

EARNING IMMUNITY UNDER 47 U.S.C. § 230

Note

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I. INTRODUCTION – THE HISTORY OF THE ACT

As mankind invents faster and more varied ways to communicate with each other, the law often scrambles to keep up. Lawmakers must struggle to find a balance between preserving free speech and stopping the dissemination of hate speech. In an effort to protect children from obscene and hateful speech on the internet, Congress passed the Communications Decency Act (CDA) twenty years ago.¹ The purpose of the Act was mainly to regulate the dissemination of pornography and explicit communication on the internet.² While well intentioned, the Act was also overreaching. Ultimately, the Supreme Court found that it posed grave concerns to the future of free speech on the internet because it censored many types of expression, not just sexual, in the interest of protecting children.³ In *Reno v. ACLU*, the court struck down the vast majority of the CDA, holding that its unconstitutionally vague language had a “chilling effect on free speech.”⁴

Reno did not do away with the CDA in its entirety, however.⁵ Certain provisions that allowed service providers to regulate the content on their

1. 47 U.S.C.A. § 223 (West).

2. *Id.*

3. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997).

4. *Id.* at 872.

5. *Id.*

websites remained.⁶ 47 U.S.C.A. § 230 gave “interactive computer services” the power to block lewd or lascivious information from their websites, and also shielded them from liability for content they did not directly “publish.”⁷

The purpose of section 230 was to encourage parents to monitor their children’s internet use rather than place the onus of responsibility on content providers.⁸ Website owners and editors were to have more freedom to publish material without fear of criminal or civil retribution.⁹ By rolling back the content-based restrictions found in the rest of the statute while leaving this section intact, the Supreme Court attempted to honor Congress’s desire to see the internet develop into “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”¹⁰

Congress’s desire was realized. The internet provides unique opportunities for virtually everyone to learn, explore, and communicate. However, it can still be a dangerous tool. While section 230 protects innocent website owners from being sued for libel or defamation because of the statements of third-parties, the statute also allows them a broad mandate to escape responsibility for dangerous forms of speech, such as threats or hate speech.¹¹ Lawmakers continue to struggle with preserving the internet as a cultural medium while also taking into account the safety of their constituents.

II. THE TEXT OF THE STATUTE

The statute itself makes explicit that this grant of liability is not extended to every website owner, but only providers of “interactive computer services.” Interactive service providers, in the context of this statute, simply make available any “information service [or] system” that allows multiple users to connect to one server.¹² Publishers of information, on the other hand, do not enjoy this same protection.¹³ This means that the owners of websites that allow people to interact with each other are protected under this statute, but website owners that produce original content are usually not. An

6. *Id.* at 881-82.

7. 47 U.S.C.A. § 230 (West).

8. 47 U.S.C.A. § 230(b).

9. *Id.*

10. 47 U.S.C.A. § 230(a).

11. See Gregory M. Dickinson, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POL’Y 863, 864 (2010)

12. 47 U.S.C.A. § 230(f).

13. *Id.*

“information content provider” may still be liable for the content of a statement if they were responsible in some way for publishing or developing the material.¹⁴ However, a mere provider may not be treated as a publisher unless there is evidence that he has developed or edited the material in some way.¹⁵ Notably, the statute offers little more guidance than this on where to draw the line between provider and publisher.

Nonetheless, section 230 is clear that it means to protect providers that do no more than offer a platform for their users to connect through.¹⁶ The law was passed in direct response to *Stratton Oakmont Inc. v. Prodigy Services*, a New York Supreme Court case that held a website liable for libelous statements on its online message board.¹⁷ Congress found that because online message boards and other forms of social media have the potential for exponential growth, it would be both unfair and nearly impossible to require such providers to police everything that occurred on their site.¹⁸

The statute does not offer protection to websites that are responsible for developing and publishing their own content.¹⁹ In *Stratton*, the defendant Prodigy was a provider of a widely read financial news bulletin.²⁰ Over two million subscribers read and participated in the message board each day, but Prodigy itself had little to do with the actual content that appeared on the page.²¹ While Prodigy did exercise some “editorial discretion” over what appeared, they did so in order to establish themselves as a reputable source of financial news.²² Prodigy did not publish or develop the libelous statements in question.²³ It is easy to see why Congress wished to insulate providers such as Prodigy from liability; Prodigy provided a useful and intellectual service that contributed to the growth of both the internet and the

14. 47 U.S.C. § 230(f)(3); *see also* Fair Hous. Council v. Roommates.com, 521 F.3d 1157, 1162 (9th Cir. 2008) (noting that if a website displays content solely created by third parties, immunity applies but not if the website is involved in the creation of any displayed content).

15. 47 U.S.C. § 230(f)(e); *Roommates.com*, 521 F.3d at 1162.

16. 47 U.S.C. § 230(f)(3); *see also* Universal Commc’ns Sys. v. Lycos, 478 F.3d 413, 419 (1st Cir. 2007).

17. H.R. Rep. No. 104–458, at 194 (1996), (Conf. Rep.). *See also* *Stratton Oakmont v. Prodigy Servs. Col*, 1995 WL 323710, at *17-18 (N.Y. Sup. Ct. Dec. 11, 1995).

18. H.R. Rep. No. 104-458.

19. 47 U.S.C. § 230.

20. *Stratton Oakmont*, 1995 WL 323710 (N.Y. Sup. Ct. Dec. 11, 1995).

21. *Id.*

22. *Id.*

23. *Id.*

financial sector.²⁴ Imposing restrictions on such websites would stifle both the quality and quantity of like services, because asking Prodigy to police the statements of over two million people would have been a Herculean task.²⁵ In a later New York State case, the New York Supreme Court applied Section 230 to similar set of facts and held that a website that merely “administer[ed] and [chose] content” to publish was immune from liability for defamation.²⁶ *Shiamli* reconciled the holding in *Stratton* with Section 230 and attempted to distinguish between the types of websites that were immune from liability.²⁷ *Shiamli* indicated that the key to winning immunity has little to do with the type of content provided, but instead the level of participation the provider has in developing the information.²⁸ However, the text of the statute itself offers little guidance to legal scholars and practitioners as to when a website crosses the line from provider to publisher.²⁹

III. THE PUBLISHER V. PROVIDER PARADOX – HOW MUCH PARTICIPATION IS TOO MUCH?

Courts in every circuit have struggled to determine how broadly Congress wished Section 230 to be construed.³⁰ The 9th Circuit, in *Fair Housing Council of San Fernando Valley v. Roommates.Com LLC*, provided some guidance. The website in question offered a forum for people seeking roommates to connect. In order to participate in the service, users were made to answer a series of questions about their race, sex, sexual orientation, and other lifestyle preferences.³¹ The Fair Housing Council of San Fernando Valley sued the website, alleging that it allowed its users to violate the Fair Housing Act and engage in housing discrimination.³² The defendant responded by claiming Section 230 immunity, arguing that it did nothing more but provide a forum to people seeking a roommate.³³ *Roommates.Com*

24. *Id.*

25. *Id.* at *3.

26. *Shiamli v. Real Estate Grp. of N.Y.*, 17 N.Y.3d 281, 284 (N.Y. Sup. Ct. 2011).

27. *Id.*

28. *Id.*

29. 47 U.S.C. § 230.

30. *See, e.g.*, *Barnes v. Yahoo!*, 565 F.3d 560 (9th Cir. 2009); *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997); *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010); *Murawski v. Pataki*, 514 F. Supp. 2d 577 (S.D.N.Y. 2007); *800-JR Cigar, Inc. v. GoTo.com*, 437 F. Supp. 2d 273 (D.N.J. 2006).

31. *Roommates.com*, 521 F.3d at 1161.

32. *Id.*

33. *Id.*

claimed that they could not be held responsible for how third parties chose to use their website, even though they provided their users with a template of questions that users could then use to discriminate.³⁴

The 9th Circuit held that Roommates.Com was an “information content provider” of the questions because they wrote the questions and forced their users to answer them.³⁵ However, the Court agreed that merely creating the question was not enough to show that Roommates.Com meant to aid in discrimination, or to show that the website was not eligible for immunity.³⁶ Instead, the plaintiff had to show that the website contributed materially to the illegal conduct.³⁷

The “material contribution” requirement forced courts and websites to re-evaluate what it meant to “develop” content. The *Roommates* decision acknowledged that “the broadest sense of the term ‘develop’ could include... just about any function performed by website.”³⁸ Therefore, in order to preserve the spirit of the statute, “developing” content had to amount to more than making a search engine or default questionnaire available.³⁹ A website would be immune if it provided its users with neutral tools, and so long as it did not “require the use of discriminatory criteria.”⁴⁰ Therefore, websites were immune for the consequences of a wide range of editorial choices. Websites may make editorial decisions about grammar, spelling, and style, and may also provide tools such as search engines or default profiles.⁴¹ So long as websites are “passive conduits,” they remain immune for third-party actions or statements.⁴²

The 6th Circuit elaborated on how to use the material contribution test in *Jones v. Dirty World Entertainment*. Dirty World was an online tabloid website that initially published its own content, but grew into a forum that allowed users to submit content of their own, and to comment on existing content.⁴³ A Dirty World user submitted defamatory content about a former National Football League cheerleader, who brought suit against the tabloid for defamation and libel.⁴⁴ The plaintiff contended that Dirty World was at

34. *Id.* at 1166.

35. *Id.* at 1167.

36. *Id.* at 1166.

37. *Id.* at 1168.

38. *Id.* at 1169.

39. *Id.*

40. *Id.*

41. *Id.* at 1172.

42. *Id.* at 1172.

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

44. *Id.* at 403.

least in part responsible for the creation of the defamatory content.⁴⁵ The Court echoed several of the maxims we now know to be true about Section 230 – that it is to be broadly construed, that it bars most claims of libel and defamation, and that it requires a showing from the plaintiff that the website in question materially contributed to publishing the information.⁴⁶ However, *Jones v. Dirty World* also puts forth a concrete test to determine if a claim is barred under Section 230. According to the 6th Circuit, a claim is barred if: 1) the defendant asserting immunity is an interactive computer service provider, 2) the information at issue was provided by *another* content provider, 3) the claim seeks to treat the defendant as the publisher or developer of the allegedly illegal statements.⁴⁷

Jones v. Dirty World thus gives us a test to apply when dealing with a Section 230 claim, but the test itself still does not help us determine how much development is too much development. The Court identifies this deficiency and addresses us, arguing that “a website owner who intentionally encourages illegal or actionable third-party postings,” or one who adds his own commentary before publishing the posts may be considered a developer.⁴⁸ A narrow interpretation of “development” would preclude all editing, even those that are merely grammatical in nature.⁴⁹ Therefore, a more appropriate definition of “development” for the purposes of granting broad immunity under Section 230 would be one that requires the website to openly encourage illegal behavior, or to design its platform “to be a portal for defamatory material.”⁵⁰ If a website induces its users to post libelous comments or posts, or editorializes those posts to make them legally objectionable, a website may be considered a developer.⁵¹

Roommates and *Dirty World* indicate that merely making content available is not enough to abrogate immunity. Neither is editing that content for style or structure. Providing users with a default profile or platform to use, or with a search engine by which to refine material is not enough. Acting as a messenger still affords a provider immunity under Section 230, even if the messaging service in question is notorious for unsavory content.⁵² However,

45. *Id.*

46. *Id.* at 408.

47. *Id.* at 409.

48. *Id.*

49. *Id.* at 412.

50. *Id.* at 413.

51. *Id.* at 414.

52. Chi. Lawyers’ Comm. for Civ. Rights Under Law v. Craigslist, 519 F.3d 666 (7th Cir. 2008); *see also* Saponaro v. Grindr, 93 F. Supp. 3d 319 (D.N.J. 2015).

encouraging users to post defamatory material or editing content to make it more objectionable crosses the line from a provider to a publisher.⁵³

Despite this guidance from two different courts, the lines between provider and publisher still vary wildly across the circuits.⁵⁴ Most courts follow *Roommates*' lead in broadly construing the statute in order to conform with Congress's intent to promote free speech, and to relieve content providers from having to police their busy websites.⁵⁵ Is this grant of broad immunity always correct? Or does it allow websites to hide behind a shield and not take responsibility for insidious and threatening content on their websites?

IV. THE CONSEQUENCES OF BROAD CONSTRUCTION

In June of 2015, the popular internet message board service, Reddit, took a drastic action that incensed many of its users. It shut down several forums, or "subreddits" that it considered objectionable.⁵⁶ Reddit removed five subreddits, including one that posted derogatory content about African Americans, and another that openly mocked obese people.⁵⁷ These subreddits were not merely forums that espoused unsavory opinions, but instead were dark corners of the internet dedicated to posting "creepshots" of children, sharing "violently racist" content and openly hating obese members of society.⁵⁸ Reddit exercised its right under Section 230 to remove content that it found lewd and lascivious, and also to remove content that it believed to be hateful and in violation of its anti-harassment policy.⁵⁹ Reddit seemed to want to be clear that they were banning "behavior, not ideas,"⁶⁰ a sentiment that perhaps indicated that they wanted to ban the act of harassment and not necessarily institute content based restrictions.

53. *Jones*, 755 F.3d 398 at 414.

54. Karen Alexander Horowitz, *When is § 230 Immunity Lost?: The Transformation from Website Owner to Information Content Provider*, 3 SHIDLER J.L. COM. & TECH. 14 (2007).

55. *See, e.g.*, *FTC v. Accusearch*, 570 F.3d 1187 (10th Cir. 2009_); *Giveforward v. Hodges*, 2015 U.S. Dist. LEXIS 102961 (D, Md. Aug. 6, 2015); *Ascentive v. Opinion Corp.*, 842 F. Supp. 2d 450 (E.D.N.Y. 2011).

56. Caitlin Dewey, *Censorship, Fat-Shaming, and the 'Reddit revolt': How Reddit became the Alamo of the Internet's Ongoing Culture War*, WASH. POST (June 12, 2015) [hereinafter *Censorship, Fat-Shaming, and the 'Reddit revolt'*].

57. *Id.*

58. Caitlin Dewey, *These are the 5 Subreddits Reddit Banned Under its Game-Changing Anti-Harassment Policy – and Why It Banned Them*, WASH. POST (June 10, 2015) [hereinafter *5 Subreddits Reddit Banned*].

59. *Censorship, Fat-Shaming, and the 'Reddit revolt'*, *supra* note 56.

60. *5 Subreddits Reddit Banned*, *supra* note 58.

Reddit's decision to excise the content was by no means surprising or unusual, but the user response provoked a conversation about the future of free speech on the internet. The community responded by harassing Reddit's CEO at the time, Ellen Pao, vilifying her far and wide across the website.⁶¹ The backlash grew so severe that a Google image search of Pao's name still retrieves images comparing Pao to infamous dictators such as Hitler and Mao Zedong.⁶² Reddit chose to take these hateful forums seriously because they crossed the line from an exercise of free speech into open harassment and hate speech.⁶³ Many of the users on these subreddits threatened violence, and unfortunately had an audience of potentially 1.5 million users to proselytize to.⁶⁴

The storm has since passed, and Reddit's user base does not seem to have suffered as a result.⁶⁵ The shutdown of those forums nonetheless taught internet users around the world an important lesson – that the internet can take an intolerable message and amplify it. The internet can take what used to be the private, intolerant thoughts of one person and broadcast it to an audience of millions of people. Thus, owners of websites that have such a wide reach have a greater responsibility to make sure their website is not actively disseminating threatening language.

Thus, Section 230's grant of immunity should be earned instead of automatic. The biggest problem with Section 230 is that it was crafted to encourage the internet to be an efficient communication medium,⁶⁶ but the internet is no longer in its nascent days.⁶⁷ The internet landscape has changed dramatically since the initial passage of Section 230, and thus, a broad grant of immunity may no longer be appropriate.⁶⁸ The internet is a part of the daily life of millions of people, and therefore should not be a lawless space.⁶⁹ The internet has the potential to amplify free speech, but "as an increasing percentage of human interaction and communication is transferred to the digital realm, legal remedies must follow."⁷⁰

With the growing popularity of websites such as Instagram, Facebook, and Twitter, it is important to explore the boundaries of Section

61. *Censorship, Fat-Shaming, and the 'Reddit revolt'*, *supra* note 56.

62. Google Image Search for Ellen Pao, GOOGLE IMAGES, images.google.com (search term "Ellen Pao").

63. Dewey, *supra* note 58.

64. *5 Subreddits Reddit Banned*, *supra* note 56.

65. *Id.*

66. 47 U.S.C.A. §230 (West).

67. Dickinson, *supra* note 11.

68. *Id.*

69. *Id.*

70. *Id.*

230 not only for the protection of internet users, but also for the protection of the companies. Many courts view a website's participation in the development of unlawful content to be a "bad faith" exception to the Good Samaritan clause of Section 230.⁷¹ This "bad faith" exception is important because it underscores the fact that the reach of a website may make claims that are not facially libelous or harmful that much worse.⁷² A malicious statement is damaging enough when shared with only a few, but the practically limitless scope of the internet can make a harmful statement worse by disseminating it to millions of people.

Granting such broad immunity to websites often leaves plaintiffs without recourse, especially as it is still relatively easy to maintain anonymity on the internet.⁷³ Anonymous users may still publish libelous, threatening, or harmful material on the internet and escape responsibility.⁷⁴ A plaintiff that has been defamed or threatened has no one to bring suit against when they have been harassed by an anonymous user, as Section 230 shields the website owner from responsibility.⁷⁵ The Supreme Court has upheld the right to maintain anonymity on the internet, citing it as a right under the first amendment,⁷⁶ but this right is incompatible with the right of the plaintiff to avoid harassment and libel. Anonymity may be a "shield from the tyranny of the majority,"⁷⁷ but it can also be a veil for the malicious to hide behind.

V. HOW SECTION 230 INTERACTS WITH CRIMINAL LAW

One of the biggest problems with Section 230 is that it acts as a grant of immunity first, and as a protection for victims of online harassment second. Victims of online harassment may look into filing civil libel suits or criminal harassment suits, but such remedies may fall short. Under the current version of Section 230, victims may contact the service provider directly and appeal to the provider to disclose the identity of the abusive poster, but the provider

71. Andrew M. Sevanian, *Section 230 of the Communications Decency Act: A Good Samaritan Law Without the Requirement of Acting as a Good Samaritan*, 21 UCLA ENT. L. REV. 121, 146 (2014).

72. Stacy M. Chafin, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773 (2008).

73. Patricia Spiccia, *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, 370 (2013).

74. *Id.*

75. *Id.*

76. *Id.* at 374.

77. *Id.* at 375.

is under no obligation to make that disclosure.⁷⁸ This means that it is often impossible to file a libel suit or a criminal harassment suit because the victim may not be able to identify the person targeting them.

There are currently no agency regulations interpreting Section 230, meaning that the only interpretation available comes from the courts.⁷⁹ Thus, victims often have no concrete statute or regulation to point to after they have suffered harassment or libel online. Section 230 will need to evolve to better suit the needs of the victims, or the FCC will need to promulgate regulations that offer victims a path to follow after they suffer harassment on the internet.⁸⁰ Because of the patchwork nature of state regulation of cyberbullying and online harassment, Section 230 must emerge as a uniform federal standard that protects victims of online harassment by requiring large internet domains such as Facebook, Reddit, and Instagram to closely police their user base.

In order to address the ways in which Section 230 needs to change, it is important to understand the current patchwork of state regulations regarding online harassment. Currently, there is no federal law prohibiting cyberbullying.⁸¹ There are some federal civil rights statutes that prohibit harassment on the basis of race, sex, or national origin, but these statutes are mostly meant to protect children in public schools.⁸² Schools and state and local governments may also face liability for failing to prevent cyberbullying in some circumstances, but suing a school for failing to protect a student can be a long and arduous process.⁸³ Because the federal government has yet to pass a regulation outright forbidding cyberbullying or online harassment, state law has evolved in a patchwork fashion to address the problem.

The body of criminal law surrounding cybercrime faces the same issues as the early version of the Communications Decency Act. Statutes prohibiting cyberbullying have to be narrowly tailored, but also cannot impose content-based restrictions on speech.⁸⁴ Courts throughout the country have struck down anti-cyberbullying statutes that violate the first amendment.⁸⁵ In *People v. Marquan M.*, the New York Court of Appeals struck down an overbroad cyberbullying statute because it encroached on free speech rights.⁸⁶ While the court acknowledged that the First Amendment was

78. *Id.* at 396.

79. *Id.*

80. *Id.*

81. JEFFREY C. MORGAN, INTERNET LAW AND PRACTICE §25:30.50 (2016).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *People v. Marquan M.*, 24 N.Y.3d 1 (N.Y. 2014).

not meant to protect abusive speech directed toward children, the First Amendment does protect similarly abusive speech directed toward adults or corporate entities.⁸⁷ The cyberbullying statute in question prohibited the harassment or bullying of a student “through any form of electronic communication,”⁸⁸ encompassing practically every form of telecommunication.

The New York Court struggled with many of the same concerns as the drafters of the Communications Decency Act. While the drafters of both the CDA and the drafters of this particular education statute sought to protect minors using the internet, their heavy-handed attempt to insulate children from virtual harm substantially infringed upon the rights of adults to air their grievances.⁸⁹ The New York Court of Appeals held that the main problem with the statute was that it “did not criminalize bullying behaviors,” but instead imposed a content-based restriction on what students could say online.⁹⁰

On the other hand, federal courts that have upheld similar state cyberbullying statutes have found that such statutes are permissible so long as they do not act as an “overbroad criminalization of protected speech.”⁹¹ This means that so long as the statute punishes the “[defendant’s] specific intent to use... the internet as [an instrument] to intimidate or torment,” the statute was not unconstitutionally vague.⁹² States may punish those with criminal intent, but may not base that punishment on the content of the abusive online post.⁹³

It is clear then, that the basic impulse that led the drafters of the CDA to pass broad legislation condemning pornographic or offensive material on the internet still exists; lawmakers still wish to protect children from harassment on the internet, but are as unsure on how to do it now as they were 20 years ago. In order to make it easier for police to find cyberbullies and for victims of online libel to identify their harassers, courts should make immunity under Section 230 more difficult to achieve.

VI. CONCLUSION – SUGGESTIONS FOR REFORMING SECTION 230

The internet has grown to a size that not even its inventors could ever have imagined. It allows us to share ideas with people thousands of miles

87. MORGAN, *supra* note 81, at § 25:30.50.

88. N.Y. Educ. Law § 11 (McKinney 2012).

89. *Marquan M.*, 24 N.Y.3d at 11-12.

90. *Id.* at 4.

91. MORGAN, *supra* note 81, at 25:30.05.

92. *State v. Bishop*, 774 S.E.2d 337, 343 (N.C. Ct. App. 2015).

93. *See Marquan M.*, 24 N.Y.3d at 7.

away, at the click of a button. It is a powerful tool for spreading human creativity and innovation, but it can just as easily be used for harm as it can for good. However, the sheer size of the internet makes it difficult to regulate. Facebook reported in October of 2014 that over one billion people actively use its social network site.⁹⁴ Twitter reports that it has 320 million active users every month.⁹⁵ Instagram reports that over 400 million people use its popular photo sharing site every month.⁹⁶ Each site coordinates the content of millions of people not just in the United States, but throughout the world. Therefore, it is an immense task to ask companies such as these to police the content found on each of their websites on any given day. Nonetheless, these companies must be held to a higher level of responsibility than they currently are in the United States. Because these sites are so omnipresent, piecemeal state regulation is not enough to keep them accountable. Reform must start at a federal level, and the best avenue to do so is by amending Section 230.

Section 230 must be reformed in a way that holds both interactive service providers and information content providers responsible for the content found on their websites.⁹⁷ Academics have suggested various methods to do so, but arguably the most effective is that of a “notice and takedown” requirement.⁹⁸ This requirement would hold such websites immune from liability so long as they have no actual or apparent knowledge of the illegal nature of the material.⁹⁹ The provision would mirror a similar provision in the Digital Millennium Copyright Act, which grants ISPs immunity if they do not know that they have published copyrighted material, and if they take steps to remove the copyrighted material.¹⁰⁰ Immunity under the DMCA is only granted to those websites that do not knowingly publish copyrighted material *and* that comply with requests to remove the protected material.¹⁰¹ It is baffling that websites are held to a higher standard to spot and remove copyrighted material than they are to identify libelous or illegal material, which can threaten the safety of its users. Websites like Facebook and Reddit may not be able to police their sites for every instance of defamatory or harassing conduct, but they should be required to take down

94. Caitlin Dewey, *Almost as Many People Use Facebook as Live in the Entire Country of China*, WASH. POST (Oct. 29, 2014).

95. *Twitter Usage/Company Facts*, TWITTER.COM, <https://about.twitter.com/company> (last visited Feb. 8, 2016).

96. *Stats*, INSTAGRAM.COM, <https://www.instagram.com/press/?hl=en> (last visited Feb. 8, 2016).

97. *See, e.g.*, Spiccia, *supra* note 73 at 369.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

objectionable material if asked, and not be granted immunity if they refuse to comply with the request.

Section 230 may also be reformed to by requiring ISPs to turn over the identities of posters who post illegal or tortious material. Advances in technology have made it more difficult to achieve true anonymity on the internet, but it is far from impossible.¹⁰² A study of Section 230 lawsuits found that in almost half of the cases studied, the tortious content was published by an anonymous user.¹⁰³ The same study went on to find that “[i]n several common media of communication, discussion forums, consumer reviews, and online matching/dating services, more than two-thirds of the speech at issue was anonymous.”¹⁰⁴ This anonymity furthermore “pose[s] a significant hurdle for plaintiffs seeking to hold a culpable third party liable for injuries he or she has caused.”¹⁰⁵ The website itself would enjoy immunity, but the plaintiff would be left entirely without recourse since anonymity shields the user against whom they need to bring a cause of action.

Anonymity is a useful tool, and one protected by the First Amendment.¹⁰⁶ The Supreme Court in *McIntyre v. Ohio Elections Commission* held that anonymity shields the author of unpopular opinions from retaliation or social ostracism.¹⁰⁷ Justice Stevens wrote that “the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.”¹⁰⁸ In line with the public policy of protecting the marketplace of ideas, courts have been loathe to force ISPs to turn over the identities of anonymous users.¹⁰⁹ However, when the shield of anonymity is used not as a “shield from the tyranny of the majority”¹¹⁰ but as a cloak that a villain may hide behind, it must be abrogated.

Requiring ISPs to turn over the identities of users who harass other users would overcome the hurdle that plaintiffs must face when harassed by an anonymous user. It would be easier for police to identify cyberbullies, and

102. See, Ellyne Phneah, *Online Anonymity Hard to Achieve but not Impossible*, ZDNET, <http://www.zdnet.com/article/online-anonymity-hard-but-not-impossible/> (last visited Feb. 13, 2017).

103. David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 432 (2010).

104. *Id.*

105. *Id.*

106. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995)

107. *Id.* at 343.

108. *Id.* at 342.

109. Spiccia, *supra* note 73, at 374.

110. *McIntyre*, 514 U.S.at 342.

would also make it easier for victims of internet libel to use civil suits to recover from their abusers.¹¹¹ Currently, when victims of bullying or libel request ISPs to take down defamatory material or turn over the identity of a malicious poster, ISPs do not always comply with their request because “nothing compels them to do so.”¹¹² Compelling ISPs to cooperate with victims would advance the victims interests.¹¹³ Section 230 could be reformed to require an executive agency such as the FCC to evaluate potentially objectionable content and determine whether the content is offensive enough to warrant abrogating anonymity.¹¹⁴ Changing the law in this way would allow an impartial review of “offensive” speech and protect the interests of both the ISP and the victim.¹¹⁵

The current state of Section 230 is incompatible with the rapid growth of the internet. Piecemeal state regulation no longer provides an adequate method of recourse. By setting a federal standard, Section 230 must provide ISPs and victims alike with an efficient and reliable method of combatting hate speech.

111. Ardia, *supra* note 103, at 486-91 (citing statistics that show plaintiff’s trouble in attaching liability to an anonymous user).

112. Spiccia, *supra* note 73, at 411.

113. *Id.* at 414.

114. *Id.* at 411.

115. *Id.*