

DOES LIABILITY ENHANCE CREDIBILITY?: LESSONS FROM  
THE DMCA APPLIED TO ONLINE DEFAMATION

OLIVERA MEDENICA & KAISER WAHAB\*

	INTRODUCTION.....	238
I.	A BACKGROUND: DEFAMATION LAW AND SECTION 230	
	JURISPRUDENCE.....	239
	A. <i>Defamation</i> .....	239
	1. Definition of Defamation.....	240
	2. Constitutional Restraints.....	241
	3. Defamation as a Fundamental Human Right.....	245
	B. <i>Section 230 and the Telecommunications Act of 1996</i> .....	246
	1. The State of Affairs Before the Communications Decency Act.....	247
	2. The Communications Decency Act.....	249
	a. Procedural History.....	249
	b. Impact of Section 230 and the Telecommunications Act of 1996.....	251
	3. The <i>Zeran v. America Online, Inc.</i> Decision.....	252
	4. Expansion of Section 230 Following <i>Zeran</i> .....	254
II.	COPYRIGHT AND DEFAMATION: A GUIDE FOR SECTION 230	
	REMODELING.....	255
	A. <i>The Digital Millennium Copyright Act</i> .....	256
	B. <i>Criticism of the Digital Millennium Copyright Act</i> .....	258
	1. Chilling of Speech.....	259
	2. Duty to Police for Copyright Infringement.....	259
	3. Sufficiency of Notice Requirement.....	261
	4. Analysis of Vicarious Liability Precedes Digital Millennium Copyright Act Immunity.....	262
	C. <i>Online Defamation Limited Liability Act</i> .....	263
	1. Policy Concerns.....	263
	2. Amendment to Section 230.....	265
	3. Public Defense Fund.....	267
	CONCLUSION.....	269

---

\* Olivera Medenica is a partner at Wahab & Medenica LLC, a graduate of Brooklyn Law School, 2000, and an adjunct faculty member at Brooklyn Law School. Kaiser Wahab is a partner at Wahab & Medenica LLC and a graduate of Columbia Law School, 1999.

This article formed the basis of the authors' presentation for a panel at Wikimania 2006, held at the Harvard Law School in August, 2006. ©2007 Olivera Medenica & Kaiser Wahab.

## INTRODUCTION

The Internet, once merely a cold war nuclear contingency,<sup>1</sup> has become the heart and soul of global culture and society. In 1990, the broadband lifestyle of today was only a glimmer in one's optical drive, as unwieldy e-mail and a text-only web merely whispered the end of print. However, ten years after Congress passed the momentous Communications Decency Act of 1996 ("CDA")<sup>2</sup> to promote Internet growth, no one can deny the Internet's firm grasp on civilization—its every new incarnation and convenience instantly becoming essential to our lives. While the CDA was founded on a prescient desire to protect both infant technologies and ancillary industries, the Internet has matured beyond all expectations.

In short, the Internet is not a novelty act; it is the very basis for human discourse on a magnitude never before imagined. As of 2006, eighty-four million Americans have broadband Internet access in their homes, at least fifteen states provide virtual schooling with hundreds of thousands of students e-learning, and twenty-five percent of all primary and secondary public schools offer virtual instruction.<sup>3</sup> In addition, it is estimated that the percentage of the American population using the Internet reached sixty-eight percent in 2005, a 160% increase since 2000.<sup>4</sup> Most notably, thirty-five percent of all Internet users and forty-two percent of home broadband users have posted content to the Internet in some fashion.<sup>5</sup>

Yet, despite the omnipresence of the Internet, Congress has left the Internet training wheels intact. The CDA continues to shield interactive computer service providers from nearly all forms

---

<sup>1</sup> See *Birth of the Internet*, CBCNEWS, Aug. 21, 2006, <http://www.cbc.ca/news/background/internet>.

<sup>2</sup> Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 52 (1996). The Communications Decency Act of 1996 was passed as Title V of the Telecommunications Act of 1996, an omnibus bill amending the Telecommunications Act of 1934. See S. REP. NO. 105-225 (1998). The Communications Decency Act amended sections 223 and 230 of Title 47 of the United States Code. However, the amendments made to Section 223 were deemed unconstitutional by the Supreme Court in *Reno v. ACLU*. See *Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>3</sup> U.S. DEP'T OF EDUC., TOWARD A NEW GOLDEN AGE IN AMERICAN EDUCATION—HOW THE INTERNET, THE LAW AND TODAY'S STUDENTS ARE REVOLUTIONIZING EXPECTATIONS (2004), *available at* <http://www.ed.gov/about/offices/list/os/technology/plan/2004/plan.pdf>.

<sup>4</sup> INTERNET WORLD STATS NEWS, INTERNET USAGE GROWTH 2000–2005 (July 2005), <http://www.internetworldstats.com/pr/edi008.htm#4>.

<sup>5</sup> PEW INTERNET & AM. LIFE PROJECT, HOME BROADBAND ADOPTION 2006: HOME BROADBAND ADOPTION IS GOING MAINSTREAM AND THAT MEANS USER-GENERATED CONTENT IS COMING FROM ALL KINDS OF INTERNET USERS (2006), [http://www.pewinternet.org/PPF/r/184/report\\_display.asp](http://www.pewinternet.org/PPF/r/184/report_display.asp).

of tort liability for defamatory speech. Further still, the CDA grants such service providers immunity when the service provider selects, publishes, or refuses to remove defamatory content from third parties that the service provider actually knows is false. However, as a matter of sound public policy, defamation tort law has always held conventional and print media liable for the publication or distribution of defamatory material. With online media capable of global and instantaneous diffusion and the supplanting of conventional media, it is both startling and curious that the CDA's absolute protection remains intact.

This article argues that the CDA should be amended to address the Internet's obvious development and to balance Congress' original legislative intent against the legitimate interests of aggrieved parties. Part I defines and outlines the traditional principles of defamation law. Part I then analyzes the legislative history of the CDA, and provides an overview of various courts' application of the statute to online defamation disputes. Parts II.A and II.B provide an analysis of the Digital Millennium Copyright Act's ("DMCA") notice and takedown procedures as well as its most common criticism. Part II.C concludes with a suggested amendment to section 230—the Online Defamation Limited Liability Act ("ODEFLLA")—which would include: (1) a safe harbor provision similar to the DMCA's Online Copyright Infringement Liability Limitation Act ("OCILLA") provisions, including a notice and takedown provision for allegedly infringing or defamatory material; (2) limited liability for Internet intermediaries by providing a statutory cap on damages; and (3) a public Internet intermediary defense fund as insurance against unwarranted liability.

## I. A BACKGROUND: DEFAMATION LAW AND SECTION 230 JURISPRUDENCE

### A. *Defamation*

The law of defamation has evolved as a tug-of-war between a plaintiff's right to enjoy his reputation and a defendant's right to freedom of speech under the First Amendment. In defamation proceedings, an injured plaintiff seeks redress for statements that are false and harmful to his reputation, against a defendant's assertion that his statements are truthful. If the tort appears deceptively simple, it is because the terms "truth" and "fault" are generally familiar. The analysis becomes infinitely more complicated, however, when the interests at issue operate on a spectrum between protecting two fundamental rights—freedom of speech and a plaintiff's intact reputation.

### 1. Definition of Defamation

Traditional defamation law provides that the status of a defendant as a common carrier, distributor, or publisher will affect the burdens to be established in a defamation case.<sup>6</sup> A common carrier defendant, for example, merely acts as a conduit for information with no editorial control, and, therefore, may not be held liable for the information that it transmits. A distributor defendant, such as a library or bookstore, may be held liable only upon a plaintiff's prima facie case and the showing that defendant had actual or constructive knowledge of the defamatory work. A publisher, in contrast, retains editorial control over the information disseminated and can be held liable under the standards discussed below at least upon a showing of negligence.<sup>7</sup>

For the most part, defamation laws vary from state to state, but the underlying elements remain the same.<sup>8</sup> To establish a valid claim for defamation, a plaintiff generally must prove: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm, or the existence of special harm caused by the publication.<sup>9</sup> The burden of proof varies depending on the status of the plaintiff as a public or private figure.<sup>10</sup>

The first factor to establish defamation focuses on the falsity of the allegedly defamatory statements. It is usually the plaintiff's burden to demonstrate that the statements were false.<sup>11</sup> A plaintiff that is either a public figure or a public official has the burden of pleading and proving falsity, and may also have the burden of establishing those elements with "convincing clarity."<sup>12</sup> A private plaintiff, however, may only have to prove his case by a preponderance of the evidence.<sup>13</sup>

The second factor requires that the defamatory statement is

---

<sup>6</sup> Jay M. Zitter, Annotation, *Liability of Internet Service Provider for Internet or E-mail Defamation*, 84 A.L.R.5th 169, § 2[a] (2006); Jae Hong Lee, *Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 471 (2004).

<sup>7</sup> Zitter, *supra* note 6, § 2[a].

<sup>8</sup> See 50 AM. JUR. 2D *Libel and Slander* § 6 (2006).

<sup>9</sup> RESTATEMENT (SECOND) OF TORTS § 558 (1977).

<sup>10</sup> See 1 ROBERT D. SACK, *SACK ON DEFAMATION* § 3.3 (2006) [hereinafter *SACK ON DEFAMATION*]. As a public figure, a plaintiff is often the subject of public scrutiny and will face higher hurdles in proving that defendant's statements were actionable. A private plaintiff, however, does not face such public scrutiny, and the threshold for liability is therefore lowered. *Id.*

<sup>11</sup> See *id.* § 3.4.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

published or communicated to a third party.<sup>14</sup> If the message is never communicated to anyone but the author of such statements and the person about whom they are written, the statements are not defamatory because the plaintiff's reputation was never harmed.<sup>15</sup> Accordingly, the defamatory statements must be communicated either purposely or negligently to a third party in order to be actionable.<sup>16</sup>

The third factor, fault, is the focal point of a defamation case. The degree of fault will depend on whether the plaintiff is a public official, a public person, or a private person.<sup>17</sup> In the majority of instances, the private plaintiff must prove the degree to which the defendant's fault amounts to negligence.<sup>18</sup> Where the plaintiff is a public person or a public official, he may have to prove "actual malice."<sup>19</sup> The method of applying fault standards has been left open for states to interpret, but it is generally understood that defendants are given the most protection when plaintiffs are public officials or public persons.<sup>20</sup>

The last factor requires the plaintiff to demonstrate that he was harmed by the alleged defamation.<sup>21</sup> Harm can include not only pecuniary injuries but also injuries such as impairment of reputation or standing in the community, personal humiliation, and mental anguish and suffering.<sup>22</sup> In some egregious instances, punitive or exemplary damages are also granted for willful offenses where a defendant is treated as an example to prevent future similar behavior.<sup>23</sup>

## 2. Constitutional Restraints

The history of defamation law is largely driven by the application of the First Amendment to the doctrines of libel and slander. American defamation law, therefore, cannot be understood without an explanation of the constitutional doctrines at issue and their interrelationship with common law principles.

*New York Times Co. v. Sullivan* is the landmark Supreme Court case in defamation jurisprudence.<sup>24</sup> *Sullivan* arose at the height of the civil rights movement in the South during the 1960s. In

---

<sup>14</sup> 50 AM. JUR. 2D *Libel and Slander* § 235 (2006).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See id.* § 31.

<sup>18</sup> *See* 1 SACK ON DEFAMATION, *supra* note 10, § 6.1.

<sup>19</sup> *See id.* § 5.1.

<sup>20</sup> 50 AM. JUR. 2D *Libel and Slander* § 31 (2006).

<sup>21</sup> RESTATEMENT (SECOND) OF TORTS § 558 (1977).

<sup>22</sup> *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-49 (1974); 1 SACK ON DEFAMATION, *supra* note 10, § 10.1.

<sup>23</sup> *See* 1 SACK ON DEFAMATION, *supra* note 10, § 10.3.

<sup>24</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

*Sullivan*, the *New York Times* had published an advertisement which civil rights advocates had purchased in order to raise funds to support their cause. The advertisement referred to demonstrations throughout the South and described how the local authorities undertook systematic expulsions from schools and used intimidation through force on a large number of demonstrators.<sup>25</sup> The advertisement specifically stated that the authorities used “truckloads of police armed with shotguns and tear-gas” and padlocked students’ dining rooms to “starve them into submission.”<sup>26</sup> In addition, the advertisement mentioned that “intimidation and violence” was used against Dr. Martin Luther King, Jr., the leader of the civil rights demonstrations.<sup>27</sup>

L.B. Sullivan, the Commissioner of Public Affairs for the City of Montgomery, brought suit against the *New York Times* for libel.<sup>28</sup> After a trial, the jury found that some of the statements in the advertisement were exaggerations and others were simply wrong, and thus found in favor of Sullivan.<sup>29</sup> The Alabama Supreme Court upheld the decision and the *New York Times* appealed to the Supreme Court of the United States.<sup>30</sup>

The Supreme Court examined the constitutionality of Alabama libel law. Under Alabama law, a defendant’s statements are “libelous per se” where “the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt.”<sup>31</sup> Alabama law further provides that when a plaintiff is a public official, his position is sufficient to “support a finding that his reputation has been affected by [the defamatory] statements.”<sup>32</sup> Once libel per se is established, a defendant’s only defense is to prove the truth of the contested statements.<sup>33</sup>

In addressing the scope of defamation law, the Court invoked the broad protections of the First Amendment which grant individuals the right to freely express themselves on matters of public questions.<sup>34</sup> The Court found that merely protecting the truth was insufficient and that a defamation case should be determined against a background of a “profound national

---

<sup>25</sup> *Id.* at 257.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 256-58.

<sup>28</sup> *Id.* at 256.

<sup>29</sup> *Id.* at 258-59.

<sup>30</sup> *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25 (Ala. 1962), *rev’d*, 376 U.S. 254.

<sup>31</sup> *Sullivan*, 376 U.S. at 263.

<sup>32</sup> *Id.* at 267.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 269.

commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>35</sup> According to the Court, the “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive.’”<sup>36</sup>

The Court concluded that a factual error or defamatory content was insufficient to overcome the protections of the First Amendment. According to the Court, the free speech guarantees of the Constitution could only be overcome with a showing of “actual malice”:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.<sup>37</sup>

The *Sullivan* decision was ground-breaking, as it went against a long line of cases regulating speech injurious to a plaintiff’s reputation.<sup>38</sup> *Sullivan* is particularly important in that it struck an authoritative balance between the interests of the general public, the protections of the First Amendment, and the concerns of an injured plaintiff. Although *Sullivan* addressed defamation of a plaintiff in the context of a public person or official, the decision set a significant precedent in pushing the boundaries of injurious speech protected by the First Amendment.<sup>39</sup>

The issue of defamatory speech with respect to private plaintiffs was decided in *Gertz v. Robert Welch, Inc.*<sup>40</sup> Elmer Gertz was a prominent Chicago attorney retained by the family of a youth killed by a policeman.<sup>41</sup> Gertz represented the family in a civil action brought against the policeman.<sup>42</sup> As a result of Gertz’s involvement in the lawsuit, the magazine *American Opinion* published an article about Gertz labeling him a “communist” and a member of a Marxist organization.<sup>43</sup> Gertz filed a libel action against the defendant, a publisher, asserting that the publication’s

---

<sup>35</sup> *Id.* at 270.

<sup>36</sup> *Id.* at 271-72 (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)).

<sup>37</sup> *Id.* at 279-80.

<sup>38</sup> See 1 SACK ON DEFAMATION, *supra* note 10, § 1.2.

<sup>39</sup> *Id.*

<sup>40</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>41</sup> *Id.* at 325.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 326.

statements were defamatory and contained serious inaccuracies.<sup>44</sup>

The Supreme Court held that Gertz was not a “public figure” and that “actual malice” was therefore not a necessary element of the libel action.<sup>45</sup> In drawing a distinction between private and public plaintiffs, the Court stated:

Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.<sup>46</sup>

According to *Gertz*, a public figure has a better opportunity to refute defamatory statements than a private figure because a public figure will have the necessary means of communication to do so.<sup>47</sup> The Court also noted that, in rare cases, a public figure could also be an individual who was unwillingly thrust into the spotlight.<sup>48</sup>

In addressing private plaintiffs, the *Gertz* Court reached two important conclusions. First, the Court deferred to the states on the issue of the appropriate standard of liability for publishers of defamatory statements where the plaintiff is a private figure.<sup>49</sup> This finding would be applicable only in instances where “the substance of the defamatory statement ‘makes substantial danger to reputation apparent.’”<sup>50</sup> Second, a plaintiff is barred from seeking punitive damages against defendant-publishers where liability is not based on knowledge of falsity or reckless disregard for the truth.<sup>51</sup> Accordingly, if a plaintiff is unable to prove “actual malice,” he can only recover damages for actual injury.<sup>52</sup>

The *Gertz* and *Sullivan* holdings are pivotal cases in the law of defamation and form the basis of modern libel and slander law. As a result of *Gertz*, various states have enacted a number of different standards in the context of private figure plaintiffs.<sup>53</sup> The vast majority require a showing of negligence to determine whether a defendant was “at fault.” A minority of states require an “actual malice” standard, while some states use a mixed standard.<sup>54</sup>

---

<sup>44</sup> *Id.* at 327.

<sup>45</sup> *Id.* at 345-48.

<sup>46</sup> *Id.* at 342.

<sup>47</sup> *Id.* at 344.

<sup>48</sup> *Id.* at 345.

<sup>49</sup> *Id.* at 347.

<sup>50</sup> *Id.* at 348 (quoting *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967)).

<sup>51</sup> *Id.* at 349.

<sup>52</sup> *Id.*

<sup>53</sup> See 1 SACK ON DEFAMATION, *supra* note 10, § 6.1.

<sup>54</sup> *Id.* §§ 6.2-6.4.



Justice Durham best described the intersecting interests of defamation and the First Amendment when he wrote the majority opinion for the Supreme Court of Utah in *West v. Thomson Newspapers*:

A visual model for understanding the nature of [defamation] might be represented by three interlocking circles. The first circle represents state defamation law and embodies the significant interest states have in providing tort remedies for injuries to reputation. The second circle, impinging on the first to varying degrees depending on language and interpretation, represents state constitutional guarantees of freedom of expression and freedom of the press. The third circle overlaps both the first and the second and embodies federal free expression and free press guarantees.<sup>55</sup>

Although these constitutional guarantees drive much of American defamation jurisprudence, the tort's reach goes beyond the foundations of a democratic state. Indeed, protection against defamation is not merely the guardian of one of our constitutional rights but rather an acknowledgment enshrined within our legal system of a greater fundamental human right.

### 3. Protection Against Defamation as a Fundamental Human Right

Fundamental to a stable and democratic society is the protection of free speech, but only to the extent that such protection does not eviscerate the equally critical right to one's reputation and privacy. Protection of these cherished concepts has ancient roots,<sup>56</sup> and defamation law arose out of the juridical recognition of those rights. As such, even as free speech became one of the cornerstones of modern democracy, western jurisprudence has never dispensed with defamation torts. Rather, it has striven to harmonize the interests of the individual with the interests of society at large.<sup>57</sup>

Various international treaties and conventions have enshrined the protection of reputation and privacy as a fundamental human right. For example, article 12 of the

---

<sup>55</sup> *West v. Thomson Newspapers*, 872 P.2d 999, 1004 (Utah 1994).

<sup>56</sup> As early as the Roman Empire, defamation was addressed through the legal doctrine of *convicium contra facere*, which attributed liability to slanderous public comments. M. Stuart Madden, *The Graeco-Roman Antecedents of Modern Tort Law*, 44 BRANDEIS L.J. 865, 897-98 (2006); see also Kif Augustine-Adams, *Law and Literature: Defamed Women: Salve Deus Rex Judaeorum*, 22 HARV. WOMEN'S L.J. 207 (1999) (examining the use of defamation as a "tool of redress" for the subjugation of women from as early as 1500).

<sup>57</sup> Consider, for example, the United States Supreme Court's balancing test for public figure defamation liability articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Universal Declaration of Human Rights states: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”<sup>58</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms best frames this right as a legitimate legal restriction arising from the consequences and responsibilities associated with free speech:

Article 10—Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>59</sup>

Collectively these and other legal instruments illustrate the fact that defamation law is not an aberrant and mildly tolerated limitation on free speech. It is a legal framework effectuating the need to balance the right to expression with individual rights. A defamation case is therefore rarely a simple matter, and as will be discussed in greater detail below, modern technology and the Internet only add to the complexity of this already complicated analysis.

B. *Section 230 and the Telecommunications Act of 1996*

Congress passed the Telecommunications Act of 1996 (“Telecom Act”) on February 1, 1996, as a major modification to the then sixty year-old telecommunications law.<sup>60</sup> The CDA is the

---

<sup>58</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 12, U.N. Doc. A/810 (Dec. 10, 1948).

<sup>59</sup> European Convention on Human Rights, art. 10, § 2, Nov. 4, 1950, 213 U.N.T.S. 222.

<sup>60</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.); *U.S. Telecom Ass’n v. Fed. Comm’n’s Comm’n*, 359 F.3d 554, 561 (D.D.C. 2004).

short title for Title V of the Telecom Act.<sup>61</sup> The CDA, originally a two-pronged legislation, was borne out of the perceived threat to children posed by highly accessible pornographic content on the Internet, paired with congressional dismay over prior case law that penalized Internet Service Providers' ("ISPs") efforts to police such content.

### 1. The State of Affairs Before the Communications Decency Act

As the Internet took on increasing importance in the nation's daily life, courts began to grapple with its implications. It had not gone unnoticed that the Internet's anonymity, lack of oversight, and instantly available and globally accessible content could be as much a curse as a blessing. Courts were thus forced to address a new twist on the old cause of action of defamation.

Traditional tenets of defamation law were, at first, awkwardly applied to the Internet's key players.<sup>62</sup> The initial threshold question was whether ISPs were "publishers" that exercised significant control over content.<sup>63</sup> If ISPs were indeed so-called "publishers" under traditional defamation law, ISPs would be held strictly liable for third-party content, under the characterization that they exercise significant control over content posted on the Internet.<sup>64</sup> Courts also deliberated whether ISPs could similarly be classified as "distributors" with liability only if they knowingly or negligently distributed defamatory content.<sup>65</sup>

In certain cases, the courts determined that ISPs were mere distributors. For example, in *Cubby, Inc. v. CompuServe Inc.*, the district court for the Southern District of New York held that CompuServe, an ISP, was not liable for defamatory content provided by a third party.<sup>66</sup> The third party in *Cubby* was Rumorville USA, an Internet discussion forum accessible through

---

<sup>61</sup> Communications Decency Act of 1996, Pub. L. No. 104-104, § 501, 110 Stat. 52 (1996)

<sup>62</sup> See, e.g., *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) (concluding that CompuServe was only a "distributor" of defamatory content and could not be held liable). But see *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229 (Nassau County Sup. Ct. May 24, 1995) (deliberately distinguishing the facts of the matter at hand from those in *Cubby*, while determining that Prodigy, by instituting and advertising an automated content control system, had transformed itself into a "publisher"), *superseded by statute*, 47 U.S.C. § 230(c) (2006). It should be noted that CompuServe and Prodigy were both leading Internet Service Providers at the time. See CompuServe, <http://webcenters.netscape.compuserve.com/menu/about.jsp?floc=DC-headnav1> (last visited Feb. 1, 2007); Wikipedia, [http://en.wikipedia.org/wiki/Prodigy\\_%28ISP%29](http://en.wikipedia.org/wiki/Prodigy_%28ISP%29) (last visited Feb. 1, 2007).

<sup>63</sup> See *Cubby*, 776 F. Supp. 135; *Stratton Oakmont, Inc.*, 1995 N.Y. Misc. LEXIS 229.

<sup>64</sup> *Stratton Oakmont, Inc.*, 1995 N.Y. Misc. LEXIS 229, at \*3-4.

<sup>65</sup> *Cubby*, 776 F. Supp. at 140.

<sup>66</sup> *Id.* at 137-38.

CompuServe by its subscribers. However, CompuServe outsourced most of its administrative functions, such as managing, reviewing, creating, deleting, and editing forum content to Cameron Communications, Inc.<sup>67</sup> As a result, the court determined that CompuServe was a distributor that had “no more editorial control over such a publication than does a public library, book store, or newsstand.”<sup>68</sup> The *Cubby* court further determined that the plaintiffs had failed to show that CompuServe knew or had reason to know of the defamatory statements in Rumorville, and, therefore, could not be held liable as a distributor for defamation.<sup>69</sup>

Yet, unfortunately for ISPs, the “publisher” theory found traction in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, a case in the Supreme Court of New York.<sup>70</sup> The *Stratton* court held that Prodigy, an ISP with more than two million subscribers and a wide variety of bulletin boards, was strictly liable as a publisher for libelous statements on one of its message boards.<sup>71</sup> In October 1994, an anonymous poster published several messages to the popular Money Talk bulletin board skewering the integrity of Stratton Oakmont, an investment banking firm, and its president.<sup>72</sup> Unlike CompuServe, Prodigy advertised its services partly by highlighting its content-filtering capabilities.

Mindful of the *Cubby* decision, the *Stratton* court distinguished Prodigy from CompuServe by noting that Prodigy had “held itself out to the public and its members as controlling the content of its computer bulletin boards.”<sup>73</sup> Prodigy’s “conscious choice, to gain the benefits of editorial control, opened it up to a greater liability than CompuServe and other computer networks that make no such choice.”<sup>74</sup> This was underscored by the court’s declaration that as a general matter computer bulletin boards are akin to “bookstores, libraries and network affiliates,” or, simply put, distributors.<sup>75</sup>

Ironically, the court determined that when the ISP does not maintain an editorial policy, it should be held to the lower distributor standard. Hence, rather than encourage self-regulation, the *Stratton Oakmont* court inadvertently promoted a

---

<sup>67</sup> *Id.* at 137.

<sup>68</sup> *Id.* at 140.

<sup>69</sup> *Id.* at 141.

<sup>70</sup> *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 N.Y. Misc. LEXIS 229, at \*13-16 (Nassau County Sup. Ct. May 24, 1995), *superseded by statute*, 47 U.S.C. § 230(c) (2006).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at \*1-2.

<sup>73</sup> *Id.* at \*10.

<sup>74</sup> *Id.* at \*13.

<sup>75</sup> *Id.* at \*12.

“look the other way” approach among ISPs; the less engaged they were with content, the less likely they could be characterized as a “publisher.”<sup>76</sup>

The *Stratton Oakmont* holding did not fade into legal oblivion as a flawed resort to traditional defamation law in order to establish corporate accountability for marketing Internet services. Rather, the decision terrorized the rising superstar ISP industry. The industry’s aspiration—to make the Internet a household item by packaging the online experience as safe and secure—collided with newfound liability, should any efforts akin to Prodigy’s prove inadequate. Accordingly, the industry turned to Congress to provide reassurance and a definitive voice to the debate, laying the groundwork for the CDA.

## 2. The Communications Decency Act

### a. Procedural History

The CDA was a response to both the effects of the *Stratton* holding and the rising concern over Internet pornography. While both causes shaped the initial version of the CDA, there were two slightly divergent approaches to deal with them. Ultimately, only one of the two approaches prevailed.

Senator Exon is credited with the pure anti-obscenity approach of the CDA, his second attempt to create obscenity regulation “for the digital world,” after a failed 1994 stand-alone law.<sup>77</sup> This targeted Article forty-seven section 223 of the United States Code, the statute that regulated obscene communications over telephone networks. The proposed amendment provided stiff penalties including fines up to \$100,000 and prison terms up to two years for anyone who “(i) makes, creates, or solicits, and (ii) initiates the transmission of, any . . . communication which is obscene, lewd, lascivious, filthy, or indecent.”<sup>78</sup> Also, under the proposed amendment, the Federal Communications Commission (“FCC”) was expressly charged with overseeing the Internet.

Representatives Cox and Wyden had the *Stratton Oakmont* decision in mind when they put forth their own amendment in the House. To Representatives Cox and Wyden, the *Stratton Oakmont* decision punished legitimate efforts to provide a “family-oriented” computer service. Hence, the amendment sought to provide a more finessed solution to online indecency by overruling the

---

<sup>76</sup> *Id.*

<sup>77</sup> See 140 CONG. REC. 18045, 18046 (1994) (statement of Sen. Exon); see also S. 314, 104th Cong. (1994).

<sup>78</sup> 141 CONG. REC. 15501, 15505 (1995) (statement of Sen. Exon).

decision altogether, thereby permitting ISPs to regulate content residing on their systems without inadvertently incurring liability if that regulation proved unsuccessful. Their proposed amendment to the Telecom Act left § 223 unaltered, kept the Internet outside of § 223's reach, and instead created a new § 230. In addition, their approach favored a technological solution in filtering software, the very approach penalized in *Stratton*.<sup>79</sup> Indeed, the House Conference Report explicitly states that “[o]ne of the specific purposes of [§ 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of . . . objectionable material.”<sup>80</sup> Furthermore, unlike Exon's approach, this second amendment did not provide the FCC a role in the regulation of Internet content.<sup>81</sup>

In developing the CDA, Congress also pursued an umbrella policy objective: “[To] promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>82</sup> Passed by the House on August 4, 1995, the complete underlying policy was laid out in § 230(b):

- (1) to promote the continued development of the Internet and other interactive computer services . . . ;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
- (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.<sup>83</sup>

---

<sup>79</sup> 141 CONG. REC. 22035 (1995) (statement of Rep. Cox).

<sup>80</sup> H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.).

<sup>81</sup> “[I]t will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet. . . .” 141 CONG. REC. H8470 (1995) (statement of Rep. Cox).

<sup>82</sup> 47 U.S.C. § 230(b)(1)-(5) (2006).

<sup>83</sup> *Id.*

With two somewhat divergent approaches on the table, the Conference Committee created a hybrid Communications Decency Act that retained § 230(b)'s policy thrust, but eliminated the proposed limitation on FCC regulation in § 230(d).<sup>84</sup> Ultimately, the Senate and House passed the new Communications Decency Act, under Title V of the Telecom Act and the bill was signed into law by President Clinton on February 8, 1996.<sup>85</sup>

b. Impact of Section 230 and the  
Telecommunications Act of 1996

Senator Exon's contribution to the Telecommunications Act was short-lived, as the Supreme Court in 1997 held that the § 223 amendments were unconstitutional, leaving only § 230.<sup>86</sup> In the time since then, § 230 has established itself as the *du jure* defense against a variety of actions for online service providers. Section 230(c)(1) provides that, "[n]o 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."<sup>87</sup> Noticeably absent from § 230(c)(1) is an express mention of distributor protection. Rather, the section sets forth protection only for "publishers or speakers" of content.<sup>88</sup> Since the *Stratton Oakmont* court distinguished distributors from publishers, and did not impose distributor liability on Prodigy, Congress did not have to eliminate distributor liability in order to overrule *Stratton Oakmont*.

As finally enacted, § 230 provides as follows:

(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

---

<sup>84</sup> See H.R. REP. NO. 104-458, at 81-84, 86-88 (1996) (Conf. Rep.).

<sup>85</sup> See S. REP. NO. 105-225 (1998)

<sup>86</sup> *Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>87</sup> 47 U.S.C. § 230(c)(1).

<sup>88</sup> *Id.*

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).<sup>89</sup>

Section 230, initially the product of Congress' effort to encourage ISPs to self-regulate, became an absolute shield for ISPs as it wound its way through the courts. The cornerstone of the courts' application and interpretation of § 230 is the Fourth Circuit's *Zeran v. America Online, Inc.* decision.<sup>90</sup> Confronted with a dispute over the scope of ISP liability for defamatory third-party content, the *Zeran* court provided both ISPs and their users nearly complete immunity.

### 3. The *Zeran v. America Online, Inc.* Decision

The scenario underlying *Zeran* is one of many that vividly illustrates the incendiary and reproductive power of the Internet to broadcast defamatory misinformation. On April 25, 1995, six days following the Oklahoma City bombing, a lone anonymous post on an America Online ("AOL") bulletin board mentioned the sale of t-shirts adorned with unsavory slogans regarding the bombing.<sup>91</sup> Moreover, the post directed interested purchasers to call Kenneth Zeran's home phone number.<sup>92</sup> Zeran, the victim of a prank, soon became inundated with irate phone calls, many of which were laced with death threats.<sup>93</sup> Logically, Zeran informed AOL of the situation. AOL refused to post a retraction as a matter of policy and instead promised only to remove the posting.<sup>94</sup> Despite the removal of offending posts, others continued to pop up in their place.<sup>95</sup> As the situation escalated, the prank even found an ear with a local Oklahoma City radio station, which in turn directed its listeners to call Zeran's phone number.<sup>96</sup> After Zeran repeatedly called AOL, AOL eventually told Zeran it would soon close the accounts through which the offending messages had been posted.<sup>97</sup> Yet, despite AOL's response, albeit muted, the

---

<sup>89</sup> *Id.* § 230(c).

<sup>90</sup> *Zeran v. AOL, Inc.*, 129 F.3d 327 (4th Cir. 1997).

<sup>91</sup> *Id.* at 329.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*



torrent of hate calls abated only after a local newspaper exposed the prank.<sup>98</sup> Shortly thereafter, the local radio station made an on-air apology.<sup>99</sup>

Tortured by this experience, Zeran filed a suit against AOL and lost both in District Court for the Eastern District of Virginia and upon appeal to the Fourth Circuit.<sup>100</sup> Zeran claimed that upon due notification of the defamatory content of the posting and its nature as a hoax, AOL had a duty to: 1) promptly remove the defamatory postings; 2) post retractions indicating the defamatory nature of the posts; and 3) actively attempt to locate and block any further defamatory posts.<sup>101</sup> In its successful motion for summary judgment in the district court, AOL relied upon § 230 as an affirmative defense.<sup>102</sup> On appeal, the Fourth Circuit focused on Zeran's argument that § 230 immunity spoke only to publisher liability and left distributor liability, which would be triggered by notice, untouched.<sup>103</sup> Ironically, beyond merely disagreeing with Zeran's argument, the Fourth Circuit concluded that in fact distributor liability was "merely a subset, or a species, of publisher liability, and is, therefore, also foreclosed by § 230."<sup>104</sup> The Fourth Circuit reached its conclusion partly out of its desire to effectuate the legislative intent behind § 230.<sup>105</sup>

By placing distributor liability under the umbrella of publisher liability and hence under § 230's ambit, the Fourth Circuit essentially eliminated all defamation liability for third-party content. Moreover, the court was completely comfortable with that proposition, as it stated that maintaining distributor liability outside of § 230 "would defeat the two primary purposes of the statute," to promote the growth of the Internet and to encourage self-regulation.<sup>106</sup> Underscoring the court's conviction that defamation did not apply to the Internet, it went on to state that "Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium"<sup>107</sup> and that defamation liability "represented, for Congress, simply another form of intrusive government regulation of speech."<sup>108</sup> Hence, the Fourth Circuit concluded that § 230 was

---

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See* Zeran v. America Online, 958 F. Supp. 1124 (E.D. Va. 1997), *aff'd*, 129 F.3d 327 (4th Cir. 1997).

<sup>101</sup> Zeran, 129 F.3d at 329-30.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 330-31.

<sup>104</sup> *Id.* at 332.

<sup>105</sup> *Id.* at 330-31.

<sup>106</sup> *Id.* at 330-31, 334.

<sup>107</sup> *Id.* at 330.

<sup>108</sup> *Id.*

enacted as a complete rejection of defamation and even other tort remedies altogether.<sup>109</sup> As a result, the *Zeran* decision paved the way for ISPs, relying upon § 230 as a panacea, to ignore and even facilitate a variety of defamatory and sometimes egregious behaviors.

#### 4. Expansion of Section 230 Following *Zeran*

Following *Zeran*, a variety of courts have employed § 230 to shield ISPs from liability for third party conduct and content, resulting in a greatly expanded array of protections. An example of the expansive § 230 approach is the decision in *Blumenthal v. Drudge*.<sup>110</sup> There, the District Court for the District of Columbia dealt with defamatory statements written by Internet news columnist Matt Drudge, a third party contributor to AOL.<sup>111</sup> The *Blumenthal* court held that AOL was not liable for Drudge's statements, despite a variety of links between AOL and Drudge indicating a far closer relationship than that of arms length third parties. In particular, AOL had entered into a content licensing agreement with Drudge that afforded him monthly payments for an electronic publication dedicated to rumor and gossip.<sup>112</sup> In addition, AOL received copy from Drudge prior to redistributing it to AOL subscribers and was authorized under the licensing agreement to remove any content from Drudge's copy that AOL deemed inappropriate.<sup>113</sup> Indeed, the *Blumenthal* court highlighted the fact that AOL advertised Drudge as a source of "unverified instant gossip."<sup>114</sup> However, constrained by § 230, the court followed *Zeran*, and held that "Congress made no distinction between publishers and distributors in providing immunity from liability."<sup>115</sup>

In *Carafano v. Metrosplash.com, Inc.*, another unfortunate result was reached.<sup>116</sup> In that case, a fan created a false profile for the actress and singer Chase Masterson on Matchmaker.com, an online dating service, using her real name and home address.<sup>117</sup> The profile even employed an email auto-responder, which provided her home address and telephone number.<sup>118</sup> As a result, Masterson was harassed by telephone and fax forcing her to

---

<sup>109</sup> *Id.*

<sup>110</sup> *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

<sup>111</sup> *Id.* at 53.

<sup>112</sup> *Id.* at 51-52.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 51.

<sup>115</sup> *Id.* at 52.

<sup>116</sup> *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

<sup>117</sup> *Id.* at 1121.

<sup>118</sup> *Id.*

abandon her home with her son for several months.<sup>119</sup> Masterson's representatives demanded that Matchmaker.com immediately remove the profile, but were rebuffed, even though the profile violated Matchmaker.com's own Terms of Service.<sup>120</sup> Ultimately, after Matchmaker.com deleted the profile, Masterson sued Matchmaker.com on a variety of grounds, including defamation and invasion of privacy.<sup>121</sup> On appeal, the Ninth Circuit concluded that Matchmaker.com was an Internet Service Provider under § 230 and was afforded complete immunity.<sup>122</sup>

## II. COPYRIGHT AND DEFAMATION: A GUIDE FOR SECTION 230 REMODELING

*Zeran* and its progeny sealed the expansive immunity of section 230 within our jurisprudence. There are numerous parallels between the virtual and non-virtual worlds, and yet the legal landscape does not seem to acknowledge the obvious similarities. While nascent technologies certainly should benefit from a nurturing environment, these disparities are most shocking when the consequences are left absorbed by an unfortunate few members of the general public. The question remains whether there should be casualties for the sake of virtual development.

One of the bases of democracy is the ability to find compromise and understanding in the often conflicting rights of each individual to property, expression, and freedom. American jurisprudence is filled with examples of such compromises, from the most fundamental to the highly sophisticated. For example, we cannot steal, but have the right to earn our own property; we may not commit perjury, but have the right to freely express ourselves. If such compromises are plentiful in our legal system, perhaps in approaching a modification to section 230, one might look to legislation addressing similar shifts from laws governing the physical world to laws governing the virtual world.

The First Amendment has largely shaped defamation law in the United States, in the same way that the protection of the arts and sciences has shaped copyright's history. Both fields have had a tremendous impact upon the Internet, and the solutions have not always been perfect. The DMCA, which addresses the peculiarities of the digital medium in the copyright context, can provide useful guidance in approaching the issue of online defamation.<sup>123</sup>

---

<sup>119</sup> *Id.* at 1121-22.

<sup>120</sup> *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055, 1061 (C.D. Cal. 2002).

<sup>121</sup> *Id.* at 1122.

<sup>122</sup> *Id.* at 1125.

<sup>123</sup> 17 U.S.C. §§ 1201-1205 (2006).

### A. *The Digital Millennium Copyright Act*

The DMCA is far-reaching legislation intended to bring the United States into compliance with international treaty obligations and address pervasive issues in digital piracy.<sup>124</sup> The Act was largely the result of the strong lobbying powers of content and online service providers. During the 1990s, the introduction of the digital format created an exponential growth in copyrighted content distributed over the Internet.<sup>125</sup> As content distribution increased, so did digital piracy.<sup>126</sup> Copyright owners lobbied Congress to provide them with additional protection against digital piracy.<sup>127</sup>

However, ISPs also expressed concern that this increase in content would impose copyright infringement liability upon them for the actions of their users.<sup>128</sup> In light of the sheer volume of works available over the Internet, traditional principles of policing for copyright infringement became outmoded.<sup>129</sup> It would be a great burden for an ISP if it had to perpetually police its infrastructure to ensure that no user was infringing upon someone else's copyright. Moreover, the obligation to police its users for potentially infringing materials could lead to an unwarranted censoring of works where even the slightest doubt existed as to its infringing nature.

To comply with treaty requirements and in order to strike a balance between the competing interests of content owners and ISPs, the DMCA was finally passed by Congress and signed into law

---

<sup>124</sup> Diane M. Barker, *Defining the Contours of the Digital Millennium Copyright Act: The Growing Body of Case Law Surrounding the DMCA*, 20 BERKELEY TECH. L.J. 47 (2005); WIPO Copyright Treaty, art. 11, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. (1997); WIPO Performances and Phonograms Treaty, art. 18, Dec. 20, 1996, 2186 U.N.T.S. 245, available at <http://www.wipo.int/clea/docs/en/wo/wo034en.htm>.

<sup>125</sup> Barker, *supra* note 124, at 47.

<sup>126</sup> See 144 CONG. REC. 18753, 18778 (1998) (statement of Sen. Dingell) ("Piracy of copyrighted works, particularly overseas, has increased dramatically, and copyright owners are desperately in need of additional protection to protect their property from thieves who increasingly prey on their creative ingenuity."); see also S. REP. NO. 105-190, at 8 (1998) ("Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.").

<sup>127</sup> See generally Pamela Samuelson, *The Copyright Grab*, WIRED NEWS, Jan. 1996, [http://www.wired.com/wired/archive/4.01/white.paper\\_pr.html](http://www.wired.com/wired/archive/4.01/white.paper_pr.html).

<sup>128</sup> 144 CONG. REC. 24463, 24465-66 (1998) (statement of Sen. Hatch) ("The OSPs and ISPs needed more certainty in this area in order to attract the substantial investments necessary to continue the expansion and upgrading of the Internet."); see also *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Property, H. Comm. on the Judiciary*, 104th Cong. (1997) (statement of Roy Neel, President and Chief Executive Officer, United States Telephone Association) ("While UTSA members are committed to the Internet, the threat of copyright lawsuits is becoming an increasingly salient consideration in offering the service at all.").

<sup>129</sup> See generally 3 MELVILLE & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.01 (2006).

by President Clinton in 1998.<sup>130</sup> The DMCA addresses a number of issues relevant to content providers, including anti-circumvention provisions and anti-trafficking provisions, which make it illegal to circumvent a technological measure protecting a copyrighted work and to traffic in devices designed for such circumvention.<sup>131</sup> Most importantly, the DMCA contains a provision entitled the Online Copyright Infringement Liability Limitation Act (“section 512” or “OCILLA”), which provides a safe harbor to ISPs from claims of copyright infringement that result from the conduct of their customers.<sup>132</sup>

Section 512 defines the conditions under which ISPs can be held liable for copyright infringement. It creates four distinct safe harbor provisions, each of which describe typical ISP functions, that are shielded from infringement damages. These functions are applicable in instances where the ISP does not take any affirmative action that directly results in copying a protected work.<sup>133</sup> In other words, section 512 is meant to provide a safe harbor where the ISP performs passive functions in its usual course of business.

In order to obtain immunity, section 512(i) provides that an ISP must first satisfy two threshold requirements. The ISP must: (1) “[adopt] and reasonably [implement] . . . a policy that provides for the termination in appropriate circumstances of [users] . . . who are repeat infringers”,<sup>134</sup> and (2) “accommodate[] and . . . not interfere with standard technical measures” that copyright holders rely on in protecting their works online.<sup>135</sup> Once an ISP satisfies these threshold requirements, it can be granted immunity while providing the following services: (1) transitory digital network communications; (2) system caching; (3) information residing on systems or networks at the direction of the user; and (4) information location tools.<sup>136</sup>

The main difference in these categories, aside from the nature of the service, is the level of action that is required by the ISP and whether the ISP must receive notice prior to taking down the allegedly infringing material (i.e., “notice and takedown” provisions). Under section 512(a), the ISP has the broadest scope of protection.<sup>137</sup> This section is a safe harbor for ISPs that provide

---

<sup>130</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

<sup>131</sup> 17 U.S.C. § 1201 (2006).

<sup>132</sup> *Id.* § 512.

<sup>133</sup> H.R. REP. NO. 105-551, pt. 1, at 26 (1998).

<sup>134</sup> 17 U.S.C. § 512(i)(1)(A).

<sup>135</sup> *Id.* § 512(i)(1)(B).

<sup>136</sup> *Id.* § 512(a)-(d).

<sup>137</sup> *See* JENNIFER M. URBAN & LAURA QUILTER, EFFICIENT PROCESS OR “CHILLING

transmission and routing, and includes high-speed Internet access providers, broadband, DSL and dial-up.<sup>138</sup> Since these ISPs are acting as mere “conduits” for information, there is no notice and takedown requirement, and such ISPs will be afforded immunity as long as they comply with the threshold requirements.<sup>139</sup>

Sections 512(c) and (d), covering hosting services and search engines, impose the requirement that ISPs respond “expeditiously” to a notice of copyright infringement by removing the allegedly infringing material.<sup>140</sup> Section 512(c) addresses hosted content such as websites, bulletin boards, and forums. Because such ISPs are not acting as mere conduits but rather “host” information provided by its users, the level of responsibility imposed by the safe harbor provisions rises accordingly. Once an ISP receives a notice, it must: (1) act expeditiously to remove, or disable access to the allegedly infringing materials; (2) notify the alleged infringer that the material has been removed; (3) forward any counter-notices from the alleged infringer to the complainant; and (4) replace the allegedly infringing material if the complainant has not filed a lawsuit within ten to fourteen days after the ISP has received the counter-notice.<sup>141</sup>

Section 512(d), which addresses search engine services, is similar to section 512(c), with the exception that ISPs are not required to notify the alleged infringer of the removal.<sup>142</sup> In other words, under section 512(d) the allegedly infringing material is simply removed upon receiving a notice of infringement.

### B. *Criticism of the DMCA*

The DMCA legislation has been heavily debated, and its interpretation is far from settled. It is inevitable that in the debate between freedom of speech and protection of personal property there should be some casualties. The question remains whether these casualties are excessive. If they are indeed excessive, it may be because the legislation has improperly struck a balance between competing interests, lacks a clear enough guideline for judicial interpretation, or simply fails to address outstanding issues. Perhaps the DMCA’s biggest challenge is whether it will withstand the passage of time or eventually become obsolete due

---

EFFECTS”? TAKEDOWN NOTICES UNDER SECTION 512 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT (Chilling Effects Clearinghouse 2006), <http://images.chillingeffects.org/Urban-Quilter-512-summary.pdf>.

<sup>138</sup> *Id.*; 17 U.S.C. § 512(a).

<sup>139</sup> URBAN & QUILTER, *supra* note 137; 17 U.S.C. § 512(b) has a notice and takedown provision similar to 17 U.S.C. § 512(c).

<sup>140</sup> 17 U.S.C. § 512(c)-(d).

<sup>141</sup> URBAN & QUILTER, *supra* note 137, at 3; 17 U.S.C. § 512(c).

<sup>142</sup> 17 U.S.C. § 512(d).

to technological advances. Although a thorough review of DMCA criticism is far beyond the scope of this article, it is useful to examine some common criticisms of section 512 and its notice and takedown provisions.

### 1. Chilling of Speech

Some of the most vocal critics of the DMCA have been First Amendment advocates. The notice and takedown provisions can, in some instances, be used as a competitive weapon rather than a genuine tool to protect copyright owners.<sup>143</sup> A study undertaken by Chilling Effects, a joint project of several law schools that analyzes cease and desist letters, revealed that over half of the notices sent to Google under section 512 were sent by businesses targeting apparent competitors.<sup>144</sup> Furthermore, approximately one third of these notices included takedown claims where the allegedly infringing material presented obvious questions for a court.<sup>145</sup> These included notices for items that were either not copyrightable or were susceptible to a fair use argument (i.e., parody, commentary, etc.).<sup>146</sup> Similarly, questions of copyright notice validity have arisen where the notice fails to satisfy the statutory requirements but the ISP nevertheless takes down the allegedly infringing materials in order to benefit from the safe harbor provisions.<sup>147</sup> Although these materials can be restored within two weeks, this time lapse can prove fatal in a virtual world where blog postings, bulletin boards, news articles, or editorial commentaries become stale within a few days or even a few hours.

### 2. Duty to Police for Copyright Infringement

The safe harbor provisions were enacted to ease the burden on ISPs of policing their customers for potential copyright infringement. The question remains, however, whether the legislation was meant to entirely eliminate this burden.

Section 512(i) provides that in order for an ISP to be eligible for the safe harbor provision, an ISP is supposed to “reasonably implement” a termination policy for repeat copyright infringers in “appropriate circumstances.”<sup>148</sup> There are neither specific rules nor any guidance as to how this termination policy must be

---

<sup>143</sup> See URBAN & QUILTER, *supra* note 137.

<sup>144</sup> Chilling Effects, Frequently Asked Questions (and Answers) About Chilling Effects Clearinghouse, <http://www.chillingeffects.org/faq.cgi#QID76> (last visited Feb. 1, 2007).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See *ALS Scan, Inc. v. RemarkQ Cmty, Inc.*, 239 F.3d 619, 624-25 (4th Cir. 2001) (articulating a substantially relaxed reading of the § 512(c) notification requirements).

<sup>148</sup> 17 U.S.C. § 512(i) (2006).

communicated to the users, which leaves the term “reasonable” open for courts to interpret.<sup>149</sup> In *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, the District Court for the Central District of California held that defendant failed to “reasonably implement” a termination policy and, therefore, could not avail itself of immunity under the DMCA.<sup>150</sup> Defendant Cybernet Ventures ran an age verification service for pornographic websites through which it collected payment for and provided access to these sites. Plaintiff Perfect 10 found over 10,000 copies of its images on websites affiliated with Cybernet Ventures’ payment system.<sup>151</sup> In interpreting reasonable implementation, the court looked at the congressional intent underlying section 512(i) and found that the section was meant to address copyright infringements of a willful and commercial nature.<sup>152</sup> The court recognized that an ISP did not have a duty to police every single infringing act individually, but when it has notice of repeat and large scale infringements, it should terminate the infringer’s use of the ISP.<sup>153</sup> Otherwise, ISPs might turn a blind eye towards such repeat infringers in order to receive financial benefits from infringers’ use of their services.<sup>154</sup> Copyright owners would be forced to provide image-by-image notice for these large scale infringements.<sup>155</sup> The *Perfect 10* holding leaves open for interpretation the extent of “policing” required by ISPs for infringements of a willful and commercial nature. Presumably in such instances, the ISP may not even receive a notice of infringement but would nevertheless be held liable for copyright infringement.

The language of sections 512(c) and (d) may underscore this interpretation of a “back door” duty to police for copyright infringement. Both provisions grant ISPs immunity as long as they do not have “actual knowledge that the material . . . on the [ISP’s] system or network is infringing” or “in the absence of such actual knowledge, [the ISP] is not aware of facts or circumstances from which infringing activity is apparent.”<sup>156</sup> Although an ISP can certainly have “actual knowledge” of infringing activity by receiving a proper notice, it remains to be determined whether an

---

<sup>149</sup> See Jennifer Bretan, *Harboring Doubts About the Efficacy of §512 Immunity Under the DMCA*, 18 BERKELEY TECH. L.J. 43, 51 (2003).

<sup>150</sup> *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1179 (C.D. Cal. 2002) (“Because the Court finds that there is a strong likelihood that Cybernet cannot establish that it has ‘reasonably implemented’ a policy directed at *terminating* repeat infringers . . . there is little likelihood that it can avail itself of section 512’s safe harbors.”).

<sup>151</sup> *Id.* at 1162.

<sup>152</sup> *Id.* at 1176.

<sup>153</sup> *Id.* at 1177.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> 17 U.S.C. § 512(c)(1) (2006).



ISP can obtain actual knowledge or awareness of infringing activity outside of this notice requirement. If knowledge is indeed obtained outside of the notice requirement, it may render adherence to the notice requirements under section 512(d)(3) entirely redundant. The *Perfect 10* decision seems to indicate that where the infringements are so large in scale, the notice requirements may not be necessary. In other words, there seem to be two extremes whereby large-scale infringement does not require notice while individual cases of infringement require strict adherence to the notice requirement. Everything in between seems to be left open for judicial interpretation and, therefore, causes a certain degree of uncertainty.

### 3. Sufficiency of Notice Requirement

Another commonly litigated issue under the DMCA is whether the copyright owner has satisfied the multi-pronged notice requirements under section 512(c)(3). Section 512(c)(3) provides specific guidelines for copyright infringement notices, and a copyright owner must provide sufficient information for the ISP to locate and remove the allegedly infringing material.<sup>157</sup>

In *Hendrickson v. eBay, Inc.* the court held that the defendant, an Internet auction site, had immunity under the DMCA because the plaintiff failed to abide by the notice requirements of section 512.<sup>158</sup> In *Hendrickson*, the owner of a copyright in a motion picture claimed that eBay was selling pirated DVD copies of the owner's movie on eBay's website.<sup>159</sup> Prior to filing suit, Hendrickson sent eBay a general cease and desist letter, but this letter did not describe with specificity the allegedly infringing materials.<sup>160</sup> eBay responded to Hendrickson's letter with a request for additional information in order to properly locate the contested items, which Hendrickson failed to provide.<sup>161</sup> The court held that eBay was immune from liability, and emphasized that the notice must be specific in order to qualify as a notice under section 512.<sup>162</sup> Most importantly, the court found that because Hendrickson's notice did not satisfy the requirements of section 512, eBay could have neither actual nor constructive notice of the allegedly infringing materials. Accordingly, under *Hendrickson*, even though a defendant may be aware of infringing activity, it can nevertheless benefit from immunity under section

---

<sup>157</sup> *Id.* § 512(c)(3).

<sup>158</sup> *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001).

<sup>159</sup> *Id.* at 1084-86.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 1085.

<sup>162</sup> *Id.* at 1089-92.

512 if a plaintiff does not abide by the statutory notice requirements.

In *ALS Scan, Inc. v. Remarq Communities, Inc.*, however, the Fourth Circuit found that the ISP defendant could not avail itself of the safe harbor provisions, even where the notice did not identify the allegedly infringing material with specificity.<sup>163</sup> The plaintiff in *ALS Scan* sent a general letter claiming that the ISP had permitted its users to access newsgroup listings which contained hundreds of infringing pornographic pictures owned by plaintiff.<sup>164</sup> The letter did not comply with the notice requirements of section 512(c) and did not identify the pictures that were allegedly infringing upon plaintiff's copyright.<sup>165</sup> The Fourth Circuit nevertheless determined that the notice was sufficient since it provided information sufficient for the defendant to locate the infringing material.<sup>166</sup>

Accordingly, the burdens imposed upon ISPs in terms of actual or constructive knowledge may hinge upon a court's determination as to whether the notice sent by the copyright owner was sufficiently specific. Under a more flexible approach, "sufficient notice" may not require that the materials be specifically identified. Conversely, under the *Hendrickson* approach, an ISP will be deemed not to have knowledge as long as the notice is not sufficiently specific.

#### 4. Analysis of Vicarious Liability Precedes Digital Millenium Copyright Act Immunity

Perhaps one of the most insidious issues with respect to the safe harbor provisions of the DMCA is whether the legislation provides shelter to ISPs prior to or only after a court's finding of vicarious liability. Indeed, the argument has been made that a finding of no immunity is more likely in instances where a court undertakes a vicarious liability analysis prior to examining whether the defendant could avail itself of the DMCA provisions.<sup>167</sup>

In the notorious *A&M Records, Inc. v. Napster, Inc.* case, for instance, the Ninth Circuit entirely bypassed the section 512 analysis and examined first whether the defendant was vicariously liable for copyright infringement.<sup>168</sup> Similarly, in *Perfect 10* and *Ellison v. Robertson*, the liability analysis preceded an analysis of safe harbor immunity, and perhaps influenced the ultimate outcome

---

<sup>163</sup> *ALS Scan, Inc. v. Remarq Cmty., Inc.*, 239 F.3d 619 (4th Cir. 2001).

<sup>164</sup> *Id.* at 622.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 625.

<sup>167</sup> Bretan, *supra* note 149, at 60.

<sup>168</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

of the case.<sup>169</sup> Although DMCA immunity in these cases was denied on grounds unrelated to issues of vicarious liability, it may evidence a judicial trend and general averseness to granting immunity in instances where a plaintiff can show control and knowledge of the infringing activity.

### C. *Online Defamation Limited Liability Act*

Although the DMCA has received its fair share of criticism, it may provide some guiding points in terms of tailoring an approach to defamatory materials posted online. Perhaps in venturing beyond the confines of the DMCA provision, it may also be possible to establish a framework to facilitate the exchange of information provided through a public Internet intermediary (“PII”) without jeopardizing the PII’s credibility and recognition. As will be discussed below, a framework for the proposed Online Defamation Limited Liability Act (“ODEFLLA”) could include: (1) a safe harbor provision similar to DMCA’s OCILLA provisions, including a notice and takedown provision for allegedly infringing or defamatory material; (2) limited liability for Internet intermediaries by providing a statutory cap on damages; and (3) a public Internet intermediary defense fund as insurance against unwarranted liability.

#### 1. Policy Concerns

If defamation and copyright law were approached without any statutory framework, an ISP or PII would have unlimited liability for materials posted online. This free-for-all approach would undeniably cripple the exchange of information online, as concerns for liability would result in restrictive guidelines for users, excessive policing by ISPs and PIIs, or both. This approach does not recognize the spectrum of interests in the dissemination of online materials, and would weigh heavily in favor of plaintiffs—whether copyright owners or the subject of defamatory materials. Conversely, a statutory framework with no liability for ISPs and PIIs would result in a virtual medium exempt from common law and statutory restrictions irrespective of the harm suffered by plaintiffs. This approach fails to recognize the spectrum of interests between the ISP or PII and an injured plaintiff, and weighs heavily in favor of content providers.

Both approaches inadequately address the respective interests of the parties in this endless debate of “who really should control”

---

<sup>169</sup> Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146 (C.D. Cal. 2002); Ellison v. Robertson, 189 F. Supp. 2d 1051 (C.D. Cal. 2002).

the Internet. It is inevitable that new technologies—such as the Internet itself was in the 1990s—will result in new challenges to established principles of law. While the interests of these new technologies should be cultivated for growth and development, they should not force the subjugation of opposing interests. This is what the DMCA was attempting to do, albeit with relative success. Nevertheless, the lessons of the DMCA should not be ignored.

If we are to compare section 230 to the analysis above, the interests at issue clearly weigh in favor of the ISPs and PIIs. In other words, section 230 drastically distinguishes a print newspaper from an online bulletin board with regard to the liability imposed for the posting of defamatory materials. The real issue is whether this distinction is warranted where the harm suffered by a plaintiff is likely identical in both instances.

For example, if an established newspaper such as the *New York Times* publishes a statement that is defamatory, it is strictly liable under common law defamation principles for the harm suffered by plaintiff. Such a statement can reach millions of readers through either the newspaper's print or online version. If an ISP features a defamatory statement, the potential harm suffered by plaintiffs can in some instances be even greater. Wikipedia, a free community-built encyclopedia, for example, is the second most-visited reference site on the Internet.<sup>170</sup> According to a 2005 study, Wikipedia's traffic rates were approximating 3.84 percent, with only Dictionary.com exceeding its popularity.<sup>171</sup> Furthermore, Wikipedia's own statistics estimate that the number of visits *per day* on Wikipedia.com equals approximately 400,000—and this is only on the English version of the site, which is by far the most popular.<sup>172</sup> Given the prominence of the site, it is evident that a defamatory statement featured within one of the entries may result in tremendous damage to an injured plaintiff. Regardless of this fact, the traditional newspaper will be held strictly liable for defamation whereas the ISP or PII will not.

Advocates for section 230 immunity could argue that this disparity is justified because the Internet and print publications are two vastly different mediums. A print and online newspaper provides numerous layers of editorial control prior to publishing

---

<sup>170</sup> Press Release, Hitwise.com, Open Source Wikipedia Zooms Ahead of Other Reference Web Sites (Apr. 25, 2005), <http://www.hitwise.com/press-center/hitwiseHS2004/wikipedia.html>.

<sup>171</sup> Enid Burns, *Wikipedia's Popularity and Traffic Soar*, CLICKZ, May 10, 2005, <http://www.clickz.com/showPage.html?page=3504061>.

<sup>172</sup> Wikipedia Statistics, Visits Per Day, <http://stats.wikimedia.org/EN/TablesUsageVisits.htm> (last visited Mar. 2, 2007).

its reporters' articles. An online bulletin board or an ISP, however, is more often likely to entrust the material to the content provider's discretionary judgment. Section 230 draws on the distinction between the two mediums by equating a publisher with editorial control; therefore, the absence of that element absolves ISPs and PII's from liability. This is a distinction with little meaning, however, as it is based on policies established to develop a nascent technology which has, over a period of ten years, been regulated almost identically to the non-virtual legal landscape. In other words, the underlying policy concerns are antiquated.

For an injured plaintiff, however, the harm suffered is significant in both instances. Indeed, as stated above, the damage may be even greater for the plaintiff defamed on the Internet. A print publication can only reach a finite audience whereas the Internet extends beyond boundaries and subscriptions to an effectively a limitless range. Thus, the question remains how to remedy this disparity in liability without jeopardizing the policies underpinning the safe harbor provisions of section 230.

## 2. Amendment to Section 230

The DMCA and its legacy can provide a blueprint for approaching an amendment to section 230. Some of the most significant facets of the DMCA are its notice and takedown provisions. There are, however, additional elements within the DMCA that are useful when approaching the issue of online defamation. This proposed amendment is referred to as the Online Defamation Limited Liability Act ("ODEFLLA").

The notice and takedown provisions of the DMCA afford a mechanism through which an ISP can avail itself of the safe harbor provisions if it removes infringing material upon receiving a written notice by the injured party. To amend section 230, the same guidelines can be followed in taking down allegedly defamatory materials.<sup>173</sup>

Under ODEFLLA, once an ISP receives written notice of an allegedly defamatory statement pursuant to a statutory notice requirement, the ISP would have to take down the defamatory materials for a finite period of time, such as ten to fourteen days. The ISP could benefit from the safe harbor provision only if it

---

<sup>173</sup> The authors recognize that one of the major differences between the DMCA and ODEFLLA is that the former is based on a federal cause of action (i.e., copyright infringement), whereas the latter is based on a state cause of action (generally the tort of defamation). In other words, a defendant may post materials online and not violate defamation statutes within its jurisdiction, but be subject to liability in a foreign state. Under such circumstances, traditional notions of conflict of laws and jurisdictional principles as applied to the Internet should govern the matter.

followed specific rules with respect to the removed material. For instance, the ISP would have to promptly contact the content provider and state that the material was taken down, explain the reason for such removal, and forward the notice provided by the complaining party. Once the content provider receives this notice, it would have an opportunity to send a counter-notice explaining why the contested material is not defamatory. All such statements, in the notice and counter-notice, would be subject to a good faith requirement, which could be used as a defense in subsequent court proceedings. There would also be statutory penalties, and direct payment of attorney's fees if a party is found to have violated such requirements. After sending the original notice, the injured party would have approximately ten days to file a lawsuit for defamation or risk having the material republished online. This procedure shifts the burden from the ISP to parties in dispute and places minimal restrictions on the length of time the material is offline.

ODEFLLA would, however, differ slightly from the DMCA in order to preserve the legislative purposes of section 230. The DMCA is a statutory mechanism that curtails ISPs' liability for copyright infringement whereas ODEFLLA would limit the expansive safe harbor provisions of section 230. In other words, the statutes come from opposite ends of the spectrum. To reflect this distinction, ODEFLLA would only impose liability upon ISPs for failure to respond to an actual written notice and would impose no veiled requirement to police, even for repeat infringers. In other words, ODEFLLA would not require ISPs to adopt and reasonably implement a policy to provide for the termination of repeat infringers, nor would it impose a constructive notice requirement bypassing the statutory notice requirements. ODEFLLA would require, however, that ISPs reasonably inform their users of its provisions and the potential penalties for posting a defamatory statement.

Although ODEFLLA may encourage ISPs to close their eyes to repeat infringers, it does not disturb the legislative balance of interests under section 230. Once an ISP fulfills its duty of informing users, the burden rests entirely on content providers and injured parties to adequately notify the ISP of the allegedly defamatory materials and the ISP's only further duty is to take down the allegedly defamatory materials for a period of ten days so that there is an opportunity resolve the dispute.

This information requirement can be satisfied in a variety of ways, but most likely through a dedicated section of the ISP or PII's website which would provide: (1) a sample notice letter; (2) a

sample counter-notice letter; (3) up-to-date contact information for a designated agent; (4) the text of ODEFLLA in its entirety; (5) a question and answer portion explaining the provisions of ODEFLLA in plain terms; and (6) an explanation of defamation and the potential liability attached to posting defamatory materials. In many ways, such information would be similar to the Privacy and Terms of Use agreements already featured on most websites.

By clarifying the burdens imposed upon ISPs, PIIs, and the parties to the dispute, ODEFLLA can effectively address some of the difficulties encountered by the DMCA. The strict compliance with the notice and takedown provisions requirement should be respected in application and judicial interpretation—which has not always been the case for DMCA provisions. ODEFLLA removes the possibility that knowledge of defamatory statements by the ISP or PII outside of the written notice requirement could result in the unavailability of safe harbor provisions; compliance with the notice must be strict so that a defective notice will not be considered sufficient constructive notice to the ISP or PII. Furthermore, an ISP or PII would not have any obligation to address repeat infringers without receiving a notice, nor would an ISP or PII need to actively implement a policy for the termination of such infringers. Furthermore, the intent of ODEFLLA is to retain the status quo while adding only an informative duty upon the ISP. Accordingly, a liability analysis should not precede the granting of immunity, but rather a court should first examine: (1) whether the ISP or PII qualifies for section 230 immunity; and (2) whether the ISP or PII's actions satisfy the provisions of ODEFLLA. Only if both conditions are met would ODEFLLA grant immunity.

Finally, ODEFLLA could provide a statutory cap on monetary damages, limited to either the harm actually suffered by an injured plaintiff, or a penalty of \$15,000 per infringement, whichever is greater. This cap could prevent excessive punitive damages that can often result in headline-grabbing verdicts. Furthermore, an ISP's compliance with the provisions of ODEFLLA can provide an additional evidentiary hurdle with litigious plaintiffs by creating a rebuttable presumption that the ISP is not liable for the defamatory statement.

### 3. Public Defense Fund

Another measure Congress may undertake to soften the blow of limited defamation liability is an opt-in public defense fund. The fund would act as a limited insurance carrier for successful

defamation claims against qualified participating ISPs. Participation in this fund would also signal ISPs' collective acknowledgement of the legitimacy of reputation and privacy rights.

There are a fair number of operating statutory insurance funds for a variety of industries and public necessities. For example, a variety of states, such as Connecticut,<sup>174</sup> Nevada,<sup>175</sup> California,<sup>176</sup> Oregon,<sup>177</sup> and South Dakota,<sup>178</sup> have client security funds that require practicing attorneys to make yearly payments to the fund as a condition to maintain their license. The funds disburse payments to qualifying clients aggrieved by the "dishonest conduct" of an attorney within that state. In addition, the national Social Security program is an example of another trust fund.

In the case of ISPs, a fund might involve an opt-in framework where ISPs voluntarily pay a statutory premium of, for example, ten dollars per year towards the fund. In the event of a successful defamation action against a participating ISP, the fund would issue a limited payout towards satisfying a damages award. In addition, the fund may be overseen by an agency such as the FCC, to which ODEFLLA would grant limited authority for that purpose and also to administer payouts. In addition, qualification guidelines can be established for participation, including compliance and adoption of a model ODEFLLA policy. Applicants might be asked to provide their policies for review by the FCC or the applicable oversight agency.

The fund can also be structured to minimize administrative burden through an effective online application process. All correspondence and review could be handled electronically. For example, the United States Patent and Trademark Office's Trademark Electronic Application System<sup>179</sup> is an impressive, fully electronic, trademark application process involving complex document and form processing. Most likely, a mere fraction of that system's capabilities would suffice for the proposed fund.

---

<sup>174</sup> See State of Connecticut Judicial Branch, Client Security Fund Committee, <http://www.jud.state.ct.us/CSF/> (last visited Feb. 1, 2007).

<sup>175</sup> See State Bar of Nevada, Answers to Your Questions, [http://www.nvbar.org/client\\_security\\_fund.htm](http://www.nvbar.org/client_security_fund.htm) (last visited Feb. 1, 2007).

<sup>176</sup> See State Bar of California, What Does It Do? How Does It Work? 7-8 (Jan. 2006), <http://calbar.ca.gov/calbar/pdfs/whowhat1.pdf#search=%22california%20state%20bar%20client%20fund%22>.

<sup>177</sup> See Oregon State Bar, Client Security Fund Rules (Apr. 2002), [http://www.osbar.org/\\_docs/rulesregs/csfrules.pdf#search=%22oregon%20state%20bar%20client%20fund%22](http://www.osbar.org/_docs/rulesregs/csfrules.pdf#search=%22oregon%20state%20bar%20client%20fund%22).

<sup>178</sup> See State Bar of South Dakota, Client Security Fund, [http://www.sdbar.org/pamphlets/client\\_security.shtm](http://www.sdbar.org/pamphlets/client_security.shtm) (last visited Feb. 1, 2007).

<sup>179</sup> See United States Patent and Trademark Office, Trademark Electronic Application System, <http://www.uspto.gov/teas/index.html> (last visited Feb. 1, 2007).



## CONCLUSION

Amending section 230 to include the interests of injured plaintiffs requires a different approach and new policy interests to be infused into the legislation. But if one begins to examine the tort of defamation not as a monetary incentive for injured plaintiffs but rather as the gatekeeper to the protection of a fundamental human right, the importance of the interests at issue is illuminated.

Lifestyles will continue to evolve as new technologies continue to fundamentally alter the way colleagues, friends, and families communicate. It is incumbent upon society to accept these changes and understand that each one carries with it a new set of responsibilities and interests. These issues are permanent, and so a dialogue must begin if the status quo serves one person's purposes to the detriment of another. The ensuing compromise may in the end be less burdensome to all than a stand-off position. ODEFLLA begins this discussion and provides an alternative means of imposing liability upon ISPs without jeopardizing the delicate balances of section 230. As someone whose wisdom preceded the Internet by a few years once stated, "[e]ven when laws have been written down, they ought not always to remain unaltered."<sup>180</sup>

---

<sup>180</sup> See ARISTOTLE, *POLITICS* 50 (Book II, Part VIII) (Benjamin Jowett & Ernest Barker eds., Benjamin Jowett trans., Clarendon Press 1885).