.

<sup>89</sup> 47 U.S.C. § 230(f)(3).

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

content posted on their sites if such responsible actions would result in potential liability. Section 230(c) offers “[p]rotection for ‘good samaritan’ blocking and screening of offensive material,”<sup>92</sup> a direct response to *Stratton*.<sup>93</sup> Section 230(c) states, “[n]o provider or user of an [ISP] shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>94</sup> The Act further asserts that interactive computer service providers cannot be held liable for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”<sup>95</sup> This statement was meant to encourage website operators to monitor their websites for objectionable content without fear of retribution for being responsible.<sup>96</sup>

#### D. *The Appellate Courts’ Approaches to § 230*

##### 1. *Zeran* and Its Progeny

The Fourth Circuit in *Zeran v. American Online*<sup>97</sup> was the first to address the scope of the immunity provided by CDA § 230. In *Zeran*, the court held that America Online, Inc. (“AOL”) was an ISP and therefore immune from liability for content posted by a third party.<sup>98</sup> The suit arose when an unidentified third party posted fictitious advertisements for t-shirts with inappropriate slogans related to the 1995 bombing of a federal building in Oklahoma City.<sup>99</sup> The post included Zeran’s home phone number, which was also the number he used to run his business. As a result, Zeran was inundated with phone calls.<sup>100</sup>

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<sup>92</sup> See *id.* § 230(c).

<sup>93</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (“[One] purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. In this respect, § 230 responded to a New York state court decision, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).”).

<sup>94</sup> 47 U.S.C. § 230(c)(1).

<sup>95</sup> *Id.* at (c)(2)(A).

<sup>96</sup> *Id.* at (b).

<sup>97</sup> 129 F.3d 327.

<sup>98</sup> See *id.* at 328.

<sup>99</sup> *Id.* at 329.

<sup>100</sup> *Id.*

Zeran contacted AOL and asked that the post be removed.<sup>101</sup> Although AOL indicated it would remove the post, the post was not removed, and the phone calls persisted.<sup>102</sup> Zeran filed a negligence suit against AOL for failure to remove and retract the defamatory statements.<sup>103</sup> The district court granted AOL's motion for judgment on the pleadings.<sup>104</sup> Ultimately, the court held that AOL was merely acting as an ISP because it was not the primary content provider, thereby triggering § 230 immunity.<sup>105</sup>

The *Zeran* decision drew a distinction between distributors of online content and distributors of print content for purposes of immunity under CDA § 230.<sup>106</sup> By classifying AOL as an ISP, the Fourth Circuit established a judicial precedent that extended the protections of the CDA § 230 to any online content distributor.<sup>107</sup> *Zeran*, therefore, found that § 230 provides immunity to online distributors in defamation suits where, had the same content been distributed in hard print, the publisher's liability would have been determined under the applicable state defamation laws.<sup>108</sup> *Zeran* prevails as the majority view.<sup>109</sup>

Two notable cases expanded the definition of what constitutes a publisher under the CDA § 230 by adopting the *Zeran* analysis. In *Batzel v. Smith*,<sup>110</sup> the Ninth Circuit held that

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<sup>101</sup> *Id.*

<sup>102</sup> *See id.*

<sup>103</sup> *Id.* at 328. Zeran never filed suit against the original poster, claiming that "AOL made it impossible to identify the original party." *Id.* at 329 n.1.

<sup>104</sup> *Id.* at 329–30.

<sup>105</sup> *Id.* at 332–33 ("The computer service provider must decide whether to publish, edit, or withdraw the posting. In this respect, Zeran seeks to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability—the publisher role.").

<sup>106</sup> *See id.* at 330–31.

<sup>107</sup> David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 149 (1997) ("Under *Zeran*, the publisher of a print newspaper could face liability for printing a defamatory letter to the editor, while the publisher of an electronic newspaper would be immune from liability for carrying unedited the same text, even if the publisher of the electronic newspaper acted with the requisite degree of culpability under state tort law.").

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

<sup>109</sup> *See Shiamili v. Real Estate Grp. of N.Y., Inc.*, 17 N.Y.3d 281, 288, 952 N.E.2d 1011, 1016, 929 N.Y.S.2d 19, 24 (2011).

<sup>110</sup> 333 F.3d 1018 (9th Cir. 2003).

a service provider or user is immune from liability under § 230(c)(1) when a third person . . . that created or developed the information . . . furnished it to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet.<sup>111</sup>

In the case, a third party sent an e-mail to the website, Museum Security Network, alleging that Ellen Batzel possibly possessed artwork stolen from Jews during World War II.<sup>112</sup> The website published the third-party e-mail to a Network listserv.<sup>113</sup> *Batzel's* holding expanded the scope of immunity to websites that post what was originally privately received third-party content under reasonable circumstances indicating that the private content was meant to be publicly dispersed.

The Tenth Circuit also affirmed the *Zeran* holding in *Ben Ezra, Weinstein, & Co., Inc. v. America Online Inc.*<sup>114</sup> In *Ben Ezra*, the court held that the service provider's simple editing of content qualified it as a publisher.<sup>115</sup> AOL provided stock quotation information that it received from third parties.<sup>116</sup> *Ben Ezra, Weinstein, and Company* ("Ben Ezra") sued AOL for defamation and negligence, alleging that AOL "published incorrect information concerning [Ben Ezra's] stock price and share volume."<sup>117</sup> *Ben Ezra* argued that AOL was not immune under the CDA § 230 because, in addition to its role as an ISP, it acted as an ICP by working with the stock quotation developers in the creation and development of the information, a role mainly comprised of communicating with the providers and deleting incorrect symbols.<sup>118</sup> The court held that deleting symbols from stock information was the role of a publisher and therefore, under *Zeran*, AOL constituted an ISP—as opposed to an ICP—triggering § 230 immunity.<sup>119</sup>

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<sup>111</sup> *Id.* at 1034.

<sup>112</sup> *Id.* at 1021.

<sup>113</sup> *Id.* at 1022.

<sup>114</sup> 206 F.3d 980 (10th Cir. 2000).

<sup>115</sup> See *infra* note 119 and accompanying text.

<sup>116</sup> *Ben Ezra*, 206 F.3d at 983.

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

<sup>118</sup> *Id.* at 985.

<sup>119</sup> *Id.* at 985–86.



The *Zeran* line of cases provides a three-prong test for determining whether a defendant is immunized under § 230.<sup>120</sup> First, the defendant must be an ISP or ISP user. Second, the defendant must have been acting as a publisher. Third, the information at issue must have been provided by a third party.<sup>121</sup> This test pulls its requirements directly from the language of § 230,<sup>122</sup> interpreting the text literally. If all three of these requirements are met, § 230 immunizes the defendant even if it would be liable under state defamation laws.<sup>123</sup>

## 2. The Minority View

Some courts have applied standards different from *Zeran's* standard to cases involving § 230.<sup>124</sup> In *Doe v. GTE Corp.*,<sup>125</sup> for example, the plaintiff sued companies providing web hosting services to websites that were selling videos of undressing athletes recorded by hidden cameras in locker rooms.<sup>126</sup> The Seventh Circuit affirmed the decision to dismiss the claim.<sup>127</sup> However, the court also explicitly rejected the *Zeran* approach to § 230 in its analysis.<sup>128</sup> Instead, the court provided two alternative interpretations of § 230. The first interpretation

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<sup>120</sup> *Batzel v. Smith*, 333 F.3d 1018, 1037 (9th Cir. 2003) (Gould, J., concurring in part, dissenting in part).

<sup>121</sup> *Id.* (“Three elements are thus required for § 230 immunity: (1) the defendant must be a provider or user of an ‘interactive computer service’; (2) the asserted claims must treat the defendant as a publisher or speaker of information; and (3) the challenged communication must be ‘information provided by another information content provider.’”).

<sup>122</sup> *See* 47 U.S.C. § 230 (2012).

<sup>123</sup> Gregory M. Dickinson, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POL'Y 863, 872–73 (2010) (“When confronted with facts that force a resolution of the ambiguous distinction between service provider and content provider, courts almost unfailingly resolve the issue in favor of immunity. Unless a service provider literally and unambiguously pens the words of the content in question, it will be immune from liability.”).

<sup>124</sup> Samuel J. Morley, *How Broad Is Web Publisher Immunity Under §230 of the Communications Decency Act of 1996?*, 84 FLA. B.J. 8, 12 (2010).

<sup>125</sup> 347 F.3d 655 (7th Cir. 2003).

<sup>126</sup> *Id.* at 656–57.

<sup>127</sup> *Id.* at 662.

<sup>128</sup> *Id.* at 660 (“If this reading is sound, then § 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law. . . . Why should a law designed to eliminate ISPs’ liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?”).

reads § 230(c)(1) as a definitional clause.<sup>129</sup> The second interpretation is to read § 230(c)(1) as “foreclos[ing] any liability that depends on deeming the ISP a ‘publisher’ . . . while permitting the states to regulate ISPs in their capacity as intermediaries.”<sup>130</sup>

In *FTC v. Accusearch Inc.*,<sup>131</sup> the Tenth Circuit held that encouraging illegal content undercuts immunity.<sup>132</sup> In that case, a website “solicited requests for confidential information,” in the form of personal data “protected by law, paid researchers to find it,” and disclosed the protected information to paying customers.<sup>133</sup> The website attempted to invoke the protections of § 230 because the researchers who provided the information were third parties.<sup>134</sup> This approach utilized the *Zeran* test as a basis for its analysis, but added two additional prongs: (1) whether the content was developed by the website; and (2) whether the website was responsible for the content in question.<sup>135</sup> The first prong defines “develop” broadly, noting that “dictionary definitions for *develop* correspondingly revolve around the act of drawing something out, making it ‘visible,’ ‘active,’ or ‘usable.’”<sup>136</sup> The second prong requires that “one must be more than a neutral conduit for [the developed] content . . . [A] service provider is ‘responsible’ for the development of offensive content only if in some way specifically encourages development of what is offensive about the content.”<sup>137</sup> These additional prongs narrowed the scope of the analysis by requiring a more precise analysis of the facts of the case than the original *Zeran* test. Under the additional prongs, the court held that the website’s actions were not “neutral” because “its actions were intended to

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> 570 F.3d 1187 (10th Cir. 2009).

<sup>132</sup> Morley, *supra* note 124, at 15.

<sup>133</sup> *FTC*, 570 F.3d at 1201.

<sup>134</sup> *Id.* (“Accusearch attempts to portray itself as the provider of neutral tools, stressing that it merely provided ‘a forum in which people advertise and request’ telephone records.”).

<sup>135</sup> *Id.* at 1197–98 (“To begin with, we consider whether confidential telephone records are ‘developed,’ within the meaning of the CDA, when, as here, they are sold to the public over the Internet. . . . This conclusion, however, does not end the inquiry. The question remains whether Accusearch was . . . responsible for the development of the specific content that was the source of the alleged liability.”).

<sup>136</sup> *Id.* at 1198.

<sup>137</sup> *Id.* at 1199.

generate” offensive content and therefore lacked immunity.<sup>138</sup> Therefore, the website was responsible for the development of the content in question and was not protected by § 230 immunity.<sup>139</sup>

### III. CDA POLICY GOALS ARE NO LONGER SUPPORTED

The primary problem with judicial interpretation of CDA § 230 as it stands is that it fails to account for malicious content that ISP operators like JuicyCampus actively solicit. The main issue behind this analytical gap is that the courts fail to incorporate an assessment of Congress’s policy objectives for enacting § 230. This failure immunizes gossip websites despite the fact that behavior employed by these websites undermines the fundamental policy reasons for enacting the CDA. Actively soliciting objectionable material strays from the two core goals of the CDA § 230: (1) promoting the growth of the Internet as a forum for free speech; and (2) encouraging website operators to monitor their content without fear that such action would implicate them as publishers and would therefore make them liable for objectionable content provided by third parties under state defamation laws.<sup>140</sup> As a result, the current approaches to interpreting § 230 all have shortcomings.

#### A. *The Failures of Zeran*

Although the *Zeran* test adheres to the text of the CDA, it fails to consider the corresponding policy reasons for the section’s enactment. This is evident in the holding of the New York Court of Appeals case, *Shiamili v. Real Estate Group of New York, Inc.*<sup>141</sup> In *Shiamili*, Real Estate operated a blog soliciting imprudent comments about its business competitor, Shiamili. Shiamili sued after one comment posted under a pseudonym was upgraded to a stand-alone post, and more reckless and harmful comments were posted to a forum established below the upgraded post.<sup>142</sup>

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<sup>138</sup> *Id.* at 1201.

<sup>139</sup> *Id.* at 1199, 1201.

<sup>140</sup> *See supra* Part II.B.

<sup>141</sup> *See* discussion *supra* Part I.C.

<sup>142</sup> *See supra* Part I.C.

## 1. The Holding

In *Shiamili*, a split court adopted the *Zeran* line of reasoning, “read[ing] section 230 as generally immunizing Internet service providers from liability for third-party content wherever such liability depends on characterizing the provider as a ‘publisher or speaker’ of objectionable material.”<sup>143</sup> The court utilized the three prongs of the *Zeran* test. First, the court determined that the blog operator was an ISP.<sup>144</sup> Like the courts before it, the court highlighted the difference between ISPs, which are shielded by the CDA § 230 when “the content at issue is provided by ‘another information content provider[,]’”<sup>145</sup> and information content providers, which are not issued immunity for content they make available.<sup>146</sup> Therefore, § 230 grants immunity to ISPs from state law liability.<sup>147</sup> Second, under the *Zeran* line of cases, websites acting as publishers, by “deciding whether to publish, withdraw, postpone or alter content,” are granted immunity as ISPs.<sup>148</sup> Third, in this case the complaint alleged that a third-party user was responsible for the objectionable content, thereby failing to allege that Real Estate was the content provider.<sup>149</sup> This fact lead the court to “reject Shiamili’s contention that defendants should be deemed content providers because they created and ran a Web site which implicitly encouraged users to post negative comments.”<sup>150</sup> Furthermore, the court reasoned, “[e]ven assuming that solicitation can constitute ‘development,’ this is plainly not a case

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<sup>143</sup> *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 17 N.Y.3d 281, 288–89, 952 N.E.2d 1011, 1017, 929 N.Y.S.2d 19, 25 (2011) (“Today, we follow what may fairly be called the national consensus.”).

<sup>144</sup> *Id.* at 290, 952 N.E.2d at 1018, 929 N.Y.S.2d at 26 (“Shiamili does not dispute that defendants, as alleged Web site operators, are providers of an ‘interactive computer service’ under section 230.”).

<sup>145</sup> *Id.* at 289, 952 N.E.2d at 1017, 929 N.Y.S.2d at 25 (quoting 47 U.S.C. § 230(c)(1) (2012)).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 286, 952 N.E.2d at 1015, 929 N.Y.S.2d at 23 (“A defendant is therefore immune from state law liability if (1) it is a ‘provider or user of an interactive computer service’; (2) the complaint seeks to hold the defendant liable as a ‘publisher or speaker’; and (3) the action is based on ‘information provided by another information content provider.’”).

<sup>148</sup> *Id.* at 289, 952 N.E.2d at 1017, 929 N.Y.S.2d at 25 (citations omitted).

<sup>149</sup> *Id.* at 290, 952 N.E.2d at 1018, 929 N.Y.S.2d at 26.

<sup>150</sup> *Id.* at 290–91, 952 N.E.2d at 1018, 929 N.Y.S.2d at 26 (“Creating an open forum for third parties to post content—including negative commentary—is at the core of what section 230 protects.”).

where the Web site can be charged with soliciting the defamatory content at issue.”<sup>151</sup> Fourth, while Real Estate may have been a content provider as to the heading, subheading, and illustration accompanying the upgraded post, this content is not actionable because the complaint does not allege its defamatory nature.<sup>152</sup>

## 2. The Dissent

Chief Judge Lippman strongly dissented and illustrated the failures of applying the *Zeran* test.<sup>153</sup> The dissent refused to accept that Real Estate’s activity was “benign.”<sup>154</sup> The dissent discussed the allegations of defendants’ “efforts to instigate additional attacks against plaintiff’s character and business”<sup>155</sup> and stated that “defendants’ attachment of this illustration, if proven, should alone defeat their immunity under the CDA.”<sup>156</sup> The dissent elaborated, discussing Congress’s intent to protect ISPs from liability when they were making a good faith effort to limit the “availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”<sup>157</sup> If this was the initial purpose of CDA § 230, the dissent argued, “an interpretation that immunizes a business’s complicity in defaming a direct competitor takes us so far afield from the purpose of the CDA as to make it unrecognizable.”<sup>158</sup>

### B. *Insufficient Minority Approaches*

#### 1. The Seventh Circuit’s Approaches

The Seventh Circuit adopted two alternative readings of § 230, both of which are insufficient. The first is to read § 230(c)(1) as a definitional clause.<sup>159</sup> This reading removes

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<sup>151</sup> *Id.* at 291, 952 N.E.2d at 1018, 929 N.Y.S.2d at 26.

<sup>152</sup> *Id.* at 292, 952 N.E.2d at 1019–20, 929 N.Y.S.2d at 27–28.

<sup>153</sup> *Id.* at 293–94, 952 N.E.2d at 1020, 929 N.Y.S.2d at 28 (Lippman, C.J., dissenting).

<sup>154</sup> *Id.* at 294, 952 N.E.2d at 1020, 929 N.Y.S.2d at 28 (“But, the allegations of defendants’ actions here are not so benign.”).

<sup>155</sup> *Id.* at 294, 952 N.E.2d at 1020–21, 929 N.Y.S.2d at 28–29.

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

<sup>157</sup> *Id.* at 295, 952 N.E.2d at 1021, 929 N.Y.S.2d at 29 (quoting 47 U.S.C. § 230(c)(2)(A) (2012)).

<sup>158</sup> *Id.* at 295, 952 N.E.2d at 1021–22, 929 N.Y.S. at 29–30.

<sup>159</sup> *See Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003).

immunity only if the website “created the objectionable information.”<sup>160</sup> Using creation as the determinative standard is circular in nature. If the content was posted by a third party, the website could argue that it must have been created by the third party or it would have posted the content itself. Under this logic, gossip websites and blogs would immunize themselves from liability by simply stating that they could not have created the content because it was created by the third-party poster.

The second alternative reading simply “forecloses any liability that depends on deeming the ISP a ‘publisher[,]’ ”<sup>161</sup> which removes any remedy for those bringing defamation actions. The court itself stated that “defamation law would be a good example of such” foreclosed liability.<sup>162</sup> Therefore, this test is far more restrictive to defamation victims than even the *Zeran* test.

## 2. The Flaws of the Tenth Circuit’s Approach

The Tenth Circuit’s test comes closest to being effective because it considers the policy reasons for enacting § 230 by examining the neutrality or activeness of the website. The court’s broad definition of “develop” implies that activities like solicitation would rise to the level of development.<sup>163</sup> However, the test does not look at the nature of the website—other than distinguishing between an ISP and ICP. Without taking this issue into account, the test fails to differentiate between websites that are intended to perform a community service and not merely defame, from those websites that are intended to spread malicious content.<sup>164</sup> If a court does not consider the nature of the website, the broad definition of develop would encompass websites that solicit non-harmful content with the intent to perform a constructive service to the community. Therefore, these constructive websites would not be immunized even though their immunization would uphold congressional intent.<sup>165</sup>

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<sup>160</sup> *Id.*

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

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

<sup>163</sup> See *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1198 (10th Cir. 2009).

<sup>164</sup> See *infra* Part IV.A.

<sup>165</sup> See *supra* Part II.B.

## IV. CONSTRUCTING A NARROWER TEST

It is evident that a new test is necessary to determine the scope of immunity under § 230 to better promote the congressional intent behind the statute. The rise of actively unfriendly websites has contorted the *Zeran* analysis, providing immunity to those whom Congress never contemplated would be implicated by § 230. Instead of self-policing, some websites solicit content that is in many cases defamatory per se, hiding behind § 230's shield of immunity and proclaiming freedom of speech. While § 230 certainly purported to promote freedom of speech, its ultimate goal was to protect those who were utilizing freedom of speech on the Internet in a responsible and civil way, those who would provide a medium for widespread exchange of valuable information in an immediate way—a responsible and legal Internet.

This Note proposes modifying the *Zeran* test by adding three additional prongs to determine whether a website should receive § 230 immunity. As it stands, the *Zeran* line requires the court to begin with three questions: (1) is the defendant an ISP; (2) was the defendant acting as a publisher; and (3) was the content provided by a third party?<sup>166</sup> After engaging in this analysis the court should contemplate three additional questions, all of which would need to be satisfied in order to remove immunity. First, the court should determine whether the primary purpose of the website is constructive. Second, the court should determine whether the ISP was active or passive in receiving and dispersing third-party content. Factors that the court should consider include—but are not limited to—the following: whether the website solicits content; whether the website enhances the content in a significant way; and whether the website indicates its support of the third party. Third, the court should determine whether the content at issue is objectionable on its face. Factors that the court should consider include whether the particular content is defamatory per se under state law and whether the merits of the content at issue outweigh the alleged injury. This Note does not suggest that the court stifle communication by holding it to be defamatory. Rather, it argues that the immunity of the CDA be lifted in the appropriate circumstances so that a

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<sup>166</sup> See *supra* Part II.D.1.

determination may be made in the appropriate forum as to whether the subject of the offending post has in fact been defamed.

#### A. *Primary Purpose Test*

The first additional prong recognizes that some websites solicit comments that are recklessly harmful but do so while contributing to social utility. This test requires the court to determine whether the social utility of the website is greater than the harm inflicted by the content the website broadcasts. Websites that have greater social utility are constructive because they provide a service to the public. This prong distinguishes websites like Yelp.com (“Yelp”) and Angieslist.com (“Angie’s List”), websites that solicit reviews of businesses from customers to inform the public, from those whose sole purpose is to display defamatory content.<sup>167</sup> Yelp’s purpose is to “help people find great local businesses like dentists, hair stylists[,] and mechanics.”<sup>168</sup> Moreover, Yelp’s general guidelines discourage users from posting inappropriate content and private information, something that gossip websites do not.<sup>169</sup> Angie’s List takes greater measures than Yelp to ensure that content is of a certain caliber. Angie’s List requires users to join and does not allow anonymous reviews.<sup>170</sup> Gossip sites and the blog in question in *Shiamili*.<sup>171</sup> do not contribute social utility. Instead, their primary purpose is to broadcast defamatory content on the Internet. Under this prong, websites distinguished as having a primary purpose that provides social utility would maintain immunity while those websites that do not perform a public service would have to satisfy the other two prongs of the analysis to maintain immunity. Essentially, this prong would act as a safety mechanism for websites that have both a social purpose and may potentially run into trouble with defamatory comments.

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<sup>167</sup> See, e.g., *Write a Review*, YELP, <http://www.yelp.com/writeareview> (last visited Jan. 18, 2014); *Frequently Asked Questions*, ANGIE’S LIST, <http://angieslist.com/faq.aspx> (last visited Jan. 18, 2014).

<sup>168</sup> *About Us*, YELP, <http://www.yelp.com/about> (last visited Jan. 18, 2014).

<sup>169</sup> See *Content Guidelines*, YELP, <http://www.yelp.com/guidelines> (last visited Jan. 18, 2014).

<sup>170</sup> *How It Works*, ANGIE’S LIST, <http://www.angieslist.com/howitworks.aspx> (last visited Jan. 18, 2014).

<sup>171</sup> See *supra* Part I.



### B. *Active v. Passive Solicitation*

The second additional prong recognizes that ISPs are not always innocent bystanders to third-party content and when they are not, they should not be rewarded as such. The majority test assumes that message boards and open forums allowing third parties to comment unsupervised are all alike in their neutrality.<sup>172</sup> In the current Internet age, this is not the case. Based on the discussion of gossip websites and *Shiamili* above,<sup>173</sup> it is clear that soliciting harmful content should implicate ISPs as “responsible” for the objectionable content and not protect them as mere neutral service providers.

If a website actively solicits harmful content, § 230 immunity will not apply. A website actively solicits content when it seeks out posts and comments of a certain kind. Solicitation by nature indicates a potential responsibility for the content. Simply defined, to solicit means to request. In determining whether the website solicited the content, a court should consider the two different types of solicitation: neutral and intentional. Neutral solicitation can be illustrated by the following example: A website like the *The New York Times* posts news articles with space beneath for comments on the article.<sup>174</sup> By posting the article, the website functions as an ICP. By providing a forum for comments, the website functions as an ISP. In this example, the nature of solicitation is neutral because the website merely seeks a response to the content of an article regardless of what it is. The website is neutral to what the third parties post in response. Intentional solicitation, on the other hand, is the behavior that websites like JuicyCampus engage in. In the case of the gossip websites mentioned above and the blog in *Shiamili*, the specific kind of information sought out is malicious and inflammatory.

When websites engage in intentional solicitation, they are undermining one of the two reasons for enacting § 230: encouraging self-policing. In fact, providing immunity to those

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<sup>172</sup> See *supra* Part II.D.1.

<sup>173</sup> See *supra* Part I.

<sup>174</sup> See, e.g., Ethan Bronner, *Pennsylvania Judge Puts Voter ID Law on Hold for Election*, N.Y. TIMES (Oct. 2, 2012), <http://www.nytimes.com/2012/10/03/us/pennsylvania-judge-delays-implementation-of-voter-id-law.html>; see also *Terms of Service*, N.Y. TIMES, <http://www.nytimes.com/content/help/rights/terms/terms-of-service.html> (last updated Jan. 9, 2014).

who solicit salacious content does the exact opposite. The current policy suggests that there is no difference between those who make a good faith effort to self-police, thereby working to maintain a high quality standard as to the information they disperse, and those who refuse to remove objectionable content because they like stirring up controversy. As a result, the Internet has become a safe-harbor for those who wish to promote content that would be unacceptable if broadcast through a different medium. At this point in time, unlike when § 230 was enacted, the Internet is an expansive and thriving network.<sup>175</sup> Therefore, it is more important to reestablish the policy encouraging self-policing and to establish a policy discouraging development of malicious websites.

The proposed prong will both reinforce the policy of encouraging self-policing<sup>176</sup> and will discourage websites that exist only to inflame and create controversy from developing. Removing ISPs' unconditional immunity will encourage website operators to think twice about what content they choose to permit on their website. The safeguard for those who cannot remove all objectionable third-party content would still be an easily satisfied test, provided the ISPs did not intentionally solicit malicious or recklessly harmful material. This key distinction benefits society by protecting the integrity of school campuses, minimizing small town rumor mills, and diminishing the availability of forums to interfere with business competitors' livelihoods. Moreover, if an ISP falls within the safeguard, the website may be given a chance to cure without being subject to harsh liability.

Additionally, and perhaps most importantly, this test would be a proactive step in the fight against cyberbullying. By removing ISP immunity on websites that solicit salacious comments from anonymous users, websites will be less inclined to provide anonymous forums with purely malicious content. Potential liability would urge ISPs to take greater care regarding the content they choose to promote and request from their users.

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<sup>175</sup> See generally Berners-Lee, *supra* note 84.

<sup>176</sup> While this test would encourage self-policing, it does not necessarily impose a mandatory duty to monitor and cure. That discussion is outside the scope of this Note.

### C. *Objectionable Content*

The third proposed prong requires courts to evaluate what type of material should be protected. This analytical step recognizes that there are different levels of objectionable content, and providers of the more malicious content should not benefit from the protections afforded by § 230. This prong mimics the primary purpose prong of the test, applying the same social utility standard to individual content. When a statement's only value is to publicly embarrass or inflict pain, the victim should have a form of recourse regardless of the medium employed to disperse the statement. If, on the other hand, the statement contains information that provides a benefit to the public in some way, the website should maintain its immunity.

Unlike the federal statute, state laws impute liability for content that the common law found the most unseemly.<sup>177</sup> When such content is at issue, states classify it as defamatory per se.<sup>178</sup> In the event that particular libel or slander is defamatory per se, the defendant is unfailingly liable.<sup>179</sup>

It is unconvincing to argue that federal law should prevail over state law for objectionable content because the Internet is so expansive and crosses state lines. As it stands, the federal law immunizes Internet providers in any state, whereas their print counterparts would be held liable under state law. When defamatory content is presented in another medium, state defamation law would apply in order to determine liability. Innocent victims of defamatory content posted on the Internet deserve the same relief that they would have received had the same content been presented through a medium other than the Internet. Much of the content on JuicyCampus, for example, was defamatory per se, and actionable if false.<sup>180</sup> Users made statements about the sexual conduct of their peers and allegations that their peers carry sexually transmitted infections.<sup>181</sup> Under most state laws, there is no question that publicly and falsely stating that a female is promiscuous would

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<sup>177</sup> See *supra* Part II.A.

<sup>178</sup> See *id.*

<sup>179</sup> See *id.*

<sup>180</sup> See *supra* notes 1–5 and accompanying text.

<sup>181</sup> Jenna Wortham, *JuicyCampus, Collegiate Tabloid, Goes Offline*, N.Y. TIMES BITS (Feb. 5, 2009, 4:47 PM), <http://bits.blogs.nytimes.com/2009/02/05/juicycampus-collegiate-tabloid-goes-offline/>.

result in liability regardless of whether that statement was printed in a newspaper or announced over the radio.<sup>182</sup> But the fact that the statement was posted on the Internet, where the website only provided a forum for “juicy” posts, activated § 230 immunity.

Because the federal law does prevail, however, it is important to consider the type of content we, as a society, want to protect and encourage. The Internet makes it easy for people with access to express themselves. If we provide immunity to those who encourage third parties to express themselves while inflicting legal injury upon others, injuries that would have a remedy in any other situation, it will be impossible to protect the typical citizen’s privacy and reputation.

As young adults are constantly reminded, anything posted to the Internet leaves a digital footprint. When employers are vetting their candidates, the first place they look is the Internet. The implications of protecting content that harms the victim in both the present and future are enormous. Courts should, therefore, be required to balance the merits of the content against the potential damage it could cause.

If the first proposed prong is satisfied because certain content was actively solicited, and if that same content would be protected in another medium, § 230 immunity should not apply. Content that the common law has recognized as defamatory per se is equally as injurious on the Internet as it is in print. Comments that are considered defamatory per se under state law are those that society discourages because their contents are particularly injurious.<sup>183</sup> Changing the medium through which someone’s reputation is attacked does not negate the impact of the words. In fact, the Internet allows for those same words to be spread to more people at a faster rate. Because the Internet can be accessed by anyone from almost anywhere, defamatory content spreads much more easily and increases the potential that an individual’s reputation will be harmed.

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<sup>182</sup> See SCHWARTZ ET AL., *supra* note 4.

<sup>183</sup> See *id.*

#### D. Test Case

For all the reasons expressed in Chief Judge Lippman's dissent,<sup>184</sup> the outcome of *Shiamili* under the *Zeran* test was unsatisfactory. However, if the court had applied the minority circuit tests, the result still would have fallen victim to Chief Judge Lippman's criticisms. Under the Seventh Circuit's first approach of reading § 230(c)(1) as a definitional clause, Real Estate would only be immune "if it created the objectionable information."<sup>185</sup> However, because the content was posted by a third party, Real Estate would claim that it could not have created the content because the third party who posted it created it.<sup>186</sup> Under the second approach the Seventh Circuit articulates, because this is an action for defamation, a cause of action that depends on treating the blog operator as a "publisher," the blog's liability as an ISP would be foreclosed.<sup>187</sup> Although the Tenth Circuit's approach would yield a satisfactory result in this case, websites like Yelp and Angie's List would be open to liability, despite the intent of CDA § 230 to immunize those types of beneficial websites.

If the New York State Court of Appeals had added these three additional prongs to its analysis, the result of *Shiamili* could have been considerably different. The Court determined that Real Estate was an ISP, that Real Estate was acting as a publisher, and that the information was provided by a third party, thereby implicating § 230 immunity. When the three proposed prongs are applied, however, Real Estate might not be provided immunity because it would lack a primary purpose other than to instigate injurious dialogue, be both an active and soliciting website, and the nature of the content would be, on its face, defamatory.<sup>188</sup>

Under the first prong, because the blog itself served no purpose other than to broadcast negative information about Shiamili's personal life, Real Estate would be subject to

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<sup>184</sup> See *supra* Part III.A.2.

<sup>185</sup> Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003).

<sup>186</sup> See *supra* Part III.B.1.

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

<sup>188</sup> If only a few of the comments resulted in defamatory content, and the primary purpose was to actually solicit real estate listings, the primary purpose test would not be satisfied, and therefore, the defendants would be afforded § 230 immunity.

evaluation under the other two prongs. Had Real Estate been trying to provide useful information to consumers instead of encouraging attacks against Shiamili with no social utility, the analysis would end here and immunity would be activated. This is where the Tenth Circuit's approach would fail because in the event that Real Estate was providing a beneficial service through this blog, it would not be protected by § 230.

Second, Real Estate satisfies the proposed second prong as an active website. Real Estate upgraded the defamatory comment by "Ardor Real Estate Sucks" to a standalone post and added an illustration, headline, and a fresh forum for comments. By upgrading the initial comment to a standalone post, Real Estate indicated that this type of content is supported by its website. While the content of that comment is covered by § 230, immunity does not apply to the comments that resulted because Real Estate flagrantly supported the initial comment's assertions. Broadcasting its support for the post by "Ardor Real Estate Sucks" informed the blog's readers that this is the kind of content the website supports. Conveying its support and then adding the open—and once again, anonymous—comment forum below the post indicates that Real Estate was asking its users to respond to the hateful comment it supported, and any reasonable user would understand that the website was seeking more injurious content about Shiamili.

Even if the court decided that the acts of upgrading and establishing a new forum are insufficient to establish solicitation, the website operator blatantly encouraged third parties to continue posting hateful comments about Shiamili by responding to a new comment on the thread. One particularly malicious comment concluded, "call me a Liar and I'll come back here and get REALLY specific."<sup>189</sup> Real Estate's website operator replied to that comment with the sole word "liar" under a pseudonym.<sup>190</sup> This action alone suffices as active solicitation. Such encouragement was the equivalent of asking the poster to add more specific harmful information about Shiamili.

Third, the content generated on the new forum falls within the bounds of defamation per se, and therefore the content at issue is objectionable on its face. Alleging that Shiamili

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<sup>189</sup> *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 17 N.Y.3d 281, 285, 952 N.E.2d 1011, 1014, 929 N.Y.S.2d 19, 22 (2011).

<sup>190</sup> *Id.*

“mistreated his employees, could not retain real estate agents, [and] failed to pay office bills”<sup>191</sup> falls directly within defamation per se under the category of imputing misconduct in an individual’s profession or office.<sup>192</sup> Because the content is defamatory per se, under New York law, Real Estate would be liable for defamation. Under this new test, immunity would not apply because Real Estate actively solicited defamatory content, and the content is objectionable on its face because it is defamatory per se.

### CONCLUSION

This Note sought to demonstrate that the scope of § 230 should be narrowed to better promote the policies underlying its enactment. While this Note appreciates the merits of granting immunity to passive ISPs, defamation victims deserve a means of recourse regardless of whether the statements at issue are printed in a newspaper, broadcast over the radio, or published for the world to see on an active, soliciting Internet website. Accordingly, this Note has identified the wide array of problems with granting active ISPs immunity for third-party content and proposed a test that will narrow the scope of § 230 where ISPs lack social utility and actively solicit content that is objectionable on its face, thereby establishing a system for victims of Internet-based defamation to obtain justice.

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<sup>191</sup> *Id.* at 293, 952 N.E.2d at 1020, 929 N.Y.S.2d at 28 (Lippman, C.J., dissenting).

<sup>192</sup> 50 AM. JUR. 2D *Libel and Slander* § 202 (2012) (“[C]ommunication is defamatory per se if it imputes misconduct in a person’s trade, profession, office, or occupation.”).