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The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation

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THE EROSION OF PUBLISHER LIABILITY IN AMERICAN LAW, SECTION 230, AND THE FUTURE OF ONLINE CURATION

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Abstract

As internet businesses started to emerge in the 1990s, online content distributors were taken to court for material they published or republished. While the court in Cubby v. CompuServe *found that the internet-based company was not liable, another court arrived at the opposite conclusion in* Stratton Oakmont v. Prodigy. *Congress resolved the ambiguity by enacting the Communications Decency Act of 1996, of which § 230 established a broad liability shield for online content distributors. Two decades later, § 230 has come under scrutiny, and many critics and lawmakers characterize it as a drastic deviation from common law that requires correction. However, an examination of the relevant case law reveals that courts had instead narrowed liability for publishers, republishers, and distributors for decades—eventually culminating in the* Cubby *decision. Section 230, we suggest, codified this process by establishing a publisher liability regime that likely would have emerged in common law. Based on this legal history, we discuss the circumstances under which mandated online content takedown could be prudent and practicable as well as those under which continuing § 230 protections may prove necessary.*

Introduction

We are more than two decades into the era of "cheap speech."[1] The relatively limited media world of newspapers, pamphlets, and three broadcast networks has given way to media abundance from cable and satellite television and—most significantly—internet distribution. Online content distributors (who act as "intermediaries" between content producers and consumers by providing a platform for content without actually creating it) such as social media sites, app stores, search engines, and

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1. *See generally* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

internet service providers (ISPs) often use intentional, semi-automated, and iterative processes to decide what content to omit and transmit. Consequently, as media theorist Clay Shirky notes, the centuries-old formula of "Filter-then-publish," has been reversed in the internet age: "[P]ublish-then-filter."[2] This rapid shift in editing from "selection" to "curation" puts immense stress on traditional publication law and liability.

To expressly protect online content distributors from punitive liability lawsuits over users' posts, Congress created a broad liability shield in section 230 of the 1996 Communications Decency Act. In recent years, this liability shield has come under scrutiny from lawmakers and advocates across the political spectrum. One primary criticism is that § 230 is a radical departure from traditional publication law. This legal reversal, critics say, makes harassing or antisocial behavior profitable and leads tech companies to discriminate against political opponents or censure unpopular viewpoints. Their proposed solutions often involve repealing § 230 or narrowing its coverage to increase the liability of online content distributors for users' behavior and content.[3]

This Article explores the debate over online content distributors' liability. In particular, it draws on decades of legal trends and defamation cases to show that § 230 is not the deviation from common-law liability that it is often characterized as. Courts rarely recognize strict liability for distribution of defamatory content.[4] In fact, many courts have recognized and endorsed "conduit liability" and the related "wire service defense," which represent powerful protections for newspapers, cable operators, and broadcasters.

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2. CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS 81, 98 (2008). This is of course a simplification of the actual process of content moderation that often engages in multiple rounds of publication and filtering for various content.

3. *See, e.g.*, Press Release, Josh Hawley, Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies (June 19, 2019), https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies.

4. *See* Lewis v. Time Inc., 83 F.R.D. 455, 463 (E.D. Cal. 1979) ("The common thread in these cases is that there can be no liability absent scienter. The requirement of scienter comports with the traditional rule that a republisher cannot be held liable unless he had knowledge of the defamatory content, and satisfies the federal constitutional rule against liability without fault.") (citation omitted).

Second, much like the Supreme Court "constitutionalized" defamation law in *New York Times Co. v. Sullivan*,[5] which protected direct publishers from liability, First Amendment considerations would likely lead courts to a § 230-like liability protection for republishers such as online distributors—even in the absence of the law.[6] While a conduit liability regime would have gradually emerged for online content distributors in the absence of § 230, we conclude the law had—and continues to have—a salutary effect on the development of online services. Section 230 protected the nascent internet industry at a critical time, and a top-to-bottom reformulation today would impose significant transition costs as courts develop an appropriate liability regime.

Part I introduces cases in which courts limited strict liability for tortious content distribution by media distributors in the decades before § 230's implementation. This history suggests that the codification of broad publisher liability in § 230 simply accelerated the prevailing trend in common law. Part II describes the two cases that prompted Congress to enact § 230, as well as subsequent cases that further shaped the liability of online content distributors. Part II closes by documenting the increasing public pressure to repeal or modify § 230. Finally, Part III discusses the circumstances in which statutory departures from both § 230 and conduit liability would be prudent and practicable while preserving free expression online.

I. The Erosion of Publisher and Distributor Liability

A popular view states that § 230 "upended a set of principles enshrined in common law doctrines" developed for the offline world.[7] The notion

5. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); *see* Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 825 (1984).

6. *See, e.g.*, Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2032–36 (2018) (arguing that "imposing defamation liability on internet intermediaries is unconstitutional" because of the collateral censorship) [hereinafter Note, *Section 230 as First Amendment Rule*].

7. David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 411 (2010); *see also* Mike Masnick, *Nancy Pelosi Joins Ted Cruz and Louis Gohmert in Attacking CDA 230*, TECHDIRT (Apr. 12, 2019, 9:42 AM), https://www.techdirt.com/articles/20190411/18521741986/nancy-pelosi-joins-ted-cruz-louis-gohmert-attacking-cda-230.shtml (quoting House Speaker Nancy Pelosi's characterization of § 230 as "a gift" to tech companies).

that, absent § 230, online platforms would be "liable like the rest of us"[8] is a common one that reflects the traditional view of publisher liability.[9] Traditionally, as with other torts,[10] publishers were often held strictly liable for the content they published, even if they did not know that a given statement was defamatory or otherwise tortious.[11] However, courts began eroding this traditional strict liability regime more than six decades before § 230 was enacted in 1996.[12]

This Part traces that legal development away from strict liability, and toward fault-based liability, not just for online intermediaries but, more generally, for distributors and publishers. Before § 230 was passed, courts granted even non-common carriers and media outlets broad liability protection for content they republished or transmitted.[13]

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8. Mark Sullivan, *The 1996 Law That Made the Web Is in the Crosshairs*, FAST CO. (Nov. 29, 2018), https://www.fastcompany.com/90273352/maybe-its-time-to-take-away-the-outdated-loophole-that-big-tech-exploits (quoting Senator Ted Cruz).

9. Gonzalez v. Google, Inc., 282 F. Supp. 3d 1150, 1157 (N.D. Cal. 2017) ("In the absence of the protection afforded by section 230(c)(1), one who published or distributed speech online 'could be held liable for defamation even if he or she was not the author of defamatory text, and . . . at least with regard to publishers, even if unaware of the statement.'") (quoting Batzel v. Smith, 333 F.3d 1018, 1026–27 (9th Cir. 2003)).

10. LAURENCE H. ELDREDGE, MODERN TORT PROBLEMS 28 (1941).

11. *See, e.g.*, Robert A. Leflar, *Radio and TV Defamation: "Fault" or Strict Liability?*, 15 OHIO ST. L.J. 252, 254 (1954) ("The law of libel and slander . . . . is ordinarily thought of as a body of law grounded on 'absolute liability.'"). In the early formation of the law, as far back as pre-Norman England, as one commentator puts it, "There is no doubt that all of the liability in those days was absolute liability." ELDREDGE, *supra* note 10, at 28.

12. Today, even an online "book publisher" will be found not liable for the content of published material if that publisher has only a "minute level of involvement with the author of the alleged defamatory material." Sandler v. Calcagni, 565 F. Supp. 2d 184, 187, 194 (D. Me. 2008). We're grateful to an anonymous reviewer for making note of this case.

13. Our analysis focuses on liability for distribution of defamatory and libelous materials, but negligence and fault-based liability also undermined strict liability for copyright infringement. *See, e.g.*, Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1370, 1372 (N.D. Cal. 1995) (acknowledging that the copyright statutes impose strict liability but declining to hold an internet access provider liable for the copying and distribution of copyrighted content); *see also* Patrick R. Goold, *Is Copyright Infringement a Strict Liability Tort?*, 30 BERKELEY TECH. L.J. 305, 309 (2015) ("Copyright infringement, according to most judges and commentators, is a strict liability tort."). *But see* Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993) (granting partial summary judgment for plaintiff where defendant online bulletin board operator distributed plaintiff's copyrighted content).

Under the traditional legal standard, "every repetition of a defamatory statement is considered a publication,"[14] and republishers were as liable as the original author.[15] The first Restatement of Torts articulated this traditional strict liability rule.[16] "Publisher" was interpreted broadly, and courts that hewed to this traditional view held liable bulletin board owners,[17] business partners of a publisher,[18] and even tavern owners who tolerated defamatory writing on the walls.[19]

Over time, however, many courts held that a republisher was more like a distributor and therefore could not be held liable for content others created absent a showing of fault.[20] A sliding scale for liability developed, based on the degree to which the transmitter or publisher edited the statement. Courts have even recognized liability protection for "wire service liability" or "conduit liability" to non-common carriers like broadcasters and print publications.[21] Two considerations drive liability protection for distributors and publishers: a desire for practical legal rules and free speech norms.

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14. Zeran v. Am. Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 799 (5th ed. 1984)).

15. Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65, 95 (1992); *see also Zeran*, 129 F.3d at 332; *see, e.g.*, Leflar, *supra* note 11, at 254 ("The law of libel and slander . . . . is ordinarily thought of as a body of law grounded on 'absolute liability.'"). Such standards apply widely not only to standard reporting but also to opinion pieces and even fictional works. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 18–21 (1990); John Preston, *The Murky World of Literary Libel*, TELEGRAPH (July 14, 2013, 7:00 AM BST), http://www.telegraph.co.uk/culture/books/booknews/10172292/The-murky-world-of-literary-libel.html.

16. RESTATEMENT (FIRST) OF TORTS: INTENTION § 580 (AM. LAW INST. 1938); *see also* ELDREDGE, *supra* note 10, at 51 ("The nature of liability for defamation is set forth in Section 580 of the *Restatement of Torts* where it definitely imposes an absolute liability.").

17. Fogg v. Bos. & L.R. Co., 20 N.E. 109, 110 (Mass. 1889) (holding defendant railroad that published defamatory statement by placing it on company bulletin board liable).

18. Woodling v. Knickerbocker, 17 N.W. 387, 388 (Minn. 1883) ("If he authorized, incited, or encouraged any person to do it; or if, having authority to forbid it, he permitted it; or, having authority to remove them, he allowed them to remain,-the act was his.").

19. Hellar v. Bianco, 244 P.2d 757, 759 (Cal. Dist. Ct. App. 1952) ("The theory is that by knowingly permitting such matter to remain after reasonable opportunity to remove the same the owner *of the wall* . . . is guilty of republication of the libel.") (emphasis added).

20. *See, e.g.*, Church of Scientology of Minn. v. Minn. State Med. Ass'n Found., 264 N.W.2d 152, 156 (Minn. 1978) (requiring that republisher either knew or should have known of defamatory nature of the statements transmitted protects libraries and vendors of books, magazines, and newspapers).

21. Auvil v. CBS "60 Minutes," 800 F. Supp. 928, 930–931 (E.D. Wash. 1992) (recognizing conduit liability for a broadcast TV station); *Church of Scientology*, 264 N.W.2d at 156 (holding that a medical association magazine was a conduit, protected from a

A. Practical Considerations Limiting Publisher and Distributor Liability

Even in the latter part of the nineteenth century, the emerging law of negligence was undercutting strict liability for torts.[22] The erosion of strict liability was premised on practical considerations and potential for economic harm.[23] More specifically, commentators recognize that there was a desire to give these new-medium publishers more leeway in a growing industry.[24] This negligence law trend away from strict liability was then extended to defamation publication and republication lawsuits.

1. The Wire Service Defense

With the emergence of news services like the Associated Press during the telegraph era, courts recognized that earlier liability theories for republication required modification.[25] For instance, in the seminal 1933 case of *Layne v. Tribune Co.*, the Florida Supreme Court declined to hold a newspaper strictly liable for republishing a defamatory dispatch from a news service.[26] Later cases regarded *Layne* as creating the "wire service defense."[27] The court held that a paper is only liable if "the publisher . . .

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defamation suit); Van Straten v. Milwaukee Journal Newspaper-Publisher, 447 N.W.2d 105, 112 (Wis. Ct. App. 1989) (granting wire service defense to newspaper journalists who relied on statements from jail personnel).

22. *See* ELDREDGE, *supra* note 10, at 32 ("There is practically no law of negligence prior to the nineteenth century. The greatest development has been since 1875."); *see also* Summit Hotel Co. v. Nat'l Broad. Co., 8 A.2d 302, 304 (Pa. 1939).

23. One motivation of this legal development was that strict liability was too punitive to young industries. Scholars like Professor Laurence H. Eldredge tied the growth of negligence legal theories to the need to protect "infant industries" and the development of an industrial sector. ELDREDGE, *supra* note 10, at 32 ("Another aspect of the developing negligence law, was the thought that undue burdens should not stifle infant industries, so that any theory of absolute liability was deemed inconsistent with this developing industrial community.").

24. *See id.*

25. *See, e.g.*, Layne v. Tribune Co., 146 So. 234, 237 (Fla. 1933) ("[C]ourts can, and must, take judicial notice of the fact that in printing an associated press, or other press service dispatch, of a purported news happening, emanating from other places or localities, the article or news item, as reproduced and published locally, is not considered as the original or voluntary composition of the newspaper publisher, who merely reproduces it in his daily news columns in the form in which it has been received, but is rather regarded by the public as a mere repetition of a publication that has already been made by its real authors in their course of disseminating the news.").

26. *Id.* at 238–39.

27. *See, e.g.*, Nelson v. Associated Press, Inc., 667 F. Supp. 1468, 1476–77 (S.D. Fla. 1987) (holding that *Newsweek* magazine was entitled to the wire service defense); MacGregor v. Miami Herald Publ'g Co., 119 So. 2d 85, 86–88 (Fla. Dist. Ct. App. 1960);

acted in a negligent, reckless, or careless manner in reproducing" the story.[28] The court grounded this holding in the practical and economic realities of distributing the news and the public need for efficient, low-cost delivery of news:

> No newspaper could afford to warrant the absolute authenticity of every item of its news, nor assume in advance the burden of specially verifying every item of news reported to it by established news gathering agencies, and continue to discharge with efficiency and promptness the demands of modern necessity for prompt publication, if publication is to be had at all.[29]

The *Layne* court also drew upon earlier legal principles when excusing the newspaper of liability under this defense:

> Those are numerous authorities, most of them of early date, which are to the effect that one who hears a slander has a legal right to repeat it, if he does so in the same words, and at the same time gives his authority for the statement, because of the rebuttal of any presumption of malice in such cases.[30]

The *Layne* decision and its "practicality argument" gained prominence as mass media and broadcast developed. According to contemporary accounts, within the first few decades of TV and radio, legal commentators were evenly split as to whether strict liability should apply to broadcasters, or whether they were more analogous to "disseminators" like bookstores, newsstands, and libraries, where fault was needed to impose liability.[31]

Appleby v. Daily Hampshire Gazette, 478 N.E.2d 721, 725–26 (Mass. 1985); *accord* Rakofsky v. Wash. Post, No. 105573/11, 2013 WL 1975654, at *12 (N.Y. Sup. Ct. Apr. 29, 2013) (recognizing wire service defense for a plaintiff who published summaries of news stories).

28. *Layne*, 146 So. at 238.

29. *Id.* at 239.

30. *Id.* at 237 (citing Waters v. Jones, 3 Port. (Ala.) 442 (Ala. 1836); Johnson v. St. Louis Dispatch Co., 65 Mo. 539 (Mo. 1877)).

31. *See, e.g.*, Kelly v. Hoffman, 61 A.2d 143, 145–46 (N.J. 1948) ("There are two schools of thought as to the act of publishing the defamatory statement by the broadcasting medium—one of so-called absolute liability . . . and the other of liability based upon negligence . . . .") (citing Sorenson v. Wood, 243 N.W. 82, 83 (Neb. 1932); Summit Hotel Co. v. Nat'l Broad. Co., 8 A.2d 302 (Pa. 1939)); Leflar, *supra* note 11, at 257 n.22 (citing cases on both sides of the dispute). The first Restatement of Torts acknowledged the broadcast issue but refused to take a position on it. RESTATEMENT (FIRST) OF TORTS: WHAT CONSTITUTES PUBLICATION § 577 (caveat) (AM. LAW INST. 1938) ("The Institute expresses

2. Other Republication Defenses

Buttressed by state laws,[32] *Layne* precipitated a trend away from the traditional view of strict publisher liability in the context of republication. For instance, only two years after *Layne*, the Pennsylvania Supreme Court announced a similar negligence rule for radio broadcast, citing the practical burdens of strict liability.[33] In *Summit Hotel Co. v. NBC*, a Pennsylvania hotel brought a defamation lawsuit against radio broadcaster, NBC, in state court.[34] It did so after the host on one of NBC's sponsored programs extemporaneously remarked to an interview guest that a certain hotel was "a rotten hotel."[35] The lower court instructed the jury that the statement was slanderous per se and held NBC liable.[36]

On appeal, the Pennsylvania Supreme Court reversed and created a new tort: radio defamation.[37] This new tort deviated from strict liability for publishers of libel or slander and created a negligence standard. The court held that a broadcaster that leases airtime cannot be held liable for an impromptu defamatory statement if the broadcaster exercised due care in selecting the lessee, as "there was no possible way in which [NBC] could have anticipated or prevented the remark."[38]

Like the *Layne* court, the Pennsylvania Supreme Court cited the economic difficulties that would result if strict liability were imposed: "A rule should be applied which will not impose too heavy a burden on the industry, and yet will secure a high measure of protection to the public or those who may be injured."[39] The court also discussed the fact that publication law was trending away from strict liability and toward a negligence standard.[40]

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no opinion as to whether the proprietors of a radio broadcasting station are relieved from liability for a defamatory broadcast by a person not in their employ if they could not have prevented the publication by the exercise of reasonable care, or whether, as an original publisher, they are liable irrespective of the precautions taken to prevent the defamatory publication."); *see also id.* § 581 cmt. f.

32. *See* Leflar, *supra* note 11, at 267–71.

33. *Summit Hotel*, 8 A.2d at 310–11.

34. *Id.* at 303.

35. *Id.* at 303 n.1.

36. *Id.* at 303.

37. *Id.* at 312; Leflar, *supra* note 11, at 262.

38. *Summit Hotel*, 8 A.2d at 312.

39. *Id.* at 310.

40. *Id.* at 304 ("A tort today implies fault or wrong. Tort liability must be founded upon some blameworthy conduct, or lack of due care resulting in the violation of a duty owing to others."); *see also* Kelly v. Hoffman, 61 A.2d 143, 147 (N.J. 1948) (finding that broadcasters

Fifteen years after *Layne*, a legal commentator noted that "the current trend is strongly away from strict liabilty [sic] as the governing rule in the field of radio and television defamation."[41] A national campaign by broadcasters in the early 1950s led most states to pass laws that eliminated strict liability for on-air defamation[42] and typically absolved broadcasters from liability if they exercised due care.[43] This legal trend and these statutes proved to be quite useful at limiting costly litigation over rebroadcasts of tortious material; in fact, decades later, a federal court failed to find any case law interpreting these state broadcaster liability laws.[44]

3. The Expansion of the Wire Service Defense to Speakers

Other state and federal courts recognize a wire service defense that is broader than the rule in *Layne*—one that is not limited to republishing wire services and news outlets.[45] The republication defense in Minnesota, New York, North Carolina, Georgia, and other states, for instance, is not limited to wire services when the original source relied on is apparent.[46] The Massachusetts Appeals Court justified the wire service defense's broader coverage in the following way: "It would pose an impermissible burden upon the media and the courts to force them to make subtle

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are "disseminators"—thus no absolute liability—and must exercise reasonable care to avoid liability for on-air defamatory statements).

41. Leflar, *supra* note 11, at 267.

42. *Id.* at 267–71.

43. *Id.* at 267–70. Judge Learned Hand defined due care in this way: "The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk." Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940).

44. Merco Joint Venture v. Kaufman, 923 F. Supp. 924, 927 (W.D. Tex. 1996).

45. *See, e.g.*, Jewell v. NYP Holdings, Inc., 23 F. Supp. 2d 348, 369–70 (S.D.N.Y. 1998) ("The New York rule, on its face, is not so limited [as *Layne*] and, indeed, has been applied in a number of cases where the republished material was originally published by a source other than a wire service.").

46. Chaiken v. VV Pub'g Corp., 119 F.3d 1018, 1032 (2d Cir. 1997) (applying the defense where the original source was a noncontract writer for the Village Voice with a "sound reputation"); Church of Scientology of Minn. v. Minn. State Med. Ass'n Found., 264 N.W.2d 152, 156 (Minn. 1978) (holding that a medical association magazine was a conduit, protected from a defamation suit); *Jewell*, 23 F. Supp. 2d at 370–71; McKinney v. Avery Journal, Inc., 393 S.E.2d 295, 297–98 (N.C. Ct. App. 1990) (granting wire service defense to a journalist who relied on daily newspapers for a story in addition to wire services); Van Straten v. Milwaukee Journal Newspaper-Publisher, 447 N.W.2d 105, 112 (Wis. Ct. App. 1989) (granting wire service defense to newspaper journalists who relied on statements from jail personnel); *see also* Cole v. Star Tribune, 581 N.W.2d 364, 369 (Minn. Ct. App. 1998).

distinctions between published material that must be independently verified and that which does not."[47]

Even speakers—those who curate and edit content[48]—could avail themselves of the "wire service defense" in the publication of defamatory content. For instance, in *Nelson v. Associated Press*, a professional psychic brought a defamation lawsuit against several media outlets, including *Newsweek*, for publishing damaging stories about her business.[49] But the *Newsweek* story at issue was not a wire service story. Rather, the magazine had contracted with and published a story from a journalist who had written an original story based on defamatory statements in wire service and news reports.[50] Despite the fact this was an original story, not a "mere reproduction" like the one at issue in *Layne*,[51] the court held that *Newsweek* was protected by the wire service defense to libel.[52] The protections within the wire service defense expanded and the doctrine grew to encompass the new, developing media outlets.

4. Conduit Liability for Mass Media

The wire service defense was later extended to television stations with the ability to edit, curate, and terminate programs.[53] As the defense was applied to new types of media publishers, it was renamed "conduit liability"—akin to the liability of common carriers such as telephone and telegraph operators.[54] However, courts very rarely impose liability on

47. Reilly v. Associated Press, 797 N.E.2d 1204, 1217 (Mass. App. Ct. 2003).

48. City of Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494 (1986) (finding that "exercising editorial discretion over which stations or programs to include in its repertoire" is speech by cable operators).

49. Nelson v. Associated Press, Inc., 667 F. Supp. 1468, 1471 (S.D. Fla. 1987).

50. *Id.*

51. Layne v. Tribune Co., 146 So. 234, 237 (Fla. 1933).

52. *Nelson*, 667 F. Supp. at 1476–77. This case bears close resemblance to the circumstances in *Blumenthal v. Drudge*, where the court dismissed a defamation case against AOL, despite the fact that AOL had commissioned the underlying story. 992 F. Supp. 44, 51–53 (D.D.C. 1998).

53. *See* Kapetanovic v. Stephen J. Cannell Prods., Inc., No. 97 C 2224, 2002 WL 475193, at *7 (N.D. Ill. Mar. 27, 2002) (extending wire service defense to a TV station).

54. RESTATEMENT (SECOND) OF TORTS: PROVIDING MEANS OF PUBLICATION § 612 cmt. g (AM. LAW INST. 1977). According to the Restatement,

> A public utility under a duty to transmit messages is privileged to do so, even though it knows the message to be false and defamatory, unless
>
> (a) the sender of the message is not privileged to send it, and
>
> (b) the agent who transmits the message knows or has reason to know that the sender is not privileged to publish it.

conduits, even when the conduit operator has knowledge that tortious material is being transmitted.[55] As one scholar puts it, "In practical terms, conduits almost never face liability for third-party speech."[56] Though it has traditionally been reserved for common carriers, courts have applied conduit liability to non-common carriers such as broadcasters and internet bulletin boards.[57] As courts have recognized in other TV programming cases, so long as TV broadcasters have "absolute non-involvement with the underlying broadcast," they can avail themselves of the conduit defense to liability.[58] Complaints against conduits are typically dismissed at the summary judgment stage.[59]

In the 1992 Washington State case of *Auvil v. CBS 60 Minutes*, a class of 4700 apple growers alleged defamation against three local CBS affiliates for running a *60 Minutes* program about chemicals being used in the apple-growing industry.[60] As in *Layne* and its progeny, the court declined to impose liability because of the burden it would impose on outlets.[61] The court reasoned that the plaintiffs' theory, if accepted, would have the following effect:

> [It] would force the creation of full time editorial boards at local stations throughout the country which possess sufficient knowledge, legal acumen and access to experts to continually monitor incoming transmissions and exercise on-the-spot discretionary calls or face $75 million dollar lawsuits at every turn. That is not realistic.[62]

Id. § 612(2).

55. *Id.*; *see also* Anderson v. N.Y. Tel. Co., 320 N.E.2d 647, 649 (N.Y. 1974) (finding telephone company not liable for a recorded defamatory answering machine message even when the company knew about the defamatory message).

56. Ardia, *supra* note 7, at 400 (citing *Anderson*, 320 N.E.2d at 649).

57. Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc., 931 F. Supp. 1487, 1492 (D. Ariz. 1996); Merco Joint Venture v. Kaufman, 923 F. Supp. 924, 929–30 (W.D. Tex. 1996); Auvil v. CBS "60 Minutes," 800 F. Supp. 928, 930–31 (E.D. Wash. 1992); Lunney v. Prodigy Servs. Co., 723 N.E.2d 539 (N.Y. 1999); *see also* Kapetanovic v. Stephen J. Cannell Prods., Inc., No. 97 C 2224, 2002 WL 475193, at *7 (N.D. Ill. Mar. 27, 2002) (extending wire service defense to a TV station).

58. *Med. Lab.*, 931 F. Supp. at 1492; *see also Merco*, 923 F. Supp. at 929–30 (recognizing conduit liability in granting summary judgment to defendant TV station for broadcasting a program with defamatory content).

59. *See, e.g.*, *Merco*, 923 F. Supp. at 929–30.

60. *Auvil*, 800 F. Supp. at 930–31.

61. *Id.* at 931–32.

62. *Id.* at 931.

Critically, the court recognized that the CBS affiliates "had the power to" exercise editorial control over the broadcast and "in fact occasionally [did] censor programming . . . for one reason or another" when the affiliate "believe[d] the content unsuitable for local consumption."[63] Despite having the power to edit the underlying content and occasionally exercising that editorial control over content, media companies (like broadcasters) are still subject to mere "conduit liability."[64]

B. First Amendment Considerations Limiting Publisher and Distributor Liability

Concern for practicality was not the only factor in the erosion of strict liability for republishers and the move toward distributor and, in some cases, conduit liability. Courts also expanded legal protection of intermediaries and publishers on First Amendment grounds, because liability chilled the free exchange of ideas and criticism.[65]

This "constitutionalizing" of defamation and republication law occurred in the latter half of the twentieth century. As Leflar noted in 1954, amid the rise of broadcast radio and TV, even broadcaster liability could chill speech:

> If, however, no amount of care could guard against the threatened harm, the preventive significance [of negligence liability] is lessened; it is limited to the possibility of foregoing the dangerous activity altogether. When the dangerous activity is the dissemination of ideas and information, and the effect in practice of foregoing it would be that certain speakers might be cut off the air altogther [sic], thus barring legitimate speech in order to take no chances on the possibility of something

63. *Id.* Courts also recognize free speech norms in § 230 cases. *See* Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 29 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017) (noting that "First Amendment values . . . drive" § 230's creation).

64. *Auvil*, 800 F. Supp. at 931–32. Similarly, a federal district court recognized the wire service defense to the Associated Press (AP), even though the AP made edits before transmitting a defamatory story. Winn v. Associated Press, 903 F. Supp. 575, 577, 579–80 (S.D.N.Y. 1995).

65. Ardia, *supra* note 7, at 401–06. Eric Goldman makes a compelling case for why § 230 is superior to common law and constitutional protection of online providers. Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33 (2019). However, many of his points deal with the increased liability providers would face under distributor liability (scienter, commercial speech, constitutional avoidance, etc.). *Id.* at 36–39. Conduit liability is more protective than distributor liability and resembles § 230 in that nearly every complaint can be dismissed. *Id.* at 39–42.

> illegitimate being said, the virtue of this pressure toward prevention fades rapidly and almost disappears.[66]

This liability protection for media intermediaries emerged because the difficulty in determining the lawfulness of contributors' speech created practical concerns, and broad application of strict liability threatened to produce a chilling effect on speech. In 1959, in *Farmers Educational & Cooperative Union v. WDAY, Inc.*, the Supreme Court held that a broadcaster was immune from liability for defamation made by a political candidate on the air:

> Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question, involving as it does, consideration of various legal defenses . . . . Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution.[67]

That same year, in *Smith v. California*, the Supreme Court held that imposing strict liability for obscene materials in bookstores is unconstitutional because doing so would deprive the public of protected material.[68] Recognizing the deleterious effect a strict liability standard could have, the Court reasoned, "If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed."[69]

The Supreme Court continued this trend in *Manual Enterprises, Inc. v. Day*.[70] In 1962, the Court held that the publisher of an erotic homosexual magazine was not civilly liable for "obscene advertising" under the Comstock Act when it published and distributed ads for companies that were being prosecuted for distributing obscene material.[71] The Court relied on both the practicality and free speech justifications for striking down the law:

> Since publishers cannot practicably be expected to investigate each of their advertisers, and since the economic consequences of an order barring even a single issue of a periodical from the

66. Leflar, *supra* note 11, at 265.
67. 360 U.S. 525, 530–31 (1959).
68. 361 U.S. 147, 153 (1959).
69. *Id.*
70. 370 U.S. 478 (1962).
71. *Id.* at 491–95.

> mails might entail heavy financial sacrifice, a magazine publisher might refrain from accepting advertisements from those whose own materials could conceivably be deemed objectionable by the Post Office Department. This would deprive such materials, which might otherwise be entitled to constitutional protection, of a legitimate and recognized avenue of access to the public.[72]

Two years later, in *New York Times Co. v. Sullivan*, the Supreme Court decided the first of what has come to be known as "media defendant" cases, which protect robust and uninhibited public communication.[73] To prevail on defamation claims under the fault-based approach, public officials and public figures must prove that defendants acted with "actual malice."[74] In later cases, the Court expanded the fault requirement to cases involving non-media defendants[75] and even private plaintiffs.[76]

The First Amendment has also been cited for the recognition of the wire service defense in mass media. In *Medical Laboratory Management Consultants v. ABC*, the co-owner of a medical testing facility sued the local broadcast station for airing an allegedly defamatory story.[77] The federal district court cited the wire service defense's First Amendment purposes in holding that that the defendant—operating as a "mere conduit" that did not in any way contribute to producing the story—could avail itself of the defense.[78] In short, laws that effectively require distributors and republishers to follow impractical content moderation practices contravene these trends in First Amendment jurisprudence.

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72. *Id.* at 493.

73. 376 U.S. 254, 270, 282 (1964); *see* Gerald R. Smith, *Of Malice and Men: The Law of Defamation*, 27 VAL. U. L. REV. 39, 40 (1992).

74. *N.Y. Times*, 376 U.S. at 283–84.

75. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762–63 (1985) (credit reporting agency).

76. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346–47 (1974). A private-figure plaintiff, operating under the prevailing negligence standard, need only show that the republisher's effort is less than reasonable. *See, e.g.*, Brown v. Kelly Broad. Co., 771 P.2d 406, 424–25, 430 (Cal. 1989).

77. 931 F. Supp. 1487, 1489 (D. Ariz. 1996).

78. *Id.* at 1492 ("The wire service defense is consistent with modern First Amendment jurisprudence.").

II. Section 230 and the Creation of Modern Internet Law

Under the traditional view of publisher liability, publishers are presumed to know the content of materials that they publish, and they can therefore be held strictly liable for tort violations such as libel and defamation[79] or copyright violations.[80] As recently as the 1990s, legal scholars still debated whether the publication liability of internet intermediaries resembled that of "print publishers, broadcasters, bookstores, libraries, physical bulletin board operators, [or] common carriers."[81] Section 230 brought some certainty to that debate and extended liability protection that resembles the conduit liability scheme for common carriers.

A. Divergent Liability Regimes for the Early Internet

In the 1990s, two New York courts—one federal and one state—encountered the same question: are online intermediaries liable for defamatory content posted by their users? The courts arrived at divergent opinions, and before other courts could develop a consensus on the issue in a common-law manner, Congress intervened to deliver legal certainty to young internet companies and the broader World Wide Web.

In *Cubby v. CompuServe*, a 1991 federal case, the developers of a computer database sued CompuServe for libel—the publication of defamatory statements.[82] CompuServe operated as a host for many internet forums and bulletin boards, and a user denigrated the plaintiffs' business practices on one of CompuServe's gossip forums.[83] CompuServe moved for summary judgment on the plaintiffs' claim, arguing that it was a distributor (and not a publisher) of the statements.[84] The court agreed that CompuServe was a distributor and granted summary judgment in its favor because

79. Cianci v. New Times Publ'g Co., 639 F.2d 54, 60–61 (2d Cir. 1980); *see also* Smith v. Utley, 65 N.W. 744, 746 (Wis. 1896) (holding managing editor of newspaper liable for publication of libelous article whether or not he actually knew of publication because matter was constructively under editor's supervision).

80. Buck v. Jewell-La Salle Realty Co., 283 U.S. 191, 198–99 (1931) (holding that copyright infringement is a strict liability tort).

81. Kean J. DeCarlo, Note, *Tilting at Windmills: Defamation and the Private Person in Cyberspace*, 13 GA. ST. U. L. REV. 547, 551 (1997). Even these analogues cannot answer the question of liability exposure for internet intermediaries, as there was an additional sliding scale of liability for distributors of content, based on the amount of curation and editorial control the intermediary exercised. *Id.* at 552.

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

83. *Id.* at 137–38.

84. *Id.*

CompuServe "neither knew nor had reason to know of the allegedly defamatory . . . statements."[85]

Though the facts in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, an unpublished decision from a New York state court in 1995, closely mirrored those in *Cubby*, the court reached a very different conclusion.[86] In *Stratton Oakmont*, a securities investment banking firm sued Prodigy, an online operator of bulletin boards and forums, for publishing a forum user's libelous statements.[87] The court distinguished the case from *Cubby* on the grounds that Prodigy exercised more editorial control of user posts than CompuServe exercised at the time of *Cubby*.[88] The court held that Prodigy was liable for users' content because the Prodigy operators engaged in moderation of user content, which equated to the company exercising editorial control.[89]

After *Stratton Oakmont*, online companies faced two undesirable options for limiting their liability for users' content: (1) engage in costly, constant monitoring of user content and take down questionable content; or (2) abandon all editorial control, like a common carrier, and leave all content online, no matter how offensive.

Congress resolved this dilemma in 1996 when it passed the Communications Decency Act (CDA). Though the CDA was originally developed as an attempt to protect children by limiting access to pornography and obscene material online,[90] two Representatives proposed an amendment to the CDA in direct response to concerns that *Stratton Oakmont* threatened to cripple then-nascent internet technology.[91] The amendment was incorporated into the CDA during conference, passed as

85. *Id.* at 141.

86. *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., Index No. 031063/94, 23 Media L. Rep. (BNA) 1794, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, 47 U.S.C. § 230, *as recognized in* Shiamil v. Real Estate Grp. of N.Y., Inc., 952 N.E.2d 1011 (N.Y. 2011).

87. *Id.* at 1794–95, 1995 WL 323710, at *1–2.

88. *Id.* at 1797, 1995 WL 323710, at *4. However, Prodigy's general counsel flatly denies that they were screening postings: Prodigy merely had software that blocked posts containing one of the "seven dirty words." Marc Jacobson, *Prodigy: It May Be Many Things to Many People, but, It Is Not a Publisher for Purposes of Libel, and Other Opinions*, 11 ST. JOHN'S J. LEGAL COMMENT. 673, 676–77 (1996).

89. *Stratton Oakmont*, 23 Media L. Rep. at 1798, 1995 WL 323710, at *5.

90. *See* Steven Levy, *No Place for Kids?*, NEWSWEEK (July 2, 1995, 8:00 PM EDT), http://www.newsweek.com/no-place-kids-184766.

91. *CDA 230: Legislative History*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/cda230/legislative-history (last visited Dec. 10, 2019).

part of the larger 1996 Telecommunications Act, and eventually codified in § 230.[92]

Section 230 was distinct from the anti-indecency regulatory framework underlying the rest of the CDA. First, § 230 announced a national policy to "encourage the unfettered and unregulated development of free speech on the Internet."[93] Second, § 230's drafters sought to establish a system whereby online service providers would develop and enforce their own standards while allowing consumers to select the appropriate standards for their needs.[94] Therefore, § 230 granted civil immunity to internet intermediaries for the content that users generate so long as they notify users of available parental control options.[95] Critically, the law expressly established that internet intermediaries should not "be treated as the publisher or speaker of any information provided by" a third party;[96] generally, only content creators are exposed to liability.

B. Broad Coverage of Section 230 Liability Protection

In *Reno v. ACLU*, the Supreme Court struck down nearly all of the CDA as content-based restrictions on speech that violated the First Amendment but left § 230 liability protection untouched.[97] Despite surviving, § 230 faced numerous challenges in the years that followed. But courts interpreted the liability protection broadly and thus allowed online moderation standards to develop.

1. Defamation

The first major challenge to § 230 liability protection came in *Zeran v. America Online, Inc.* in 1997.[98] A prankster, who posed as a man named Kenneth Zeran[99] on an America Online (AOL)-affiliated message board, advertised products with tasteless slogans about the Oklahoma City

92. *See id.*

93. *Id.* (quoting Batzel v. Smith, 333 F.3d 1018, 1027 (9th Cir. 2003)).

94. *Id.*

95. 47 U.S.C. § 230(c)(2), (d) (Westlaw through Pub. L. No. 116-90).

96. *Id.* § 230(c)(1). As discussed below, the law also required compliance with relevant federal criminal laws, such as those governing child pornography, sex trafficking, and copyright law. *Id.* § 230(e).

97. *See* 521 U.S. 844 (1997).

98. 129 F.3d 327 (4th Cir. 1997).

99. Kenneth Zeran operated a business in Seattle, Washington at the time the prankster uploaded the postings. *See id.* at 329; *see also* Steven M. Cordero, Comment, *Damnum Absque Injuria:* Zeran v. AOL *and Cyberspace Defamation Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 775, 776 (1999).

bombing.[100] The imposter posted Zeran's phone number for interested buyers, and Zeran soon began receiving media attention as well as harassing and threatening phone calls.[101] Zeran contacted AOL to request that the posts be removed, but over the next few days more posts appeared, and the harassment continued.[102] Zeran filed suit against AOL, arguing that while § 230 immunized AOL from publisher liability, the law did not immunize AOL from distributor liability.[103]

After losing in federal district court,[104] Zeran appealed the decision to the Fourth Circuit.[105] The Fourth Circuit found that § 230 protected AOL from distributor liability because its purpose was to "create[] a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service," in order "to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."[106] The court held that distributor liability "is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230."[107]

2. Product Authentication

The CDA text did not limit § 230 liability protection to defamation claims, and courts afforded intermediaries immunity from other types of liability associated with user-generated content. For instance, in *Gentry v. eBay, Inc.*, a California state court found that § 230 liability protection protected the auction website from liability for failing to authenticate autographed sports and entertainment memorabilia.[108] Because the website did not create the descriptions of the items, select the categories they were placed in, or confirm or deny the authenticity of such items, it could not be held liable for the actions of third-party sellers regarding the authenticity of the memorabilia.[109]

100. *Zeran*, 129 F.3d at 329.
101. *Id.*
102. *Id.*
103. *Id.* at 330–31.
104. *Id.* at 328 ("The district court granted judgment for AOL on the grounds that the Communications Decency Act of 1996 ("CDA") bars Zeran's claims.") (citation omitted).
105. *Id.*
106. *Id.* at 330.
107. *Id.* at 332.
108. *See* Gentry v. eBay, Inc., 121 Cal. Rptr. 2d 703, 716 (Ct. App. 2002).
109. *Id.*

3. Bad Actors on Social Networks

Early social networking sites also quickly became involved in debates over where to draw the line between intermediary and content creator. In *Doe v. MySpace, Inc.*, a thirteen-year-old minor accused the social networking site of failing to implement basic safety measures to protect minors using its services.[110] The thirteen-year-old minor had evaded MySpace age restrictions by claiming that she was eighteen when creating an account and was later sexually assaulted by a nineteen-year-old she had met on the site.[111] The plaintiff did not allege that MySpace was negligent in failing to remove her profile, but rather that it had failed to take sufficient security measures to prevent bad-actor users from preying on minors.[112] The Fifth Circuit, however, refused to impose liability on MySpace because the minor had violated the site's terms of service and therefore risked her own safety by lying about her age and voluntarily posting information to the website without her parent's supervision.[113]

C. Establishing the Limits of Section 230

Most early cases established that § 230 created broad liability protection for internet intermediaries whose users engaged in some form of misbehavior. But subsequent cases and legislation have established limits to its application. Still, courts have generally recognized that any limitations placed on liability protection must be narrowly tailored to ensure that the law continues to serve its intended purpose.

1. Copyright

One notable exception to liability protection under § 230 arises in cases with copyright violations. In fact, subsection (e)(2) specifically states that the liability protection should not "be construed to limit or expand any law pertaining to intellectual property."[114] In 1998, Congress passed the Digital Millennium Copyright Act (DMCA)[115] to address two concerns: (1) that intermediaries were not adequately addressing copyright violations and (2)

110. 528 F.3d 413, 416 (5th Cir. 2008).

111. *Id.* MySpace's age restrictions at the time required its users to be fourteen to create a profile. *Id.*

112. *Id.* at 420–21.

113. *Id.* (providing a transcript of a hearing before the district court that indicates the plaintiff's concession as to lying, disobeying the website's requirements, and her parent's failure to adequately supervise).

114. 47 U.S.C. § 230(e)(2) (Westlaw through Pub. L. No. 116-90).

115. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

that § 230 liability protections removed the incentives for them to address those violations.[116] The DMCA incorporated the Online Copyright Infringement Liability Limitation Act (OCILLA)[117] to create a compromise that imposed liability against operators who failed to remove offending content after receiving notice and clarified when operators could be held liable for copyright violations.[118]

Under OCILLA, intermediaries or storage providers were immune from liability for a user's copyright violations so long as they did not receive a direct financial benefit from the infringement and complied with requests for removal of copyrighted material.[119] Though the statute did not require constant monitoring for violations, it did require intermediaries or storage providers, on their own initiative, to remove material that a reasonable person would know infringed on copyrights.[120]

2. Intermediaries and Illegal Behavior

While the protections for intermediaries have grown to immunize the young information-sharing industry, courts have found that, many times, intermediaries cross the line from "service provider" to "content provider." The distinction between different types of providers plays an important role for purposes of liability protection under § 230 because those who develop the content's platform can be liable for the underlying illegal statements.[121]

Fair Housing Council of San Fernando Valley v. Roommates.com, LLC ("*Roommates*") provides an example of a case where a court determined that a content provider exercised enough control over content to forfeit its liability protection.[122] *Roommates* involved a roommate-matching website that required users to enter demographic information including gender, sexual orientation, and family situation when creating their profiles.[123] Users were also able to select, via a drop-down menu, their preferences for the sex and sexual preference of potential roommates.[124] The Fair Housing Council alleged that these drop-down menus required users to make

116. *See generally* Carolyn Andrepont, Comment, *Digital Millennium Copyright Act: Copyright Protections for the Digital Age*, 9 DEPAUL-LCA J. ART & ENT. (1999).

117. Pub. L. 105-304, Title II, § 202(a), 112 Stat. 2877 (1998).

118. *See* 17 U.S.C. § 512(c)(1) (2018).

119. *Id.* § 512 (c)(1)(B)–(C).

120. *See id.* § 512 (c)–(d).

121. *See* 47 U.S.C. § 230(f)(3) (Westlaw through Pub. L. No. 116-90).

122. *See* 521 F.3d 1157, 1162–67 (9th Cir. 2007) (noting that the content at issue is required to use the platform).

123. *Id.* at 1165.

124. *Id.*

statements and roommate preferences in violation of federal housing discrimination laws.[125]

The district court initially dismissed the case because it found that the website was an intermediary that enjoyed liability protection under § 230.[126] The Fair Housing Council appealed to the Ninth Circuit, which reversed the district court and held that § 230 did not protect a website in this circumstance.[127] The court reasoned that an intermediary that "contributes materially to the alleged illegality of the conduct" is not entitled to liability protection under § 230.[128]

This distinction between merely allowing users to post content and actively encouraging illegal behavior has been an issue in multiple cases, notably including those involving sex trafficking, terrorism, and violence. However, courts have generally found that § 230 protects intermediaries from liability (even when state law might attach a tort violation) so long as the online provider was acting in a conduit capacity.[129] Similarly, § 230 provides protection for intermediaries who engage in good-faith filtering efforts to remove such content but who may fail in a specific case.[130]

Courts have also generally upheld liability protection for advertisements that might include questionable or even illegal activities, such as prostitution, provided that the intermediary did not encourage the activity or engage in the drafting or placement of the advertisement beyond the financial transaction.[131] In recent cases, such as those against the website Backpage.com, more questions have been raised about how far liability protection extends when an intermediary assists with or modifies the wording of ads as part of the approval process.[132]

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125. *Id.*

126. Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, No. CV 03-09386PA(RZX), 2004 WL 3799488, at *3–4 (C.D. Cal. Sept. 30, 2004).

127. *Fair Hous.*, 521 F.3d at 1170.

128. *Id.* at 1168. The case was then remanded back to the lower court, which actually found Roommates.com's activity violated the FHA and FEHA, but the Ninth Circuit reversed and held that the website won the case on the merits. Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216, 1219, 1223 (9th Cir. 2012).

129. *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1103 (9th Cir. 2009) (holding § 230 barred the plaintiff's state law negligence claim, arising from the unauthorized sharing of nude photographs of the plaintiff on defendant's site).

130. *See* 47 U.S.C. § 230(c) (Westlaw through Pub. L. No. 116-90).

131. *See* Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009).

132. *See* Fla. Abolitionist v. Backpage.com LLC, No: 6:17-cv-orl-28TBS, 2018 WL 1587477, at *4–5 (M.D. Fla. Mar. 31, 2018); Doe No. 1 v. Backpage.com, LLC, No. 17-11069-LTS, 2018 WL 1542056, at *1 (D. Mass. Mar. 29, 2018).

In general, federal prosecutors have been able to secure convictions for intermediaries that engage in an illegal activity or transaction, as § 230 liability protection does not cover such scenarios. For example, as Cary Glynn details in describing a potential criminal case against Backpage.com under an earlier version of § 230,[133] prosecutors alleged that MyRedbook accepted payments to feature certain ads, despite knowing that prostitution was likely to be illegal in the jurisdiction and that the ads were being used to facilitate sex with minors, and failed to respond to law enforcement requests.[134] Similarly, the government indicted the owner of the website RentBoy after an investigation discovered that website employees reviewed ads and told advertisers how to rephrase them so as to avoid mentioning sexual acts or drawing the attention of law enforcement.[135]

D. Law, Policy, and Changes to Section 230

The movement to modify or repeal § 230 has grown over the years as internet-based companies have transformed from small startups to some of the largest companies in the world. Though it closely tracked the development of common law that culminated in the *Cubby* decision, § 230 liability protection is often characterized as a radical departure from traditional publication law.[136] According to lawyer Joshua M. Masur, § 230 is "an exception to the rule of common-law liability for republication."[137] As UNC law professor David S. Ardia put it, § 230's creation "upended a set of principles enshrined in common law doctrines that had been developed over decades, if not centuries, in cases involving *offline* intermediaries. [I]t halted judicial attempts to adapt the common law to the

133. Cary Glynn, *The DoJ's Busts of MyRedbook and Rentboy Show How Backpage Might Be Prosecuted*, TECH. & MARKETING L. BLOG (Sept. 28, 2017), https://blog.ericgoldman.org/archives/2017/09/the-dojs-busts-of-myredbook-rentboy-show-how-backpage-might-be-prosecuted-guest-blog-post.htm.

134. Government's Sentencing Memorandum 2–3, United States v. Omuro, No. 3:14-cr-00336 (N.D. Cal. May 14, 2015).

135. Glynn, *supra* note 133.

136. *See, e.g.*, Ardia, *supra* note 7, at 411; Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 137–38 (2008) (characterizing § 230 as a provision "alter[ing] centuries of common-law precedent [in order] to grant the owners of such private online forums unprecedented immunity from liability for defamation and related torts committed by third-party users") (citing 47 U.S.C. § 230(c)(1)); *see also* Masnick, *supra* note 7 (quoting House Speaker Nancy Pelosi characterizing § 230 as "a gift" to tech companies).

137. Joshua M. Masur, *A Most Uncommon Carrier: Online Service Provider Immunity Against Defamation Claims in* Blumenthal v. Drudge, 40 JURIMETRICS 217, 218 (2000).

changing technology."[138] As another advocate for modifying the current system argued, § 230 provides internet intermediaries with "special treatment" that makes publishing "harassing, destructive content . . . profitable."[139]

Journalists, legal scholars, and advocates have suggested that § 230 has contributed to the spread of conspiracy theories,[140] protected child predators,[141] enabled powerful online platforms to evade local laws,[142] and favored a system that disproportionately censors conservative viewpoints.[143] Law professor Ann Bartow similarly stated that large internet platforms are able to "launder the proceeds of hate speech, and happily cash the checks" because of their protection from liability.[144] In August 2018, even Senator Ron Wyden, who drafted § 230 while serving in the House of Representatives, wrote that technology companies' "ineptitude" in filtering indecent content is undermining congressional faith in the law.[145] This frustration with § 230 even seems to have penetrated the courts.[146]

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138. Ardia, *supra* note 7, at 411.

139. Arthur Chu, *Mr. Obama, Tear Down This Liability Shield*, TECHCRUNCH (Sept. 29, 2015, 2:31 PM CDT), https://techcrunch.com/2015/09/29/mr-obama-tear-down-this-liability-shield/; *see also* Ann Bartow, *Section 230 Keeps Platforms for Defamation and Threats Highly Profitable*, LAW.COM (Nov. 10, 2017, 1:10 AM), https://www.law.com/therecorder/sites/therecorder/2017/11/10/section-230-keeps-platforms-for-defamation-and-threats-highly-profitable/?slreturn=20181030153646.

140. Chu, *supra* note 139.

141. *See, e.g.*, Elizabeth P. Stedman, Comment, *MySpace, but Whose Responsibility? Liability of Social-Networking Websites When Offline Sexual Assault of Minors Follows Online Interaction*, 14 VILL. SPORTS & ENT. L.J. 363, 387–90 (2007) (discussing the CDA in the context of making a proximate cause argument more difficult).

142. *See* Christopher Zara, *The Most Important Law in Tech Has a Problem*, WIRED (Jan. 3, 2017, 12:00 AM), https://www.wired.com/2017/01/the-most-important-law-in-tech-has-a-problem/.

143. Sullivan, *supra* note 8 ("Many Republicans believe that Silicon Valley tech companies are determined to suppress conservative content on their platforms."); *see also* James Altschul, *It's Time for Congress to Treat Twitter as a Publisher*, FEDERALIST (Nov. 29, 2018), https://thefederalist.com/2018/11/29/time-congress-treat-twitter-publisher/.

144. Ann Bartow, *Online Harassment, Profit Seeking, and Section 230*, 95 B.U. L. REV. ANNEX 101, 102 (2015) [hereinafter Bartow, *Online Harassment*].

145. Ron Wyden, *The Consequences of Indecency*, TECHCRUNCH (Aug. 23, 2018, 1:15 PM CDT), https://techcrunch.com/2018/08/23/the-consequences-of-indecency/.

146. *See, e.g.*, Eric Goldman, *Ten Worst Section 230 Rulings of 2016 (Plus the Five Best)*, TECH. & MARKETING L. BLOG (Jan. 4, 2017), https://blog.ericgoldman.org/archives/2017/01/ten-worst-section-230-rulings-of-2016-plus-the-five-best.htm (listing cases that undermine earlier conceptions of § 230 protection).

Both legislative action and political rhetoric suggest that the movement to reform or repeal § 230 is gaining traction. In 2018, Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), which amended § 230 to impose liability against intermediaries when users conduct sex trafficking activity on their platforms.[147] Yet many civil-society advocates and lawmakers would like to go further, suggesting similar carve-outs for societal ills like opioid sales[148] and hate speech.[149] For instance, legal scholar Ann Bartow has called for reforming § 230 by introducing a conditional liability protection that more closely resembles the DMCA's notice-and-takedown system.[150]

But even before the creation of § 230, many courts had shifted away from the strict liability regime and toward conduit liability protections and fault-based requirements.[151] In many circumstances, even a distributor that had known of the tortious material would have been immune from liability because the social and judicial norms favoring practicable moderation practices and free speech had eroded the traditional liability standards.[152] In effect, § 230 codified the conduit liability protection that courts were applying to traditional media distributors—including some cases after 1996.[153]

As one federal district court noted in 1994, "[p]rotection for republication . . . has not been rigorously circumscribed within the wire service context" and covers several types of media intermediaries that

147. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 3 (2018).

148. Samantha Cole, *Senator Suggests the Internet Needs a FOSTA/SESTA for Drug Trafficking*, MOTHERBOARD (Sept. 5, 2018, 1:47 PM), https://motherboard.vice.com/en_us/article/8xbwvp/joe-manchin-fosta-sesta-law-for-drug-trafficking-senate-intelligence-committee-hearing. Many conservatives, for instance, would like to remove the intermediary liability because of perceived unfair censoring of conservatives. Sullivan, *supra* note 8.

149. *See* Wyden, *supra* note 145 ("There are real consequences to social media hosting radically indecent speech, and those consequences are looming.").

150. Bartow, *Online Harassment*, *supra* note 144, at 102–03.

151. A similar trend can be observed in copyright. *See, e.g.*, Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995). *See generally* Goold, *supra* note 13. *But see* Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993) (finding that an online bulletin board operator is liable for direct copyright infringement when users upload copyrighted images, and the operator fails to remove the images).

152. *See also* Julio Sharp-Wasserman, Note, *Section 230(c)(1) of the Communications Decency Act and the Common Law of Defamation: A Convergence Thesis*, 20 COLUM. SCI. & TECH. L. REV. 195, 199 (2018).

153. *See* Lunney v. Prodigy Servs. Co., 723 N.E.2d 539 (N.Y. 1999).

republish content.[154] And in its 1999 *Lunney v. Prodigy Services Co.* decision, the New York Court of Appeals expressly classified an internet bulletin board operator as a common-law conduit.[155] The court still applied the "conduit designation," even though the bulletin board operator "reserves for itself broad editorial discretion to screen its bulletin board messages" and occasionally exercises that discretion.[156] The court explained that even if Prodigy had prohibited "certain vulgarities" from bulletin board messages, it would have retained its "passive character" in the other posts that it did not censor and would not been obligated to "guarantee the content of" the messages it did not edit.[157]

Lunney resembled the internet intermediary protection found in *Cubby*, which was decided eight years earlier, and was part of the legal trend of courts creating protective rules for media intermediaries. Despite tens of millions of Americans interacting online in the mid-1990s,[158] we are aware of no case from 1991 to 1996—save *Stratton Oakmont*—where an online distributor was liable for republishing a user's tortious material.[159] *Stratton Oakmont* was therefore an anomaly, not a development of common law.[160]

The succession of *Cubby*, the broadcast cases like *Auvil*, and *Lunney* in the 1990s suggests that the passage of § 230 simply accelerated the expansion of liability protection for online content distributors that otherwise would have been established by common law, custom, and state legislatures. Consistent with this theory, a 2010 study by David S. Ardia found that most § 230 cases would have arrived at the same outcome regarding whether the distributor was liable under common law.[161] As Ardia states in a discussion of his empirical work, "many of the

154. Nicholson v. Promoters on Listings, 159 F.R.D. 343, 356 (D. Mass. 1994) (citing broadcaster, internet, and newspaper republication cases).

155. *Lunney*, 723 N.E.2d at 541–42 (holding that an internet service provider and bulletin board operator, "like a telephone company, is merely a conduit").

156. *Id.* at 542.

157. *Id.* (citation omitted) (quoting the lower court decision).

158. Kara Swisher, *Internet's Reach in Society Grows, Survey Finds*, WASH. POST, Oct. 31, 1995, at A1 (describing a Nielsen poll finding thirty-seven million internet users in the United States and Canada).

159. At least some courts already viewed *Cubby* as establishing persuasive precedent that an internet intermediary could not be held strictly liable for publishing defamatory statements. *See, e.g.*, Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., 907 F. Supp. 1361, 1367 n.10 (N.D. Cal. 1995).

160. *See* Matthew C. Siderits, Comment, *Defamation in Cyberspace: Reconciling* Cubby, Inc. v. Compuserve, Inc. *and* Stratton Oakmont v. Prodigy Services Co., 79 MARQ. L. REV. 1065, 1079–80 (1996).

161. Ardia, *supra* note 7, at 480.

intermediaries that invoked section 230 likely would not have faced eventual liability under the common law because they lacked knowledge of and editorial control over the third-party content at issue in the cases."[162]

Still, § 230 had a salutary effect at a critical time. A 2019 report by Engine,[163] a technology startup advocacy group, suggested that without § 230, the costs of defending against litigation might be ruinous for many startups, even if they eventually win the case.[164] According to the in-house and external attorneys consulted for the report, responding to a user-generated content liability claim through a motion to dismiss alone could cost $15,000 to $80,000.[165] And defending a case through discovery could cost a firm anywhere from $100,000 to more than half a million dollars.[166]

As Ardia points out, § 230's liability protection gave online providers that made decisions regarding third-party content a "breathing space" and legal certainty after *Stratton Oakmont* derailed the *Cubby* and conduit liability trend.[167] A period of uncertainty—and massive "collateral censorship"—would have ensued because online providers do not know in advance where their users are located. Any provider with users in New York would have been potentially subject to liability for users' posts under the *Stratton Oakmont* decision. § 230 precluded that turn of events.

In short, wholesale changes to § 230's publisher liability regime could create a *Stratton Oakmont*-like situation where online providers feel compelled to comply with the strictest state trial court decision to avoid exposing themselves to liability for user content. In the long term, for the reasons discussed above, courts likely would have extended conduit liability-like protections to online providers. However, because the traditional view is that the "conduit" designation only applies to common carrier or public utility services[168] and online services do not fall under

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162. *Id.*

163. *About Engine*, ENGINE, https://www.engine.is/about-engine (last visited Dec. 12, 2019) ("Engine is a policy, advocacy, and research organization supporting startups as an engine for economic growth.").

164. ENGINE, SECTION 230: COST REPORT (2019), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5c8168cae5e5f04b9a30e84e/1551984843007/Engine_Primer_230cost2019.pdf.

165. *Id.*

166. *Id.*

167. Ardia, *supra* note 7, at 480 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

168. Conduit liability protection typically referred to public utilities. *See* RESTATEMENT (SECOND) OF TORTS: PROVIDING MEANS OF PUBLICATION § 612 cmt. g (AM. LAW INST. 1977).

> A public utility under a duty to transmit messages is privileged to do so, even though it knows the message to be false and defamatory, unless

either category, the amount of time it would have taken for that process to occur likely would have exacerbated online content providers' concerns and thus resulted in fear-based overcompliance.

III. The Next Era of Publishing and Curation

Section 230 minimized the cost of engaging in content distribution and removed some of the online content distributors' possible fears about making moderation part of their business model. It also provides certainty that allows online content distributors to conduct their business without the risk of protracted litigation. While an examination of the legal precedent leading up to the enactment of § 230 suggests that courts would likely establish a similar liability regime in common law, repealing § 230 today would impose significant costs during the resulting transition period.

If § 230 is modified to make online intermediaries liable for more types of user-generated content, any such transition should be narrowly tailored and focused on cases where (1) there is general agreement that the content at issue has minimal speech value, (2) where basic software programs or nonexpert curators can easily identify the content as impermissible, and (3) dedicated content removal efforts would have a limited impact on legitimate speech. The massive amount of internet content to be screened, however, means that notice liability only seems effective under certain, narrow circumstances.

A. Curation Standards and User-Generated Content Communities Under Liability Protection

Section 230 provided breathing room that encouraged intermediaries to develop a wide range of standards for best practices in curation and moderation.[169] In the United States, this statutory regime has allowed norms to develop without the need for regulatory enforcement and has also allowed communities to determine for themselves what is and is not appropriate.[170] In many instances, online communities set their own rules.

(a) the sender of the message is not privileged to send it, and
(b) the agent who transmits the message knows or has reason to know that the sender is not privileged to publish it.

Id. § 612(2).

169. *See* Jason Koebler & Joseph Cox, *The Impossible Job: Inside Facebook's Struggle to Moderate Two Billion People*, MOTHERBOARD (Aug. 23, 2018, 12:15 PM), https://motherboard.vice.com/en_us/article/xwk9zd/how-facebook-content-moderation-works.

170. *See* Tarleton Gillespie, *How Social Networks Set the Limits of What We Can Say Online*, WIRED (June 26, 2018, 7:00 AM), https://www.wired.com/story/how-social-

However marginal the number of those completely self-governed communities, they would likely not exist without § 230 because these communities would not have had the opportunity to develop under a stricter regime, nor would they be able to afford to comply with regulation that mandates employing expensive content moderation algorithms. Although § 230 allows both large and small platforms to set their content moderation standards, it does not place a judgment on whether those standards are good or bad.

Critics of § 230 allege that intermediaries that curate or moderate content should forfeit liability protection like the defendant in *Stratton Oakmont*. For example, conservative critics have argued that § 230 requires a degree of neutrality in implementing these moderation decisions.[171] Yet § 230 was never about neutrality. As Senator Wyden, one of the original authors, stated in an interview, "Section 230 is not about neutrality. Period. Full stop."[172]

Instead of focusing on neutrality, courts have distinguished between mere moderation decisions and cases where intermediaries exercise more control by editing content or encouraging certain behavior. This includes cases where the websites encouraged behavior that could violate existing laws. For example, in *Roommates*, when the website created content that appeared to violate the Fair Housing Act's antidiscrimination policy, the Ninth Circuit found that the site was not entitled to § 230 protection.[173] Similarly, before the enactment of FOSTA and the sex trafficking exception from § 230 liability protection, prosecutors indicted top officials from Backpage.com for conspiracy, facilitating prostitution, and money laundering after they failed to take appropriate steps to prevent advertisers

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networks-set-the-limits-of-what-we-can-say-online/; Charlie Warzel, *"A Honey Pot for Assholes": Inside Twitter's 10-Year Failure to Stop Harassment*, BUZZFEED NEWS (Aug. 11, 2016, 8:43 AM ET), https://www.buzzfeed.com/charliewarzel/a-honeypot-for-assholes-inside-twitters-10-year-failure-to-s?utm_term=.gipx7zY0E#.ubRQYWjyA.

171. *See, e.g.*, Cat Zakrzewski, *The Technology 202: This Is Ted Cruz's Playbook to Crack Down on Big Tech for Alleged Anti-conservative Bias*, WASH. POST (Apr. 11, 2019), https://www.washingtonpost.com/news/powerpost/paloma/the-technology-202/2019/04/11/the-technology-202-this-is-ted-cruz-s-playbook-to-crack-down-on-big-tech-for-alleged-anti-conservative-bias/5cae7278a7a0a475985bd3d3/?utm_term=.ec797e19ad22.

172. Emily Stewart, *Ron Wyden Wrote the Law That Built the Internet. He Still Stands by It—and Everything It's Brought with It*, VOX RECODE (May 16, 2019, 9:50 AM EDT), https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulations-neutrality.

173. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1174–76 (9th Cir. 2008).

from using their website to commit crimes.[174] This distinction between mere moderation and more active engagement has allowed law enforcement to punish bad actors while enabling most intermediaries to make a wide variety of content moderation decisions.

In fact, § 230 encourages intermediaries to develop and enforce their own standards through a Good Samaritan safe harbor provision and has become essential for the growth of the wide variety of services relying on user-generated content. This Good Samaritan[175] safe harbor is core to a wide variety of platforms beyond social media by allowing them to make choices regarding content moderation without constant concerns of litigation and has been illustrated in the variety of platforms that have been the subject of cases involving § 230, including review sites, internet and mobile service providers, and search engines.[176] Rather than discouraging intermediaries from engaging in content moderation, § 230 has provided a way for each individual intermediary to select curation norms without fear that an occasional mistake might expose the company to excessive liability.[177]

Allowing intermediaries to develop their own standards has also allowed specialized communities to decide whether to restrict or allow content. Communities have developed a variety of norms that depend on their users' acceptance of various content, and those norms can vary even within platforms as they emerge from interaction both within and between communities on the platforms.[178] For example, as a study of Reddit communities noted, while some universal norms apply to moderation across

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174. Tom Jackman & Mark Berman, *Top Officials at Backpage.com Indicted After Classifieds Site Taken Offline*, WASH. POST (Apr. 9, 2018, 5:12 PM CDT), https://www.washingtonpost.com/local/public-safety/top-officials-at-backpagecom-indicted-after-classifieds-site-taken-offline/2018/04/09/0b646f36-39db-11e8-9c0a-85d477d9a226_story.html?utm_term=.227623710afd.

175. 47 U.S.C. § 230(c) (Westlaw through Pub. L. No. 116-90).

176. *See, e.g.*, Nemet Chevrolet, Ltd., v. Consumeraffairs.com, Inc., 591 F.3d 250 (4th Cir. 2009) (involving a review site); Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003) (involving a mobile and ISP provider); Parker v. Google, Inc., 422 F. Supp. 2d 492 (E.D. Pa. 2006) (involving a search engine).

177. *See How Social-Media Platforms Dispense Justice*, ECONOMIST (Sept. 6, 2018), https://www.economist.com/business/2018/09/06/how-social-media-platforms-dispense-justice.

178. *See* Eshwar Chandrasekharan et al., *The Internet's Hidden Rules: An Empirical Study of Reddit Norm Violations at Micro, Meso, and Macro Scales*, *in* 2 PROCEEDINGS OF THE ACM ON HUMAN-COMPUTER INTERACTION 32:1 (2018), http://eegilbert.org/papers/cscw18-chand-norms.pdf.

the entire online community, individual subreddits[179] and related groups of subreddits developed more specific norms.[180]

As it was written, § 230 encouraged the development of an environment where such diversity of options was possible. Even absent strict regulation, most platforms prefer to exclude obscene and graphic material as a way to grow their user bases and make it easier to cultivate relationships with potential advertisers or other financial supporters.[181] Yet individual platforms and even communities within these platforms may still arrive at different decisions on contentious content, including decisions about what might be considered harassment or hate speech, or what content deserves a warning.[182] Additionally, particularly for parental controls, a wide range of options—from barely monitoring to highly restrictive—has developed both by individual platforms and ISPs as well as third party services to provide users with a variety of methods for choosing which content to block.[183]

The organic evolution of terms of service and norms within online communities, as opposed to top-down regulation, has enabled a wide variety of online communities to develop. Content moderation decisions often affect the formation of these communities and the interactions of their users.[184] In general, many active communities create a global marketplace for both goods and ideas that would be unimaginable without an open internet. Even before the rise of social media, online communities that were organized by shared interests such as professional groups, hobbies, and sports teams arose and maintained (or expanded) existing local communities.[185] These self-organizing groups and communities may become increasingly insular as people tend to interact with like-minded

179. *Id.* at 32:2.

180. *Id.*

181. *See* Tarleton Gillespie, *Regulation of and by Platforms*, *in* THE SAGE HANDBOOK OF SOCIAL MEDIA 254, 262 (Jean Burgess et al. eds., 2017).

182. *See* Chandrasekharan et al., *supra* note 178, at 32:16–32:21.

183. *See* Jennifer Huddleston, *Technology Is Not Your Parent: But Innovation Can Be a Parent's Best Friend*, MEDIUM: PLAIN TEXT (Jan. 16, 2018), https://readplaintext.com/technology-is-not-your-parent-4fc6d2df99ff.

184. *See* Yuqing Ren & Robert E. Kraut, A Simulation for Designing Online Community: Member Motivation, Contribution, and Discussion Moderation 21–24 (2008) (unpublished manuscript), https://pdfs.semanticscholar.org/b15b/603c3f4460439a7f6f868adf868bad4929fb.pdf.

185. Jenny Preece et al., *History of Online Communities*, *in* 3 ENCYCLOPEDIA OF COMMUNITY 1023 (Karen Christensen & David Levinson eds., 2003).

individuals and consume information and advertisements that reinforce the community's pre-existing beliefs.[186]

Yet the internet has generally been a powerful force for providing a global platform that has low barriers to entry and can empower marginalized individuals to become involved in commerce or speech in ways they traditionally could not. For example, microwork platforms[187]—websites that unite a large number of individuals who each complete small, relatively simple task—allow individuals who were previously excluded from the workforce to participate.[188] Similarly, online platforms have amplified voices in social movements that might have otherwise gone unheard.[189]

In summary, § 230 immunizes online intermediaries from liability for user-generated content, regardless of their size. Therefore, any changes that limits liability protection will impose compliance costs on all intermediaries. Any such change should explicitly recognize those social costs as well as the advantage it will create for larger firms with the resources to comply. No matter how well intended any such change may be, it must account for the chilling effect on innovation by startups and small firms, as well as the artificial barriers to entry that will entrench incumbent firms.

B. Notice Liability for Online Distributors

When weighing the proper level and scope of regulation, courts and legislatures must balance competing concerns between what liability is appropriate and what liability is feasible. They also must consider the potential unintended consequences of what such regimes may result in, including both over action and under action.

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186. *See* Dimitar Nikolov et al., *Measuring Online Social Bubbles*, PEERJ COMPUTER SCI. (Dec. 2, 2015), https://peerj.com/articles/cs-38/.

187. *See, e.g.*, AMAZON MECHANICAL TURK, https://www.mturk.com (last visited Jan. 8, 2020) (advertising that individuals and businesses can utilize Amazon's platform to "outsource their processes and jobs to a distributed workforce who can perform these tasks virtually").

188. *See Empowering Women Through the Internet*, INT'L DEV. RES. CTR., https://www.itu.int/en/Lists/consultationOct2017/Attachments/56/Empowering%20women%20through%20the%20Internet_Jan2018.pdf (last visited Dec. 19, 2019).

189. *See* David Meek, *YouTube and Social Movements: A Phenomenological Analysis of Participation, Events, and Cyberplace*, 44 ANTIPODE 1429, 1436–43 (2012) (discussing one example of the use and impact of social media on social movements via analysis of Invisible Children).

Section 230 anticipated the Supreme Court's liability maxim in *Bartnicki v. Vopper*, a 2001 decision about (offline) intermediary liability: "The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."[190]

Legislative changes to intermediary liability should keep that maxim in mind, and any modifications to § 230 must account for the huge amount of content that social media and online distributors transmit. Every minute, more than 87,500 tweets and 2.1 million snaps[191] are sent, and over 3.8 million searches are conducted.[192] As the *Zeran* court noted, "liability upon notice has a chilling effect on the freedom of Internet speech. . . . 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 notification . . . ."[193] Given the scale and increasing number of products that rely on user-generated content, such as review sites and messaging services, content moderation at scale remains an incredible challenge for platforms—even as artificial intelligence improves and companies hire more content moderators.[194]

1. When Notice Liability Succeeds

Section 230 reform proposals would create more categories for which intermediaries are subject to notice liability.[195] But exposing intermediaries to additional notice liability undermines the purposes of § 230. As the *Zeran* court recognized, "[L]iability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation."[196] However, notice liability or automated or semi-automated rejection of

190. 532 U.S. 514, 529 (2001).

191. The colloquial term for photos or videos sent via SnapChat.

192. Jeff Desjardis, *What Happens in an Internet Minute in 2019?*, VISUAL CAPITALIST (Mar. 13, 2019), https://www.visualcapitalist.com/what-happens-in-an-internet-minute-in-2019/.

193. Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).

194. *See, e.g.*, Nemet Chevrolet, Ltd., v. Consumeraffairs.com, Inc., 591 F.3d 250 (4th Cir. 2009) (involving a review site); Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003) (involving a mobile and ISP provider); Parker v. Google, Inc., 422 F. Supp. 2d 492 (E.D. Pa. 2006) (involving a search engine); *see also* Jacob Parker Black, Note, *Facebook and the Future of Fair Housing Online*, 72 OKLA. L. REV. 701, 717–18 (2020) (proposing that the implementation of both "input filtration" and "ex-post analysis" is the most effective and practical solution for moderating internet speech).

195. *See* Benjamin Volpe, *From Innovation to Abuse: Does the Internet Still Need Section 230 Immunity?*, 68 CATH. U. L. REV. 597 (2019) (proposing notice liability for Internet platforms for torts online).

196. *Zeran*, 129 F.3d at 333.

antisocial content could be effective in some circumstances: (1) where there is a social consensus that the content in question has minimal speech value, (2) where basic software programs or nonexpert curators can easily identify the content as impermissible, and (3) dedicated removal efforts result in limited collateral censorship.

As the Supreme Court pointed out in *Bartnicki*, "third party" speech can be suppressed when "the speech at issue is considered of minimal value."[197] Section 230 implies this limitation since it does not protect content that is obscene or otherwise violates criminal law.[198] In some cases, notice liability for this antisocial content has been effected by statute[199] and supplemented through an industry-wide best practice or unified stance.[200]

Perhaps the best illustration of censoring minimally valuable speech has been the identification and removal of clearly antisocial content: child pornography and similar child abuse. As the Supreme Court noted in *New York v. Ferber*, "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."[201] As a result, intermediaries have generally been willing to cooperate with federal investigations of such material.[202] This willingness stems not only from the establishment of

197. Bartnicki v. Vopper, 532 U.S. 514, 530 n.13 (2001) (citing Osborne v. Ohio, 495 U.S. 103, 110 (1990); New York v. Ferber, 458 U.S. 747, 762 (1982)).

198. *See* 47 U.S.C. § 230(e)(1) (Westlaw through Pub. L. No. 116-90).

199. *See, e.g.*, *id.* § 230(e).

200. There is widespread use by social media sites and websites to automatically filter and report illegal child abuse images, for instance, with use of Microsoft's PhotoDNA database. *See PhotoDNA*, MICROSOFT, https://www.microsoft.com/en-us/photodna (last visited Jan. 9, 2020). There are also informal best practices by social media companies to remove certain violent, livestreamed content. *See*, *e.g.*, *Social Media Platforms Say They Are Taking Action to Remove Christchurch Shooting Content,* CNA (Mar. 15, 2019, 7:28 PM), https://www.channelnewsasia.com/news/technology/social-media-platforms-say-they-are-taking-action-to-remove-11348974.

201. *Ferber*, 458 U.S. at 762.

202. *See Weakening Section 230 Won't Prevent Sex Trafficking*, TECHFREEDOM (Aug. 3, 2017), http://techfreedom.org/weakening-section-230-wont-prevent-sex-trafficking/ (discussing that the safe harbor provision incentivizes the platform operators' active involvement in monitoring for illegal activity); *see also Guidelines for Law Enforcement*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-law-enforcement-support#16.5 (last visited Jan. 9, 2020) (illustrating how one company handles law enforcement takedown requests).

potential criminal liability but also from intermediaries' general agreement about what material is a violation and why the violation is harmful.[203]

Not only has notice liability assisted in the removal of such detrimental material, but it has also created a market for new screening software that automatically identifies and removes that material.[204] The general acknowledgment of this harm has also encouraged intermediaries to share technologies and research.[205] The collateral censorship from these image removals does not appear to suppress much legitimate, high-value speech.

2. When Notice Liability Is Less Successful

For other categories of content like hate speech and cyberbullying, the consensus on what constitutes content that should be subject to removal is less clear, and law enforcement takedown requirements could limit legitimate and protected speech. Defamation and other intentional torts are not always easy to identify or prove, even by courts considering the issues.[206] This lack of consensus favors approaches that allow a diverse market for content moderation.

While notice liability has succeeded in reducing images of child pornography and abuse, it has produced mixed results for copyright and other intellectual property violations. Notably, the DMCA has struggled with numerous false positives—falsely characterizing content as violating a copyright when it does not—and easy-to-navigate loopholes that prevent intermediaries from identifying all potentially infringing material.[207] There are several reasons why the DMCA has been less successful in changing user or intermediary behavior for content that may infringe on copyrights than the exception to § 230 liability protection for child pornography.

First, copyright violations are often more difficult to identify. As a result, basic software and nonexpert moderators have a hard time flagging and screening copyright violations with a high degree of reliability. For example, fan videos and fanfiction that involve characters and images from

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203. *See* Jemima Kiss, *How Microsoft, Google and ISPs Aim to Halt Child Abuse Images*, GUARDIAN (Nov. 18, 2013, 11:05 EST), https://www.theguardian.com/technology/2013/nov/18/microsoft-google-summit-halt-child-abuse-images.

204. *See id.*

205. *See id.*

206. *See* Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525, 530–31 (1959) ("Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question . . . .").

207. *See* Brad Stone, *The Inexact Science Behind D.M.C.A. Takedown Notices*, N.Y. TIMES BITS (June 5, 2008, 11:18 AM), https://bits.blogs.nytimes.com/2008/06/05/the-inexact-science-behind-dmca-takedown-notices/.

copyrighted material are typically not considered violations, but the same clips or quotes may violate copyrights in other contexts.[208] Parodies and creative uses may also change what is or is not a violation but require greater consideration of context to determine whether or not such uses constitute a violation.[209]

Second, notice liability encourages intermediaries to adopt an "act first, question second" approach that exacerbates the potential for abuse and false positives when no harm has actually occurred. For example, YouTube has removed a singer's own concert video based on DMCA complaints[210] and removed a video of a *Star Wars* clip without John Williams's score for violating the score's copyright by not having it there.[211] While these examples may seem extreme, in 13.3% of takedown requests in a sample, the underlying infringing content cannot be located, and for another 6%, the allegedly infringed work cannot be identified.[212]

Third, the DMCA's notice-and-takedown requirements establish barriers to entry for new competitors because notices from others, by their nature, require repeated investigation. A small company that publishes user-generated content but has limited resources must dedicate at least some of its staff to responding to takedown requests even though they may turn out to be false. But by failing to remove allegedly infringing material, a company would risk exposing itself to crippling liability.

Finally, notice liability ignores the potential benefits of modifying and reproducing copyrighted material, such as parody and fair use. Overbroad

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208. *See generally* Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869 (2009).

209. Andrew S. Long, *Mashed Up Videos and Broken Down Copyright: Changing Copyright to Promote the First Amendment Values of Transformative Video*, 60 OKLA. L. REV. 317, 334–38 (2007) (describing the difficulty in distinguishing works considered to be parody, which are classified as transformative and therefore do not infringe on prior copyrights, and works that are considered to be satire, which are presumptively non-transformative and may infringe on prior copyrights).

210. Mike Masnick, *YouTube Takes Down Ariana Grande's Manchester Benefit Concert on Copyright Grounds*, TECHDIRT (June 7, 2017, 11:55 AM), https://www.techdirt.com/articles/20170606/17500637534/youtube-takes-down-ariana-grandes-manchester-benefit-concert-copyright-grounds.shtml.

211. Tim Cushing, *Warner/Chappell Issues Copyright Claim Over YouTube Video Deliberately Containing None of Its Music*, TECHDIRT (Aug. 10, 2017, 12:00 PM), https://www.techdirt.com/articles/20170810/10140137975/warner-chappell-issues-copyright-claim-over-youtube-video-deliberately-containing-none-music.shtml.

212. Jennifer M. Urban et. al, *Notice and Takedown in Everyday Practice* 93–94 (Univ. of Cal. Berkeley Pub. Law Research Paper No. 27556282017, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628.

DMCA takedown requests limit the set of ideas that can be spread without necessarily improving the veracity or quality of published material as a whole by creating strict limitations for the sharing of copyrighted material.[213] The history of the DMCA illustrates that such increased liability creates two broad categories of costs: (1) enforcement costs and (2) social and litigation costs associated with false positives.[214]

Because of these looming costs, notice liability should be limited to a clearly defined set of material that is egregiously offensive. Any such change to the § 230 liability regime must consider the inevitable difficulties and social costs that false positives will create and avoid expanding to content that by its nature resists clear, technical characterization. The significant number of deficient takedown notices generated under the DMCA should serve as a cautionary tale when considering expanding notice liability to other areas.

3. Potential Applications Based on This Framework

With the recognition of many of these limitations in mind and the potential of emerging consensus around identifiable harmful content in mind, we consider "revenge porn" as one area where notice liability may prove more effective and practicable than the DMCA's imperfect notice-and-takedown provisions—and where there is sufficient agreement within most internet communities about the harm or potential for harm. According to the Cyber Civil Rights Initiative, forty-six states and the District of Columbia have laws concerning revenge porn—the nonconsensual distribution of another individual's sexually explicit images.[215] Some platforms—including Google, Microsoft, Reddit, and Twitter—already have policies to remove such content on request or recognize that such content violates the site's terms of service.[216] These policies illustrate an

213. *See generally* Joseph P. Liu, *The DMCA and the Regulation of Scientific Research*, 18 BERKLEY TECH. L.J. 501, 503 (2003) (discussing whether "academic encryption researchers should reasonably fear liability under the DMCA for certain types of research").

214. Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 320–22 (2013).

215. *46 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER C.R. INITIATIVE, https://www.cybercivilrights.org/revenge-porn-laws/ (last visited Dec. 19, 2019).

216. *See* Jacqueline Beauchere, *'Revenge Porn': Putting Victims Back in Control*, MICROSOFT ON ISSUES (July 22, 2015), https://blogs.microsoft.com/on-the-issues/2015/07/22/revenge-porn-putting-victims-back-in-control/; Jennifer Golbeck, *Google to Remove Revenge Porn from Search Results*, SLATE (June 19, 2015, 3:12 PM), https://slate.com/technology/2015/06/google-announces-plan-to-remove-revenge-porn-from-search-results.html; Amanda Hess, *Reddit Has Banned Revenge Porn. Sort Of.*, SLATE (Feb.

emerging understanding that the potential harm of such content outweighs its speech value.

Laws that criminalize revenge porn could face First Amendment speech challenges if they are overbroad and thus criminalize legitimate speech.[217] As a result, imposing notice liability might allow intermediaries to limit harmful and harassing content while protecting legitimate First Amendment speech. By only requiring removal upon notice, any such change to § 230's regime would allow harmed individuals to request a takedown of information that was shared without consent, much like for a copyright violation. As in the case of copyright violations under the DMCA, these requests would be subject to a review process or a proscribed method for appealing a decision to remove the content. But in this case, false positives seem less problematic because the value of the speech restricted is generally considered low, while the risk of harm from nonconsensual distribution is patent.

If notice liability were applied to revenge porn, safe harbor provisions should also be created to limit liability when it is not reasonable for a platform to keep pace with a novel violation or the quantity of content. Additionally, encouraging intermediaries to develop tools that identify and flag such content (like tools that identify and remove child pornography) should accompany laws implementing this liability to make it feasible for intermediaries to protect themselves from increased liability, regardless of their size.

Notice liability is successful when intermediaries can employ a reasonable screening mechanism that can clearly identify a harm and user content clearly violates an established standard. Unfortunately, there are few such generally-agreed-upon norms. Despite the narrow circumstances under which notice liability is successful, proposals to amend § 230 by imposing notice liability requirements should be limited to a narrow set of content that is widely recognized as offensive and harmful, like child pornography.

25, 2015, 11:36 AM), https://slate.com/news-and-politics/2015/02/reddit-bans-revenge-porn-victims-advocates-and-the-aclu-react-to-the-new-rule-against-nonconsensual-porn.html; Lily Hay Newman, *Twitter Moves to Prohibit Revenge Porn*, SLATE (Mar. 12, 2015, 7:09 PM), https://slate.com/technology/2015/03/twitter-updates-its-privacy-policy-against-revenge-porn-and-rep-katherine-clark-discusses-online-harassment.html.

217. *See, e.g.*, *Ex parte* Jones, No. 12-17-00346-CR, 2018 WL 2228888, at *7 (Tex. Ct. App. May 16, 2018) (finding that Texas's revenge porn law was overly broad and violated the First Amendment); *see also* Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 661–72 (2016).

Despite the benefits of this system, any notice liability regime can invite opportunistic use of notice.[218] Specifically, it is foreseeable that politically controversial speech and business product reviews would be the most likely targets in notice liability regimes due to the proprietary and social gains associated with successful messaging.[219] Therefore, exceptions to § 230 and conduit liability should be designed with the expectation that takedown notices will be abused. Ultimately, when making these determinations, lawmakers must carefully weigh the harm to individuals, the efficacy of a notice liability regime for the type of content at issue, the risk and extent of collateral censorship, and the culpability of the online intermediary.

Conclusion

The § 230 reform movement is growing, and many reform arguments complain that online intermediaries receive a special dispensation regarding publisher liability. However, publisher liability is more complicated than § 230's reformers' characterizations. Starting in 1933—and for six subsequent decades—courts gradually chipped away the regime of strict liability for publishers and content distributors. They did so based on the practical difficulties of requiring all intermediaries to screen all media content for potentially tortious material and unnecessary restrictions on First Amendment-protected speech. Culminating with the decision in *Cubby*, courts eventually established that mass media distributors warranted extensive liability protections, including protection for conduit liability.

When the anomalous 1995 *Stratton Oakmont* decision was released, Congress swiftly resolved the dissonance by enacting section 230 of the Communications Decency Act in 1996. Section 230 codified earlier precedent and established a regime of liability protection for online content distributors at a time when internet firms had grown to reach audiences of tens of millions of people. Reformers' arguments gained urgency in recent years; Congress gave the reform effort traction when it passed FOSTA in 2018. By amending § 230 to impose liability against intermediaries when users conduct sex trafficking activity on their platforms, Congress signaled that other categories of anti-social content might also properly be excluded from § 230's broad liability protection.

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218. *See* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 86 n.238 (2006).

219. *See* Note, *Section 230 as First Amendment Rule*, *supra* note 6, at 2038.

But while reformers may interpret FOSTA as signaling a departure from § 230's publisher liability scheme, anti-social content should only be excluded in narrow circumstances where widely available software and nonexpert content moderators can clearly identify content that may be subject to removal. Pragmatic and First Amendment concerns that informed decades of publisher and conduit liability cases are still relevant to the ongoing debate about content moderation, and any debate surrounding the future of § 230 should be informed by these precedents.