

INCORPORATING AN ACTUAL MALICE EXCEPTION TO SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

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INTRODUCTION

The Communications Decency Act of 1996 (“CDA”) was introduced by Senator J. James Exon (D-NE) primarily to shield minors from pornography on the internet.¹ During the legislative process, Representatives Christopher Cox (R-CA) and Ron Wyden (D-OR) attempted to resolve another concern they had about the emerging internet: how defamation law applied to it.² Worried about a recent case that held a web-related defendant liable for defamation because it made efforts to filter content and block obscenity from its network, the Congressmen introduced the Online Family Empowerment Act (“Cox-Wyden Amendment”).³ The Amendment, which eventually became section 230, was designed to encourage web-related organizations to self-regulate by shielding “Good Samaritan” web-related organizations from liability.⁴

In relevant part, section 230 provides, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of

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1. Benjamin Volpe, Comment, *From Innovation to Abuse: Does the Internet Still Need Section 230 Immunity?*, 68 CATH. U. L. REV. 597, 602 n.34 (2019) (citing 142 CONG. REC. S714, S718 (daily ed. Feb. 1, 1996) (statement of Sen. Exon)).

2. Patricia Spiccia, Note, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VAL. U. L. REV. 369, 381 (2013).

3. *Id.* at n.50 (citing 141 CONG. REC. H8468-69 (daily ed. Aug. 4, 1995)).

4. *Id.* at 383.

any information provided by another information content provider.”⁵ Thus, for example, Facebook is not liable for the defamatory comments of one of its users posting on the website. Case law has interpreted the section broadly, creating almost complete civil immunity for interactive computer services (“ICS”) for the statements of their users. Despite the good intentions behind the provision, if it encourages self-regulation by some ICSs, there is a lot of evidence it fails to encourage it, and may even discourage it, in others. Examples abound of defamatory statements made on websites that remain online even after knowledge on the part of the ICS that the statement is not true. Moreover, new problems such as the facilitation of sex trafficking and malicious catfishing⁶ have developed, with the knowledge and sometimes the collusion of ICSs. Section 230 prevents holding ICSs accountable for their wrongful behavior.

The section’s problems are not hidden.⁷ For at least fifteen years, commentators have been writing about how properly to amend section 230.⁸ Although Congress, with one limited exception, has not amended the provision, there is a reason to believe that could change. Significant figures in both major political parties have made recent statements against section 230. In November 2019, Andrew Yang and Rep. Tulsi Gabbard called for changes in the provision.⁹ Yang unveiled a plan to “amend the Communications Decency Act to reflect the reality of the 21st century—that large tech companies are using tools to act as publishers without any of the responsibility.”¹⁰ In January 2020, former Vice President Joe Biden expressed his desire to revoke section 230 altogether.¹¹ Biden’s comments mark the first time a 2020 presidential candidate has called for the repeal of

5. 47 U.S.C. § 230(c)(1) (2012).

6. A “catfish” is “a person who sets up a false personal profile on a social networking site for fraudulent or deceptive purposes.” *Catfish*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2018).

7. See Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 373 (2005) (“Websites can facilitate defamation, pornography, and wholesale invasions of privacy without the risk of tort liability.”).

8. See, e.g., *id.*; DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2014); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401 (2017); Mary Anne Franks, *Moral Hazard on Stilts: ‘Zeran’s’ Legacy*, LAW.COM: THE RECORDER (Nov. 10, 2017), <https://www.law.com/therecorder/sites/therecorder/2017/11/10/moral-hazard-on-stilts-zerans-legacy/>.

9. Cristiano Lima, *Yang, Gabbard Take Aim at Tech’s Legal Shield*, POLITICO (Nov. 14, 2019, 12:45 PM), <https://www.politico.com/news/2019/11/14/yang-gabbard-take-aim-at-techs-legal-shield-070925>.

10. *Id.*

11. Cristiano Lima, *Biden: Tech’s Liability Shield ‘Should be Revoked’ Immediately*, POLITICO (Jan. 17, 2020, 10:56 AM), <https://www.politico.com/news/2020/01/17/joe-biden-tech-liability-shield-revoked-facebook-100443>.

section 230.¹² On the Republican side, in February 2020, Attorney General William Barr said it might be time for the government to seek sweeping changes in section 230.¹³ The political attention provides an opportunity for reform.

This essay proposes such a reform. To that end, Section I will provide a brief background of the origin and purpose of section 230. Section II will chronicle problems that have resulted from the broad application of section 230, including defamation, sex trafficking and prostitution, and other egregious conduct. Section III will present our proposed amendment to section 230: the application of the actual malice standard to the conduct of ICSs. Finally, we will briefly conclude.

I. THE ORIGIN AND PURPOSE OF SECTION 230

In enacting section 230, the primary concern about liability for ICSs was defamation. Defamation is a false statement concerning another that harms the other person's reputation; it requires an unprivileged publication to a third party, made with the requisite degree of fault.¹⁴ "Publication" can either be oral, which many courts distinguish as slander, or written, which many courts refer to as libel.¹⁵ In jurisdictions recognizing the distinction, libelous statements do not require proof of special damages, *i.e.*, out-of-pocket losses, because written statements are permanent and capable of doing more damage.¹⁶

The Supreme Court of the United States has constitutionalized the fault requirement in defamation cases. The fault standard varies depending primarily on the status of the plaintiff, but also on whether the statement concerns the public interest.¹⁷ Two significant standards have emerged. Under *New York Times v. Sullivan*¹⁸ and its progeny, one who publishes a defamatory statement concerning a public official or a public figure with regard to her conduct, fitness, or role in that capacity is subject to liability only if the defendant: (a) knows that the statement is false, or (b) acts with

12. *Id.*

13. Tony Romm, *Attorney General Barr Blasts Big Tech, Raising Prospect that Firms Could be Held Liable for Dangerous, Viral Content Online*, WASH. POST (Feb. 19, 2020, 5:40 PM), <https://www.washingtonpost.com/technology/2020/02/19/attorney-general-barr-blasts-big-tech-questioning-its-protection-liability-content/>.

14. RESTATEMENT (SECOND) OF TORTS §558 (AM. LAW INST. 1977).

15. RODNEY A. SMOLLA, *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL* 65 (1988).

16. KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 300 (4th ed. 2012).

17. *See id.* at 303-305 (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

18. 376 U.S. 254 (1964).

reckless disregard for the truth.¹⁹ This standard often is referred to as “actual malice.”²⁰ Under *Gertz v. Robert Welch, Inc.*²¹ and its progeny, one who publishes a defamatory statement concerning a private person, or concerning a public official or public figure with regard to a purely private matter, is subject to liability for a standard as low as negligence.²²

The specific problem for ICSs was republication. Someone who republishes the defamatory statements of another may be held liable as if they were the original defamer.²³ Courts defend such liability on the ground that those who spread a defamatory statement are contributing to the harm caused by the initial speaker.²⁴ Although an ICS, such as Facebook, may not be the speaker of the words on its website, under the common law, the ICS had clear exposure to liability as a re-publisher.

Regarding republication, the common law recognized a distinction between publishers and distributors. A publisher exercises editorial control over the third-party information and is subject to liability for the content of the speech.²⁵ Publishers explicitly include radio and television broadcasters, and are subject to the same standard of liability as the original publisher.²⁶ Thus, under the common law, if found to be a publisher, an ICS would be liable for republishing a defamatory statement about public officials or figures if it acted with knowledge or reckless disregard for the truth; it would be liable to a private plaintiff for mere negligence. Distributors, who only deliver or transmit defamatory matter, are subject to liability only if the distributor knew or had reason to know of the defamatory nature of the material.²⁷ Distributors, such as libraries and bookstores,²⁸ are subject to limited liability due to concerns it would be onerous to have to read every

19. RESTATEMENT (SECOND) OF TORTS § 580A (AM. LAW INST. 1977). Public officials hold public office. See *Sullivan*, 376 U.S. at 267. Public figures are “individuals who were not elected or appointed officials, but whose prominence in politics, entertainment, sports, or other pursuits made them a subject of public interest.” ABRAHAM, *supra* note 16, at 305. Courts also recognize “limited purpose public figures.” See *Gertz*, 418 U.S. at 351. Such a person would normally be considered a private plaintiff, but “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” *Id.*

20. See ABRAHAM, *supra* note 16, at 304.

21. 418 U.S. 323 (1974).

22. RESTATEMENT (SECOND) OF TORTS § 580B (AM. LAW INST. 1977).

23. Amanda Groover Hyland, *The Taming of the Internet: A New Approach to Third-Party Internet Defamation*, 31 HASTINGS COMM. & ENT. L.J. 79, 94 (2008) (citing I ROBERT D. SACK, SACK ON DEFAMATION § 7.1 (5th ed. 2017)).

24. *Id.* at 94-95.

25. Spiccia, *supra* note 2, at 378.

26. RESTATEMENT (SECOND) OF TORTS § 581 (AM. LAW INST. 1977). Newspapers are also publishers. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

27. *Id.*; see also Spiccia, *supra* note 2, at 378.

28. RESTATEMENT (SECOND) OF TORTS § 581 cmt. e (AM. LAW INST. 1977).

publication prior to distributing it.²⁹ Under the common law, if found to be a distributor, an ICS would be liable for republishing a defamatory statement if it knew or had reason to know the statement was false.

Two early cases applying the republication doctrines to the internet laid the groundwork for section 230. The first major case on the issue was *Cubby Inc. v. CompuServe Inc.*,³⁰ a New York district court case in which CompuServe hosted an internet forum providing users with an electronic newsletter.³¹ The court held that because CompuServe did not review the content of the posts in the online bulletin board, it did not exercise editorial control and was a distributor.³² As a distributor, CompuServe neither knew nor had reason to know of the defamatory content on the bulletin board and was not liable.³³ By contrast, four years later, in *Stratton Oakmont v. Prodigy Servs. Co.*,³⁴ a New York state court found the host of an internet bulletin board was a publisher. The court distinguished *Cubby* by finding Prodigy “carved out a niche in the Internet mass market by advertising that it offered a safe Internet that was suitable for family use.”³⁵ Moreover, Prodigy actually filtered out objectionable material and monitored the content on its bulletin boards.³⁶ Because it exercised editorial control, Prodigy was a publisher and liable under the common law rules of republication.³⁷

Stratton Oakmont, arguably providing a disincentive to ICSs to regulate their own content, is the case that spurred Representatives Cox and Wyden to introduce the amendment that became section 230.³⁸ Section 230, in relevant part, 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.”³⁹ Thus, it protects “interactive computer service[s]” that host user-generated content, and

29. Spiccia, *supra* note 2, at 378-79.

30. 776 F. Supp. 135 (S.D.N.Y. 1991).

31. See Rustad & Koenig, *supra* note 7, at 366 (citing *CompuServe*, 776 F. Supp. at 137).

32. *Id.* (citing *CompuServe*, 776 F. Supp. at 137).

33. *Id.* (citing *CompuServe*, 776 F. Supp. at 141).

34. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) *superseded by statute*, Communications Decency Act of 1996, Pub. L. 104-104, § 509, 110 Stat. 56, 138-39 (codified at 47 U.S.C. § 230 (2012)).

35. Rustad & Koenig, *supra* note 7, at 367 (citing *Stratton Oakmont*, 1995 WL 323710 at *2-4).

36. *Id.*

37. Hyland, *supra* note 23, at 98 (citing *Stratton Oakmont*, 1995 WL 323710 at *4); Rustad & Koenig, however, note the case was settled while an appeal was pending. Rustad & Koenig, *supra* note 7, at 367-68.

38. Spiccia, *supra* note 2, at 381 n.50 (citing 141 CONG. REC. H8468-69 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden)).

39. 47 U.S.C. § 230(c)(1) (2012).

retains liability for “information content provider[s]” that “creat[e] or develop[]” content.⁴⁰ An “interactive computer service” is “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”⁴¹ More specifically, section 230 protects these ICSs from liability as a “publisher.”⁴²

Courts have interpreted section 230’s protections broadly. One year after its passage, the Fourth Circuit Court of Appeals interpreted the section for the first time. In *Zeran v. America Online, Inc.*,⁴³ the plaintiff was the victim of a prank in which a bulletin board user posted the plaintiff’s name and phone number in connection with t-shirts celebrating the Oklahoma City bombing.⁴⁴ Plaintiff notified defendant America Online (“AOL”), which removed the post, but new postings continued to appear.⁴⁵ Plaintiff, who eventually began receiving threatening phone calls and needed police protection, sued AOL for negligence, arguing section 230 only protected AOL from publisher, not distributor, liability.⁴⁶ Because AOL knew of the defamatory content in the postings, it would arguably be liable as a distributor. The Fourth Circuit held section 230 precluded both publisher and distributor liability, reasoning that distributor liability was merely a subset of publisher liability, and thus included in the statutory language.⁴⁷ The court further stated:

Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.⁴⁸

Despite occasional holdings to the contrary, *Zeran* has been very influential;⁴⁹ most courts protect “interactive computer services” from

40. § 230(c); § 230(f).

41. § 230(f)(2).

42. § 230(c)(1).

43. 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

44. Rustad & Koenig, *supra* note 7, at 376 (citing *Zeran*, 129 F.3d at 329).

45. Hyland, *supra* note 23, at 99 (citing *Zeran*, 129 F.3d at 329).

46. *Id.* (citing *Zeran*, 129 F.3d at 329, 331).

47. Rustad & Koenig, *supra* note 7, at 377 (citing *Zeran*, 129 F.3d at 332).

48. Hyland, *supra* note 23, at 100 (citing *Zeran*, 129 F.3d at 333).

49. See Hyland, *supra* note 23, at 100-08.

liability, regardless of whether they would have been publishers or distributors at common law.

Moreover, courts have interpreted “interactive computer service” broadly. In 2008, one commentator noted that every web-related defendant before every court had been considered an “interactive computer service.”⁵⁰ She concluded, “The universal application of section 230 to these defendants creates a landscape where virtually any web-related defendant would qualify for section 230 protection, regardless of the degree of editorial control they possessed.”⁵¹ When every web-related defendant is held to be an “interactive computer service” and most courts then protect those defendants from liability either as a publisher or distributor, a near-total civil immunity results. As noted, this immunity has created problems, to which we turn next.

II. THE UNINTENDED CONSEQUENCES OF SECTION 230

Not surprisingly, section 230 allows many defamatory statements to remain on the internet, even with the knowledge of the host ICS, without consequences. The defamatory statements are about people in their personal and professional capacities, including both the private and public sectors. For example, the owner of www.TheDirty.com solicited photographs, video, and commentary about people to be posted online.⁵² In short, it is a “user-generated tabloid primarily targeting nonpublic figures.”⁵³ Anonymous users began sending information about Sarah Jones, a Cincinnati Bengals cheerleader and high school teacher.⁵⁴ A user submitted a photograph of Jones with a Bengals player and stated, “She has also slept with every other Bengal Football player.”⁵⁵ A later post stated that Jones had chlamydia and gonorrhea, and that her ex-boyfriend talked about having sex with her in many different locations, including her classroom.⁵⁶ The post named the high school at which she taught.⁵⁷ The owner not only posted these comments and photographs, but added commentary of his own.⁵⁸ Jones “sent . . . over twenty-seven emails, pleading for [the owner] to remove these posts from the website, to no avail.”⁵⁹ The court found the published content to be

50. *Id.* at 107.

51. *Id.*

52. *Jones v. Dirty World Entm't Recordings, LLC*, 755 F.3d 398, 402-03 (6th Cir. 2014).

53. *Id.* at 401.

54. *Id.* at 403.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Jones*, 755 F.3d at 403-04.

59. *Id.* at 404.

defamatory but granted judgment as a matter of law based on section 230 immunity.⁶⁰

In *La'Tiejira v. Facebook, Inc.*, a woman pursuing modeling work sued a person who commented on her Facebook page and Facebook itself.⁶¹ A person claiming to be “Kyle Anders” came onto plaintiff’s Facebook page and questioned whether she was a woman:

[A] man that’s what you are for real you’re no woman for sure and all the world knows that you are a man born male you men make me sick with all this crazy homo transtranny shit grow up accept what God made you that is what you are a man accept it and move the hell on yeah yeah yeah so what Dressing in drag wearing makeup drag queens homos damn men cant make your mind up get you act straight you are male stop acing like a female be who God made you to be that’s a man that what gets me the owner of this facebook let any ole freak on her you got men wearing makeup wigs cut of penis high cheek bone ex football players wearing women clothing like high fashion models you say you’re a model worldwide model come on you, re the football player I talked to in California you had some surgery done but I know that’s you and you’re not fooling me paree thats you I never forget a face stop lying on facebook change your sex to male ever one in this worlds knows that you’re male man I do not care who you claim to be you’re (NFL)

Who would hire you as a model needs to look up your dress I’m sure your balls are still there the owner of this facebook is so big he needs to better check out these things.

Whatever.⁶²

According to findings of fact in a separate state defamation case, a doctor examined plaintiff and concluded she had been born a female and had never had transgender surgery; at one time, she had been pregnant.⁶³ The same day “Kyle Anders” posted to her Facebook page, plaintiff employed Facebook’s procedures for deleting the post, which consisted of notifying Facebook why the post should be deleted; it remained up for six months.⁶⁴ Section 230 provided Facebook immunity.⁶⁵

In another case, a man established a website, “Eye on Emerson,” in which he posted news and commentary about the local government activities of a borough in New Jersey.⁶⁶ The website included a forum in which users

60. *Id.* at 402.

61. 272 F. Supp. 3d 981, 983-84, 988-89 (S.D. Tex. 2017).

62. *Id.* at 988-89.

63. *Id.* at 988.

64. *Id.* at 989.

65. *Id.* at 995.

66. *Donato v. Moldow*, 865 A.2d 711, 713 (N.J. Super. Ct. App. Div. 2005).

could post anonymous comments.⁶⁷ Users posted comments that falsely stated one of the borough council members “climbed a ladder to the author’s bedroom” and videotaped the author while dressing, that the same council member was “emotionally and mentally unstable and in need of psychiatric help,” and that another member of borough council and an acquaintance “do drugs.”⁶⁸ The owner of the website selectively edited and commented on the posts and the subjects of the defamatory statements confronted him with the most offensive posts.⁶⁹ The owner refused to accommodate the defamed parties, so they sued.⁷⁰ Section 230 immunity protected the owner from liability.⁷¹

The immunity’s difficulties, however, are not limited to defamation. Another significant social problem fostered by section 230 immunity is sex trafficking. In *Doe v. Backpage.com*, three minors sued Backpage, a provider of online advertising, for its role in their sexual trafficking.⁷² Beginning at the age of 15, each of the minors was advertised on Backpage with postings that included their photographs.⁷³ The first minor was advertised during two periods in 2012 and 2013 and was raped over 1,000 times.⁷⁴ The second minor was advertised between 2010 and 2012 and estimates she was raped over 900 times; the third minor was advertised beginning in 2013 and was unable to estimate the number of times she was raped.⁷⁵ Despite its belief that Backpage had “tailored its website to make sex trafficking easier,”⁷⁶ the court held that Backpage was shielded by section 230 from liability to minor victims of sex trafficking for posting advertisements of the victims as prostitutes.⁷⁷ The court stated that Backpage performed traditional publisher functions in its website policies and practices and was not the publisher or speaker of the contents of the advertisements.⁷⁸ The court advised, “The remedy is through legislation, not through litigation.”⁷⁹

Courts have also protected ICSs from liability for vicious catfishing schemes. In a recent case, Matthew Herrick used Grindr, a dating application

67. *Id.*

68. *Id.*

69. *Id.* at 716-17, 727.

70. *Id.* at 717.

71. *Id.* at 713.

72. 817 F.3d 12, 17 (1st Cir. 2016).

73. *Id.* at 17.

74. *Id.*

75. *Id.*

76. *Id.* at 29.

77. *Id.*

78. *Backpage.com*, 817 F.3d at 15.

79. *Id.* at 29.

for gay men, until he became the victim of catfishing.⁸⁰ Herrick's ex-boyfriend impersonated Herrick on Grindr through fake profiles, which expressed that Herrick was interested in bondage, role-play, rape fantasies, etc., and even encouraged men to go to his house and workplace for sex.⁸¹ Hundreds of Grindr users responded to these fake profiles, and many of them even went to Herrick's home or workplace.⁸² Herrick and others reported the impersonating accounts to Grindr approximately 100 times, but, other than an automated response, Grindr never responded.⁸³ Herrick sued Grindr for, among other causes of action, products liability, negligence, and negligent and intentional infliction of emotional distress.⁸⁴ Affirming the district court's ruling, the Second Circuit held that the claims were barred by section 230, as the application (Grindr) is a provider of an interactive computer service, and the claims were based on information provided by another information content provider (the ex-boyfriend).

Is there a way to resolve, or at least ameliorate, these problems without putting an onerous burden on ICSs?

III. SOLUTIONS FOR SECTION 230

Congress felt compelled to try to resolve one problem associated with section 230: sex trafficking. Congress enacted the Fight Online Sex Trafficking Act ("FOSTA") in an attempt to mitigate the serious problems imposed by protecting from liability interactive computer services engaged in sex trafficking.⁸⁵ FOSTA is an exception to section 230 that removes immunity for services used with "the intent to promote or facilitate the prostitution of another person."⁸⁶ FOSTA sets forth the "sense of Congress" that section 230 was never intended to grant immunity to websites that further sex trafficking.⁸⁷ Congress deserves credit for acting to protect people from being trafficked for sex. Even if FOSTA successfully resolves sex trafficking problems,⁸⁸ however, the statutory language is so narrow that it

80. *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018).

81. *Id.*

82. *Id.*

83. *Id.* at 585.

84. *Id.* at 588, 593.

85. Fight Online Sex Trafficking Act, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as 18 U.S.C. § 2421A (2018)).

86. *Id.*

87. *Woodhull Freedom Found. v. United States*, 948 F. 3d 363, 368 (D.C. Cir. 2020).

88. FOSTA is already being challenged as, among other things, unconstitutionally vague. *Id.* at 369. The statute did not define "promote" or "facilitate" or "prostitution." *Id.* at 372. A group of people who advocate for the rights of sex workers are concerned their advocacy will be deemed to promote or facilitate prostitution. *Id.* at 369. Separately, a licensed massage therapist is challenging

only applies to the “promot[ion] or facilitat[ion] [of the] prostitution of another person.”⁸⁹ Such a standard cannot help those defamed on the internet or, like Matthew Herrick, subjected to a malicious catfishing scheme. A broader solution is necessary.

Two reform proposals have received a lot of attention: the repeal of section 230 and a notice-and-takedown procedure. We have concerns about both. A complete repeal of section 230, allowing the common law to determine liability for ICSs, would be unfair and overly burdensome. The common law afforded additional republication defamation protection to distributors, such as bookstores and libraries, because it would be onerous to be accountable for all the content in the books they provided to third parties. The owners and employees of bookstores and libraries should not have to read every book in their collections to determine if they are defamatory. Yet, the common law standard, tailored to bookstores and libraries, would insufficiently protect ICSs. Facebook has approximately 2.45 billion monthly active users.⁹⁰ 1.62 billion people use Facebook on a daily basis.⁹¹ As of September 2019, Twitter had 330 million active monthly users, producing 500 million tweets per day.⁹² With only a few possible exceptions, bookstores and libraries do not contend with millions or billions of authors. Moreover, those authors are not able to make new statements at any time, like is true on the internet. Under such circumstances, ICS republication liability to a “had reason to know” standard is untenable.

Additionally, the return to the common law distinction between publishers and distributors would potentially restore the “moderator’s dilemma” that section 230 was enacted to avoid. Publishers exercise “editorial control” over their content and distributors do not.⁹³ If courts return

the law because Craigslist will no longer advertise his services, threatening his livelihood. *Id.* at 369-70. See also Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279, 280 (2018) (“Unfortunately, FOSTA almost certainly will not accomplish Congress’ goals of protecting sex trafficking victims and reducing their victimization.”).

89. 18 U.S.C.S. § 2421A (2018).

90. Sarah Aboulhosn, *18 Facebook Statistics Every Marketer Should Know in 2020*, SPROUTSOCIAL (Jan. 21, 2020), <https://sproutsocial.com/insights/facebook-stats-for-marketers/>.

91. *Id.*

92. Salman Aslam, *Twitter by the Numbers: Stats, Demographics & Fun Facts*, OMNICORE, <https://www.omnicoreagency.com/twitter-statistics/> (last updated Feb. 10, 2020). Despite the focus on large ICSs, Eric Goldman argues the real protection of section 230 is for new entrants in the market. Eric Goldman, *Senate’s “Stop Enabling Sex Traffickers Act of 2017”--and Section 230’s Imminent Evisceration*, TECH. & MARKETING L. BLOG (July 31, 2017), <https://blog.ericgoldman.org/archives/2017/07/senates-stop-enabling-sex-traffickers-act-of-2017-and-section-230s-imminent-evisceration.htm> (“As usual, Section 230’s real benefit comes from leveling the playing field for new industry entrants; so as the costs of entry go up, we see less entry.”).

93. *Supra* notes 25-29 and accompanying text.

to reviewing the behavior of an ICS under the common law distinction, ICSs would have an incentive to stop moderating their content. The lack of moderation might mean that parts of the internet would deteriorate because of the repeal, opposite of the repeal's purpose.

Notice-and-takedown proposals, the most commonly suggested reform,⁹⁴ are also problematic. Most proposals mirror Title II of the Digital Millennium Copyright Act ("DMCA"), providing that internet service providers "are immune from liability so long as they do not have actual or apparent knowledge of the infringing nature of the material; they do not benefit financially from the infringing material; and upon notification of claimed infringement, they rapidly remove or restrict access to the material."⁹⁵ The notification must be in writing and include:

- (1) a physical or electronic signature of the owner of the copyrighted material or his authorized agent; (2) identification of the allegedly infringing material; (3) the location of the material at issue; (4) "information reasonably sufficient to permit the [ISP] to contact the complaining party"; (5) a statement that the alleged victim of the infringement "has a good faith belief that the use of the material . . . is not authorized"; and (6) "a statement that the information in the notification is accurate, . . . under penalty of perjury."⁹⁶

Many of these proposals apply to ICSs as distributors, as understood at common law.⁹⁷ Applied to tort law, the proposals would require detailed notice provided to the ICS about a particular statement the writer considered defamatory, etc. If the ICS responded in an appropriate way, the ICS would be immune from tort liability.

We find the concept of notice-and-takedown proposals appealing. Perhaps the best feature of the proposals is that they do not place on ICSs the burden of monitoring the content on their websites. The burden is placed on the person about whom statements are made to bring it to the attention of the ICS; only after the subject of the statements notifies the ICS does the ICS have to review the statements. Given the volume of content involved, that is an attractive idea. We are concerned, however, about a heckler's veto. If a person does not like statements made about them on the internet, it is nearly cost-free to request they be removed, regardless of whether the statements are tortious. If an ICS receives immunity by taking down provisions about

94. Spiccia, *supra* note 2, at 397.

95. *Id.* (citing 17 U.S.C. § 512(c) (2018)). *But see* Rustad & Koenig, *supra* note 7, at 397-410 (differentiating their proposal from the DMCA).

96. Spiccia, *supra* note 2, at 397-98 (citing 17 U.S.C. § 512(c)(3) (2018)).

97. *See, e.g.,* Rustad & Koenig, *supra* note 7, at 387 (referring to their proposal as a "distributor with notice rule").

which they are notified, we fear they will do so overly often. The *Zeran* court used this rationale to support its holding of non-liability for distributors: “Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not.”⁹⁸

In the copyright infringement context, there is empirical data supporting this concern. A Dutch civil rights group conducted an experiment in which it posted an 1871 document by a well-known Dutch author, clearly too old to be subject to copyright, to ten internet service providers.⁹⁹ They then emailed takedown notices to each internet service provider, claiming to be the holder of the copyright and demanding the document be taken down.¹⁰⁰ Seven of the ten removed the material, “sometimes within hours and without informing the account holder.”¹⁰¹ We fear the potential damage of notice-and-takedown to the free flow of information on the internet.

An alternative we believe deserves greater consideration from policymakers and scholars is the application of the actual malice standard to torts committed by ICSs in a distributor capacity. Amanda Groover Hyland made a version of this proposal in 2008,¹⁰² though we would modify some of the details. Under Hyland’s proposal, in defamation cases, distributor liability would return.¹⁰³ The standard to which the ICS as distributor would be held would depend on whether the website contained political or social commentary and whether it allowed user comments.¹⁰⁴ These factors figure into her analysis because the Supreme Court has indicated First Amendment safeguards must be elevated to protect defendants when the speech is of political or social importance and when the plaintiff has access to the media.¹⁰⁵ Those defendants who met both requirements would be subject to the actual malice standard.¹⁰⁶ If the website did not meet the requirements, the court would decide the appropriate standard of review.¹⁰⁷ If the actual

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

99. Rustad & Koenig, *supra* note 7, at 394.

100. *Id.*

101. *Id.* at 394-95. Rustad & Koenig propose to fix this problem by giving those “victimized by frivolous or bad faith takedown demands” a “right to a federal court hearing, as well as rights to legal or equitable remedies.” *Id.* at 344. This is a step in the right direction, but we fear ICSs will often take the path of least resistance and not bother with a lawsuit.

102. Hyland, *supra* note 23.

103. *Id.* at 120.

104. *Id.*

105. *Id.* at 116-18.

106. *Id.* at 122.

107. *Id.* at 121. It is possible courts would return to the common law “reason to know” standard absent other guidance.

malice standard applied, Hyland notes the plaintiff would have “to show that the operator left the offending statement online for an unreasonable length of time after the operator knew it was false, or acted in reckless disregard of its falsity.”¹⁰⁸

Hyland argues the pressure that notice puts on defendants in a notice-and-takedown system is ameliorated, and the level of detail in the complaint would receive more attention. She states, “Complaints that contained little or no factual basis to support the allegation of defamation would require little or no action on the part of the web operator. Detailed, timely, good-faith complaints would provide the web operator with more information to make a decision to remove the content.”¹⁰⁹ The dialogue between the complainant and the operator “could provide the basis for the court to determine whether . . . the operator acted with reckless disregard for the truth.”¹¹⁰

Using the actual malice standard is attractive for several reasons. First, it is familiar to the courts, which have used the standard to judge defamation cases for over fifty years. Second, it provides ICSs with a lot of protection. Just as notice-and-takedown proposals remove the need for ICSs to monitor their content, the actual malice standard operates similarly. Part of the actual malice standard is knowledge. The other part—reckless disregard for the truth—requires a “high degree of awareness of . . . probable falsity;”¹¹¹ a defamation plaintiff must prove the defendant “entertained serious doubt as to the truth” of the statement.¹¹² Especially given the volume of content involved, such knowledge or near knowledge will almost always have to come from a notification. At the same time, the notification does not come with immunity if the ICS removes the statements, creating a strong incentive to remove regardless of the tortious nature of the statements. Instead, the ICS is governed by the most protective constitutional standard mandated in First Amendment cases. Third, despite the protection of such a standard, if the ICS behaves egregiously, liability is still possible, unlike under current section 230.

Although we adopt Hyland’s proposal, we would alter it in two ways. First, we would apply actual malice in all cases against ICSs acting as distributors; we would not review the website for political or social content or access to comments. We appreciate Hyland’s reasons for doing so, but we think the two-tiered analysis has two detriments. Because ICSs might be held to a “reason to know” standard, ICSs would have to monitor their content in

108. Hyland, *supra* note 23, at 121.

109. *Id.* at 122.

110. *Id.*

111. *Id.* at 92 (citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

112. *Id.* (citing *St. Amant v. Thomson*, 390 U.S. 727, 731 (1968)).

case they were found not to qualify for the actual malice standard. Additionally, the process of determining which standard applies adds complexity and expense to litigation. In any event, ICSs publishing political or social content and offering access to comments are protected at the highest level mandated by the First Amendment. Second, we would apply the actual malice standard to torts beyond defamation. Thus, if an ICS engaged in tortious conduct involving knowledge or reckless disregard, such as intentional infliction of emotional distress, the ICS is accountable.

How would the actual malice standard work in the examples discussed earlier? In each of the defamation cases, it is possible the ICS would be held liable. All of the plaintiffs in those cases reached out to the defendant ICS to complain about the content of posts; in *Jones*, the plaintiff contacted the defendant at least twenty-seven times.¹¹³ After that contact, whether the defendant knew or entertained serious doubts as to the truth of the statements would depend on what was communicated by the plaintiffs. The burden is on the plaintiffs to make the case for defamatory falsehood to the defendant. If that case has been made, such that the defendant knows or has a high degree of awareness of probable falsity, and a reasonable amount of time is allowed to remove the statements, it is hard to reach any other conclusion than that the defendant has become a wrongdoer and should be held accountable.

The standard would further protect victims of malicious catfishing schemes. For example, in *Herrick v. Grindr*,¹¹⁴ a court likely would find that Grindr's conduct rose to the level of actual malice. Herrick and others reported the impersonating accounts to Grindr approximately 100 times, but, other than an automated form response, Grindr never responded.¹¹⁵ Despite multiple complaints, alleging falsehoods leading to alarming attacks, Grindr did nothing. After 100 complaints, Grindr knew or had a high degree of awareness of the probable falsehood of Herrick's Grindr account. Herrick sued for, among other causes of action, intentional infliction of emotional distress ("IIED").¹¹⁶ A defendant is liable for IIED if s/he: (1) intentionally or recklessly; (2) engages in extreme and outrageous conduct; (3) that causes; (4) severe emotional distress.¹¹⁷ Intent can be proved by either purpose or substantial certainty.¹¹⁸ Substantial certainty, or knowledge to a near

113. *Jones v. Dirty World Entm't Recordings, LLC*, 755 F.3d 398, 404 (6th Cir. 2014); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 989 (S.D. Tex. 2017); *Donato v. Moldow*, 865 A.2d 711, 716-17, 727 (N.J. Super. Ct. App. Div. 2005).

114. 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018).

115. *Id.* at 585.

116. *Id.* at 588, 593.

117. RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965).

118. *Garratt v. Dailey*, 279 P.2d 1091, 1094 (Wash. 1955).

certainty, overlaps with actual malice, with its focus on knowledge or high degree of awareness. Thus, after 100 complaints, a court could easily find Grindr was substantially certain it was engaging in extreme and outrageous conduct and substantially certain it would cause severe emotional distress by leaving Herrick exposed to multiple attacks upon his safety when it could have protected him by merely taking down his Grindr account.

CONCLUSION

Because of the context of the internet, particularly with regard to republication defamation, web-related defendants should not be held accountable by traditional common law standards. The conclusion that they should not be accountable at all, however, does not follow. The actual malice standard holds web-related defendants accountable for egregious harm, while protecting them from overly burdensome liability. When determining how to amend section 230, policymakers and scholars should consider it carefully.