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"Good name in man and woman, dear my lord, Is the immediate jewel of their souls: Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands: But he that filches from me my good name Robs me of that which not enriches him, And makes me poor indeed."[1]

INTRODUCTION

Although written hundreds of years ago, this quote from *Othello* still rings true in the twenty-first century because human nature has largely remained the same. Human beings still place great importance on the perceived reputation of others when choosing who to associate with. A bad reputation can mean lost business opportunities and friendships. Additionally, humans still have the tendency to act out of spite and tarnish the reputation of others, sometimes through spreading false information.

The recognition of these truths as to the nature of humanity is why libel laws have existed for so long. The tort of defamation has long pre-existed the creation of the United States (we borrowed the concept from English common law) because of the inevitability of its occurrence and the level of harm it can do to a person,[2] despite its tension with First Amendment values. Each generation has had varying levels of success

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1. WILLIAM SHAKESPEARE, OTHELLO act 3, sc. 3, l. 160–66.

2. Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 566 (1903).

reconciling this tension. Unfortunately, in the twenty-first century we have allowed modern systems of communication to distract us from the importance of this necessary balance.

Today, as more of our communications move online, the potential damage that defamation can have on an individual's reputation can be severe.[3] Internet defamation is widespread, difficult to fully correct or retract, and oftentimes made with complete anonymity.[4] The Internet's reach is unlike any form of communication in history. However, a victim of online defamation has far fewer options for legal recourse than a person who is defamed in the physical world, even though the damage has the potential to be far greater.

The lack of legal recourse afforded to victims of online defamation is due to the way Section 230 of the Communications Decency Act (Section 230) is written and construed. Section 230 immunizes Internet Service Providers (ISPs) from liability for limiting or restricting access to objectionable material and prevents ISPs from being treated as original publishers of information they did not create but appears on their platforms.[5] The scope of immunity reflected in judicial decisions since its enactment basically amounts to blanket immunity—any liability for third-party content is prohibited.[6] For example, if a person is defamed on Facebook, only the original content creator is liable for defamation. Even if Facebook knew the content was defamatory and did not remove it, as an ISP it is completely immune from liability for the content's defamatory character.[7]

Despite this prevailing interpretation, there is another way to interpret Section 230 that is more consistent with traditional defamation law. The alternative interpretation leaves open the possibility of imposing distributor liability on ISPs and users who transmit defamatory content. In other words, the language of Section 230 suggests the potential for ISPs to be categorized as distributors, holding them liable if they know or have reason to know of defamatory content on their platform. Therefore, in the above hypothetical regarding Facebook, liability could be imposed if a

3. *See, e.g.*, Kashmir Hill, *A Vast Web of Vengeance*, N.Y. TIMES (Feb. 2, 2021), https://www.nytimes.com/2021/01/30/technology/change-my-google-results.html/ [https://perma.cc/Z4AM-NM9M].

4. *See id.*

5. Jeff Kosseff, *The Lawsuit Against America Online That Set Up Today's Internet Battles*, SLATE (July 14, 2020), https://slate.com/technology/2020/07/section-230-america-online-ken-zeran.html [https://perma.cc/CEB4-U2YY]; *see also* 47 U.S.C. § 230; *see also* VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 8 (2021).

6. *See* Kosseff, *supra* note 5; *see also* BRANNON & HOLMES, *supra* note 5, at 11.

7. *See* Kosseff, *supra* note 5; *see also* BRANNON & HOLMES, *supra* note 5, at 14–15.

plaintiff can prove that Facebook had knowledge of the defamatory content and then failed to take reasonable action.

This Note contends that under current interpretations of Section 230, there is little to no accountability for online defamation, thus Congress should consider amending Section 230 and removing contradictory language, so victims of defamation can hold ISPs accountable for defamatory content that they do not reasonably investigate and remove. Victims of online defamation should be permitted a legal path forward as opposed to the blind alley created by the current interpretation of Section 230. Part I of this Note discusses the history and importance of defamation laws. Part II explores how courts have applied Section 230 in online defamation cases and how current interpretations of the statute create a barrier for victims of defamation. Finally, Part III recommends novel Section 230 interpretations and amendments that provide victims of serious Internet defamation legal recourse.

I. HISTORY AND IMPORTANCE OF DEFAMATION LAWS

A. The Conflict Between Free Speech and Defamation

The importance of an individual's reputation formed the basic notion of the tort of defamation. An individual's reputation "[i]n the communitarian view . . . is the image of the individual created and held by others."[8] Therefore, "defamation was seen as an attack . . . on the very essence of the self."[9] Defamation laws in America had to be balanced with an individual's right to free speech.[10] As indicated in the U.S. Bill of Rights: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press."[11] In the United States, freedom of speech was (and is) considered to be paramount to protect citizens from a strong central government.[12]

However, despite the apparent tension between defamation laws and freedom of speech, libel was maintained as common law tort.[13] In essence, defamation was designed to effectuate society's "pervasive and strong

8. M. M. Slaughter, *The Development of Common Law Defamation Privileges: From Communitarian Society to Market Society*, 14 CARDOZO L. REV. 351, 352 (1992).

9. *Id.* at 353.

10. David L. Hudson Jr., *Libel and Slander*, THE FIRST AMEND. ENCYCLOPEDIA (May 14, 2020), https://mtsu.edu/first-amendment/article/997/libel-and-slander [https://perma.cc/9DLE-4BGG].

11. U.S. CONST. amend. I.

12. *See* Andrew T. Kenyon, *What Conversation? Free Speech and Defamation Law*, 73 MOD. L. REV, 697, 701 (2010).

13. Hudson, *supra* note 10.

interest in preventing and redressing attacks upon reputation."[14] The continued existence and enforcement of defamation laws indicates that protecting reputation is still considered relevant in sustaining a lawful society, which accords respect to every individual. In fact, defamation law shares a common principle with freedom of speech: the inherent value of the individual. Freedom of speech under the First Amendment reflects the importance of one's ability to voice his opinion to "further a search for truth, further the operation of democracy or self government, and further the development of autonomous subjects or individual liberty."[15] Defamation laws reflect the value of one's right to protect his reputation among his peers and recognize the damage that false, published statements can do to an individual.[16]

B. A Brief Explanation of Defamation Laws

To be considered defamatory, a statement must cause others to view the subject of the statement unfavorably. According to the Restatement (Second) of Torts, "[a] communication is defamatory if it tends . . . 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."[17] This does not mean the majority of the community must react to the individual unfavorably, but only that the defamatory statement has a negative impact on his reputation among a substantial number of people in the community.[18] Traditionally, a prima facie defamation claim included the following three elements: (1) a false and defamatory statement concerning another; (2) published to a third party without privilege; and (3) the publication harms the plaintiff.[19]

The level of responsibility one has for sharing defamatory content depends on how the law classifies the sharer—as a publisher or distributor.[20] These legal distinctions are based on the presumed level of control each classification has over the published materials.[21] For instance, primary publishers—such as a newspaper or magazine publisher—face strict liability for defamatory content because they have more editorial

14. Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

15. Kenyon, *supra* note 12, at 701.

16. *See* RESTATEMENT (SECOND) OF TORTS §§ 558, 559, 577 (AM. L. INST. 1977); *see also* Michelle J. Kane, Blumenthal v. Drudge, 14 BERKELEY TECH. L.J. 483, 485 (1999).

17. RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1977).

18. RESTATEMENT (SECOND) OF TORTS §559 cmt. e (AM. L. INST. 1977).

19. RESTATEMENT (SECOND) OF TORTS §558 (AM. L. INST. 1977).

20. Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 (9th Cir. 2009).

21. Amanda Groover Hyland, *The Taming of the Internet: A New Approach to Third-Party Internet Defamation*, 31 HASTINGS COMMC'NS. & ENT. L.J. 79, 96 (2008).

control.[22] They "can be held liable for defamatory statements contained in their works even absent proof that they had specific knowledge of the statement's inclusion."[23] "Primary publishers that republish false statements are usually held to the same standard of liability as the original author of the statement."[24] Conversely, a distributor—such as a bookstore, newspaper stand, or a Facebook user who shares a post—may face liability for content they did not create when they transmit it.[25] Distributors are presumed to be passive conduits of information and include entities that have little or no control over what they republish.[26] If classified as a distributor, one will only be held liable if they *knew* or had *reason to know* that the third-party material transmitted was defamatory.[27] This standard provides shelter for entities that cannot screen the content they distribute because of the knowledge requirement.

C. Online Defamation Before Section 230

The aforementioned classifications of ISPs yielded contradictory results prior to the enactment of Section 230. The two cases prompting Section 230's enactment, *Cubby v. CompuServe*[28] and *Stratton Oakmont v. Prodigy*,[29] yielded entirely different results.

In *Cubby*, CompuServe, an online library, was not held liable for defamatory statements because it did not know the statements at issue had been published on their forum.[30] Subscribers to CompuServe had access to forums.[31] The "Journalism Forum" focused on the journalism industry and was managed by Cameron Communications, Inc. (CCI).[32] CCI contracted with CompuServe to "'manage, review, create, delete, edit and otherwise control the contents' of the Journalism Forum 'in accordance with editorial and technical standards . . . as established by CompuServe.'"[33] The plaintiffs alleged that the defamatory statements at issue were published as part of the Journalism Forum carried by

22. *Id.* at 97.

23. Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) (citing W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 810 (5th ed. 1984)).

24. Hyland, *supra* note 21, at 96–97.

25. *See* Jae Hong Lee, Note, Batzel v. Smith *&* Barrett v. Rosenthal*: Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 471 (2004).

26. Hyland, *supra* note 21, at 97.

27. RESTATEMENT (SECOND) OF TORTS § 581(1) (AM. L. INST. 1977).

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

29. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

30. *Cubby*, 776 F. Supp. at 139–41.

31. *Id.* at 137.

32. *Id.*

33. *Id.*

CompuServe; therefore, CompuServe should be classified as a publisher of the statements.[34] CompuServe moved for summary judgement and asserted "that it acted as a distributor, and not a publisher, of the statements, and cannot be held liable for the statements because it did not know and had no reason to know of the statements."[35] Because CompuServe did not manage the content itself, the court characterized CompuServe as a distributor; therefore, any liability would have to be based on knowledge it had of the defamatory posting.[36] Since the plaintiff could not show that CompuServe had the requisite knowledge to impose distributor liability, the court granted CompuServe's motion for summary judgment and held that it was not liable for the defamatory posting.[37]

In *Stratton Oakmont*, the trial court reached the opposite conclusion. In that case, Prodigy, a computer network with subscribers communicating over bulletin boards, was sued for defamatory statements posted on a board titled "Money Talk."[38] The plaintiffs claimed that Prodigy was a publisher and could be held to a stricter standard of liability[39] for the defamatory statements because it "exercised editorial control over the content of messages posted on its computer bulletin boards," and actually "held itself out" as asserting editorial control.[40] The court ultimately agreed with the plaintiffs without departing from the holding in *Cubby*. The court distinguished *Stratton Oakmont* from *Cubby* in two ways: "[f]irst, P[rodigy] held itself out to the public . . . as controlling the content of its computer bulletin boards. Second, P[rodigy] implemented this control through its automatic software screening program . . . ."[41] The court saw the use of the software as "actively utilizing technology and manpower to delete notes . . . on the basis of offensiveness and 'bad taste,' . . . [as Prodigy was] clearly making decisions as to content, and such decisions constitute editorial control."[42] These actions placed Prodigy in a unique position as a publisher; thus, the court held that Prodigy was liable for the defamatory postings.[43]

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34. *Id.* at 138.

35. *Id.*

36. *Id.* at 140–41.

37. *Id.* at 141.

38. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

39. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) ("Publishers can be held liable for defamatory statements contained in their works even absent proof that they had specific knowledge of the statement's inclusion.").

40. *Stratton Oakmont*, 1995 WL 323710, at *2.

41. *Id.* at 4.

42. *Id.*

43. *See id.* at 4–5.

II. THE ENACTMENT OF SECTION 230

The decisions in *Cubby* and *Stratton Oakmont* became known by two U.S. representatives, Chris Cox (R-CA) and Ron Wyden (D-OR), who introduced Section 230 as part of the Communications Decency Act (CDA).[44] Their concern was that *Stratton Oakmont* "seemed to punish a well-intentioned effort to provide a 'family-oriented' computer service."[45] By enacting Section 230, Congress hoped "to overturn the result in [*Stratton Oakmont* by removing] any disincentives for ISPs to police their service for offensive content."[46] This was accomplished in two parts of the statute. First, 47 U.S.C. § 230(c)(1) reads: "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."[47] The plain reading of this statutory language indicates that "§ 230 creates 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."[48] Essentially, courts cannot allow claims that regard computer service providers as publishers.[49] Any of these services that make editorial decisions about what to keep up or remove from their platform will be immune from liability.[50] Thus, Section 230(c)(1) overturns the result in *Stratton Oakmont* by allowing ISPs to keep defamatory content up without fault.

Second, Congress used Section 230(c)(2) to protect ISPs that monitor and screen content. That section reads:

> 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,

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44. Ashley Johnson & Daniel Castro, *Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved*, ITIF (Feb. 22, 2021), https://itif.org/publications/2021/02/22/overview-section-230-what-it-why-it-was-created-and-what-it-has-achieved [https://perma.cc/7KUS-22CZ]; *see also* Lee, *supra* note 25, at 473.

45. Lee, *supra* note 25, at 473.

46. *Id.*

47. 47 U.S.C. § 230(c)(1). An "information content provider" is defined in Section 230(f)(3) 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." 47 U.S.C. § 230(f)(3). In contrast, an "internet service provider" (ISP) is the medium on which the content is distributed, not the creator of the content itself. ISPs are eligible for immunity according to the plain reading of Section 230. *See* BRANNON & HOLMES, *supra* note 5, at 11–12.

48. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

49. *Id.*

50. *Id.*

> harassing, or otherwise objectionable, whether or not such material is constitutionally protected ….[51]

Section 230(c)(2) essentially gives ISPs the power to regulate content in good faith without worrying about First Amendment lawsuits. With the continuing threat of impending lawsuits, Congress was concerned that new Internet companies would not achieve the same level of growth.[52]

The purposes of Section 230 are listed in the statute itself.[53] Most importantly, Section 230 includes the following: preserving the free market as it currently exists;[54] promoting the "continued development of the Internet and other interactive . . . media"[55]; and encouraging "the development of technologies which maximize user control."[56]

A. Online Defamation After Section 230: Zeran v. AOL

An early judicial decision chose to read Section 230 broadly. *Zeran v. America Online, Inc.* reflects the later trends of judicial decisions, despite being wrought with controversy. Essentially, *Zeran* created "a kind of immunity with no offline parallel."[57]

In *Zeran*, the plaintiff sued America Online (AOL) for unreasonable delay in "removing defamatory messages posted by an unidentified third party."[58] The post at issue advertised t-shirts relating to the recent Oklahoma City bombing of the Alfred P. Murrah Building.[59] The t-shirts included phrases such as: "Visit Oklahoma . . . It's a BLAST!!!" and "Finally, a day care center that keeps the kids quiet—Oklahoma 1995."[60] The post instructed those interested in the shirts to call "Ken" and included the plaintiff's phone number.[61] This distasteful prank caused the plaintiff to receive angry and derogatory messages, as well as death threats.[62] At one point, he received an abusive call every two minutes.[63] Once the plaintiff informed AOL about what was going on, the post was removed.[64] However, a similar post resurfaced shortly after, and the calls began

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51. 47 U.S.C. § 230(c)(2)(A).
52. *Zeran*, 129 F.3d at 330.
53. *See* 47 U.S.C. § 230(b).
54. 47 U.S.C. § 230(b)(2).
55. 47 U.S.C. § 230(b)(1).
56. 47 U.S.C. § 230(b)(3).
57. JAMES GRIMMELMANN, INTERNET LAW: CASES AND PROBLEMS 196 (10th ed. 2020).
58. Zeran v. Am. Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997).
59. *Id.* at 329.
60. Kosseff, *supra* note 5.
61. *Zeran*, 129 F.3d at 329.
62. *Id.*
63. *Id.*
64. *Id.*

flooding in once again.[65] AOL frequently assured the plaintiff that they were handling the issue, but according to the plaintiff there was a significant delay in any action taken.[66] As a defense to this suit, AOL invoked Section 230 and moved for summary judgment.[67]

The plaintiff in *Zeran* argued that Section 230 immunity did not extend to distributor liability, and an ISP like AOL could be held liable if they had specific knowledge of the statement's defamatory nature.[68] The plaintiff pointed out that "distributor" takes on a different legal meaning than "publisher,"[69] and "publisher" is the only phrase included in Section 230(c)(1).[70] Therefore, the plaintiff asserted that Section 230 does not protect distributors, and AOL could be considered a distributor "like traditional news vendors or book sellers," thereby warranting liability because AOL had the requisite knowledge of the defamatory post and failed to act.[71]

The court of appeals affirmed the district court's decision to grant AOL's motion for summary judgment for three main reasons.[72] First, the court reasoned that AOL fell "squarely within [the] traditional definition of a publisher."[73] Quoting W. Page Keeton, the court stated that "[e]very one who takes part in the publication . . . is charged with publication."[74] Therefore, the court reasoned that even if AOL could be classified as a distributor, it was still a type of publisher because it had the choice of whether to "publish, edit, or withdraw the posting."[75] From the court's perspective, the plaintiff was trying to impose liability upon AOL for exactly what Section 230 protects it from: imposition of liability on an Internet service provider for statements made by another information content provider.[76]

Second, the court reasoned that the plaintiff's interpretation was inconsistent with the original policies behind the law. According to the court, imposing notice liability "reinforces service providers' incentives to

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 331.

69. *Id.*

70. *See* 47 U.S.C. § 230(c)(1) ("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.").

71. *Zeran*, 129 F.3d at 331.

72. *Id.* at 328.

73. *Id.* at 332.

74. Zeran v. Am. Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997) (citing W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 799 (5th ed. 1984)).

75. *Id.*

76. *Id.* at 333.

restrict speech,"[77] which has a "chilling effect on the freedom of Internet speech."[78] Additionally, the court reasoned that the plaintiff's interpretation "would deter service providers from regulating" offensive content for fear of facing distributor liability.[79]

Finally, the court reasoned that this interpretation would create a flood of lawsuits resulting in an impossible burden for ISPs.[80] The court stated that the plaintiff's interpretation would defeat the law's policy of encouraging the development of the Internet and new technologies because ISPs could not continue to grow in the face of endless lawsuits.[81]

After *Zeran*, courts dealing with Section 230 defamation claims have largely agreed with *Zeran*'s holding. In fact, this broad interpretation of Section 230 was stretched to its farthest possible lengths in *Blumenthal v. Drudge*.[82] In that case, the court granted summary judgment to AOL even though AOL contracted and paid for the allegedly defamatory gossip column that was at issue in the case.[83] Unlike *Zeran*, where the posts were written by anonymous users, the posts in *Drudge* were written by identifiable Internet users. Yet, the court still refused to impose liability even though the ISP in that case promoted the problematic content and paid the original content-creator.[84]

In practical effect, *Zeran* created a three-part inquiry:

> (1) is the defendant an 'interactive computer service' within the meaning of Section 230; (2) does the plaintiff's cause of action treat the defendant as a publisher; and (3) was the content at issue in the suit 'provided by another information content provider?' If a plaintiff's cause of action against a website or other computer service treats that service as a publisher of third-party-created-content, the defendant will be immune from liability—end of story.[85]

B. Lingering Questions in a Post-Zeran World

After the court decided *Zeran*, the plaintiff, Kenneth Zeran, began advocating for a change in the law. He believes that the right approach is to treat "all platforms as distributors . . . providing them with protections until they are notified of the allegedly illegal user content."[86] According to

77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998).
83. *Id.* at 53.
84. Kane, *supra* note 16, at 483.
85. 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, 868 (2010).
86. Kosseff, *supra* note 5.

Zeran, "he never would suggest that platforms have an obligation to proactively detect illegal content; rather, they should be able to handle complaints and remove harmful content after being notified."[87] Specifically, Zeran contends that "[t]he operative word isn't *monitoring* or *filtering* . . . [i]t's *response*."[88]

Zeran is justified in questioning the outcome of his case because it led to troubling policy questions and conflicts. Perhaps the most obvious is that the *Zeran* interpretation of Section 230 immunity is a license for bad actors to spread defamatory information. The *Zeran* decision demands no personal responsibility for those who act with intention, particularly because the statute provides user immunity.[89] Users are situated differently than ISPs in substantial ways that do not align with the holding in *Zeran*. Individual users are not faced with the task of monitoring a large volume of third-party content; rather, they are only tasked with regulating themselves. Additionally, users may be more likely than ISPs to actively engage in malicious propagation of defamatory or offensive material and bear personal responsibility for the content they distribute.

An additional concern with continuing to adhere to the holding in *Zeran* is the rapidly evolving nature of the Internet, which has grown out of "its infancy . . . into a vigorous and muscular adolescent."[90] The Internet is a different medium than it was when Congress enacted Section 230 and when the court decided *Zeran* twenty-four years ago. The policies which were adhered to in the 1990s are arguably out of touch with the state of the Internet today. For example, the drafters of Section 230 worried about ISPs being able to monitor massive amounts of content.[91] However, today ISPs have the ability to do this, mostly through notification systems that are employed by users.[92] These systems allow users to flag content that goes against the platform's established guidelines.[93] ISPs hire individuals, who serve as "fact checkers," to monitor content as well as remove potentially misleading or false information.[94] These new realities demonstrate that responding to user concerns over defamatory material is no longer an impossibility for ISPs. While the Internet has "continue[d] to serve as a valuable facilitator of free expression . . . it has now become

87. *Id.*

88. *Id.*

89. 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher . . . .").

90. Lee, *supra* note 25, at 491.

91. Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).

92. *See, e.g.*, *How Our Fact-Checking Program Works*, FACEBOOK JOURNALISM PROJECT (Aug. 11, 2020), https://www.facebook.com/journalismproject/programs/third-party-fact-checking/how-it-works [https://perma.cc/YLU9-PQGV] [hereinafter FACEBOOK JOURNALISM PROJECT].

93. *Id.*

94. *Id.*

such a robust and integral part of modern life that it can safely be subjected to at least minimal regulation."[95]

Moreover, Section 230 is premised on the notion that Internet speech deserves special protections because the Internet is a special forum for the exchange of robust and diverse ideas.[96] However, the courts and Congress have not sincerely questioned the truth of this proposition. Why is Internet speech special? Why do ISPs deserve more rigid protections than publishers in the non-virtual world when Internet defamation can cause even more damage to the victim?[97] This is perhaps another example of how notions about the Internet in the 1990s no longer reflect the state of the Internet today.

Surprisingly, despite the policy decision to protect ISPs from liability, ISPs are given explicit permission to remove content as they see fit. This permission is granted in Section 230(c)(2) and allows ISPs to act as a publisher and remove content for any reason as long as they perceive it to be "objectionable."[98] This provision of Section 230 seems to render (c)(1) superfluous. "If providers who choose to censor third-party-created content are already immune under subsection (c)(1) because the content is not their own, then what can be the purpose of subsection (c)(2), which grants immunity if they choose to censor?"[99] This provision poses more questions than it solves problems for three reasons. First, the statute imposes a "good faith" standard on the provider or user, as well as a subjective standard of what they consider to be "obscene, lewd . . . or otherwise objectionable."[100] This part of the law maximizes ISP control of their platforms to take down what they please, completely at their discretion, which could undeniably have the effect of "chilling" Internet speech. This seems completely contrary to at least two of the statute's stated goals: maximizing user control and maintaining robust Internet speech.[101] Second, ISP liability is not consistent with how they are treated. Section 230(c)(2) explicitly gives ISPs publisher-like editorial control, while (c)(1) bars their treatment as publishers. Third, as part of the CDA, these sections read together are contrary to the stated goals of the Act.[102] The original goal was to shield minors from harmful material on the Internet.[103] Congress sought to achieve this by criminalizing "the

95. Dickinson, *supra* note 85, at 874.
96. 47 U.S.C. § 230(a)(3).
97. *See, e.g.*, Hill, *supra* note 3.
98. 47 U.S.C. § 230(c)(2)(A).
99. Dickinson, *supra* note 85, at 869.
100. 47 U.S.C. § 230(c)(2)(A).
101. 47 U.S.C. § 230(b)(2)–(3).
102. Dickinson, *supra* note 85, at 870.
103. Reno v. ACLU, 521 U.S. 844, 849 (1997).

'knowing' transmission of 'obscene or indecent' messages."[104] In contrast, Section 230 immunizes ISPs when they leave up offensive material.[105]

Those who advocate for maintaining Section 230 as it is written would say that (c)(2) solves part of the *Stratton Oakmont* dilemma.[106] In that case, the court held Prodigy liable for the defamatory content on its bulletin board because it placed itself into the role of a publisher by actively screening messages.[107] The decision in *Stratton Oakmont* provided a disincentive to others like Prodigy to filter any content for fear of litigation. Section 230(c)(2) hopes to prevent this same result by allowing self-regulation. Congress wanted to encourage ISPs to self-regulate at their own liberty without worrying about First Amendment claims.[108] However, (c)(2) does nothing to protect defamed individuals. Why would an ISP self-regulate if there were no consequences (under (c)(1)) should it decide not to? Market forces could arguably motivate an ISP to remove objectively obscene content that the average user would not want to see (such as grotesque images or language) but might not motivate them to remove content that defames one individual. Without the threat of a lawsuit, an ISP has nothing to lose by keeping the material online; why would it waste its time with removal?

III. PROPOSED SOLUTIONS

There is a myriad of problems with the current status of Section 230 which cannot be remedied with a one-size-fits-all solution. Before any type of reform takes place, the legislature must reexamine what general policy goals should be prioritized going forward, given what we know about the Internet today. Is the main goal to maximize user control and protect Internet speech at all costs, defamation victims be damned? If so, (c)(2) must be reconsidered because of the power it gives ISPs to control speech. Conversely, Congress could attempt to balance the interests of free speech and defamation, as lawmakers and courts have attempted to do throughout history. That is a much more sensible policy solution, especially given what we know about how much damage the Internet can do to one's reputation.

There are many solutions that can be implemented to better align Section 230 with traditional defamation laws, Section 230's original policy goals, and the Internet policies lawmakers should be pursuing. This

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104. *Id.* at 859.

105. *See* 47 U.S.C. § 230(c)(2)(A).

106. *See supra* Part I.C.

107. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995).

108. Lee, *supra* note 25, at 474.

Note offers four possible changes to Section 230 to achieve these goals: first, interpreting Section 230 narrowly; second, revising Section 230(c)(2) so that holistically, the entire law is more consistent with the original policy goals of promoting robust Internet speech and maximizing user control; third, revising Section 230 to impose user liability; and finally, imposing ISP liability using the Digital Millennium Copyright Act as a model.

A. A Narrower Construction

The interests of defamation victims can be balanced with original Section 230 policies by changing the way the law is currently interpreted to include distributor liability. The original policies include preserving the free market as it currently exists;[109] promoting the "continued development of the Internet and other interactive . . . media"[110]; and encouraging "the development of new technologies which 'maximize user control.'"[111] This can be accomplished without any changes to the language of the statute. Currently, broad immunity is granted to ISPs, whereas a different reading could attach significance to the fact that the word "distributor" is not included in the language of Section 230.[112] Under a narrower construction, if courts find distributors are not included under Section 230, distributors would be liable based on the knowledge they had about the defamatory posting at the time. This interpretation is completely plausible because of its consistency with common law, which recognizes a legal distinction between publishers and distributors.[113] In fact, Congress could have been aware of this distinction when it drafted Section 230. There is no need to assume, as the court in *Zeran* did, that the underlying desire to protect the First Amendment was also supposed to totally sacrifice the competing value of defamation laws,[114] especially because an alternate interpretation is entirely plausible: distributors should not be included within this broad immunity because they do not fall under the umbrella term of a "publisher."[115]

If this interpretation prevails, the result in *Zeran* would have been more satisfactory. In that case, despite the plaintiff continuously notifying AOL of the online harassment he was experiencing, AOL was able to escape liability for allowing online defamation because of Section 230

109. 47 U.S.C. § 230(b)(2).
110. 47 U.S.C. § 230(b)(1).
111. 47 U.S.C. § 230(b)(3).
112. *See* 47 U.S.C. § 230(c)(1).
113. *See* RESTATEMENT (SECOND) OF TORTS § 581(1) (AM. L. INST. 1977).
114. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir.1997).
115. *See* RESTATEMENT (SECOND) OF TORTS § 581(1) (AM. L. INST. 1977).

protections.[116] Under a narrower construction, if the court characterized AOL as a distributor, it would be liable based on the knowledge it had about the defamatory posting at the time. AOL employees acquired this knowledge when the plaintiff notified them about the problematic posts.[117] The plaintiff would have well deserved recourse in a situation in which it was clear he was being defamed anonymously with AOL being the only avenue for restraining the problem.

Additionally, the result in *Cubby* would remain undisturbed. In that case, CompuServe contracted with a separate entity to monitor its platform and thereby did not know or have reason to know of any of the defamatory postings at issue.[118] Under this proposed interpretation, because CompuServe would not have the requisite knowledge required to be classified as a liable distributor, it would not have been liable.[119]

The main objection to a narrower construction of Section 230 immunity is that the result in *Stratton Oakmont* would be the same, but Congress enacted Section 230 to overturn that decision. However, this is not necessarily true. In *Stratton Oakmont*, the court held that because Prodigy represented itself as controlling the content on its message boards, it was liable as a publisher of the defamatory information.[120] If the case was decided in a post-Section 230 world while applying a narrower interpretation, it is possible that Prodigy would have been granted Section 230 immunity because it would still be classified as a publisher, not a distributor. Prodigy was determined by the presiding court to be a publisher because it publicly represented itself as controlling the content on its message boards, thereby accepting the highest degree of editorial control and the highest standard of liability.[121] Thus, Congress' initial concerns about *Stratton Oakmont* are not reasons against a narrow construction because even under a narrower construction of Section 230 allowing for distributor liability, Prodigy would not be liable because of their classification as a publisher, which is explicitly immunized in the language of Section 230.[122]

However, it would be a mistake not to mention the potential problems with a narrower construction, especially as it relates to *Stratton Oakmont*. It may not be fair to compare that case with *Zeran*, which is an

116. *Zeran*, 129 F.3d at 328.

117. *Id.* at 329.

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

119. RESTATEMENT (SECOND) OF TORTS § 581(1) (requiring that it must *know* or have *reason to know*).

120. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995).

121. *Id.* at *4–5.

122. *See* 47 U.S.C. § 230(c)(1).

ethically clearer case. In *Zeran*, the defamatory posting served little First Amendment value—it was a prank which contained demonstrably false information resulting in extreme harassment.[123] However, in *Stratton Oakmont*, the opposite is true. The postings in that case accused others of criminal behavior and lying, [124] which (if truthful) does have value in becoming public knowledge. Furthermore, a narrower construction in a case that is more similar to *Stratton Oakmont* could lead to puzzling results: why should a publisher who retains more editorial control over content be subjected to immunity, whereas distributors with less control can face liability if they have the requisite knowledge? Such an interpretation could also prompt every ISP to either clearly establish themselves as publishers and be granted immunity or shield themselves from any knowledge about what is posted to avoid distributor liability, thereby inhibiting any incentives it may have had to engage in self-policing.

These are valid concerns that would render a narrower construction essentially useless. However, ISPs already have no incentive to self-police when it comes to a defamed individual, as seen in *Zeran*.[125] Under Section 230(c)(1), nothing will happen to an ISP if it does not act because it will not be treated as the "publisher or speaker" of the defamatory information.[126] Additionally, if an ISP classified as a distributor intentionally shields itself from having knowledge, it may still be liable if there were *reason to know* of a post's defamatory nature.[127] The "reason to know" standard could prevent ISPs from intentionally ignoring posts because in certain situations, an ISP may still have reason to know about defamatory content (such as in *Zeran* where the plaintiff had notified AOL of the problem), which would subject it to liability despite not having actual knowledge.[128] This standard and market forces—which will encourage ISPs to invoke some level of content moderation in order to attract and obtain user traffic—will prevent ISPs classified as distributors from intentionally ignoring postings to avoid liability. The market will not allow an ISP to plead ignorance if the goal of an ISP is to run a profitable Internet service, and in turn ISPs cannot claim ignorance when they have reason to know.

Additionally, Congress can justify imposing notice liability on distributors while granting publishers immunity. If the goal is to encourage

123. *See generally* Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir.1997).

124. *Stratton Oakmont*, 1995 WL 323710, at *1.

125. The content posted was not of an objectively obscene nature; rather, the harm was concentrated on one individual which provided no incentive for AOL to remove the post.

126. 47 U.S.C. § 230(c)(1).

127. RESTATEMENT (SECOND) OF TORTS § 581(1) (AM. L. INST. 1977).

128. *Id.*

self-policing and minimal government interference, that encouragement could be realized by not faulting ISPs who participate in this type of monitoring for some instances that get overlooked, assuming it has made a good faith effort. A distributor, on the other hand, has much less responsibility and can better monitor content since it is only required to act if something is specifically brought to its attention. Judicial discretion could be applied in these situations: the more responsibility an ISP takes on in self-policing, the more generous a judge should be in excusing mistakes made in good faith. If the ISP takes a more hands-off approach, it will be expected to investigate and act reasonably when notified because it has not already taken matters into its own hands.

A. Reconsidering and Revising Section 230(c)(2)

Another suggested solution is a revision to Section 230(c)(2). This section is puzzling when compared to (c)(1) because it contradicts what is arguably the most important policy behind Section 230: maintaining robust Internet speech.[129] While (c)(1) does not treat an ISP as a publisher or speaker of third-party content, (c)(2) allows them to act as publishers by allowing them to remove content they find to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[130] The issue with the wording of (c)(2) is the catchall phrase, "otherwise objectionable."[131] This essentially gives ISPs publisher-like power over third-party content, while (c)(1) prevents them from facing legal culpability for their content, thereby giving ISPs the ability to control the free flow of information. The amount of control ISPs have under (c)(2) could have other downstream impacts on speech in a free society. For example, ISPs could have a strong influence "on shaping independent thought, market access, consumer behavior, election integrity and speech . . . . In a very real way, these platforms are transforming the nature of what it means to be 'free' in a free society."[132]

The more companies that engage in moderating behaviors, the more we move away from the original policy behind the law: ensuring true diversity in Internet discourse.[133] Giving ISPs this privilege in conjunction with Section 230(c)(1) allows them to be gatekeepers without legal accountability. As such, policymakers should remove the contradicting

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129. 47 U.S.C. § 230(b)(2); *see also* 47 U.S.C. § 230(a)(3).

130. 47 U.S.C. § 230(c)(2)(A).

131. *Id.*

132. Rachel Bovard, *Section 230 Protects Big Tech from Lawsuits. But It Was Never Supposed to Be Bulletproof*, USA TODAY (Dec. 13, 2020), https://www.usatoday.com/story/opinion/2020/12/13/section-230-big-tech-free-speech-donald-trump-column/3883191001/ [https://perma.cc/LPJ3-67HP].

133. *Id.*

language in Section 230(c)(2) to promote Internet speech. By removing the term "otherwise objectionable" from 230(c)(2) and making the existing list exhaustive, lawmakers can limit the reasons an ISP may lawfully remove content. Then, an ISP can be held accountable when removal was not sufficiently based on one of the listed reasons.

There are two additional reasons for amending Section 230(c)(2) that do not relate to defamation. First, the juxtaposition between Sections 230(c)(1) and 230(c)(2) highlights the contradictory nature of Section 230 in its explicit language and purported policy. This contradiction further shows that Congress did not intend Section 230 to fully upend common law. Second, there should be regulations on platforms that control such a large percentage of information because of the risk of drowning out other voices. The First Amendment becomes obsolete if that right is subject to the discretion of the Big Tech oligarchy. By removing the catchall phrase "otherwise objectionable" and maintaining an exhaustive list of content categories appropriate for removal, ISP control would be limited and user control would be maximized, resulting in protection of the right to free speech and a limit to ISP discretion. Furthermore, defamatory content should be included in that exhaustive list.

B. Imposing Distributor Liability on Users

A third suggestion is to remove user immunity from Section 230. The explicit language of Section 230 grants user immunity along with ISP immunity.[134] The term is not defined but it has been given its common meaning; individuals who choose to participate in online forums.[135] The presumed reason for its inclusion is contained in the statute itself: maximization of user control.[136] Users should feel free to disseminate information from third parties, thereby empowering Internet speech.[137]

While user immunity is enumerated in the statute, it is yet another policy contradiction when considering the justifications for Section 230 immunity. Particularly, individual users are not comparable to ISPs under the analysis in *Zeran*. For example, the *Zeran* court was concerned that ISPs could not monitor and respond to massive volumes of third-party postings.[138] However, users are not similarly situated because they are only responsible for regulating their own online behavior. Additionally, ISPs typically bear less responsibility for third-party content than users because

134. 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher . . . .").

135. Barrett v. Rosenthal, 146 P.3d 510, 513 (Cal. 2006).

136. *See* 47 U.S.C. § 230(b)(3).

137. *Barrett*, 146 P.3d at 516.

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

ISPs are more likely to distribute information passively through its users, whereas individual users are more likely than ISPs to act with malicious intent when distributing defamatory information.

The above differences seem to indicate that users should face some type of legal responsibility for knowingly disseminating defamatory information on the Internet, just as they would in the non-virtual world. Section 230 as it is currently written has the potential to serve as a license for bad actors to knowingly and intentionally engage in this damaging behavior. If a user had the requisite knowledge that the content they distributed was defamatory, distributor liability is appropriate and should be imposed.

Imposing distributor liability on users would not have a "chilling" effect on Internet speech because, like distributor liability in the non-virtual world, the burden of proof for imposing distributor liability in a defamation case is very high. The Restatement (Second) of Torts establishes that a distributor "is subject to liability if, but only if, he knows or has reason to know of its defamatory character."[139] This standard deters litigants from bringing defamation suits because the burden of proof is substantial.[140] Also, the fact-finding process in a defamation lawsuit is extensive and costly.[141] Individual Internet users who become defendants in defamation cases are unlikely to have the funds to cover a judgment in the plaintiffs favor (especially after paying for litigation). These two factors prevent truly frivolous defamation suits from actually making it to trial and do not have a profound effect on speech. The same is true for a lawsuit based on Internet defamation. There will not be a lawsuit every time defamation occurs online for precisely the same reasons why there is not a lawsuit every time defamation occurs in print.

User liability may also solve part of the dilemma faced by ISPs. If distributor liability deters a user from disseminating defamatory information, presumably there will be less defamatory content for ISPs to respond to. As noted earlier, users are much more likely to engage in active and malicious distribution of defamatory material, whereas ISPs tend to take a more passive role. If users are deterred with legal consequences,

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139. RESTATEMENT (SECOND) OF TORTS § 581(1) (AM. L. INST. 1977).

140. *See* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 875 (2000).

141. David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U. L.J. 1207, 1297 (1995) ("[I]f you add up all the litigation costs and the money that is actually paid to plaintiffs—if you add up all the money that both the plaintiff and the defendant have thus spent as a result of the litigation—somewhere between 3.5% and 8% of that goes to the plaintiff, and over 90% . . . go to legal fees and expenses.").

there will theoretically be less defamatory content circulated in the first place.

A legal deterrent is necessary for online users because it is vital that the law encourages individuals to take responsibility for their actions. As technology develops, and as more communications occur online, regulations that hold individuals responsible for online behavior become more necessary. Whether perpetrators are acting online or not is irrelevant to whether they are responsible for their actions. Therefore, imposing notice-based distributor liability on users of Internet services could reinforce this personal responsibility and prevent some online defamation from occurring in the first place.

C. Imposing Distributor Liability on ISPs Using the DMCA

Although imposition of user liability makes sense from a policy standpoint, it may not yield satisfactory results for the victim. If a plaintiff can overcome the high standard of proof and cover the costs of defamation litigation, a defendant who is an individual user is unlikely to have the funds to make a lawsuit worthwhile. Therefore, victims of online defamation should have some avenue of legal recourse against ISPs when they can meet the high standard of proof and classify the ISP as a distributor.

In *Barrett v. Rosenthal*, the California Court of Appeals pointed out an interesting contrast between Section 230 immunity and another form of immunity granted under the Digital Millennium Copyright Act (DMCA):

> The DMCA immunizes providers who transmit material that infringes the rights of the holder of a copyright if the provider did not originate the infringing content, has no editorial control over the material, does not know the material is infringing or have reason to know, acts expeditiously to remove the material after learning of the infringement, and receives no financial benefit from the infringing activity.[142]

The *Barrett* court pointed out that liability allowed under the DMCA is similar to distributor liability under common law because a distributor is classified as someone with little editorial control over the defamatory material; knowledge of the defamatory nature of the material is a prerequisite to liability. [143] Additionally, the court stated that DMCA

142. Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142, 158 n.11 (Cal. Ct. App.), *as modified* (Feb. 3, 2004), *review granted and opinion superseded*, 87 P.3d 797 (Cal. 2004), and *rev'd*, 146 P.3d 510 (Cal. 2006) (citing 17 U.S.C. § 512(a)–(d)).

143. *Id.*

liability might demonstrate that "Congress d[id] not feel this level of liability [would] unduly chill Internet communication."[144]

The DMCA is a helpful model that can be used to implement notice-based liability on ISPs who qualify as distributors thereby making Section 230 more consistent with common law. "The DMCA conditions ISP liability for online infringement of copyright-protected works on the service provider's actual or constructive knowledge of infringement."[145] Similarly, Section 230 could be revised so that ISPs would only face liability when they failed to remove defamatory content based on sufficient notice. Therefore, the plaintiff's burden would be to demonstrate that an ISP had the necessary knowledge about the defamatory content and still failed to take it down.

A possible revision to Section 230 based on the DMCA could include a specific process on how to give the requisite notice to ISPs. Then, when an ISP receives notice, the ISP must act reasonably to remove the defamatory content, and if not, face liability. To balance First Amendment concerns, a process allowing the accused to defend their use of the allegedly defamatory content should be included in the revision. A common critique of the DMCA is that it "treats the fair user and the infringing user exactly the same way; it denies both users the opportunity to defend their respective uses before takedown."[146] The same critique could apply to a revised Section 230: someone who distributes content that is not defamatory would face the same legal consequences as a person spreading truly defamatory information. For this reason, and because of the particularly delicate balance between defamation and the First Amendment, there should be accessible options for the person defamed to request removal *and* for the person accused of defamation to contest removal.

Notification systems do not place a substantial burden on ISPs because many already have notification systems in place that allow users to report certain objectionable material.[147] The problem with defamation online is the lack of incentive ISPs have to remove it. A notification provision added to Section 230 would provide that incentive and allow for victims of defamation, who can meet the high standard of proof that distributor liability requires, to recover against ISPs that do not act reasonably after receiving notice of defamatory material on their service.

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144. *Id.*

145. Vanessa S. Browne-Barbour, *Losing Their License to Libel: Revisiting § 230 Immunity*, 30 BERKLEY TECH. L.J. 1505, 1554 (2015).

146. Charles K. Lane, *The DMCA's Safe Harbor Provision: Is It Really Keeping the Pirates at Bay?*, 14 WAKE FOREST J. BUS. & INTELL. PROP. L. 192, 205 (2013).

147. *See, e.g.*, FACEBOOK JOURNALISM PROJECT, *supra* note 92.

To avoid arbitrary removals, as Section 230 in its current form attempts to prevent, "reasonable action" must have a clear definition that is articulated in the statute itself. The term "reasonable action" still gives ISPs discretion to act in many forms depending on the circumstances. For example, if a post is not taken down immediately, an ISP can attach a notice to the post which reads "this post is subject to investigation because it possibly contains defamatory content."[148] Then, reasonable action would constitute conducting a good-faith investigation and making a determination about removal. The ISP will not face liability if it conducted a good faith investigation on which they based their decision, whether or not it removes the post. On the other hand, if the potentially defamatory post is removed immediately, the poster should have an avenue for contesting removal clearly outlined in Section 230 (as previously suggested).[149]

Another possible revision to Section 230 is to require ISPs who fail to establish clear guidelines for notification and removal to follow the notice take down procedures outlined in a revised Section 230. This would allow (and encourage) ISPs to set up their own reasonable procedures for dealing with a complaint of defamation. An ISP will therefore become open to liability if they fail to establish procedures and do not abide by the procedures outlined in the statute, or if the plaintiff can demonstrate that an ISP's established procedures are not reasonable, not followed, or applied improperly. This way, a victim of online defamation will have options and be able to bring suit whether or not an ISP decides to create its own guidelines for handling defamation complaints.

CONCLUSION

The language in Section 230 has made it difficult for a plaintiff to recover damages for defamatory statements made by third-party users online. The courts' broad construction of Section 230 has produced troubling results that completely reject traditional defamation laws and allow bad actors to escape responsibility for their behavior online. As more of our communications move online, it is vital that Congress amends Section 230. Courts may also address these concerns by adopting a narrower construction of Section 230 that allows for the imposition of distributor liability. Additionally, Congress can change the text of Section 230 to include distributor liability. To further clarify Section 230, Congress should first revise Section 230(c)(2) to dispose of contradictions

148. This is similar to the fact checking feature ISPs have recently been using. A label will accompany a posting that the ISP suspects contains false information, warning other users of what it possibly contains.

149. *See supra* pp. 26–27.

within Section 230, thereby making the law more holistically consistent in promoting Internet speech. As a general policy, it is important to make sure ISPs take responsibility for the platforms they govern and not become cultural gatekeepers. Second, Congress should remove the word "user" from Section 230(c)(1), which would allow for the imposition of user liability. This change would encourage individuals to act responsibly online and likely eliminate much of the online defamation that occurs. Finally, Congress should use the DMCA as a framework for notice take down provisions under Section 230 and allow ISP liability based on notice.

Each of these proposals is more consistent with traditional defamation laws than Section 230 in its current form. As a society, we should not allow modern forms of communication to complicate the simple notion that individuals should have avenues of recourse for defamation. The tort of defamation, whether it occurs online or in-person, should allow individuals to protect their reputation, which in turn, protects their mental health, livelihood, and relationships with others.