

Picking up the Pieces: Finding Unity after the Communications Decency Act Section 230 Jurisprudential Clash

Ryan French

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Picking up the Pieces: Finding Unity after the Communications Decency Act Section 230 Jurisprudential Clash

I. INTRODUCTION: TRADITIONAL LIABILITY MEETS THE INTERNET

In January 1985, Michael Savage submitted a personal service classified advertisement to *Soldier of Fortune* magazine.¹ Savage was a young Vietnam veteran seeking employment as a bodyguard, courier, or mercenary—jobs that could utilize his “special skills.”² The overwhelming majority of the 30 to 40 weekly phone calls he received were solicitations for his participation in criminal activity.³ Succumbing to the lucrative nature of these jobs, Savage accepted one in August 1985.⁴ He and an accomplice were to kill Richard Braun, an Atlanta businessman whose own business partners had hired Savage.⁵ On August 26, 1985, as Braun was driving down the driveway of his home with his 16-year-old son, Savage’s accomplice stepped in front of Braun’s car and repeatedly fired his pistol into the car.⁶ A wounded Braun rolled out of his vehicle onto the ground, where Savage’s partner shot him twice in the head.⁷

Braun’s sons brought suit against *Soldier of Fortune* magazine, alleging its negligence in publishing Savage’s “gun for hire” ad.⁸ The Eleventh Circuit affirmed the finding that Savage’s ad should have alerted a reasonably prudent publisher to the risk that Savage was soliciting illicit jobs.⁹ As the publisher of Savage’s ad, the magazine was liable for \$2 million in damages for the wrongful death of Richard Braun.¹⁰

Twenty-five years later, murder remains a danger in every U.S. city, and the Savage scenario is not unrealistic. The United States has embraced the Internet revolution, with its citizens quickly adapting their businesses and social lives to the opportunities of

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1. Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1112 (11th Cir. 1992).

2. *Id.* (“GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete [sic] and very private. Body guard, courier, and other special skills. All jobs considered. [contact information].”).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 1122.

10. *Id.* at 1114.

cyberspace. At least one tech-savvy Savage imitator has already offered his mercenary services online.¹¹ In fact, the *Soldier of Fortune* scenario could occur almost identically on the Internet today, but with one important difference: the murder victim's family would probably recover nothing from the website. As long as the website did not help create the ad, it would be completely protected from liability by the Communications Decency Act ("CDA").¹²

The CDA is an unyielding federal statute that protects websites from liability for anything third parties create or post online.¹³ It contains one of the most powerful legal immunities available—a complete protection for any content placed on a website by a third party, regardless of the website's awareness of the content.¹⁴ The CDA is a formidable legal hurdle to plaintiffs who have suffered injury via the Internet. Victims of online housing discrimination,¹⁵ cruel gossip,¹⁶ and horrendously defamatory Internet profiles¹⁷ are all equally unable to sue the websites that host the offending content.

However, there are many who question the far reach of the CDA's protections. These extreme scenarios seem to spout injustice; but not all is as it seems. The immunity provided by the statute's modest four sentences has inspired volumes of

11. In 2008, the disgruntled girlfriend of an Irish millionaire was sentenced to six years in prison after arranging for the "accidental death" of her lover and his two sons. Although she stumbled upon a willing assassin through a "Hitmen for Hire" website, the plot was foiled. Henry McDonald, *'Caring, Loving and a Decent Lady'—Millionaire Pleads for Woman who Sent Hitman to Kill Him*, THE GUARDIAN (U.K.), Nov. 4, 2008, <http://www.guardian.co.uk/world/2008/nov/04/sharon-collins-pj-howard-hitman>.

12. Or so the overwhelming majority of courts have suggested. *See, e.g., Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1166 (9th Cir. 2008) (granting immunity if a website "does not create or develop the information . . .") (quotations and brackets omitted).

13. 47 U.S.C. § 230 (2006).

14. *See* 47 U.S.C. § 230(c) (2006).

15. *See Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008) (granting classified ad website immunity from liability for discriminatory comments of its users who were seeking roommates with certain sexual, racial, or religious qualities).

16. *See Sunny Hostin, Online Campus Gossips Won't Show Their Faces*, CNN.COM (Mar. 17, 2008), http://articles.cnn.com/2008-03-17/justice/sunny.juicy_1_web-site-posts-page-six?_s=PM:CRIME (discussing the inability of victims to recover against gossip websites that allow anyone to anonymously post rumors about anyone else).

17. *See, e.g., Zeran v. AOL, Inc.*, 129 F.3d 327 (4th Cir. 1997) (granting website immunity for a fake profile that was opened on the website under someone else's identity to mock the Oklahoma City bombing).

interpretive guidance.¹⁸ Without any Supreme Court decision to guide the federal circuits, the current CDA jurisprudence is an amalgamation of interpretive strategies and statutory approaches that appear to be hopelessly intertwined. If Savage were to post his advertisement online today on Soldieroffortune.com (“SOF.com”), the website’s liability might be different depending on which interpretive approach the court applied.¹⁹ One court might find that as long as Savage’s ad was created without the website’s help, the website would be immune.²⁰ Another court might find that the website would lose its immunity if it knew about the ad’s existence,²¹ while yet another court might find that the website would gain immunity only by taking steps to restrict access to the ad.²² Finally, another court might find that even if the website helped Savage create the ad, it could still gain immunity if it took steps to restrict access to it.²³

Chiefly, this Comment posits that there is indeed one superior interpretation of the CDA, and that there is not nearly as much disagreement as courts have suggested. In order to bring consistency to the jurisprudence, courts must not only accept this approach, but also actively discard the remnants of failed approaches. Part II.A of this Comment lays the foundation of the CDA’s congressional development. Part II.B describes the jurisprudential development of the statute, with particular attention to three of the most prominent federal circuit cases that have interpreted it. In Part III, this Comment analyzes the differing approaches to the CDA—both the most widely accepted and the less prominent approaches. In Part IV, this Comment posits that a unified *Zeran*–publisher approach is best suited for adoption by all of the courts. Part IV also challenges those particular courts that have pioneered the jurisprudence to refine their methodology, renounce misleading reasoning, and finally bring harmony to CDA interpretation and application.

18. See, e.g., *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006) (overturning the state appellate court’s decision to adopt a different interpretation of the CDA); see also discussion *infra* Parts III–IV.

19. Where SOF.com is used in this Comment, the situations and web address are merely hypothetical. There is no evidence that such ads are placed on *Soldier of Fortune*’s website, and it appears that the website does not even permit classified ads to be displayed online. See *SOLDIER OF FORTUNE MAGAZINE*, <http://www.sofmag.com/> (last visited Oct. 22, 2010).

20. See discussion *infra* Parts III.A–B.

21. See discussion *infra* Part III.E.

22. See discussion *infra* Part III.C.

23. See discussion *infra* Part III.D.

II. A HISTORY OF CONFLICT: WHERE THE CDA BEGAN AND WHERE IT IS GOING

Only one section of the CDA, 47 U.S.C. § 230, concerns website immunity.²⁴ Passed by Congress in February 1996, § 230 originally served only as an amendment to the broader CDA.²⁵ Unlike the other provisions of the CDA, § 230 caused little stir during its swift passage through Congress.²⁶ Because of § 230's role as an amendment, it is first necessary to consider the background and history of its legislative context, the CDA.

A. *The Communications Decency Act*

On February 1, 1995, Senator J. James Exon introduced to the Senate what he characterized as the most important legislation on which he had ever worked²⁷—the Communications Decency Act.²⁸ Senator Exon and the bill's cosponsor, Senator Dan Coats, pointedly addressed the U.S. Senate, cautioning that the proliferation of online pornography was threatening to infect every computer and child in America.²⁹

1. *A Noble Cause*

To combat the perceived threat of rampant online pornography, Senator Exon proposed the heart of the CDA, a revision of 47 U.S.C. § 223. His revision extended the decency and obscenity standards that already protected cable and telephone users to a new telecommunication device—the Internet.³⁰ Senator Exon was primarily concerned with the ease with which children could access obscene material on the Internet.³¹ Many in the Senate shared Senator Exon's concerns, but many also disapproved of the sweepingly broad nature of his proposal.³² The Exon–Coats

24. 47 U.S.C. § 230 (2006).

25. Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 163, 172 (2006).

26. See H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.).

27. 141 CONG. REC. 15,505 (1995).

28. *Id.* at 3,203.

29. *Id.* Senator Exon introduced his legislation by announcing, “[T]he information superhighway should not become a red light district.” *Id.*

30. *Id.*

31. There is a disturbing amount of pornography on the Internet, Senator Exon reasoned, and it is never more than “a few clicks away from any child with a computer.” *Id.* at 16,009 (statement of Sen. Exon).

32. See, e.g., *Id.* at 16,013 (statement of Sen. Feingold). The Telecommunications Act of 1996, of which the CDA was only a part, actually

amendment made it a federal crime to display or describe “patently offensive” content to persons under age 18, or merely to knowingly transmit with a telecommunications device any “communication which is obscene or indecent.”³³

Some senators feared that the CDA’s language would be used to punish the messenger.³⁴ They likened its approach to holding the mailman liable for the contents of the mail and feared an e-mail service could be held criminally liable for an offensive e-mail message.³⁵ In the end, the Exon–Coats language was largely incorporated into the final CDA.³⁶ However, to secure its passage, Senator Exon agreed to add what was, at the time, a deceptively uncontroversial House amendment: § 230.³⁷

2. *The Catalyst: Stratton Oakmont v. Prodigy*

On August 4, 1995, Representative Christopher Cox proposed an amendment to the Exon–Coats CDA bill.³⁸ Entitled “Online Family Empowerment,” the amendment was cosponsored by Representative Ron Wyden and sought to eliminate some of the perceived wording problems of the proposed CDA.³⁹ The Congressmen believed Internet services, website operators, and families were better situated than the government to control obscene or offensive online content.⁴⁰ However, they worried that the existing legal scheme actually discouraged websites from participating in the content-monitoring process.⁴¹ They further worried that the Exon–Coats CDA revision only exacerbated this problem.⁴² Representative Cox pointed to a recent court case, *Stratton Oakmont v. Prodigy Services Co.*, which suggested that

contained a broad deregulatory scheme aimed at reducing government involvement in the telecommunications industry. *See* 142 CONG. REC. 2,042–43 (1996) (statement of Sen. Dole).

33. 47 U.S.C. § 223(a)(1)(B) (2002) (prior to amendment).

34. 141 CONG. REC. 22,046 (1995) (statement of Rep. Lofgren).

35. *Id.*

36. *See* 47 U.S.C. § 223 (2006); *Reno v. ACLU*, 521 U.S. 844, 859–60 (1997).

37. 47 U.S.C. § 230 (2006).

38. 141 CONG. REC. 22,044 (1995).

39. *Id.* at 22,044–46.

40. *See Id.* at 22,045.

41. *Id.*

42. *See id.*

courts would punish websites that tried to screen out offensive content far more harshly than those websites that did nothing.⁴³

In *Stratton*, a New York appellate court held Prodigy, a website operator, liable for defamatory comments posted by an anonymous user on the website's message board.⁴⁴ In similar cases, other courts had refused to find such liability, because the websites knew nothing of the content.⁴⁵ The *Stratton* court ironically reasoned that because Prodigy made efforts to screen inappropriate content, it therefore shouldered the burden of liability for any content that did get through its screening process.⁴⁶ Although the *Stratton* decision occurred in the context of defamation liability, it spurred fears that an online service provider might be held liable for any illegal content displayed using its service.⁴⁷ "[T]hat is backward," Representative Cox stated, because "[w]e want to encourage people like Prodigy . . . to do everything possible . . . to help us control [online content]."⁴⁸

3. *The Shield of § 230*

As a result, the Cox–Wyden amendment purported to do two things.⁴⁹ First, it would protect "computer Good Samaritans," online service providers that take steps to filter indecent or offensive material, from "taking on liability such as incurred in the *Prodigy* case."⁵⁰ Second, it would "establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet"⁵¹

Representatives Cox and Wyden feared that without their amendment, the CDA would discourage companies and individuals from developing or using technologies to screen indecent communications.⁵² After *Stratton*, such entities might fear liability for failed attempts at screening content.⁵³ Other representatives feared that courts might begin holding websites liable for all third-

43. *Id.*; *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. App. Div. 1995).

44. *Stratton*, 1995 N.Y. Misc. LEXIS 229, at *13–14.

45. *See, e.g.*, *Auvil v. CBS "60 Minutes,"* 800 F. Supp. 928, 931–32 (E.D. Wash. 1992), *aff'd*, 67 F.3d 816 (9th Cir. 1995); *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991).

46. *Stratton*, 1995 N.Y. Misc. LEXIS 229, at *10.

47. 141 CONG. REC. 22,045 (1995) (remarks of Rep. Cox).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *See id.*

53. *Id.*

party content, regardless of the website's actions.⁵⁴ The rest of the House apparently agreed, and the Cox–Wyden amendment subsequently obtained House approval by a vote of 420 to 4.⁵⁵ It was adopted into the Exon–Coats CDA modification with only minor changes.⁵⁶ With the passage of the CDA in February 1996, it became codified in 47 U.S.C. § 230(c):

(c) Protection for “Good Samaritan” blocking and screening of offensive material.

(1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—

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

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].⁵⁷

It is apparent from its structure that § 230(c) has two distinct parts. Section 230(c)(1) specifically provides only that a “provider or user of an interactive computer service” shall not be treated as a publisher or speaker of third-party content.⁵⁸ Whether this provision is merely descriptive or provides some kind of protection is one of the principal debates surrounding § 230.⁵⁹ Next, §

54. *See Id.* at 22,046 (Rep. Goodlatte remarked, “[t]here is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board.”).

55. *Id.* at 22,054.

56. H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.).

57. Title 47 U.S.C. § 230(c) contains the active provision of the Cox–Wyden amendment. Sections 230(a) and (b), respectively, contain the congressional findings praising the advancements offered by the Internet and the congressional policy statements encouraging the development of the Internet and fighting criminal activity. Section 230(d), not relevant here, contains an obligation to notify customers of parental control protections. Sections 230(e) and (f) contain certain exemptions and definitions, respectively.

58. 47 U.S.C. § 230(c)(1) (2006).

59. *See* discussion *infra* Parts III.A–C.

230(c)(2) specifically provides that a “provider or user of an interactive computer service” shall not be held civilly liable because of attempts to restrict content or to enable users to restrict content.⁶⁰ From its wording, § 230 therefore appears to immunize certain websites from two forms of liability: (1) the inequitable *Stratton* dilemma, whereby a website could be held liable as the publisher of all information because of its attempt to filter some of the information; and (2) liability to those whose content a website filters, although the content is constitutionally protected.⁶¹ Roughly translated, websites would not face liability for not blocking enough content *or* for blocking too much content.

The statute also makes a crucial distinction between two classes of cyber-entities, “interactive computer services” and “information content providers.”⁶² According to the statute’s definitions, any participant in the entire Internet connection process is presumptively an interactive computer service.⁶³ However, if interactive computer services or people accessing the service create any information, they acquire the status of information content provider.⁶⁴ Under § 230(c)(1), interactive computer services cannot be treated as the publisher or speaker of a content provider’s content.⁶⁵ Thus, the relevant distinction made by these terms is one of content creation. Individual websites fall into both of these categories. A website is the content provider of any content that it supplies, but it is only an

60. 47 U.S.C. § 230(c)(2) (2006).

61. *See* 47 U.S.C. § 230(c) (2006). This immunity effectively eliminates two disincentives websites might have to participating in the content-monitoring process: the fear of liability for not blocking enough, and the fear of liability for blocking too much.

62. 47 U.S.C. § 230(f)(2–3) (2006).

(2) *Interactive computer service*. The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) *Information content provider*. The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

There is a third cyber-entity defined in § 230(f), an “access software provider.” However, the statute indicates that this is but a sub-class of the “interactive computer service” category, and the only place in § 230 that access software providers are referenced is in the definition of interactive computer services. *See* 47 U.S.C. § 230(f) (2006).

63. *See* 47 U.S.C. § 230(f)(2006).

64. *See id.*

65. *See* 47 U.S.C. § 230(c)(1) (2006).

interactive computer service where it merely allows users to add information or post comments.⁶⁶

B. The Courts Square Off: The Jurisprudential Development of the CDA

The opposition and doubts that the Exon–Coats revision of CDA § 223 faced during its congressional passage soon proved to be well-founded. In fact, on the same day the CDA was signed into law by President Clinton, 20 plaintiffs filed suit, alleging the unconstitutionality of § 223.⁶⁷ It took only one week for a federal court to enter a temporary restraining order barring enforcement of the overly broad provisions of the statute.⁶⁸ However, § 230 remained untouched, and was suddenly detached from the problem it was intended to solve.⁶⁹

The CDA's passage soon had another unforeseen consequence. As the jurisprudential interpretation of the statute unfolded, the previously uncontroversial § 230 became the center of a heated debate.⁷⁰ As it turned out, the few sentences of § 230(c) were not so easily applied. Despite the plethora of cases interpreting it, a mere handful of these cases contain what are by far the most influential interpretations, applications, and limitations of the statute.

1. The Fourth Circuit Strikes First: Zeran v. AOL

Despite the obscenity- and indecency-oriented nature of the CDA, nothing in the wording of § 230 restricts its application to such situations.⁷¹ Section 230 saw its first interpretation in the case

66. Courts have had little trouble accepting this proposition. *See, e.g.*, *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008).

67. *Reno v. ACLU*, 521 U.S. 844, 861 (1997).

68. *ACLU v. Reno*, 1996 U.S. Dist. LEXIS 1617 (E.D. Pa. 1996). The Supreme Court eventually affirmed the same district court's finding of the unconstitutionality of the content-based indecency provisions of § 223. *Reno*, 521 U.S. 844, 885.

69. *See* Christopher Butler, *Plotting the Return of an Ancient Tort to Cyberspace: Towards a New Federal Standard of Responsibility for Defamation for Internet Service Providers*, 6 MICH. TELECOMM. & TECH. L. REV. 247, 256 (2000).

70. Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569 (2001).

71. *See* 47 U.S.C. § 230(c)(2)(A) (2006) (encompassing obscenity, filthiness, violence, harassment, and anything objectionable).

of *Zeran v. AOL, Inc.*, in which the plaintiff, Kenneth Zeran, was the victim of a cruel Internet hoax.⁷² An unknown perpetrator claimed to be Zeran and provided his contact information on an AOL online bulletin board that allowed users to post publicly available content.⁷³ On this forum, the perpetrator began advertising t-shirts and other merchandise “glorifying the bombing” of the Oklahoma City federal building in 1995.⁷⁴ After receiving dozens of threatening phone calls, Zeran learned of the source of the prank.⁷⁵ He immediately contacted AOL, demanding that it remove the postings.⁷⁶ However, even after being notified, AOL failed to prevent continued postings.⁷⁷ Zeran filed suit against AOL, alleging AOL’s negligence in failing to adequately respond to the malicious postings despite having been made aware of them.⁷⁸ In response, AOL claimed immunity under the newly enacted § 230.⁷⁹

The Fourth Circuit considered the extent to which § 230 forbade AOL from being held liable for the anonymously contributed content.⁸⁰ The court highlighted the importance of uninhibited Internet communication and determined that, accordingly, § 230’s immunity should be “broad.”⁸¹ “Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role.”⁸² Zeran’s claim would thus be barred if holding AOL liable placed it in the role of publisher.⁸³ To evade this reasoning, Zeran delved into the common law definition of “publishers,” claiming that AOL was not a publisher as recognized by the CDA.⁸⁴

Zeran contended that § 230(c)(1) applied only to a very precise notion of “publisher” that should be interpreted in the context of traditional defamation law.⁸⁵ Traditional defamation law allows for two different classifications of those who are responsible for disseminating and publicizing information.⁸⁶ The publisher

72. 958 F. Supp. 1124 (E.D. Va.), *aff’d*, 129 F.3d 327 (4th Cir. 1997).

73. *Zeran v. AOL, Inc.*, 129 F.3d 327, 329 (4th Cir.1997).

74. *Zeran*, 958 F. Supp. at 1126.

75. *Zeran*, 129 F.3d at 329.

76. *Id.*

77. *Id.* at 329.

78. *Id.* at 330.

79. *Id.*

80. *Id.*

81. *Id.* at 331.

82. *Id.* at 330.

83. *Id.*

84. *Id.* at 331–32.

85. *Id.*

86. *Id.* at 332.

classification is reserved for those persons or entities that actually communicate a given statement, like an author or a newspaper.⁸⁷ However, the classification of distributor is given to those persons or entities that are merely conduits for the publication efforts of someone else, and includes newsstands and booksellers.⁸⁸ The reason for the distinction lies in the respective degree of knowledge that distributors have compared to actual publishers.⁸⁹ Publishers are likely to be aware of the contents of their publications, whereas distributors cannot possibly be expected to know the contents of every publication they sell.⁹⁰ Although publishers of information are strictly liable for the contents of their communications, distributors are liable only if they are aware of defamatory statements.⁹¹

Zeran conceded that the CDA forbids holding AOL strictly liable as the publisher of the damaging comments.⁹² However, he claimed that he was not trying to place AOL in the role of “publisher,” and therefore it did not qualify for § 230’s protections.⁹³ Instead, Zeran argued, because AOL had actual knowledge of the comments, he was seeking only to hold AOL liable as a “distributor,” something that § 230 did not forbid.⁹⁴

Zeran’s argument did not persuade the Fourth Circuit.⁹⁵ It found that the distributor classification is merely one subset of the broad common law notion of a publisher.⁹⁶ More importantly, the court noted that Congress passed § 230 specifically to prevent websites from avoiding attempts to screen content.⁹⁷ The *Zeran* court concluded that distributor liability threatened this congressional goal because the prospect of liability for knowledge might discourage websites from allowing themselves to become aware of offensive content.⁹⁸

Suddenly, the difficulties of allocating responsibility on an anonymous forum like the Internet were a disturbing reality. If the websites could not be held liable for the content, then, quite often, nobody could. Only § 230(c)(2) explicitly precludes any civil

87. *Id.* at 331.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 331–32.

95. *Id.* at 332.

96. *Id.*

97. *Id.* at 332–33.

98. *Id.* at 333.

liability, and it is limited to Good Samaritan screeners; but the Fourth Circuit interpreted § 230(c)(1) as conferring a wholly separate immunity.⁹⁹ The court held that § 230(c)(1), “[b]y its plain language . . . 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.”¹⁰⁰

Courts have considered the *Zeran* decision to be the “fountainhead” of the “[n]ear-unanimous case law” holding that § 230 provides immunity to websites from lawsuits that seek to hold them liable for others’ contributions.¹⁰¹ However, *Zeran* has never gained complete acceptance among scholars,¹⁰² and some courts have signaled that they have no intention of adopting *Zeran*’s broad rule.¹⁰³

2. *The Seventh Circuit Answers: Doe v. GTE and Chicago Lawyers’ Committee v. Craigslist*

If the Fourth Circuit has taken the broadest view of § 230, the Seventh Circuit has taken the narrowest. In two separate panel opinions, Judge Frank Easterbrook has seriously questioned the validity of current interpretations of § 230 immunity.¹⁰⁴ In fact, writing for the Seventh Circuit, he questioned whether § 230(c)(1) actually creates any form of immunity.¹⁰⁵

In *Doe v. GTE and Chicago Lawyers’ Committee for Civil Rights v. Craigslist*, the Seventh Circuit noted the possibility of an alternative reading of § 230(c)(1) that does recognize some

99. *Id.* at 330.

100. *Id.*

101. Chi. Lawyers’ Comm. for Civil Rights Under the Law v. Craigslist, Inc., 461 F. Supp. 2d 681, 688–89 n.6 (N.D. Ill. 2006), *aff’d*, 519 F.3d 666 (7th Cir. 2008) (“Virtually all subsequent courts that have construed Section 230(c)(1) have followed *Zeran*.”); *see, e.g.*, Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142, 151–52 (Cal. Ct. App. 2004), *rev’d*, 146 P.3d 510 (Cal. 2006); Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003).

102. *See, e.g.*, David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147 (1997); Michael H. Spencer, *Defamatory E-Mail and Employer Liability: Why Razing Zeran v. America Online Is a Good Thing*, 6 RICH. J.L. & TECH. 25 (2000); David Wiener, *Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran?*, 39 SANTA CLARA L. REV. 905 (1999); *see also* Barrett, 9 Cal. Rptr. 3d at 154 n.8 (listing discordant analyses by scholars).

103. *See* Barrett, 9 Cal. Rptr. 3d at 154.

104. *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003); Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008).

105. *GTE*, 347 F.3d at 660.

protection, but not to the extent of *Zeran*.¹⁰⁶ Instead of an immunity for any information originating from third parties, the court reasoned that § 230(c)(1) may only prevent any form of liability for *publishing*.¹⁰⁷ The most obvious example of such liability is the defamation cause of action, which requires that someone actually *publish* the defamatory information.¹⁰⁸ However, this publisher immunity is also interpreted to prevent liability for any actions that are traditionally done by publishers, such as screening, displaying, removing, or editing content.¹⁰⁹ Withholding determination of the issue of § 230 immunity in *GTE*, the Seventh Circuit did not commit to this “publisher approach” until *Craigslist*.¹¹⁰ In *Craigslist*, the court found that classified ad website Craigslist.org could not be held liable for any of the discriminatory housing ads of its customers.¹¹¹ Because any theory of liability essentially punished the website for merely publishing customer ads, § 230(c)(1) precluded liability.¹¹²

3. *A New Battlefield: The Ninth Circuit and Fair Housing Council v. Roommates.com*

Unlike the Seventh Circuit, the Ninth Circuit did not purport to create a new interpretation of § 230, but it did suggest a limit to *Zeran*. It did so with a strict determination of whether a given website helped to create the content in question.¹¹³ By its plain language, § 230(c)(1) does not apply to every website or access provider.¹¹⁴ Immunity is available only to a website if it is not an information content provider, that is, if it did not create the illegal content in question.¹¹⁵

In *Fair Housing Council v. Roommates.com*, the Ninth Circuit, sitting en banc, determined that a website that requires third parties to create illegal content is to be considered the creator of that

106. *Id.*; *Craigslist*, 519 F.3d 666.

107. *GTE*, 347 F.3d at 660.

108. *Id.*

109. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). These activities are considered to be publisher actions, even if the cause of action does not specifically require the element of publishing. *See id.*

110. *Craigslist*, 519 F.3d 666.

111. *Id.* at 669–71.

112. *Id.* at 671.

113. *See infra* text accompanying notes 116–124.

114. 47 U.S.C. § 230(c)(1) (2006).

115. *See id.* (“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.”).

content as well.¹¹⁶ In *Roommates.com*, the website was accused of violating the Fair Housing Act, a federal law that forbids discrimination on the basis of certain protected traits in the context of housing.¹¹⁷ Roommates.com operated a website that served to match those offering roommates or living arrangements with those seeking them.¹¹⁸ An integral part of its registration process was a series of questions in which registrants were required to indicate their own gender as well as their preferences regarding a roommate's gender, sexual orientation, and parental status.¹¹⁹

In determining the applicability of § 230 immunity, the court did not hesitate to recognize the website's users, who indicate their discriminatory preferences, as content providers.¹²⁰ However, the court went a step further by also characterizing Roommates.com as a content provider.¹²¹ By leaving its users with only discriminatory alternatives, it had thus contributed to the development of discriminatory content and was outside the scope of § 230 immunity.¹²² This interpretation is potentially in conflict with a literal reading of the *Zeran* holding, which precludes all "liability for information that originates with third parties."¹²³ Thus, if a website encourages or induces illegal content, it may still be considered a de facto content provider.¹²⁴

III. AFTER THE DUST SETTLES: SALVAGING THE JURISPRUDENTIAL INTERPRETATIONS OF § 230

There is little doubt that § 230 has caused more controversy than Congress ever envisioned. From its uncontroversial roots, § 230 has quickly spawned a burgeoning record of judicial decisions and academic commentary. Although the jurisprudence has arguably followed the *Zeran* decision,¹²⁵ such a generalization

116. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1166 (9th Cir. 2008).

117. *Id.* at 1162 n.4.

118. *Id.* at 1161–62.

119. *Id.* at 1164–65.

120. *Id.* at 1165.

121. *Id.* at 1166.

122. *Id.*

123. *Zeran v. America Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997).

124. *See Roommates.com*, 521 F.3d at 1175 ("If you don't encourage illegal content, . . . you will be immune.").

125. *Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 688 (N.D. Ill. 2006), *aff'd*, 519 F.3d 666 (7th Cir. 2008); *see, e.g.*, *Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142, 151–52 (Cal. Ct. App. 2004), *rev'd*, 146 P.3d 510 (Cal. 2006); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).

masks a complicated and ongoing debate. Parts of this debate are obscure because different courts may reach the same conclusion with regard to the ultimate liability of similarly situated defendants, yet use wholly different interpretations of the statute. Many of the courts even cross-cite and quote conflicting analyses in other judicial opinions in support of their own opinions. Although the case law has not explicitly acknowledged all of them, there are no less than *five* distinct judicial interpretations of § 230, and each one of them alters the degree of protection given to a website.

A. The Fourth Circuit, Zeran v. AOL, and Third-Party Immunity: Is There a Victor?

As the first judicial decision to interpret § 230, *Zeran* both gained quick judicial acceptance and caused immediate controversy.¹²⁶ Its “third-party approach” has been characterized as the broadest possible interpretation of the CDA, but such complaints have done little to deter its influence.¹²⁷ At present, *Zeran*’s expansive holding has been adopted by as many as seven of the federal circuits.¹²⁸ Under *Zeran*’s third-party approach, § 230 does two things: (1) Section 230(c)(1) contains a broad immunity for any content originating with third parties, and (2) § 230(c)(2) contains a broad immunity for “Good Samaritan” content-blockers.¹²⁹ If the *Zeran* third-party approach were applied

126. See *Ben Ezra, Weinstein, & Co. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (fully adopting *Zeran* holding); *Sheridan*, *supra* note 102 (disapproving of *Zeran*’s broad interpretation).

127. See *Craigslist*, 461 F. Supp. 2d at 694 (“[C]ourts have merely latched on to *Zeran*’s language [to] grant broad, if not in fact, limitless, immunity . . .”).

128. See Chi. Lawyers’ Comm. for Civil Rights Under the Law, Inc. v. *Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008). The Seventh Circuit, while rejecting *Zeran*, explicitly attributed it to five federal circuits. *Id.* These five circuits are the Fourth, Tenth, Third, First, and Ninth Circuits. See *Zeran*, 129 F.3d 327 (4th Cir. 1997); *Ben Ezra*, 206 F.3d at 985 n.3 (10th Cir. 2000) (quoting *Zeran*); *Green v. AOL*, 318 F.3d 465, 471 (3d Cir. 2003) (quoting *Zeran*); *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418–19 (1st Cir. 2007) (impliedly adopting *Zeran*); *Batzel*, 333 F.3d at 1034 (9th Cir. 2003) (holding that § 230 provides broad immunity “when a third person or entity that created or developed the information” furnishes it to a website for publication). At least two other federal circuits—the Eighth and the Fifth—have adopted *Zeran*-type legal standards. See *Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010) (reaching a holding identical to *Zeran*); *Doe v. MySpace, Inc.*, 528 F.3d 413, 422 (5th Cir. 2008) (interpreting the CDA to “prohibi[t] claims against Web-based interactive computer services based on their publication of third-party content.”).

129. See *Zeran*, 129 F.3d 327.

to Mr. Savage's hypothetical Internet ventures, SOF.com would be completely immune from liability for Savage's ad because the ad content originated from a third party. *Zeran's* holding provides considerable protection to websites and applies even if the website is aware of the content.

B. The Seventh Circuit's Answer—Publisher Immunity

Zeran's third-party interpretation has had no shortage of critics. Judicial critics of *Zeran* have been fewer, but there are some courts that have fervently rejected its analysis. The most prominent of these is the Seventh Circuit Court of Appeals. Its rejection of *Zeran's* third-party approach may seem trivial, but understanding the Seventh Circuit's disagreement is vital to tracing its effects upon other decisions and other circuits.

1. No Truce: The Seventh Circuit's Holding in Craigslist

In *Chicago Lawyers' Committee v. Craigslist*, the Seventh Circuit specifically rejected the *Zeran* holding.¹³⁰ The district court placed particular emphasis on *Zeran's* extension of immunity from all "information originating with a third-party"¹³¹ The court perceived this holding as conflicting with the actual wording of § 230(c)(1), which only "bars those causes of action that would require treating an [interactive computer service] as a *publisher* of third-party content."¹³² According to the district court, the *Zeran* interpretation is unsupported by the language of § 230 and effectively creates a "limitless immunity."¹³³

The Seventh Circuit affirmed the district court's decision and explicitly rejected the third-party approach of *Zeran*.¹³⁴ Instead, the Seventh Circuit adopted a "publisher approach," refusing to find a website liable under any cause of action that punishes the website for being a publisher.¹³⁵ Under this approach, websites are immune

130. Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008).

131. *Craigslist*, 461 F. Supp. 2d at 693.

132. *Id.* (emphasis added).

133. *Id.* at 697.

134. *Craigslist*, 519 F.3d at 671–72 (7th Cir. 2008).

135. *Id.* at 671. Several courts applying this "publisher immunity" phrase it as a three-part test that mirrors the statutory wording of § 230(c): (1) the website must qualify as an interactive computer service, (2) the objectionable information must be information provided by another, and (3) the claim must require treatment of the website as "the publisher." See, e.g., *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 421–22 (1st Cir. 2007); F.T.C.

for exercising traditional publisher functions, such as displaying, removing, or censoring content.¹³⁶ Faced with the publisher approach, SOF.com would still be immune from liability for Mr. Savage's ad because the website's only role in the entire scheme was as a publisher who displayed the ad.

2. *Shifting Alliances: The Publisher Approach Gains Support*

The Seventh Circuit is not alone in requiring the element of publication. The Ninth Circuit has echoed the concerns of the Seventh Circuit, warning that providing § 230 immunity anytime a website used third-party content would "eviscerate" the statute.¹³⁷ The Ninth Circuit has also concluded that the threshold question for § 230 immunity is whether the plaintiff is seeking to hold a website accountable as the "publisher or speaker of third-party content."¹³⁸ In fact, this view of § 230 is emerging as the preferred interpretation throughout the federal circuits.¹³⁹ One might wonder how this is even possible, considering the "near-unanimous" consensus that has supposedly evolved in support of *Zeran's* holding.¹⁴⁰ This conflict presents one of the more confusing considerations for courts applying § 230. The third-party approach and the publisher approach have been viewed as fundamentally different, yet, in many instances, they both find support within the same judicial decision.

v. *Accusearch, Inc.*, 570 F.3d 1187, 1196 (10th Cir. 2009); *Barnes v. Yahoo!*, Inc., 570 F.3d 1096, 1100–01 (9th Cir. 2009).

136. See *Barnes*, 570 F.3d at 1102. Some causes of action are easy to identify as publisher claims, like defamation, because one of its specific elements is publication. *Id.* at 1106–09. However, this determination is not always easy, with plaintiffs often disguising their "publisher treatment" claims as negligent misrepresentation, negligence, and invasion of privacy actions. See, e.g., *id.* (negligence); *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (negligent misrepresentation and negligence); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003) (negligence and false light privacy claims).

137. *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1171 (9th Cir. 2008).

138. *Barnes*, 570 F.3d at 1101.

139. See *Universal Commc'n*, 478 F.3d at 421–22 (1st Cir. 2007) (adopting publisher requirement); *Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003) (same); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 258 (4th Cir. 2009) (same); *MySpace*, 528 F.3d 413, 419 (5th Cir. 2008) (same); *Craigslist*, 519 F.3d at 671 (7th Cir. 2008) (same); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (same); *Barnes*, 570 F.3d at 1100 (9th Cir. 2009) (same); *Accusearch*, 570 F.3d at 1197 (10th Cir. 2009) (same).

140. See *Chi. Lawyers' Comm. for Civil Rights Under the Law v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 688 (N.D. Ill. 2006), *aff'd*, 519 F.3d 666 (7th Cir. 2008).

3. *Hints of Agreement: Comparing Zeran's Third-Party Immunity to Craigslist's Publisher Immunity*

The *Craigslist* district court opinion provides a detailed breakdown of the supposed differences between *Zeran's* third-party approach and the Seventh Circuit's publisher approach.¹⁴¹ Principally, the *Craigslist* court posited that *Zeran's* holding is far too broad, that its definition of publisher activities is also too broad, and that courts are applying it almost blindly in practice.¹⁴² However, if these differences are exaggerated, then there is the possibility of sweeping *agreement* among the federal circuits.

a. *The Shield of § 230(c)(1): Immunity or Imagination?*

The Seventh Circuit opinions in *GTE* and *Craigslist* contribute greatly to the apparent discrepancy between the two approaches. In both cases, the court questioned whether § 230(c)(1) "creates any form of immunity."¹⁴³ After all, it is § 230(c)(2) that is actually phrased as an immunity for Good Samaritan screeners.¹⁴⁴ The *Craigslist* district court noted that courts following *Zeran* fail to address this divergence in the statutory language.¹⁴⁵ However, the *Craigslist* court failed to explain how its interpretation of § 230(c)(1) actually offers something that is not, for all intents and purposes, also an immunity.¹⁴⁶ In reality, the effect of the *Craigslist* holding is identical to the holding of *Zeran* and its progeny: no website can face liability for publishing third-party content.

b. *Illusions of Disagreement: The Substantive Effect of Craigslist's Distinction*

Taken literally, *Zeran's* third-party approach immunizes a website from liability for any third-party content.¹⁴⁷ The publisher approach supplies an immunity-like protection for *publishing* any third-party content. It also purports to limit protection to a

141. *See id.*

142. *Id.*

143. *Craigslist*, 519 F.3d at 669.

144. *See* 47 U.S.C. § 230(c) (2006) (entitled "Protection for 'Good Samaritan' blocking and screening of offensive material.>").

145. *Craigslist*, 461 F. Supp. 2d at 693–94.

146. *Id.*

147. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("[Section] 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.").

website's publication decisions such as displaying, reviewing, editing, withdrawing, and deciding whether to publish content.¹⁴⁸ However, one would be hard-pressed to hypothesize even one scenario where this distinction truly matters. It would require a website to somehow display a third party's content without publishing it, a seemingly impossible situation. Because publishing merely means "to disseminate to the public," as a medium of information display, *anything* that a website does is publishing.¹⁴⁹ The "narrower" reading adopted by the Seventh Circuit in *Craigslist* is not narrower at all when everything that a website does is inherently some form of publishing.

Further supporting the superficiality of this distinction is the *Zeran* opinion itself. Other parts of that opinion confirm that the Fourth Circuit meant to make no distinction between its holding and holdings like that in *Craigslist*. The *Zeran* court devoted most of its analysis to the publisher determination, and even specifically stated, "[Section] 230 precludes courts from entertaining claims that would place a computer service provider in a *publisher's* role."¹⁵⁰ However, instead of acknowledging that the *Zeran* opinion also establishes a requirement of publishing activity, the *Craigslist* court dismissed this language as an "internal inconsistency" that lessens the persuasiveness of the entire *Zeran* opinion.¹⁵¹

c. "Publishing" in Zeran vs. "Publishing" in Craigslist

Even where the *Zeran* court discussed a "publisher" requirement, the district court in *Craigslist* maintained that the two courts' definitions of publisher activities were in hopeless conflict.¹⁵² The *Craigslist* court worried that *Zeran's* definition of publisher functions, which includes *altering* third party content, would permit a website to actually create content under the guise of altering it.¹⁵³ In such a case, the website could be immune from liability under the third-party approach for content it actually

148. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009).

149. *See Craigslist*, 461 F. Supp. 2d at 694 (defining "publish" to mean "to make public announcement of" or "to disseminate to the public") (quoting MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 944 (10th ed. 1999)).

150. *Zeran*, 129 F.3d at 330 (emphasis added).

151. *Craigslist*, 461 F. Supp. 2d at 695.

152. *Id.*

153. *Id.* Consider the possibility of a comment posted to a website that states, "John Smith is not a liar," which the website operator alters to say, "John Smith is a liar." According to the *Craigslist* court, such an alteration could theoretically be defamatory but protected as a publisher action under *Zeran*. *See id.*

created, because it changed content that originated from a third party.¹⁵⁴ Although this is technically true under a literal reading of *Zeran*'s holding, it is plainly an absurd application of *Zeran*'s wording.

As the *Craigslist* court noted, if a website *altered* content, then it would "no longer be posting information provided by 'another content provider'"¹⁵⁵ However, there is nothing in the *Zeran* opinion's wording that forbids the third-party approach from making the same distinction. In fact, *Zeran* recognizes that if AOL had created the illegal content, then the content would no longer originate from a third party, and third-party immunity would not apply.¹⁵⁶

d. Reaching a Truce: Harmonizing Zeran's Third-Party Approach and Craigslist's Publisher Approach

To interpret the two approaches harmoniously, a court would need to appropriately apply the *Zeran* approach in an alteration situation. It is reasonable to assume that if a website altered content to the extent of actually creating content, then a court would correctly identify the site as an information content provider, thus not entitled to immunity. However, the *Craigslist* district court determined that "[t]his is not an idle concern."¹⁵⁷ It worried that courts were using *Zeran* to bestow immunity on websites *because* they actually altered the content, which would make them publishers under a literal reading of *Zeran*.¹⁵⁸ The *Craigslist* district court feared that courts would end their inquiry there instead of withholding immunity if it was the website's alteration that actually made the comment offensive or defamatory.¹⁵⁹ However, the *Craigslist* court's fears are quite unfounded. The court cited three cases that were apparently the best examples of this abusive application of *Zeran*'s third-party approach.¹⁶⁰ A close inspection of these cases reveals that the scenario about which *Craigslist* was so worried has never actually occurred.¹⁶¹

154. *Id.*

155. *Id.*

156. *See Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). In *Zeran*, it was undisputed that AOL had not contributed *any* content. *Id.* at 330 n.2.

157. *Craigslist*, 461 F. Supp. 2d at 695.

158. *Id.*

159. *Id.*

160. *Id.*

161. The court began with *Dimeo v. Max*, 433 F. Supp. 2d 523 (E.D. Pa. 2006), *aff'd*, 248 Fed. App'x 280, (3d Cir. 2007). There, the district court

On the contrary, courts that subscribe to the *Zeran* approach have been keenly aware of these considerations. Subsequent jurisprudence relying on *Zeran* has noted that the immunity status of publishers who edit content only extends to editing of material that “retain[s] its basic form and message.”¹⁶² Recognition of this principle has stemmed from § 230’s definition of “information content provider,” which encompasses any entity that is responsible, even in part, for the “development” of the content in question.¹⁶³ Courts have taken hold of this language, remaining vigilant in their concern that a website not be permitted to contribute to the illegality of content.¹⁶⁴ It was precisely this reasoning that led the en banc Ninth Circuit to hold that *Roommates.com* was an unprotected content provider when it forced its users to choose from a list of discriminatory alternatives.¹⁶⁵ The court in *Roommates.com* even went so far as to say that those who *encourage* illegal content may forfeit their CDA

repeatedly noted that the defendant website did not author or create any of the posts, nor was this even alleged. *Id.* at 524, 527, 530. The *Craigslist* court overlooked the footnote in *Dimeo*, establishing that if material is altered, “the material published [must] . . . retain[n] the material’s basic form and message” for the site to retain its immunity. *Id.* at 530 n.11. The plaintiff in *Dimeo* never alleged such an alteration. *Id.* at 530. The *Craigslist* opinion also cited *Donato v. Moldow* to support its worries. 865 A.2d 711 (N.J. Super. Ct. App. Div. 2005). However, this case quotes the *same* qualifying language of *Dimeo* that any material published must retain its basic form and content in order for immunity to apply. *Id.* at 724. The content that the *Donato* plaintiff alleged to be an alteration amounted only to deletion of third-party comments and the removal of vulgarity—publisher activity that is clearly protected under either interpretation of the CDA. *Id.* at 716–17, 719–20, 726–27. The *Craigslist* court also cited *Ben Ezra, Weinstein, & Co., Inc. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000), a case that involved only deletions, and not *alterations*, of erroneous stock information. *Ben Ezra*, 206 F.3d at 986. Because the deletions considered in *Ben Ezra* were legitimate, good-faith deletions of erroneous information, and not the manipulative, meaning-changing deletions illustrated in *supra* note 153, the *Craigslist* district court’s reference to it is unfounded.

162. *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

163. 47 U.S.C. § 230(f)(3) (2006) (emphasis added).

164. *See, e.g.*, *F.T.C. v. Accusearch, Inc.*, 570 F.3d 1187, 1197–99 (10th Cir. 2009) (“We therefore conclude that a service provider is ‘responsible’ for the development of offensive content . . . if it in some way specifically encourages development of what is offensive about the content.”); *Universal Comm’n Sys., Inc. v. Lycos*, 478 F.3d 413, 419 (1st Cir. 2007) (“[Information content provider] is a broad definition, covering even those who are responsible for the development of content only ‘in part.’”); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1171–75 (9th Cir. 2008).

165. *Roommates.com*, 521 F.3d at 1165–66.

immunity.¹⁶⁶ In fact, the vast majority of the “*Zeran*-approach” circuits have explicitly left room for liability based on the inducement of illegal content.¹⁶⁷ This should resolve any concerns of the *Craigslist* court that *Zeran* threatens to provide a “limitless immunity.”¹⁶⁸

With these considerations in mind, the effect on SOF.com’s hitman advertisement is not to be underestimated. Under the *Zeran* third-party approach or the publisher approach, SOF.com would not be liable for the contents of Mr. Savage’s ad. However, if SOF.com encouraged or induced the ad, then the website would forfeit its § 230 immunity.

e. Craigslist’s Attack on Zeran: Friendly Fire

This detailed breakdown of the Seventh Circuit’s rejection of *Zeran* suggests an interesting possibility. The approach to which the Seventh Circuit subscribes has no substantive difference from the *Zeran* approach that it so explicitly rejects. Acknowledgement of this premise reconciles the surprising number of cases that appear to have adopted both the *Zeran* third-party approach and the publisher approach recognized by the Seventh Circuit.¹⁶⁹ If this is true, then there is actually an overwhelming majority of courts, including the Seventh Circuit, currently in agreement on how to interpret § 230: a unified *Zeran*-publisher immunity. Indeed, the subtle distinction between these two “differing” approaches is lost even on the Fourth Circuit, which recently cited *Craigslist* to support its own *Zeran* § 230 interpretation.¹⁷⁰ Although this debate

166. *Id.* at 1175 (“The message to website operators is clear: If you don’t encourage illegal content, . . . you will be immune.”).

167. *See, e.g., id.* (9th Cir. 2008); *Accusearch*, 570 F.3d at 1199 (10th Cir. 2009); *Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010); *Doe v. MySpace, Inc.*, 528 F.3d 413, 421–22 (5th Cir. 2008); *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009); *Dimeo v. Max*, 248 Fed. App’x. 280, 282 (3d Cir. 2007); *Universal Commc’n*, 478 F.3d at 421 (1st Cir. 2007).

168. In further support of this notion, the *Roommates.com* opinion explicitly announces its complete agreement with the Seventh Circuit’s *Craigslist* decision. *Roommates.com*, 521 F.3d at 1172 n.33.

169. *See, e.g., Universal Commc’n*, 478 F.3d at 421–22 (1st Cir. 2007) (both following *Zeran* and adopting publisher requirement); *Green v. AOL*, 318 F.3d 465, 471 (3d Cir. 2003) (same); *Nemet Chevrolet*, 591 F.3d at 258 (4th Cir. 2009) (same); *MySpace*, 528 F.3d at 419 (5th Cir. 2008) (same); *Johnson*, 614 F.3d at 792 (8th Cir. 2010) (same); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101–02 (9th Cir. 2009) (same); *Ben Ezra, Weinstein, & Co., Inc. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (same).

170. *Nemet Chevrolet*, 591 F.3d at 254. In a footnote, the court acknowledged that the Seventh Circuit interprets § 230 differently but that it is

may seem pointless, the semantic disagreement between *Zeran* and *Craigslist* has actually been the root of the confusion that has denied the CDA jurisprudence the uniformity it so badly needs.

C. Cause for Disagreement: Definitional Clauses and a Definitional Immunity

If jurisprudential discussions of the CDA are to be understood fully, one must delve deeper into the past. Five years before *Craigslist*, the Seventh Circuit first considered the reach of CDA immunity in *Doe v. GTE*.¹⁷¹ At the time, the court was not required to adopt an approach, but it nonetheless spoke on the matter in dicta, explicitly disagreeing with the third-party approach of *Zeran*.¹⁷² It was here that the Seventh Circuit first offered the publisher approach as only a possibility, but it was also here that the court offered another possibility, a far more extreme departure from the *Zeran* holding.¹⁷³ Spawning a new definitional approach, the Seventh Circuit posited that § 230(c)(1) could be read “as a definitional clause rather than as an immunity from liability.”¹⁷⁴ In other words, § 230(c)(1) provides no protection, but only provides the background for § 230(c)(2)’s Good Samaritan immunity. If an entity did not contribute the content, then it is not a publisher under § 230(c)(1) and is therefore eligible for immunity given to Good Samaritan screeners under § 230(c)(2).¹⁷⁵ Conversely, if an entity did contribute the content, then it is the publisher or speaker of that content and is ineligible for Good Samaritan screener immunity under § 230(c)(2).¹⁷⁶

This interpretation of § 230 would be revolutionary. It would effectively erase the entire body of law developed after *Zeran*. Under a definitional interpretation, § 230 offers no immunity unless an entity qualifies as an interactive service provider that did not contribute the content, *and* has taken Good Samaritan actions

unaware of the effect of that distinction, of “whatever academic interest that distinction may be.” *Id.* at 255 n.4. Nor do other courts honor the distinction outlined by the Seventh Circuit. *See Roommates.com*, 521 F.3d at 1179–80 (crediting the Seventh, Fourth, and Ninth Circuits with “embrac[ing] this robust view of [§ 230(c)(1)] immunity . . .”) (McKeown, J., dissenting).

171. 347 F.3d 655 (7th Cir. 2003).

172. *Id.* at 660.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

to restrict access to it.¹⁷⁷ If Mr. Savage's hitman ad on SOF.com were scrutinized under the definitional approach, then SOF.com would have no immunity unless the website made Good Samaritan attempts to filter or remove it or similar ads. Even if SOF.com took such Good Samaritan steps, § 230(c)(2) would not provide a blanket immunity, but only a protection from liability "on account of" those steps.¹⁷⁸ The definitional approach effectively limits the application of § 230 exclusively to scenarios like *Stratton*, where the website was punished because it attempted to screen the offensive content of others.¹⁷⁹

Despite the extreme departure from any recognized interpretation, the Seventh Circuit offered several justifications for a definitional approach. First, unlike the distinct immunity granted by § 230(c)(2), § 230(c)(1) is phrased as a definition.¹⁸⁰ Second, the broad third-party immunity of *Zeran* arguably has the exact opposite effect of what Congress intended—it encourages websites and interactive services to do nothing, because taking Good Samaritan screener steps provides no additional immunity.¹⁸¹ Third, the title of § 230(c) is "Protection for 'Good Samaritan' blocking and screening of offensive material."¹⁸² Only by limiting the protection of § 230(c)(1) to Good Samaritan screeners is it possible to interpret § 230 consistently with its title.¹⁸³

1. Misplaced Loyalties: The Seventh Circuit and the Definitional Approach

The definitional approach has not garnered the support of even one court, including the Seventh Circuit that first offered it as a possibility. Yet, the reasoning that supports it pervades the cases of both the Seventh and Ninth Circuits.¹⁸⁴ The Seventh Circuit

177. *Id.* at 659–60.

178. 47 U.S.C. § 230(c)(2) (2006).

179. *See Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. App. Div. 1995).

180. *Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670 (7th Cir. 2008).

181. *Id.*

182. 47 U.S.C. § 230(c) (2006).

183. *Craigslist*, 519 F.3d at 670.

184. *See, e.g., id.* ("Why not read § 230(c)(1) as a definitional clause rather than as an immunity from liability . . . ?"); *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (same); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009) ("Subsection (c)(1) does not mention 'immunity' or any synonym."); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) ("[S]ection 230(c) can and should be interpreted consistent with its caption," "Good Samaritan" blocking and screening.).

advanced it only as a possibility in the dicta of *Doe v. GTE* before the court settled on the publisher interpretation in *Craigslist*.¹⁸⁵ Because of *GTE*, though, some courts were under the impression that the Seventh Circuit had chosen the definitional approach.¹⁸⁶ Even the *Craigslist* decision has not clarified the matter.¹⁸⁷ The Seventh Circuit's apparent adherence to two conflicting interpretations can be attributed to the disproportionate attention the Seventh Circuit allotted to discussing the definitional interpretation in both the *GTE* and *Craigslist* opinions.¹⁸⁸ Although *GTE* devoted one sentence to suggest the publisher reading, which the court actually adopted in *Craigslist*, the *GTE* opinion devoted three paragraphs to discussing the definitional approach.¹⁸⁹

Five years later, in *Craigslist*, the Seventh Circuit compounded the disproportionate analysis it gave to the definitional approach in *GTE* by reciting the entire discussion again.¹⁹⁰ Unlike the opinion in *GTE*, the *Craigslist* opinion allots a few more sentences to the publisher approach.¹⁹¹ Even then, the court fails to adopt explicitly the publisher approach, and likewise fails to reject explicitly the definitional approach.¹⁹² However, *Craigslist*'s holding makes it clear that the court applied the publisher approach because it was "only in a capacity as publisher" that Craigslist could be liable.¹⁹³ Such a holding grants immunity for publisher actions and is implicitly incompatible with a definitional view of § 230(c)(1) that does not recognize any protection absent Good Samaritan blocking efforts. However, the court's disproportionate discussion of a view

185. *GTE*, 347 F.3d at 660.

186. *See, e.g.*, *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 n.3 (11th Cir. 2006) ("[T]he Seventh Circuit determined that the CDA is not necessarily inconsistent with state laws that create liability for interactive service providers that refrain from filtering or censoring content."); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 n.4 (4th Cir. 2009) ("The Seventh Circuit, for example, prefers to read '§ 230(c)(1) as a definitional clause rather than as an immunity from liability.'").

187. *See Nemet Chevrolet*, 591 F.3d at 255 n.4 ("The Seventh Circuit, for example, prefers to read '§ 230(c)(1) as a definitional clause rather than as an immunity from liability.' Of whatever academic distinction that may be . . .") (citing *Craigslist*, 519 F.3d at 669) (citations omitted).

188. *See Craigslist*, 519 F.3d at 669–70; *GTE*, 347 F.3d at 659–60.

189. *GTE*, 347 F.3d at 660 ("There is yet another possibility: perhaps § 230(c)(1) forecloses any liability that depends on deeming the [Internet service provider] a 'publisher'—defamation law would be a good example of such liability—while permitting the states to regulate [Internet service providers] in their capacity as intermediaries.").

190. *Craigslist*, 519 F.3d at 669–70.

191. *Id.* at 670–71.

192. *See id.*

193. *Id.* at 671.

that it rejected and its lack of an explicit choice combine to create a misleading and confusing opinion in *Craigslist*. Because of this confusion, even the rejected definitional interpretation of § 230(c)(1) has remained relevant.¹⁹⁴

2. Mixed Signals: The Ninth Circuit and Definitional Reasoning

The Seventh Circuit's *Craigslist* opinion has misled more than one court. The Ninth Circuit's *Roommates.com* opinion is a salient example.¹⁹⁵ There, the Ninth Circuit adopted the view that § 230(c)(1) provides a publisher immunity.¹⁹⁶ However, almost in passing, the *Roommates.com* opinion recites much of the argument advanced by the Seventh Circuit to support the definitional approach.¹⁹⁷

The *Roommates.com* opinion begins by recognizing that Congress intended to “immunize the *removal* of user-generated content, not the *creation* of content.”¹⁹⁸ Taken literally, this proposition challenges the utility of awarding § 230 immunity in situations other than those where the online entity is liable for removing someone else's content, which only Good Samaritan screeners do.¹⁹⁹ The *Roommates.com* court next contended that it was “perhaps the only purpose” of § 230 to overrule the specific problem that occurred in *Stratton*.²⁰⁰ However, by recognizing only § 230(c)(2)'s Good Samaritan immunity, it is the definitional approach that is limited precisely to “overrul[ing]” the specific problem that occurred in *Stratton*.²⁰¹ Finally, the Ninth Circuit joined the Seventh Circuit in finding that “[i]ndeed, the section is

194. It is some version of this interpretation that the Fourth Circuit credits to the Seventh Circuit, even after *Craigslist*. *Nemet Chevrolet, Ltd. v. Consumer Affairs, Inc.*, 591 F.3d 250, 254 n.4 (4th Cir. 2009) (“The Seventh Circuit, for example, prefers to read ‘§ 230(c)(1) as a definitional clause rather than as an immunity from liability.’”).

195. See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163–64 (9th Cir. 2008).

196. See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009).

197. *Roommates.com*, 521 F.3d at 1163–64.

198. *Id.* at 1163. (emphasis added)

199. The en banc Ninth Circuit continued by reciting the legislative history of § 230, emphasizing repeatedly that it was designed to protect those who *restrict* offensive content. See *id.* (emphasizing “restriction” twice). Again, limiting § 230's immunity to restrictions of content is not consistent with an immunity that extends to all publishers but is only consistent with a definitional approach.

200. *Id.* at 1163 n.12.

201. See *id.* at 1163. The website in *Stratton* faced liability for attempting to screen others' content as a “Good Samaritan.” *Id.*

titled ‘Protection for “Good Samaritan” blocking and screening of offensive material’ and . . . the substance of section 230(c) can and should be interpreted consistent with its caption.’²⁰²

These arguments support only one interpretation of § 230: the definitional approach. A court cannot interpret the Good Samaritan title of § 230(c) consistently with its substance and still find that it applies outside the context of Good Samaritan blocking. Nor can a court genuinely argue that the “only purpose” of § 230 is to overrule *Stratton*, and then apply § 230 to any context where the website does not attempt to restrict content as did the website in *Stratton*. In spite of all this reasoning, the Ninth Circuit formally adheres to the *Zeran*-publisher approach.²⁰³ As time has shown, without correction, this confusion threatens to further complicate the already cloudy CDA jurisprudence.

D. The Conflict Escalates: The Ninth Circuit, Barnes v. Yahoo, and a Reverse Definitional Approach

It was not long before the Ninth Circuit was forced to explain its *Roommates.com* holding. In 2009, *Barnes v. Yahoo!* forced the Ninth Circuit to confront the conflict between its publisher immunity standard and its definitional immunity reasoning.²⁰⁴ Compared to other cases, it should have been an easy decision. The plaintiff, Cecilia Barnes, much like the plaintiff in *Zeran*, was the victim of a fake Internet profile.²⁰⁵ This time the profile proclaimed the plaintiff’s promiscuity and sexual deviancy.²⁰⁶ The court easily identified her claim as an attempt to hold the Yahoo website liable for its role as a publisher, and held that publisher immunity barred the claim.²⁰⁷ However, Barnes’s complaint included one argument the Ninth Circuit had to address separately.

1. The Reconciliation

Even though the court held that publisher immunity applied, Barnes’s complaint forced the court into a corner. She cited the court’s own en banc opinion in *Roommates.com* to remind the court that the purpose of § 230 was to encourage websites to take

202. *Id.* at 1163–64. The court even explicitly cited to the Seventh Circuit cases of both *Craigslist* and *GTE* for support. *Id.*

203. *See Roommates.com*, 521 F.3d at 1163–64.

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

205. *Id.* at 1098.

206. *Id.*

207. *Id.* at 1102–04.

action, “not to provide an excuse for doing nothing.”²⁰⁸ The *Barnes* court went on to reaffirm that reasoning²⁰⁹ and reaffirm the reasoning of the Seventh Circuit, all the while supporting an argument for a strictly definitional reading of § 230(c)(1).²¹⁰ Finally, the court acknowledged that its citation to differing interpretations was an “apparent contradiction,” and so attempted to resolve it.²¹¹

The Ninth Circuit panel in *Barnes* began its explanation by reciting the publisher interpretation of § 230(c).²¹² However, the court continued with an attempted explanation of the “apparent contradiction” between its adoption of the publisher approach and its praise for the reasoning of the definitional approach.²¹³ It next established that it is “crucia[1]” to understand that § 230(c)(2) protects:

not merely those whom subsection (c)(1) already protects, but *any* provider of an interactive computer service. Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue, can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable.²¹⁴

2. Stalling for Time: The Reverse Definitional Interpretation of Barnes

The *Barnes* reasoning is extremely confusing, and the court’s opinion contains no further explanation or application. However, it appears to provide a third level of immunity—one that a *content provider* or *creator* is eligible for “if they act to restrict access to [the content]”²¹⁵ The Ninth Circuit has effectively retained the

208. *Id.* at 1105.

209. *Id.* (“It would indeed be strange for a provision so captioned to provide equal protection as between internet service providers who do nothing and those who attempt to block and screen offensive material.”).

210. The court also cited *Craigslist* in support of its notion that “Subsection (c)(1) does not mention ‘immunity’ or any synonym.” *Id.* at 1100. It joined the Seventh Circuit in doing so, but it, too, failed to explain how its protection is something other than an immunity. See Chi. Lawyers’ Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669 (7th Cir. 2008).

211. *Barnes*, 570 F.3d at 1105.

212. *Id.* Under this interpretation, § 230(c)(1) protects websites from being held liable as publishers, and § 230(c)(2) protects websites from liability for Good Samaritan steps to restrict access. *Id.*

213. *Id.*

214. *Id.* (citation omitted).

215. *Id.*

effects of the prevalent § 230 interpretation unchanged. It has also added, however, a completely new immunity for which only good faith screeners who are also content providers are eligible.²¹⁶ If Mr. Savage's hitman ad is reconsidered under this approach, the consequences are startling. According to the *Barnes* court, SOF.com could actually help Mr. Savage create the hitman ad, display it on the website, and then gain immunity by subsequently taking steps to restrict access to it.

The *Barnes* opinion, while attempting to reach a publisher immunity conclusion, defends definitional immunity reasoning while creating a brand new interpretation: a "reverse definitional immunity." The *Barnes* interpretation could be called "reverse," because a definitional reading of § 230(c)(1) establishes which parties are eligible for the Good Samaritan screener immunity of § 230(c)(2); *Barnes*, however, creates an immunity for someone who is completely *ineligible* for the definitional qualification of § 230(c)(1): a website that, although a content provider, has made efforts to screen that provide immunity under § 230(c)(2).²¹⁷ In this maze of statutory inbreeding, it is easy to miss that this explanation does not change anything about the "apparent contradiction:" a § 230(c)(1) publisher approach protects websites that do nothing.

E. A Resilient Survivor: Strict Publisher Immunity

The four CDA approaches discussed above comprise the bulk, if not all, of "active" § 230 interpretations. Nonetheless, there is at least one other approach that remains relevant despite its lack of judicial embrace—the approach that the Fourth Circuit rejected in *Zeran*.²¹⁸ The "strict publisher" approach accepts the immunity of the publisher approach, but applied only to a *restricted* category of publishers.²¹⁹

The strict publisher approach contends that the publisher immunity of § 230(c)(1) precludes only the strict liability that direct publishers traditionally faced. This interpretation leaves room for the notice- or knowledge-based liability of distributors.²²⁰ Applying the same reasoning to online entities, § 230(c)(1) would immunize a website only from strict liability as a publisher of third-party content. However, if they were aware of its subject matter and dissemination, these same websites could be held liable

216. *See id.*

217. *See id.*

218. *See Zeran v. AOL, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997).

219. *See id.* at 331.

220. *See id.*

as distributors of third-party content. In the SOF.com hitman ad scenario, SOF.com would be immune from liability as a publisher. However, as a distributor, SOF.com would be immune from liability for Mr. Savage's ad only until the website was notified of the ad's existence.

F. The Battle Rages On: Other Interpretations

One should not take this Comment's enumeration of § 230 approaches to imply a limit. Although the five approaches described above have garnered the most attention and commentary, § 230 has an uncanny ability to inspire judicial and interpretive creativity. One judge has suggested that CDA immunity should apply only when the website takes no active role in selecting which content gets published, something the *Zeran*-publisher approach permits under the protected traditional acts of a publisher.²²¹ Others have suggested that courts adopt a totality-of-the-circumstances approach, weighing context-specific factors in each case.²²² There is also no shortage of commentators, including judges who appear to have followed *Zeran* only begrudgingly, and who wait for Congress or courts to begin remodeling the CDA.²²³ Until Congress or the Supreme Court finally settles this dispute, every one of these approaches remains viable.

221. *Batzel v. Smith*, 333 F.3d 1018, 1038 (9th Cir. 2003) (Gould, J., dissenting).

222. Ali Grace Ziegrowsky, *Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act*, 61 HASTINGS L.J. 1307, 1324–31 (2010). Ziegrowsky suggests that courts undertake a fact-intensive totality of the circumstances approach to determine the culpability of a website for a given display of content. Factors to be considered might include the purpose of the website, the importance of freedom of speech, anonymity, responses to removal requests, and financial gain. *Id.*

223. *See, e.g.*, *Blumenthal v. Drudge*, 992 F. Supp. 44, 52–53 (D.C. 1998) (“While it appears to this Court that AOL in this case has taken advantage of all the benefits conferred by Congress in the [CDA], and then some, without accepting any of the burdens that Congress intended, the statutory language is clear”); *Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006) (“We acknowledge that recognizing broad immunity for defamatory republications on the Internet has some troubling consequences. Until Congress chooses to revise the settled law in this area, however, plaintiffs who contend they were defamed in an Internet posting may only seek recovery from the original source of the statement.”); *see also* Sewali K. Patel, *Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 672–73 (2002); Ziegrowsky, *supra* note 222; Freiwald, *supra* note 70, at 643–54; Spencer, *supra* note 102, at 178.

IV. RESOLVING THE CONFLICT: REGROUPING AND REFINING

It is understandably intimidating for a court to interpret the CDA today. Section 230's jurisprudence is a rare example of such extreme complexity, disarray, and importance in case law, yet it lacks a single guiding Supreme Court decision. A court unfamiliar with the history of the statute and unaware of its differing interpretations faces a daunting challenge. After gaining an understanding of the law, however, courts could create a uniform body of § 230 jurisprudence that is balanced, equitable, and finally in harmony.

A. The Victor Leaves the Battlefield

The prospect of unity in the jurisprudence of the CDA is an attractive concept. The parallel application of the *Zeran* third-party approach and publisher approach is perhaps the only method to achieve this goal. A unified *Zeran*-publisher approach acknowledges the unity of the two approaches, and single-handedly embraces the bulk of the CDA's jurisprudential analyses.

1. The Perceived Inequities of a Zeran-Publisher Approach

There has been no shortage of critics of the Fourth Circuit's decision in *Zeran*.²²⁴ Some wonder why websites should experience such an unfair advantage over traditional print media.²²⁵ Moreover, some feel a broad immunity is a disproportionate legislative response to the problem Congress sought to correct in *Stratton*.²²⁶ Others disapprove of the prospect of immunizing websites that acquiesce to or benefit from their users' illegal content.²²⁷

a. Websites vs. Newspapers: Unfair Treatment?

Some critics take issue with the disparate treatment now experienced by the brick-and-mortar counterparts of websites, such as newspapers and newsstands, which face immensely greater exposure for content that websites can allow freely.²²⁸ A physical

224. See *supra* note 102.

225. See, e.g., Melissa A. Troiano, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1483 (2006).

226. See, e.g., Sheridan, *supra* note 102, at 179.

227. Ziegłowski, *supra* note 222, at 1331.

228. Sheridan, *supra* note 102, at 149-150.

newspaper's classified ad or opinion section remains within the realm of strict liability, but an online newspaper's classified ad or comments section is immune.²²⁹ Returning briefly to the story of Mr. Savage and *Soldier of Fortune* magazine,²³⁰ his victim's family received \$4 million when the magazine displayed Savage's hitman ad.²³¹ Yet, it is troubling to acknowledge that if *Soldier of Fortune* magazine is eclipsed by SOF.com, the same classified ad displayed on the website would result in no similar form of liability.

Although this concession is seemingly unfair, it is necessary in light of the interests at stake. Looking to the legislative debate surrounding the CDA, this result is the unavoidable and, indeed, *intended* result of the CDA.²³² Unlike their physical equivalents, many online services operate in such a way that every single comment by a third-party user is automatically posted, with the number of comments and posts on a given website reaching into the *millions*.²³³ A comprehensive monitoring system on heavily-trafficked websites might be financially burdensome, unfeasible, or impossible. As Congress observed, it is the open-ended nature of such websites that makes them both so attractive and so difficult to monitor, and therefore so in need of protection.²³⁴

b. Publisher Liability vs. Distributor Liability: Knowledge is Not Power

Even if the proposition of limited liability for online content is accepted, perhaps Congress intended that actual knowledge of a defamatory or illegal post could still subject a website to liability.²³⁵ This was the brunt of the plaintiff's argument in *Zeran*—a strict publisher approach contending that § 230 should not foreclose the common law notion of distributor liability.²³⁶ The strict publisher approach would impose distributor liability on a website if it was notified of illegal content.²³⁷ In the *Soldier of Fortune* hypothetical,

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

230. See *supra* Part I.

231. See *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1114 (11th Cir. 1992).

232. 141 CONG. REC. 22,047 (1995) (statement of Rep. Goodlatte) (“We have been told it is technologically impossible for interactive service providers to guarantee that no subscriber posts indecent material on their bulletin board services.”).

233. See *Zeran v. AOL, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

234. 141 CONG. REC. 22,045–46 (1995) (statement of Rep. Wyden).

235. See *Zeran*, 129 F.3d at 333.

236. See *id.* at 331.

237. *Id.*

this would permit SOF.com to face liability for a hitman ad if the website was notified or knew of its illegal or dangerous nature.

Despite these troubling worst-case scenarios, the unified *Zeran*-publisher approach explicitly accepts this risk.²³⁸ This has troubling implications, such as leaving no incentive for websites like AOL or SOF.com to take down extremely damaging or even dangerous posts they know to exist.²³⁹ However, such concerns are not dispositive. As the *Zeran* court pointed out, § 230(c)(1) precludes any form of publisher liability.²⁴⁰ There is a distinction between publishers and distributors, but traditional defamation law suggests that a distributor is only one form of the more general classification of publisher.²⁴¹ The wording of § 230(c)(1) is much too general to read such a context-specific distinction into the statute.²⁴²

Moreover, in passing § 230, Congress sought to prevent websites from being punished for attempts to screen content.²⁴³ Distributor liability threatens this congressional goal, because the prospect of liability for knowledge might discourage websites from allowing themselves to ever become aware of offensive content.²⁴⁴ Websites might remove any system of formal notification so that they cannot have knowledge imputed to them.²⁴⁵ A website might also face a substantial burden if it must investigate every complaint it receives, or else face liability.²⁴⁶ As the *Zeran* court feared, websites might choose instead to just remove all content that is complained about, without regard to its offensiveness or the resulting chilling effect on free speech.²⁴⁷

Finally, courts should give due deference to the congressional response to the prevailing *Zeran*-publisher approach. In 2002, a conference committee report of the House of Representatives signaled its complete approval of the jurisprudential application of

238. *Id.* at 333.

239. One court even applied § 230 to immunize a website where a plaintiff alleged that the site had actual knowledge of child pornography being posted. *See Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348, slip op. at 9–10 (E.D. Tex. 2006); 35 Media L. Rep. 1435 at *3–4. The plaintiffs, parents on behalf of their minor child, accused Yahoo of knowingly profiting from the existence of Yahoo chatrooms devoted to child pornography. *Doe*, slip op. at 6–7. Whether Yahoo actually had such knowledge was not proven, and was indeed unlikely. *Id.*

240. *Zeran*, 129 F.3d at 332.

241. *Id.*

242. *See id.*

243. *Id.* at 332–33.

244. *Id.* at 333.

245. *Id.*

246. *Id.*

247. *Id.*

this approach, explicitly endorsing *Zeran* and two other cases that have followed the *Zeran*-publisher interpretation.²⁴⁸ Such informal approval should not dissuade a court from following a statute's wording, but it does prove that Congress is satisfied with § 230's effect and will not support any other interpretation of the statute.

2. *A Unified Alliance: The Zeran-Publisher Approach*

The *Zeran*-publisher approach is not perfect. Like any approach, it has negative consequences. It is no easy task to balance the competing interests of uninhibited information exchange with guaranteed liability for abuses of that exchange. However, the *Zeran*-publisher approach represents the best policy decision. Uninhibited defamation and illegal content without any hope of a website's intervention is more of a danger in theory than in practice. In reality, public relations considerations alone are enough to induce a website to remove illegal content. Immunity in spite of knowledge could potentially protect websites who downright refuse to remove illegal content. More often, however, such expansive immunity will operate to protect innocent websites from having knowledge imputed to them by virtue of a complaint of which they may not actually be aware.

The *Zeran*-publisher approach offers the best method to courts faced with the CDA today. Its wording is grounded in the statutory language of § 230 and is most capable of honoring the intent of the statute.²⁴⁹ It balances the desire to protect websites from an impossible burden with the desire to hold creators of illegal content liable. Its widespread acceptance offers uniformity amid a disheveled jurisprudence.

3. *The Zeran-Publisher Approach—Adaptability and Capability*

Courts have proven exceptionally capable at adapting and shaping the limits of the *Zeran*-publisher approach. The Seventh Circuit was correct to be wary of a strict application of *Zeran*, but

248. H.R. REP. NO. 107-449, at 13 (2002) (Conf. Rep.). In a conference committee report that accompanied new legislation, the committee specifically indicated: "The Committee notes that [Internet service providers] have successfully defended many lawsuits using section 230(c). The courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence . . . and defamation ([10th Circuit case following *Zeran*]; *Zeran v. America Online*, 129 F.3d 327 (1997)). The Committee intends these interpretations of section 230(c) to be equally applicable to those entities covered by [new legislation]."

249. See 47 U.S.C. § 230(b)(4) (2006).

other courts have limited it appropriately to retain the spirit of § 230 and align *Zeran*'s third-party immunity with the Seventh Circuit's publisher immunity.²⁵⁰ In particular, the Ninth Circuit has done an exemplary job of preventing any unfair application of the prevailing approach.²⁵¹ Faced with Roommates.com's requirement that its customers choose discriminatory roommate preferences, the court carefully considered to what extent Roommates.com "developed" the content.²⁵² Leaving the spirit of § 230 intact, the court recognized that although it was the customers who ultimately entered their discriminatory choice, it was the website that had effectively created the content by forcing its customers to do so.²⁵³

As mentioned earlier, courts have already suggested that any culpable behavior by a website will not go unnoticed.²⁵⁴ As many as seven federal circuits have signaled that encouraging or inducing a third party to create questionable content might be sufficient to forfeit immunity.²⁵⁵ The courts' proven readiness to adapt the *Zeran*-publisher approach to common sense notions of equity makes it an especially attractive alternative.²⁵⁶

B. The Remnants of Defeat: The Remains of Alternative Approaches

If courts recognize the unity of the *Zeran*-publisher approach, any other approach will exist only as a minority view. However, because of its unfavorable consequences, plaintiffs repeatedly

250. See *supra* notes 167, 169.

251. See, e.g., Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1165–69 (9th Cir. 2008) (not permitting website to encourage illegal content); Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1106–09 (9th Cir. 2009) (not permitting website to apply immunity to liability for subsequent promises regarding content).

252. *Roommates.com*, 521 F.3d at 1165–69.

253. See *id.*

254. See *id.* at 1175 ("If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune."); Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671–72 (7th Cir. 2008) (suggesting that any inducement of illegal content would not be protected); see also *supra* note 167.

255. See *supra* note 167.

256. One Ninth Circuit opinion deserves particular recognition for its astute reasoning. Ironically, this ruling was a completely separate part of the *Barnes v. Yahoo* opinion. 570 F.3d 1096, 1098–99 (9th Cir. 2009). Creating the reverse definitional immunity in response to the plaintiff's negligence complaint, the Ninth Circuit also faced a separate complaint for promissory estoppel to which neither publisher immunity nor reverse definitional immunity applied. See *id.* The court found that § 230 did not forbid holding Yahoo liable for its representative's promise that it would immediately remove the ad, if the plaintiff relied on that promise to her detriment. *Id.* at 1106–09.

attempt to persuade courts to apply alternative interpretations of § 230. Without a Supreme Court decision to bind the circuits, there is nothing to prevent a federal circuit from changing its interpretation. Also, recognizing the supporting reasoning behind these alternative interpretations can help courts avoid the result of inadvertently supporting a conflicting approach in dicta.

1. The Definitional Approach as a Viable Alternative

Despite its lack of support, the definitional approach arguably finds much greater support in the statute's intent, title, and structure.²⁵⁷ The Seventh Circuit pointed out that this approach would harmonize the statute with its purpose and its title, "Protection for Good Samaritan Blocking and Screening"²⁵⁸ The court acknowledged that *Zeran* has been followed by four federal circuits, yet it could not reconcile it with the language of § 230(c)(1).²⁵⁹ The Seventh Circuit's opinion in *GTE* questions the utility of immunizing interactive computer services under § 230(c)(1) for doing nothing, when the entire purpose underlying its enactment was to prevent interactive services from doing nothing.²⁶⁰

a. The Definitional Approach and the Structure of § 230

The trouble with rejecting the definitional approach is that it makes sense. Indeed, at the time of its enactment, the definitional reading of § 230 was possibly exactly what Congress had in mind. This partially explains why it has been so easy for a court like the Ninth Circuit to unwittingly support the definitional approach in its

257. It should be noted that some courts also characterize the publisher interpretation of the Seventh Circuit as definitional. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com*, 591 F.3d 250, 255 n.4 (4th Cir. 2009) ("The Seventh Circuit, for example, prefers to read '§ 230(c)(1) as a definitional clause rather than as an immunity from liability.'). *Craigslist* appears to affirm that the Seventh Circuit shares this view. 519 F.3d at 670 ("Why not read § 230(c)(1) as a definitional clause rather than as an immunity from liability . . . ?"). However, as explained earlier, regardless of its name, the Seventh Circuit publisher protection operates as an immunity. See discussion *supra* Part III.B.3.a. The only truly definitional reading of § 230 is the one offered by *GTE* and rejected by *Craigslist*. See discussion *supra* Part III.C.

258. *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003).

259. *Id.* at 659–60 (citing the Third, Fourth, Ninth, and Tenth Circuits).

260. *Id.* at 660 ("Yet § 230(c) . . . bears the title 'Protection for 'Good Samaritan' blocking and screening of offensive material,' hardly an apt description if its principal effect is to induce [Internet service providers] to do nothing about the distribution of indecent and offensive materials via their services.'").

reasoning.²⁶¹ Any interpretation of § 230 that pretends to be completely in harmony with the statute's structure, wording, purpose, and history will have trouble defending that assertion. This is why it is important to acknowledge and concede the shortcomings of the unified *Zeran*-publisher approach.

The very structure of the statute supports the definitional approach. As the district court in *Craigslist* noted, it defies principles of statutory interpretation to interpret § 230(c)(2) to provide an immunity with its definitive wording—"No provider . . . shall be liable . . ."—and to simultaneously interpret § 230(c)(1) to provide an even greater immunity without any equivalent wording.²⁶² A broad publisher immunity reading of § 230(c)(1) also renders § 230(c)(2) completely superfluous. By interpreting § 230(c)(1) to cover all publishing acts, a Good Samaritan screener never even needs to resort to the Good Samaritan immunity in § 230(c)(2).²⁶³

Another recurring argument for the definitional approach is the title of § 230(c): "Protection for 'Good Samaritan' blocking and screening of offensive material."²⁶⁴ This title encompasses both § 230(c)(1) and § 230(c)(2), yet the *Zeran*-publisher approach posits that a Good Samaritan requirement is only applicable to § 230(c)(2).²⁶⁵ However, this inconsistency in the title is not enough

261. See *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163–64 (9th Cir. 2008); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–05 (9th Cir. 2009).

262. *Chi. Lawyers' Comm. for Civ. Rights Under The Law v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 693–94 (N.D. Ill. 2006), *aff'd*, 519 F.3d 666 (7th Cir. 2008); see also *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely when it 'includes particular language in one section of a statute but omits it in another.'" (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993))).

263. Some courts have disagreed with this statement, pointing out that unlike § 230(c)(1), § 230(c)(2)'s immunity would provide immunity from liability to the content-provider where the website wrongfully *removed* its content. See, e.g., *GTE*, 347 F.3d at 660 (characterizing § 230 as "designed to eliminate [Internet service providers'] liability to the creators of offensive material"); *Barrett v. Rosenthal*, 146 P.3d 510, 520–21 (Cal. 2006). It is possible that this could happen, but it is highly unlikely that third-party content-providers have First Amendment or any other rights on a private party's website in the first place. See *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) ("[T]he constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state."). Not surprisingly, this function of § 230(c)(2) remains much more convincing in theory than in practice.

264. 47 U.S.C. § 230(c) (2006).

265. Both the Seventh and Ninth Circuits have made this same point, albeit in support of the *Zeran*-publisher approach. See *Roommates.com*, 521 F.3d at 1164 ("[T]he substance of section 230(c) can and should be interpreted consistent with its caption."); see also *Chi. Lawyers' Comm. for Civil Rights*

to make the definitional approach a superior alternative to the *Zeran*–publisher approach. It is elementary that a statute’s provisions trump its title if the two conflict.²⁶⁶ It is the substance and not the title of statutes that grant them effect, and § 230(c)(1) has no Good Samaritan requirement.²⁶⁷

b. The Definitional Approach and the Intent of § 230

If a court claims that the *only* reason for enacting § 230 was to counteract the troubling *Stratton* decision, it can support only a definitional approach.²⁶⁸ *Stratton* was outrageous because it punished a website for attempting to screen offensive content, when the website would have faced no liability if it had simply allowed offensive content to be posted freely.²⁶⁹ If § 230 was meant only to prevent a similar injustice from occurring again, then only § 230(c)(2)’s Good Samaritan immunity is needed. If that is the case, § 230(c)(1) should be read as definitional. However, this argument also fails because the assertion that § 230 was meant exclusively to prevent a *Stratton* situation is not necessarily true. The House Conference Committee’s report recognizes that it is only “[o]ne of the specific purposes” of § 230 to overrule *Stratton* and similar decisions.²⁷⁰ Further, the CDA’s congressional debate recognized the impossible burden that websites face if they can be held liable for third-party content, even if they do not make attempts to screen offensive content.²⁷¹ The congressional concern about this burden suggests that a narrow definitional reading of § 230 was not its intent.

Under the Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 670 (7th Cir. 2008). If this does not make sense to the reader, it is not supposed to. Herein lies much of the confusion caused by the comingling of competing § 230 interpretations.

266. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004) (“The caption of a statute, this Court has cautioned, ‘cannot undo or limit that which the [statute’s] text makes plain.’”) (citing *Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 529 (1947)).

267. See 47 U.S.C. § 230(c)(2) (2006).

268. See *Roommates.com*, 521 F.3d at 1164 n.12 (stating that “it seems to be the principal or perhaps the only purpose” of § 230 to overrule *Stratton*).

269. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. App. Div. 1995).

270. H.R. REP. No. 104-458, at 194 (1996) (Conf. Rep.) (emphasis added) (“One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”).

271. See 141 CONG. REC. 22,046 (1995) (remarks of Rep. Goodlatte).

Finally, perhaps the most convincing argument for a definitional approach, and one that has stumped the Ninth Circuit,²⁷² is the reward of *Zeran*—publisher immunity to websites that do nothing to screen content when § 230 was enacted specifically to motivate websites to take action. However, Congress also did not want websites to face the burden of liability for third-party content.²⁷³ Protection for websites that do nothing is the price the *Zeran*—publisher approach accepts in order to guarantee that websites are never punished for third-party content. As discussed earlier, only by providing immunity to all websites—even those with knowledge and even those who do nothing—can websites be fully encouraged to participate in the content-screening process.

For all its logical and structural validity, the definitional approach remains inferior to the *Zeran*—publisher approach. Section 230 was meant to provide substantial protection to websites that permit third parties to contribute content. The limited immunity of a definitional approach plainly falls short of this. Although the definitional approach is supported by certain canons of statutory interpretation, nothing can change the plain wording of § 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.”²⁷⁴

2. An Imminent Conflict: The Viability of the Barnes Reverse Definitional Approach

In *Barnes*, the Ninth Circuit provided the first and only version of a reverse definitional approach.²⁷⁵ The court explained that its approach was derived from a recognition of the congressional intent to reward only those websites which take affirmative actions—now, providers of content who are ineligible for immunity under § 230(c)(1) can obtain immunity under § 230(c)(2) if they restrict access to that content.²⁷⁶ This interpretation of § 230(c)(2) does not change the actual “apparent contradiction” the court was claiming to address: the sweeping immunity that § 230(c)(1) gives to those websites that do nothing to control content.²⁷⁷

The reverse definitional approach also runs contrary to any supportable reasoning because it conflicts with the words, history,

272. See *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009).

273. See 141 CONG. REC. 22,046 (1995) (statement of Rep. Goodlatte).

274. 47 U.S.C § 230(c)(1) (2006).

275. See *Barnes*, 570 F.3d at 1105.

276. See *id.*

277. See *id.*

and intent of the CDA. According to *Barnes*, websites can create offensive content and then obtain immunity by acting “to restrict access to the content because they consider it obscene.”²⁷⁸ This may not run into the problem of rewarding immunity for doing nothing, but it does something even more unacceptable: it rewards immunity to a website that *actively creates the content*.²⁷⁹ Surely, if it makes no sense to reward *passivity*, as the Ninth Circuit claims, then it is absurd to reward obscene *activity*.²⁸⁰

Additionally, the very wording of the statute forbids this result. Section 230(c)(2)(A) immunizes only actions “taken in good faith,” an unlikely description for the actions of someone who has already been determined to be the creator of obscene, defamatory, or illegal content.²⁸¹ It is equally unlikely that Congress would ever create a legal immunity for obscenity-providers that have a change of heart. The Communications Decency Act was meant to foster Internet growth and prevent the unregulated proliferation of obscenity online.²⁸² If it stretches the CDA’s purpose to immunize websites that make no effort to filter third-party obscenity, then it mocks the CDA’s purpose to immunize a creator of obscenity for not successfully blocking its own content. If the reverse definitional approach of *Barnes* is ever questioned, the Ninth Circuit most certainly faces a confusing and losing battle. Conversely, by returning to the unified *Zeran*–publisher approach, the Ninth Circuit can at once embrace the most viable approach and rejoin the judicial consensus.

3. *Stubborn Survivor: The Strict Publisher Interpretation*

The “strict publisher” interpretation of § 230(c) is similar to the *Zeran*–publisher approach, but it leaves room for interactive service providers to face liability for content of which they are aware. The strict publisher interpretation remains a minority view, but its popularity among scholars²⁸³ and plaintiffs²⁸⁴ continues to

278. *Id.*

279. *Id.*

280. *See id.*

281. *See id.*

282. 47 U.S.C. § 230(a)-(b) (2006); *See also* 141 CONG. REC. 16,009 (1995).

283. *See, e.g.,* Patel, *supra* note 223, at 678; Freiwald, *supra* note 70, at 596; Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142, 154 n.8 (Cal. Ct. App. 2004), *rev’d*, 146 P.3d 510 (Cal. 2006) (listing scholarly disagreement).

284. *See, e.g.,* Zeran v. AOL, Inc., 129 F.3d 327, 330 (4th Cir. 1997); *Barnes*, 570 F.3d at 1103–04; Perfect 10, Inc. v. CCBill, LLC, 340 F. Supp. 2d 1077, 1107 (C.D. Cal. 2004), *aff’d in part and rev’d in part on other grounds*, 481 F.3d 751 (9th Cir. 2007); Austin v. CrystalTech Web Hosting, 125 P.3d 389, 392 (Ariz. Ct. App. 2005); Doe v. AOL, Inc., 783 So. 2d 1010, 1013–17 (Fla. 2001).

make it relevant. Whether Congress intended a broad protection for those websites that knowingly permit the posting of defamatory or illegal content is still the subject of controversy.²⁸⁵ The strict publisher approach is arguably a fairer balance of the competing congressional goals of Internet growth and obscenity control.²⁸⁶ Under this approach, websites, as distributors, would still not face liability for third-party content. However, if websites are notified of illegal or obscene content, they would be forced to remove it—something websites should do.

The fairness of this approach is attractive, but it too must yield to the *Zeran*–publisher approach. As discussed earlier, liability upon notice presents the triple threat of (1) encouraging websites to remove any complaint system whereby they might have knowledge imputed to them, (2) the unbearable burden of considering every complaint received, and (3) the risk that websites will just remove all controversial content, thus chilling speech.²⁸⁷ A website that refuses to remove horribly defamatory or obscene content is more of a danger in theory than in practice. The *Zeran*–publisher approach recognizes this risk, too, but has made the determination that punishing innocent conduits of information is the greater and far more likely injustice.

C. Tending to the Wounded: Refining a Chaotic Jurisprudence

A few courts have already helped to create harmony by acknowledging the nearly-uniform jurisprudence that has spread with the *Zeran*–publisher immunity interpretation of § 230.²⁸⁸ However, the process is not nearly complete. When the Seventh Circuit refused to identify its publisher protection as an immunity, it injected substantial confusion into the analysis. The result is an illusion of disagreement.²⁸⁹ Both of the widely-adopted approaches—the *Zeran* third-party approach and the publisher approach—are carefully applied in the same way to extend

285. Sheridan, *supra* note 102.

286. See *id.* at 172–78. There is a convincing application of this approach by the California Court of Appeals in *Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142 (Cal. Ct. App. 2004). However, the California Supreme Court swiftly overturned this case to reunite California’s jurisprudence with *Zeran*. *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006).

287. See *Zeran*, 129 F.3d at 332–33.

288. See, e.g., *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010).

289. See Chi. Lawyers’ Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669–71 (7th Cir. 2008) (offering both a definitional approach and a publisher approach, but not explicitly adopting or rejecting either one); *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (same).

immunity only when the defendant is acting in its publisher capacity.²⁹⁰ The Seventh Circuit must reconcile its own publisher approach with the *Zeran* publisher approach and recognize that they are indeed the same—a unified *Zeran*–publisher immunity.

Courts must also be mindful of the impure applications of this unified *Zeran*–publisher approach. Specifically, this Comment cautions against the continued misapplication of definitional reasoning by the Seventh and Ninth Circuits. These particularly influential courts must use their roles to clarify the state of the law. Both circuits must abandon the reasoning of the definitional approach that has infiltrated their respective opinions.²⁹¹ If their respective courts are going to recognize any form of protection derived from § 230(c)(1), they must recognize that it functions as more than a definition.²⁹² If they are going to protect websites that do not take steps to screen content and become Good Samaritan screeners, then they must stop demanding that the entire text of the statute relate only to its title,²⁹³ and they must stop claiming that the CDA should be limited to overruling *Stratton*.²⁹⁴

Finally, if the Ninth Circuit recognizes that it has mistakenly signaled approval of a definitional reading of § 230, it must acknowledge that the jurisprudential inbreeding is the only thing responsible for its makeshift § 230 interpretation in *Barnes*.²⁹⁵ It has

290. See discussion *supra* Part III.B.3.

291. *Craigslist*, 519 F.3d at 670 (“Why not read § 230(c)(1) as a definitional clause rather than as an immunity from liability . . . ?”); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) (“[S]ection 230(c) can and should be interpreted consistent with its caption,” “Good Samaritan” blocking and screening.).

292. See *Craigslist*, 519 F.3d at 669 (“We have questioned whether § 230[(c)](1) creates any form of ‘immunity,’ Subsection (c)(1) does not mention ‘immunity’ or any synonym.”); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009) (quoting *Craigslist*); see also *GTE*, 347 F.3d at 660.

293. See *Roommates.com*, 521 F.3d at 1164 (“[T]he substance of section 230(c) can and should be interpreted consistent with its caption.”); *Craigslist*, 519 F.3d at 670 (“Yet § 230(c) . . . bears the title ‘Protection for “Good Samaritan” blocking and screening of offensive material’ Why not . . . harmonize the text with the caption?”); *Barnes*, 570 F.3d at 1105 (“It would indeed be strange for a provision so captioned to provide equal protection as between internet service providers who do nothing and those who attempt to block and screen offensive material.”).

294. See *Roommates.com*, 521 F.3d at 1163 n.12 (“[I]t seems to be the principal or perhaps the only purpose” of § 230 to overrule *Stratton*.).

295. Although *Barnes* has yet to be cited for its troubling proposition, there is still cause for concern. As a panel opinion of the Ninth Circuit, it is binding on all other panel decisions until it is overturned by an en banc decision. See *Murray v. Cable NBC*, 86 F.3d 858, 860 (9th Cir. 1996). This same challenge may also be an obstacle to any attempt to officially renounce the definitional reasoning of the

effectively created a broad new approach that potentially immunizes the creation of defamatory and other illegal content.²⁹⁶ By renouncing the definitional reasoning dicta utilized by *Roommates.com* and *Barnes*, the court will not be forced into the same corner again.

V. CONCLUSION

No approach to the CDA can offer both a broad immunity to websites and a broad protection to potential victims of defamation, discrimination, or any other illegal content. Every interpretation of the CDA suffers from some form of conflicting reasoning, ignored legislative intent, or unfavorable result. These considerations are indeed competing, and the inherent result is compromise. A unified *Zeran*-publisher approach is the only interpretation of § 230 that protects the interests of both prudence and justice. Allowing SOF.com to gain immunity after Mr. Savage posts his ad on the website is the only way to encourage the website to screen content fearlessly and fairly. Both Congress²⁹⁷ and the courts²⁹⁸ wisely prefer this result to its converse—a website that faces liability for the content of millions of posts it cannot read, and instead prefers not to let third parties communicate any ideas on its forum.

Courts face a tough challenge if they hope to refine the CDA's jurisprudence. They must become keenly aware of the varying interpretations of § 230. The differing interpretive approaches have collided dramatically in a cloud of conflict, feigned agreement, and illusions of disagreement. It is time to pick up the pieces of the CDA's jurisprudence, sweep away the debris, and recognize the legacy of the *Zeran*-publisher approach.

*Ryan French**

Ninth Circuit in *Roommates.com*, which was itself an en banc decision, also binding on the entire Ninth Circuit. See *Roommates.com*, 521 F.3d 1157.

296. See *Barnes*, 570 F.3d at 1105.

297. See 141 CONG. REC. 22,045-46 (1995) (statement of Rep. Wyden) (recognizing the importance of a vibrant Internet and the impossibility of charging open websites with controlling content).

298. See *Zeran v. AOL, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) (“Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230’s statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.”).

* J.D./D.C.L., 2012, Paul M. Hebert Law Center, Louisiana State University.