REVISITING INTERNET SERVICE PROVIDERS’ IMMUNITY FROM DEFAMATION LIABILITY
A DECADE AFTER ENACTMENT OF THE COMMUNICATIONS DECENCY ACT

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ABSTRACT

TAE HEE LEE: Revisiting Internet Service Providers’ Immunity From Defamation Liability
A Decade after Enactment of the Communications Decency Act
(Under the direction of Dr. Ruth Walden)

This thesis explores the Internet Service Providers’ immunity from cyber-torts by third parties since the enactment of the Communications Decency Act of 1996. It examines two court groups’ rationales concerning Section 230’s immunity provision: rationales split between those courts following the Fourth Circuit decision in Zeran v. AOL – which granted ISPs absolute immunity from torts liability – and other courts disagreeing with Zeran. The legislative history analyzed in this thesis strongly supports the premise that Section 230 did not grant perfect immunity, but instead limited immunity to ISPs that engaged in Good Samaritan blocking. Interest groups have strongly influenced the ISP immunity issue from the legislation to recent court cases. The case analysis demonstrates that broad immunity did not encourage ISPs to self-police the Internet. The news portal analysis demonstrates that anti-Zeran courts’ reasoning concerning the meaning of the “development” of content is appropriate for applying to the current Internet environment.
To my wife Jung Hye

and three children
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CHAPTER I

INTRODUCTION

If an anonymous person falsely described somebody as a murderer on the Internet, what kind of relief can the defamed person expect from the courts?

In September 2005, John Seigenthaler Sr., a former USA Today editor and the founder of the First Amendment Center, was astonished when he found his fake biography, which directly linked him to the assassinations of both John F. Kennedy and his brother Robert Kennedy in Wikipedia, the anyone-can-contribute online encyclopedia. ¹ This entry also included false claims that Seigenthaler had lived in the Soviet Union from 1971 to 1984. ² According to Seigenthaler, the only correct fact in the biography was that he was “the administrative assistant” to Robert Kennedy. ³

This defamatory entry was made by an anonymous user on May 26, 2005. The only action of Wikipedia was to correct the misspelling of a word, just three days after the entry was originally posted. This entry was taken down only after Seigenthaler complained to Jimmy Wales, the founder of Wikipedia, on October 7, 2005. ⁴ However, the defamatory entry had remained uncorrected for almost four months, and what was more, numerous minor


² Id.

³ Id.

websites hyperlinked and displayed the hoaxed biography for several months after Wikipedia removed it. Seigenthaler wanted to investigate who posted the malicious entry. However, this defamatory entry was traceable only to the Bellsouth Internet account of an anonymous user, and the giant Internet service provider refused to identify its user, because ISPs won’t reveal users’ information without a court subpoena.\(^5\) However, before long, the identity of the poster was revealed by an anti-Wikipedia activist. The poster of the libelous biography was the employee of a small delivery company in Nashville, Tennessee.\(^6\) The reason he gave for posting the false biography was that he thought Wikipedia was a joke site and made the fake biography to try to shock his colleagues.\(^7\) The affair started as a joke, but it ended up as an “Internet character assassination,” said Seigenthaler in the Op-Ed section of \textit{USA Today}.\(^8\)

The Seigenthaler case raises important issues: Is there complete legal immunity from defamation suits for ISPs such as Wikipedia regardless of how long an inaccurate article stays on the sites? What if Wikipedia had refused Seigenthaler’s request to take down the entry? Should ISPs retain their immunity when they knowingly distribute defamatory postings?

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\(^5\) Seigenthaler, \textit{supra} note 1. According to Seigenthaler, when he asked Jimmy Wales for the identity of the author of the fake biography, Wales’s reply was that Wikipedia did not know and could not find out the author. In order to identify the poster’s identity he should file a “John or Jane Doe” lawsuit because of federal privacy law, which doesn’t allow a communication company to reveal the private information of its customer. If the court accepted plaintiff’s claim, then the company would respond to subpoena to disclose the identity of user. At least one anonymous poster filed a lawsuit against Yahoo! for disclosing his identity to the employer that he criticized on a Yahoo! message board. See \textit{John Doe v. Yahoo!}, No.CV00-4993-NM(C. D. Cal. filed May 11,2000). However, the plaintiff later withdrew his complaint.


Seigenthaler did not file a libel suit against Wikipedia because he discovered that Section 230 of the Communications Decency Act (CDA) provides legal immunity to ISPs for defamation posted by third parties. As Seigenthaler pointed out in his USA Today article, the Act means, unlike traditional media such as print and broadcast companies, online service companies can rarely be sued for “disseminating defamatory attacks on citizens posted by others.”

He scathingly wrote that a string of court decisions demonstrated that “Congress has creatively barred defamation lawsuits against all Internet service providers.”

Attorney Anita Ramasastry agreed with if he had filed a lawsuit, “The court very likely would have dismissed his case.”

In 1996, Congress passed the CDA to regulate the circulation of objectionable material, especially pornography, over the Internet in order to protect children by making it illegal to send indecent material to children or to display it on the website. The CDA was designed to encourage self-regulation by allowing Internet Service Providers (ISPs) to exercise editorial control in filtering offensive material. To achieve this goal, Congress created a specific provision, Section 230 of the CDA, which granted broad immunity from liability to ISPs for any defamation on their web pages supplied by a third party. In Zeran v. America Online, a seminal case interpreting section 230, the U.S. Court of Appeals for the Fourth Circuit found that an ISP was not liable even though it ignored notices of the

9 Id.

10 Seigenthaler, supra note 1.


defamatory posting from the offended person and neglected to remove it.\textsuperscript{14} In \textit{Blumenthal v. Drudge}, AOL was judged to be free of liability even though the company had promoted news items including a defamatory story about a false rumor.\textsuperscript{15} Since \textit{Zeran}, blanket immunity for ISPs has firmly taken root as the predominant case law.

Introducing the CDA, the late Senator Jim Exon of Nebraska emphasized the paramount purpose of the statute: “The information superhighway should not become a red light district.”\textsuperscript{16} The \textit{Zeran} court also interpreted that the ultimate goal of Section 230 was “to cultivate the robust nature of Internet communication” and “to keep government interference in the medium to a minimum.”\textsuperscript{17} To accomplish this goal, Congress decided to eliminate the “threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium,” the \textit{Zeran} court declared.\textsuperscript{18}

However, a decade after its enactment Section 230 of the CDA has continuously come under fire. The Seigenthaler-Wikipedia controversy was just one of the recent cases.

Seigenthaler said that, even though he was a staunch advocate of First Amendment freedom, we live in a universe of new media “populated by volunteer vandals with poison-pen intellects. Congress has enabled them and protects them.”\textsuperscript{19} Furthermore, Judge Ronald

\begin{footnotes}
\item[14] 129 F.3d 327 (4\textsuperscript{th} Cir. 1997).
\item[17] Zeran v. America Online, Inc., 129 F.3d 327, 330 (4\textsuperscript{th} Cir. 1997).
\item[18] \textit{Id.}
\item[19] Seigenthaler, \textit{supra} note 8.
\end{footnotes}
M. Gould, apparently criticizing the Zeran decision, argued that some courts’ opinions made the Internet like the “Old West: a lawless zone.”

It seems that courts that have considered cyber-libel cases have recently faced the criticism from both inside and outside the judiciary that Section 230 has allowed libel to go unpunished and the Internet to be an unregulated zone that does not contribute to the robust nature of the Internet, on the contrary, and that the statute detracts from the potential of the Internet as effective mass communication media. However, in spite of the criticism of Zeran, many of courts have confirmed the Zeran court’s interpretation of the original intention of Congress. Some scholarships also strongly support Zeran on First Amendment grounds. A decade has passed since the enactment of Section 230. It is time to revisit Section 230, to rethink the appropriate standard of ISP liability.

The purposes of this thesis are (1) to examine the legislative history of the CDA, especially Section 230, to determine how and why Congress decided to grant ISPs immunity, (2) to trace the evolution of court opinions concerning ISP immunity and to analyze how the courts justified their different conclusions, (3) to explore relevant legislation passed in other countries as well as how courts of these countries have approached ISP liability immunity.


While this thesis will also generally review the common law of libel, the philosophical and historical background of Internet regulation, and compare other relevant laws, such as copyright law concerning ISP liability, the focus of the study will be on determining how to strike a sound balance between the protection of freedom of expression and individual reputations on the Internet. This thesis will clarify the current issues concerning ISP liability and will try to find and suggest possible solutions to build a more robust cyberspace. Ultimately, the thesis will try to find answers to the question of whether Section 230 is effective in satisfying its statutory purpose in an ever-changing Internet environment.

1.1. LEGAL BACKGROUND

1.1.1. THE COMMON LAW OF DEFAMATION

Before examining ISP immunity from liability for third-party postings, it is necessary to understand the framework of the common law of defamation. The Restatement (Second) of Torts defines a defamatory communication as one that “tends so as to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”23 Why do courts impose liability for defamatory statements? The late Justice Potter Stewart pointed out that “society has a pervasive and strong interest in preventing and redressing attacks upon reputation.”24 Protecting reputation reflects the value that society places on “the essential dignity and worth of every human being.”25

25 Id.
Mike Godwin also mentioned that the goal of libel law is to compensate for the damage from defamation as a remedy and a deterrent against future defamation.\textsuperscript{26} In \textit{Gertz v. Welch} (1974), Justice Lewis Franklin Powell wrote, “[A]bsolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.”\textsuperscript{27} Justice Powell declared that the Court would not require states to abandon “the legitimate state interest underlying” the libel law: “the individual’s right to the protection of his own good name.”\textsuperscript{28} Powell’s opinion acknowledges that freedom of speech is not absolute and “must be balanced against other competing social interests.”\textsuperscript{29} Consequently, the Court has made efforts to appropriately accommodate the need for freedom of expression and the legitimate interest in redressing wrongful injury.\textsuperscript{30} In other words, the Court puts weight on not only creating “breathing space”\textsuperscript{31} for freedom of speech and press, but also the social need to protect other individual rights.\textsuperscript{32}

Under common law principles, if a defamatory statement was communicated to a third party, the content was “published” and the publisher could be held liable.\textsuperscript{33} In particular, Section 577 of the \textit{Restatement} indicates that one who intentionally and unreasonably fails to

\textsuperscript{26} MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE 82-84 (2003).

\textsuperscript{27} 418 U.S. 323, 341(1974).

\textsuperscript{28} \textit{Id}.


\textsuperscript{30} 418 U.S. at 342.


\textsuperscript{32} In \textit{New York Times v. United States}, 403 U.S. 713,761-62 (1971), Justice Blackmun argued in his dissenting opinion that the First Amendment is “only one part of an entire Constitution,” and “each provision of the Constitution is important.” According to his argument, “First Amendment absolutism” has never commanded a majority of the Court.

\textsuperscript{33} \textit{RESTATEMENT (SECOND) OF TORTS, supra} note 23, at 577.
remove defamatory statements under his control should also be subject to liability for “continued publication.” This principle is extremely important because the U.S. Court of Appeals for the Fourth Circuit, in Zeran v. AOL, interpreted the CDA to mean that ISPs can enjoy freedom from liability even though they ignore notifications of defamatory postings.

Under the “republication rule,” someone who repeats or republishes a defamatory statement made by a third party bears a liability equal to that of the original publisher. The Texas Court of Appeals in Dement v. Houston Printing Co. stated that by republishing a defamatory statement, a person “becomes responsible for his own act in doing so, and, if he seeks to justify, he must prove the truth of the charge published.” In other words, the law regards a republisher of a defamatory statement as having “adopted” the statements as his/her own, based on an old rationale that “talebearers are as bad as talemakers.”

1.1.2. THREE LIABILITY CATEGORIES

For the purpose of deciding liability for defamation, courts have traditionally divided the various entities that publish, republish, or disseminate a defamatory statement into three categories: publisher, distributor, and common carrier.

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34 Id.


PUBLISHER LIABILITY

A publisher exerts comprehensive editorial control over the distribution of information.\textsuperscript{41} Newspapers, magazines, and broadcasters are classic examples of publishers.\textsuperscript{42} Publishing companies are held liable for libel because their employees select, write, edit, and/or distribute false and defamatory statement to the public.\textsuperscript{43} In other words, publishers have a responsibility to monitor the content of their publications.\textsuperscript{44} Their editorial control is stronger than that of common carriers and distributors. A publisher of content supplied by third parties over which he/she has editorial control can be held liable for libel when the following four conditions are met:\textsuperscript{45} (1) a false and defamatory statement concerning another person, (2) an unprivileged publication by a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) the existence of harm caused by the publication.\textsuperscript{46}

\textit{New York Times v. Sullivan}\textsuperscript{47} established the modern standard for publisher liability by refusing to hold a publisher strictly liable for disseminating defamatory material.\textsuperscript{48}

\textsuperscript{41} Id.

\textsuperscript{42} SCHACHTER, \textit{supra} note 38, at 275.

\textsuperscript{43} KENT R. MIDDLETON, WILLIAM E. LEE, BILL F. CHAMBERLIN, \textit{THE LAW OF PUBLIC COMMUNICATION} 117 (6\textsuperscript{th} ed., 2003).

\textsuperscript{44} Sewali Patel, \textit{Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Cours Go?}, 55 VAND. L.REV. 647, 654-59 (2002).


\textsuperscript{46} Id. \textit{See also} \textit{RESTATEMENT (SECOND) OF TORTS} 558 (1977).

\textsuperscript{47} 376 U.S. 254 (1964). Before \textit{New York Times v. Sullivan}, defamation was considered a strict liability tort. According to Black’s Law Dictionary (7\textsuperscript{th} ed. 1999), a strict liability tort can be defined as one in which liability “does not depend on actual negligence or an intent to harm” but is based on the breach of a duty that is imposed by the law.
Instead of adopting strict liability, the Court ruled that the First Amendment demands a minimum constitutional fault standard of “actual malice” when public officials file defamation suits.\(^{49}\) Later, in \textit{Gertz v. Robert Welch, Inc.}, the Court ruled that private libel plaintiffs are not required to prove \textit{New York Times v. Sullivan} actual malice but the minimum fault standard of negligence.\(^{50}\)

**Distributor Liability**

Those who deliver or transmit defamatory material can be defined as “distributors.”\(^{51}\) Bookstores, libraries, and news vendors are categorized as distributors, which exert less editorial control than publishers but more than common carriers.\(^{52}\) More specifically, a distributor “only delivers or transmits defamatory matter published by a third person” and is subject to liability only if the distributor “knows or has reason to know of the material’s defamatory character.”\(^{53}\) Generally, distributors have no legal duty to examine publications for defamatory content prior to offering them for sale.\(^{54}\)

\(^{48}\) Patel, \textit{supra} note 44, at 655-59.

\(^{49}\) Luftman, \textit{supra} note 39. In this case, Sullivan, the police commissioner of Montgomery, Alabama, argued a false advertisement printed in \textit{The New York Times} damaged his personal reputation and that the newspaper should be held liable for defamation. However, the Court held that while the \textit{Times}’s failure to check the defamatory advertisement might be evidence of negligence, it was not sufficient to prove “actual malice,” or publishing while “knowing it was false or exercising reckless disregard for the truth.”


\(^{51}\) Schachter, \textit{supra} note 38, at 275.

\(^{52}\) Luftman, \textit{supra} note 39, at 1084-88.

\(^{53}\) \textit{Id.}; \textit{see also} \textit{Restatement (Second) of Torts} 581(2).

\(^{54}\) Schachter, \textit{supra} note 38, at 275.
Smith v. California\textsuperscript{55} is said to be first case in which the Supreme Court addressed a distributor’s liability.\textsuperscript{56} Smith, the proprietor of a bookstore in Los Angeles, was convicted under a city ordinance that made it unlawful for any person to have any obscene or indecent books in any place for sale.\textsuperscript{57} The Supreme Court ruled that “by dispensing with any requirement of knowledge of the content of the book on the part of the bookseller, the ordinance tends to impose a severe limitation on the public’s access to constitutionally protected matter.”\textsuperscript{58} Moreover, the Court addressed the fact that if booksellers wanted to be absolved of liability for disseminating obscene materials, they had to thoroughly inspect the contents of every book in the store.\textsuperscript{59} As a result, the ordinance restricted the sale of both obscene and constitutionally protected books.\textsuperscript{60} The Court reasoned that bookstore owners are not publishers who control the content of their offerings and that asking owners to review each book for obscenity would unconstitutionally hamper the free flow of information.\textsuperscript{61}

In Auvil v. CBS \textit{“60 Minutes,”}\textsuperscript{62} a federal district court used a similar rationale to reject an argument that CBS affiliates had a duty to exercise editorial control over a “60

\textsuperscript{55} 361 U.S. 147 (1959).
\textsuperscript{56} Luftman, \textit{supra} note 39, at 1086.
\textsuperscript{57} 361 U.S. 147.
\textsuperscript{58} \textit{Id.} at 153.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} Luftman, \textit{supra} note 39, at 1086.
\textsuperscript{62} 800 F.Supp. 928 (E.D.Wa. 1992). Some 4700 Washington apple growers filed a defamation suit against CBS and its affiliates for airing an episode of “60 minutes” criticizing the pesticide Alar, which was commonly used in the apple industry as a growth regulator. The Natural Resources Defense Council expressed concern over research which indicated that Alar cannot be washed off the fruit, nor will peeling remove it. Based on these findings, “60 minutes” investigated a report published by NRDC and centered a broadcast on those concerns. After the program aired, apple prices and sales declined, costing apple growers sustained losses amounting to as
Minutes” broadcast. In this case, the network’s affiliates republished the program by relaying an unedited feed without exercising any editorial control. The court held that the plaintiffs’ argument 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,” The court added, “[T]hat is unrealistic.” The court reaffirmed the classic rationale that distributors would be liable only if they knew or had reason to know of the defamatory character of the publication and said there is no “conduit liability.”

In Misut v. Mooney, a New York state court dealt with the liability of a distributor defendant who exercised basic editorial control before distribution. In this case, a contract printer had scrutinized fifteen articles prior to publication and had no other input into the material, which he printed. The court ruled that the defendant was not liable for defamation on the basis that he had not exercised sufficient editorial control over the material. The court also held that examining the material is no indication that the printer had any

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64 Id. at 932.

65 Id.


67 Luftman, supra note 39, at 1086

68 475 N.Y.S. 2d 233, 236.
knowledge or reason to know of its libelous nature because it was not “in a position to test the truth of statements submitted by an independent author.”

**COMMON CARRIER LIABILITY**

Common carrier liability can apply to any entity that acts as a passive conduit to provide facilities that enable the exchange of communications. Telephone companies, telegraph and microwave communications companies would be typical examples. They simply carry the messages of others without editorial control and basically have an obligation to serve the public by transmitting communication efficiently and on a non-discriminatory basis. Thus, to impose a responsibility for common carriers to monitor the massive volume of communications transmitted across their lines is too heavy a burden and also has the potential to invade privacy. Therefore, should they be held liable for defamation by a third party, “their social function could not be satisfied.” Based on this reasoning, courts have ruled that common carriers may avoid liability for defamation regardless of whether they know or had reason to know of the defamation because they have no editorial control. Therefore, Luftman concluded that a common carrier “is not subject to

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69 *Id.*

70 [Schachter, supra note 38, at 275.](#)


72 [Middleton et al, supra note 43, at 117.](#)

73 [Davis, supra note 45, at 79.](#)

74 *Id.*

75 *Id.*

76 [Restatement (Second) of Torts 581(1) (1977).](#)
defamation.”77 For example, in *Anderson v. New York Tel. Co.*, the New York Court of Appeals held that a telephone company was not a publisher and not subject to liability, even though the plaintiff had notified the company about allegedly defamatory recorded messages and the telephone company had refused to stop the recordings.78

Common carriers are clearly distinguished from publishers and distributors due to their lack of editorial control. However, the conceptual borderline between publishers and distributors is unclear. David Sheridan referred to a publisher as a “primary publisher” who has control over the content79 and a distributor as a “secondary publisher” or “republisher” because he “does not create content but makes it available to others.”80 In many cases publishers are also considered distributors and would be liable for defamation as either a primary publisher or a republisher.81 For example, a television network not only creates programs but also distributes them. This vague distinction between publishers and republishers also leads to confusion and controversy over ISP liability in Internet libel.82

It is important to note that distributors have always been held liable when they had knowledge of or had reason to know of defamatory content; this principle has not been challenged under the common law. However, this principle has been disregarded in Internet libel by the blanket protection granted to ISPs under Section 230 of the CDA and the current

77 Luftman, *supra* note 39, at 1084.


80 *Id.*


82 *Id.*
interpretation of Section 230 in Zeran v. AOL, and has become one of the major points in the ensuing discussion surrounding the issue.

1.1.3. Internet Libel Cases Before the Adoption of the CDA

With the advent of the Internet, courts faced the dilemma of applying to ISPs the traditional three categories of liability for defamation. Before the passage of the CDA in 1996, courts used a case-by-case approach in applying the common law’s standards to cyberspace.83 The three categories are appropriate for addressing the traditional media but did not always work with the “technological and communication structure” of the Internet.84 In attempting to apply traditional libel law to the Internet, courts reached conflicting conclusions in similar cases.85 Two cases well represent this situation: Cubby v. CompuServe86 and Stratton Oakmont, Inc. v. Prodigy Service. 87

In Cubby, a federal district court determined that CompuServe, an ISP that offered its subscribers access to an electronic library of news publications, was not a publisher but a distributor because it did not take steps to monitor the content of its discussion forum.88

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83 Id.


85 Friedman & Buono, supra note 22, at 52.


88 776 F.Supp.135 (S.D.N.Y. 1991). The plaintiff, Cubby, charged CompuServe and Don Fitzpatrick with libel claiming that CompuServe was liable for allegedly defamatory statements relating to his publication Skuttlebut. The allegedly defamatory story was made by Rumorville USA, an electronic daily newsletter published by Don Fitzpatrick Associates. CompuServe offered CompuServe Information Services (“CIS”) to subscribers for membership and online time usage fees. In return for these fees, the user was given access to an electronic library including thousands of information sources and interest forums. When Rumorville was ready to publish a newsletter, it uploaded it directly onto the CompuServe network. Therefore, the publication received no prior review by CompuServe before being posted. Cubby claimed that court should conclude that CompuServe was a publisher and hold it to a higher standard of liability. On the other hand, CompuServe argued that it was a
Citing Smith, the court held that CompuServe should not be held liable for a defamatory posting because it had no more editorial control over an electronic daily newsletter’s online forum than did other distributors, such as public libraries. Furthermore, the court held that it was unfeasible for CompuServe to screen every publication it carried for potentially defamatory statements. In conclusion, the court said that “given the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know” of the allegedly defamatory statements. However, Cubby failed to establish that.

Four years after Cubby, in Stratton Oakmont, Inc. v. Prodigy Service Co., a New York state trial court took a different direction in applying defamation liability to ISPs. An unidentified bulletin board user posted accusations of crime and fraud against Stratton Oakmont, Inc., a securities investment firm, and its president, Dainel Porush, on Prodigy’s “Money Talk” bulletin board. Unlike Cubby, the court ruled that Prodigy was a “publisher” since “an on-line service that sufficiently exercised editorial control over the content of

distributor of Rumorville. Furthermore, it could not be liable because it neither knew nor had reason to know of the allegedly defamatory statements. The district court rejected the plaintiff’s claim.

89 Id. The court cited the Smith case holding: “Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near approach to omniscience. And the bookseller’s burden would become the public’s burden, for by restricting him the public’s access to reading matter would be restricted. If the contents of books and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed.” Smith v. California, 361 U.S. 147, 152-53 (1959).

90 Id.

91 Id.

92 Id. at 140,41.


94 Id.
messages posted on its computer bulletin boards” was a “publisher.” Prodigy had advertised itself as a family-oriented service, monitoring its boards and screening for offensive messages for a safe Internet. In order to satisfy this purpose, Prodigy actually “created an editorial staff” who had the ability to continually monitor the bulletin board, and the court regarded these activities as a “censorship.” In rejecting Prodigy’s claim that it should be treated as a distributor, the court focused on editorial activities such as actively screening and editing messages before posting them, running software screening programs, and publishing content guidelines. The court ruled that “Prodigy’s conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice.” These activities rendered Prodigy a publisher instead of a distributor, the court reasoned. Consequently, Prodigy was the publisher of all statements made on the bulletin board because of its frequent editing control regardless of actual editing or removal of the particular material. Against the claim that publisher liability would exert a chilling effect on ISPs’ efforts to self-police their services,

95 Id.
96 Id.
97 Id. at 13
98 Id.
99 Id. at 13.
100 Id. at 10. Prodigy attempted to rely on the Cubby case. However, the court distinguished this case from it for two reasons. “First, Prodigy held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, Prodigy implemented this control through its automatic software screening program and the Guidelines which Board Leaders are required to enforce. By actively utilizing technology and the manpower to delete notes from its computer bulletin boards on the basis of offensiveness and bad taste, for example, Prodigy is clearly making decisions as to content, and such decisions constitutes editorial control.”

the court replied that such claims “incorrectly presumed that the market will refuse to compensate a network for its increased control and the resulting increased exposure.”

However, the two courts’ decisions created “troubling problems” of ISP liability. While some ISPs that screened online content bore the potential danger of liability in libel suits despite their good faith efforts to prevent defamatory or illegal postings, those ISPs that did not take any action to block offensive material were free from such threats. This conflicting result appeared to encourage ISPs to ignore the content on their websites or bulletin boards in order to attain the much safer distributor status.

1.1.4. SECTION 230 AND ZERAN V. AOL

The decision in Stratton Oakmont that more efforts by ISPs to try to provide family-oriented content by self-policing would make them more vulnerable to defamation suits created a sensation in Congress, which was designing legislation to regulate pornography on the Internet. Before long, Congress reacted to this situation with legislation, i.e., Section 230 of the Communications Decency Act. The House Conference Report clearly stated that “one of the specific purposes of [Section] 230 is to overrule Stratton Oakmont v. Prodigy and any other similar decisions.”

The most salient characteristic of Section 230 is a deviation from the common law of defamation. First of all, Section 230 (c) (1) states that “no provider or user of an Interactive computer service shall be treated as the publisher or speaker of any information provided by

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102 Id. at 13.

103 Davis, supra note 45, at 85.

104 Id.

105 Sheridan, supra note 79, at 159.

another information content provider.” As mentioned above, common law divided potential defamation defendants into three categories; however, Section 230 eliminates the liability of publishers who distribute third-party content. Second, Section 230 contains a so-called the “Good Samaritan” provision, which grants “protection for private blocking and screening of offensive material.” This provision was a clear reaction to Stratton Oakmont, Inc. v. Prodigy Service Co., since Congress feared that the decision would deter ISPs from policing offensive material such as Internet pornography. The Good Samaritan provision allows ISPs to enjoy even broader immunity from publisher liability. In other words, even though ISPs exert editorial control over third-party contents just like newspapers’ gatekeepers (publishers), they would be protected under the umbrella of Section 230.

Another crucial point of Section 230 is the Information Content Provider (ICP) provision. Section 230 distinguishes an ISP from ICP. The traditional role of ISPs is to provide access to the Internet. However, Section 230 defines an ISP more broadly as “an information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or

107 47 U.C.A. § 230 (c) (1).

108 47 U.S.C. § 230 (c) (2) “No provider or user of an interactive computer service shall be liable on account of (a) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (b) any action taken to enable or make available to information content providers or others the technical means to restrict access.”


ISP immunity is granted when defamatory content is created by “another information content provider.” However, an ISP might be subject to joint liability with an ICP when it contributes to develop the material originally made by third party. In this statute an ICP is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” Section 230 does not grant the same immunity to ICPs. However, in many of the cases, the borderline between an ISP and an ICP is somewhat unclear. According to the Good Samaritan provision, an ISP’s editorial control is shielded. However, editing control is, to a degree, related to the notion of development of content. This leads to these questions: What extent of development of content might cause an ISP to become an ICP? What is the meaning of “development”? The ambiguous conceptual demarcation between ISPs and ICPs is the most controversial part of the problem. This distinction rests on how the courts interpret the phrase “the development or creation of information.”

Lastly, Section 230 (c)(1) does not specifically mention protection for distributors, only for “publishers or speakers.” Therefore, soon after the enactment of the CDA, in Zeran v. America Online, Inc., the courts had to address for the first time whether Section 230 intended publisher liability to include distributor liability. In particular, notification-based liability arose as an immediate issue.

113 47 U.S.C. 230 (c) (1).
114 47 U.C.A. § 230 (f) (3).
115 47 U.S.C. 230 (f) (3).
116 129 F.3d 327 (4th Cir. 1997).
In Zeran v. AOL, the court interpreted Section 230 broadly and granted immunity to ISPs for acting not only as publishers but also as distributors. Kenneth Zeran sued AOL, arguing that the ISP, as a distributor, had a responsibility to immediately remove defamatory postings by a third party once notified but had unreasonably delayed removing them, had neglected to screen other similar defamatory entries, and had refused to post retractions.\footnote{Id. Just six days after the Oklahoma City bombing of April 19, 1995, an anonymous individual posted a message advertising the sale of tee-shirts and other items with slogans glorifying the bombing on an American Online (AOL) bulletin board. The messages stated that the merchandise could be purchased by calling the plaintiff at the listed telephone number. As a result of this spiteful message, Zeran received a large number of hostile calls including death threats. In fact, Zeran was a commercial publisher with no connection to the Oklahoma City bombing. Zeran informed AOL that he was not involved in these unauthorized messages and asked that AOL both remove them and take steps to prevent reposting. AOL deleted the message at first but refused to post a retraction. Despite removal, the same messages were reposted on numerous occasions in an approximately three week period. Meanwhile, Oklahoma City Radio received a copy of the first AOL posting and urged audiences to call Zeran. The numerous calls subsided only after a local newspaper exposed the defamatory advertisement and after the local radio station made an on-air apology. Zeran filed a libel suit against AOL.}

Zeran argued that “Section 230 immunity eliminates only publisher liability, leaving distributor liability intact.”\footnote{Id. at 331.} He stressed that he provided AOL with sufficient notification of the defamatory posting, making the company liable as a distributor because it “acquired knowledge of the defamatory statement’s existence.”\footnote{Id. at 332.}

One issue that emerged was the language of Section 230. Zeran contended that Congress used only the term “publisher.” Accordingly, the law was applicable only to publisher liability, while “distributors are left unprotected by Section 230.”\footnote{Id.}

The U.S. Court of Appeals for the Fourth Circuit rejected Zeran’s claim, declaring that Section 230 granted ISPs blanket immunity. The court held that Section 230 created “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.”

Thus, any claims based on “the publisher’s traditional editorial functions such as deciding whether to publish, withdraw, postpone or alter content” are not allowed.

Zeran’s proposed distinction between publisher and distributor was also rejected. According to the Zeran court, distributors are traditionally considered publishers under libel law. The Zeran court did not deny that Stratton Oakmont and Cubby recognized a legal distinction between publishers and distributors. However, “this distinction signifies only that different standards of liability may be applied within the larger publisher category, depending on the specific type of publisher concerned,” the Zeran court explained. Furthermore, the

121 Id. at 330.

122 Id.

123 Id. at 332. The Zeran court held that it would be very difficult to distinguish the terms “publisher” from “distributor” in the “garden variety defamation” because the publication of the statement was a “necessary element” of defamation action, in that, only those who published could “be subject to this form of tort liability.” Furthermore, the court added the rationale why distributors are considered to be publishers for the purpose of defamation law: “Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the books, newspapers, magazines, and information available to others as to be regarded as publishers.”

More theoretically, the Fourth Circuit court found the authority of their logic from the Restatement (Second) of Torts. Section 577 definition of “publication” of defamatory material, which states,

(1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.

(2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.

Thus, “publisher is not merely one who intentionally communicates defamatory information. Instead, the law also treats as a publisher or speaker one who fails to take responsible steps to remove defamatory statement from property under her control.” In other words, if the one who had responsibility to remove a defamatory story did not do his duty, he could be liable as a publisher. See id. at 332 and also Jane Doe v. AOL, 783 So.2d 1010, 1015 (Fla. 2001).

124 Id. at 332.
Zeran court justified its decision by stating it could not find any mention in the two decisions that “distributors are not a type of publisher for the purpose of defamation law.”

The court concluded that distributor liability was “merely a subset, or a species, of publisher liability and is therefore also foreclosed by Section 230.” Therefore, AOL fit within the term “publisher” as used in Section 230.

Citing the First Amendment, the court rejected the claim of notification-based liability for ISPs, saying that such an obligation “could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability.” According to the court, “It would be impossible for service providers to screen each of their millions of postings for possible problems.”

In sum, any attempt to distinguish between publisher liability and notice-based distributor liability can not be allowed. Therefore, according to the Zeran rationale, the Section 230(c) as a whole granted absolute immunity to ISPs for third-party posting because whether they do (subsection (c)(2)) or do not (subsection (c)(1)) make good faith efforts such as editorial control, there is no liability under either state or federal law.

Since Zeran, the rationale of this case has become “the standard for judging Internet-based defamation claims under the Section 230” and has offered the basis for the other

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125 Id.

126 Id. In a related context, the court said that if ISPs were subject to distributor liability, they would face potential liability each time they received notice of a potentially defamatory statement. Therefore, the court worried that notice-based liability would prevent service providers from self-regulating activity.


128 Id. at 331.

129 See John Doe v. GTE Corporation and Genuity Inc., 347 F.3d 655, 660 (7th Cir. 2003).
defendants to expand the reach of Section 230 immunity.\textsuperscript{130} However, this case has generated endless controversy over ISP liability.

To date, the Supreme Court has not addressed the question of whether ISPs should be held liable for third-party defamation. While the Supreme Court struck down the provisions of the CDA that prohibited the Internet transmission of indecent communications to persons under the age of eighteen, the constitutionality of the immunity granted to ISPs under Section 230 was not questioned.\textsuperscript{131}

\textbf{1.2. Literature Review}

The scholarly literature that provides the foundation for this study can be categorized into three sections: 1) studies by scholars with different perspectives on the Internet, especially those of cyber-libertarianism, the clear-rules approach, and the moderate view;\textsuperscript{132} 2) controversy regarding Section 230 and the Zeran decision; 3) comparisons to other laws concerning ISP liability.

\textbf{1.2.1. Different Approaches to the Internet: Is the Internet a Free Speech Zone?}

The policy underlying Section 230 of the CDA reflects a certain philosophical attitude toward the Internet: in “cyberspace,”\textsuperscript{133} the less government intervention and the broader the self-regulation the better.\textsuperscript{134}

\textsuperscript{130} Friedman & Buono, supra note 22, at 659.

\textsuperscript{131} Reno v. ACLU, 521 U.S. 844 (1997). In this case, the Court ruled unconstitutional Section 223(a) and Section 223(d) of the CDA, which prohibited knowing transmission of “indecent” or certain “patently offensive” communications to minors.

\textsuperscript{132} Aaron Burstein, Thomas Devries, and Peter S. Menell, The Rise of Internet Interest Group Politics, 19 BERKELEY TECH. L.J. 1, 5 (2004). This article categorized attitudes toward the Internet as “cyber-libertarianism” and “clear rules” approach. The moderate view is added by the author.

\textsuperscript{133} The term “cyberspace” was developed by novelist William Gibson in his popular science-fiction novel \textit{Neuromancer}. He defined cyberspace as a “consensual hallucination that felt and looked like a physical space.
Section 230 clearly shows this intention by declaring that it is national policy “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation,” and further, “to encourage the development of technologies which maximize user control” over information.

There are various theories and approaches on how to deal with government regulation of the Internet, but it is helpful to classify three perspectives for this study: cyber-libertarianism, the clear rules approach, and the moderate view.

**Cyber-libertarianism**

Advocates of cyber-libertarianism emphasize that the value of the Internet is maximized when no regulation controls the flow of communication. In this view, the Internet is the ultimate free speech medium. Cyberspace is such a totally different place from the traditional communication realm that it should remain a free zone, governed by self-regulation and protected by the First Amendment, a zone free from government control. Consequently, some commentators assert that the government should have the wisdom to permit cyberspace to make its own rules, just as “churches are allowed to make religious

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134 Schachter, supra note 38, at 282.

135 47 U.S.C. §230 (b) (2).

136 47 U.S.C. § 230 (b) (3).

137 See Margaret Chon, *Internet Law Symposium: Introduction*, 20 Seattle Univ. L.R. 613 (1997). The term “cyber-libertarian” was used by Chon for the first time. He defined cyberlibertarians as those who believe the private ordering through the contract is the most natural form of legal regulation on the Internet.

law” and “securities exchanges can establish commercial rules so long as they protect the
vital interest of the surrounding community.”\(^\text{139}\)

Schachter pointed out that this logic and the theory that speech is a vehicle for attaining
individual self-determination was embedded in Section 230.\(^\text{140}\) The Section states that it was
designed “to encourage the development of technologies which maximize user control.”\(^\text{141}\)

According to Bruce Sanford and Michael Lorenger, the Internet is fundamentally
different from traditional mass communication media in at least three respects.\(^\text{142}\) First, the
Internet can offer an “unlimited number of information sources”\(^\text{143}\) without concerns about
the scarcity that limits the electromagnetic spectrum of the broadcast media.\(^\text{144}\) Second, users
and producers on the Internet overlap.\(^\text{145}\) In other words, “every person who taps into the
Internet is his own journalist.”\(^\text{146}\) Last but most importantly, “the Internet has no
gatekeepers,” such as publishers or editors, who can control the distribution of information, a

\(^{139}\) \textit{Id.} at 1392.
\(^{140}\) \textsc{Schachter}, \textit{supra} note 38, at 283.
\(^{141}\) 47 U.S.C. § 230 (b) (3).
\(^{142}\) Bruce W. Sanford & Michael J. Lorenger, \textit{Teaching An Old Dog New Trick: The First Amendment In an
\(^{143}\) \textit{Id.} at 1141.
\(^{144}\) \textit{See} Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). In this case, the U.S. Supreme Court said that
the physical limitations of the electromagnetic spectrum justify government licensing of broadcasters. Justice
White pointed out that as long as demand for spectrum space exceeds the frequencies available, no one can
claim a First Amendment right to broadcast.
\(^{145}\) Sanford & Lorenger, \textit{supra} note 142.
\(^{146}\) \textit{Id.} at 1142. According to the authors, before the advent of Internet, anyone could argue his opinion in the
town square. However, the distribution of one’s message was limited “by the power of the lungs.” Only few
selected people such as journalists or politicians could transmit their ideas to the public. Now “Internet
speakers” can convey their ideas to millions of people at their homes without any restriction.
characteristic that facilitates the decentralization of the supply of information. According to Schachter, one of the underlying rationales of Section 230 reflects the concept that “the Internet has no gatekeeper.”

Furthermore, anonymity, one of the characteristics of the Internet, enables John Doe to communicate with numerous people without any fear of retaliation or punishment. Jonathan D. Wallace emphasized that anonymous and pseudonymous speech on the Internet is “entitled to the same First Amendment protections” as in traditional media. Sanford and Lorenger concluded that “the lack of gatekeepers, wide-open networks, and anonymity make the Internet invaluable as a tool of free speech.” And “[t]he Internet’s value is maximized” when the rules and regulations controlling the flow of communication are minimum, Sanford and Lorenger added.

Some commentators found the justification for self-rule in the global nature of computer networks. According to David R. Johnson and David Post, cyberspace has no territorially based boundary, and, furthermore, computer networking destroys “the link

147 Id.
148 SCHACHTER, supra note 38, at 282.
149 In general, the advocates of the First Amendment have argued that the Framers of the Constitution recognized clearly the value of anonymous speech and that anonymous speech is essential to the democratic process because it is often the only way for unpopular views to be heard. This rationale was accepted by the U.S. Supreme Court. The Court said, in Talley v. California, 362 U.S.60 (1960), “the L.A. Handbill ordinance requiring identification might deter perfectly peaceful discussions of public matters of importance due to fear of identification and reprisal.” In the same context, cyberlibertarians argue that the anonymity of the Internet should be protected in order for Internet users to express alternative views without fear of reprisal. See generally, Victoria Smith Ekstrand, Unmasking Jane and John Doe: Online Anonymity and the First Amendment, 8 COMM, L. & POL’Y 405 (2003).
151 Sanford and Lorenger, supra note 142, at 1143.
152 Id.
between geographical location and the power of local government to assert control over online behavior.”153 They argued that cyberspace can develop its own self-governance system and that a community of online users and service providers should be up to this task.154

“A Declaration of the Independence of Cyberspace” by John Perry Barlow essentially condensed the idea of cyber-libertarianism.155 Barlow stressed that even though Internet users may be distributed across the many jurisdictions of the real world, the only law in cyberspace would be the “Golden Rule.”156 Therefore, users would “be able to build our particular solutions on that basis,” so the Internet culture did not invite government to regulate and could “not accept the solutions you [i.e., the government] are attempting to impose.”157

Mike Godwin supported the same idea. Godwin’s extreme position was that “[l]ibel is dead” in cyberspace.158 In other words, the “net has the potential to render libel law altogether obsolete.”159 His argument started with the question, “Why hasn’t the net seen more libel lawsuits?”160 To answer this question, Godwin pointed out two differences between cyberspace and real space. At first, he argued, in terms of First Amendment law, the

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153 Johnson & Post, supra note 138, at 1370. The authors, furthermore, wrote that the global network also destroys the link between “geographical location and the effects of online behaviors on individuals or things; the legitimacy of a local sovereign’s efforts to regulate global phenomena; and the ability of physical location to give notice of which set of rules apply.”

154 Id. at 1389.

155 Available at http://homes.eff.org/~barlow/Declaration-Final.html.

156 Id.

157 Id.

158 GODWIN, supra note 26, at 101.

159 Id.

Internet has changed the nature of the “limited public figure,” those who thrust themselves into the vortex of public debate, as defined by the Supreme Court in *Gertz v. Robert Welch Inc.* He argued that since anyone with Internet access is able to thrust himself into public debate, it was “almost trivially easy to become a public figure” in cyberspace. In order for public figures to win libel suits, they must prove “actual malice” on the part of the publishers. However, Godwin asserted that in practical terms, it is very difficult to do so.

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161 GODWIN, *supra* note 26, at 103. Even though Godwin’ cyber-libel argument applied traditional libel law to the Internet, it is far different from the clear rules approach. His argument is based on the premise of a regulation-free Internet and ultimately aims at eliminating libel law from cyberspace. Therefore, his argument concerning public figures is just the supporting argument to reach the main goal, a free Internet. Actually, Godwin is critical of Section 230 because it depends not on the Internet user’s self-regulation but ISPs’ self-regulation. In his view, it is another kind of regulation of the Internet.

162 418 U.S. 323, 341(1974). Elmer Gertz was a famous Chicago civil rights attorney who was hired by a family to sue Chicago police officer Richard Nuccio who had killed the family’s son. He had nothing to do with Nuccio’s criminal trial. However, he was libeled by *American Opinion*, a magazine representing the right-wing John Birch Society. The libelous news story called Gretz a “Leninist” and “communist fronter.” Further, the magazine falsely reported that the police had a file on Gertz that took a “big Irish cop to lift.” Gertz filed a lawsuit; however, a lower court found that Gertz was a public figure because he represented the family in the lawsuit and the magazine had not violated the actual malice test for libel which the Supreme Court had established in *New York Times v. Sullivan* (1964). However, the Supreme Court reversed the lower court’s decision, ruling that Gertz was a private person who did not have to prove actual malice to win the libel suit. According to the Court, “Public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.” Public figure have access to channels of effective communication so that they can counteract false statements about them. In contrast, private persons are more “vulnerable to injury” and they have less effective opportunity for rebuttal. The Court said that Gertz did not have fame or notoriety; neither had he thrust himself into the vortex of the public issue involving the trial of the policeman.

163 GODWIN, *supra* note 26, at 89.

164 *See* New York Times v. Sullivan, 376 U.S. 254 (1964). In this case, the Court defined actual malice as proof that the statement was made with “knowledge that it was false or with reckless disregard of whether it was false or not.” Furthermore, the Court ruled that the public officials, not the press, should hold the burden of the proof as to the actual malice.

165 GODWIN, *supra* note 26. at 87.
Another reason for the scarcity of libel suits is the ease with which one can respond to a libelous posting – Godwin called it “self-help”166 – reducing or eliminating any actual need for libel suits.167 In the real world, where “public officials and public figures usually enjoy significantly greater access to the channels” of communication to counteract false statements than private individuals,168 private persons are more vulnerable to harm from defamation. But those individuals now have the same broad, unlimited access to the Internet to correct libelous statements.169

Most importantly, Godwin argued that Internet service providers are more like bookstores than traditional publishers because of the low expectation that they will review the materials and that Congress seemed to accept this argument in the Communications Decency Act.170 Jeremy Stone Weber, applying Godwin’s rationale to Internet bulletin boards, also argued that everyone should be treated as a public figure.171 Furthermore, he pointed out that the Internet is a “textbook marketplace for the trade of ideas.”172 Therefore, “if ever a true marketplace of ideas existed, it exists where the cyber-libel plaintiff can make

166 Id. Godwin borrowed this term from the Gertz decision. Justice Powell, in Gertz, wrote that the Court “has no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation plaintiffs is self-help.”

167 Id. Godwin argued that if someone posted a hundred lines of false and libelous statements about his sex life or personal habits, he can reply with “five hundred lines of point-by-point refutation.”


169 GODWIN, supra note 26, at 88-89.

170 Id. at 91-101.


172 Id. at 277.
a nearly instantaneous and universal response on the bulletin board.”173 This argument reflects Justice Stevens’ opinion in Reno v. ACLU174 that “any person or organization with a computer connected to the Internet can publish information.”175

**“CLEAR RULES” APPROACH**

The opposite of cyber-libertarianism is the “clear rules” approach. In contrast to cyberlibertarian’s free-Internet approach, this approach is based on the strong normative view that Internet should be regulated.176 The basic premise of this view is that the Internet’s legal issues should be handled not by new rules such as Internet libel law but by existing legal rules because “the Internet presents few, if any, new legal questions.”177 This is the approach U.S. courts have always taken to new technology, applying existing rules of law unless Congress enacted specific legislation. This approach was supported by U.S. Court of Appeals for the Seventh Circuit Judge Frank Easterbrook in his article about copyright law and the Internet.178 Judge Easterbrook asserted that the optimal way of managing disputes in cyberspace is to “keep doing what you have been doing” because currently existing principles can be applied to most behavior in cyberspace and then to “make rules clearer”

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173 Id.

174 521 U.S. 844, 886.


176 Burstein, DeVries, and Menell, *supra* note 132, at 5.

177 Id.

when necessary.\textsuperscript{179} He argued that there is no separate law of cyberspace since “the best way to learn the law applicable to specialized endeavors is to study general rules.”\textsuperscript{180}

Joseph Sommer’s argument is more extreme. He asserted that “cyber law” or “law of the Internet” does not exist.\textsuperscript{181} His basic logic is simple: Technology is socially significant but cannot create legal categories to govern most fields of law. For example, “tort law is not the law of the automobile, even though auto accident is the paradigmatic tort case.”\textsuperscript{182} In the same way, “cyber law” that is associated with the Internet or other information technologies is not a useful concept, according to Sommer.\textsuperscript{183}

Ronald Mann and Seth Belzley argued that government regulation of the Internet is inevitable.\textsuperscript{184} According to them, it should come as no surprise that harm perpetrated on the Internet, such as piracy, “continues to grow each year”; moreover, the lack of regulation makes illegal behavior too easy.\textsuperscript{185} They argued that advocacy of self-regulation or no regulation of the Internet is based on the “unexamined view” that the Internet is fundamentally different from the real world.\textsuperscript{186} In contrast to cyber-libertarians, Mann and

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\textsuperscript{179} Id.
\textsuperscript{180} Id. at 209.
\textsuperscript{181} Joseph H. Sommer, Against Cyberlaw, 15 Berkelely Tech. L.J. 1145, 1147 (2000).
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Ronald J. Mann & Seth R. Belzley, The Promise of Internet Intermediary Liability, 47 WM AND MARY L. Rev. 239 (2005).
\textsuperscript{185} Id. at 306.
\textsuperscript{186} Id.
Belzley regard the relative anonymity of Internet users not as a safeguard of free speech but an obstacle that makes redress for damages generally less effective.\(^{187}\)

Godwin’s “public figure” rationale has generated severe criticism from the “clear rule” advocates. Stephanie Blumstein argued that although defamed individuals can access the Internet, Godwin’s model, which is based on a self-regulating system, provides “no deterrent effect” for malicious posting because “no one is potentially accountable under the law” for his/her actions\(^{188}\). According to her argument, self-help also seems ineffective because it is extremely questionable whether “those who read the first defamatory statement may necessarily revisit the same web site to read the response.”\(^{189}\) Blumstein asserted that the “Internet is not self regulating.” Therefore, solutions are immediately needed for malicious postings and ISPs’ disregard of the notice of the defamatory messages.\(^{190}\)

Robert O’Neil also criticized the “responsive capacity” rationale, saying that it overemphasizes the importance of the “call a press conference and they will come” factor.\(^{191}\) According to O’Neil, even though the defamatory message was retracted in response to a complaint from the defamed people, “the damage had already been done in ways the subjects could not easily refute or redress” because of the republication of defamatory statement by other media including newspapers and magazines.\(^{192}\) O’Neil also argues that even if the

\(^{187}\) Id.

\(^{188}\) Blumstein, supra note 110.

\(^{189}\) Id. at 424.

\(^{190}\) Id. at 423-24.

\(^{191}\) O’Neil, supra note 175, 631-33.

\(^{192}\) Id. at 632.
defamed persons create their own web pages, their readership and that of the web sites that originally posted the defamatory message would likely have minimum overlap. 193

THE MODERATE VIEW

Those who hold the moderate view can be characterized as the people who attempt a compromise between a free Internet and strong regulation of cyberspace. Typically, Lawrence Lessig suggested a “some-regulation-better-than-none” approach, noting the interaction between legal policy and technology.194 He focused on the paradoxical situation that “an ideology against regulation” restricts the government’s motivation to regulate, but this ideology invites “the defeat of the very values that are being defended.”195 He used spam regulation as an example. The regulation of increasing unsolicited commercial e-mail faced harsh resistance from those who considered it a kind of censorship.196 However, he pointed out that lack of such regulation led many to choose a white-list approach, which allows the reception of e-mail only from the people one knows. He stated that, in a sense, this situation means “a general and valuable feature of the original design of the Internet is inverted.”197

Concerning the CDA, Lessig pointed out that many people resist legislative efforts to facilitate the blocking of pornography based on First Amendment grounds.198 Accordingly, the absence of legal regulations increases demand for technical regulation, which is designed

193 Id.
194 Lawrence Lessig, Law Regulating Code Regulating Law, 35 LOY. U. CHI. L.J. 1, 10 (2003). He said that “policymakers must seek a balance. Their aim must be to guarantee enough privacy to ensure the flourishing of a free society. But they must also make sure that individuals don’t have too much privacy, if the public benefits of information are not to be defeated.” Id. at 3.
195 Id. at 14.
196 Id.
197 Id. at 13.
198 Id. at 11.
to prevent circulation of pornography on the Internet. However, these technologies of filtering software are over-inclusive. He said that the software “enables a wild range of filtering, from pornography, to violence, to sites that criticize filtering.” 199

Lessig did not mention Section 230 and blanket immunity for ISPs. However, Lessig’s premise raises the significant question: What are the “some-regulation-better-than-none” solutions concerning ISPs immunity?

1.2.2. CONTROVERSY OVER SECTION 230 & THE ZERAN DECISION

The enactment of Section 230 and the Zeran decision generated considerable controversy among scholars. Two main issues have emerged in the literature. The first is the propriety of the blanket immunity from tort liability for ISPs, and second is the vagueness of the distinction between an ISP and an ICP.

Michael Rustad and Thomas Koenig asserted that cyberspace provides an ideal legal environment for torts and online criminals because ISPs have no duty to mitigate harm caused by illegal or irresponsible behavior by third parties. 200 The negative side effects of blanket immunity for ISPs, he argued, manifest themselves not only in defamation but also fraud, sexual harassment, invasion of privacy, and financial injury. 201 They diagnosed the “Good Samaritan” clause of Section 230 as a failed attempt because “ISPs currently have no duty to police the Internet or develop technologies to track down off-shore posters of

199 Id. at 12.


201 Id. at 342, 354-62.
objectionable material.” 202 To make matters worse, Section 230 made online consumers defenseless because “immunized ISPs are the only identifiable deep pocket.” 203

Christopher Butler also observed that the broad ISP immunity of Section 230 has “transformed the Internet into an almost liability-free zone for libelous content.” 204 Butler urged courts to revive traditional defamation law. He pointed out that “common law distributor liability already provides strong protection to ISPs.” He argued that it was inefficient and unjust to grant ISPs a lower standard of liability even though they have already become “one of the greatest distributors.” Similary, Walter Pincus, drawing on his journalistic experience, criticized the unfairness of the law. 205 Pincus, a reporter for The Washington Post, noted that the traditional printed version of the newspaper would be liable if it published a defamatory story written by him, but if the same story were posted on washingtonpost.com, the web site would not be liable due to Section 230 protection. 206

Attorney Miree Kim pointed out that Section 230 immunity is so “overly broad that any person or entity that serves multiple users on the Internet qualifies as an ISP.” 207 According to Kim, several courts have regarded non-traditional service providers such as individuals, website hosts, and e-commerce sites as ISPs under Section 230 if “they serve

202 Id. at 351.
203 Id.
206 Id.
multiple users over the Internet.” She also noted that the courts have conferred ISP status on several kinds of entities: a chat room, an e-commerce site, a wire service web site, an Internet bookseller, and a spam-mail forwarding-service company.

Commentators also criticized the Zeran ruling. According to Stephanie Blumstein, the significant impact of Zeran is that even if an ISP knowingly carried defamatory material or ignored a complaint, it is protected by Section 230 as long as the content was posted by a third party.

Lee also argued that the court’s broad interpretation had established a troubling precedent by allowing AOL to refuse to remove the defamatory message promptly, thus exceeding the scope set by the CDA. Furthermore, he argued that “the Internet has matured into a strong and vigorous adolescent,” that no more special protection is needed, and that it is time to return to the traditional standards of defamation liability including distributor liability.

208 Id.


210 Storney v. eBay, 2000 WL 1705637.


215 Lee, supra note 13, at 476.

216 Id. at 493.
Ian Ballon noted that Congress enacted Section 230 to overrule the *Stratton Oakmont* decision that held Prodigy was liable as a publisher. However, he pointed out that there was no reference in the legislative history to *Cubby*, in which the court apparently held that “an online provider that does not monitor content is subject to liability as a distributor.” Accordingly, if Congress had intended to afford ISP immunity from distributor liability as well, it “arguably would not have limited its discussion to *Stratton Oakmont.*”

David Sheridan pointed out that the plain language of Section 230, which does not specify that ISPs cannot be held liable as distributors, supports the view that Congress enacted Section 230 to immunize only the publisher, not the distributor. He also argued the *Zeran* court overstated the danger of claims based on distributor liability. He maintained:

> It is not at all clear that being exposed to distributor liability would be a disaster for online services. An interactive computer service does not commit the tort of distribution of defamatory material until it knows of the content and, with the requisite degree of fault, fails to take steps to remove the offending posting. It is likely that in most cases a service’s liability would not arise until well after the message at issue was posted. Since the service would be liable only for damages caused by its tortious conduct, and since most of the damages would occur before the service committed a tort, even a service that was found liable would not face a large damage award.

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218 *Id.* at 8.

219 *Id.*

220 Sheridan, *supra* note 79, at 162 (1997). Sheridan argued that Section 230 was intended to overrule *Stratton Oakmont* in which publisher liability and distributor liability were discussed. However, he said, “Section 230 (c) (1) say only that providers and users of interactive computer services shall not incur liability as publishers or speakers of information provided by other content providers.” He pointed out, “It does not say that ISPs can not be held liable as distributors.”

221 *Id.* at 172.

222 *Id.* at 173.
As a reaction to severe criticisms of blanket ISP immunity, some scholars defended the holding in Zeran. Fredman and Buono argued that “Section 230 has been properly interpreted by the courts.” They pointed out that both state and federal courts have welcomed not only the basic holding of Zeran that ISPs are immune from defamation liability but also have positively extended “the reach of Section 230 immunity.” In other words, the courts concluded that Section 230 immunity generally covers all torts claims, not merely defamation, originating from third party postings. Furthermore, the courts have also enlarged the ruling in Zeran by recognizing even ISP’s business partner who have license contract his works with the ISPs as a third party. Friedman and Buono said, aiming at Ballon’s argument that Congress only intended to overrule the Stratton Oakmont decision not Cubby through Section 230, that Congress did “not intend to split the difference between Cubby and Stratton Oakmont but rather sought to replace” the traditional defamation law with a clear policy of ISP immunity regardless of the distinction between publisher and

223 Friedman and Buono, supra note 22, at 650. For example, in Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1996), the court granted AOL for the defamatory article written by Durdge. Even tough Druge made license contract with AOL, the court held that he was a third party without any distinction from other common users of AOL.

224 Id. at 657-58.

225 Id. Section 230 did not clearly define the reach of immunity. This clause only mentioned that an ISP should not “be treated as the publisher or speaker of any information” provided by third party. However, courts enlarged the reach of immunity. Friedman and Buono mentioned the Blumenthal courts holding as an example: “[i]n some sort of tacit quid pro quo arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-policing the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempt.” 992 F. Supp. 44, 52 (D. D. C. 1998). They said, for instance, that in Acquino v. Electriciti, Inc., a state court in California held that the Section 230 barred the state law claims against the ISPs including claims of negligence, breach of contract, and intentional infliction of emotional distress caused by other people.

226 Id. For example, in Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1996), the court granted AOL immunity for the defamatory article written by Durdge. Even though Druge had a contract with AOL, the court held that he was a third party without any distinction from other common users of AOL.
distributor. 227 Friedman and Buono also rebutted the criticism based on the fact that
CompuServe was not mentioned in legislative history. They argued that Congressmen Cox,
the co-author of Section 230, mentioned his displeasure with both Cubby and Stratton
Oakmont during floor debate concluding that the “existing legal system provide[d] a massive
disincentive for the people who might best help us control the Internet to do so.”228 In their
view, the Zeran court’s reasoning that distributor liability is merely a subset of publisher
liability could be justified by common law principle. Supporting that argument, they cited
one of the definitions of a publisher in the Restatement (Second) of Torts as an example,
namely that “[o]ne who intentionally and unreasonably fails to remove defamatory matter
that he knows to be exhibited on land or chattels in his possession or under his control.”229
Therefore, they concluded that the Zeran court’s “broad reading of Section 230,” that is
“immunizing all [I]sps from any species of publisher liability including distributor liability,”
might apparently accord with intention of the Congress.230

Regarding the intention of the ISP immunity provision, Paul Ehrlich suggested an
alternative approach. Ehrlich argued that legislative history demonstrates that Congress did
not contemplate allowing full immunity to ISPs.231 However, regardless of Congress’s

227 Id. at 662.
229 Friedman and Buono, supra note 22, at 662 (quoting the Restatement (Second) of Torts § 577(2)).
230 Id. Ian Ballon’s opinion as to interpreting the Restatement of Torts is opposite to Friedman and Buono’s. He
said that distributor liability that Congress intend to incorporate in the Act was not a broad definition taken from
the Restatement of Torts. He argued, “While distribution may indeed be a form of publication under the
Restatement, it does not necessarily follow that Congress intended to adopt the Restatement definitions and
preempt all claims for distributor liability.” Ballon, supra note 217.
231 Paul Ehrlich, Cyberlaw: Regulating Conduct on the Internet: Communications Decency Act § 230, 17
BERKELEY TECH. L.J. 401, 408 (2002). Ehrlich said that the reasons for his argument are first, that the language
of the plain text of the immunity provision does not expressly preclude distributor liability, and second, that the
reluctance to choose “zero liability,” the courts may have stepped toward “the correct solution,”232 furthermore, “blanket immunity created by Zeran seems a good fit for obscenity.”233 One reason was that the elimination of distributor liability could remove uncertainty for ISPs in their attempt to self-police and motivate innovation.234 Ehrlich put more weight on the invisible hand of the market than the power of regulation. In other words, regardless of immunity, the market would “encourage internet service providers to filter where appropriate.”235 Unless the uncertainty was removed, huge costs, which should be borne by the ISPs, might be incurred to screen the contents in order to prevent libel suits. Furthermore, “leaving liability to turn on a reasonableness test in the courts” might increase uncertainty because of the long period of litigation, confusion from the different courts’ holdings in similar cases of several jurisdictions.236 However, in Ehrlich’s view, obscenity is best regulated by the market because “the unique characteristics of Internet speech and mobility [of users] will quickly guide the market toward equilibrium.”237

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232 Id.
233 Id. at 411.
234 Id. at 412.
235 Id.
236 Id.
237 Id. at 412-13. Ehrlich explained the process of equilibrium. Section 230 encourages the development of filtering technologies. If an ISP chooses a new filtering policy that angers its users, users can easily switch services to other ISPs with filtering policies to suit their taste. Therefore, no ISPs will remove too much speech because it will never face liability for leaving such speech alone, and ISPs wants to avoid a reputation for censorship. Accordingly, “at equilibrium there will be a very low amount of top-level filtering by large services, with local filters allowing for personalized access.” He argued that this was exactly Congress’ intension.
To date, few scholars have paid attention to the notion of ICP in spite of the courts’ recent concerns about it. Under the CDA, an ISP is immune from liability for third party posting if it is not a co-developer of the statement. However, Ryan W. King pointed out that the CDA does not clearly define “what actions constitute development.” Furthermore, Fridman and Buono said that the courts have yet to identify clearly “the point at which an [I]SP crosses the line” from merely providing third-party content to “creating” or “developing” the content, which leads directly to publisher liability.

King proposed that definition of development would subject an ISP to publisher liability if an ISP actively selected the information posted on website, and the CDA should be amended to include this broad definition of “development.” According to King’s explanation, ISPs should be subject to publisher liability if they post information that they specifically selected for publication, but not be subject to liability if they post all the non-objectionable material they receive. For example, if ISPs review all emails and post non-objectionable message, ISP will be immune. However, an ISP is under publisher liability if it posts the particular messages.

Bryan Davis maintained that the hazy distinction between an ISP and an ICP has been a source of confusion. Under Section 230, an ISP has no defamation liability as a publisher

238 King, supra note 101. (No page number in original paper.)
239 Friedman & Buono, supra note 22.
240 King, supra note 101.
241 Id.
242 Id.
243 Davis, supra note 45, at 102.
while an ICP is “where liability would attach.” 244 Davis addressed a few court cases that argued that a certain degree of editorial control over third-party content “could shift an ISP from a publisher role to an ICP role.” But this situation results in a “paradox” of logic, Davis said. 245 An ICP can be understood as a kind of publisher because it creates or develops the content; therefore, “once a court determines that an ISP is an information content provider, the ISP would necessarily also be a publisher, and thus immune under Section 230.” However, ICPs are not covered by Section 230. 246 Therefore, the current editorial control approach is not a useful standard for determining what actions would characterize an ISP as either an ICP or a publisher under Section 230, Davis said. As an alternative he suggested the adoption of the concepts of “joint work” 247 and “work made for hire.” 248

Unfortunately, it is difficult to find more scholarly literature regarding the ICP, in particular literature focusing on the criteria of the courts for defining the “creation or development” of content.

1.2.3. COMPARISON OF THE CDA AND THE DMCA

244 Id., at 92-93.
245 Id.
246 Id. at 92.
247 Id. at 93. According to Davis, joint work means “any creative work that was co-created, authored, or developed by two or more persons or entities with the intent that the contributions of all parties merge into a unitary final product.”
248 Id. Work for hire refers to “any creative work that was prepared by an employee within the scope of his or her employment.” Davis argued that the court should introduce fact-based inquires to determine if a creative work is a joint work or work made for hire, and based on this test court should decide whether an ISP is an ICP or publisher under section 230.
Concerning the distributor liability issue, some scholars have suggested adopting the approach taken in the Digital Millennium Copyright Act. Congress has enacted two provisions limiting the liability of ISPs for third-party activity: Section 230 and Section 512 of the DMCA. While the CDA provides ISPs the umbrella of blanket immunity, the DMCA creates several complex “safe harbors,” codified in Section 512, which limit ISPs’ copyright liability for regularly conducted Internet activity under certain conditions: (1) “transitory digital network communications,” (2) “system caching,” (3) “information residing on systems or networks at direction of users,” and (4) “information location tools.”

Unlike the CDA, the DMCA introduced a “take-down” provision, which subjects an ISP to distributor liability for failing to remove copyright infringement materials by a third party if the ISP knew of or was sufficiently notified of the infringement.

Some scholars suggested the take-down provision of the DMCA, the so-called notice-based system, as a solution to the controversy over distributor liability under the CDA. Rustad and Koenig proposed a new cybertort law into which they incorporated the DMCA

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249 Congress enacted the DMCA in October 1998, two years after the enactment of CDA, in an attempt to address some of the copyright issues presented by the advent of the Internet and digital media. See Pub. L. No. 105-190, at 2 (1998).

250 Like the CDA, the safe harbor provisions of the DMCA were established as a reaction to a court decision. See Religious Technology Center v. Netcom On-line Communication Service, Inc., 907 F.Supp. 1361 (1965). Unlike overruling Stratton Oakmont in the CDA, Congress largely adopted many of the principles of that decision in the case of the DMCA.


252 17 U.S.C. §512(c)(1)(c). Section 512(c) of the DMCA immunizes service providers from copyright infringement claims only if they don’t have actual knowledge of the infringing activity and promptly block allegedly infringing sales once notified. To qualify for such protection, an ISP must (1) lack actual knowledge or awareness of facts or circumstances from which infringing activity is apparent; (2) not receive a financial benefit directly attributable to the infringing activity, if the provider has the right and ability to control such activity; (3) respond expeditiously to remove or disable allegedly infringing material from its service on receipt of an appropriate written notice.

253 See Blumstein, supra note 110; Rustad & Koenig, supra note 200; Marc S. Reisler, Content Immunity for ISPs Is Jeopardized by Competing Law, New York Law Journal, Mar. 9, 2004.
take-down provision,\textsuperscript{254} saying that “the DMCA provides an excellent blueprint.” In their proposal for “legal reform” of cybertorts, “ISPs would be liable only for failing to act swiftly in blocking or removing content known to be a venue for an ongoing tort.”\textsuperscript{255} According to Rustad and Koenig, takedown is not an unfamiliar tool used by ISPs to police the Internet. For example, some corporations, such as Microsoft, already remove objectionable content as a means of self-help, they argued.\textsuperscript{256} In support of their argument, Rustad and Koenig cited the European Union Community’s E-Commerce Directive, which also introduced a similar procedure that imposes an affirmative duty on ISPs to take down offensive material.\textsuperscript{257} However, warning of potential for the abuse of takedown power and the frequent and irresponsible subpoenas that have been seen under the DMCA, they said counter measures such as federal court oversight are necessary to put a stop to unwarranted takedown demands based on general, vague, or inaccurate allegations.\textsuperscript{258}

Reisler also argued that Congress should reevaluate the CDA in light of its experience with the DMCA.\textsuperscript{259} In particular, Reisler said that it is difficult to see the advancement of a cogent policy behind the two different congressional approaches in the CDA and the DMCA. Reisler stated that in light of the increasing availability of legal copyrighted materials on the

\textsuperscript{254} Rustad & Koenig, \textit{supra} note 200, at 406.

\textsuperscript{255} \textit{Id.} at 399.

\textsuperscript{256} \textit{Id.} at 400.

\textsuperscript{257} \textit{Id.} at 408-11.

\textsuperscript{258} \textit{Id.} at 403.

Internet, “it is hard to imagine that Congress now believes that notice provision imposes an impossible burden on ISPs to evaluate each notice.”

Ryan W. King also supported the idea of transplanting the take-down provision of the DMCA into the CDA for three reasons. First, the take-down provision imposes liability only if ISPs ignore defamatory statements on purpose. Second, the provision does not stifle the unique nature of the Internet because this provision is the most efficient tool for ISPs to respond to notices of defamation. In his view, through the introduction of the take down provision, ISPs can save the investigation costs because “their only responsibility is to take-down the statement according to formal procedure.” Lastly, the take-down provision protects individuals from cyber-defamation by imposing liability when ISPs refuse to remove libelous statements.

Band and Schruers also compared the CDA and the DMCA provisions on ISP liability. However, unlike Rustad and Koenig, they used CDA distributor immunity as the standard for criticizing the take-down provision of the DMCA. According to their argument, under the DMCA, “an ISP would be on notice concerning the possibility of future infringement” after receiving the first notification. Thus, ISPs would have to choose to either

\[260 \text{Id.} \]
\[261 \text{Id.} \]
\[262 \text{Id.} \]
\[263 \text{Id.} \]
\[264 \text{Jonathan Band & Matthew Schruers, Safe Harbors against the Liability Hurricane: The Communications Decency Act and The Digital Millenium Act, 20 Cardozo Art & Ent. L. J. 295 (2002).} \]
\[265 \text{Id.} \]
expose themselves to infringement liability or incur significant monitoring costs. Therefore, they argued that both would obstruct “the growth of the Internet.”

1.3. RESEARCH QUESTIONS

The main purposes of this thesis are to analyze the controversy over the ISP immunity provision and to suggest a solution. Ultimately, the thesis questions whether Section 230 has achieved its originally intended goal. Most importantly, this thesis addresses the basic question of whether the Communications Decency Act, which was intended to regulate cyber-pornography, has changed into a law for protecting Internet Service Providers from the torts claims, including defamation suits, and if so why.

This thesis will address the following research questions:

1. What is the legislative history of Section 230? How and why was it added to the CDA? What role, if any, did special interest groups play in the enactment of Section 230? How and why did Section 230 remain when the U.S. Supreme Court struck down the rest of the CDA in 1997?

2. How have the courts interpreted and applied Section 230? How have courts interpreted “distributor liability” since Zeran v. AOL? Specifically how have courts distinguished between ISPs and ICPs? How have courts defined “creating” or “developing” content? Which rationales between Zeran and Anti-Zeran court group are more appropriate to apply to new Internet mass communication environments such as news portals?

1.4. METHODOLOGY

This thesis is designed to conduct multiple analyses to evaluate Section 230.

\[266\] Id. at 320
This thesis will investigate the legislative history of the CDA, focusing on how interest
groups influenced the enactment of Section 230. For this investigation, the thesis will
examine the record of congressional debates and hearings related to the CDA from 1995 to
1996, and also the newsletters of important interest groups. Furthermore, this study will
analyze all court records, including amicus briefs, of *Reno v. ACLU*,\(^\text{267}\) which struck down
the CDA, to find the reasons for the fact that the Court retained Section 230.

To explore Internet libel law and ISP liability issues, this thesis will analyze federal
and state cases involving Section 230, retrieved through Westlaw and the Media Law
Reporter. For the study of the evolution of the courts’ conflicting opinions, this thesis
divides the courts’ decisions into two groups – those that follow the *Zeran* court’s reasoning
and those that oppose it – and then compares those opinions. Finally, the thesis will examine
possible application of each group of court decision to news portals.

\(^{267}\) 521 U.S. 844 (1997).
CHAPTER 2

LEGISLATIVE HISTORY OF THE CDA

President Clinton signed the Telecommunications Competition and Deregulation Act into law on February 8, 1996, stating, “Today, with the stroke of a pen, our law will catch up with the future.” This legislation transformed in a revolutionary way the U.S. communication law that had been in force for more than 60 years, i.e., the Communications Act of 1934. President Clinton pointed out that the blessings of the Information Age will “be mixed” because new information technologies “make it more difficult for parents to raise their children” by protecting them from “images parents don’t want them to see.” As reflecting these concerns, Title V of this legislation included the Communications Decency Act of 1996, which made it a crime to knowingly disseminate “indecent” or “patently


270 See 142 CONG. REC. S715 (daily ed. February 1, 1996). Senator Warner said this “landmark” legislation “will revolutionize the telecommunications industry” and “will promote increased competition among telecommunications service providers.” The Telecommunications Act amended the Communications Act of 1934.

271 Id.

offensive” materials to minors through the Internet.\textsuperscript{273} What is more, Congress also added a new section to the CDA, the “Online Family Empowerment” provision, which is entitled “SEC. 230. Protection for private blocking and screening of offensive material.” \textsuperscript{274} This provision, known as the Good Samaritan provision, was designed to protect on-line service providers from civil liability if they chose to block offensive content from their system.\textsuperscript{275} However, strong opposition to the CDA arose from the Internet related industry and interest groups for a free Internet. Within hours of the bill being signed into the law, the statute was confronted with a First Amendment lawsuit seeking claiming injunctions by several interest groups led by the ACLU because of its vague or overly broad indecency standard.\textsuperscript{276} Finally, on June 26, 1997, the U.S. Supreme Court held that the CDA was unconstitutional because its “indecent” and “patently offensive” provisions abridge the freedom of speech protected by the First Amendment.\textsuperscript{277} However, Section 230 of the CDA survived this decision because the Court did not mention this provision.\textsuperscript{278}

The controversy surrounding the constitutionality of the CDA has been very heated. Therefore, most of the scholarly studies about the legislative history of the CDA have

\textsuperscript{273} 141 CONG. REC. S9770 (daily ed. July 12, 1995).

\textsuperscript{274} 142 CONG. REC. S687 (daily ed. February. 1, 1996).

\textsuperscript{275} 142 CONG. REC. H1100 (daily ed. January 31, 1996).

\textsuperscript{276} In two cases, federal trial courts in Pennsylvania and New York enjoined enforcement of the CDA in 1996. The Pennsylvania court unanimously struck down the CDA on the ground that the definition of “indecent” material is vague and that it effected a complete ban of constitutionally protected adult speech. See ACLU v. Reno, 929 F. Supp. 824, 855 (E.D. Pa.1996). The New York court held that the CDA was overbroad but not vague. While the government argued that the safe harbor defenses narrowed the scope of the statute, the court rejected that argument because current technology does not make the affirmative defense feasible and partially relied on third parties to be effective. See Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y.1996).

\textsuperscript{277} Reno v. ACLU, 521 U.S. 844 (1997).

\textsuperscript{278} Id.
focused on the indecency provision related to cyber-porn in order to attack or to support its legitimacy,\(^{279}\) while Section 230 has received less study.

This chapter examines the legislative history of the CDA in terms of Section 230, that is, how and why the Internet service provider’s immunity provision was introduced and what kind of problems were caused by making this provision part of the CDA. In particular, this chapter highlights the political power games among related interest groups and their connections with political groups.

2.1. ORIGIN AND ENACTMENT OF THE CDA AND SECTION 230

2.1.1. Proceedings in the Senate—Criminal liability of ISPs

EXON’S PROPOSAL OF THE CDA

On February 1, 1995, the late Senator James Exon (D-Neb.) and Senator Slade Gorton (R-Wash.) introduced the Communications Decency Act (S. 314).\(^{280}\) This proposal amended Section 223 of Title 47, United States Code, entitled “Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications,” and was referred to the Senate Commerce Committee.\(^{281}\)

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Introducing the CDA, Senator Exon warned that the Internet was in danger of being polluted by indecent materials and that more governmental regulation was needed:

Sadly, there is a dark side to the bright flicker of the computer screen. The explosion of technology also threatens an explosion of misuse. … The information superhighway should not become a red light district. This legislation will keep that from happening and extend the standards of decency which have protected telephone users to new telecommunications devices. … Once passed, our children and families will be better protected from those who would electronically cruise the digital world to engage children in inappropriate communications and introductions.  

He proposed imposing a fine of up to $100,000 or up to two years in prison for anyone who “makes, transmits, or otherwise makes available…obscene, lewd, lascivious, filthy, or indecent” messages or images to a person under the age of 18. The simple phrase “makes available” might have made all ISPs liable. In other words, if the bill had been enacted, anyone who provided communications service, including ISPs, would be criminally liable for the transmitting of indecent materials to minors. Consequently, criminal liability of ISPs became a big issue in the controversy over the CDA. It seemed clear that Senator Exon intended that ISPs should incur a certain amount of liability when circulating pornography, thus hoping to regulate effectively cyber-porn. In fact, Exon’s 1995 proposal was not his first attempt. In July 1994, Exon had previously proposed similar legislation (S. 1822) to stop lewd or obscene communications over the Internet. Although his first attempt failed to pass the Senate, Exon included the provision that held ISPs criminally liable

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283 The Center for Democracy and Technology, supra note 281, at section 223 (a)-(d). Exon’s proposal expanded FCC regulation of obscene and indecent audio text to cover all content carried over all forms of electronic communication networks.

284 Id.

285 140 CONG. REC. S9745 (daily ed. July 26,1994)
in his original proposal. Some supporters of the CDA argued in favor of this viewpoint. In the Senate Judiciary Committee hearing on “Cyberporn,” child advocate, Barry Crimmins, argued that ISPs such as AOL held a substantial liability when circulating pornography on the Internet, insisting on “zero tolerance for Child Pornography.” According to Crimmins, even though ISPs argued they were not aware of pornography trafficking, the crackdown against cyber-porn “must include serious punitive measures against companies like AOL.” He contended that if ISPs “put a fraction of the effort into dealing with this problem that they put into spin doctoring their culpability,” inexpensive and effective solutions could be found.

However, Exon’s draft ran into opposition from the Internet industry and civil liberty groups because of its vague definition of such terms as “indecency” and broad criminal liability. For instance, the Center for Democracy and Technology criticized the bill because it would compel service providers “to closely monitor every private communication, 

\[\text{\textsuperscript{286}}\text{ S. REP. NO. 103-367 at 102 (1994). In this proposal, Senator Exon tried to expand the scope of the Communications Act of 1934 by replacing the term “telephone” with “telecommunications device.” Furthermore, the Act, if passed, made it possible to punish whomever “makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent” by means of a telecommunications device.}\]

\[\text{\textsuperscript{287}}\text{ Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action: Hearings on S. 892 Before the Senate Committee on the Judiciary, 104\textsuperscript{th} Cong. 169 (1995) (Statement of Barry Crimmins, Child Advocate). available at http://www.dct.org/speech/cda/950724crimmins.html.}\]

\[\text{\textsuperscript{288}}\text{ Id.}\]

\[\text{\textsuperscript{289}}\text{ Id. Crimmins pointed out that AOL had been unresponsive and arrogant when approached in a good-faith effort to solve to prevent the circulation of pornography. In response to Crimmins’ complaints about pedophile chat rooms, AOL said, “For confidentiality reasons, we cannot disclose information on actions we’ve taken against other members … Actions within a private room do not fall under the jurisdiction of the Term of Service. We strongly suggest that if you are being harassed by someone in a private room, you use the “ignore” button to block their dialogue from your screen,” through the response mail. Id. Terms of staff American Online’s letter at Feb 2,1995. However, Crimmins argued that “ignoring child pornography does not stop its spread, nor does it relieve AOL of its responsibilities when its service is being used as a safe harbor for the criminals.” Id. Crimmins letter at Feb 2, 1995.}\]

\[\text{\textsuperscript{290}}\text{ See Cannon, supra note 279, at 59.}\]
electronic mail message,” and, therefore, the bill posed a “substantial threat to the freedom of speech.” 291 Online petitions were gathered with 107,000 signatures against the proposed bill, and even the conservative group Morality in Media said that Exon’s draft was a “disservice to the American people” and “a giant step backwards.” 292 Even the Justice Department warned of the possible unconstitutionality of Exon’s proposal. 293

**REACTION TO EXON’S PROPOSAL & THE IMPACT OF THE PRODIGY CASE**

Meanwhile, two significant events occurred that directly influenced Exon’s draft by providing fuel to the controversy over the CDA. One was the legislative reaction. In April of 1995, Senator Patrick Leahy (D-Vermont), who was a strong opponent of Exon’s approach to regulating the Internet, introduced a new bill, the “Child Protection, User Empowerment, and Free Expression in Interactive Media Study Bill” (S.714). 294 This bill would have ordered the Attorney General’s Office of the United States to study the Internet and then submit a report to the Senate on whether current criminal laws governing distribution of obscenity over the computer were adequate. 295 In Senator Leahy’s opinion, Exon’s bill was “a result of hasty decision” and a lack of understanding of the Internet and technology. 296

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293 *See* 141 CONG. REC. S8088 (daily ed. June 9, 1995). Senator Exon criticized the Justice Department because it required the Exon revision drops the bill’s definition of “knowing” and the so-called “predominant defense issue.”


295 *Id.*

296 Arora, *supra* note 279, at 482. *See also* 141 CONG. REC. S8342 (daily ed. June 14, 1995). Senator Leahy stated, “Before legislating to impose Governmental regulation on the content of communications in this
contrary, in Senator Exon’s eye, Senator Leahy’s amendment was an effort “to kill all effective action” and “delay the bill.”

One notable point is that Leahy’s bill was proposed as an alternative to the CDA. Opposing passage of the CDA, Senator Leahy argued that he had “different ways of trying to figure out ultimately how to protect them [children] and the First Amendment at the same time.” What Senator Leahy suggested as the alternative was “parental control.” In his bill, Senator Leahy asked the Attorney General also to investigate the availability of technical means to enable parents and other users to control access to objectionable content. This provision of Leahy’s amendment could be viewed as laying the foundation for the introduction of Section 230 because the term “parental control,” which was a key notion of section 230, appeared in congressional discussions as a viable alternative for the first time.

The statement of Senator Russ Feingold (D-Wis.) in the Senate, supporting the Leahy bill, represented the liberal groups’ viewpoint:

enormously complex area, I feel we need more information from law enforcement and telecommunications experts.”

297 See 141 Cong. Rec. S8339 (daily ed. June 14, 1995). Furthermore, Senator Exon pointed out that if the argument of “parental responsibilities” worked effectively, “parents must follow their children around all of the time” because children might access cyber-porn through the Internet not only at home but also outside home such as at a library or school. Id.

298 Mckay, Supra note 279, at 480. Senator Leahy amended his bill several times, and he added his proposal about the study of Attorney General Office to Exon’s Amendment.


300 See 141 Cong. Rec. S8391 (daily ed. June 14, 1995). Leahy’s Amendment No.1387 articulated that, “Not later than 150 days after date of the enactment of this act, the Attorney General shall submit” to the senate “(C) an evaluation of the technical means available (i) to enable parents to exercise control over the information that their children receive by interactive telecommunications systems so that children may avoid violent, sexually explicit, harassing, offensive, and other unwanted material on such systems; (ii) to enable other users of such systems noncommercial information that such users may avoid violent […] material on such systems; and (iii) to promote the free flow of information, consistent with the values expressed in the Constitution, in interactive media; and (D) recommendations on means of encouraging the development and deployment of technology, including computer hardware and software, to enable parents and other users of interactive telecommunications systems to exercise the control described in clauses (i) and (ii) of subparagraph (c).
Clearly there are ways parents can exact control over what their children can access on their home computers. It is clearly preferable to leave this responsibility in the hands of parents, rather than have the Government step in and assert control over telecommunications. Whenever there is a choice between Government intervention and empowering people to make their own decisions, we ought to try first to use the situation of the approach that involves less government control of our lives.\footnote{141 CONG. REC. S8386 (daily ed. June 14, 1995).}

In the Senate other solutions were proposed even though they failed to pass. Senator Grassley proposed revising the existing prohibitions on indecent broadcasting to make them applicable to cyberspace.\footnote{141 CONG. REC. S7922-23 (daily ed. June 7, 1995).} Senator Inouye proposed the voluntary use of tags in the name, address, or text of an electronic file containing indecent contents to ensure identification.\footnote{141 CONG. REC. S8368 (daily ed. June 14, 1995).}

The other important factor that derailed Exon’s attempt to regulate cyberporn was 
Stratton Oakmont, Inc v. Prodigy,\footnote{1995 WL 323710 (N.Y. Sup. Ct.1995). Regarding this case, see Section C. Internet libel case before the adoption of the CDA, at 15-6.} in which the court ruled that ISPs should be liable for their editorial control over the harmful transmission of objectionable materials despite good faith efforts to make family-oriented sites safe from offensive material. The Prodigy court expected its decision would “compel all computer networks to abdicate control of their bulletin boards” including family oriented computer services.\footnote{Id. at 13-4.} The court in its decision urged that this issue ultimately be solved by Congress when it made the CDA.\footnote{Id. The Prodigy court stated: “Presumably PRODIGY’s decision to regulate the content of its bulletin boards was in part influenced by its desire to attract a market it perceived to exist consisting of users seeking a “family-oriented” computer service. […] In addition, the Court also notes that the issues addressed herein may ultimately be preempted by federal law if the Communications Decency Act of 1995, several version of which are pending in Congress, is enacted.”}

As for
Senator Exon, this decision was not acceptable because his main aim was to “provide much needed protection for children” by forcing ISPs actively to self-police the Internet.\(^{307}\)

In the end, on March 23, 1995, Exon tried to reach a compromise with dissenting groups by amending his proposed bill (S. 314)\(^{308}\) and re-introduced his amendment to the Senate.\(^{309}\) In his amendment, Senator Exon incorporated a number of “safe harbor” defense provisions designed to avoid criticism of infringing on freedom of expression on the Internet.\(^{310}\) The idea of a “safe harbor” defense originated with Lance Rose, the author of the


\(^{308}\) See S. Rep. No. 104-23 at 59-60.

\(^{309}\) See 141 CONG. REC. S8090 (daily ed. June 9, 1995).

\(^{310}\) See 141 CONG. REC. S8386-87 (daily ed. June 14, 1995). Exon’s amendment No 1364 states that:

(f) Defenses to the subsections (a), (d), and (e), restrictions on access, judicial remedies respecting restrictions for persons providing information services and access to information services--

(1) No person shall be held to have violated subsections (a), (d), or (e) solely for providing access or connection to or from a facility, system, or network over which that person has no control, including related capabilities which are incidental to providing access or connection. This subsection shall not be applicable to an individual who is owned or controlled by, or a conspirator with, an entity actively involved in the creation, editing or knowing distribution of communications which violate this section.

(2) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his employment or agency and the employer has knowledge of, authorizes, or ratifies the employee's or agent's conduct.

(3) It is a defense to prosecution under subsection (a), (d)(2), or (e) that a person has taken reasonable, effective and appropriate actions in good faith to restrict or prevent the transmission of, or access to a communication specified in such subsections, or complied with procedures as the Commission may prescribe in furtherance of this section. Until such regulations become effective, it is a defense to prosecution that the person has complied with the procedures prescribed by regulation pursuant to subsection (b)(3). Nothing in this subsection shall be construed to treat enhanced information services as common carriage.

(4) No cause of action may be brought in any court or administrative agency against any person on account of any activity which is not in violation of any law punishable by criminal or civil penalty, which activity the person has taken in good faith to implement a defense authorized under this section or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.
book *Net Law*. 311 A few days after Senator Exon proposed his original bill, Rose proposed a safe harbor provision to Senator Exon, which with a few changes could make him “a big winner.” 312 David Loundy commented, “Rose’s suggestion would protect system operators who try to keep their systems clear of illegal materials, yet are not able to screen out 100% of all illicit materials.” 313

Exon’s amendment embodied Rose’s idea. First, there is no violation if entities merely provide access to networks or systems not under their control without creating content. 314 This provision narrowed the scope of the CDA relating to ISPs liability because it means that if ISPs are not aware of the contents of communications, they should be exempt from criminal penalty. 315 However, Exon maintained limited ISP criminal liability, that is, this defense would not be applicable if ISPs were involved in “creation, editing or knowing distribution” of offensive material. 316 A second exemption was made to protect employers from liability for the actions of employee unless the employee’s conduct was within the


312 Id. Rose’s first suggestion was to remove the proposed change of Section 223(a), which made it illegal to “make available” obscene messages to others. That is, let the laws regarding voice phone harassment alone. Another suggestion was to provide a safe harbor for ISPs and system operators who try to manage the systems in decent ways. He recommended that if a system operator “was prosecuted in his or her role, the prosecutor must show that the service was “generally and obviously illegal” to impose liability on the sysop based simple on system contents.” Otherwise, liability should be assigned only when the system operator was actually familiar with, knew, or should have known of the obscene material.

313 Loundy, *supra* note 292.

314 Id. Exon’s Amendment of CDA, Section 223(f)(1).


scope of employment. The third was generally called “the good faith defense.” That is, it is not a violation for those providers to take, in good faith, reasonable, effective, and appropriate actions to restrict access by minors to offensive materials.

As for Exon and his supporters, the defense provisions were a kind of strategic retreat to save the CDA. Senator Exon explained to the Senate that he had made revisions “in response to the concerns that have been raised by the Justice Department, the pro-family and anti-pornography groups, and the First Amendment scholars.” Furthermore, in introducing the amendment, Exon emphasized “a great deal of cooperation from the online service providers,” who are “key members of [this] new industry.”

In particular, the “good faith provision” was the legislative answer to the *Stratton Oakmont* decision. Senator Coat clearly declared that “the intent of the amendment is not to hold a company who tries to prevent obscene or indecent material under this section from being liable as a publisher for a defamatory statement for which they would not otherwise have been liable,” after he explained the *Stratton Oakmont* decision to the Senate.

Consequently, the proposal calling for full criminal liability for ISPs was abandoned. Instead, Exon’s amendment provided ISPs with a wide-ranging safe harbor by declaring that

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317 Id. Section 223 (f)(2).

318 Id. Section 223(f)(3).

319 See 141 Cong. Rec. S8088-89 (daily ed. June 9, 1995). As to Exon’s revision of the original draft, Senator Leahy (D-Vt), one of the strongest opponent of Exon’s bill, said that the revisions “reflect diligent and considered effort by him and his staff to correct serious problems.” See also Appendix Two. the full text of Exon’s amendment.


“this defense [should] be construed broadly to avoid impairing the growth of online communications through a regime of vicarious liability.” 322

Civil liberties groups still remained actively opposed to the CDA. Immediately after Exon revised his draft, the Center for Democracy and Technology, a leading civil group opposing the CDA, evaluated the draft as “an important improvement” over the original version because of the creation of several exemptions to limit ISPs’ liability. 323 However, the CDT stated, “[T]he bill is still an unconstitutional intrusion on the free speech and privacy rights of Internet users and all content providers,” and vowed to keep fighting “this dangerous legislation.” 324

Conservatives in the Senate reacted against the liberal groups’ movement by introducing an even more draconian bill than Exon’s original draft. On June 7, 1995, Senators Bob Dole (R-Kan.) and Charles Grassley (R-Iowa) proposed the “Protection of Children From Computer Pornography Act of 1995” (S. 892) as a free standing bill, which was designed to provide prison sentences for five years if ISPs or BBSs “knowingly or recklessly transmit indecent pornographic materials to children.” 325 This bill was patently aimed at ISPs and at Exon’s appeasement position toward the ISPs. 326 Introducing the bill, Senator Grassley stated:

Some so-called access providers facilitate this [transmitting pornography] by refusing to take action against child molesters, even after other computer users

322 See H.R. CONF. REP. 104-458.
324 Id.
326 Id.
have complained. So, my bill would make it a crime for access providers who are aware of this sort of activity to permit it to continue.\(^{327}\)

After a long debate, on June 14, 1995, the Senate passed the CDA, Exon’s amended version, as attached to the Telecommunication Reform Bill (S. 652) by a vote 84 to 16.\(^{328}\) Before the vote, Senator Exon made a shocking presentation to insure the passage of the CDA. During the heated debate, Senator Exon waved a so-called “Blue Book,” which contained pornography downloaded from the Internet, including photos and stories featuring torture and child abuse, emphasizing that such pornography was “only a few click-click-clicks away from any child on the Internet” and free of charge.\(^{329}\) Senator Exon’s tactic was very effective. While the Exon bill passed overwhelmingly, Leahy’s alternative failed to pass the Senate with little discussion “due to [its] overwhelming support for Exon’s bill.”\(^{330}\)

### 2.1.2. PROCEEDINGS IN THE HOUSE – CIVIL IMMUNITY FOR ISPS

**ORIGINAL FORM OF SECTION 230 AND COMPARISON WITH EXON’S BILL**

Even though Exon’s bill successfully passed the Senate, the situation in the House was very different from that of the Senate. On June 20, 1995, soon after the passage of the CDA in the Senate, House Speaker Newt Gingrich expressed public opposition to the Senate

\(^{327}\) *Id.* This proposal gave great concern to civil liberty groups because Senator Dole was the Senate Majority leader and Republican presidential candidate. The CDT commented that this proposal “represents an even greater threat” to the First Amendment than the CDA. *See* the Center for Democracy and Technology, CDT Policy Post No 16, June 6, 1995, *available at* https://www.cdt.org/publications/pp160606.html. On the contrary, this bill played a role in supporting Exon’s bill. Senator Exon argued in Senate debate that “the effective role of alternative measure, like that of Senators Grassley and Dole, cannot be overlooked as part of pressure that brought this matter [protecting children] to a successful point.” *See* 141 Cong. Rec. S8339 (daily ed. June 14, 1995).


\(^{329}\) 141 Cong. Rec. S8088-89 (daily ed. June 9, 1995). In addition, Senator Exon encouraged his colleague senators to read and watch the objectionable materials. Furthermore, Senator Dan Coats (R-IN) illustrated the graphic nature of the material they had in their Blue Book. *See Id.*

bill on a television show, calling it “clearly a violation of free speech,” and went on to say that the debate had not been a “serious way to discuss a serious issue.” Separately from the Senate’s legislation, the House of Representative had sought to develop its own Telecommunication Reform Bill, H.R. 1555, which was introduced May 3, 1995, by Representative Thomas Bliley. In this bill, Leahy’s alternative successfully was attached by Rep. Klink (D-Penn). However, there was no room for Exon’s CDA. On June 30, 1995, Representative Chris Cox (R-Calif.) and Ron Wyden (D-Ore.) introduced the “Internet Freedom and Family Empowerment Act” (hereafter, IFFEA, HR. 1978) as an alternative to


“I think that the Amendment you referred to by Senator Exon in the Senate will have no real meaning and have no real impact and in fact I don’t think will survive. It is clearly a violation of free speech and it’s a violation of the right of adults to communicate with each other. I don’t agree with it and I don’t think it is a serious way to discuss a serious issue, which is, how do you maintain the right of free speech for adults while also protecting children in a medium which is available to both? That’s also frankly a problem with television and radio, and it’s something that we have to wrestle with in a calm and mature way as a society. I think by offering a very badly thought out and not very productive amendment, if any thing, that put the debate back a step.”

332 See 141 CONG. REC. H4520, H4545 (daily ed. May 3,1995). The bill made the particular subsection for barring FCC regulation: “(d) FCC REGULATION OF THE INTERNET AND OTHER INTERACTIVE COMPUTER SERVICES PROHIBITED.— Nothing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to content or other regulation of the Internet or other interactive computer services.”

333 Id. In fact, On Feb. 21, 1995, Representative Tim Johnson (D-SD) introduced the House counterpart to the Exon/Gorton Communications Decency Act (HR 1004), which would criminalize the transmission of any content deemed “obscene, indecent, lewd, lascivious, filthy, or harassing.” However, HR 1004 has not been modified since its introduction. See Center for Democracy & Technology, House CDA Sponsor Urges “Go-Slow” approach, calls for hearings, April 3, 1995, available at http://www.cdt.org/speech/cda/950403johnson_ltr.html. Full text of HR 1004 is available at http://web.lexis-nexis.com.libproxy.lib.unc.edu/congcomp/document?_m=14252ccfe010e88c637778070f40b4dd&_docnum=1&wchp=dGLbVtb-zSkSA&_md5=faa4bacbf2c1791beee4df451438d610.
Exon’s CDA, which was designed to be added as Section 230 of the amendment of the Communications Act of 1934. 334

Representatives Cox and Wyden’s solution to the circulation of pornography through the Internet was utterly different from that of Senator Exon. The Senate bill depended on rigid enforcement of regulation by imposing criminal penalties for transmitting cyberporn. However, by developing the Leahy amendment, the Cox-Wyden Act presented “parental control” instead of governmental regulation as a solution. 335 Introducing the IFFEA, Representative Cox stated, “[P]arents and families are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats.” 336 New computer technology, according to the Cox’s proposal, made it possible to protect children by installing software that could block out pornography in family computers. 337 Supporting Cox, Representative Goodlatte stated on the House floor that this Act could eliminate the danger of unconstitutionality by allowing parents to “make important decisions with regard to what their children get access.” 338

The original version of the IFFEA consisted of two significant parts: The no regulation provision and the creation of “Good Samaritans” protection for ISPs. 339


335 Id. See also Cannon, supra note 279, at 69.


337 Id. Cox stated that “parents can get relief now from the smut on the Internet by making quick trip to the neighborhood computer store where they can purchase reasonable price software that blocks out the pornography on the Internet.”


339 Id.
First, the IFFEA explicitly prohibited the FCC from imposing content regulations on the Internet or other interactive communication services.\textsuperscript{340} Reflecting the legislators’ emphasis on no regulation by government, Section 230 was originally designated “Protection for private blocking and screening of offensive material; FCC Economic Regulation of Computer Services Prohibited.”\textsuperscript{341} Furthermore, subsection (d) clearly articulated, “Nothing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to content or other regulation of the Internet.”\textsuperscript{342}

As mentioned above, the Senate bill would have produced the effect of heightening FCC regulation and bestowing more power on the FCC.\textsuperscript{343} However, in Representative Cox’s view, government censorship over the Internet was “inefficient and ineffective”\textsuperscript{344} by making the FCC spend huge amounts of money “trying to define elusive terms [such as indecent communication] that lead to a flood of legal challenges.”\textsuperscript{345} Furthermore, the FCC regulation “will freeze or at least slow down technology” and, therefore, “will threaten the future of the Internet.”\textsuperscript{346} Thus, Representatives Cox and Wyden hoped to establish as “the

\begin{flushright}
341 Id.
342 Id.
344 Id.
\end{flushright}
policy of United States that we do not wish to have content regulation by the Federal Government” of what is on the Internet.347

More importantly, IFFEA retained the Good Samaritan provision that removed liability for ISPs that make a good-faith effort to edit objectionable material in order to protect minors.348 Subsection (2) of the original draft of IFFEA provided:

(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.-- No provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by an information content provider. No provider or user or interactive computer services shall be held liable on account of--

(1) any action voluntarily taken in good faith to restrict access to material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(2) any action to make available to information content providers or others the technical means to restrict access to material described in paragraph (1). 349

This provision was the reaction of the House version against the Statton Oakmont decision.350 Introducing the IFFEA, Cox clearly stated that the Good Samaritan provision would protect ISPs “from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us to solve this problem.”351

The language of the Good Samaritan provision was very similar to the “safe harbor defense” provision of the Senate-passed Exon CDA. However, wide differences existed between the two approaches. To protect the private blocking of pornography on the Internet, the safe

348 Id.
351 Id.
harbor provision provided limited immunity from possible criminal prosecution. However, under the Good Samaritan provision of the IFFEA, criminal liability of ISPs intrinsically did not exist because this bill rejected federal regulation of the ISPs. One important point is that Section 2 (e)(1) articulated that the Good Samaritan provision would not have any effect on the established “dial-a-porn statute or other Federal criminal statutes.” However, these laws were hardly applicable to ISPs. Accordingly, the goal of the Good Samaritan provision was to make ISPs free from “civil liability” for good-faith editorial control. Except for the lesson from the *Prodigy* case, other reasons why the House enlarged the scope of ISPs’ immunity from both criminal and civil liability were not provided in the legislative history of the IFFEA.

The significant point was that the Good Samaritan provision had an intrinsic contradiction in its concept. That is, the bill was designed to protect ISPs who were doing the editing in a good-faith, however simultaneously the bill did not intend to encourage ISPs to monitor or screen content. Furthermore it did not create “any obligation for providers” to block objectionable material on the Internet from minors.

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352 *Id.* It was one of the controversial issues over the introduction of the CDA whether established criminal law standards, such as the Communication Act of 1934, apply to the ISPs and Internet. Senator Exon and his supporters in the Senate thought the Communication Act of 1934 was only applicable to “telephone communications,” therefore an amendment was needed in order to enlarge the scope of the criminal liability toward the Internet. However, Anti-Exon members, such as Senators Leahy and Feingold, said, “It is not clear that existing criminal statutes are incapable of enforcing law to protect children on interactive telecommunications. There have been many reports of prosecution of illegal activity related to the transmission of obscenity using interactive telecommunications.” See 141 CONG. REC. S8336 (daily ed. June 14, 1995).

353 See 104 H. R. CONF. REP. No.104-458. at 194. The Committee of Conference Report stated that “this section provides Good Samaritan protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable” material.

What Representatives Cox and Wyden really wanted to encourage was not ISPs’ self-policing of their content but parents’ self-screening of their children. For instance, one specific goal of this provision was “to overrule Stratton-Oakmont v. Prodigy and any other similar decisions” because such decisions would create serious barriers “to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services,” the Conference Committee report said.355

Senator Leay’s statement at the hearing on cyberporn and children provided more vivid language about this conflict:

If we grant too much power to online providers to screen for indecent material, public discourse and online content in cyberspace will be controlled by the providers and not the users of this fantastic resource. On the other hand, we want our laws should encourage and not discourage online providers from creating a safe environment for children. 356

Senator Feingold, a strong supporter of the “parental control” approach, also regarded ISP control as a kind of censorship, which would cause “a tremendous chilling effect on speech over the Internet.” He argued that “the fact that America Online censored the word ‘breast’ on its service, albeit temporarily, should forewarn members of things to come.”357

What was it that the House wanted to encourage ISPs to do? It might be to develop blocking software for parents to control online contents. On the House floor, Senator Cox stated, after mentioning the Prodigy case:


That [the Prodigy decision] is backward. We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. This technology is very quickly becoming available.\textsuperscript{358}

What is more, the language of the IFFEA also clearly stated that supporting the development of filtering and blocking technology was U.S. policy.\textsuperscript{359}

These facts implied that the IFFEA was written entirely in ISPs’ favor. Under the logic of the IFFEA, ISPs should be exempt from both criminal and civil liability for their objectionable contents so long as they did not create them. Furthermore, ISPs did not need to make any effort to screen their contents because they don’t have any moral and legal responsibility. Screening was not the role of ISPs but that of parents. Consequently, this logic could lead to the conclusion that self-regulation, the notion which is contrasted with government regulation, means only by parents not by ISPs.

The fact that the IFFEA was based on “parental control” could cause another significant problem. That is, it can hardly be expected that “parental control” would be applied to objectionable material beyond the cyberporn. For example, defamatory stories could not be expected to be blocked by parental control, and parental control could not be a solution to protect the e-commerce customer from fraudulent commercial advertisements on the web.

\textsuperscript{358} 141 CONG. REC. H8470 (daily ed. August 4, 1995).

\textsuperscript{359} 141 CONG. REC. H8469 (daily ed. August 4, 1995). The IFFEA articulated:

(b) policy- It is the policy of the United States to- […]

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.
On August 4, 1995, the House approved the Cox-Wyden amendment by a
overwhelming majority of 421 to 4 and attached it to the Telecommunication Reform Act
(HR. 1555).\textsuperscript{360} It seemed a victory for civil liberties groups, which blocked Exon’s CDA in
conference.

However, at the same time, the House also passed the “Manager’s Mark” amendment,
which contained a new Exon-like criminal penalties provision, known as the Hyde
amendment, in direct conflict with the Cox-Wyden amendment.\textsuperscript{361} It was a strong reaction by
conservatives in the House. That is, the Hyde amendment made it possible to punish those
who “intentionally communicate by computer, … to any person the communicator believes
has not attained the age of 18 years, any material that, in context, depicts or describes, in
terms patently offensive as measured by contemporary community standards, sexual or
excretory activities or organs.”\textsuperscript{362}

The Hyde amendment caused strong criticism from supporters of the Cox-Hyden
amendment. John Bryant (D-Tex.) charged that this amendment was “written in the

\begin{footnotesize}
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\item \textsuperscript{360} 141 CONG. REC. H8478-79 (daily ed. August 4, 1995).
\item \textsuperscript{361} 141 CONG. REC. H8444 (daily ed. August 4, 1995). This amendment was introduced by Representative Tom
Bliley (R-VA), Henry Hyde (R-IL), and Dingell (R-MI). The 66-page Managers Amendment was a collection
of several amendments to HR1555, covered 42 section, that were voted on as a block. The Exon-like provision
was Section 403 under the title of “PROTECTION OF MINORS AND CLARIFICATION OF CURRENT
LAWS REGARDING COMMUNICATION OF OBSCENE AND INDECENT MATERIALS THROUGH
THE USE OF COMPUTERS.” However, the public attention of this amendment focused on whether to change
the definition of adequate competition to include the resale to services of another carrier in long distance
industry. The amendment drastically softened the test needed to prove that competition exists and shortened
dramatically the wait Bells have for entry into long distance. Vice President Gore issued a statement on August
3 saying that “this bill has been sold to the highest bidder in every telecommunications industry. The losers are
the American people.” See the White House office of the Vice President, \textit{Statement by Vice President Core on
\item \textsuperscript{362} \textit{Id.}
\end{itemize}
\end{footnotesize}
darkness” because the committee or its members “did not have any input into this.”\footnote{141 CONG. REC. H8456 (daily ed. August 4, 1995).}

According to the Electronic Frontier Foundation, one of the leading free-Internet groups, this amendment was submitted at the last minute and “most legislators had no idea that they voted on this last amendment and the summary of the Manager’s Mark did not mention these new criminal provisions.”\footnote{Electronic Frontier Foundation, \textit{Congress Action Resumes on Internet Censorship Legislation}, \textit{EFFECTOR ONLINE} Vol. 8, No.16. (October. 7,1995), http://trout.cpsr.org/cpsr/lists/rr/EFFector_Online_08.16__CDA_Ale.} The ACLU also criticized the Exon-like provision, saying it would “effectively reduce all online content to that which is suitable only for children” and raised the question of ISP liability.\footnote{ACLU, \textit{House Adopts Exon-Like Speech Crimes}, Cyber-Liberties Alert (August 4, 1995). http://www.eff.org/Censorship/Internet_censorship_bills/aclu_hr1555_95_passage.alert.} Without doubt, the Hyde amendment made the Cox-Wyden amendment a hollow victory.

\subsection*{2.1.3. Proceedings in the Conference Committee-
White’s Compromise of Different Approaches}

Two fundamentally different versions of the bill from the Senate and the House were referred to a conference committee to reconcile the conflicting bills.\footnote{S. CONF. REP. NO. 104-230 at 1, 187-88.} Strictly speaking, a modified Exon proposal, the Hyde-Christian coalition proposal,\footnote{\textit{See} the Center for Democracy and Technology, \textit{CDT Policy Post} No 30 (December 1, 1995), available at http:// www.cdt.org/publications/pp301201.html. According to the CDT report, Hyde endorsed a proposal offered by conservative religious groups in October. This proposal was more restrictive than to Exon proposal.} the Grassley proposal,\footnote{\textit{Id}. This proposal is similar to the Grassley/Dole “Protection of Children from Computer Pornography Act,” S.892. The most prominent characteristic of this bill was that it would create broad immunity for ISPs and content providers without clear limitation.} and Cox-Wyden proposal were reviewed by the conferees.\footnote{\textit{Id}.} The committee included

\footnote{\textit{Id}.}
Senator Exon, Representative Rick White (R-Wash.), and Representative Henry Hyde. Neither Cox, nor Wyden was on the committee. The conference committee witnessed a battle between liberal and conservative groups in Congress to get more portions of their initiatives regarding the scope of ISP liability and the standard of objectionable materials to be regulated.

While the committee put the finishing touches on several controversial provisions of the Telecommunication Act, Representative White, an original co-sponsor of Cox-Wyde, prepared a new proposal to settle the conflict between the Exon and Cox-Wyden amendments.

Based on the Cox-Wyden amendment, White’s proposal added the criminal penalties for transmission of objectionable materials from the Exon amendment. First of all, the White proposal “would not impose liability on online service providers merely for transmitting the message of their users.” White’s proposal also retained the “good faith defense” provision that offered safe harbor to ISPs from criminal liability when they instituted measures to try to protect minors from offensive content. One of the most important points concerning the issue of constitutionality was that White narrowed the vague


371 See The Center for Democracy and Technology, supra note 367.


373 Id.

374 Id.
language of “indecent material” in the Exon amendment by replacing it with the more specific “harmful to minors.” In addition, the compromise maintained the provision that prohibited the FCC “from regulating online content or from having oversight over the underlying technologies of the net.”

In summary, behind this compromise, there were significant big deals made between Representative White and Senator Exon. In fact, White made small change in the language of the bill; however, there were big deals beyond the language modification between two forces supporting each bill. Fundamentally, the logic of Exon’s CDA was to impose strict criminal penalties on those circulating cyberporn. On the other hand, the Cox-Wyden amendment in the House was opposed to imposing such criminal liability of Exon bill and argued users’ self-regulating was a more effective way to protect children by providing ISPs with immunity from civil liability. Therefore, according to Cox and Wyden’s logic, strict criminal liability could not be imaginable to introduce. However, representative White forced the stance of the Cox-Wyden amendment to move into acceptance of criminal liability. On the contrary, no idea of the protection of ISPs from civil liability was enshrined in Exon’s bill. As for conservative groups, ISPs’ immunity from civil liability was beyond their concern. When Exon added the good faith defense provision in his amendment, he did not remove the civil liability but limited immunity from criminal prosecution. But Exon and conservatives in Congress also changed their stance to give more immunity to ISPs so as to pass the CDA. As a result, the two bills that had expressly different views as to cyberporn and regulating the Internet survived as two section of the CDA.

375 Id.
376 Id.
Furthermore, by adding a narrowly tailored “harm to minors” standard instead of the vague “indecent” standard, the White compromise presented a gift for civil liberty groups even though it invited immediate reaction.

In sum, to meet both amendments’ main interests, the White’s compromise attempted to make a formal combination of two totally different approaches without any consideration of what kind of problems would be created. Furthermore, such combination of two different approaches foreshadowed the controversy over the scope of CDA and Section 230 in the near future.

**REACTION OF CONSERVATIVES IN THE HOUSE**

On December 6, 1995, members of the House and Senate conference committee voted 20-13 to accept the White proposal.377 Before voting, Rep. Henry Hyde (R-Ill) offered his proposal, which was designed to grant the federal government stronger power to regulate online content than Exon’s amendment.378 In particular, his proposal patently aimed at imposing strict criminal liability on ISPs. His proposal would have forced ISPs like Prodigy, CompuServe, and American Online to be held responsible for every aspect of their service, that is, ISP executives could have been jailed for two years and fined up to $100,000 when “indecent” contents were transmitted to minors by their services, even in areas beyond their control.379 His proposal was not adopted by the committee. However,

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378 See The Center for Democracy and Technology, supra note 372.

379 See Id. See also, Anna Eshoo, Nanny on the Net, EFFECTOR ONLINE Vol 9, No.1 (Jan. 5, 1996), http://www.eff.org/effector/HTML/effect09.01.html#telecom
White’s victory did not last long. Representatives Hyde and Bob Goodlatte (R-Va.) proposed an amendment to replace the “harmful to minors” standard in the language in the White compromise with “indecency,” i.e., going back to Exon’s original standard.\(^{380}\) This time, the committee reversed its position in favor of the Hyde-Goodlatte proposal. The Goodlatte amendment was approved on a vote of 17-16.\(^{381}\) However, it caused strong criticism from civil liberties groups, and it refueled a dying controversy over the bills unconstitutionality.\(^{382}\)

**Final Version of the Amendment**

On January 4, 1996, the conference committee presented a preliminary draft of the final telecommunications reform bill, which would mandate broad governmental regulation of online speech.\(^{383}\) The most important change to the legislation was doing away with the provision prohibiting federal government regulation of the Cox-Wyden bill.\(^{384}\)

In the final draft the conferees eliminated the title of the Cox-Wyden amendment that had passed in the House: “FCC CONTENT AND ECONOMIC REGULATION OF

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\(^{381}\) *Myer, supra* note 377, at 1. Thirteen Republicans supported the indecency standard with the help of four Democrats. According to Craig A. Johnson, American Reporter correspondent in Washington, Representative Pat Schroeder (D-Colo.) voted for the Goodlatte amendment “without really having time to examine the implications of her actions or the alternative White proposal.” Even though Rep. Schroeder asked three times for the distribution of staff recommendations at least 24 hours in advance of a conference meeting and vote, it was not accepted. See Craig A. Johnson, *Committee Slaps the Net* (December 14, 1995). http://www.virtualschool.edu/mon/CyberPorn/CongressSlapsNetAgain.html.

\(^{382}\) The next day after the passage Hyde-Goodlatte proposal, Senator Feingold argued on the Senate floor that the committee should “revise this action” to reject restrictions on constitutionally protected speech when the full conference committee votes on this legislation. She said that “the censorship of the Internet is a perilous road for the Congress to walk down,” furthermore, it would be “a dangerous precedent for First Amendment protections.” *See* 141 Cong. Rec S 18248 (daily ed. December 7, 1995).


\(^{384}\) *Id.*
In addition, White deleted the subsection (d) of Section 230 in the Cox-Wyden amendment, which articulated that “FCC regulation of the Internet and other interactive computer services [was] prohibited.”

As mentioned in the section titled “Original form of the Section 230 and Comparison with Exon’s Bill,” the prohibition of federal regulation of the Internet was the critical goal of the Cox-Wyden amendment along with protection of ISPs. Therefore, for civil liberties groups, the abandonment of this policy meant significant regression.

However, this change was predictable when Representative White had accepted the criminal liability approach because government regulation and criminal penalties were inseparably related to each other. Representative Anna Eshoo pointed out that imposing criminal penalties such as those contained in the Hyde proposal “open[ed] the door for the Federal Communications Commission (FCC) to engage in broad-based regulation of the Internet.” Representative Lynn Woolsey (D-Calif.), showing the relationship between criminal penalties and governmental regulation, stated that under the final draft by the conference committee, “individuals who disseminate material that the Federal Government


386 Id.

387 See 141 Cong. Rec. H8470 (daily ed. August 4, 1995). Introducing IFFEA, Representative Cox stated: “[O]ur amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provided a front end to the Internet […] Second, it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet.” Id.

388 Eshoo, supra note 379.
believes may violate contemporary community standards of decency could face prison
terms.” 389

When White’s compromise was introduced to the conference committee, many civil
liberties groups supported it as an inevitable but workable compromise.390 However, exactly
because of its acceptance of criminal penalties, the American Civil Liberties Union (ACLU)
did not endorse the White proposal.391 According to the ACLU’s argument, like the Hyde
proposal the White proposal would not only violate the First Amendment but also “impose a
complex regulatory scheme.” 392 The ACLU statement pointed out the White proposal’s
intrinsic problem:

The White proposal criminalizes the communicating to anyone under 18 any
content that is deemed “harmful to minors.” Such standard would be created
at the federal level for the first time, so that the White proposal created at
entirely new federal category of speech crimes. … The ACLU strongly
believes that no new speech crimes are justified, and that interests such as
parental concerns are adequately addressed without such governmental
intervention. 393

389 142 CONG. REC. H1173 (daily ed. February 1, 1996).

390 See Electronic Frontier Foundation, EFF Statement on Proposals Regarding Content Control on the Net
EFF stated that it “acknowledges the value of the efforts of Rick White” endorsing most of the provisions of the
White proposal. The Center for Democracy and Technology also said the White proposal was likely to be more
“reasonable and workable” than other conservative proposals. See Center for Democracy and Technology,
supra note 367.

391 American Civil Liberties Union, Letter to House Conferees: Cyberspace Censorship and the Hyde and
White Proposals to the House Conferees on Telecommunications Deregulation, S.652 and H.r.1555. (December
5, 1995), http://www.epic.org/free_speech/CDA/hyde_letter.html. In this letter, the ACLU urged the conferees
to reject all presented proposals including both the White and the Hyde bills in order not to create a new
regulatory scheme to control online speech.

392 Id.

393 Id. However, the ACLU did not reject all possibility of criminal liability. The ACLU said that “if such
crimes were to be created, they should be narrowly crafted.” In other word, the legislation should “clearly
identify proscribed content; target and punish active wrongdoers.” However, even in this case, the ACLU
argued that ISPs should be exempted. Id.
Representatives White, Cox, and their colleagues fought to retain the provisions barring the FCC from regulating online contents, however, their attempt was in vain.\textsuperscript{394} As a result, the White compromise was reached at great a cost. It accepted criminal liability, which resulted in abrogation of their important goal of non-governmental regulation. Moreover, it failed to include the “harm to minors” standard in the end. However, Representative White and civil liberties groups had a half victory in maintaining the ISPs’ civil liability protection provision and in implanting the “online family empowerment” idea in the law.

On February 1, 1996, Congress passed the Telecommunications Act of 1996 by overwhelming margins in both the House and Senate. Only 14 members of Congress voted against the legislation; the vote was 416 to 9 in the House\textsuperscript{395} and 91 to 5 in the Senate.\textsuperscript{396} The TITLE V “OBSCENITY AND VIOLENCE” of the Telecomm bill was named the Communications Decency Act of 1996.\textsuperscript{397} The same language as that of the original version of Exon’s bill, which was introduced on the same day one year prior, became Section 223 of the CDA.\textsuperscript{398} Under Section 223, anyone found guilty of knowingly transmitting “indecent” material over the Internet would face up to two years in prison and fines of up to $250,000.\textsuperscript{399} Simultaneously, this bill also included most parts of the “Internet Freedom and Family

\textsuperscript{394} See Center for Democracy and Technology, supra note 381. Just before the passage of the Telecommunication bill of the House, the Representative White argued that the FCC should not have a role in regulating the Internet. However, his argument failed to induce his fellows to reject the bill.


\textsuperscript{397} S. REP. NO. 104-230, at 81-84 (1996). See also, Appendix Four: THE COMMUNICATIONS DECENCY ACT OF 1996.

\textsuperscript{398} Id.

\textsuperscript{399} Id.
Empowerment Act,” which granted ISPs broad civil immunity for Good Samaritan self-policing as a special Section 230 of the CDA.400

2.2 Active Role of Interest Groups: Two Leading Forces of the Controversy

At noon on Monday June 12, 1995, Senators gathered on Capitol Hill to deal with the anti-cyberporn bill, the CDA, sponsored by Senator Exon.401 In accordance with custom, the session began with a prayer at the call of the Chaplain, Dr. Lloyd:

Almighty God, Lord of all life, we praise You for the advancements in computerized communications that we enjoy in our times. Sadly, however there are those who are littering this information superhighway with obscene, indecent, and destructive pornography. … Cyber solicitation of teenagers reveals the dark side of online victimization. … Oh God, help us care of our children. Give us wisdom to create regulations that will protect the innocent.402

Two days after this prayer, the Senate rushed a vote to the floor, as the Chaplain said, to control the “pollution of computer communication.”403 The Exon bill was passed overwhelmingly by “inspired” Senators.404

However, immediately after the President signed the Telecommunication Act including the CDA which was part of it, on February 9, 1996, thousands of websites put up a blue-ribbon graphic supporting the Electronic Frontier Foundation’s “Blue Ribbon Campaign” for free speech, and more than 500 websites, led by the Center for Democracy


402 Id.

403 Id.

and Technology, one of the leading civil liberties groups, turned their screens to black for 48 hours to protest the passage of the CDA. 405

The controversy surrounding the introduction of the CDA inside and outside the Congress was a “most crucial battle of the on-line community’s brief history” over governmental regulation and free speech in cyberspace.406 Two main forces, religious right groups and a coalition of civil liberties and online industry groups, played key roles in leading the controversy. In general, religious right groups, the proponents of the CDA, were best characterized as politically and socially conservative, Judeo-Christian, and strong believers in family values, with deep concern over the corruption of minors.407

On the opposite site of the religious right groups, a coalition of civil liberties groups fought the religious right groups to protect freedom of Internet speech. Internet business groups such as American Online, CompuServe, and Microsoft acted in strong solidarity with civil liberties groups as they shared opposition to the CDA in order to safeguard their business interests.

Literally, the controversy surrounding the CDA was about “cyber-porn.” The religious right groups focused on combating pornography, “a dark side” of Internet,408 while civil liberties group emphasized cyberspace, an affirmative side of the Internet and new


Therefore, their approach to cyber-porn was basically different, and furthermore, conflicts between the two groups were inevitable. In their attempts to win the battle, both pro-CDA and anti-CDA groups were tightly connected to key politicians in Washington.

2.2.1. PRO-CDA GROUPS’ APPROACH

The Communication Decency Act was a reflection of the religious right’s moral standards. The CDA itself was a “creature of the religious right,” which designed and sculpted it, organized political leaders to support it, and provided politicians with ammunition when they engaged against civil liberties groups. 410

WHO INVENTED THE CDA?

Though Senator Exon was the author of the CDA, ex-prosecutor Bruce Taylor of the National Law Center for Children and Families actively helped create the CDA. When Taylor was in office, he gained a reputation as a specialist in this field with more than sixty prosecutions of obscenity cases. 411 The relationship between Taylor and Exon stemmed from at least 1994. When Exon first attempted to introduce the CDA, Taylor helped Exon by drafting the CDA. 412 Thereafter, Taylor’s efforts to establish the law that protected children from cyberporn continued. Civil liberties groups alleged that Taylor was deeply involved in


411 Id.

412 Id.
publication of the “Rimm study,” which greatly contributed to passing the Exon’s bill by reporting the extent of the circulation of pornography on the Internet. This study, first published in the *Georgetown Law Journal*, was a front-page “exclusive” in *Time* magazine on July 3, 1995. Senator Charles Grassley used the Rimm study as one justification for the introduction of the CDA in his Senate statement on June 26, 1995. However, civil liberties groups questioned how Senator Grassley exploited statistics from the Rimm study two weeks before it was released in *Time* magazine, and they established some persuasive inference.

According to Mike Godwin, staff counsel to the Electronic Frontier Foundation, Taylor assisted Rimm in preparing his thesis project about cyberporn as early as November 1994, when Rimm was a junior at Carnegie Mellon University. Furthermore, Taylor shared office space with Deen Kaplan, an editor of the *Georgetown Law Journal*, in a complex that also housed the National Coalition for Children and Families. Furthermore Senator Exon was known to have obtained his “blue book” materials from Deen Kaplan, Godwin wrote.

413 Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 Geo. L.J. 1849 (1995). In this study, Rimm surveyed 917,410 sexually explicit pictures, descriptions, shout stories and film clips. He concluded that pornography was rampant on the cyberspace by showing the result that on those Usenet newsgroups, 83.5 percent of the pictures were pornographic.


419 *Id. See also* Wallace, *supra* note 410.

420 *Id.*
This circumstantial evidence showed that Taylor might have been closely related to Rimm’s study from the beginning.

Cathy Cleaver, director of legal studies for the Family Research Council, was another key designer of the CDA.\(^{421}\) According to Bryant and Plotnikoff’s news story, she was asked by Senator Coats to help create the decency provision just like Taylor was asked.\(^{422}\) In *Reno v. ACLU*, Taylor and Cleaver co-authored the amicus curiae brief in support of the CDA on behalf of 26 members of Congress.\(^{423}\)

**ACTIVE ROLE OF RELIGIOUS RIGHT GROUPS**

After Senator Exon introduced the CDA, a pro-CDA coalition led by religious right groups moved in harmony with their companion groups in Congress. Several religious right groups, including the Christian Coalition, Enough is Enough, Cleaver’s Family Research Council, and Taylor’s the National Law Center for Children and Families, began to link themselves as a strong political force and began to negotiate with key politicians such as Senators Exon and Coats.\(^{424}\) On June 13, 1995, one day before the voting on the Exon-Coats anti-pornography amendment, which faced strong opposition from pro-civil liberties politicians such as Senator Leahy, five religious right groups and the Chamber of Commerce of the United State of America sent letters to senators strongly supporting the bill.\(^{425}\) The Christian Coalition, in its letter, argued that increasing computer pornography required

\(^{421}\) Bryant and Plotnoff, *supra* note 406.

\(^{422}\) *Id.* Godwin agreed that “Cleaver and Taylor heavily lobbied to get this foot in the door.” *See* Godwin, *supra* note 418.


\(^{424}\) Bryant and Plotnoff, *supra* note 406.

\(^{425}\) *See* 141 CONG. REP. S8837-38 (daily ed. June 14, 1995).
“action, not more study,” and then urged senators to support the Exon bill “on behalf of the
1.6 million members.” 426 Gary L. Bauer, president of the Family Research Council, also
asked senators to support Exon’s bill “to eliminate cyberspace as a safe heaven for
pornography.”427 These letters were circulated on Capitol Hill just before the vote on the
Exon bill.428

When the anti-pornography act faced a serious attack on the “indecency standard” in
the conference committee, religious right groups acted most aggressively to protect the CDA.
They sent a letter proposing “a more restrictive net censorship proposal” than the Exon
amendment under the name of eleven pro-CDA groups to Representative Thomas Bliley and
Senator Larry Pressler, the co-chairmen of the conference committee.429 Representative Hyde,
chairman of the House Judiciary Committee, endorsed this proposal made by the Christian
Coalition and other members of the religious right by officially proposing it to the conference
committee as an effective alternative to the White proposal.430 McCandish and Godwin
pointed out that “with any Republican but Henry Hyde in control of the House conferees, the
CDA would have died in committee.”431 However, if powerful interest groups did not
support him, his conservative approach would have been ineffective. For example, when the

426 Id.
427 Id.
428 Id.
429 Electronic Frontier Foundation, Campaign to Stop the Unconstitutional Communications Decency Act (Nov.
2, 1995), http://www.eff.org/Censorship/Internet censorship bills/s314 hr1004 s652.alert.
430 See the Center for Democracy and Technology, CDT Policy Post No 30 (December 4,1995),
http://www.cdt.org/publications/pp311204.html. Even though the Hyde proposal failed to block the passage of
the White proposal, Hyde succeeded in protecting “indecency standard” by endorsing the Goodlatte amendment.
431 Stanton Stanton McCandlish and Mike Godwin, Response to the San Jose Mercury News’s Story about the
Lobbying behind Passage of “Communications Decency Amendment,” March 8, 1996, available at
lawsuit against the CDA was pending in court, Enough is Enough, one of the leading religious right groups, presented Senator Exon the first ‘For Such a Time as This’ award for his leadership in passage of the CDA.432

**THE VIEW OF ISPs’ LIABILITY**

During the controversy concerning ISPs’ liability for circulating cyberporn, religious right groups had attempted time and again to extend the range of ISP liability. Incorporating the good faith defense provision, Senator Exon stepped back from his position favoring strong ISP liability in order to mitigate civil liberties groups’ opposition. However, religious right groups did not withdraw their negative view of ISPs.

The testimony of Patricia Shao, a volunteer for Enough Is Enough, in the Senate Judiciary Committee Hearing on “Cyberporn” explained the religious rights groups’ point of view:

> Early this summer, my thirteen-year old daughter went to her friend’s house to play on the computer. … The girls were in a teenage chatroom on America OnLine, and were propositioned for “cybersex.” … I am aware of software and other “lock-out” features that I can download into my computer. But what happens when my children are at a neighbor’s house? … I believe in freedom of speech. I also believe in responsibility; responsibility by the providers of the online service companies to protect the innocence of children. If hard-core pornographic materials are illegal in the mainstream distribution channels, it should also be illegal on the Internet. 433

One of the important rationales of the CDA was based on imposing criminal liability. In the rationale of the religious right groups, persons have the responsibility of monitoring all the activities that occur on their services including transmitting indecent materials.

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Consequently, imposing criminal liability was an effective and efficient tool to force ISPs to self-screen objectionable content on their services. As Cathy Cleaver, a director of the Family Research Council, pointed out, religious right groups refused to “give up the right to prosecute the worst offenders online,” and they believed that society had “a right to have that kind of criminal law.” Therefore, it was natural that religious right groups moved to impose stricter liability on ISPs.

When Senators Grassley and Doles proposed “The Protection of Children from Computer Pornography Act of 1995,” which was aimed at imposing on ISPs broader criminal liability than that of Exon’s bill, the Family Research Council actively endorsed the Act. In this bill, Senators Grassley and Doles introduced the willfulness standard. The meaning of the willfulness standard or degree of knowledge required to impose liability was unclear. However, in a letter responding to Grassley’s request, Cathy Cleaver of the Family Research Council advised that “the Act is fully consistent with the Supreme Court’s indecency precedents,” with no serious constitutional concerns.

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437 Id. That is, this bill would create criminal liability for system operators and ISPs who not only “knowingly” transmit indecent material to minors but also “willfully” permit minors to use an electronic communications service in order to obtain indecent material. Senator Grassley said, “A willfulness standard is more appropriate for on-line service providers because those services can only monitor customer communications in narrow circumstances or face criminal prosecution for invasion of privacy.” Id.

438 See the Center for Democracy and Technology, CDT Policy Post No 16 (June 6, 1995), http://www.cdt.org/publications/pp160606.html. According to the CDT’s analysis, the degree of knowledge meant that “an entity could be said to have the material on its system if it is merely informed by a third party that some material on its system is indecent.”

439 Letter from Cathleen Cleaver, Legal Director Family Research Council, to Charles Grassley, Senator (June 7, 1995) http://thomas.loc.gov/cgi-bin/query/F?r104:2:./temp/~r104saWTt3:e27918:.
liability for ISPs seemed to move backwards, conservative groups such as the American Family Association tried to stop the movement by direct protest and suggesting alternative legislation. When Exon introduced his “good faith defense” provision in order to negotiate with the civil liberties groups, the American Family Association sent a letter to Senator Exon warning him that if significant changes were made, “the pro-family movement will uniformly oppose” his bill. 440

The climax of legislative attempts to impose strict criminal liability on ISPs was the Hyde proposal in conference committee, as mentioned above.441 Even though the Hyde proposal ended in failure, the argument continued that the Act was not stringent enough because it granted too much of a safe harbor to ISPs. In particular, German legislation regarding ISP liability provided pro-CDA groups with an argument for imposing criminal liability on ISPs. In Germany, CompuServe, one of the access providers, temporarily blocked more than 200 sexually explicit sites and presented a list of these sites because it received a letter from a prosecutor to take necessary steps to avoid possible criminal penalties for pornography in cyberspace under German law.442 Patrick Trueman, the director of governmental affairs of the American Family Association, in his article observed, “CompuServe may have reason to fear German law but seems safe in providing pornography


441 See the Center for Democracy and Technology, CDT Policy Post No 30 (December 4, 1995). See also chapter II. subsection “Reaction to the Conservative group in the House.”

to American citizens.” 443 Furthermore, he pointed out that it was an irony that CompuServe and other ISPs “may have to block pornography to German children, but are free to provide it to the children of America.” 444 Supporting the Hyde proposal that would force ISPs voluntarily to restrict access to pornography by providing no defense provision, he asked, “[W]hy is Congress so willing to protect those who distribute and profit from computer pornography?” 445 In his view, the Exon-White compromise would “impose on ISPs all the benefits of a common carrier but none of burden.” 446 Therefore, this provision would result in the failure to eradicate pornography on the Internet because “bad actors” would not be deterred from placing pornography on websites. 447 The best carrot-and-stick approach was a “tough law,” he wrote, which represented the view of most religious right groups. 448

2.2.2. ANTI-CDA GROUPS’ APPROACH

A COALITION OF CIVIL LIBERTIES AND INTERNET BUSINESS GROUPS.

Soon after Senators Exon and Gorton introduced the draft of the CDA, civil liberties groups noticed that it was primarily aimed at “plac[ing] substantial criminal liability on telecommunications service providers including telephone networks, commercial online

443 Id.
444 Id.
445 Id.
446 Id. Truemans’ article was introduced in its entirety to the House by Representative Robert K. Dornan on February 1, 1996, just before the Congress voted on the Exon-White amendment.
447 Id. In his letter to Senator Exon, Truman stated that Exon’s amendment “provi[ed] several defenses against prosecution which have the effect of gutting the current dial-a-porn law, making it useless for the prosecution of computer obscenity crimes.” Letter from Patrick A. Trueman to Senator Exon (April 4, 1995), available at http://www.cdt.org/speech/cda/950404amfam_exon_ltr.html.
448 Id.
services, the Internet, and independent BBS’s." If the bill were to be enacted, it would compel ISPs to closely monitor every communication carried on their networks, and this situation “poses a substantial threat to the freedom of speech.” Accordingly, an alliance between civil liberties groups and Internet business groups was a necessary consequence. The alliance organization, named the “Interactive Working Group” led by the Center for Democracy and Technology (hereafter CDT) immediately started to protest against the CDA. The first action of the Interactive Working Group was to send a letter to Senators Exon and Larry Pressler, chairman of the Senate Commerce Committee, with the suggestion of joint research for a forward-looking solution. In this letter, sent in early March 1995, twenty-seven civil liberties groups and Internet business corporations took part, including the ACLU, AOL, and Time Warner. What is more, the number of organizations that joined the


450 Id.

451 The Internet business groups might divide broadly into two categories based on their specific function or business areas on the Internet: software makers and Internet service providers.

452 The Center for Democracy and Technology, CDT Policy Post No. 3 (March 3, 1995), http://www.cdt.org/publications/pp30302.html. The core of this coalition was formed years ago as the Digital Privacy and Security Working Group and several other overlapping EFF-coordinated coalitions the exact membership and focus of which has varied depending on the legislative/regulatory calendar, new developments in technology, shifts in legal precedent, etc.” McCandlish and Godwin, supra note 431.

453 Id.

454 Id. The members of the Interactive Working Group that had signed the letter contained various kinds of interest groups. The list of the members was that: American Civil Liberties Union, America Online, Inc. Association of Research Libraries, American Society of Newspaper Editors, American Association of Law Librarians, American Library Association, Apple Computer, Business Software Alliance, Cavanagh Associates, Center for Democracy and Technology, Compuserve Incorporated, Consumer Federation of America, Cox Enterprises, Inc., Electronic Frontier Foundation, Electronic Messaging Association, Information Technology Industry Council, Interactive Services Association, Media Access Project, Newspaper Association of America, National Newspaper Association, National Retail Federation, People for the American Way Action Fund, Recreational Software Advisory Council, SmithKline Beecham, Software Publishers Association, Targetbase Marketing, The Internet Company, and Time Warner. In addition, some conservative organizations, such as CatoInstitute and PFF were on pro-CDA side. See McCandlish and Godwin, supra note 431.
Interactive Working Group rapidly increased. When they started the “Campaign to Stop the Unconstitutional Communications Decency Act,” sixty-three organizations joined the anti-CDA force.455

According to McCandish and Godwin, the two interest groups, i.e., civil liberties and Internet business groups, had a subtle difference in their fundamental goals and lobbying style even though their agendas of both groups overlapped in many respects.456 The civil libertarians put emphasis predominantly on the need to protect the public interests, while the industry groups were largely concerned with protecting their business interest, that is, exemption from possible liability.457 However, the main goal of the Interactive Working Group coalition was to bring both groups, with their somewhat different agendas, into line with each other.458 The fact that most of the anti-CDA congress members came from western states where Internet businesses such as entertainment and software industries were concentrated was also an important factor. For example, Representatives Cox and Wyden came from respectively California and Oregon. Furthermore, Rick White was a representative from the state of Washington, Microsoft’s district.459

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456 See McCandlish and Godwin, supra note 431.

457 Id.

458 Id.

459 White served as a representative until 1999, and then became CEO of TechNet, the technology industry lobbying group, based in Palo Alto. In early 2005, he left that position for another run against Maria Cantwell in 2006.
Who Invented Section 230

When Senator Exon introduced his new amendment on February 1, 1995, civil liberties groups analyzed its harmful effect on free speech and began to develop alternative approaches that could replace the Exon and religious groups’ strict government regulation approach. Just eight days later, CDT developed an alternative approach and published it even though it was not elaborated. It stressed “user control” in opposition to the religious right’s “government control.” In its first Policy Post, CDT explained:

The power and flexibility of interactive media offers a unique opportunity to enable parents to control what content their kids have access to, and leave the flow of information free for those adults who want it. … Most interactive technology, such as Internet browsers and the software used to access online services such as America Online and Compuserve, already has the capability to limit access to certain types of services and selected information. … In the case of criminal content the originator of the content, not the carriers, should be responsible for their crimes. And, users (especially parents) should be empowered to determine what information they and their children have access to.

In summary, this Policy Post proposed the basic concepts of IFFEA, such as parental control, “no ISPs’ criminal liability on third party content,” and “encouragement to develop filtering technology.” Two weeks and a few days later, CDT issued five more principles that alternative legislation should include to enable parents to protect children from objectionable material: federal legislation essential to protect free speech on the net, maximum reliance on technology to empower parents, protection for statute’s constitutionality, emphasis on

\[\text{460} \text{ The Center for Democracy and Technology, supra note 449.}\]

\[\text{461 Id.}\]

\[\text{462 Id.}\]

\[\text{463 The Center for Democracy and Technology, CDT Policy Post No. 6 (March 24, 1995), http://www.cdt.org/publications/pp060323.html.}\]
enforcement of existing statutes;\footnote{464} and codification separately from the existing dial-a-porn statute.\footnote{465}

It was not long before CDT’s argument was echoed in the Senate. Senator Patrick Leahy sent a letter to Jerry Berman, the director of the CDT, and the Interactive Working Group, to ask for a collaborative effort.\footnote{466} That effort resulted in proposal of the “Child Protection, User Empowerment, and Free Expression in Interactive Media Study Bill” (S.714) in June of 1995.\footnote{467} According to a CDT Policy Post, after the passage of the Exon bill in the Senate in June, the Interactive Working Group began to work directly with Representatives Cox and Wyden to find an effective alternative that could bolster the parental control technology.\footnote{468}

In the end, the basic concepts of anti-CDA groups were codified by representatives Cox and Wyden, who introduced the “Internet Freedom and Family Empowerment Act

\footnote{464} CDT explained that federal and state law already prohibited transportation of obscene materials. Therefore, Congress should examine whether new law is required. \textit{Id}. This concept implanted directly into the Leahy amendment. This principle implied and could be extended that no other criminal penalty provision would be necessary; therefore, the Exon criminal law, the amendment of Section 223, also would be not required. This principle was embodied by the Cox-Wyden’s IFFEA. \textit{Id}.

\footnote{465} CDT said that “modification of the existing section 223, originally written for the analogue telephone system, to regulate new interactive media causes unnecessary confusion, both for the treatment of the new technology and with respect to the stability of the regulation of audiotext services. If new [bill] is written, it should be stand on its own.” This opinion also presented in Cox-Wyne’s IFFEA, which uniquely applied to Internet business companies such as ISPs. \textit{Id}.


\footnote{467} See 141 CONG. REC. S8330 (daily ed. June 14, 1995). \textit{See also} The Center for Democracy and Technology, \textit{POLICY POST} No. 8, April 7, 1995, \textit{available at} http://www.cdt.org/publications/pp10209.html., or subsection of this thesis “Reaction to Exon’s Proposal & Impact of Prodigy case.” Senator Leahy openly stated in the Senate, “A number of groups support the approach of the Leahy study, including civil liberties groups, librarians, online providers, newspaper editors and others.” See 141 CONG. REP. S8341 (daily ed. June 14, 1995). Furthermore, Leahy said that over 35,000 people signed an electronic petition in support of the Leahy study. \textit{Id}.

(IFFEA, HR.1978),” which included the provisions concerning parental control, no criminal penalties for ISPs, and granting ISPs civil immunity for Good Samaritan blocking. The Cox-Wyden amendment favored the Internet business industry because it would offer the broadest immunity among the amendments that had been introduced until then. At this time, Internet business groups championed the Cox-Wyden amendment in the frontline of the battle and tried to create a more favorable environment for its acceptance. The Commercial Interest Exchange Association, an organization with a membership of 160 ISPs, had sent a letter to urge every representative to support the Cox-Wyden amendment just one day before the House voted on it. On July 17, 1995, America Online announced that it had entered a partnership with SurfWatch Software and would provide its service to prevent children from accessing sites that contained sexually explicit material. CompuServe also announced a partnership with SPRY Inc., which developed the parental control software “Internet in a Box” about the same time.

According to the Reno court, parental control software was first introduced in August 1995 by Microsystems Software, Inc., when the controversy was heating up over the


470 Letter from Robert D. Collet, the president of the Commercial Internet Exchange Association, to Representatives (August 3, 1995). In November 9, 1995, thirty seven Internet business companies and related Interest groups, including AOL, AT&T, Bell Atlantic, Time Warner Inc., and CompuServe, sent a letter to the conference committee in the Senate and the House. In this mail, they urged the support for Cox-Wyden-White bill and asked the opportunity to brief the committee in their ongoing efforts to assist the law enforcement.

471 The Center for Democracy and Technology, Interactive Working Group Report to Senator Leahy: Parental Empowerment, Child Protection, & Free Speech in Interactive Media (July 24, 1995), http://www.cdt.org/speech/cda/950724iwg_leahy.html. According to this report, Surf Watch Software was designed to provide parental control for families who do not subscribe to commercial online services. Surf Watch allows parents to block their children's access to Usenet newsgroups, World Wide Web sites that are known to contain sexually explicit material. When activated with a private password held only by a parent, Surf Watch completely prevents any user from accessing these areas. This software resides on the home PC. Id.

472 Id.
introduction of the CDA and the Cox/Wyden amendment passed the House. Soon after the CDA passed both Congress on February 1, 1996, Microsystems signed a licensing agreement with CompuServe and Prodigy. The facts that Congress’s legislation passed simultaneously with the development of the filtering technologies and that ISPs adopted those technologies immediately showed how members of congress and the Internet industry closely interacted with each other, moreover, how Section 230 reflected on Internet business industries.

THE VIEW OF ISPs’ LIABILITY

Anti-CDA groups contended that regulating ISPs was an inappropriate strategy from the beginning because of the nature of the Internet. In the Senate hearing, Jerry Berman, executive director of the Center for Democracy and Technology, stated that “criminalizing behavior of service providers [was] not an effective means of protecting children from indecent material.” According to his argument, it would be impractical for ISPs to control each and every one of the millions of U.S. and international citizens who speak daily online. Furthermore, the global nature of the Internet would be another barrier to control of the Internet contents because “much of obscene material is accessible from the United States but transmitted from other countries, beyond the practical reach of U.S. law.”

474 Id.
476 Id.
477 Id.
Therefore, ISPs and civil liberties groups’ fundamental position was opposition to any kind of criminal liability for ISPs. Interestingly, like the extreme conservative groups’ opposing the introduction of the “good faith defense” provision of the Exon amendment, civil liberties groups also did not welcome that provision because the limitation of the ISPs’ liability would still be “weak and threaten” the nature of the internet. 478 CD T criticized Exon’s new bill saying it would force ISPs to exercise control as “new gatekeepers” instead of the federal government.479 In their view, facing potential criminal liability would force ISPs to employ all available measures to restrict or prevent access by minors in order to maximize their likelihood of availing themselves of this defense. Thus, in the long run, it would “spell the end of the open, decentralized communication environment” of the Internet.480

It is difficult to find any statement about civil liability of the ISPs during the period from the introduction to the enactment of the CDA in civil liberties groups’ writings.481 When the Cox-Wyden bill (H1978) passed the House, the CDT welcomed just removal of “disincentives for online service providers” to exercise editorial control over their content, but made no mention of civil immunity beyond this.482 Civil liberties groups focused on


479 Id.

480 Id.

481 See Electronic Frontier Foundation, EFF Statement on 1996 Telecommunications Regulation Bill (February 1, 1996), http://www.eff.org/Censorship/Internet_censorship_bills/cda_960201_eff.statement.

482 The Center for Democracy and Technology, CDT Policy Post No. 23 (August 4, 1995), http://www.cdt.org/publications/pp230804.html. According to the Good Samaritan provision, the CDT post said, “The bill would remove liability for providers of interactive communications services who take good faith steps to restrict access to obscene or indecent materials to minors or provide software or hardware to enable their users to block objectionable material. (section (2)(c)) In addition, the bill would overturn the recent court
eliminating criminal liability and the disadvantage of Good Samaritan blocking, not granting broad civil immunity, to ISPs. 483

2.2.3. EVALUATION OF RENO v. ACLU

EVOLUTION OF THE CASE

The ink used by President Clinton in signing the Telecommunication Act of 1996 into the law was hardly dry when battle began in court over the constitutionality of the CDA. Civil liberties groups led by the ACLU filed a lawsuit against Attorney General Reno and the U.S. Department of Justice (DOJ) in a U.S. District Court in Pennsylvania. 484 Internet business groups such as AOL, Microsoft Network, Apple Computer Inc, and CompuServe Inc. actively came out in the frontline of the battle by filing a similar action in the same court decision (Stratton Oakmont, Inc. v. Prodigy Services Co., N.Y. Sup. Ct. May 24, 1995) which held Prodigy liable for content on its network because the service screens for sexually explicit material and language. Prodigy now faces a $200 million lawsuit.” CDT’s interpretation is significant because the language of the CDA clearly explains that the Good Samaritan provision is applicable only when ISPs exercised editorial control, not granting perfect civil immunity for ISPs.

483 Id.

484 See ACLU v. Reno, 929 F. Supp. 824, 827 (E.D. Pa. 1996). The plaintiffs were the American Civil Liberties Union; Human Rights Watch; Electronic Privacy Information Center; Electronic Frontier Foundation; Journalism Education Association; Computer Professionals for Social Responsibility; National Writers Union; Clarinet Communications Corp.; Institute for Global Communications; Stop Prisoner Rape; AIDS Education Global Information System; Bibliobytes; Queer Resources Directory; Critical Path AIDS Project, Inc.; Wildcat Press, Inc.; Declan McCullagh d/b/a Justice on Campus; Brock Meeks d/b/a Cyberwire Dispatch; John Troyer d/b/a The Safer Sex Page; Jonathan Wallace d/b/a The Ethical Spectacle; and Planned Parenthood Federation of America, Inc. Id. What is more, Joe Shea, a newspaper editor, also brought a First Amendment challenge to the CDA at a district court of New York on Feb. 17, 1996. See Shea v. Reno, 930 F. Supp. 916, 922 (S.D.N.Y.1996). Plaintiffs of this suit included the American Liabrary Association; American Online, Inc.; American Booksellers Association, Inc.; American Booksellers Foundation for Free Expression; American Society of Newspaper Editors; Apple Computer, Inc.; Association of American Publishers, Inc.; Association of Publishers, Editors and Writers; Citizens Internet Empowerment Coalition; Commercial Internet Exchange Association; CompuServe Incorporated; Families Against Internet Censorship; Freedom to Read Foundation, Inc.; Health Sciences Libraries Consortium; Hotwired Ventures LLC; Interactive Digital Software Association; Interactive Services Association; Magazine Publishers of America; Microsoft Corporation; The Microsoft Network, L.L.C.; National Press Photographers Association; Netcom On-Line Communication Services, Inc.; Newspaper Association of America; Opnet, Inc.; Prodigy Services Company; Society of Professional Journalists; Wired Ventures, Ltd. Id. at 829. Two cases were consolidated for all matters relating to the preliminary injunction. Id. at 827-28.
on Feb. 27, 1996. Anti-CDA groups challenged not the entire the CDA, but sections 223(a) and 223(d) of the CDA. They argued these “indecent transmission” and “patently offensive display” provisions, which made it a crime to send offensive Internet material to persons under the age eighteen, would chill adult speech. The district court decided the case on June 11, 1996, finding the CDA facially unconstitutional. Judge Buckwalter and Chief Judge Sloviter found the CDA unconstitutionally overbroad under the First Amendment and unconstitutionally vague under the Fifth Amendment.

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485 Id. at 828.

486 Section 223(a)(1)(B) by means of a telecommunications device knowingly (i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

487 Section 223(d) Whoever (1) in interstate or foreign communications knowingly (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunications facility under such persons control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

488 ACLU, 929 F. Supp. at 829.

489 Id. A three-judge panel convened to adjudicate the ACLU’s claim. Judges Dolores Sloviter, came from the United States Court of Appeals for the Third Circuit; Ronald Buckwalter, from the United States District Court for the Eastern District of Pennsylvania; and Stewart Dalzell, also from the United States District Court for the Eastern District of Pennsylvania wrote a separate opinions but unanimously held that the CDA was unconstitutional.

490 ACLU, 929 F. Supp. at 858-59 (Judge Buckwalter), 857 (Judge Sloviter). Chief Judge Sloviter argued, “Whatever the strength of the interest the government has demonstrated in preventing minors from accessing ‘indecent’ and ‘patently offensive’ material on-line, if the means it has chosen sweeps more broadly than necessary and thereby chills the expression of adults, it has overstepped onto rights protected by the First Amendment.” Furthermore, she also agreed with the ACLU’s claim that CDA’s provision could be used to censor the materials which were widely considered educational, artistic, or newsworthy. She concluded, “The CDA is patently a government-imposed content-based restriction on speech, and the speech at issue, whether denominated ‘indecent’ or ‘patently offensive,’ is entitled to constitutional protection” See, ACLU, 929 F. Supp. at 919-25. Judge Buckwalter stated that the safe harbor defense would not be available because current
found the CDA overbroad but not vague. Based on the speech-enhancing and democratic character of the Internet, he concluded that “the disruptive effect of the CDA on Internet communication, as well as the CDA’s broad reach into protected speech, not only render the Act unconstitutional but also would render unconstitutional any regulation of protected speech on this new medium.”

On June 26, 1997, in a 7-2 decision, the Supreme Court affirmed the district court’s decision invalidating the CDA’s “indecent” and “patently offensive” provisions by finding those provisions abridged freedom of speech. Even though anti-CDA groups failed to bar the passage of the CDA in Congress, they led the court battle against pro-CDA groups. The Court’s ruling was a “a clear rejection of the views of far-right groups.” Ira Glasser, ACLU executive director, also pointed out, “Everyone knew the CDA was unconstitutional, but Congress passed the law and the President signed it.” He concluded, “This was why independent courts are required to protect liberty.”

The Court addressed seven main reasons why 223(a) and 223(d) were unconstitutional: (1) the two provisions were content-based blanket restrictions on speech; (2) there was no basis for qualifying the level of First Amendment scrutiny that should be applied to Internet; (3) unclear definitions of “indecent” and “patently offensive” caused First

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491 Id. at 867-69, 883.

492 Id. at 867


494 Citizens Internet Empowerment Coalition, U.S. Supreme Court Rules on Communications Decency Act (June 26, 1997) (Statement of Elliot Mincberg, Executive Director of People for the American Way). http://www.ciec.org/SC_appeal/970626_CIEC.shtml

495 ACLU, Hails Supreme Court Victory in Internet Censorship Challenge (June 27, 1997) http://www.aclu.org/privacy/speech/15493prs19970627.html
Amendment controversies; (4) the overly broad of scope of the two provisions would impose a heavy burden on the federal government to explain why a less restrictive provision would not be as effective; (5) the two provisions were not narrowly tailored to the goal of protecting minors; (6) the safe harbor defenses provision did not serve to narrowly tailor the regulation; (7) the government’s assertion that an interest in fostering the growth of the Internet provided an independent basis for upholding the constitutionality of 223(a) and 223(d) was unpersuasive.496

Revisiting the Court’s Decision

In Reno v. ACLU, the Court provided a very clear decision on the basis of the First Amendment: “the important words in the CDA were unconstitutionally vague.”497 Strictly speaking, the Court’s decision was an answer to the scope of the CDA and its constitutionality, not an answer to Senator Exon’s approach to protect minors from cyberporn, in other words, to whether government regulation of the Internet by imposing criminal liability on ISPs could be constitutional.


497 MIDDLETON et all, supra note 43 at 416. According to the Court, the CDA’s undefined terms incurred special concerns because the CDA constituted “content–based regulation of speech,” therefore it would be able to influence the free flow of expression. Furthermore, the CDA was a criminal statute which possibly threaten to silence. Concerning this point, the Government argued that the CDA’s “patently offensive” standard was no more vague obscenity standard than the obscenity standard that was established in Miller v. California, 413 U.S. 15 (1973). In Miller, the Court established three-prong text for obscenity. Government maintained that the CDA’s standard was a part of the second prong of the Miller test, which defined that “(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.” However, the Court rejected this argument because the CDA’s standard lacked critical requirement of Miller test, i.e., “specially defined by the applicable state law.” Therefore, the CDA would ban offensive or indecent material that has literary, artistic, political, or scientific value although that material would be protected for the adult due to its social value. Furthermore, unclearly defined terms “patently offensive” and “indecent” would cause self-censorship even though their massage would be entitled to constitutional protection. See 521 U.S. at 872-74.
In terms of governmental regulation of the Internet, the Court’s stance was unclear. Showing an opposition to censorship of the Internet, the Court said that “governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.” Therefore, “the interest in encouraging freedom of expression in a democratic society,” wrote Justice John Paul Stevens, “outweighs any theoretical but unproven benefit of censorship.”

However, the Court agreed to use the severability clause of the Act to sever the “indecency” provision, both Section 223 (a) and 223 (d) of the CDA, leaving the rest of the obscenity section standing. It suggested that government could constitutionally prohibit obscenity on the Internet and did not entirely reject the imposition of criminal liability on the transmitters and creators of cyberporn as long as it met the legal definition of obscenity. Furthermore, the Court left open the possibility that if the CDA regulation of indecency were to be a more narrowly tailored, it could be held constitutional. Even though its main parts, indecency provisions, were held unconstitutional, the rest of the CDA, including the “safe harbor” provision protecting ISPs from being liable for the words of others, was not affected by this decision and remained law.

Significantly, Section 230 of the CDA, the provision granting ISPs civil immunity for third-party postings, also remained in effect. The reason was very simple. This provision was

498 But the Supreme Court’s ruling that the Internet is entitled to the highest level of First Amendment protection means government regulation would be difficult.

499 521 U.S. at 885.

500  Id.


502 521 U.S. at 883.
not at issue in the case because the ACLU did not challenge it. In fact, when the ACLU filed a suit at Pennsylvania District Court, it claimed there was confusion since there was a different defense for ISPs liability in Section 223, the good faith defense provision, and Section 230 (c)(1), the Good Samaritan protection provision. However, that claim disappeared in the trial.503

The anti-CDA groups’ main purpose in the suit was not only to nullify the core provisions of the CDA but also to invalidate the criminal penalty approach of the religious right groups. For the Internet business groups, the latter was more important. For example, the Chamber of Commerce of the U.S.A. argued in an amicus curiae brief that the imposition of sweeping criminal penalties based on the content of the Internet would “produce a chilling effect on business use of online communications and severely threaten the development of this important infrastructure.”504

In Reno v. ACLU, the Court did not expressively endorse Section 230. However, the Court revealed its opinion by supporting “parent control,” the essential idea of Section 230, saying that technology would be a constitutionally acceptable way to prevent children’s access to indecent material. Justice Stevens addressed his affirmative view of parent control

503 ACLU, Compl. ACUL v. Reno, No. 96-963 (E.D. Pa. Feb. 8, 1996). Available at http://www.epic.org/free_speech/censorship/lawsuit/complaint.html. In Complaint, the ACLU argued that “. Section 230(c)(1) provides: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” This section appears to conflict with new 47 U.S.C. Sec. 223(e), which only provides a defense if a “facility, system, or network” on which “indecent” or “patently offensive” material appears is not under the control.” The ACLU also argued, “The defenses provided under the statute are vague and contradictory. It is not clear what 47 U.S.C. Sec. 223(e)(1) means by a “facility, system, or network” not being “under [the] control” of a person since even online providers who do not themselves create the content of communications over their systems can technologically exercise “control” over the communications for which they are conduits. It is also not clear whether 47 U.S.C. Sec. 230(c)(1) provides a defense for anyone who is not a “publisher or speaker.” Thus, those who act in part as access providers or hosts for interactive communications cannot know to what extent they will be held liable for “indecent” or “patently offensive” communications to minors.”

citing the lower court finding: “Currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available.” Such a statement by the Court brought to mind the language of Section 230, that one important goal of the Act was “to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.”

In contrast, the Court rejected the government argument that the good faith defense provision of the CDA could constitute the sort of “narrowly tailoring” that would save the CDA. The Court stated this defense was technologically illusory because no proposed screening software existed that could block all tagged material. Furthermore, the Court did not recognize the effectiveness of credit card and age verification to narrow the CDA provision’s scope. According to the Court, there was no effective way to determine the identity or the age of a user accessing material through e-mail or a chat room. Credit card

505 521 U.S. at 877.


507 47 U.S.C.A. § 223 (e)(5) (West Supp. 1997). The text of the provision is: § 223 (e)(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d), or under subsection (a)(2) with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person (A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or (B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

508 See 521 U.S. at 848. According to the government argument, ISPs may take protective “good faith action,” for example, by “tagging” their indecent communications in a way that would indicate their contents, thus permitting recipients (parents) to block their reception with appropriate software. Therefore, such actions of ISPs could be effective.

509 See 521 U.S. at 857.
verification would not be economically feasible for most noncommercial websites due to the cost of installing and maintaining such a system.510

One important aspect that must be pointed out is that the Court’s standard toward two kinds of technologies, parental control software and ISP defense software, was quite different although both of them had technological weaknesses. In fact, parental control software could screen only “certain suggestive words or known sexually explicit sites,” and it could not screen “sexually explicit images” at that time.511 However, the Court recognized parental control software as being an “effective method” to protect children from cyberporn.512 This implied the Court preferred user control to ISP control or government regulation of the contents of the Internet.

In summary, Reno v. ACLU was a “decisive victory” for civil libertarians. They successfully invalidated the crux of the CDA reversing their failure in Congress. Section 230, which embodied the family empowerment idea represented by parental controls, was left as the only solution for cyberporn because Section 230 was not affected by the Court’s decision. More importantly, even though the Court did not clearly rule, Internet business groups got an endorsement of the effectiveness of parental control technology and opposition to government regulation on cyberspace.

2.3. FINDINGS AND DISCUSSIONS

From the time when Senator Exon proposed it to when the Court held that its indecency provisions violated the Constitution, the CDA had its ups and downs. In the Senate,

510 See 521 U.S. at 855-57.
511 See 521 U.S. at 855.
512 Id.
the original version of the CDA was passed as a legal detergent to clean up Internet pollution. However, the House chose the IFFEA, the original version of Section 230, as a reaction to the Exon bill. Even though the conference committee reached a compromise between the two drafts, the Court held the core provisions of the CDA unconstitutional. However, Section 230 remained intact. Furthermore, the legislative history showed that it was a reasonable assumption that all actions and reactions to the CDA were the result of the conflict between two sharply divided forces inside and outside of Congress and their conflicting views of the Internet. To reflect both forces’ interest, Congress made a deformed law, which contained two conflicting approaches in one law concerning who should and how to govern cyberporn and the new information superhighway. It was an easy and hasty compromise with a combination of the two provisions.

In the end, the vicissitudes of the CDA resulted in several adverse effects. Different groups involved in the drafting of the CDA had different ideas about the meaning of the Section 230. In particular, misinformation on a number of issues has led to much confusion regarding the purpose, scope, and necessity of Section 230.

1. Rough Law with No Consideration of Tort.

The most remarkable lesson to be gained from the legislative history of the CDA is that the scope and the meaning of the Section 230 cannot be understood without consideration of the entire perspective of the CDA.

The CDA, both Section 223 and Section 230, is fundamentally designed to find a legal solution for protecting children from pornography on the Internet. Senator Exon clearly


514 See Cannon, supra note 279, at 68.
started that the CDA “stands for the simple premise that it is wrong to provide pornography to children on a computer just as it is wrong to do it on a street corner or anywhere else.”\textsuperscript{515} Furthermore, supporting the IFFEA, Representative Goodlatte also emphasized that the Cox-Wyden amendment is a “thoughtful approach to keep smut off the net without government censorship.”\textsuperscript{516}

If that is so, how did Section 230 become the law for governing defamation and other torts on the Internet? There is no direct reference to defamation or tort law in the legislative history of the CDA. Neither senators nor representatives clearly mentioned tort liability in Congress. The only reference was in the Conference Report of Section 230, which said that “one of the specific purposes of this section is to overrule \textit{Stratton-Oakmont v. Prodigy},”\textsuperscript{517} which dealt with the matter of a defamatory story, not pornography.\textsuperscript{518}

However, it seemed that the main reason Congress paid attention to this case was unrelated to the fact that it was a libel case. More exact reasons might have been that Prodigy was a family oriented website, and that Prodigy employed “screening and blocking software that keep obscenity off” its network.\textsuperscript{519} According to Representative Cox, the “existing legal system provided a massive disincentive” rather than encouragement for the people who might best help control the Internet, and \textit{Stratton-Oakmont} was a typical example of this


\textsuperscript{516}141 \textit{Cong. Rec.} H8471 (daily ed. August 4, 1995). The House Report on H.1555 (the House version of Telecommunication Reform Bill) summarized that Section 230 was to provide liability protection for on-line service providers who take steps to “clean up the Internet.” See H. \textit{Rep. No.104-458}, summary of the section 230 (1996).

\textsuperscript{517}H. \textit{R. Conf. Rep. No.104-458}, at 194 (1996). However, in Conference Report provided no more comment about the scope of section 230, that is, whether this provision could cover defamation and other tort cases or not.

\textsuperscript{518}See subsection of the thesis chapter 1. 1.1.3. \textit{INTERNET LIBEL CASES BEFORE ADOPTION OF THE CDA}.

\textsuperscript{519}141 \textit{Cong. Rec.} H8469 (daily ed. August 4, 1995).
ironic situation. Therefore, Congress stated in Section 230 that one of the policies of the U.S. was “to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.” Decisions such as *Stratton-Oakmont* “create serious obstacles” to attaining this policy, according to the Conference Report.

Both the good faith defense provision of Section 223 and the Good Samaritan protection provision of Section 230 were reactions to *Stratton-Oakmont v. Prodigy*. However, no congressman discussed this defense in terms of defamation or tort liability.

In the civil liberties groups’ records there is also no reference to defamation or tort liability of ISPs during the period of congressional consideration of the CDA. For instance, when the Cox-Wyden amendment passed the House, the Center for Democracy & Technology focused its analysis on the difference between the Senate-passed Exon bill and its new approach to protecting children from pornography. Concerning the Good Samaritan provision, the CDT reiterated Representative Cox’s argument. One interesting point is that the CDT focused the scope of Section 230 very narrowly on “obscene or indecent material” without extension to tort liability:

520 *Id.*


523 The Center for Democracy & Technology, the leading anti-CDA group, published their Policy Post 57 times and also Proposal analysis 5 times from February 1995 when Exon proposed his original proposal in the Senate to July 1997 when Congress held the CDA unconstitutional. However, no mention about defamation or Tort law with the context of ISPs liability or Section 230. available at, http://www.cdt.org/publications/pposts1995.shtml, and http://www.cdt.org/publications/pposts1996.shtml

524 The Center for Democracy and Technology, CDT Policy Post No 23, August 4,1995. available at http://www.cdt.org/publications/pp10209.html. The CDT addressed, “Unlike the Senate-passed ‘Exon/Coats Communications Decency Act (CDA), the Cox/Wyden amendment ensures that individuals and parents can decide for themselves what information they or their children receive.”
The bill would remove liability for providers of interactive communications services who take good faith steps to restrict access to obscene or indecent materials to minors or provide software or hardware to enable their users to block objectionable material. 525

The letter from Commercial Internet eXchange Association ("CIX") to House members also asserted that the purpose of the Cox-Wyden bill was to immunize ISPs that monitor and screen content “in order to create family-oriented service.”526

What does it mean that there was no reference to defamation or tort liability for ISPs in the record of Congress and civil liberties groups? This situation might reasonably lead to three significant assumptions.

First, in spite of the language of the congressional record about Stratton-Oakmont v. Prodigy, this is not sufficient to imply that section 230 can be applied to libel cases and furthermore, to all torts cases. The main concern of Congress was not only to absolve ISPs of liability but also to protect the plaintiffs’ reputation from the possible defamatory posting. Congress’ concern was focused on how to protect children from cyberporn. In other words, this law is not for libel or tort, but the law for to regulating cyberporn. To effectively regulate the cyberporn, Congress just intended to eliminate the disincentive of Good Samaritan blocking.

Second, until Section 230 of the CDA made it into law by passing both the Senate and the House, no stakeholder in the CDA might have considered the extension of the reach of the CDA from cyberporn to defamation or all torts.

525 The Center for Democracy and Technology, CDT Policy Post No.31 (December 4, 1995). http://www.cdt.org/publications/pp311204.html. Regarding to the White amendment, the CDT Post simply mentioned that this bill would protect ISPs from “vicarious liability for transmitting their subscribers messages or for merely providing access to the Internet.”

The last but most important point is that, even though the Good Samaritan provision can be broadly applied to all tort cases including defamation because of the simple mentioning of the *Stratton-Oakmont* case, it cannot avoid the criticism that it should be considered poor law.

When the CDA finally passed Congress, Representative Howard Berman (D-Calf.) criticized the conference committee’s hasty processing of the bill. Bernard stated, “No hearings were held by any committee of jurisdiction” with regard to the conference committee’s bill.527 Furthermore, “[H]aving failed to engage in this inquiry and analysis, we have a conference report which assumes that the broadcast indecency standard can simply be applied whole-sale to displays of the online content.”528 “A quick review of the political process” showed “how bad legislation occurs when the content of a bill is kept from public scrutiny,” the Electronic Frontier Foundation argued in a statement.529 These criticisms are appropriate and can be directly applied to Section 230. There were no references, no discussion, no public hearings on Section 230, in particular, in terms of extension to the libel and torts law. Neither the suitability of the legislation nor the scope of the Good Samaritan provision was under scrutiny. As a result, unclear and unverified assumptions became a principle law governing defamation and other torts on cyberspace.

2. CAN SECTION 230 APPLY TO DEFAMATION ON THE INTERNET?

A closer look at Section 230 raises doubt about the logic of its application. Is it appropriate to apply the rationale of Section 230 to defamation or other torts cases?

527 142 CONG. REC. H1166 (daily ed, February 1, 1996).

528 *Id.*

The starting point of the rationale of Section 230 is the concept of “parental control,” a kind of user control. That is, the most effective way to protect children from pornography is for parents to decide for themselves what information their children receive.\textsuperscript{530} Thus, the philosophy in the original version of Section 230, that self-regulating without penalty is “the best way to police the Internet,” is enshrined.\textsuperscript{531} Proponents of this legislation believed that available blocking technology can make this approach successful.\textsuperscript{532} In summary, the rationale of Section 230 may be assumed to be that ISPs should be immunized from liability for circulating pornography because parental control is sufficient to protect children with the help of cutting-edge filtering technologies.

Here, the rationale of Section 230 raises the two significant questions.

First, we must review whether the parental control rationale can be an available and effective way to police Internet libel in the same way as pornography. To answer this question, it is important to understand the different natures of online defamation and pornography on the Internet.

\textsuperscript{530} See 142 CONG. REC. H8470 (daily ed. August 4, 1995), See also Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action: Hearing on S.892, before the Senate, 104\textsuperscript{th} Cong. 104-438 (1995) (Statement of Sen. Patrick Leahy).

\textsuperscript{531} Id. Senator Leahy argued, “This [Cox/Wyden amendment] is the best way to police the Internet without unduly restricting free speech or squelching the growth of this fantastic new communications medium. It is parents, not the government, who should decide what restrictions to place on their children's access to that which they consider objectionable: whether it is beer advertising, or fantastic card games that some parents believe promote interest in the occult. Available blocking technology can make pornographic Usenet news groups or World Wide Web sites off-limits to children.”

\textsuperscript{532} Id.
Section 230 employed the term “user control” instead of parental control as a broader concept.\textsuperscript{533} Parental control is not appropriate to Internet libel because the objects of Internet libel are mainly adults not children. According to this logic, users are empowered to decide what they want to get on the Internet.\textsuperscript{534} On the contrary, in case of libel, the defamed have a right to protect their reputation with the hundreds of thousands users who want to get the information about the alleged defamation.

The intrinsic distinction between cyberporn and online defamation can become clearer when comparing them in terms of damage. Under the logic of parental control, regardless of whether ISPs display or transmit indecent materials, they can enjoy immunity.\textsuperscript{535} As “computer coffee shops” providing access to information,\textsuperscript{536} ISPs have no responsibility for pornography on the Internet. The responsibility to protect children from cyberporn would lie with the parent (user) because parents choose what their children are entitled to see.

Significantly, no harm to children is caused until children get pornography from the Internet under the parental control rationale. If only children don’t watch the indecent materials whether by means of filtering and screening technology or not, hundreds of millions cyberporn that are circulated on the Internet are beyond the concern of Section 230.

\textsuperscript{533} See 47 U.S.C.A. § 230 (b)(3). In this sub-provision, section 230 articulates that it is a U.S policy to “encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who used the Internet and other interactive computer service.”

\textsuperscript{534} See 142 CONG. REC. H8470 (daily ed. August 4, 1995).

\textsuperscript{535} When ISPs or individuals knowingly transmit pornography on the Internet, they would be punishable by the Section 223 of the CDA. However, Section 223 was invalidated by the Supreme Court’s decision in Reno. However, regardless of section 223, the parent control rationale basically rejects any criminal penalty or civil liability for transmitting the cyberporn.

\textsuperscript{536} Reno, 521 U.S. at 850.
That is, just republication by posting pornography on their service does not invite the civil damages to users (parent or children), if parents successfully isolate children from the cyberporn.

However, the nature of defamation is quite different from that of cyberporn. Under common law, harm to reputation “would normally be assumed to flow from a defamatory publication of the nature involved,” that is, general damage to reputation will be assumed as soon as defamatory statements are [re]published and circulated to others. Furthermore, this presumption of harm to reputation from a defamatory publication may mean that the defamed is entitled to claim general damages. In a defamation case, unlike cyberporn, it does not matter whether particular users filter defamatory stories. What is important is whether defamatory story is [re]published or not. Once defamatory stories are republished by posted by third party, damage to reputation may be occurred because of the high possibility of being viewed by other people. Furthermore, in case of cyber-porn, users may be simultaneously plaintiffs who suffered injury. On the contrary, in case of the Internet libel, most of the plaintiffs are not users but third parties who are defamatory described. Accordingly, user’s interest is directly related to self-control in cyberporn, in case of online defamation, self-control is much less relevant to user’s interest because defamatory stories may not aim at user.

Second, it should be verified whether technologies for user control are available for online defamation.

538 Id.
No detailed information about filtering technologies exists in the legislative record of the CDA.\footnote{Before the vote to Cox/Wyden amendment in the House, Representative Wyden presented some filtering software in the House floor. Wyden stated that the products were “reasonably priced and available”, simply to make clear that it is possible for parents “to child-proof the family computer” with this technology. However, he provided more detailed information about how the software can screen technically pornography on the home computer. See 141 CONG. REC. H8470 (daily ed. August 4, 1995).} However, in\textit{ACLU v. Reno}, the U.S. District Court for the Eastern District of Pennsylvania reviewed user control software programs, and concluded that these technologies were a “reasonably effective method” for shielding children from objectionable material based on the parents’ own values and tastes.\footnote{See ACLU v. Reno, 929 F. Supp. 824, 839-42 (E.D. Pa. 1996). (Finding 55–73).} According to the district court, parental control technologies can screen for certain suggestive words or for known sexually explicit sites.\footnote{Id.} For example, Cyber Patrol, software designed for parents control, had the “CyberNot list,” which contained approximately 7,000 sites in twelve categories.\footnote{Id. Twelve categories contained: Violence/Profanity; Partial Nudity; Nudity; Racism/Ethnic Impropriety; Satanic/Cult; Drugs/Drug Culture; Militant/Extremist; Gambling; Questionable/Illegal; and Alcohol, Beer & Wine.} The software made it possible for parents to selectively block access to any or all of the twelve CyberNot categories simply by checking boxes in the Cyber Patrol program manager. To make the list, Microsystems employed staffs to search the sites.\footnote{Id. CyberNot list were updated on a weekly basis. Once installed on the home computer, the copy of Cyber Patrol receives automatic updates to the CyberNot list over the Internet every seven days.}

This technology may enable parents to block pornography and inappropriate websites from their children. However, it is very iffy assumption that this software can filter libelous postings to prevent users from viewing them. The Seigenthaler case, mentioned in the Introduction of this thesis, is a good example. Can Cyber Patrol software filter Seigenthaler’s defamatory biography posted on Wikipedia?
Wikipedia was definitely not filtered by the Cyber Patrol program, because it was not subject to any category of the CyberNot list. It is impossible to categorize numerous kinds of online defamatory postings as specific forms of defamation.

Furthermore, if the users screened for certain suggestive words, Seigenthaler’s defamatory biography was not filtered by the user control program for two reasons. One reason is that it is impossible for user programs to define defamatory statements. Defamations are linguistically indeterminate statements. Thus one cannot search for specific words such as sex or other terms of pornography. Furthermore, defamatory statements require the decision whether the entity is true or false; however user control software can not do that. The other reason is that it is impractical for a software company to check innumerable websites in the world, incalculable entities of each site as the Court pointed out in Reno.544

Basically parental control is a passive approach to protect minors from obscenity. Online defamation cannot be controlled by this passive approach. To offer a substantial remedy to the defamed and to lessen damage to individual reputations, the solution to Internet defamation lies in a more positive approach.

Several arguments mentioned above show that it is inadequate to apply Section 230 to Internet libel because of the superficial language of Section 230. One must study the hidden rationale that forms the basis of that Section.

3. CONFUSION OVER THE SCOPE OF SECTION 230

Even though Section 230 can be applied to defamation and tort law, the actual scope of ISP immunity raises another significant question. Did Congress really intend to create an

544 See Reno, 521 U.S. at 851.
absolute defense for ISPs from all causes of actions involving information such as a defamatory story created by a third party? The legislative history of Section 230 raises strong doubts about it. It suggests that the Section 230 should be interpreted only to the extent necessary to remove the disincentives of Good Samaritan blocking of the objectionable materials. That is, only when ISPs screen or filter contents in good faith, should this provision can be applied.

Section 230 consists of two subsections: (c)(1) the “Treatment of Publisher or Speaker” provision and (c)(2) the “Civil Liability” provision, this one concerns good faith blocking. Subsection (c)(1) stated, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” In Zeran v. American Online, the court decided that subsection (c)(1) grants ISPs broad immunity on the First Amendment, stating that tort liability would create “another form of intrusive government regulation of speech.”

However, the legislative history of the CDA makes it reasonable to argue for only limited immunity for ISPs.


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


548 See Zeran v. America Online, Inc. 129 F.3d 327, 330. (4th Cir. 1997). In Zeran, the court held that faced with potential liability for “millions postings”, citing the Reno decision, would cause a chilling effect. Accordingly, ISPs might choose to severely censor the messages posted. The Zeran court concluded that “Congress consider the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.”
First of all, in the language of Section 230 (c), this provision is under the title of “PROTECTION FOR GOOD SAMARITAN BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.” This implies that Section 230 (c)(1) should be applied to defamation cases only when ISPs make Good Samaritan blocking efforts.

Related to these arguments, it is remarkable point that if Section 230 was unquestionably designed to change the result in future cases like Stratton Oakmont, that goal was accomplished with only section 230 (C)(2), the God Samaritan defense provision without broad immunity provision. The troubling result of Stratton Oakmont was the fact that more good faith effort to self-police objectionable material will increase the danger to hold liability, therefore, Section 230 (c)(2) eliminates this potential danger. Accordingly, a broader immunity extension is not needed to overrule Stratton Oakmont, and section 230 (C)(1) would have to be construed within the context of the Good Samaritan efforts.549

Significantly, the history of this provision strongly supports this view. When the Cox-Wyden amendment (IFFEA, H1978) passed the House, the two subsections of the Section 230 (c) were not separated.550 Therefore, at that time, it could be reasonably understood that subsection (c)(1) of the final version of the CDA was established in order to be subject to the Good Samaritan blocking provision. Introducing IFFEA, Representative Cox emphasized that the first purpose of his amendment was to “protect computer Good Samaritans,” but no

549 Related to this issue, the Court of appeal of California, in Barrett v. Rosenthal, presented interesting interpretation on the Section 230. The Court held, “if, as Zeran says, Congress’s use of word “publisher” covers distributors as well as original publishers, and therefore reflects an intent to create an absolute immunity, it would not have been necessary for Congress to specifically protect providers and users who monitor content; section 230(c)(2) would be mere surplusage.” 114 Cal. App 4th 1379, 1399 (Cal. Ct. App. 2004).

mention was made of other kinds of civil immunity. 551 Civil liberties groups’ interpretation of this section of the IFFEA was the same as Cox’s view. The Center for Democracy and Technology in its Policy Post said that the bill would “remove disincentives for online service providers to exercise editorial control over their networks and to deploy blocking and screening technologies for their subscribers.”552 However, no comment about broad immunity for ISPs appeared in the CDT Policy Post.

The separation between the two sub-sections took place when Representative White proposed his compromise bill after negotiating with Senator Exon. The White-Exon amendment made no specific mention of the reason for separation of the two sub-sections. One important point is that the Conference Committee Report indicated limited ISP immunity, with no reference to broad immunity. The exact purpose of Section 230 was to provide “Good Samaritan protection from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material,” the Conference Report said.553 There was no reference as to why this separation of the two sub-sections occurred.

In short, both the language of Section 230 itself and its meager legislative history support the conclusion that there is little indication that Congress intended to grant ISPs absolute immunity from all kinds of libel actions resulting from third party postings.


552 The Center for Democracy and Technology, CDT Policy Post No.23, (August 4, 1995). http://www.cdt.org/publications/pp230804.html. The CDT said that bill would remove liability for ISPs “who take good faith steps” to restrict access to obscene materials to minors or provide software or hardware to enable their users to block objectionable material. In addition, the CDT put on emphasis that this bill overturned the Stratton Oakmont case.

553 H. R. CONF. REP. NO.104-458, at 194 (1996). The Conference Committee adopted the White/Exon amendment with some modification. However, Section 230 (c) remained intact. Italics is emphasized by author.
4. CONTROVERSY OVER DISTRIBUTOR LIABILITY

The most critical point in the Zeran decision was that the court concluded that Congress intended to preempt not only ISPs’ publisher liability but also ISPs’ distributor liability under state defamation law.554 According to Zeran, Section 230 guarantees blanket immunity even though ISPs knowingly disseminate or participate in spreading objectionable materials.

This interpretation might overrule the rationale of common law that the distributor is subject to liability only if he/she “knows or has reason to know of the material’s defamatory character,” as mentioned in the “Legal Background” section of chapter 1. 555

In light of the plain language of the statute, Section 230(c)(1) indicated that an ISP should not be considered a publisher, and, therefore, should be granted immunity from publisher liability. However, the statute did not specifically immunize ISPs from distributor liability.556 Thus, the ISP immunity provision can be construed either narrowly as immunizing ISPs from only publisher liability or broadly as immunizing ISPs from both publisher and distributor liability.557 However, the legislative history of the CDA shows that the Zeran court’s interpretation was supported on meager grounds.

Section 223 of the CDA, the criminal counterpart of Section 230, was based on the logic of imposing distributor liability on ISPs. The language of the core subsections of Section 223 clearly states that it worked on the basis of knowledge. For instance, Section 223(a)(2) provides that one who “knowingly permits a telecommunications facility under his

554 129 F.3d 327,332.
555 RESTATEMENT (SECOND) OF TORTS 581(2).
556 See Patel, supra note 44, at 677.
557 Id.
control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined [...] or imprisoned not more than two years, or both.” 558

Furthermore, the Good Faith defense provision of Section 223 demonstrated clearly that Congress distinguished publisher liability from distributor liability when it passed this statute. In subsection (e)(1), Congress immunized publisher liability if ISPs only act as a passive transmitters of content. 559 However, this defense cannot be applicable when ISPs are actively involved in the creation of content or “knowing distribution of communications that violate this section, or who knowingly advertise the availability of such communications.” 560

Significantly, when Senator Exon added the good faith defense provision to his original amendment, the language of this subsection was the same as the premise under the distributor liability of the common law:

This defense shall not be available to an individual who ceded editorial control to an entity which the defendant “knew or had reason to know” intended to engage in conduct that was likely to violate this section. 561

556 Section 223(a) (1)(b) also states that whoever communicates “by means of a telecommunications device knowingly- (i) makes, creates, or solicits [...] suggestion, proposal, image, or other communication which is obscene or indecent knowing that the recipient of the communication is under 18 years of age.” Furthermore, subsection (d) (2) articulate that whoever “knowingly permits any telecommunication facility under such person’s control to be used for an activity prohibited by paragraph (1) [...] shall be fined [...] or imprisoned not more than two years, or both.”

559 See 47 U.S.C.A.§ 223 (e)(1). Entire language of the this subsection is:

(e) In addition to any other defenses available by law: (1) No person shall be held to have violated subsection (a) or (d) solely for providing access or connection to or from a facility, system, or network not under that persons control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.


Thus, this limitation of ISPs’ immunity supports the presumption that Congress intended to distinguish between distributor liability and publisher liability.\textsuperscript{562}

On the other hand, it is possible to argue that Section 230 and Section 223 came from totally different roots, and, therefore, making a simple comparison is inappropriate. However, the two provisions were considered by the conference committee. Furthermore, the conference committee made an effort to keep the policy consistent between the two sections. Section 223(f)(1), which assures that ISPs will not be prosecuted for implementing a defense which is not a violation of law, is a good example to support such view.\textsuperscript{563} The Conference Committee Report stated that this section “supplements without in any way limiting the Good Samaritan liability protection of Section 230.”\textsuperscript{564}

In short, it is hard to understand why Congress would have intended to impose a distributor liability on ISPs only in criminal cases, not in civil cases. In the Committee,

\textsuperscript{562} Senator Exon clearly explained this point in the Senate, “No one has a defense to obscenity when they distribute or make obscenity available. The only exception to this is for the carriers and connectors in their roles as a mere access connectors, only then they would be exempt from the obscenity traffic of others. However, if the online service providers go beyond solely providing access, and attempt to pander or conspire with pornographer, for instance, then they would lose their obscenity exemption and be liable along with everyone else. This is a limited remedy to prevent the bill from causing a “prior restraint” on First Amendment rights.” See 141 CONG. REC. S8838 (daily ed. June 14, 1995). In fact, the \textit{Stratton Oakmont} case was concerning not the distributor liability but publisher liability. Because the \textit{Stratton Oakmont} court ruled the Prodigy should hold a publisher liability because it had software for editing control. Accordingly, Congress solved the problem caused by this case by introducing a good defense provision. Therefore, Congress seemed not to have a specific reason to immunize the distributor liability but publisher liability. The statement of Senator Coats, coauthor of the Exon/Coat bill, demonstrated their clear understanding in \textit{Stratton Oakmont} case and its instruction. “[T]he court held that an online provider who screened for obscenities was exerting editorial content control. This led the court to treat the online provider as a publisher, not simply a distributor, and to therefore hold the provider responsible for defamatory statements made by others on the system. I want to be sure that the intend of the amendment is not to hold a company who tries to prevent obscene or indecent material under this section from being held liable as a publisher for defamatory statements for which they would not otherwise have been liable.” See 141 CONG. REC. S8345 (daily ed. June 14, 1995).

\textsuperscript{563} 47 U.S.C.A. § 223 (f)(1). “No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this section or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.”

Senator Exon and Representative Hyde, who strongly argued the need for strict ISP liability, also pushed through two sections in agreement with other members of the committee. Considering the legislative history, the Zeran court’s interpretation, which did not recognize distributor liability, was unreliable because the court interpreted Congress’s intention within the context of Section 230 without considering the whole perspective of the CDA.

5. INTERNET LIBEL AND INTEREST GROUP POLITICS

The legislative history of the CDA demonstrates the significant influence of interest groups in the making of new laws for regulating the Internet and online communications. From the beginning three stakeholders in the controversy—the religious right, online business, and civil liberties groups—had explicit agendas. To attain completely different goals, main forces in this controversy directed their full efforts from the stage of legislation to battles in the courts. Both religious groups and the coalition between civil liberties and Internet business groups directly communicated with individual members of Congress and drafted several bills that reflected their interests. The Exon amendment, the Grassley-Dole proposal in the Senate, the Hyde “Manager’s Mark” amendment in the House, the Hyde proposal, and the Goodlatte proposal in the conference committee were designed and inspired by religious right groups. On the other side, the Leahy amendment in the Senate, the Cox-Wyden amendment in the House, and the White compromise in the Conference Committee were encouraged and co-authored by the civil liberties and Internet business groups. When each group’s bill faced a crisis, each group took stronger proposals to protect its interests. In this respect, Congress, in many ways, worked as a “spokesperson” for interest groups to advance their agendas.
In the long history of the CDA, no interest group stood up for the victims of online defamation. There might be several reasons. One main reason is that the notion that “defamation is personal” has been embedded in libel laws.\(^{565}\) The aim of the defamation law is to protect an individual’s reputation; however “no person can sue for damage to the reputation of another,” because reputation is personal to each individual.\(^{566}\) No one knows in advance if he or she will ever be a libel plaintiff. Segenthaler certainly did not know this in 1996 that a decade later he’d be the subject of a false, defamatory bibliography on Wikipedia. Accordingly, it would not be feasible to organize online defamation plaintiffs themselves as a political force to influence both the courts and Congress due to the individualistic character of the defamation.

“Interest groups are opportunists”; they make efforts “where they can have the greatest impact.”\(^{567}\) In this respect, protecting individual reputation held an item of little attraction to interest groups; therefore it is difficult to expect interest groups’ help for online victims. The intrinsic conflicts between defamation law and freedom of speech may have added to the difficulty.\(^{568}\)

\(^{565}\) Alexis v. Williams, 77 F. Supp.2d. 35, 40 (D.D.C. 1999); See also, supra note 7. “A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer.”

\(^{566}\) MIDDLETON et al, supra note 43, at 97.


\(^{568}\) The law that allows individuals to sue for damaged reputations creates financial risks for the media and professional communicators. See MIDDLETON et al, supra note 43, at 93-94. Furthermore, libel law may limit the power of the media “by opening their newsgathering and decision-making processes to public scrutiny and accountability.” In general, the rights of individuals to protect their reputations are weighed against the rights of others to be heard on important issues. Libel defendants argue that “the importance of issues of public concern should be debated in a free, open and uninhibited manner.” See Joseph A. Russomanno, Libel: defense Issues and Strategies, in COMMUNICATION AND THE LAW 105,105 (Wat Hopkins ed, 2001).
The active role of interest groups does not end with the passage of legislation; on the contrary, they continue to try to exert strong influence on the courts. According to law scholar Lawrence Baum, it seems highly improper for interest groups to lobby a judge directly.\(^{569}\) But interest groups can attempt to influence a court by participating in the litigation processes in several ways such as initiating litigation, helping to bring it to a court by sponsorship of the case, and submitting amicus curiae briefs that ask a court to rule a certain way or urge the Supreme Court grant or deny a writ of certiorari.\(^{570}\)

The coalition between civil liberties and Internet business groups filed a lawsuit against the CDA and led the Court’s decision in *Reno v. ACLU*, moreover, the coalition has continued after *Reno v. ACLU*. In several defamation and tort cases related to ISP immunity, civil liberties groups have supported ISPs by submitting amicus curiae briefs.\(^{571}\)

Their coalition is still strong and steady. In *Barrett v. Resenthal*, one of most important Internet libel case concerning ISP liability, AOL, Ebay, the Electronic Frontier Foundation, ACLU, and Law professors with expertise in the Internet law (civil liberties group) submitted briefs of amicus curiae for Ilena Rosenthal, defendant and website operator.\(^{572}\) However, no interest group submitted amicus curiae for Barrett, the plaintiff. Importantly, religious right groups, which were counter partners of civil liberties groups, were not involved any more in ISP immunity case because their main concern was to protect children from cyber-porn not Internet victims from libel.

\(^{569}\) See Baum, *supra* note 567, at 80-82.

\(^{570}\) Id.


As mentioned above, generally a defamation suit is brought by an individual. This means that in order to overturn Zeran an individual would have to fight against not only big Internet business companies such as AOL with huge capital but also civil liberties groups with strong social influence, legal knowledge, and experience. As a result, if the courts do not try to strike the balance of the social interests, Section 230 would be an invincible law for ISPs regardless of its adverse effects and lack of legal justification. The next chapter will analyze the courts cases concerning ISP liability from this point of view.
CHAPTER 3

TWO APPROACHES TO ISP IMMUNITY IN INTERNET LIBEL

Since the Zeran decision the courts’ interpretations of Section 230 regarding ISP immunity have been divided into two camps. The Supreme Court has not addressed the question of whether ISPs should be held liable for third party defamation on the Internet. The courts that follow the seminal decision Zeran v. America Online have adopted a relatively expansive definition of an ISP and have considered the immunity provision of Section 230 to be robust.573 Since 2003, however, a few courts have attempted to challenge the Zeran decision, arguing that absolute immunity for ISPs is unreasonable and beyond the intention of the framers of the CDA. Points at issue are (1) the validity of Zeran, which held that Section 230 granted distributor immunity from libel suits, and (2) the possibility that an ISP might be subject to joint liability for defamation with an information content provider.

In this chapter, the thesis will compare the two court groups of court opinions in order to examine how Congress’s legislative purpose has been construed by the courts and what kinds of problems have been caused.

Another important goal of this chapter is to investigate whether the rationale of Section 230 is still valid in light of the rapid changes in the Internet environment. When passing Section 230, Congress had in mind bulletin boards as a main Internet communication model. However, in the ten years since enactment of the CDA, the Internet has dramatically

developed. Several kinds of Internet communication models such as blogs were invented. Now, ISPs are not a simple conduit of Internet communications. In recent years, Internet Service Providers’ news portals such as Yahoo! News, AOL news, and Google news have emerged as major news distribution channels in cyberspace. Any person with access to the Internet may, without charge, register as a Yahoo! user and then engage in various online activities and access to numerous entities made by Internet content providers and other users. Furthermore, several brand-new technologies for enhancing ISPs’ commercial functions, such as rating systems and aggressive distributing tools, have been developed.

How have courts interpreted the CDA in response to these developments of the Internet and to ISPs’ functional diversification?

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574 Scholars have yet to agree on a clear definition of an ISP’s news service. Several names such as “news Web page,” “news pages of ISPs,” “on-line news aggregator,” and “digital media,” have been employed in a functional manner, but they seem to lack rigorous academic analysis or reasoning. In this article, “ISP’s news portal” (hereinafter the “news portal”) is used to indicate news pages that are managed and disseminated by ISPs. News portals are different from other online news media or traditional offline media because they employ no reporters directly and publish no original work; however, they play a multimedia role offering as various text, video, and images from numerous sources.


News portals have captured a major segment of the online news market as a new form of media. For many people, news portals already are likely to be employed as the primary outlet from which they frequently obtain information. See Barb Palser, Is it journalism? Yahoo! News attracts a large audience but does no original reporting. American Journalism Review, June 2002 v24 i5 at 62(1).

3.1. Distributor Liability

3.1.1. THE EVOLUTION OF PRO-ZERAN APPROACHES

The immunity provided by Section 230 of the CDA and endorsed by the Zeran courts has evolved into a “durable defense” for ISPs.\(^{579}\) In short, the Zeran court’s reasoning was summarized in two main points: (1) Congress recognized the threat of tort-based lawsuits and therefore enacted Section 230 to provide “broad immunity” for ISPs; (2) the CDA granted ISPs immunity both as publishers and distributors because distributor liability is nothing more than a subset of publisher liability.\(^{580}\) Most courts firmly abide by the Zeran precedent, reinforcing the rationale of Zeran, and have extended the range of application.\(^{581}\) Recently, the U.S. District Court for the District of Oregon called the Zeran decision “Ninth Circuit law” and followed its rationale.\(^{582}\) Furthermore, in Austin v. Crystaltech Web Hosting in December 2006, the Court of Appeals of Arizona concluded that “the interpretation of a

\(^{579}\) Driscoll, supra note 84, at 111.

\(^{580}\) 129 F.3d 332.


\(^{582}\) See Barnes v. Yahoo!, Inc. 2005 WL 3005602 (D. Or. 2005). The Oregon court stated that, “this case is controlled by Ninth Circuit law holding that \(<section> 230 provides service providers such as defendant with “broad immunity for publishing content provided primarily by third parties.”’’ The court also addressed that “there can be no dispute that in the nine years since Section 230 was enacted that courts across the country have held that Section 230 generally bars claims that seek to hold the provider of an interactive computer service liable for tortuous or unlawful information that someone else disseminates using that service.”
federal statute by federal courts [is] persuasive” and applied the Zeran rule that “notice alone could not transform an original publisher into a distributor.”583

The Logic of Policy Choice The heart of the Zeran decision is the “policy choice” theory. That is, Congress had two important goals: “to keep government regulation of the Internet to a minimum” and “to ensure vigorous enforcement of Federal criminal law” to deter trafficking in objectionable material via the Internet. However, Congress made a “policy choice not to deter harmful online speech through the separate route of imposing tort liability” on ISPs for other parties’ potentially injurious damages.584

One year after Zeran, in Blumenthal v. Drudge, the court made another important decision that elaborated on the Zeran court’s reasoning by rejecting AOL’s liability for posting a defamatory story by an independent contractor (Drudge), even though AOL paid a license fee to Drudge.585 This case has two significant points in terms of distributor liability. First of all, the Blumenthal decision reconfirmed “any attempt to distinguish between publisher liability and notice-based distributor liability” would be unavailing.586 Federal District Judge Paul L. Friedman decisively stated, “Congress made no distinction between publishers and distributors in providing immunity from liability.”587


584 Zeran, 129 F.3d. at 331.

585 992 F.Supp. 44 (D.D.C.1998). The Drudge Report, an electronic publication written by Matt Drudge, said that assistant in Clinton administration Sidney Blumenthal had a history of spouse abuse. This statement later turned out to be false. However, the Drudge Report appeared not only on his Web site but also on AOL service. Because Drudge had a license agreement with AOL that made the Drudge Report available to all AOL members. AOL paid Drudge a royalty of $3,000 monthly under its 1 year contract and reserved the right to remove content that was in violation of its terms of service. Blumenthal filed a lawsuit both Drudge and AOL, and the court held that AOL was just an ISP on which the Drudge Report was carried.

586 Id, at 52.

587 Id.
Second, the *Blumenthal* court developed the “policy choice” rationale. The *Blumenthal* court was the first court that acknowledged unfairness of such broad immunity. The court stated, “If it were writing on a clean slate, this Court would agree with plaintiffs” because AOL had a right to exercise editing control over the *Drudge Report*, promoted it “as a new source of unverified instant gossip on AOL” under the license contract with Drudge. Therefore, the Blumenthal court reached the conclusion that the AOL was not “a passive conduit like the telephone company, a common carrier with no control and therefore no responsibility.” Instead, it would seem “only fair to hold AOL to the liability standards” applied to a publisher or, at least, to a distributor such as a library. However, the *Blumenthal* court, in the end, recognized AOL had no responsibility. “Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others,” Judge Friedman wrote.

The logic of policy choice was elaborated by other federal courts. In *Batzel v. Cremers*, the Ninth Circuit court of appeals understood Congress’s “policy choice” as giving more protection to the “new and burgeoning Internet medium” than traditional media. Furthermore, the court stated “every court, so far, to reach issue of liability of publisher and distributor has decided that Congress intended to immunize both distributors and publishers. The court explained that Congress had two reasons for making this choice. One is that Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet and to develop e-commerce. The other is that Congress hoped to encourage ISPs to self-policing the Internet.

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590 Id.
591 Id.
592 Id.
593 *Batzel v. Smith*, 333 F. 3d 1018 (9th Cir.2003) Furthermore, the court stated “every court, so far, to reach issue of liability of publisher and distributor has decided that Congress intended to immunize both distributors and publishers. The court explained that Congress had two reasons for making this choice. One is that Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet and to develop e-commerce. The other is that Congress hoped to encourage ISPs to self-policing the Internet.
court stated that “Congress has chosen to treat cyberspace differently” from traditional mass media, consequently the CDA “overrides the traditional treatment of publishers, distributors, and speakers under statutory and common law.”

The Batzel court stated that there is an apparent tension between two goals of Section 230, namely “promoting free speech while at the same time giving parents the tools to limit the material their children can access over the Internet” because the latter is a speech-restrictive purpose. However, “laws often have more than one goal in mind, and that it is not uncommon for these purposes to look in opposite directions,” the court wrote. Consequently, the Batzel court held that even though the CDA overall may have had the purpose of restricting content, Section 230 “sought to further First Amendment and e-commerce interests on the Internet while also promoting the protection of minors.”

The logic evolved that “Congress deliberately chose not to deter harmful online speech by means of civil liability” for ISPs because Congress intended to encourage self-regulation, and immunity is the form of that encouragement. One district court went further, stating that “Congress reasoned that any liability would threaten development of the online industry.” Therefore, Congress determined liability “should rest with the actual wrongdoers,” not intermediary servers.

594 Id. at 1026.

595 Id. at 1027-28. However, the Batzel court’s holding that two goals would create tension is questionable because Representatives Cox and Wyden wrote the original version of Section 230 for the purpose of reject the Federal government regulation on the Internet (content) in order to protect freedom of speech on the Internet.

596 Id. at 1028.

597 Id.


However, the Zeran court’s policy choice theory has focused on one specific goal, i.e. promoting Internet business, among the several goals of Section 230, without consideration of the entire perspective of the CDA.\textsuperscript{600} One of the main grounds of the policy-choice theory that the Zeran court explained was that it is impossible for ISPs to screen millions of postings and the specter of potential liability would chill ISPs pushing them to choose to restrict the number and types of messages.\textsuperscript{601} However, if such concern were the real intention of the Congress, it might incur the question directly: why did not Congress did not apply such rule to criminal liability? On the contrary, in Section 230 (b) (5), Congress articulated that it is their intention “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer”\textsuperscript{602}

Another reason, the Zeran court said, was to remove the disincentives to self-regulating by the Stratton Oakmont decision. However, such concern was more appropriate ground for granting ISPs not absolute immunity from civil liability but limited immunity only to apply when ISPs exert Good Samaritan blocking. The Section 230 (c)(2) “Civil liability” provision only mentioned that a good faith action of an ISP might be immune, while broad immunity did not appear.

The Zeran court’s policy choice theory was based on the subjective interpretation of the plain language of Section 230. The Zeran court did not explain why Congress made the policy choice not to impose all kinds of civil liability on ISPs. Therefore, it is reasonably understood that such logic is not a policy choice of Congress but that of courts.

\textsuperscript{600} The scope of immunity under the Section 230 which really congress wanted to grant is unclear. See, chapter II. (3) Finding and Discussion.

\textsuperscript{601} See Zeran, 129 F. 3d at 332.

\textsuperscript{602} 47 U.S.C.A.\S 230 (b)(5). Italic is emphasized by author.
The Legal Background and the Extension of the Zeran Decision  In theory, the Zeran court found the authority for its logic in the Restatement (Second) of Torts.603 Section 577’s definition of “publication” of defamatory material states:

(1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.

(2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.604

Thus, a “publisher is not merely one who intentionally communicates defamatory information. Instead, the law also treats as a publisher or speaker one who fails to take responsible steps to remove defamatory statement from property under her control.” 605 In other words, if the one who had the responsibility to remove a defamatory story has not done his/her duty, he should be held liable as a publisher.606 Thus, the Zeran court reached the conclusion that distributors were considered to be publishers for purpose of defamation law and therefore, notice (or knowledge)-based liability as a distributor was also eliminated.

The Zeran rationale, which was established in the case of an AOL bulletin board, was expanded beyond defamation and the simple Internet access function of ISPs. The Court of Appeals of Washington, in Schneider v. Amazon.com, Inc., ruled that Internet website operators were immune from interference with business expectancy and contractual liability arising from allegedly false statements about the plaintiff and his business made by third

603 See Zeran, 129 F.3d. at 332.
605 Jane Doe v. AOL, 783 So.2d 1010, 1015 (Fla. 2001).
606 Id.
parties and failure to remove the posting in the book review section. The court could discern “no difference between website operators and ISPs in the degree to which immunity will encourage editorial decisions that will reduce the volume of offensive material.” Copy centers that provide access by renting computer services were not liable for allegedly defamatory comments made in chat room by customers using copy center computers. The online auction site eBay was also immune from liability for negligence arising out of plaintiffs’ purchase of allegedly forged autographed sports items under Section 230’s broad immunity.

Under the Zeran court approach, whether ISPs ignore the notice of defamatory posting does not matter. Mark Austin, owner of Bali travel business, brought an action against Crystaltech Web Hosting, a website hosting company, after an article appeared on Crystaltech’s website alleging that Bali officials would file criminal charges against him. Even though Austin requested to have the articles removed, Crystaltech refused. However, following the decision in Zeran, the court held that a web hoster’s receipt of notice of the allegedly defamatory nature of a statement did not trigger liability as a distributor of the statement. According to the court, “notice alone [for defamatory posting] could not transform an original publisher into a distributor” because receiving the notice of potentially defamatory posting means to thrust the distributor into the role of a traditional publisher, who

608 Id.
612 Id.
“must decide whether to publish, edit, or withdraw the material.” According to the Zeran approach, pre-publication selecting and post-publication screening cannot make ISPs subject to defamation suits.

Furthermore, the failure to remove the defamatory posting in spite of ISP’s promise to eliminate it is also immune under the CDA. In Barnes v. Yahoo!, Inc., even though the plaintiff alleged that Yahoo! employees did not fulfill the promise to remove the defamatory profile, Yahoo! was protected by Section 230. The court held that “broken promise” claims were based on defendant’s “exercise of editorial discretion,” which was subject to section 230’s prohibition of publisher liability.

In a similar context, an ISP’s violation of the Membership Agreement including removal of the offending content, based on the breach of contract, also was beyond the civil liability by Section 230, according to the District Court for the Eastern District of Pennsylvania bound by the Zeran precedent. In addition, the court determined that the Membership Agreement did not obligate AOL to take action against the violator, accordingly inaction was not a breach of contract.

AGGRESSIVE DISTRIBUTION Under the Zeran approach, ISPs’ active role in distributing content does not create distributor liability. In Optinrealbig.com, LLC v. Ironport Systems,

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613 Id.

614 Batzel, 333 F. 3d at 1032.


616 See Noah v. AOL Time Warner Inc. 261 F. Supp. 2d 532 (E.D. Va. 2003). Saad Noah was a Muslim AOL subscriber. Noah suffered numerous insults from other users when he visited two Islam-themed AOL-run chat rooms. Noah immediately reported offensive posting, even emailed directly to CEO Steve Chase, and finally sued AOL claiming that AOL’s inactions constituted a breach of contract.

617 Noah, 261 f. Supp. 2d. at 545.
Inc., commercial e-mailer OptinRealBig sue against SpamCop, a spam-mail blocking company, alleging that inflated the actual number of the spam mail reports against Optin by multiple copies of the same reports to ISPs. Defendant OptinRealBig argued that SpamCop deliberately sent spam reports to non-subscribers (ISPs) who did not choose to receive the reports; therefore SpamCop’s active distribution removes its immunity. However, the U.S. District Court for the Northern District of California found that the activities of SpamCop were not subject to liability. In the court’s view, distributing content to non-subscribers might be considered as “aggressive activity” but “it does not destroy the distributor immunity.”

3.1.2. ANTI-ZERAN COURTS’ APPROACH

Since its publication in 1997, the Zeran decision has become a powerful precedent in interpreting Section 230. However, it faced criticism from a few other courts. The courts following an anti-Zeran approach are relatively few, but have recently been found.

The courts’ criticisms of the Zeran rationale have gradually increased, beginning with Jane Doe v. America Online. In this case, Justice Lewis of the Supreme Court of Florida

618 Optinrealbic.com, LLC v. Ironport Systems, Inc. 323 F.Supp. 2d 1037 (N.D. Cal. 2004). SpamCop operated a website where individuals could report the receipt of e-mails that they got a spam. SpamCop reported the spam to the ISPs from which they had been sent. In order to find where this spam originated, SpamCop software broke down the e-mail header into its component parts and run a search through IP addresses to determine the originating network. In some cases, the sender of bulk e-mails might send messages through multiple ISPs. It is difficult to determine the exact originating ISP, so Spam Cop forwards the e-mail report to all of the ISPs through which the e-mail might have been sent. Defendant OptIn alleged that this practice artificially inflates the number of reports against it.

619 Id. at 1046.

620 Id.

621 783 So.2d 1010 (Fla. 2001).
openly criticized the Zeran court’s decision regarding Section 230 for providing “carte blanche immunity for wrongful conduct” beyond Congress’s intention.622

**Challenging Zeran’s Legal Framework**

The most remarkable argument of Justice Lewis is the challenge against Zeran’s legal foundation. Writing for three judges in dissent, Justice Lewis took issue with the Zeran court and the majority’s reliance on the Restatement (Second) of the Torts, in particular application of § 577 of the treatise623 when interpreting the immunity provision of Section 230.

According to the acrimonious criticism of Justice Lewis, the Restatement of the Torts, although it was a venerable treatise, was out of date when it was published in 1977. 624 Consequently, Justice Lewis argued, “While the general common law tort principles contained in the Restatement are still viable, of course, the treatise has yet to incorporate the realities of the World Wide Web.” 625 Basically, the 1977 edition of the Restatement of the Torts encompassed radio and television; moreover, it has yet to address the role of the Internet.626

More significantly, Justice Lewis argued that the fatal flaw of Zeran’s logic was the erroneous conclusion that distributors are merely an internal category of under section 577 (2) of the Restatement of the Torts. As to distributor liability, section 577 (2) said that “[w]ho intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its

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622 Id. at 1019.

623 RESTATEMENT (SECOND) OF TORTS §577 (1977). See also, supra note 598.

624 Jane Doe, 783 So.2d at 1020.

625 Id. at 1021.

626 Id.
continued publication.”627 Therefore, the law treated as a publisher or speaker one who fails to take reasonable steps to remove defamatory statements when interpreting distributor liability.628

However, Justice Lewis argued that distributor liability is not correctly defined in the section 577, but in section 581(1). This section defined distributor liability as “one who only delivers or transmits defamatory matter published by a third person is subject to liability if, only if, he knows or has reason to know of its defamatory character.”629

A clear difference exists between the two provisions. In the case of the former, as employed by the Zeran court, “an ISP can never be subject to liability based upon its own patently irresponsible role as a distributor;”630 because the distributor is a subset of publisher and therefore, this provision can be applied to Section 230 (c)(1).631 However, the latter means distributor liability can take place when ISPs “only deliver or transmit” defamation published by a third party; and more exactly, if an ISP fails to remove known defamatory material on its website, then it may be subject to tort liability.632 According to the dissenting opinion, Section 577 (2) has not been cited as “pervasive authority in many cases.”

627 Id. at 1015.
628 Id

629 RESTATEMENT (SECOND) OF TORTS §581 (1) (1977). This sub section is under the title “Transmission of Defamation Published by Third Person.”

630 Jane, 783 So.2d. at 1024.
631 Zeran, 129 F.3d. at 332.

632 Jane, 783 So.2d. at 1023. According to the dissent’s application to section 581, AOL, in this case, would have potential liability as a distributor because “it is alleged that AOL actually knew of the illicit character of the material which it was transmitting over its Internet Service.”
Furthermore, the function served by ISP is very similar to that of a telephone, ticker, teletype or telegraph company which transmits third party message for a fee.  

In conclusion, Zeran court’s legal frame was based on the wrong and outdated section of the Restatement of Torts.

**Reinterpretation of Broad Immunity Provision**

The Seventh Circuit’s opinion in *Jone Doe v. GTE Corporation* showed its unwillingness to give ISPs a “free ride” when innocent individuals were injured through the Internet.  

The Seventh Circuit questioned, “Why not read Section 230 (1) as a definitional clause rather than as immunity from liability?” According to the appellate court’s point of view, while Section 230 (c)(2) contains plain language granting immunity from liability to Good Samaritan ISPs, Section 230(c)(1) does not contain any express language limiting liability. Therefore, it might be the better interpretation to read Section 230(c)(1) as primarily definitional. In this case, an ISP would enjoy the benefit of immunity from liability only when it affirmatively takes steps in good faith to protect the victims (users) of defamation or

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633 *Id.* at 1021. According to Justice Lewis, Section 577(2) would be covered by section 577(2), while section 588 (1) covered telephone, ticker, telegraph company. Justice Lewis stated that “since the subjective activity involves the transmission of messages trough an electronic medium, which can only be sent or received through a telecommunications interconnection for which the customer pays a fee, the latter appears more appropriate” to apply to an ISP. *Id.*

634 347 F. 3d. 655 (7th Cir. 2003). *See supra* note 612. As addressed earlier, the Seven Circuit affirmed trial court’s decision that rejected claims of athletes, who were secretly taped naked in their locker rooms, bathrooms, and showers, that ISPs should be liable for circulating these illegal video tapes through the website. In spite of their ruling based on the *Zeran* decision, the court gave significant suggestions, i.e., that the plaintiffs should have claimed with regard to interpreting Section 230. The Seventh Circuit patently disagree with *Zeran* and lower court opinions, however it did not overrule the *Zeran* rationale because plaintiffs did not contend that “GTE published the tapes and pictures for purpose of defamation and related theory of liability.” *Id.* at 660.


636 *Doe*, 347 F. 3d, at 660.
other torts. On the other hand, if an ISP fails to do so, “it would become a publisher or speaker and lose the benefit of Section 230 (c)(2).”

The Seventh Circuit pointed out that Section 230(c) bore the title “Protection for Good Samaritan Blocking and Screening of offensive material.” The court stated that its approach to Section 230(c) would “harmonize the text with the caption.”

In addition, the Seventh Circuit also suggested “another possibility” that if section 230 (c)(1) “forecloses any liability that depends on deeming the ISP a publisher,” the immunity may be limited to claims which would succeed only if the ISP acts specifically as a publisher or speaker, not a distributor.

The Seventh Circuit’s approach regarding Section 230 is very similar to and well supported by this thesis’s analysis of the legislative history because of the original form of Section 230, in which subsection (C)(1) and (c)(2) were not separated, may be read in the same way as the Seventh Circuit did.

**Controversy of Self-control**

Even though Justice Lewis and the GTE court did not refuse to follow the Zeran reasoning, they foreshadowed the parade of rejections to follow Zeran rule. Finally, in 2004, two California Courts of Appeal expressly disagreed with the Zeran rationale maintaining that the statute does not explicitly absolve providers or users of third party content from all

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637 Id.
638 Id.
639 Id.
640 See Chapter II (C)(3) Confusion of the Scope of Section 230.
liability. The courts held that immunity should not be upheld if an ISP knowingly ignores the claim of falsity.

In *Barrett v. Rosenthal*, a Court of Appeal of California held that “the statute cannot be deemed to abrogate the common law principle that one who republishes defamatory matter originated by a third person is subject to liability if he or she knows or has reason to know of its defamatory character.” In *Grace v. E-Bay, Inc.* another Court of Appeals of California, followed the *Barrett* decision for the same reasoning. Both courts directly employed Justice Lewis’s logic in *Jane Doe v. America Online*, applying Restatement §581(1) instead of §577 (2) as their legal framework regarding the distinction between publisher liability and distributor liability.

641 Barrett v. Rosenthal, 114 Cal. App. 4th 1379, (Cal. Ct. App. 2004); Grace v. E-Bay, Inc., 120 Cal. App. 4th 984 (Cal. Ct. App. 2004). However, the California Supreme Court granted review of Barrett and Grace, and as a result they have been depublished pursuant to California rule of Court 976 (d)(1).

642 Barrett, 114 Cal. App. 4th at 1392. Stephen J. Barrett and Terry Polevoy were physicians who sought to discredit alternative or nonstandard healthcare practices and products. And respondent Ilena Rosenthal participates in two Usenet “newsgroups” which focus on “alternative medicine.” On or about August 14, 2000, Rosenthal commenced distributing on newsgroups an e-mail message that she received from Timothy Bolen, another defendant in this case. The message accused Polevoy of “stalking women” and urged “health activists … from around the world to file complaints to government officials.…” Bolen’s message contained more defamatory language. Soon after Rosenthal distributed Bolen’s message, Barrett informed her that it was false and asked that it be withdrawn. However, Rosenthal refused to do so and, what is more posted more additional defamatory messages about them referring to Barrett as “quacks.” *Id.*, at 1384-1386. The trial court held that Rosenthal was immune from defamation liability under Section 230 as an ISP user. The trial court found the distributor’s republication was not actionable because the distributor did not originate but merely republished the defamatory story with same reasoning as the Zeran court. However, the California Court of Appeals overturned the lower court decision.

643 Grace, 120 Cal. App. at 997-998. Roger Grace, editor and co-publisher of Los Angeles’ Metropolitan News-Enterprise, purchased vintage magazines on eBay and then criticized their delivery and condition. The seller responded with postings that called Grace “dishonest all the way!!!!” and demanding that he be banned from the Web site. The court said that Section 230 did not immunize eBay against liability for distributing information it knows or had reason to believe was false.

644 See Barrett, 114 Cal. App. 4th at 1394. The Barrett court criticized the Zeran decision that focusing solely on section 577 of the Restatement (Second) of the Torts, the Zeran court “ignored the complementary common law rule described in section 581(1) of the Restatement.” The Grace court also chose section 581(1) when they explain distributor liability without mentioning of section 577. See Grace, 120 Cal. App. at 994.
The opinions of the two courts started with a totally different premise from Zeran. First, the two courts disagreed with the crux of the Zeran rationale concerning self-regulation. In the Zeran-line, courts have a positive view as to the effect of broad immunity, in other words, blanket immunity may lead the ISPs to exercise more self-regulating. They believed that Congress sought to remove disincentives to self-regulation and “encourage service providers to self-regulate the dissemination of offensive material over their server” without fear they would incur liability as a result of their behavior. 645 However, as for the Zeran-line reasoning, failure of self-regulating was not important646 because the primary policy-choice of Congress was to promote the Internet and related businesses.647

However, the Barrett and Grace courts contended that the blanket immunity advocated in Zeran frustrated the purpose of the CDA by discouraging Good Samaritan Blocking.648 According to the two courts, blanket immunity for ISPs would make them not “bother to screen their content at all because they will never be subject to liability.”649 On the other hand, if ISPs could be held liable for their failure to remove or neglecting to screen objectionable materials, then “ISPs would have a greater incentive to screen.” 650

645 Zeran, 129 F.3d. at 331. Reflecting this viewpoint, Zeran-line courts interpreted that Congress enacted Section 230 to forbid the imposition of publisher liability on ISPs for the exercise of its editorial and self-regulatory function. See Ezra, 206 F. 3d at 986.

646 Blumenthal, 992 F. Supp. at 52. The Blumenthal court also stated that “Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing unsuccessful or not even attempted.”

647 See id. at 50.

648 Barrett, 114 Cal. App. 4th at 1403.

649 Id.

650 Id.
In the two courts’ view, this promise is based on common sense in that “an ISP will not waste its time and money monitoring content” because of no disadvantage for not self-policing.  

The *Zeran* court concluded that establishing distributor liability would make ISPs screen each of their millions of postings for possible problems, and thus chill speech. However, maintaining that *Zeran* had overstated the danger of distributor liability, the *Barrett* court, citing another tort-based case, said that “a distributor is obliged to review messages from a particular source in advance of posting only when informed.” Therefore, the court stated that “distributor liability would not require a service provider to review the communications in advance of posting them but only to act reasonably after being placed on notice that the communication is defamatory.” Apparently, courts dissatisfied with the *Zeran* ruling advocated including defamation common law in interpreting Section 230.

651 *Id.* In fact, two courts analysis as to the adverse effect of absolute immunity under the *Zeran* rationale originated from Justice Lewis’s argument. In *Jane Doe v. America Online*, Justice Lewis, in the dissent opinion, criticized the majority view that “carte blanche immunity for wrongful conduct” under *Zeran* was not intended by Congress, and this view “ignores the common law underpinnings of the present controversy; fails to accommodate the traditional distinction between publishers and distributors consistently recognized in American jurisprudence.” See *Doe*, 783 So.2d at 1019, (Fla. 2001). The *GTE* court, the Seven Circuit, shared this view other anti-*Zeran* courts asking that “why should a law designed to eliminate ISPs’ liability to the creators of offensive material end up defeating claims by the victims of tortuous or criminal conduct?” See *Doe*, 347 F. 3d at 660. The *Barrett* court cited scholars’ analysis to contradict *Zeran* court’s opinion about the threat of distributor’s liability. The court said that “the total elimination of distributor liability under *Zeran* would eliminate a potential incentive to the development of those technologies, that incentive being the threat of distributor liability.” See also, Sewali K. Patel, *Immunizing Internet Service Providers from Third Party Internet Defamation Claim: How Far Should Court Go?*, 55 VAND. L. REV.647, 683-685 (2002).

652 *See, Zeran*, 129 F.3d at 333. “If computer service providers were subjected to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement from any party, concerning any message.”


655 *Id.* at 1406. The *Barrett* court also argued that it is unclear that being exposed to distributor liability would be a disaster for online service as *Zeran* court worried about. To win the libel suit, the plaintiff should prove several difficult requirements: defendant’s fault; and if defendant is a public figure; it will be required actual
3.1.3. Discussion: Undesirable Effects of the Zeran Approach

The Zeran line courts approach, which focuses on promoting the development of e-commerce, has brought some significant results. First, blanket immunity for ISPs leaves the victims of tort law without effective or in some case any legal remedy. The decision in *John Doe v. GTE Corporation* was a typical case. Someone secretly placed video cameras in the locker rooms, bathrooms, and showers of several college sports teams including football players at Illinois State University. Tapes showing undressed players were sold on a website hosted by GTE Internetworking. Unfortunately for the athletes, the people who created and distributed the video were bankrupt or unlocatable. The college officials, who had failed to detect the cameras, prevailed on grounds of qualified immunity. The only remaining defendants were relevant ISPs. However, the court dismissed the athletes’ claims against ISPs echoing the decision in Zeran, that ISPs were not liable for the content provided by a website owner using the ISP’s service. As a result, nowhere could the athletes find ways to be compensated for their damages. Although the victims’ nude images were publicized without permission, the court could not provide compensation to them. In *Patentwizard v. Kinko’s*, plaintiffs who were defamed in Kinko’s chat room filed a lawsuit against ISPs in

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656 See, *Grace*, 120 Cal. App. 4th at 996. The court said, referring to *Oakmont, Inc v. Prodigy*, “in light of the well-established common law distinction between liability as a primary publisher and liability as a distributor and Congress’s expressed intention to overrule an opinion that held the operator of a computer bulletin board as a primary publisher rather than a distributor, we cannot conclude that use of the term ‘publisher’ in Section 230(c)(1) discloses a clear legislative intention to abrogate distributor liability.”

657 347 F. 3d. 655 (7th Cir. 2003).

658 *Id.* at 656.

659 *Id.* at 660, 662. Even though the court affirmed lower court ruling that granted blanket immunity to ISPs, the court made a notable suggestion which reinterpretated the meaning of the Section 230 (c). Regarding this point, the thesis will discuss next subsection “Challenge to Zeran.”
lieu of suing Jimmy, a pseudonym of the Kinko’s user who created the defamatory statement.\textsuperscript{660} However, the plaintiffs’ lawsuit ended up as a failed attempt.

Second, the worries about the weakness of the “user control” rationale came to be realized in some cases. When Senator Exon introduced his amendment, he pointed out the need to provide blocking software at libraries and schools to protect children from objectionable information.\textsuperscript{661} Six years after the enactment of the CDA, a mother of a child, who used a computer at a library in Livermore, California, to download pornographic pictures, filed a lawsuit.\textsuperscript{662} Before suing, she requested the City of Livermore to install blocking software on computers that children would use to access the Internet. However, the City of Livermore did not install the software. The Court of Appeal of California determined that Section 230 (c) (1) prohibited holding ISPs liable for their failure to edit, withhold, or restrict access to offensive material, thus the City of Livemore was also entitled to such immunity.\textsuperscript{663}

In fact, the court recognized Congress’s deep concern about protecting children, and therefore, in order to combat this problem Congress conferred Good Samaritan blocking

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{661} 141 CONG. REC. S8339 (daily ed. June 14, 1995). Senator Exon stated that “I have also heard a great deal today about the parents’ responsibility, which means that the parents that have such responsibility must follow their children around all of the time.[…] We have just made a concession in the telecommunications bill before us to give the schools and libraries a break, if you will, because we want them involved in this. The schools will be sources of the [objectionable] information that Senator Coats and I have been describing. The library is a place where they can pick it up. We also talk about some of the software and the off-limits proposition that some of the software may or may not provide.”
\item \textsuperscript{663} \textit{Id.} at 694-96.
\end{itemize}
\end{footnotesize}
immunity. However, in spite of Congress’s concern, the court employed again the “policy choice” theory: Congress made the policy choice to immunize ISPs from tort liability. 664

Here, some ironies were found. When Congress enacted Section 230, the basic argument of the civil liberties groups was to encourage using filtering technology to encourage user control; however, the court rejected providing filtering technology under the same law. As reviewed in Chapter II, user control is the basic concept embedded in Section 230. 665 As the court mentioned, filtering technology enables a user to control the objectionable material, and Section 230 (a)(2) clearly states that ISPs should “offer users a great degree of control over the information that they receive.” 666 However, the court only emphasized one policy purpose: to “promote the development of the Internet.” This policy choice seems to be made not by Congress but by the court without serious consideration of the legislative history and the rationale of parental control.

Third, the pro-Zeran’s approaches raised strong doubt of whether Section 230 attained its objective. The Barrett court and other anti-Zeran advocates advanced the theoretical proposition that blanket immunity would not encourage self-policing as mentioned above. However, this criticism can be practically demonstrated by some cases related to notice-based distributor liability. Some cases verified that when ISPs received

664 Id.
665 See Chapter 2. 2.1.2. Proceedings in the House, subsection “Can Section 230 be a law to apply defamation on the Internet.”
notice from victims of objectionable messages posted by third parties, ISPs took the “do-nothing” option instead of removing them or screening in advance regardless of notice.667

In Doe v. AOL, Doe’s mother found that Richard Lee Russell videotaped and photographed her eleven-year-old son and two other minors engaged in sexual activity and then sold the photos and videos through AOL’s chat rooms. Doe’s mother notified AOL that Russell transmitted obscene and unlawful photographs or images. According to the plaintiff’s allegation, although AOL reserved the right to terminate without notice the service of the wrongdoer, AOL neither warned Russell to stop nor suspended his service.668

In Barnes v. Yahoo! Inc., Barnes alleged that her former boyfriend made her profile including her nude pictures and detailed information about her, such as her workplace, and posted them on Yahoo’s website. According to Barnes, she tried on several occasions to get Yahoo! to remove it by sending email and telephone messages. However, these efforts were in vain. She did not even receive a reply. Approximately three months after the first notice, Barnes was contacted by a Yahoo employee who promised to remove her profile. However, her unauthorized profile was not removed until Barnes sued Yahoo!.669

In another case, Amazon.com agreed that some postings about Schneider and his books violated the guidelines and promised him to take steps to remove these postings. However, the postings were not removed. 670

667 Doe, 347 F. 3d. at 660. The Seven Circuit stated that if ISPs granted blanket immunity regardless of distributor liability, “ISPs may be expected to take the do-nothing option and enjoy immunity” because precautions are costly, “not only indirect outlay but also in lost revenue from the filtered customers.”

668 Doe, 783 So. 2d at 1012.


670 Schneider, 108 Wn. App. at 458.
In *Batzel v. Smith*, when attorney Batzel complained to a web operator about a defamatory posting that falsely described Batzel as an offspring of a famous Nazi politician who had a lot of stolen art as a legacy, her request for a retraction was ignored.671 According to Batzel’s claim, the web operator did not advise people who inquired about the genuineness of such allegation.672 As a result, she lost several prominent clients including Jewish clients and also became the subject of an investigation by the North Carolina Bar.673

Four typical cases clearly demonstrate the simple premise: “The Internet is not self-regulating.”674 As the anti-Zeran courts said, the Zeran rationale of absolute immunity did not prompt ISPs to self-regulate. On the contrary, it encouraged ISPs to hide under the umbrella of broad immunity without any effort to prevent creating Internet victims.

3.2. INTERPRETING “CREATION OR DEVELOPMENT OF CONTENT”

The logic of Information content providers’ liability was employed in order to seek legal remedy for Internet victims due to the Zeran court’s strict restriction of imposing distributor liability on ISPs. Since Zeran, many victims of defamation and other torts in cyberspace have argued that some kinds of ISP activities might give ISPs co-author status as an ICP due to ISPs’ contribution to contents.675

671 Batzel v. Smith, 333 F. 3d 1018 (9th Cir.2003).
672 Id. at 1021-22.
673 Id. at 1022.
674 Blumstein, supra note 110, at 423.
675 The first issue of ICP liability controversy is concerning the editing control. After Zeran, the courts had not acknowledged the distributor liability related to failure to editing control, they used ICP concept. And then plaintiffs argued that several kinds of ISPs activities might be constitute ICPs. See Ben Ezra v. AOL, 206 F.3d 980 (10th Cir. 2000), Batzel v. Smith, 333 F. 3d 1018 (9th Cir.2003).
The *Zeran* and anti-*Zeran* courts present ostensibly diverse approaches to the issues of distributor liability of ISPs and the scope of CDA immunity. As a second round of controversy, this conflict extends to the issue of joint liability between ISPs and ICPs, especially with regard to interpreting what constitutes the development of content. The *Zeran* court required active and substantial change of content to establish joint liability. However, the anti-*Zeran* courts’ interpretation is broader and more flexible. Several categories that are defined by the divided courts apply to the case of news portals. (This will be treated in a later section.)

### 3.2.1. The Origin of the ICP

It is hard to find any references by Congress to the information content provider in the legislative history of the CDA.

The seminal concept of joint liability, especially in its application to the liability of ICPs, was mentioned first in *Blumenthal v. Drudge*. 676 *Blumenthal* applied Section 230 to immunize AOL from liability for Drudge’s defamatory remarks that were disseminated by AOL. In spite of rejecting the plaintiff’s claim, the court maintained that “Section 230 does not preclude joint liability for the joint development of content.” 677 Joint liability, the court said, is like the relationship of “lyricist” and “composer” as joint authors of a song. 678

If an ISP had no role in creating or developing any of the information made by a third party as a conduit of information, then the ISP would be immune under the *Zeran* rule. If an

676 See *Blumenthal*, 992 F. Supp. 44, at 50-51. Also see, Walter Pincus, *The Internet Paradox: Libel, Slander & the First Amendment in Cyberspace*, 2 Green Bag 2d 279 (1999), at 286. However, the Drudge court failed to apply this interpretation to the case because no evidence was presented that AOL had any role of creating or developing information in the Drudge Report.

677 *Id.* That is, Section 230 (c) (1) would not protect AOL if it developed or created content entirely on its own.

678 *Id.*
ISP, on the other hand, created content by itself, then the ISP could be held liable as a publisher. If ISPs contributed to the creation and development of a third party entity, they might be beyond Section 230’s immunity provision because ISPs have joint liability as co-authors. In this case, ISPs’ status changed into simultaneously ISPs and ICPs. Thus, courts should examine a defendant’s status as an ICP by determining its involvement in how third party content is created or developed.679

3.2.2. THE ZERAN REASONING

In the Zeran-line courts’ view, the essential criterion in deciding the status of an ICP was the degree to which an ISP and its users were substantially involved in developing and transmitting the content itself. Furthermore, a crucial consideration was whether the basic form and message of the content were actually and substantially changed. Minor transformation of information is regarded as a traditional editorial function that places a party behind the shield of immunity. The Ninth Circuit, mentioning the rationale of Congress’s policy choice, concluded that courts have adopted and should adopt “a relatively expansive definition of “interactive computer service” and a relatively restrictive definition of “information content provider.””680 In Donato v. Moldow, the Superior Court of New Jersey clearly revealed the Zeran line approach stating that Section 230 “has received a narrow, textual construction, not one that has welcomed creative theories or exhibited judicial creativity” when considering how to decide the scope of the ICP.681

680 Carafano v. Matchmaker.com, Inc. 339 F.3d 1119, 1123 (9th Cir. 2003).
EDITING FOR SELF-REGULATING. Self-regulating and editorial control did not turn ISPs into ICPs. In *Ben Ezra*, the Tenth Circuit considered whether AOL’s actions such as deleting some stock symbols or other information from the database in an effort to correct errors rendered it an ICP. The court held that “by deleting the inaccurate stock quotation information, defendant [AOL] was simply engaging in the editorial functions Congress sought to protect” by enacting the Section 230 Good Samaritan blocking provision. The court added that AOL merely made the data unavailable and did not create or develop the information displayed, even though AOL communicated frequently with the stock quote providers.

SUBSTANTIAL CHANGE STANDARD. Simple editing does not constitute the development of content. Following the same line of reasoning of the *Zeran* court, the Ninth Circuit, in *Batzel v. Smith*, established important standards of what constituted a content provider. The pertinent question was whether Smith was the sole content provider of his e-
mail, or whether Cremers, who published Smith’s e-mail as the operator of the Web site, could also be considered to have “creat[ed]” or “develop[ed]” Smith’s message.  

In this case, Cremers posted email made by Smith on the Network listserv with “some minor wording changes.” The court held that Smith composed the e-mail entirely on his own and then found that Cremers’s minor alternations of Smith’s e-mail did not “rise to the level of development.” Such activity did not alter the basic form and message of the original e-mail. The court defined the “development of information” to mean something more substantial than merely editing a portion of an e-mail and selecting material for publication under Section 230’s Good Samaritan blocking and screening clause.

However, the court’s opinion invited the question of what constitutes a substantial level of content development. Even though several courts have ventured explanations, an adequate definition is still lacking.

The Ninth Circuit, in Carafano v. Metrosplash, also held that defendant Matchmaker.com, Inc. cannot be considered an ICP under Section 230 because “no profile has any content until a user actively creates it,” even though Matchmaker forced its users to

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686 Id. at 1031.
687 Id. at 1022.
688 Id.
689 However, the ruling sparked serious criticism. Because of the ruling, for example, “news letter composers and bloggers have a license to spread false hurtful information with impunity.” In other words, bloggers could post severely defamatory stories under the protection of the court precedent and Section 230 if such stories were made by a third party regardless of whether the author’s consent had been obtained. See, John W. Dean, Defamation Immunity On The Internet: An Evolving Body of Law Has Been Stretched Beyond Its Limits, (2004) available at http://writ.findlaw.com/dean/20030704.html.
answer the multiple choice questionnaire. \footnote{Carafano v. Matchmaker.com, Inc. 339 F.3d 1119, 1125 (9th Cir. 2003). The Nine Circuit overruled the lower court’s opinion. The Carafano decision of trial court, however, is very important because some courts follow its rationale concerning the scope of an ICP. This case will be addressed more minutely another subsection.}

In the court’s view, Matchmaker did not play a significant role in creating, developing, or transforming the content.

**Selection for Publication and Reasonable Standard.** The Batzel court established another critical standard of the term “development” as defined in Section 230. This case questioned whether the web operator’s activity of selecting emails constituted the development of content. \footnote{See Batzel, 206 F.3d at 1032-36.} The majority of the court determined that ISP immunity as a publisher “will extend to the selection of material” supplied by others, namely the selection for publication did not constitute partial creation or development of that information. \footnote{Id. at 1032.}

According to the court, the distinction between “deciding to publish” and “deciding not to publish” some of the material submitted is “not a viable one.” Furthermore, “a distinction between removing an item once it has appeared on the Internet and screening before publication cannot fly either.” \footnote{Id. In Batzel court’s view, Congress’s intention to encourage self-control technology is supporting factor immunizing ISP’s selecting function. The court stated that “the goal of encouraging assistance to parents seeking to control children’s access to offensive material would suggest a preference for a system in which the offensive material is not available even temporarily.”} Therefore, Cremers, the website operator, can not be considered an ICP due to his selection of the material for publication.

However, the question still remained because in this case, Smith, the author of the email, argued that he never expected that his email would be posted on the Web. \footnote{Id. The Batzel court stated that “in most cases their conclusion that be Cremers, web-operator, cannot be considered an ICP would be end matters, however this case presents one twist on the usual § 230 analysis.”} Thus, the question becomes whether Smith can be said to have “provided” his email as Section 230
means. The court stated that “if information is provided to those individuals in a capacity unrelated to their function as a provider or user of interactive computer services, then there is no reason to protect them” because Section 230 supplies immunity only for entities acting as ISPs or their users.  

However, in such situation, some standards are needed to determine whether the email is provided for posting or not. In the *Batzel* court’s opinion, it depends not on the information provider’s intention but instead on the service provider’s or user’s “reasonable perception of those intentions or knowledge.” The *Batzel* court concluded:

> We therefore hold that a service provider or user is immune from liability under § 230 (c)(1) when a third person or entity that created or developed the information in question furnished it to the provider or user under the circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other “interactive computer service.”

The court reasoned a First Amendment grounds stating that “[a]bsent an incentive for ISPs and users to evaluate whether the content they receive is meant to be posted, speech over the Internet will be chilled rather than encouraged.”

**RATING SYSTEM.** In *Gentry v. eBay*, the court faced the issue of whether implementing a customer rating system was a substantial level of content development. The plaintiff argued that eBay was an ICP in that it was responsible for the creation or development of information for online auctions through a highly structured rating system, the

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695 *Id.* The court gave an example that “if website operator got a defamatory “snail mail” letter from an old friend, the website operator can not be said to have been provided the information in his capacity as a website service.”

696 *Id.* at 1034.

697 *Id.*

698 *Id.*
However, the court did not find eBay to be an ICP. The court ruled that eBay’s rating system comprised negative and positive information “provided by third party consumer and dealer” not by eBay. Furthermore, eBay’s star symbol and “Power Sellers” designation is “simply a representation” of the amount of such positive information received by other users of eBay’s Web site.

**LICENSE CONTRACT.** As mention earlier, in *Blumenthal*, the court ruled license contracts did not confer ICP status on an ISP or its users. This reasoning was echoed in *Schneider*. An ISP’s possession of a license for rights to material from a third party does not mean that the ISP automatically becomes an ICP. The Washington Court of Appeals simply summarized its reasoning as follows: “If actual editing does not create liability [by the Good Samaritan provision of Section 230], the mere right to edit [contractual license] can hardly do so.” Because in this case, the defendant Amazon actually altered or edited the

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699 99 Cal. App. 4th 816 (App. Div. 2002). Online auction service eBay categorized each response as “Positive Feedback,” “Negative Feedback,” or “Neutral Feedback.” And eBay provided color-coded star symbols next to the name of a seller who had achieved certain levels of “Positive Feedback” and offered a separate “Power Sellers” endorsement based on sales volume and positive feedback rating. Lars Gentry, who had purchased forged autographed sports items via an eBay auction, argued that eBay encouraged its users to rely upon its “Feedback Forum” prior to engaging in a sales transaction. Therefore, eBay was an ICP in that it was responsible for the development of information, Gentry maintained.

700 *Id.* at 834.

701 *Id.*


703 *Schneider v. Amazon.com, Inc.* 108 Wn.App 454 (Wash. Ct. App. 2001). In *Blumenthal*, for the first time, the matter of a contractual license became an issue in Internet libel. The court, citing a lack of evidence, did not clearly determine whether Drudge is or was an employee or agent of AOL. However, regardless of contractual relationship or license, the court determined that the sole criterion for judging AOL’s liability was the existence of a factual role in writing or editing the material. The *Schneider* case differed slightly from the *Blumenthal* case in that Schneider granted Amazon a license for free. However, the Washington appeals court did not make that distinction.

704 *Id.* at 466.
visitors’ comments, the court rejected the plaintiff’s argument that a license to alter content converted the ISP into an ICP.\(^{705}\)

**Aggressive Distributing.** Sending hyperlinks in order to induce users’ feedback did not constitute the “development” of content. A federal court in California turned down the claim of a commercial e-mailer OptInRealBig claim that SpamCop had contributed the content by its aggressive distributing activity.\(^{706}\) The spam-mailer company argued that Spamcop changed or influenced the content (1) by removing the name and email address of the registered user when reporting the spam, (2) by using hyperlinks leading a recipient back to SpamCop’s website, and (3) by sending out numerous reports, the impact of which were exaggerated.\(^{707}\) However, the court found that SpamCop’s activities could not be considered a contribution to the content because “they do not alter, shape, or even edit the content.”\(^{708}\) Furthermore, the court did not believe the argument that multiple mailings of spam reports would amount to an alteration in the content.\(^{709}\)

### 3.2.3. The Anti-Zeran Reasoning

Essentially, courts that oppose the Zeran opinion maintain that a service provider loses immunity when it contributes to the content even though the contributions might not reach the level of altering the content. The courts have tried to counter the formal approach,

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\(^{705}\) *Id.*. Amazon.com advised potential book reviewers in its terms of service that “you grant Amazon.com and its affiliates… fully sublicensable right to use, reproduce, modify, adapt, publish, translate, create derivative works …. You also grant Amazon.com and the sublicensees the right to use the name that you submit…..” Schneider argued that this provision meant that Amazon.com substantially developed content.


\(^{707}\) *Id.*

\(^{708}\) *Id.* at 1047. SpamCop’s report to ISPs says, “This message is brief for your comfort. Please follow links for details.” When an ISP administrator opens the link, it connects to a page on SpamCop’s website where the spam reports relating to that ISP are listed. It encouraged the ISP to take action against the spammer

\(^{709}\) *Id.*
which considers only the standard definition of the contribution of content—whether an ISP or its users substantially change the nominal meaning of the content. Instead of rigorously following the Zeran standard, dissident courts have focused on both potential and actual effects on the content when they interpret development.

**Active Role Standard.** In Carafano v. Metrosplash.com, Inc., the seminal case on ICP liability, the U.S. District Court for the Central District of California developed an active role standard.\(^{710}\) Even though the Court of Appeals overruled the trial court on the very issue, at least one federal district court cited the reasoning of the trial court in Carafano after this decision was overruled.\(^{711}\) According to the Carafano trial court, ICP status would result when an ISP is actively involved in developing content beyond the role of mere conduit of information. In the Zeran line courts’ view, the most critical factor to determine the ICP status was whether an ISP transformed the core of the content. However, for the Carafano court, the question “how much changed” would not be significant. What is important was whether an ISP “actually played any role” in changing the content.

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\(^{710}\) Carafano v. Matchmaker.com, Inc. 207 F. Supp. 2d 1055 (C.D. Cal. 2002). Christianne Carafano is a popular actress who had appeared in numerous films. Defendant Matchmaker.com is a commercial Internet dating service. In order to submit a profile, members are required to complete a detailed questionnaire containing both 62 multiple-choice and essay questions. Matchmaker reviews all photographs before they are posted on the server. In 1999, an unknown person using a computer in Berlin posted a “trial” personal profile of Carafano under the profile name of “Chase 529.” However, the profile contained false and defamatory information asserting that she was looking for a man with “a strong sexual appetite.” Annoyed by faxes and telephone calls, Carafano filed a libel suit claiming that Matchmaker is an ICP without the protection of Section 230. Even though the trial court heard Carafano’s argument, Carafano failed to prove the defendant’s actual malice. However, the Court of Appeals for the Ninth Circuit rejected the lower court’s opinion on the ICP issue, holding that Matchmaker did not seem to be ICP because it did not play a significant role in developing the relevant information. The appellate court, following the Zeran line of reasoning, focused on who was the primary author of the content and determined that the one who selected the content was not Matchmaker, but the individual user. Therefore “actual profile information consisted of the particular options chosen and the additional essay answers provided. Matchmaker was not responsible.” However, the lower court’s ruling was affirmed on other grounds. See, 339 F.3d 1119, 1122 (9th Cir., 2003).

In order to reach this conclusion, the Carafano court employed the Blumenthal court’s use of joint liability. The Blumenthal court stated that “joint liability would be possible if AOL had any role whatsoever in creating or developing any of the information in the posted material.” Based on that precedent, the court agreed that defendant Matchmaker was an ICP because Matchmaker contributed to the content of the profiles by asking a series of essay questions and multiple-choice questions that shaped the eventual content that subscribers posted. Accordingly, the court found that Matchmaker did not act simply as a conduit but took an active role in developing the information that got posted and, therefore, rejected the defendant’s argument that Matchmaker’s service functioned just like a bulletin board.

Creating Headlines. In MCW, Inc. v. Badbusinessbureau.com, the U.S. District Court for the Northern District of Texas crucially enlarged the scope of “creation or development,” saying that creating headline constitutes development of content. In determining whether ISPs qualify as ICPs, the court stated, the critical issue is whether they are “responsible, in whole or in part, for the creation or development of [any disputed]...

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713 Id. The court said, “Matchmaker’s members cannot post any other additional information even if he or she desires. However, a bulletin board and the other types of online forum designed by defendants merely provide the forums for the speech and do not contribute to the creation or development of information provided by the users of these services.”

714 MCW Inc., 2004 WL 833595. Plaintiff offered clients job-hunting skills and career-counseling services under the marks HALDANE and BERNARD HALDANE. Defendants operated a consumer complaint forum website called “The Rip-Off Report” at the domain names “ripoffreport.com” and “badbusinessbureau.com.” Defendants post consumer complaints on the website, organizing the complaints geographically by company and under various other heading. MCW filed a law suit claiming that defendant began using the Bernard Haldane marks and similar variation in connection with the publishing and posting of false, misleading, and disparaging statement about MCW. In particular, MCW argued that the defendants post web site reports using the protected mark, and create defamatory titles to postings.
Information.”715 In the court’s view, MCW, the consumer complaint forum website, is an ICP because MCW creates, develops, and posts original, defamatory information concerning plaintiff’s trade mark by creating messages in the form of report titles and various headings. According to the court’s opinion, the titles and headings of a report are a part of the Web page content. The court clearly stated that “the CDA does not distinguish between acts of creating or developing the contents of reports, on the one hand, and acts of creating or developing the titles or headings of those reports, on the other.”716 Consequently, if creating a heading, a report title, and messages, the ISP would qualify as an ICP, thus be beyond Section 230’s immunity.717

**Participation in Developing Information** Another important criterion the MCW court provided in determining ICP status is “participating in the process of developing information.”718 The court paid attention to the fact that Badbusinessbureau, the defendant’s website, actively encouraged, instructed, and participated in the consumer complaints posted on the website.719 In the eyes on the court, such behavior, including active solicitation, was clearly more than “making minor alternations” to a consumer’s message but constituted

715 *Id.* at 32.

716 *Id.*

717 *Id.* MCW’s claims were only based on the content. However, the court said that “the CDA does not distinguish between acts of creating or developing the contents of reports, on the one hand and acts of creating or developing the titles or headings of those reports, on the other.”

718 *Id* at 35.

719 *Id.* at 34. MCW argued that defendant encouraged consumers to take photos of owner, owner’s car with license plate, the owner handing out Rip-off Reports, the Bernard Haldane sign. The court found that these allegations suggested that the defendant was responsible for the material created and developed by the consumer.
“participating in the process of developing information.”  The court concluded that a party may be responsible for information created by a third party without “actually creating or developing the information itself.”

**SELECTION PROCESS.** Judge Ronald M. Gould’s dissenting opinion in the Batzel case offered valuable insight into an ICP’s liability. On a petition for rehearing en banc, Gould sharply criticized the majority’s decision, arguing that “pre-publication selection and editing of another entity’s information is ‘development’ of information, which would place the selector or editor outside the statutory immunity declared by Congress.” Gould distinguished between pre-publication, selecting or editing, and post-publication. In his view, “selecting” (or providing availability) is different from “screening” (restricting availability). Unless the offensive materials were already posted, he asked, how else could

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720 Id.

721 Id. at 36. To develop the reasoning of granting ICP’s liability, the court reinterpreted the intention of CDA. “CDA requires court to consider whether a party is responsible for creation or development of content. Therefore, the statute does not require a court to determine only whether a party creates or develops the information. Being responsible for the creation or development of the information is sufficient. This distinction is significant because a party may be responsible for information created by a third party without actually creating or developing the information itself.” The court complained that “the decision of the Ninth Circuit in Carafano case, which overturned the lower court’s opinion regarding ICP liability, ignored this distinction.” *Id.* From the MCW’s court’s perspective, the Ninth Circuit’s decision was based solely on the nominal interpretation of who create or develop the content. As a result, the Ninth Circuit made paradoxical reasoning “broadening the scope of immunity to protect those who do not create or develop the information themselves, but are responsible for the creation or development of information.”

722 Batzel v. Smith, No. 01-56380 at 17011 (9th Cir. 2003). In the dissent, Judge Gould complained that the majority cited other courts cases in which “development did not include the exercise of traditional editorial functions.” However, in Judge Gould’s eyes, this reasoning was inappropriate for those cases involved the actual or potential editing or removing of information that had already been posted. This case, however, concerned the matter of pre-publication. He argued even recent decisions have focused only on post-publication editing and screening. No federal court of appeal has addressed the question of prepublication selection and posting of harshly defamatory material.

723 Id.

724 The majority held that no functional difference existed between selection and screening. See, *Batzel*, 333 F. 3d. at 1032.
one talk about restricting access or availability? \(^{725}\) Furthermore, Gould argued that when a person selects and posts information that had never been posted before, such actions are promoting access, not restricting access, to material. \(^{726}\) After analyzing the intent of Section 230, he emphasized that even though Congress provides immunity for a Web site operator who edits or removes what another person has posted on the Internet, this immunity does not apply to a web site operator who initially places libelous content on the web. \(^{727}\)

### 3.3. Applying Two Approaches to News Portals

Two court groups have evolved clearly different approaches each based on a different strong rationale. This section explores the issue of which court group’s approach is more appropriate to the current Internet media landscape and development of Internet technologies. For this purpose, the author decided to apply the two approaches to news portal Websites because news portals are one of the most influential type of Websites in terms of user numbers and employment of Internet technologies.

Imagine that one morning Yahoo! News posted on its web site a *USA Today* news story that contained false information and was defamatory, and it was introduced not only on Yahoo! News but also on the home page of Yahoo.com as a headline. Imagine, further, that many users saw this information right away via Yahoo!’s news alert service on their mobile devices. The defamatory information could reach as many as 274 million Yahoo users. \(^{728}\)

\(^{725}\) *Id.* at 17013.

\(^{726}\) *Id.*

\(^{727}\) *Id.* at 17015.

\(^{728}\) See, Yahoo! media relations, wherein Yahoo! notes that more than 274 million unique users worldwide used the Yahoo! global network of properties and logged 2.4 billion page views per day as of March 2004. This information available at [http://docs.yahoo.com/info/pr/faq.html](http://docs.yahoo.com/info/pr/faq.html).
many more than the number of unique users of USAToday.com.729 In this instance, USAToday provided its news story to Yahoo! via a contractual license. Imagine, further that the subject of the story asked Yahoo! News to delete the item, but Yahoo ignored the request only because USAToday.com did not send any notice about a retraction.

How different would the result be in the hypothetical case if the two court groups’ principles were applied? Furthermore which group’s potential opinion is more persuasive?

3.3.1. CHARACTERISTICS OF NEWS PORTALS

STRUCTURE News portals began as nothing more than news aggregators or news search engines, but they are an entrenched presence on the Internet. Most news portals have no reporters and create no original stories.730 Primarily, they republish the work of other news outlets. News portals generally enter into licensing agreements with news agencies, established newspapers, and broadcast stations.731 Therefore, a number of news companies provide news stories, photos, and audio and video with news portals as independent

729 See, Nielsen/NetRatings, Round-the-clock news coverage of the war in Iraq draws surfers online, according to Nielsen/NetRatings, March 27, 2003, available at http://www.nielsen-netratings.com/pr/pr_030327.pdf. During the week ending March 23, 2003, the first full week of the U.S. war campaign against Iraq, the unique audience of Yahoo! News was 5,354,000, more than four times that of USA Today.com, which drew only 1,190,000.


731 See, PR Week, Associated Press Team Up With Yahoo! News (Jan. 6, 2003). “The Associated Press (AP) has teamed up with Yahoo! News to offer fee-based archives from the AP on the Yahoo! News site. Users can access the archives by conducting a keyboard search for articles dating back to January 1, 1998. Relevant articles will be displayed, and users then have the option of purchasing them at $1.50 each.”
contractors. Sources for news can number 100, while organized links number in the thousands or higher.

This organizational function provides value to the user, and news portals can shape their Web pages just like any high quality newspaper’s Web site. It is unlikely that people visit Yahoo! News just to get news from The Washington Post, even though Yahoo! News displays Washington Post stories. Most users visit Yahoo! News to access news stories that Yahoo! News selects according to its news value criteria. Users visit Yahoo! News to get information under the Yahoo! News logo, regardless of the original sources.

The most prominent characteristics of news portals are that they function as a multimedia outlet, combining various channels, such as newspapers, broadcasters, and magazines. In organizational and editorial function, a news portal can be similar to a newspaper. Like a print daily, a news portal divides its space into subject categories, such as politics, economics, and sports, and then places various stories in each section’s limited space. Further, the news portal includes third party content such as comics and Op/Ed columns. Of course, a news portal’s selection and organization of news can vary from a pure algorithm, like Google news, to a paperless newspaper, like Daum, in South Korea. Yahoo! News, for example, employs a team of editors that makes the selections. They are responsible for the design and content of the Web page, selecting and placing each news story. Unlike Yahoo!

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733 Palser, supra note 577.


735 Id.
News, AOL is more apt to alter content, rewriting a headline, for example. These sites vary in their news selection, which could be a crucial element of in determining news portals’ legal immunity. In particular, they shape the package of the news story, adding previous or related news stories, images, and videos to help people evaluate the information. These peripheral actions serve to add value for the user. A news portal’s unique aggregating function has been called a new type of journalism.\textsuperscript{736}

**NEWS SELECTION.** A news portal like Yahoo! News exercises several steps in news selection and uses various tools to attract the users’ attention. Yahoo.com features a special news section, “In the News,” on its homepage, in which six or seven news headlines are posted. Yahoo! News chooses to display these news stories from among the numerous items provided by news services.\textsuperscript{737}

People who visit Yahoo.com can click on the headline in which they are interested, making the “In the News” a doorway to news stories. Most importantly, though, the headlines’ prominence may suggest those news stories are the most newsworthy items at that time.

A second area of news selection occurs on the Yahoo! News page, which functions in a manner like that of the front page of a traditional newspaper. Yahoo! News posts top news stories in a dozen categories, including politics, business, and sports. Yahoo! News also selects the leading story and posts it at the top of the page, as a newspaper might place the top story above the fold. Each of the stories features a photo, and in some cases video, that is

\textsuperscript{736} Id.

\textsuperscript{737} Front page headlines were selected from 13 categories of news.
provided by several media and news wires, for example AP, Reuters, and AFP. In this regard, the editing process is similar to that of a newspaper.

The process is repeated for each topical area. Yahoo! News shapes the layout and content of each section by selecting and laying out several news stories and linking additional content. During these processes, Yahoo! News selects news items from among the numerous stories sent by partners and then decides the size and location in the section according to the item’s news value and recency.

3.3.2. TOOLS FOR CONTENT DEVELOPMENT AND DISTRIBUTION

Yahoo! News has several ways to develop the news stories and facilitate their distribution. An important feature of Yahoo! News is the rating system for news stories, which appears at the bottom of the story and photo pages. Every user can participate in the rating. Yahoo calculates each story’s or photo’s average rating, as well as the number of ratings it has received. Users can view the average rating and the number of participants, and what is more, add their ratings to the stories and photos. Yahoo! News presents the feature as a way to “recommend” the news story to others. This means that the rating system is designed to play an active role in attracting users’ attention by offering other people’s evaluations of the news story. In this respect, the average rating and rating frequency become new information about the news story made available to users. Even though ranking is made

738 The order of the news selection process takes place in reverse order. A news story is selected for publication; the top story of each section is selected; the top news story overall is chosen; and headlines are chosen for the “In the News” section.


740 Id., Rating consists of 5-point scales, where 1 is recommend “Not at All” and 5 is recommend “Highly.”

741 Id.
by the user and not by Yahoo! News, the site calculates the rating and displays it as new information.

Every Yahoo! News user can post and read messages about news stories on a message board. At the bottom of every story appears a box containing a link to that story’s message board. After clicking on the link, the user can see a list of messages related to that story. In addition, a user sees the headline and summary of the news story being discussed.

Yahoo! News has a “news alert” system to distribute news stories to users. If one signs up for its news alert service, he or she can receive updated information by e-mail or other means. Yahoo! News uses four types of alert channels to notify subscribers. Yahoo! News notifies the user when a news story matches the user’s interest (by subject and source); offers the latest breaking headlines from the AP; sends an HTML or text e-mail of Yahoo! News category and feature pages; and sends news to a user’s mobile device. One advantage of Yahoo! News for a user may be the use of an RSS (Really Simple Syndication) feed. Users can easily create and disseminate feeds of data such as news links, headlines, and summaries to their own Web site or blog. These devices allow Yahoo! News to play an active and aggressive role in distributing news and information.

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743 Id.


745 Id.
Yahoo! News also has a “Most Popular” section, which displays the news stories that users frequently used, divided into three categories: Most e-mailed, Most viewed, and Ratings. This peripheral content provides added value to the central content.

**Headline Creation.** Yahoo! News generally does not create the headline itself, instead using the headlines provided by the news service. However, AOL often writes a headline for stories from wire services and other third-party sources. For example, on March 26, 2005, Yahoo! News and AOL News posted as a top item the same news story regarding a federal appeals court panel’s refusal to order the reinsertion of Terri Schiavo’s feeding tube. Yahoo! News ran the headline\(^{746}\) provided by The Associated Press: “Schiavo’s Father Says She’s in Last Hours.”\(^{747}\) AOL, however, ran a different headline: “Federal Court Again Rejects Schiavo Parents’ Case.”\(^{748}\)

Different headlines on AOL News and Yahoo! News point to a significant implication regarding the issue of the creation or development of content. The AOL headline changed the news angle from that written by the creator of news story. While the AP headline focused on the position of Schiavo’s father, AOL highlighted the court’s actions. AOL’s headline could be construed as an interpretation of the issue and the insertion of its point of view.


\(^{747}\) Mike Schneider, “Schiavo’s Father Says She’s in Last Hours,” The Associated Press (March 26, 2005), available at http://hosted.ap.org/dynamic/stories/B/BRAND_DAMAGED_WOMAN?SITE=FLSTU&SECTION=HOME.

3.3.3. Applying Internet Defamation Rules to News Portals

PRO-ZERAN COURTS

About 30 years ago, the U.S. Supreme Court said that “a newspaper is more than a passive receptacle or conduit for news, comment, and advertising.”749 From the Court’s perspective, editorial control and judgment are fundamental functions for creating a qualified and credible medium. The “choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials” are crucial functions of media that should be preserved.750

By the same reasoning, news portals should be considered more than ISPs. Yahoo! News, for example, chooses material from numerous sources and evaluates its news value and places it on the Web page. In many regards, news portals function like traditional media.

Under the current state of Internet doctrine, the outcome of the hypothetical USAToday case, described above, would be vastly different, depending on which line of reasoning a particular court adopted.

A court following Zeran’s line of reasoning would not consider the news portal to be a publisher or distributor if it did not provide original content. The involvement of Yahoo! News editors would be ignored. The USAToday news story was posted on the “In the News” section on the home page of Yahoo.com, but the news selection process did not substantially alter the content itself. The USAToday news story was placed as the top story of the politics section for an extended period of time. The size of the news story was not regarded as “development” of the content. A license with USAToday could not help to convert Yahoo!


750 Id.
News into an ICP because a license is just a mere right to edit. What is more, article ratings and numerous comments could not affect the liability of Yahoo! News because all of them were provided by third parties.

Pro-Zeran courts would disagree with recognizing a news portal’s liability as a distributor. Therefore, a distributor’s knowledge-based negligence would not be established. Yahoo! News could continue to disseminate the defamatory news story through its various devices.

However, the Zeran line of reasoning brings several problems that cannot be answered unambiguously when applied to a news portal. The fundamental problem is the vague definition of “contribution to the content.” The Blumenthal case ruled only whether AOL engaged in substantive or editorial involvement and did not establish a clear definition of “creation or development.” Batzel merely found that the plaintiff’s minor alterations to an e-mail did not “rise to the level of ‘development.’” Furthermore, most courts ruled ICP status based on one or two actions, such as selecting an e-mail or making a minor alteration, rating, licensing a right, or deleting a symbol. However, what about several options that the courts have identified as being potential elements of contributing content? A news portal could engage in similar actions. In the hypothetical case, Yahoo! News posted the USAToday’s defamatory news story by selecting it from among those of several news services. What is more, Yahoo! News has a contractual license with the USAToday, and the

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751 Batzel v. Smith, 333 F. 3d 1018 (9th Cir. 2003).
754 Ben Ezra v. AOL, 206 F.3d 980 (10th Cir. 2000).
site offered additional information concerning the story. All these actions rise to the level of development, contrary to what the Batzel court determined.755

SIGNIFICANT ISSUES.

The ambiguity of the Zeran court opinion gives rise to several significant issues. First is the issue of selection. Prior to republishing the USA Today news story on the Yahoo! News, the information had been selected at four stages. More importantly for a defamation suit, it is easy to imagine that the news story caused greater harm, given the wider Yahoo! audience and given the prominent placement. In other words, the editors at Yahoo! News added more news value to this story than those of USA Today when they decided on its size and location. However, the most important issue is that if there is no selection, there is no republication as Judge Gould pointed out in Batzel.756 At the time of selection, various kinds of stories were available to the editors of Yahoo! News. Actions such as adding links to additional reports far exceeded the role of being a mere conduit of information; doing so contributed to the content by developing added value.757

Second, the nature of the introductory news section on the home page of Yahoo.com can give rise to a significant problem. Because the “In the News” section consists only of headlines, there is no attribution to any other source. Users find only the Yahoo! logo.758 It is

755 Batzel, 333 F. 3d, at 1031.

756 See, Batzel v. Smith, No. 01-56380 at 17008 (9th Cir. 2003).

757 Strictly speaking, in Batzel, Cremers, the Web site operator, only decided whether to post the e-mail on the Web. However, the Yahoo! News editors make that decision as many as four times.

758 The situation for AOL is similar to that of Yahoo!. The AOL home page features a headline news section. Furthermore, AOL’s news section on the home page is devided into two kinds of news, “TODAY’S STORIES & FEATURES” (especially selected as a top story of the day) and “AOL NEWS” (other top stories). Neither one of them, identifies the source of the information.
reasonable to expect that the information will be perceived not as a part of republished news but as a new publication in itself.

More importantly, the Restatement (Second) of Torts noted that “the public frequently reads only the headlines of a newspaper or reads the article itself so hastily or imperfectly as not to realize its full significance.” Therefore, a complete newspaper article is ordinarily not the context of the headline, even though it may explain or qualify a defamatory imputation conveyed when the headline alone is read. Furthermore, courts have ruled that a defamatory headline alone is sufficient grounds for a libel suit. A Louisiana appellate court reasoned that a headline by itself may be considered libelous even if the news story below the headline was accurate. The *New Orleans Times–Picayune* lost a libel suit for the headline “Bid Specs Reported Rigged.” The news story was factual. However, the court said that “even though the news story below the headline was correctly reported, the word ‘rigged’ in the headline was defamatory because it denoted ‘fraudulent, illegal and improper.’” This reasoning can be extended to Internet media. Some users, for example, might not click the headlines, merely skimming the attribution-free information before proceeding to another section. A service like Yahoo! News just reprints the headlines provided by the news services, but others, such as AOL, do not.

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759 *Restatement (Second) of Torts* §564.

760 *Id.*


762 *Id.* However, the headline issue remains controversial. Some courts said that the headline and article must be read as a whole. That is, if the meaning of the headline is explained by the news story, the headline and the story, taken together, are not defamatory. *See Fernandes v. Tenbruggencate*, 649 P. 2d. 1144 (Haw. 1982). The case of a news portal is different, however, when the headline is on a separate page from the body of the story. In a newspaper, the story is located directly below the headline.
The creation of headlines raises a significant issue regarding the practice of content development. Two of the major functions of a headline are “helping set the tone of the newspaper” and “depicting the mood of the story.”\textsuperscript{763} A good headline attracts the reader’s attention to the story and helps the reader determine what to read or what to ignore. Furthermore, headlines reveal as much about the tone or character of a newspaper as anything it contains.\textsuperscript{764} Thus, the headline plays an active role in setting the tone of news story.

While this would not matter if the headline is not defamatory, such actions could make AOL subject to liability as an ICP. Even though AOL’s news stories were provided by an original source, AOL made alterations that changed the tone, presumably to add value. Engaging in peripheral modifications, though leaving the central content intact, might lead a court to classify the ISP as an ICP. Actions such as making a headline could be considered a substantial development of the content, and routinely developing content could make an ISP like AOL an ICP, although \textit{Zeran} suggests that such actions would not.

As an ICP, Yahoo! News enjoys greater immunity under \textit{Zeran} than that associated with traditional media outlets. Yahoo! News has greater protection even though, in function or in utility to a user, it is little different from sites operated by traditional outlets such as The Miami Herald.

Lastly, limiting news portals’ liability for defamation raises serious issues. In the hypothetical USAToday case, a court could rule that only USAToday should be liable for

\footnotesize{\textsuperscript{763} BRIAN BROOKS & JACK SISSORS, THE ART of EDITING 156 (7th ed. 2001). Other functions of headline are to attract the reader’s attention; to summarize the story; to help the reader index the contents of the page; and to provide adequate typographic relief.}

\footnotesize{\textsuperscript{764} Id. at 158.}
defamation as an original publisher while exempting Yahoo! News. In measuring the scope of the harm the plaintiff suffered, the court could calculate damages USA Today must pay based on the number of all possible readers, including the much larger readership of Yahoo! News. When deciding compensatory damage awards, juries consider the number of people who may have read or heard the defamation as a primary factor.\textsuperscript{765}

\textbf{Anti-Zeran Courts}

Courts that disagree with the \textit{Zeran} ruling already have found several cases for making a news portal liable for defamation as an ICP. The pre-publication selection of information conveys a tacit approval of the newsworthiness of that information.\textsuperscript{766} The recipient understands that information selected for dissemination by another person has been deemed worthy of dissemination by the sender. Therefore, republished information is not the same qualitatively as the original information that the sender provided.\textsuperscript{767} A news portal’s repeated steps in news selection and some type of editing function, such as deciding size and placement, adds to the news value and is actually developing the content.

The rating system is open to reconsideration, as well. In the \textit{Gentry} case, the court held that the rating role did not constitute a contribution to content, saying that the ratings were made by a third party. The Yahoo! News rating system is more developed than that of the eBay’s “FeedBack” system, which was at issue. The Yahoo! News rating system is designed to evaluate directly the content (of a news story), while eBay’s system is designed

\textsuperscript{765} \textit{See}, Middleton et all, \textit{supra} note 43, at 149. Other factors such as the degree of fault, the seriousness of the defamatory charge, the degree of injury suffered, and the character and reputation of the litigants can be considered in deciding the damage awards.

\textsuperscript{766} \textit{See}, Batzel v. Smith, 333 F. 3d 1018, 1037-1041 (9th Cir. 2003). Gould wrote, “A person’s decision to select particular information for distribution on the Internet changes that information in a subtle but important way: it adds the person’s imprimatur to it.”

\textsuperscript{767} \textit{Id.}
to evaluate not contents (the merchandise for sale) but the seller’s credibility, even though in both instances the evaluators are third parties. Further, eBay functions as a system of exchange, a marketplace, while Yahoo! itself is the service. What is more, Yahoo! News offers the average rating result and the number of participants. It turned raw materials (individual rates) into information (average rate) of the content. A rating system offers important information, other peoples’ opinion, about the news story. Therefore, it may be able to directly influence the reader’s opinion. In this sense Yahoo! News participates in the process of developing information.

Lastly, headlines themselves are regarded as the creation or development of content, as a Texas district court in MCW\textsuperscript{768} ruled that headings and titles are part of content. Therefore, for opponents of the Zeran line of reasoning, AOL’s creation of headlines is likely to be regarded as the development of content.

**Distributor Liability**

In the hypothetical USA Today case, the distributor’s liability is very important. Under Batzel, even if the defamed person asks for a retraction and the deletion of the news story from the database, the distributor does not need to respond to this request because of protection under Section 230. Under Barrett, however, a person cannot enjoy immunity provided under Section 230 in republishing information that one knows is defamatory.

However, the characteristics of news portals and technological innovations in information distribution provide additional reasons for favoring the Barrett ruling in explaining why distributor liability of ISPs should be recognized. A news portal can use

\textsuperscript{768} MCW Inc., 2004 WL 833595.
cutting-edge information distribution technology such as a mobile device. The portal’s influence on the reader is very direct, effectual, and prevailing.

Under the Zeran precedent, Yahoo! News, in the hypothetical USAToday case, would have no liability for continuing to publish further news related to the defamatory news story provided by USAToday, ignoring the defamed person’s request. More seriously, even if that person were to win a lawsuit against the USAToday, Yahoo! News could continue to post the USAToday news story and make it available in its database because Yahoo! News is considered an ISP protected by Section 230. Further, if the USAToday were to publish a retraction and apology, Yahoo! News would not need to republish it; Yahoo! News would have no legal responsibility in the matter, even if it saved the USAToday news story in a news database.

\[769\] However, in traditional defamation law, republication of a statement after the defendant’s notice about the false and defamatory content might be or could be treated as evidence of reckless disregard. See, supra note 23, at § 580 A.
CHAPTER 4

CONCLUSION

The purpose of this thesis was to explore why Congress enacted Section 230 and how the courts have evolved the case law concerning the ISP immunity.

When Congress passed the CDA in 1996, the intent was to protect children from cyberporn. However, the CDA mainly was used by ISPs as a safety net against all kinds of torts, including defamation suits brought by third parties, under the protective umbrella of Section 230. This was mainly because the courts have broadly interpreted the scope of ISP immunity as defined under Section 230 since the Fourth Circuit first ruled in Zaran in 1997. But ISP immunity continues to be controversial as it ignores to a dangerous extent the interest of the victims of Internet defamation and also the common law traditions that would hold traditional media liable in such instances.

The questions this thesis ultimately sought to answer were whether Congress intended Section 230 to grant “absolute” civil immunity to ISPs and whether granting perfect immunity could work as an effective and well-balanced means to govern the rapidly changing Internet. Part I of this chapter will summarize the findings of the research. Based on these findings, Part II will address some suggestions for how the “Good Samaritan law” could actually make a “good law.”

SUMMARY OF FINDINGS

RESEARCH QUESTION 1: LEGISLATIVE HISTORY OF SECTION 230.
1-1. **WHAT IS THE LEGISLATIVE HISTORY OF SECTION 230? HOW AND WHY WAS IT ADDED TO THE CDA?** The original version of Section 230 was designed as an alternative to Senator Exon’s amendment to the CDA. Exon and the conservative members of the Senate believed that criminal penalties were an effective means of regulating cyberporn and that ISPs were not exempt from limited liability. However, the House had a different remedy for cyberporn. House members disagreed with expanding federal regulations and imposing liability on ISPs because of the potential chilling effect on cyberspace. As an alternative, Representatives Cox and Wyden made the IFFEA, the original version of Section 230, which preferred self-regulation to government regulation along with the anticipation that advances in filtering technology would realize this premise. In addition, reflecting the troubling result of *Stratton v. Prodigy*, the IFFEA incorporated the Good Samaritan blocking protection so as not to discourage ISPs from exercising self-regulation.

However, when Congress finally passed the CDA, these two laws based on totally different and conflicting philosophies were integrated into the CDA as the result of political negotiation.

Four aspects of the legislative history of the CDA clearly raise the question whether such broad immunity for ISPs should be considered valid. First, when Congress wrote Section 230 (or Section 223, the Exon amendment), there was no direct reference to defamation or tort law. The only reference was in the Conference Report of Section 230, which said that “one of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy.*” This became the only ground for granting broad immunity. Second, the rationale of “user control” embedded in Section 230 is inappropriate to apply to Internet libel and cyber-torts. Third, the legislative history strongly supported the premise that the immunity defined
by Section 230 reasonably meant only limited immunity for ISPs that engaged in “Good Samaritan Blocking,” instead of absolute immunity. Finally, the history also implied that the CDA, including Section 230, was crafted based on the assumption that knowledge-based distributor liability would be recognized.

1-2. WHAT ROLE, IF ANY, DID SPECIAL INTEREST GROUPS PLAY IN THE ENACTMENT OF SECTION 230?

Interest groups, whether the religious right or the coalition between civil liberties groups and Internet businesses, were actually co-authors of the CDA, including Section 230. In particular, civil liberties groups and Internet businesses successfully cooperated to combat the religious right, even though their ultimate goals were different, i.e. protecting freedom of the speech on the Internet versus creating a favorable environment for businesses. Furthermore, many members of Congress who strongly supported Section 230, including key players who wrote Section 230, had close ties to the businesses. Thus Section 230 inevitably reflected the interests of the ISPs.

On the contrary, there was no interest group representing victims of Internet defamation. Moreover, the characteristic of defamation law as a remedy for damage to individual reputation made it difficult to organize victims as a political force.

1-3 HOW AND WHY DID SECTION 230 REMAIN WHEN THE U.S. SUPREME COURT STRUCK DOWN THE REST OF THE CDA IN 1997?

When the ACLU and Internet business groups filed a suit against the CDA, they did not mention Section 230. They did not need to because Section 230 exactly reflected either their business interests or philosophical views. Though the Court did not explicitly endorse Section 230, it revealed its preference in Internet regulation approaches by supporting
“parental control.” One important fact is that *ACLU v. Reno* foreshadowed the strong movement to protect Section 230 on the part of these interest groups, which attempted to make the statute unassailable. The coalition between Internet businesses and civil liberties groups continued after *ACLU v. Reno* in several defamation or tort cases, while the religious right lost interest in the issue of ISP liability since their only interest was to protect children from pornography. Consequently, as no one except the plaintiffs and their attorney pushed for ISP liability in Internet libel cases, the courts also paid little attention to creating remedies for Internet victims. In sum, the victims were virtually alone, without any social support.

**Research Question 2: Two Different Approaches to Section 230**

**2-1. How have courts interpreted and applied Section 230?**

Even though *Zeran v. AOL* became a dominant precedent in interpreting Section 230, the decision has continuously been challenged by other courts. The courts are now divided into two distinct groups: pro-*Zeran* and anti-*Zeran*. The pro-*Zeran* side supported the rationale that “Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new burgeoning Internet medium.”770 They expressly safeguarded Internet businesses by mentioning tort liability for third party postings as representing “another form of regulation” and saying that Congress “sought to prevent lawsuits from shutting down Internet services on the Internet.” However, anti-*Zeran* courts disagreed with granting perfect immunity because it was beyond the intent of Congress and caused significant adverse effects. They argued for returning to the common law tradition for governing cyberspace; furthermore, courts should and could supply legal remedies for online defamation victims, they said.

770 *Zeran*, 129 F. 3d at 330.
2-1. **How have courts interpreted “distributor liability” since Zeran v. AOL?**

The pro-Zeran group considered distributor liability to be nothing more than a subset of publisher liability; therefore, the CDA granted broad immunity to ISPs both as publishers and distributors. Even though this civil immunity would have troubling effects, such as failure to deter harmful online speech or intentional failure of self-regulating, these results were Congress’s policy choice to protect freedom of speech and the interests of Internet businesses. Ironically, the crux of the pro-Zeran courts’ rationale is the belief that broad immunity would encourage ISPs to self-police the Internet.

This paradox was directly criticized by the anti-Zeran courts. Unlike Zeran, the Barrett and Grace courts stated that perfect immunity did not encourage ISPs to self-regulate, rather encouraging them not to screen their content because it would be no more than a waste of time and money. They said the Zeran court’s logic concerning distributor liability lacked precedent and theoretical background. Distributors are not a subset of publishers; on the contrary, they belong to a set of entities who perform a “secondary role in disseminating defamatory matter” created by third parties.\(^\text{771}\) Like the legislative history analysis in this thesis, the anti-Zeran courts argued that Section 230(1) should be read not as a broad immunity provision but merely a definitional clause. Therefore, ISP immunity should be applied only when ISPs affirmatively act to block objectionable material in good faith. Many cases concerning ISP immunity demonstrated that ISPs did not automatically self-police as the Zeran court had imagined. Rather, ISPs enjoyed the right not to self-control under the protection of the CDA. As a result, absolute immunity took away the last resort of Internet defamation victims to be compensated for their damages.

\(^\text{771}\) *Doe*, 783 So. 2d at 1022.
2-3. Have courts distinguished between ISPs and ICPs? How have courts defined “creating” or “developing” content?

As Zeran blocked the imposition of any kind of civil liability on ISPs for injury from third-party postings, anti-Zeran courts paid attention to the concept of ICPs and joint liability for ISPs co-authors. The two court groups clashed again concerning the scope of ICPs. The pro-Zeran courts considered ISPs to be ICPs only when the basic form of the message was substantially transformed. Minor changes or traditional editing controls did not constitute “development” of information. The selection process was also regarded as a part of the publication process, which is protected under the immunity provision. Rating, editing according to licensing contracts, and aggressive distribution using cutting-edge Internet technology did not change ISPs into ICPs because these acts could not significantly change the content created by a third party.

However, anti-Zeran courts introduced the “active role standard” with a broader and more flexible scope of ICP liability. In other words, the important factor in the eyes of anti-Zeran courts was not the amount of the changed content but the ISPs’ actual involvement in transforming the content. Therefore, requiring users to answer multiple-choice questions shapes the development of information. Furthermore, a title or headline was regarded as a contribution to the content even though it did not substantially change the information. Selecting which information to post would be very significant involvement, and participating in content development, such as by actively soliciting information, could be considered contribution even without transforming the content.

2-4. Which rationale is more appropriate to apply to the new online mass communication environment, such as exemplified by news portals?
As the last analysis, this thesis applied two court rationales to news portals. Influential news portals such as Yahoo! News and AOL News have similar systems of selecting and editing articles as do traditional news outlets. But they have no reporters and no original news stories. Furthermore, portals have various ways of developing stories and facilitating their distribution. Most news portals employ rating systems, message boards, hyperlinks, news alert systems, and news delivery services to users’ e-mail accounts. One important fact is that the “most viewed” list or other methods of rating stories facilitate consumption of the news. Some news portals create their own headlines even though the stories themselves are provided by the news services.

In the eyes of the Zeran court, the news portals would not be considered publishers or distributors because they do not create original content. Furthermore, their news selection process or the supporting tools to produce new information about the news stories such as other people’s interest or page views, would not be regarded development of the content because it would not significantly change the content. Cutting-edge distribution technology also would not make ISPs into ICPs.

On the contrary, according to anti-Zeran courts’ opinions, news portals would be liable for defamatory stories as ICPs because of their news selection process. Furthermore, if ISPs contributed to a certain degree in developing the story’s news value, such as providing headlines or ranking it in the “most viewed” list, they should be liable for those stories.

It seems clear that the pro-Zeran courts would not appropriately reflect the nature of the revolutionarily changed Internet. In contrast, anti-Zeran courts would more flexibly deal with new mass media, Internet-based or otherwise. News portals are only an example.
When Congress enacted Section 230 and the CDA, it never predicted the appearance of the blog, even though blogs are now one of the more popular forms of communication on the Internet. Are blogs also ISPs? What if the owner of a blog or an anonymous user copied defamatory content, such as Seigenthaler’s Wikipedia biography? Can blogs enjoy immunity under Section 230 according to Zeran?

Discussion and Suggestions

The findings provided theoretical and logical support to the idea that Section 230 is not a sound law for covering Internet libel and other cyber-torts. The legislative history of the CDA clearly demonstrated that Section 230 was not designed as a law for addressing Internet cyber-torts. Section 230 ignored the common law traditions regarding torts without any consideration of side effects and legal application. Even so, the statute firmly became rooted as an Internet defamation-and-tort law.

Furthermore, in application to the cases, most courts seemed to distort or exaggerate the real intent of Congress and ignored the complexities surrounding Internet communication. There seemed to be two stages of exaggeration. The Zeran court created the policy choice theory to justify absolute immunity, stating that Congress deliberately made a policy choice not to limit harmful online speech to encourage free speech and protect Internet business interests. In reality, the choice was not made by Congress but by the Zeran court and its followers. As discussed in Chapter 2, the legislative history does not indicate perfect immunity to ISPs and Congress did not decide not to deter harmful speech – such a choice would be in direct opposition to the primary principle of the CDA.
The results of the Zeran-line courts’ decisions are grave. As Judge Gould pointed out, some court opinions made the Internet like the “Old West: a lawless zone.”\textsuperscript{772} It is wrong that courts protect not only the “good faith” activities of ISPs but also “bad faith” activities under the umbrella of Section 230; in other words, the court should not afford “good faith” immunity to “bad faith” ISPs.

It is true that Congress, especially the designers of Section 230, intended to promote the Internet both as a burgeoning communication medium and a business opportunity because it was significantly influenced by the civil liberties and Internet business-related groups. However, such an incentive should be reconsidered because the current Internet environment is very different from the simple online bulletin boards that Congress had in mind when passing Section 230. “The Internet is no longer in its infancy,” one observer remarked, questioning “whether the Internet continues to need such subsidies” of broad protection from defamation liability.\textsuperscript{773} This thesis agrees with such arguments.

This is the time for Congress and the courts to reconsider integrating the intent of Section 230’s “Good Samaritan” provision with innovations in communication technology. The thesis suggests that Congress should rewrite Section 230 or enact other legislation to cover Internet libel and ISP immunity. The theoretical architecture for creating more robust and up-to-date rules for the Internet is already being built by the anti-Zeran courts. New legislation should strike a balance between freedom of online speech and protection of Internet victims’ interests.

\textsuperscript{772} Batzel v. Smith, 333 F. 3d 1018, 1040 (9th Cir. 2003).

Section 230 is a worthwhile provision designed with noble intentions, namely to cultivate the robust nature of Internet communication and to keep government interference therein to a minimum. However, as many cases demonstrated, free speech and the development of the Internet are not promoted by a grant of perfect immunity to ISPs that know or have reason to know that certain information is problematic. It was a costly lesson for the last decade. Immunity for ISPs should be limited; in particular, notice-based distributor liability should be recognized in order to encourage ISPs to engage in Good Samaritan blocking.

What is important is that Congress should thrust itself into the debate concerning issues such as whether it was wrong to provide ISPs immunity from libel and other tort suits, and if ISPs should enjoy some immunity, what degree would be appropriate.

If it will be difficult for Congress to rewrite Section 230, no doubt about that the courts should positively open the door toward the anti-Zeran approach instead of the pro-Zeran approach.

The coalition of civil liberties and Internet business-related groups is still strong and steady while no social force represents Internet victims. This is due to the individuality of libel suits and loss of interest on the part of the religious right. The courts should take care to understand the nature of ISP liability cases and pay special attention to striking the balance between two different social values.
APPENDIX ONE

SENIOR EXON AND GORTON’S PROPOSAL OF CDA (S.314).

104th CONGRESS
1st Session
S. 314

IN THE SENATE OF THE UNITED STATES
February 1 (legislative day, January 30), 1995

Mr. Exon (for himself and Mr. Gorton) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

SECTION 1. SHORT TITLE.
This Act may be cited as the ‘Communications Decency Act of 1995’.

SEC. 2. OBSCENE OR HARASSING USE OF TELECOMMUNICATIONS FACILITIES UNDER THE COMMUNICATIONS ACT OF 1934.
(a) Offenses: Section 223 of the Communications Act of 1934 (47 U.S.C. 223) is amended--
(1) in subsection (a)(1)--
(A) by striking out 'telephone' in the matter above subparagraph (A) and inserting 'telecommunications device';
(B) by striking out 'makes any comment, request, suggestion, or proposal' in subparagraph (A) and inserting 'makes, transmits, or otherwise makes available any comment, request, suggestion, proposal, image, or other communication';
(C) by striking out subparagraph (B) and inserting the following:
(B) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communications ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communication;
and
(D) by striking out subparagraph (D) and inserting the following:
(D) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication; or;
(2) in subsection (a)(2), by striking 'telephone facility' and inserting 'telecommunications facility';
(3) in subsection (b)(1)--
(A) in subparagraph (A)--
(i) by striking 'telephone' and inserting 'telecommunications device'; and
(ii) inserting ‘or initiated the communication’ and ‘placed the call’, and
(B) in subparagraph (B), by striking ‘telephone facility’ and inserting ‘telecommunications facility’; and
(4) in subsection (b)(2)---
(A) in subparagraph (A)---
(i) by striking ‘by means of telephone, makes’ and inserting ‘by means of telephone or telecommunications device, makes, knowingly transmits, or knowingly makes available’; and
(ii) by inserting ‘or initiated the communication’ after ‘placed the call’; and
(B) in subparagraph (B), by striking ‘telephone facility’ and inserting in lieu thereof ‘telecommunications facility’.

(b) Penalties: Section 223 of such Act (47 U.S.C. 223) is amended---
(1) by striking out ‘$50,000’ each place it appears and inserting ‘$100,000’; and
(2) by striking ‘six months’ each place it appears and inserting ‘2 years’.

(c) Prohibition on Provision of Access: Subsection (c)(1) of such section (47 U.S.C. 223(c)) is amended by striking ‘telephone’ and inserting ‘telecommunications device’.

(d) Conforming Amendment: The section heading for such section is amended to read as follows: obscene or harassing utilization of telecommunications devices and facilities in the district of columbia or in interstate or foreign communications’.

SEC. 3. OBSCENE PROGRAMMING ON CABLE TELEVISION.
Section 639 of the Communications Act of 1934 (47 U.S.C. 559) is amended by striking ‘$10,000’ and inserting ‘$100,000’.

SEC. 4. BROADCASTING OBSCENE LANGUAGE ON RADIO.
Section 1464 of title 18, United States Code, is amended by striking out ‘$10,000’ and inserting ‘$100,000’.

SEC. 5. INTERCEPTION AND DISCLOSURE OF ELECTRONIC COMMUNICATIONS.
Section 2511 of title 18, United States Code, is amended---
(1) in paragraph (1)---
(A) by striking ‘wire, oral, or electronic communication’ each place it appears and inserting ‘wire, oral, electronic, or digital communication’, and
(B) in the matter designated as ‘(b)’, by striking ‘oral communication’ in the matter above clause (i) and inserting ‘communication’; and
(2) in paragraph (2)(a), by striking ‘wire or electronic communication service’ each place it appears (other than in the second sentence) and inserting ‘wire, electronic, or digital communication service’.

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SEC. 6. ADDITIONAL PROHIBITION ON BILLING FOR TOLL-FREE TELEPHONE CALLS.

Section 228(c)(6) of the Communications Act of 1934 (47 U.S.C. 228(c)(6)) is amended--
(1) by striking `or' at the end of subparagraph (C);
(2) by striking the period at the end of subparagraph (D) and inserting a semicolon and `or'; and
(3) by adding at the end thereof the following:
`(E) the calling party being assessed, by virtue of being asked to connect or otherwise transfer to a pay-per-call service, a charge for the call.'.

SEC. 7. SCRAMBLING OF CABLE CHANNELS FOR NONSUBSCRIBERS.

Part IV of title VI of the Communications Act of 1934 (47 U.S.C. 551 et seq.) is amended by adding at the end the following:

SEC. 640. SCRAMBLING OF CABLE CHANNELS FOR NONSUBSCRIBERS.

`(a) Requirement: In providing video programming unsuitable for children to any subscriber through a cable system, a cable operator shall fully scramble or otherwise fully block the video and audio portion of each channel carrying such programming so that one not a subscriber does not receive it.
(b) Definition: As used in this section, the term `scramble' means to rearrange the content of the signal of the programming so that the programming cannot be received by persons unauthorized to receive the programming.'.

SEC. 8. CABLE OPERATOR REFUSAL TO CARRY CERTAIN PROGRAMS.

(a) Public, Educational, and Governmental Channels: Section 611(e) of the Communications Act of 1934 (47 U.S.C. 531(e)) is amended by inserting before the period the following: `, except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity'.
(b) Cable Channels for Commercial Use: Section 612(c)(2) of the Communications Act of 1934 (47 U.S.C. 532(c)(2)) is amended by striking `an operator' and inserting `a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity.'

TEXT OF 47 U.S.C. 223 AS AMENDED BY S. 314

**NOTE:  [] = deleted
ALL CAPS = additions

47 USC 223 (1992)

Sec. 223. [Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications]
OBSCENE OR HARASSING UTILIZATION OF TELECOMMUNICATIONS DEVICES AND FACILITIES IN THE DISTRICT OF COLUMBIA OR IN INTERSTATE OR FOREIGN COMMUNICATIONS"

(a) Whoever--

(1) in the District of Columbia or in interstate or foreign communication by means of [telephone] TELECOMMUNICATIONS DEVICE--

(A) [makes any comment, request, suggestion or proposal] MAKES, TRANSMITS, OR OTHERWISE MAKES AVAILABLE ANY COMMENT, REQUEST, SUGGESTION, PROPOSAL, IMAGE, OR OTHER COMMUNICATION which is obscene, lewd, lascivious, filthy, or indecent;

[(B) makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number;]

"(B) MAKES A TELEPHONE CALL OR UTILIZES A TELECOMMUNICATIONS DEVICE, WHETHER OR NOT CONVERSATION OR COMMUNICATIONENSUES, WITHOUT DISCLOSING HIS IDENTITY AND WITH INTENT TO ANNOY, ABUSE, THREATEN, OR HARASS ANY PERSON AT THE CALLED NUMBER OR WHO RECEIVES THE COMMUNICATION;

(C) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

[(D) makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number; or]

(D) MAKES REPEATED TELEPHONE CALLS OR REPEATEDLY INITIATES COMMUNICATION WITH A TELECOMMUNICATIONS DEVICE, DURING WHICH CONVERSATION OR COMMUNICATIONENSUES, SOLELY TO HARASS ANY PERSON AT THE CALLED NUMBER OR WHO RECEIVES THE COMMUNICATION,

(2) knowingly permits any [telephone facility] TELECOMMUNICATIONS FACILITY under his control to be used for any purpose prohibited by this section, shall be fined not more than $[50,000]100,000 or imprisoned not more than [six months] TWO YEARS, or both.

(b)(1) Whoever knowingly--
(A) within the United States, by means of [telephone] TELECOMMUNICATIONS DEVICE, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call or INITIATED THE COMMUNICATION; or

(B) permits any [telephone facility] TELECOMMUNICATIONS FACILITY under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined in accordance with title 18, United States Code, or imprisoned not more than two years, or both.

(2) Whoever knowingly--

(A) within the United States, [by means of telephone], makes BY MEANS OF TELEPHONE OR TELECOMMUNICATIONS DEVICE, MAKES, TRANSMITS, OR MAKES AVAILABLE (directly or by recording device) any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call OR INITIATED THE COMMUNICATION; or

(B) permits any [telephone facility] TELECOMMUNICATIONS FACILITY under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $[50,000] 100,000 or imprisoned not more than [six months] TWO YEARS, or both.

(3) It is a defense to prosecution under paragraph (2) of this subsection that the defendant restrict access to the prohibited communication to persons 18 years of age or older in accordance with subsection (c) of this section and with such procedures as the Commission may prescribe by regulation.

(4) In addition to the penalties under paragraph (1), whoever, within the United States, intentionally violates paragraph (1) or (2) shall be subject to a fine of not more than $[50,000] 100,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(5)(A) In addition to the penalties under paragraphs (1), (2), and (5), whoever, within the United States, violates paragraph (1) or (2) shall be subject to a civil fine of not more than $[50,000] 100,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either--

(i) by a court, pursuant to civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.
(6) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1) or (2). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

(c)(1) A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication specified in subsection (b) from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

(2) Except as provided in paragraph (3), no cause of action may be brought in any court or administrative agency against any common carrier, or any of its affiliates, including their officers, directors, employees, agents, or authorized representatives on account of--

(A) any action which the carrier demonstrates was taken in good faith to restrict access pursuant to paragraph (1) of this subsection; or

(B) any access permitted-- (i) in good faith reliance upon the lack of any representation by a provider of communications that communications provided by that provider are communications specified in subsection (b), or (ii) because a specific representation by the provider did not allow the carrier, acting in good faith, a sufficient period to restrict access to communications described in subsection (b).

(3) Notwithstanding paragraph (2) of this subsection, a provider of communications services to which subscribers are denied access pursuant to paragraph (1) of this subsection may bring an action for a declaratory judgment or similar action in a court. Any such action shall be limited to the question of whether the communications which the provider seeks to provide fall within the category of communications to which the carrier will provide access only to subscribers who have previously requested such access.

APPENDIX TWO

EXON’S SECOND AMENDMENT

Substantial changes from previous version include:

-- the term 'knowingly' has been added to section (a)(1)(A)
-- additional defenses have been added in subsection (d)

**NOTE: [] = deleted
ALL CAPS = additions

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
COMMON CARRIERS

47 USCS | 223 (1992)

| 223. [Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications]

OBSCENE OR HARASSING UTILIZATION OF TELECOMMUNICATIONS DEVICES AND FACILITIES IN THE DISTRICT OF COLUMBIA OR IN INTERSTATE OR FOREIGN COMMUNICATIONS"

(a) Whoever--

(1) in the District of Columbia or in interstate or foreign communication by means of [telephone] TELECOMMUNICATIONS DEVICE--

[ (A) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent;]

(A) KNOWINGLY --

(i) MAKES, creates, or solicits, and
(ii) INITIATES THE TRANSMISSION OF,

ANY COMMENT, REQUEST, SUGGESTION, PROPOSAL, IMAGE, OR OTHER COMMUNICATION
WHICH IS OBSCENE, LEWD, LASCIVIOUS, FILTHY, OR INDECENT;

(B) makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number;

(C) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

(D) makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number; or

(2) knowingly permits any [telephone] TELECOMMUNICATIONS facility under his control to be used for any purpose prohibited by this section, shall be fined not more than $[50,000]100,000 or imprisoned not more than [six months] TWO YEARS, or both.

(b)(1) Whoever knowingly--

[(A) within the United States, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call;]

(A) WITHIN THE UNITED STATES, BY MEANS OF TELECOMMUNICATIONS DEVICE --

(i) MAKES, CREATES, OR SOLICITS, AND
(ii) PURPOSEFULLY MAKES AVAILABLE,

ANY OBSCENE COMMUNICATION FOR COMMERCIAL PURPOSES TO ANY PERSON, REGARDLESS OF WHETHER THE MAKER OF SUCH COMMUNICATION PLACED THE CALL OR INITIATED THE COMMUNICATION; OR

(B) permits any [telephone facility] TELECOMMUNICATIONS FACILITY under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined in accordance with title 18, United States Code, or imprisoned not more than two years, or both.

(2) Whoever knowingly--

[ (A) within the United States, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes which is available to any
person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or ]

(A) WITH THE UNITED STATES, BY MEANS OF TELEPHONE OR TELECOMMUNICATIONS DEVICE,

(i) MAKES, CREATES, OR SOLICITS, AND
(ii) PURPOSEFULLY MAKES AVAILABLE (DIRECTLY OR BY RECORDING DEVICE)

ANY INDECENT COMMUNICATIONS FOR COMMERCIAL PURPOSES WHICH IS AVAILABLE TO ANY PERSON UNDER 18 YEARS OF AGE OR TO ANY OTHER PERSON WITHOUT THAT PERSON'S CONSENT, REGARDLESS OF WHETHER THE MAKER OF SUCH COMMUNICATION PLACED THE CALL; OR

(B) permits any [telephone facility] TELECOMMUNICATIONS FACILITY under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $[50,000] 100,000 or imprisoned not more than [six months] TWO YEARS, or both.

(3) It is a defense to prosecution under paragraph (2) of this subsection that the defendant restrict access to the prohibited communication to persons 18 years of age or older in accordance with subsection (c) of this section and with such procedures as the Commission may prescribe by regulation.

(4) In addition to the penalties under paragraph (1), whoever, within the United States, intentionally violates paragraph (1) or (2) shall be subject to a fine of not more than $[50,000] 100,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(5)(A) In addition to the penalties under paragraphs (1), (2), and (5), whoever, within the United States, violates paragraph (1) or (2) shall be subject to a civil fine of not more than $[50,000] 100,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either--

(i) by a court, pursuant to civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(6) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1) or (2). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.
(c)(1) A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication specified in subsection (b) from the [telephone] TELECOMMUNICATIONS DEVICE of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

(2) Except as provided in paragraph (3), no cause of action may be brought in any court or administrative agency against any common carrier, or any of its affiliates, including their officers, directors, employees, agents, or authorized representatives on account of—

(A) any action which the carrier demonstrates was taken in good faith to restrict access pursuant to paragraph (1) of this subsection; or

(B) any access permitted—
   (i) in good faith reliance upon the lack of any representation by a provider of communications that communications provided by that provider are communications specified in subsection (b), or   (ii) because a specific representation by the provider did not allow the carrier, acting in good faith, a sufficient period to restrict access to communications described in subsection (b).

(3) Notwithstanding paragraph (2) of this subsection, a provider of communications services to which subscribers are denied access pursuant to paragraph (1) of this subsection may bring an action for a declaratory judgment or similar action in a court. Any such action shall be limited to the question of whether the communications which the provider seeks to provide fall within the category of communications to which the carrier will provide access only to subscribers who have previously requested such access.

(d) ADDITIONAL DEFENSES; RESTRICTIONS ON ACCESS; JUDICIAL REMEDIES RESPECTING RESTRICTIONS. --

(1) NO PERSON SHALL BE HELD TO HAVE VIOLATED THIS SECTION WITH RESPECT TO ANY ACTION BY THAT PERSON OR A SYSTEM UNDER HIS CONTROL THAT IS LIMITED SOLELY TO THE PROVISION OF ACCESS, INCLUDING TRANSMISSION, DOWNLOADING, INTERMEDIATE STORAGE, NAVIGATIONAL TOOLS, AND RELATED CAPABILITIES NOT INVOLVING THE CREATION OR ALTERATION OF THE CONTENT OF THE COMMUNICATIONS, FOR OTHER PERSON'S COMMUNICATIONS TO OR FROM A SERVICE, FACILITY, SYSTEM, OR NETWORK NOT UNDER THAT PERSON'S CONTROL.

(2) IT IS A DEFENSE TO PROSECUTION UNDER SUBSECTIONS (a)(2), (b)(1)(B), AND (b)(2)(B) THAT A DEFENDANT LACKED EDITORIAL CONTROL OVER THE COMMUNICATIONS SPECIFIED IN THIS SECTION.
(3) IT IS A DEFENSE TO PROSECUTION UNDER SUBSECTIONS (a)(2), (b)(1)(B), AND (b)(2)(B) THAT A DEFENDANT HAS TAKEN GOOD FAITH, REASONABLE STEPS, AS APPROPRIATE --

(A) TO PROVIDE USERS WITH THE MEANS TO RESTRICT ACCESS TO COMMUNICATIONS DESCRIBED IN THIS SECTION;

(B) PROVIDE USERS WITH WARNINGS CONCERNING THE POTENTIAL FOR ACCESS TO SUCH COMMUNICATIONS;

(C) TO RESPOND TO COMPLAINTS FROM THOSE WHO ARE SUBJECTED TO SUCH COMMUNICATIONS;

(D) TO PROVIDE MECHANISMS TO ENFORCE A PROVIDER'S TERMS OF SERVICE GOVERNING SUCH COMMUNICATIONS; OR

(E) TO IMPLEMENT SUCH OTHER MEASURES AS THE COMMISSION MAY PRESCRIBE TO CARRY OUT THE PURPOSES OF THIS PARAGRAPH. NOTHING IN THIS SECTION IN AND OF ITSELF SHOULD BE CONSTRUED TO TREAT ENHANCED INFORMATION SERVICES AS COMMON CARRIAGE.

(4) IN ADDITION TO OTHER DEFENSES AUTHORIZED UNDER THIS SECTION, IT SHALL BE A DEFENSE TO PROSECUTION UNDER SECTION (b) THAT A DEFENDANT IS NOT ENGAGED IN A COMMERCIAL ACTIVITY THAT HAS AS A PREDOMINATE PURPOSE AN ACTIVITY SPECIFIED IN THAT SUBSECTION.

(5) NO CAUSE OF ACTION MAY BE BROUGHT IN ANY COURT OR ANY ADMINISTRATIVE AGENCY AGAINST ANY PERSON ON ACCOUNT OF ANY ACTION WHICH THE PERSON HAS TAKEN IN GOOD FAITH TO IMPLEMENT A DEFENSE AUTHORIZED UNDER THIS SECTION OR OTHERWISE TO RESTRICT OR PREVENT THE TRANSMISSION OF, OR ACCESS TO, A COMMUNICATION SPECIFIED IN THIS SECTION. THE PRECEDING SENTENCE SHALL NOT APPLY WHERE THE GOOD FAITH DEFENSES UNDER SUBSECTION (c)(2) APPLY.

(6) NO STATE OR LOCAL GOVERNMENT MAY IMPOSE ANY LIABILITY IN CONNECTION WITH A VIOLATION DESCRIBED IN SUBSECTION (a)(2), (b)(1)(B), (b)(2)(B) THAT IS INCONSISTENT WITH THE TREATMENT OF THOSE VIOLATIONS UNDER THIS SECTION PROVIDED, HOWEVER, THAT NOTHING HEREIN SHALL PRECLUDE ANY STATE OR LOCAL GOVERNMENT FROM ENACTING AND ENFORCING COMPLEMENTARY OVERSIGHT, LIABILITY, AND REGULATORY SYSTEMS, PROCEDURES, AND REQUIREMENTS SO LONG AS SUCH SYSTEMS, PROCEDURES, AND REQUIREMENTS GOVERN ONLY INTRASTATE SERVICES AND DO NOT RESULT IN THE IMPOSITION OF INCONSISTENT OBLIGATIONS ON THE PROVISION OF INTERSTATE SERVICES.
(e) FOR PURPOSES OF SUBSECTION (a) AND (b), THE TERM 'KNOWINGLY' MEANS AN INTENTIONAL ACT WITH ACTUAL KNOWLEDGE OF THE SPECIFIC CONTENT OF THE COMMUNICATION SPECIFIED IN THIS SECTION TO ANOTHER PERSON.
APPENDIX 3.
THE ORIGINAL VERSION OF COX-WYDEN BILL (H.R.1978)

H.R. 1978

IN THE HOUSE OF REPRESENTATIVES

Mr. Cox (for himself and Mr. Wyden) introduced the following bill; which was referred to the Committee on ____

A BILL

To encourage and protect private sector initiatives that improve user control over computer information services.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled

SECTION 1. SHORT TITLE

This Act may be cited as the "Internet Freedom and Family Empowerment Act".

SEC. 2. ONLINE FAMILY EMPOWERMENT

Title II of the Communications Act of 1934 (47 U.S.C. et seq.) is amended by adding at the end the following new section:

"SEC. 230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL: FCC CONTENT AND ECONOMIC REGULATION OF COMPUTER SERVICES PROHIBITED.

"(a) FINDINGS. -- The Congress finds the following:

"(1) The rapidly developing array of Internet and other interactive computer service available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

"(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops."
"(3) The Internet and other interactive computer services offer a forum for a true
diversity of political discourse, unique opportunities for cultural development, and
myriad avenues for intellectual activity.

"(4) The Internet and other interactive computer services have flourished, to the
benefit of all Americans, with a minimum of government regulation.

"(5) Increasingly Americans are relying on interactive media for a variety of political,
educational, cultural and entertainment services.

"(b) POLICY.-- It is the policy of the United States to--

"(1) promote the continued development of the Internet and other interactive
computer services and other interactive media;

"(2) preserve the vibrant and competitive free market that presently exists for the
Internet and other interactive computer services, unfettered by State or Federal
regulation;

"(3) encourage the development of technologies which maximize user control over
the information received by individuals, families, and schools who use the Internet
and other interactive computer services;

"(4) remove disincentives for the development and utilization of blocking and
filtering technologies that empower parents to restrict their children's access to
objectionable or inappropriate online material; and

"(5) ensure vigorous enforcement of criminal laws to deter and punish trafficking in
obscenity, stalking, and harassment by means of computer.

"(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF
OFFENSIVE MATERIAL.-- No provider or user of interactive computer services shall be
treated as the publisher or speaker of any information provided by an information content
provider. No provider or user or interactive computer services shall be held liable on account
of--

"(1) any action voluntarily taken in good faith to restrict access to material that the
provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent,
harassing, or otherwise objectionable, whether or not such material is constitutionally
protected; or

"(2) any action to make available to information content providers or others the
technical means to restrict access to material described in paragraph (1).

"(d) FCC REGULATION OF THE INTERNET AND OTHER INTERACTIVE
COMPUTER SERVICES PROHIBITED.-- Nothing in this Act shall be construed to grant
any jurisdiction or authority to the Commission with respect to content or other regulation of the Internet or other interactive computer services.

"(e) EFFECT ON OTHER LAWS.--

"(1) NO EFFECT ON CRIMINAL LAW.-- Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

"(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW.-- Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

"(3) IN GENERAL.-- Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.

"(f) DEFINITIONS.-- As used in this section:

"(1) INTERNET.-- The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

"(2) INTERACTIVE COMPUTER SERVICE.-- The term 'interactive computer service' means any information service that provides computer access to multiple users via modem to a remote computer server, including specifically a service that provides access to the Internet.

"(3) INFORMATION CONTENT PROVIDER.-- The term 'information content provider means any person or entity that is responsible, in whole or in part, for the creation or development of information provided by the Internet or any other computer service, including any person or entity that creates or develops blocking or screening software or other techniques to permit user control over offensive material.

"(4) INFORMATION SERVICE.-- The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."
APPENDIX FOUR

THE COMMUNICATIONS DECENCY ACT OF 1996
(Section 223 & Section 230)

TITLE V OBSCENITY AND VIOLENCE
Subtitle A Obscene, Harassing, and Wrongful Utilization of Telecommunications Facilities

SEC. 501. SHORT TITLE.

This title may be cited as the "Communications Decency Act of 1996".

SEC. 502. OBSCENE OR HARASSING USE OF TELECOMMUNICATIONS FACILITIES UNDER THE COMMUNICATIONS ACT OF 1934.

Section 223 (47 U.S.C. 223) is amended

(1) by striking subsection (a) and inserting in lieu thereof:

"(a) Whoever

"(1) in interstate or foreign communications

"(A) by means of a telecommunications device knowingly

"(i) makes, creates, or solicits, and

"(ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person;

"(B) by means of a telecommunications device knowingly

"(i) makes, creates, or solicits, and

"(ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

"(C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;

"(D) makes or causes the telephone of another repeatedly or continuously to ring, with intent
to harass any person at the called number; or

"(E) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication; or

"(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both."; and

(2) by adding at the end the following new subsections:

"(d) Whoever

"(1) in interstate or foreign communications knowingly

"(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

"(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

"(2) knowingly permits any telecommunications facility under such persons control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

"(e) In addition to any other defenses available by law:

"(1) No person shall be held to have violated subsection (a) or (d) solely for providing access or connection to or from a facility, system, or network not under that persons control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.

"(2) The defenses provided by paragraph (1) of this subsection shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate this section, or who knowingly advertises the availability of such communications.

"(3) The defenses provided in paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the
violation of this section that is owned or controlled by such person.

"(4) No employer shall be held liable under this section for the actions of an employee or agent unless the employees or agents conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.

"(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d), or under subsection (a)(2) with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person

"(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

"(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

"(6) The Commission may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d). Nothing in this section authorizes the Commission to enforce, or is intended to provide the Commission with the authority to approve, sanction, or permit, the use of such measures. The Commission shall have no enforcement authority over the failure to utilize such measures. The Commission shall not endorse specific products relating to such measures. The use of such measures shall be admitted as evidence of good faith efforts for purposes of paragraph (5) in any action arising under subsection (d). Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.

"(f)(1) No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this section or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

"(2) No State or local government may impose any liability for commercial activities or actions by commercial entities, nonprofit libraries, or institutions of higher education in connection with an activity or action described in subsection (a)(2) or (d) that is inconsistent with the treatment of those activities or actions under this section: Provided, however, That nothing herein shall preclude any State or local government from enacting and enforcing complementary oversight, liability, and regulatory systems, procedures, and requirements, so long as such systems, procedures, and requirements govern only intrastate services and do not result in the imposition of inconsistent rights, duties or obligations on the provision of interstate services. Nothing in this subsection shall preclude any State or local government from governing conduct not covered by this section.
"(g) Nothing in subsection (a), (d), (e), or (f) or in the defenses to prosecution under (a) or (d) shall be construed to affect or limit the application or enforcement of any other Federal law.

"(h) For purposes of this section

"(1) The use of the term telecommunications device in this section

"(A) shall not impose new obligations on broadcasting station licensees and cable operators covered by obscenity and indecency provisions elsewhere in this Act; and

"(B) does not include an interactive computer service.

"(2) The term interactive computer service has the meaning provided in section 230(e)(2).

"(3) The term access software means software (including client or server software) or enabling tools that do not create or provide the content of the communication but that allow a user to do any one or more of the following:

"(A) filter, screen, allow, or disallow content;

"(B) pick, choose, analyze, or digest content; or

"(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

"(4) The term institution of higher education has the meaning provided in section 1201 of the Higher Education Act of 1965 (20 U.S.C. 1141).


SEC. 509. ONLINE FAMILY EMPOWERMENT.

Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

"SEC. 230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL

"(a) FINDINGS.—The Congress finds the following:

"(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
"(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

"(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

"(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans. with a minimum of government regulation.

"(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

"(b) POLICY.- It is the policy of the United States-

"(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

"(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

"(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

"(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

"(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

"(c) PROTECTION FOR 'GOOD SAMARITAN BLOCKING AND SCREENING OF OFFENSIVE MATERIAL'.

"(1) TREATMENT OF PUBLISHER OR SPEAKER.-No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

"(2) CIVIL LIABILITY.-No provider or user of an interactive computer service shall be held liable on account of

"(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
"(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

"(d) EFFECT ON OTHER LAWS.

"(1) NO EFFECT ON CRIMINAL LAW.-Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating to exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

"(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW.-Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

"(3) STATE LAW.-Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is in consistent with this section.

"(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW.-Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

"(f) DEFINITIONS.-As used in this section:

"(1) INTERNET.-The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

"(2) INTERACTIVE COMPUTER SERVICE.-The term 'interactive computer service' means an information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

"(3) INFORMATION CONTENT PROVIDER.-The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

"(4) ACCESS SOFTWARE PROVIDER.-The term 'access software provider' means a provider of software (including client or server software), or enabling tools that do any one or more of the following

"(A) filter, screen, allow, or disallow content;

"(B) pick, choose, analyze, or digest content; or
"(C) transmit, receive, display, forward cache, search, subset, organize, reorganize, or translate content.".
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