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## COLLATERAL CENSORSHIP AND THE LIMITS OF INTERMEDIARY IMMUNITY

*Felix T. Wu\**

*The law often limits the liability of an intermediary for the speech it carries. And rightly so, because imposing liability on intermediaries can induce them to filter out questionable content and this “collateral censorship” risks suppressing much lawful, even highly beneficial, speech. The “collateral censorship” rationale has its limits, though, and correspondingly, so should the applicability of intermediary immunity. The worry with collateral censorship is not just that intermediaries censor, but that they censor more than an original speaker would in the face of potential liability. Increased censorship, in turn, is the product of applying liability targeted at original speakers to entities whose interests diverge from original speakers. Where the “intermediary” has the interests of an original speaker, and so should be regarded as one, or where the form of liability already takes into account the intermediary’s interests, collateral censorship is not the problem, and immunity is not the right response. This understanding should, in particular, inform the interpretation of § 230 of the Communications Decency Act of 1996, a federal statute that broadly immunizes Internet intermediaries from speech torts and many other forms of liability. In cases involving the republication of e-mails, questionnaires, member screening, and contract claims, among others, courts have begun to explore the limits of this immunity, but have done so haphazardly and inconsistently, having largely lost sight of the underlying rationale for immunity. Focusing on the conditions that generate*

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*problematic collateral censorship provides a principled basis upon which to define the limits of intermediary immunity generally, and § 230 in particular.*

## INTRODUCTION

Suppose I find that someone has posted a defamatory comment about me on an online message board. Is the operator of the message board liable? Or suppose someone e-mails me a bit of juicy gossip, and I repeat the gossip on my blog. Am I liable? Or suppose I pay my Internet service provider to scan my incoming e-mails for viruses, but my ISP fails to do so, and an e-mail virus infects my computer. Is my ISP liable?

Under a federal statute, § 230 of the Communications Decency Act of 1996,<sup>1</sup> the answer to the first question is definitively no.<sup>2</sup> Indeed, as that statute has been interpreted by the courts, a message board operator is not liable for a defamatory comment posted by a third party even if the target of the comment asks the operator to remove the posting and the operator refuses.<sup>3</sup> Some commentators have criticized this result as unduly allowing message board operators and other Internet intermediaries to ignore even patently unlawful speech without facing any consequences, to the detriment of those harmed by the speech.<sup>4</sup> The result, however, appears firmly

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1 47 U.S.C. § 230 (2006). The key provision for purposes of this article is § 230(c)(1), which reads: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The statute includes exceptions for federal criminal law, "any law pertaining to intellectual property," and communications privacy law. § 230(e)(1)–(2), (4). In particular, entirely different law applies to the message board operator's liability for a posting that infringes copyright. See 17 U.S.C. § 512; see also Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101, 103–05 (2007) (describing the safe harbors that apply to an intermediary's liability for intellectual property claims).

2 See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997).

3 See *id.* at 332; see also *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103–05 (9th Cir. 2009) (declining "to read the principles of defamation law into" § 230(c)(1)); *Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007) (following *Zeran* in holding "that Section 230 immunity applies even after notice"); *Barrett v. Rosenthal*, 146 P.3d 510, 519 (Cal. 2006) (concluding that "the *Zeran* court's construction of the term 'publisher' is sound").

4 See DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION* 149–59 (2007); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 117–19 (2009); Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 618 (2001); Lemley, *supra* note 1, at 112–13; Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 341–42 (2005). But see H. Brian Holland, *In Defense of Online Intermediary Immunity*:

entrenched in the courts, which have repeatedly defended it on both statutory and policy grounds.<sup>5</sup>

The second and third questions, and others like them, have received far less academic attention. Existing commentary has largely focused on critiquing intermediary immunity generally and suggesting alternatives to § 230,<sup>6</sup> rather than on defining the types of factual and legal settings in which such immunity is appropriately applied. Given the courts' interpretation that § 230 eliminates even notice-based liability, defining the applicability of that immunity becomes all the more important. Such issues of applicability have arisen with increasing frequency, and courts have struggled to find a coherent framework to address them. The answers they have given so far have been largely inconsistent and unprincipled.<sup>7</sup> This Article provides a framework for understanding both how to conceptualize the limits of intermediary immunity as a policy matter and how courts should interpret § 230.

In order to define the bounds of intermediary immunity, and answer the second and third questions, we need to return to the first question and determine more precisely why intermediary immunity might be an appropriate response in the situation of a message board operator's liability for defamatory content. A prime rationale for immunity in that context is concern over what has been called "collateral censorship."<sup>8</sup> Collateral censorship occurs when a (private) inter-

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*Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369, 391-96 (2008) (defending the courts' interpretation of § 230).

5 See, e.g., *Barnes*, 570 F.3d at 1103-05; *Zeran*, 129 F.3d at 332; see also *Blumenthal v. Drudge*, 992 F. Supp. 44, 51-52 (D.D.C. 1998) ("If it were writing on a clean slate, this Court would agree with plaintiffs. . . . But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.").

6 See sources cited *supra* note 4; see also Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 138 (2008) (recommending a fee-shifting provision and the creation of a statutory tort of no-fault defamation); Matthew Schruers, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205, 208 (2002) (concluding, based on an economic analysis, that the most efficient regime is one in which immunity is conditioned on good faith monitoring and arguing that § 230 is such a regime). See generally Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239 (2005) (using the economic principle of identifying the least-cost avoider to analyze the desirability of intermediary liability as a means to control various types of misconduct on the Internet).

7 See *infra* Part III.

8 See J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2298 (1999); Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 NOTRE DAME L. REV. 79, 116-18 (1995); see also

mediary suppresses the speech of others in order to avoid liability that otherwise might be imposed on it as a result of that speech.<sup>9</sup> This is a problem because some of the suppressed speech might in fact be lawful, even socially desirable.<sup>10</sup> For example, imposing defamation liability on a message board operator for carrying defamatory content may well induce it to block a wide array of potentially defamatory content, including some which is in fact true or mere opinion, or otherwise not actionable. The result is that the accurate report of corporate malfeasance is swept away along with the nasty, fabricated rumor.

Intermediary immunity is a response to the problem of collateral censorship. To avoid giving intermediaries an incentive to block lawful content, they are immunized from claims even as to the unlawful content that they carry. If the content of a message cannot provide a basis for suing the intermediary, then the intermediary no longer has a legal incentive to suppress that message based on its content. Whether immunity is a *necessary* response to the threat of collateral censorship is, of course, contested.<sup>11</sup> Collateral censorship does, however, provide the major justification for immunity, particularly in its broadest forms,<sup>12</sup> so that the *absence* of problematic collateral censorship marks situations in which even those who generally support immunity ought to reject it.

We therefore need to understand what makes collateral censorship a problem. In particular, the problem cannot be simply that the threat of liability results in the suppression of speech, for that is true whenever there is liability for speech. People regularly engage in self-censorship under fear of liability, but if that is the crux of the problem, then the appropriate solution would be to change the substantive liability itself.

The unique harm of collateral censorship, as opposed to self-censorship, lies in the incentives that intermediaries have to suppress more speech than would be withheld by original speakers. This additional suppression occurs because intermediaries have different incentives to carry particular content than original speakers have to create it in the first place.<sup>13</sup> Those incentives diverge both because original

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Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 27–33 (2006) (using the equivalent concept of “proxy censorship”).

9 See Balkin, *supra* note 8, at 2298.

10 *Id.* at 2303.

11 See *infra* notes 36–38 and accompanying text.

12 See *infra* notes 39–42 and accompanying text.

13 See Balkin, *supra* note 8, at 2298.

speakers obtain benefits from the speech not realized by intermediaries and because intermediaries face liability risks not borne by original speakers. When the same law is then applied to intermediaries and original speakers alike, despite the divergence of incentives, then the deterrent effect on intermediaries will be excessive.<sup>14</sup>

The problem of collateral censorship is thus one of applying a law crafted for original speakers to entities whose interests diverge from those of original speakers. We can therefore identify two types of situations in which collateral censorship is not the problem and intermediary immunity is not the appropriate response. The first is when the putative intermediary is actually acting not as an intermediary at all, but rather as an original speaker. When an entity faces the incentives of an original speaker, we should treat it as such and subject it to the liability faced by original speakers generally. This straightforward proposition has been lost on courts interpreting § 230, which have focused inappropriately on who “made up” the content, rather than who is speaking it, in separating speakers from intermediaries. If I blog about a juicy rumor, I am the speaker, and I should be subject to liability, even if the rumor started elsewhere.

The second situation in which collateral censorship is not the problem is when the form of liability is one specifically directed to the intermediary. When the liability being imposed on the intermediary is not one that could be sensibly imposed on the original speaker, then we need not worry about the potential divergence of incentives. Any such divergence becomes irrelevant to the appropriateness of the liability. To be sure, there may continue to be other substantive rules, common law or constitutional, that govern the appropriateness of the intermediary liability. But it is inappropriate to use immunity to short-circuit the analysis. If my ISP promises to scan my e-mail, it should be held liable for that promise, even if third-party activity is the basis for damages, because a promise is only sensibly enforced against the promisor.

Part I of this Article describes in more detail how intermediary immunity can be justified as a solution to the problem of collateral

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14 Assaf Hamdani has made a similar point previously. See Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901, 916–18 (2002). His focus, however, was primarily on different types of intermediary-speaker relationships and the effect of that relationship on the relative difficulty of aligning incentives through market mechanisms. See *id.* at 906. The focus here is instead on different legal and factual bases for liability and on the potential for divergent incentives to be either absent or unproblematic even in settings in which market mechanisms do not help to align incentives.

ensorship. Part II traces the development of intermediary immunity, first in the common law and then in § 230, showing that collateral censorship has been a prime rationale for intermediary immunity, particularly in its broadest forms. Part III describes issues the courts have faced in determining whether intermediary immunity is appropriately applied in particular factual settings, and describes why the courts' approaches thus far have been unsatisfactory. Part IV uses the theory of collateral censorship to derive two limits on the appropriate scope of intermediary immunity. Part IV.A shows that immunity is inappropriate when the intermediary is really an original speaker, because it is situated as such. Part IV.B shows that immunity is inappropriate when the form of liability is one specifically directed at intermediaries. A brief conclusion follows.

### I. THE PROBLEM OF COLLATERAL CENSORSHIP

The Internet promised us “cheap speech,”<sup>15</sup> and it delivered. Measured in sheer volume, there is surely more content on Facebook today than has ever been printed by the *New York Times*.<sup>16</sup> Ordinary people can now debate their political views,<sup>17</sup> rate the latest restaurants and hotels,<sup>18</sup> advertise their goods and services,<sup>19</sup> and write their autobiographies,<sup>20</sup> all before a worldwide audience. No longer is such speech limited to those who were able to get past the old gatekeepers—newspapers, book publishers, retailers, and the like.<sup>21</sup> Now all that is needed is an Internet connection.<sup>22</sup>

For better and worse, the old gatekeepers served as a filter. At the same time as they were preventing most people from speaking to a broader audience, they were also checking people's ability to broadcast harmful speech. Now that they no longer stand as a barrier to

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15 See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

16 See *Statistics*, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (“More than 750 million active users. . . . There are over 900 million objects that people interact with (pages, groups, events and community pages).”) (last visited Sept. 22, 2011).

17 See *Doe v. Cahill*, 884 A.2d 451, 454 (2005) (describing a defamation claim arising out of statements anonymously posted on a local politics blog).

18 See Susan Stellin, *Unpacking Complaints: Hotels Seek Quicker Redress on TripAdvisor Reviews*, N.Y. TIMES, Oct. 26, 2010, at B7.

19 See Claire Cain Miller, *Craigslist Says It Has Shut Its Section for Sex Ads*, N.Y. TIMES, Sept. 16, 2010, at B1.

20 See Jeffrey Rosen, *Your Blog or Mine?*, N.Y. TIMES MAG., Dec. 19, 2004, at 24.

21 See Volokh, *supra* note 15, at 1834.

22 According to a recent federal study, sixty-eight percent of American homes are connected to the Internet. See Cecilia Kang, *Survey Maps Out Digital Divide*, WASH. POST, Feb. 18, 2011, at A16.

good speech, they no longer stand as a barrier to the bad either. In among the explosion of speech on the Internet is much that defames, or threatens, or harasses, or defrauds, or invades privacy; in short, much speech that is unlawful and unprotected by the First Amendment.

As the old gatekeepers have diminished in importance, a new set of intermediaries has risen to prominence. Cheap speech on the Internet is made possible through the assistance and acquiescence of these intermediaries. Each one can potentially silence speech, good and bad.<sup>23</sup>

Consider a comment on a blog and who can prevent the comment from reaching its audience. The person whose blog it is could delete the comment,<sup>24</sup> or perhaps even edit it.<sup>25</sup> The blogger could disable comments entirely, or moderate them, requiring that each one be approved by the blogger before it is posted.<sup>26</sup> The service that hosts the blog could remove the comment<sup>27</sup> or delete the entire blog.<sup>28</sup> The domain name registrar responsible for the blog's domain

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23 See Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 702 (2010); Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653 (2003).

24 See *Blogger Help: How Do I Delete Comments?*, GOOGLE, <http://www.google.com/support/blogger/bin/answer.py?hl=en&answer=42398> (last visited Sept. 22, 2011) ("You can . . . delete any comments (registered or anonymous) that are left on your own blog . . .").

25 TypePad, for example, allows its blog owners to edit comments, see *Managing Comments*, TYPEPAD, [http://help.typepad.com/tp/us/managing\\_comments.html](http://help.typepad.com/tp/us/managing_comments.html) (last visited Sept. 22, 2011) ("Click the Edit link below the commenter name to view the full details of the comment. The text of the comment can be edited along with the Author, Email, and URL submitted."), but Blogger does not, see *Blogger Help: How Do I Delete Comments?*, *supra* note 24 ("It is not possible to edit comments.").

26 See *Blogger Help: How Do I Moderate Comments on My Blog?*, GOOGLE, <http://www.google.com/support/blogger/bin/answer.py?hl=en&answer=42537> (last visited Sept. 22, 2011).

27 See *Prior TypePad Terms of Service*, TYPEPAD, <http://www.typepad.com/legal/prior-terms-of-service.html> (last visited Sept. 22, 2011) ("Six Apart and its designees shall have the right (but not the obligation) in their sole discretion to refuse or remove any Content that is available via the Service. Without limiting the foregoing, Six Apart and its designees shall have the right to remove any Content that violates the TOS or is otherwise objectionable." (emphasis added)). Updated terms of service with a substantively identical provision are available at *TypePad Terms of Service*, TYPEPAD, <http://www.typepad.com/legal/terms-of-service.html> (last visited Sept. 22, 2011).

28 See Declan McCullagh, *Mass Deletion Sparks LiveJournal Revolt*, CNET NEWS (May 30, 2007, 6:47 PM), [http://news.cnet.com/2100-1025\\_3-6187619.html](http://news.cnet.com/2100-1025_3-6187619.html).

name could cancel the domain name registration.<sup>29</sup> The website's Internet access provider could refuse to send the packets of information containing the comments,<sup>30</sup> or could refuse all packets originating from the server hosting the blog. An individual's Internet access provider could block such packets as well.

If harmful speech is proliferating on the Internet because the old gatekeepers no longer wield their power, might we not want to harness the power of these new intermediaries instead? Perhaps by imposing liability on such intermediaries for the speech they carry, we can induce them to suppress harmful speech. As just described, intermediaries can control the speech they carry. Moreover, they can easily be identified, unlike users, who might use pseudonyms and communicate online without directly identifying themselves.<sup>31</sup> Intermediaries can easily be sued, unlike users who might reside in a foreign jurisdiction, outside the reach of U.S. courts. And intermediaries have the resources to pay money damages, and thereby compensate victims for harm they have suffered.

The problem with harnessing the power of intermediaries by imposing liability on them is that the fear of liability may induce intermediaries to block or eliminate too much content, including content that may be both lawful and socially desirable. This is the problem of collateral censorship. The message board operator who is liable for every post has an incentive to move from an open posting policy to one in which posts are pre-screened. But the operator has limited screening resources, so much speech may be lost simply because the operator cannot get to it all.<sup>32</sup>

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29 See Declan McCullagh, *GoDaddy Pulls Security Site After MySpace Complaints*, CNET NEWS (Jan. 25, 2007, 8:20 PM), [http://news.cnet.com/2100-1025\\_3-6153607.html](http://news.cnet.com/2100-1025_3-6153607.html); see also Ben Sisario, *U.S. Shuts Web Sites in Its Battle to Stop Online Piracy*, N.Y. TIMES, Nov. 27, 2010, at B2 (discussing seizure of domain names by the U.S. government). The Domain Name System translates domain names to IP addresses, the numerical "addresses" of computers on the Internet. See *Ctr. for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 617–18 (E.D. Pa. 2004). Technically, even if the domain name were cancelled, the blog and its comments would still be available to anyone who knew the IP address of the site, but because Internet systems are largely designed to work with domain names, rather than directly with IP addresses, a website without a domain name, for all practical purposes, does not exist.

30 Differentiating the packets containing the comments from the other packets originating from the same server would require the controversial practice of "deep packet inspection." See Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 916–17 (2009).

31 See Mann & Belzley, *supra* note 6, at 268–69. Absent specific efforts to hide their IP address, however, users can often be identified through records kept by intermediaries. See *Doe v. Cahill*, 884 A.2d 451, 454–55 (Del. 2005).

32 See Lemley, *supra* note 1, at 110–12.

More problematically, even if volume is not an issue, the operator has an incentive to screen out any type of marginal content, that is, any content that significantly increases its risk of liability. Because of the difficulty of distinguishing lawful from unlawful content, the uncertainty of the judicial process, and the expense of defending against even a meritless lawsuit, the marginal content excluded by the intermediary is likely to include a substantial amount of lawful speech.<sup>33</sup> In the context of a financial message board, for example, what might be excluded is any allegation of corporate malfeasance. Indeed, some of the most socially beneficial speech, such as true whistleblowing, can also be the riskiest for the intermediary, and thus the most likely to be censored. Society may benefit from the exclusion of false allegations, but excluding true ones entails significant social loss.

Nor are such problems eliminated by moving from a regime of strict liability to one in which liability depends upon notice. The threat of notice-based liability may induce operators to remove any complained-about posting without much evaluation of the merits of the complaint. If intermediaries do act in this way, this would potentially allow anyone to effectively demand the removal of content by simply complaining to the intermediary.<sup>34</sup> Any company or individual unhappy about unflattering comments could demand their removal, even if the comments are true.

Immunizing intermediaries from liability for the speech they carry is a response to the problem of collateral censorship. Without the fear of liability, intermediaries no longer have a legal incentive to suppress speech based on its content.<sup>35</sup> To be sure, immunity is not the only possible response to collateral censorship. Some advocates of intermediary liability have argued that market discipline, in the form of lost customers and bad publicity, will prevent intermediaries from excessively blocking speech.<sup>36</sup> More broadly, some scholars have

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33 See Kreimer, *supra* note 8, at 28–29.

34 See Schruers, *supra* note 6, at 244; cf. Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 666–67 (2006) (finding that more than thirty percent of the copyright infringement notices they studied raised “substantive legal questions related to the underlying copyright claim”).

35 Of course, they continue to have other incentives to suppress speech, such as any business incentive driven by customer demand for filtered content.

36 See Freiwald, *supra* note 4, at 622. While such market forces might mitigate the problem, however, the market likely cannot eliminate the problem altogether, because of lack of meaningful user choice, information asymmetries, and transaction costs, among other market imperfections. See Kreimer, *supra* note 8, at 33–34; see also

argued that the costs of collateral censorship are simply outweighed by the benefits of intermediary liability.<sup>37</sup> This view has particularly been advanced with respect to notice-based liability, which some argue strikes the right balance between the competing interests.<sup>38</sup>

But while the existence of problematic collateral censorship does not ensure that immunity is the right response, its absence does strongly suggest that immunity is the wrong response. Collateral censorship is not the only rationale upon which to base immunity, but in both the theoretical literature<sup>39</sup> and the case law,<sup>40</sup> it has been a prime rationale, particularly for immunity in its broadest forms. Alternate rationales largely fail to justify, for example, the kind of strong immunity § 230 now provides. For instance, as described further below, § 230 was premised in part on a desire to encourage, rather than discourage, the filtering of content, by removing legal disincentives to filter.<sup>41</sup> That rationale, while explaining why we would not want to condition liability on the intermediary's choice to filter, does not explain what is wrong with simply imposing strict liability across the board. Similarly, strict liability could lead to inequitable price discrimination if intermediaries use proxies such as age to price the risk imposed by a given customer,<sup>42</sup> but price discrimination is an unlikely response to notice-based liability. Privacy concerns might be important in the context of more utility-like intermediaries, but they seem misplaced when applied to bloggers, website operators, and others dealing in primarily public material.

To understand the outer limits of intermediary immunity, then, we need to understand the conditions that lead to problematic collateral censorship. One common formulation of the problem starts with the observation that “[i]ntermediaries do not and cannot reasonably

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Hamdani, *supra* note 14, at 922–24 (analyzing transaction costs that would hinder a market approach).

37 See Citron, *supra* note 4, at 120 (“Even a well-balanced policy may over-deter on some occasions and under-deter on others. The acceptability of those respective errors depends on the values we attach to the problematic conduct and to the potential harm.”); Freiwald, *supra* note 4, at 622 (“Although a rule that required intermediaries to remove defamatory postings of which they knew or should have known would not be cost-free, it does not need to be so to justify its adoption.”); Mann & Belzley, *supra* note 6, at 273 (“[T]he social benefits to be gained from eradicating any of the various forms of misconduct . . . must be weighed against the costs of imposing intermediary liability.”).

38 See Freiwald, *supra* note 4, at 616–20; Rustad & Koenig, *supra* note 4, at 389–90.

39 See Kreimer, *supra* note 8, at 27–33; Schruers, *supra* note 6, at 243–44.

40 See *infra* Part II.D.

41 See *infra* Part II.C.

42 See Kreimer, *supra* note 8, at 36–39.

expect to capture anything like the full social value of the uses that pass through their system.”<sup>43</sup> In more economic terms, the services provided by Internet intermediaries create positive externalities that far outweigh any negative ones.<sup>44</sup> Because Internet intermediaries do not internalize all of the benefits they create, neither should they internalize all of the costs. Otherwise, when the costs exceed their internalized benefits, they will refuse to provide service, even when the activity is socially desirable because the social benefits outweigh the costs.<sup>45</sup>

When it comes to speech, though, speakers rarely, if ever, capture the “full social value” of their speech. The audience, and in turn society at large, often benefits as much or more than the speaker, and that added value generally will not find its way back to the speaker. That is, speech itself creates substantial positive externalities.<sup>46</sup> While this warrants caution in imposing liability for speech—caution often mandated by the First Amendment<sup>47</sup>—it has never entailed a blanket immunity for speech. The existence of positive externalities cannot explain why we would choose to immunize the intermediary, but not the original speaker.

The problem of collateral censorship is therefore not simply a problem of externalized benefits and the self-censorship that results. It is a problem rooted in the fact that intermediaries create even more externalized benefits than original speakers, a difference unaccounted for when the same liability is imposed on intermediaries and original speakers alike. That is, even though the social benefits of a particular piece of content may be the same, whether or not an intermediary is involved, the intermediary captures less of the value from

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43 Lemley, *supra* note 1, at 112; *see also* Hamdani, *supra* note 14, at 917 (“Unlike the primary wrongdoers depicted by the economic literature, ISPs do not capture the full value of the conduct they are entrusted with policing.”).

44 *See* Keith N. Hylton, *Property Rules, Liability Rules, and Immunity: An Application to Cyberspace*, 87 B.U. L. REV. 1, 36–37 (2007); *see also* Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 262–64 (2007) (describing different types of externalities).

45 *See* Lemley, *supra* note 1, at 112.

46 *See generally* Brett M. Frischmann, *Speech, Spillovers, and the First Amendment*, 2008 U. CHI. LEGAL F. 301, 310–21 (2008) (analyzing externalities generated by speech).

47 *See, e.g.*, *N.Y. Times v. Sullivan*, 376 U.S. 254, 278–79 (1964); *see also* Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 435–37 (2007) (describing the ways in which the Supreme Court “has significantly modified substantive and procedural legal doctrines . . . to expressly carve out breathing space to protect First Amendment interests”).

that speech, and has a correspondingly higher incentive to suppress it in the face of liability, than the original speaker of that content.<sup>48</sup>

Take defamation law, for example. In the decades since *New York Times v. Sullivan*, the Supreme Court has crafted First Amendment rules for defamation law that ultimately permit false statements to go unpunished.<sup>49</sup> These rules help to mitigate the self-censorship that might otherwise result when individuals fail to speak the truth, for fear of liability. Having already accounted for such “chilling effects,” why further immunize intermediaries? The answer is because the chilling effects on intermediaries are even greater, and the law ought to account for that difference.

### A. *Divergent Incentives*

What matters then is that intermediaries sometimes suppress speech under conditions in which original speakers would not self-censor. This occurs because the intermediaries’ incentives to speak do not match that of original speakers, because both the benefits and costs of speech can diverge. Understanding that divergence requires an understanding of some of those benefits and costs. What induces people to speak? For example, why do people write and post reviews of products or merchants? Why do people blog?

In some instances, there may be monetary rewards for speaking. There are websites that offer incentives, even cash, for users to write reviews.<sup>50</sup> Buyers on the eBay auction website have some incentive to post positive reviews of sellers after a successful transaction, and vice versa, because it may induce the opposite party to post positive feedback, which facilitates future transactions.<sup>51</sup> Disgruntled customers may gripe about a company publicly in hopes that the company will notice and will rectify the customer’s situation or otherwise provide recompense in order to avoid further bad publicity or in exchange for deleting the gripes.<sup>52</sup>

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48 See Hamdani, *supra* note 14, at 916–18 (describing the divergence of incentives between third parties and primary wrongdoers).

49 For example, suits by public officials and public figures require a showing of “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *Sullivan*, 376 U.S. at 280.

50 See, e.g., REVIEWSTREAM, <http://www.reviewstream.com> (last visited Sept. 22, 2011).

51 See *Feedback Forum*, EBAY, <http://pages.ebay.com/services/forum/feedback.html> (last visited Sept. 22, 2011).

52 See, e.g., *Harrison v. Microfinancial, Inc.*, 74 U.S.P.Q.2d (BNA) 1848 (D. Mass. 2005) (describing one griper’s offer to transfer his gripe site to the company if the

In many situations, however, direct monetary rewards are unlikely or nonexistent, and even when they exist, they cannot explain the volume of speech on the Internet.<sup>53</sup> In most settings, a product or company review may benefit other users, but will not directly benefit the user who wrote the review. On the surface, this seems like a classic free-rider problem. Society as a whole would benefit from everyone taking the time to write accurate product reviews, but for any one individual, the incentive is to only read reviews, never write them.<sup>54</sup> If everyone were to act only according to self-interest, then we might expect to see very few reviews at all.

But people do write reviews, and blog entries, and comments. One important non-monetary incentive to speak is to build one's reputation. People may blog in part to become known for their views.<sup>55</sup> Reputation building appears to work as an incentive even when the reputation being built is virtual and unconnected to an offline identity, perhaps even unconnected to other identities on other parts of the Internet. Social media companies tap into this desire for online reputations by giving out "badges" for user activity.<sup>56</sup> Sometimes the badges come with additional privileges,<sup>57</sup> but often the badges are purely reputational and are intended to be their own reward.<sup>58</sup> Reputational incentives seem to be quite significant even on Wikipedia, even though Wikipedia articles are not signed and connecting specific article edits to specific users can be cumbersome.<sup>59</sup>

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company would "[r]eturn all the money you've stolen over the last 15 years,' and '[s]end written letters of apology to all the victims'").

53 See YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 35–38 (2006). Indeed, sometimes monetary rewards can even be counterproductive. See *id.* at 92–96.

54 Cf. Eytan Adar & Bernardo A. Huberman, *Free Riding on Gnutella*, 5 *FIRST MONDAY* (Oct. 2, 2000), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/792/701> (measuring and analyzing free riding in file sharing networks).

55 See SOLOVE, *supra* note 4, at 20.

56 See Caroline McCarthy, *Social-Media Games: Badges or Badgering?*, CNET NEWS (May 3, 2010, 7:00 AM) [http://news.cnet.com/8301-13577\\_3-20003822-36.html](http://news.cnet.com/8301-13577_3-20003822-36.html).

57 The Huffington Post, for example, gives out a variety of badges. Those who do a good job of flagging inappropriate comments are rewarded with "Moderator" badges that allow the user to have more influence in deleting inappropriate comments. See *Frequently Asked Questions: Badges*, HUFFINGTON POST, <http://www.huffingtonpost.com/p/frequently-asked-question.html#badges> (last visited Sept. 22, 2011). Of course, the "privilege" in this case is that of continuing to actively contribute to the site.

58 "Top Reviewers" on Amazon, for example, are marked as such, but do not gain any additional privileges. See *Badges*, AMAZON, <http://www.amazon.com/gp/help/customer/display.html?nodeId=14279681> (last visited Sept. 22, 2011).

59 See ANDREA FORTE & AMY BRUCKMAN, *WHY DO PEOPLE WRITE FOR WIKIPEDIA? INCENTIVES TO CONTRIBUTE TO OPEN-CONTENT PUBLISHING* (2005), available at <http://>

Revenge may be another important motivation. Someone who feels cheated in a transaction may want to discourage others from doing business with the offending vendor by publicizing the complaint. There may be little prospect of recompense in such a scenario, but the griper may be satisfied to impose harm on the perpetrator, for harm's sake, rather than to be made whole.<sup>60</sup> A jilted lover may want to do the same.<sup>61</sup>

People may also write out of a sense of social obligation to give back to a community or a resource from which they have benefited. Those speaking out against bad companies or bad dates might feel an obligation to warn others so that they can develop the information resource and ultimately avoid similar bad experiences themselves.<sup>62</sup>

Finally, people write and communicate simply to express themselves. The very act of writing and talking to others has an intrinsic value. The rapid growth of blogging may have less to do with making it easy to broadcast one's views widely as it does with simply making it easy to talk.<sup>63</sup>

Websites and other intermediaries do not obtain these social and psychic benefits from speech when they distribute the speech of others. If there is reputational benefit, or the satisfaction of revenge, or a sense of fulfillment of social obligations, none of these accrue to the benefit of the intermediary. As Michael Meyerson has noted:

If distributors face a threat of litigation, the speech for which they will be liable is not their own, but that of unaffiliated speakers. Distributors have no strong personal stake in the communication.

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[www.andreaforte.net/ForteBruckmanWhyPeopleWrite.pdf](http://www.andreaforte.net/ForteBruckmanWhyPeopleWrite.pdf). Wikipedia article edits are attributed to usernames on each article's history page, but history pages are separate from the main article pages and are not likely to be viewed by most readers. See *Help: Page History*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Help:Page\\_history](http://en.wikipedia.org/wiki/Help:Page_history) (last visited Oct. 13, 2011).

60 For example, one dissatisfied customer who griped about his experiences on an online forum wrote, "I guess it doesn't matter that the day I got [the allegedly defective product] all of the DEFECTS existed [sic] and nothing I have done caused them. But don't worry about that. What I loose [sic] in dollars I will make up in entertainment at their expence [sic]." *Kauffman Racing Equip., L.L.C. v. Roberts*, 930 N.E.2d 784, 788 (Ohio 2010). And later, "Again, this is not to get a resolution. I have a much bigger and dastardly plan than that and this is the perfect place to start." *Id.* The online website Ripoff Report seems to be tapping into similar incentives with its tag line: "Don't let them get away with it. Let the truth be known!" RIPOFF REPORT, <http://www.ripoffreport.com> (last visited Sept. 22, 2011).

61 See DON'T DATE HIM GIRL, <http://dontdatehimgirl.com/home> (last visited Sept. 22, 2011).

62 See *Kauffman*, 930 N.E.2d at 788 ("Just trying to help other potential victims.").

63 See SOLOVE, *supra* note 4, at 24 ("Many blogs are more akin to diaries than news articles, op-ed columns, or scholarship.").

There is no powerful political belief or pride of authorship to counterbalance the dangers and costs of litigation. If the threat of liability causes rational speakers to censor themselves and “steer far wider of the unlawful zone,” a rational distributor can be expected to steer far wider still. It simply does not have to get very cold to chill the distribution of someone else’s speech.<sup>64</sup>

Another source of divergence is that intermediaries face an increased risk of liability, both actual and perceived, as compared to original speakers. One way to mitigate risk is to have evidence of the lawfulness of the speech. In this regard, an original speaker is likely to be closer to the facts that underlie her speech, and have more ready access to evidence of those facts, including her own first-hand knowledge. Moreover, an original speaker is likely to face fewer time constraints in collecting such evidence. An intermediary faces not only a potentially large volume of speech to assess, but also a relatively short amount of time within which to perform the assessment. If instead the intermediary delayed in distributing speech, that by itself could already be a significant impediment to speech. Finally, original speakers may experience confirmation bias,<sup>65</sup> and may overestimate the truth or lawfulness of their speech.

If it were easy to contract around, this divergence of incentives might be of no consequence. There are, however, substantial impediments to shifting benefits to the intermediary and risks to the speaker. For one, transaction costs in this context can be quite high. It may be infeasible to bargain over each piece of content, even *ex post*,<sup>66</sup> and measuring the *ex ante* aggregate risk posed by each user is difficult.<sup>67</sup> Indemnification is effective only if there is a realistic prospect of easily collecting from the user. Moreover, a user willing to risk a lawsuit in order to speak may not be able to turn that willingness into cash that

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64 Meyerson, *supra* note 8, at 117 (footnote omitted); *see also* Kreimer, *supra* note 8, at 28 (“To be sure, every prospect of liability or other sanction can chill speech, but intermediaries have a peculiarly fragile commitment to the speech that they facilitate.”).

65 *See* *Mosley v. City of Chi.*, 252 F.R.D. 445, 446 (N.D. Ill. 2008) (defining confirmation bias as “the well-documented tendency, once one has made up one’s mind, to search harder for evidence that confirms rather than contradicts one’s initial judgment” (quoting RICHARD A. POSNER, *HOW JUDGES THINK* 111 (2008))).

66 *See* Hamdani, *supra* note 14, at 924–25.

67 *See* Kreimer, *supra* note 8, at 37–38 (discussing the inaccuracies of actuarial predictions).

can be transferred to the intermediary.<sup>68</sup> Thus, the market is unlikely to result in a convergence of incentives.<sup>69</sup>

Sometimes intermediaries obtain benefits from the speech of others that the original speakers do not obtain. A prime example is advertising revenue on sites with user-generated content. Such revenue, however, while dependent on user speech generally, is unlikely to be sensitive to the presence or absence of any particular piece of content, or even several pieces of content. Thus, within limits, intermediaries can likely obtain all or most of the advertising revenue they would otherwise obtain, while still censoring speech. As a result, when faced with liability for carrying particular content, the intermediary continues to have an incentive to censor when the original speaker would not, because it loses little or nothing for doing so, while the original speaker loses all of the benefits of that content.<sup>70</sup>

### B. *Same Liability*

The problem of collateral censorship depends not just on a divergence of incentives, but on the failure to account for that divergence in the liability to be imposed. There is nothing inherently problematic about two entities with different incentives. The problem comes in treating them alike. Granting immunity as a way to avoid collateral censorship assumes that the deterrent effect as to original speakers is “correct,” because they were the ones that the liability was originally intended to reach. In that case, the greater deterrent effect as to intermediaries is excessive, and immunity is one possible response.

When liability is instead crafted with the incentives of the intermediary in mind, then the general rationale for immunity is undermined. In theory, this could be because the liability, while applicable to both intermediaries and original speakers, is correct as to intermediaries and too weak as to original speakers. The more likely scenario is that the type of liability to be imposed cannot sensibly be imposed on original speakers, and *only* applies to the intermediary or the particular situation in which the intermediary finds itself. Then the cause of action has hopefully been calibrated for intermediaries, or if not, then the cause of action itself can and ought to be changed.

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68 *Id.* at 38.

69 *But see* Hamdani, *supra* note 14, at 927–30 (describing mechanisms that “may operate to align the incentives of the ISPs and subscribers”).

70 In some circumstances, that of auction sites, for example, the intermediary does face a significant loss from blocking each additional piece of content. In those cases, the primary source of divergent incentives is merely the magnitude of the benefit to be obtained, rather than its nature. *See id.* at 954–56.

To be sure, immunity is a possible response even in this last scenario. One can decide that it is normatively desirable not to impose some particular form of liability, say contract liability or a recordkeeping requirement, on intermediaries. But then the reason cannot be that these forms of liability were really intended for someone else. Instead, immunity would need to be justified on some other grounds, grounds that presumably ought to depend on the nature of the liability itself. What justification could there be for saying that intermediaries should never be subject to recordkeeping requirements, regardless of what those requirements might be? To make the intermediary immune in this context is to disagree with the substance of the law itself. That requires a substantive analysis, not invocation of a blanket immunity.<sup>71</sup>

## II. THE DEVELOPMENT OF INTERMEDIARY IMMUNITY

This Part traces the development of intermediary immunity, first in the common law, and then in the enactment and interpretation of § 230, and shows the importance of concerns over collateral censorship to that development.

### A. *Traditional Intermediary Liability*

The idea that intermediaries should be subject to less liability than original speakers has its roots in constitutional and common law. Traditionally, defamation law has divided speech intermediaries into three categories: publishers, distributors, and conduits. Publishers, also called primary publishers, are responsible for the content they publish regardless of whether they author that content or whether they are specifically aware of the material at issue.<sup>72</sup> Thus, newspapers are responsible not only for the contents of articles written by staff or freelance writers, but also for statements contained in the advertise-

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<sup>71</sup> The framework developed here partially supports, on different theoretical grounds, Nancy Kim's view that web sites should be liable for failing to adopt a reasonable "business model." See Nancy S. Kim, *Web Site Proprietorship and Online Harassment*, 2009 UTAH L. REV. 993, 1043 (2009). Her view is based on seeing web sites as having a "proprietaryship," defined as an "ability to capitalize upon the activity on a Web site, regardless of whether it in fact chooses to do so," and on an analogy to business premises liability. *Id.* at 1036. Some such forms of "business model liability" may well be liability targeted at intermediaries.

<sup>72</sup> However, at the very least as to matters of public concern and plaintiffs who are public figures, the plaintiff must also show some form of fault on the part of the defendant as to the falsity of the statement. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

ments they print.<sup>73</sup> A newspaper cannot escape liability simply by showing that it failed to read the advertisement in question before printing it.<sup>74</sup>

At the other end of the spectrum, conduits are not liable for the content they carry, even if they are in a particular instance aware of the content and its implications.<sup>75</sup> One justification for such immunity is that conduits generally exercise no editorial control over the content they carry, and in fact may be greatly restricted in the circumstances under which they can refuse service to a customer. This applies, for example, to telephone companies.<sup>76</sup> But a broader rationale for conduit immunity is that conduits provide no more than a service that can be used for both lawful and unlawful purposes, and that they therefore should not be considered a proximate cause of their subscribers' unlawful acts.<sup>77</sup> Under this view, conduits have no duty to do anything even after receiving notice of harmful speech. This latter rationale applies even if the conduit has the legal right to suppress the speech.

In between publishers and conduits lies the category of distributors, sometimes called secondary publishers. Distributors exercise some control over the content they distribute, often through the ability to refuse to distribute specific material. Their involvement with the material they distribute is limited enough, however, that they are not automatically charged with knowledge of its contents. Instead, a distributor of defamatory material "is subject to liability if, but only if, he knows or has reason to know of its defamatory character."<sup>78</sup> Bookstores and libraries are entities commonly cited as examples of distributors. This same standard of liability has been applied in the context

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73 See, e.g., *Triangle Publ'ns, Inc. v. Chumley*, 317 S.E.2d 534 (Ga. 1984); see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964) (treating an advertisement as any other press report).

74 In some instances, however, it might be reasonable to rely on the advertiser's implicit or explicit assurance that the advertisement is not defamatory. See *Chumley*, 317 S.E.2d at 537.

75 See *Anderson v. N.Y. Tel. Co.*, 320 N.E.2d 647, 648 (N.Y. 1974) (Gabrielli, J., concurring).

76 *Id.* at 648-49.

77 *Id.* at 649 (contrasting "newspapers, magazines, radio, television and telegraph" and stating that "[t]he telephone company is not part of the 'media' which puts forth information after processing it in one way or another").

78 RESTATEMENT (SECOND) OF TORTS § 581 (1977).

of other intermediaries as well, such as contract printers,<sup>79</sup> that might not otherwise be viewed as “delivering” or “transmitting” content.<sup>80</sup>

The rationale for imposing a lesser standard of liability on distributors has long been that distributors might otherwise be too cautious, distributing only those materials that they had previously inspected, or in which they could be particularly confident. Often cited in this regard is *Smith v. California*, an obscenity case in which the Supreme Court struck down an ordinance imposing liability on booksellers without regard to their knowledge of the books’ contents.<sup>81</sup> The Court reasoned that under such an ordinance:

Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. . . . And the bookseller’s burden would become the public’s burden, for by restricting him the public’s access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller’s limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public’s access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller’s self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.<sup>82</sup>

Thus the rationale for holding distributors to a lesser form of liability than publishers is that imposing publisher liability on distributors would induce distributors to engage in collateral censorship, that is, the refusal to distribute content out of fear of liability. They would do so first because they would be induced to pre-screen content and the volume of such content would necessarily shrink in the face of “limitation in the amount of reading material with which [they] could familiarize [themselves].”<sup>83</sup> And second, “timidity in the face of . . .

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79 See *Sandler v. Calcagni*, 565 F. Supp. 2d 184, 195–96 (D. Me. 2008); *Misut v. Mooney*, 475 N.Y.S.2d 233, 236 (N.Y. Sup. Ct. 1984); *Maynard v. Port Publ’ns, Inc.*, 297 N.W.2d 500, 507 (Wis. 1980).

80 See RESTATEMENT (SECOND) OF TORTS § 581.

81 361 U.S. 147, 155 (1959).

82 *Id.* at 153–54 (citation omitted) (internal quotation marks omitted).

83 *Id.* at 154; *cf. Anderson v. N.Y. Tel. Co.*, 345 N.Y.S.2d 740, 757 (N.Y. App. Div. 1973) (Witmer, J., dissenting) (noting that requiring the same level of investigation of a telephone company as of a newspaper “would be unreasonably onerous when applied to a telephone company in light of the manifest differences between the

absolute criminal liability” would induce rational booksellers to suppress not only obscene books, but others that are “not obscene.”<sup>84</sup>

Under *Smith* and the cases citing it, it is clear that distributors have no obligation to pre-screen the material they carry, because of the problem of collateral censorship. How far this rationale extends, and precisely what obligations distributors might still have under the common law, however, has never been clear. This is in large part because courts have decided comparatively few defamation cases involving distributors,<sup>85</sup> and of these, the vast majority invoked the distributor liability standard to dismiss the claim against the distributor.<sup>86</sup> Knowledge of the contents, while certainly necessary for distributor liability, may not be sufficient. If knowledge of falsity is required, then the liability of distributors would be quite close to that of conduits.<sup>87</sup> The matter is enough in doubt that even though the Restatement uses the formulation that liability is imposed “if, but only if” the distributor has knowledge, a leading treatise has stated that “[t]he question remains whether the neutral distributor such as a library is liable even if the distributor knows of the defamation.”<sup>88</sup>

In the pre-Internet era, there was little need to develop much law on distributor liability or immunity. At the time, editorial control over most mass-produced content resided in the institutional media, such

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social functions of the two, particularly since the telephone company merely makes a physical service available to a customer’s independent use,” whereas the newspaper “undertakes direct responsibility for what is published and has the resources to verify its stories”), *rev’d*, 320 N.E.2d 647 (N.Y. 1974).

84 *Smith*, 361 U.S. at 154.

85 In many of the cases that do exist, the plaintiff appears to have sued the distributor, often only one of many potential distributor defendants, largely as a device to destroy diversity and keep the suit against a national, out-of-state publisher in state court. *See Lewis v. Time Inc.*, 83 F.R.D. 455, 466 (E.D. Cal. 1979); *see also Boladian v. UMG Recordings, Inc.*, 123 Fed. App’x 165, 167 (6th Cir. 2005); *Dworkin v. Hustler Magazine, Inc.*, 611 F. Supp. 781, 784–85 (D. Wyo. 1985). The device generally fails, with the federal court finding that the joinder of the distributor was “fraudulent” because there was no evidence of knowledge on its part, and thus that removal was proper. *But see Spence v. Flynt*, 647 F. Supp. 1266, 1274 (D. Wyo. 1986) (“This was simply not a case of an innocent magazine seller unwittingly disseminating allegedly libelous material. Rather, we have a distributor who possessed detailed knowledge of the ongoing bitter battle between *Hustler* and Spence, and who, after receiving a complaint about the magazine, failed to investigate and continued to sell it.”).

86 *See Lewis*, 83 F.R.D. at 463 (“The researcher of California libel law is struck by the paucity of cases holding distributors liable for the distribution of defamatory material. This court has discovered no California case imposing liability where a distributor merely sold an unchanged libelous periodical.”).

87 Knowledge of falsity is a species of actual malice, a standard already notoriously difficult to meet.

88 DAN B. DOBBS, *THE LAW OF TORTS* § 402, at 1123 (2000).

as newspapers, book publishers, and television producers. These institutions could reasonably control the content they produced and then reasonably take responsibility for it. In such a world, there was relatively little benefit to either plaintiffs or society generally in pursuing booksellers, for example, when the institutional publisher was a more obvious target. The publisher, not the bookseller, was the one capable of controlling harmful speech at its source and compensating victims when its discretion failed. Targeting the many vendors of a publication would be unwieldy at best.<sup>89</sup> At worst, it would exacerbate any problems of collateral censorship with little corresponding benefit.

### B. *Internet Intermediaries*

The latent question of whether distributors should retain any liability became more pressing with the advent of Internet intermediaries. There is nothing inherent in the technical functions of the new technologies that makes them fundamentally different from what came before—an Internet access provider is much like a telephone company in transmitting signals from one location to another. The social structures of speech and media changed, however, and it is this change that brought the question of intermediary liability to the fore.

In particular, the Internet made it possible to disseminate speech widely without going through the institutional media, with the result that it became much more pressing to determine the liability faced by institutional distributors. But Internet distributors do not map neatly onto the traditional categories. On the one hand, Internet distributors may seem much like carriers, dutifully transporting content authored by others from one point to another, without much volition on the part of the intermediary.

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<sup>89</sup> *Barricade Books, Inc. v. Langberg*, No. 95 CIV. 8906 (NRB), 2000 WL 1863764, at \*1 (S.D.N.Y. Dec. 19, 2000), shows the exception to the rule in a case in which Steve Wynn, owner of multiple Las Vegas casinos, was the plaintiff who brought suit. The requirement to show knowledge, of course, itself discourages suits against distributors. Even under that standard, though, one might have expected to see more cases in which plaintiffs first provide notice of the objectionable material to distributors and then either seek its removal or sue. Perhaps plaintiffs did this and most distributors simply complied. Still, if this were a common tactic, it would be surprising not to find in the case law at least a few distributors that resisted. (The distributor in *Lerman* is one that resisted. In that case, the publisher was also sued, but filed for bankruptcy. *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 128 (2d Cir. 1984). Moreover, the distributor was a national distributor, not an individual magazine vendor, and hence more like a publisher in being a single point of control. *See id.*)

On the other hand, a website host, more than a news vendor, is a single point of control, best situated to prevent the spread of harmful speech. The decision of a website hosting service to remove content makes it unavailable to everyone, whereas news vendors might only control a segment of the market. It is true that the cost of finding an alternative host is probably far less than the cost of finding an alternative newspaper, but the switching costs are likely to be significant enough to deter many speakers.<sup>90</sup> Even if full publisher liability is rejected, these considerations push in the direction of imposing more liability on Internet distributors than courts have generally imposed on offline distributors.

Another salient characteristic of Internet intermediaries, though not one unique to the Internet per se, is that they process and transmit content in electronic form. This enables such intermediaries to have more fine-grained control over the content they process than distributors of physical media. A newsstand, for example, can choose whether to distribute a newspaper, but it cannot generally excise a particular article or a particular sentence in an article of that newspaper. An electronic distributor is potentially in a position to make either of those edits, or to filter out particular words or other predefined content. Moreover, electronic distributors are better able to manipulate the content they distribute by categorizing it, sorting it, or repackaging it. In all of these ways, Internet intermediaries act in ways that might be characterized as less content neutral, or at least more “content intensive,” than their offline counterparts.

It is perhaps not surprising then that early courts gave inconsistent results in applying traditional defamation law to Internet intermediaries. In *Cubby, Inc. v. Compuserve Inc.*,<sup>91</sup> one court held that Compuserve, an early proprietary network service, should be regarded as a distributor of content made available on its forums, and that it thus faced no liability in the absence of evidence that it “knew or had reason to know” of the allegedly defamatory statements.<sup>92</sup> Another court, in *Stratton Oakmont, Inc. v. Prodigy Services Co.*,<sup>93</sup> held that Prodigy, another early proprietary network service, should be regarded as a publisher of the content on its bulletin boards, and that it was therefore responsible for statements as to which it had no prior notice.

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90 See Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 998–99 (2008).

91 776 F. Supp. 135 (S.D.N.Y. 1991).

92 *Id.* at 141.

93 1995 WL 323710, at \*1 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, 47 U.S.C. § 230 (2006), *as recognized in* *Shiamili v. Real Estate Grp. of N.Y. Inc.*, 17 N.Y.3d 281 (2011).

The *Stratton Oakmont* court, distinguishing *Cubby*, reasoned that Prodigy had taken on the role of publisher by doing two things. “First, Prodigy held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, Prodigy implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce.”<sup>94</sup> These two rationales track the salient characteristics of Internet intermediaries identified above. The first seems to reflect the court’s readiness to find that the intermediary had taken on responsibility by acting as a point of control. It is unlikely that a bookseller that similarly held itself out as selling family-friendly books would also find itself suddenly classed as a publisher of those books. The second reflects the greater entanglement of an intermediary with the content it processes that is made possible by the electronic processing of content. Thus, the *Stratton Oakmont* decision, aberration or not,<sup>95</sup> reflects the greater pull of intermediary liability in the Internet context.

### C. Section 230 of the Communications Decency Act

It is against this backdrop of uncertainty in the scope of traditional distributor liability, as well as the difficulty of mapping Internet intermediaries onto traditional ones, that Congress passed § 230 of the Communications Decency Act. Section 230 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>96</sup> and that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”<sup>97</sup> The Act provides exceptions for federal criminal laws, intellectual property laws, and communications privacy laws.<sup>98</sup>

Despite its potentially broad language, however, § 230 was not the product of debate over the proper scope of intermediary liability on the Internet. Section 230 began as the “Online Family Empower-

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94 *Id.* at \*4.

95 See Douglas B. Luftman, Note, *Defamation Liability for On-Line Services: The Sky Is Not Falling*, 65 GEO. WASH. L. REV. 1071, 1093 (1997) (arguing that the result in *Stratton Oakmont* was based on a “technological misunderstanding”). The New York Court of Appeals later held in *Lunney v. Prodigy Servs. Co.*, 723 N.E.2d 539 (N.Y. 1999), that Prodigy was not a publisher of the messages appearing on its bulletin board, although by then Prodigy appears to have changed both its rhetoric and its practices.

96 47 U.S.C. § 230(c)(1) (2006).

97 47 U.S.C. § 230(e)(3).

98 See 47 U.S.C. § 230(e)(1)–(2), (4).

ment” amendment to the Telecommunications Act of 1996.<sup>99</sup> Introduced by Representatives Cox and Wyden, the amendment was intended to be an alternative to the provisions that the Senate had passed criminalizing the transmission of indecent material to minors.<sup>100</sup> In discussing the amendment, Representative Cox was clear that the provision was intended to reverse *Stratton Oakmont* and to eliminate the corresponding disincentive to screen content.<sup>101</sup> The many representatives that spoke in favor of the amendment, however—and virtually all who spoke favored it—lauded it not for its treatment of intermediary liability, but because it rejected government intervention and supposedly endorsed parental responsibility and control as the solution to the problem of protecting children from pornography.<sup>102</sup>

Section 230 does contain a separate immunity provision for providers of filtering software,<sup>103</sup> but it is hard to locate any parental control in § 230(c)(1), which validates the choices of online service providers without regard to parental choices. The representatives may have had in mind that § 230 would enable online service providers to compete more effectively in offering different levels of filtering, some more aggressive than others, from which parents could choose. Mainly it seems that the members of the House were focused on countering the Senate provisions, and were perhaps thinking less about what the House amendment would do than what it, in contrast to the

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99 See 141 CONG. REC. H8468 (1995); see generally Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51 (1996) (discussing the legislative history of the Communications Decency Act).

100 See Cannon, *supra* note 99, at 67. Those provisions were later struck down by the Supreme Court in *Reno v. ACLU*, 521 U.S. 844 (1997).

101 See 141 CONG. REC. H8469-70 (1995).

102 See 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden) (“The gentleman from California (Mr. Cox) and I are here to say that we believe that parents and families are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats.”); *id.* at H8471 (statement of Rep. White) (“I want to be sure we can protect [children] from the wrong influences on the Internet. But . . . the last person I want making that decision is the Federal Government. In my district right now there are people developing technology that will allow a parent to sit down and program the Internet to provide just the kind of materials that they want their child to see. That is where this responsibility should be, in the hands of the parent. That is why I was proud to cosponsor this bill, that is what this bill does . . . .”); *id.* (statement of Rep. Lofgren) (“[The Senate approach] will not work. It is a misunderstanding of the technology. The private sector is out giving parents the tools that they have. I am so excited that there is more coming on. I very much endorse the Cox-Wyden amendment . . . .”).

103 47 U.S.C. § 230(c)(2)(B).

Senate provisions, would not do. Beyond the *Stratton Oakmont* problem, no one in the House made an explicit statement about the generally appropriate level of liability to impose on Internet intermediaries, or about whether or why such intermediaries should be entirely immune from certain kinds of claims.<sup>104</sup>

The final bill was even more confused on this point. The conference committee was dominated by legislators that favored the Senate approach.<sup>105</sup> To reconcile the House amendment, the committee dropped the one conflicting provision, which would have denied the Federal Communications Commission any role “with respect to content or any other regulation of the Internet or other interactive computer services,”<sup>106</sup> and incorporated the remainder of the amendment, with all of its language celebrating free speech on the Internet,<sup>107</sup> into the final bill. The conference committee report stated that the provision was intended to overrule *Stratton Oakmont*, but otherwise provided little guidance on the question of intermediary liability.<sup>108</sup>

#### D. Section 230 in the Courts

It then fell to the courts to interpret a provision that on its face was relatively ambiguous, and about which Congress had provided little guidance. The first appellate court to do so was the Fourth Circuit in *Zeran v. America Online, Inc.*<sup>109</sup> The *Zeran* court squarely confronted the issue of whether § 230 precluded only imposing publisher liability on intermediaries, leaving distributor liability intact, or whether it precluded both types of liability. The plaintiff *Zeran* claimed that while § 230 precluded treating America Online (AOL) as a publisher of the content on its message boards, it did not preclude treating AOL as a distributor, liable upon notice of the offending content.<sup>110</sup>

The Fourth Circuit rejected this argument, with reasoning that reflected a concern that preserving distributor liability would lead to collateral censorship, although the court did not use that term. First, as a textual matter, the court found that imposing distributor liability was also treatment “as a publisher,” because distributors are “a type of publisher for purposes of defamation law.”<sup>111</sup> The court went on to

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104 See 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995).

105 See Cannon, *supra* note 99, at 91.

106 See 141 CONG. REC. H8468 (1995).

107 See 47 U.S.C. § 230(a)–(b).

108 See H.R. REP. NO. 104-458 (1996) (Conf. Rep.).

109 129 F.3d 327 (4th Cir. 1997).

110 See *id.* at 331.

111 *Id.* at 332.

explain that its view was “reinforced because AOL is cast in the same position as the party who originally posted the offensive messages,” and that the theory of liability being asserted against AOL was “precisely the [same] theory under which the original poster of the offensive messages would be found liable.”<sup>112</sup>

Moreover, the court found that “like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech,” because service providers “have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not.”<sup>113</sup> The court also worried about the potential for abuse: “Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply ‘notify’ the relevant service provider, claiming the information to be legally defamatory.”<sup>114</sup> For all of these reasons, the court concluded that Congress must have intended to immunize AOL entirely, even after notice. Other courts have largely followed the lead of the *Zeran* court in similarly rejecting notice as a basis to deny immunity.<sup>115</sup> Except for a brief interlude in the California courts,<sup>116</sup> no court has specifically adopted the view that notice undermines immunity.

### III. PUZZLES IN APPLYING § 230

While courts quickly settled on how to apply § 230 to core cases, such as message boards and the like, courts have continued to struggle over what *types* of cases fit within the language and rationale of the statute.

#### A. “Users”

On its face, § 230 applies equally to either a “provider or user of an interactive computer service.”<sup>117</sup> Because everyone on the Internet is a “user of an interactive computer service,” a key question has been whether there is any limiting principle as to this element of the statute. Read literally, the statute appears to make online newspapers and

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112 *Id.* at 333.

113 *Id.*

114 *Id.*

115 *See, e.g.,* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1103–05 (9th Cir. 2009); Universal Commc’n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 420 (1st Cir. 2007); Doe v. Am. Online, Inc., 783 So.2d 1010, 1015–17 (Fla. 2001).

116 *See* Barrett v. Rosenthal, 4 Cal. Rptr. 3d 142, 150–51 (Ct. App. 2004), *rev’d*, 146 P.3d 510, 519 (Cal. 2006).

117 47 U.S.C. § 230(c)(1) (2006).

blogs immune for publishing any sourced content.<sup>118</sup> If a reporter or blogger receives a “hot tip” though, and then proceeds to publish an article about it, there seems little justification for holding the writer immune for the resulting publication. The courts’ discomfort with such potential results has led them to try to formulate principles to limit immunity, but the attempts thus far have all been wanting.

### 1. Leading Cases

In a pair of leading cases, the Ninth Circuit and the California Supreme Court were faced with the question of whether § 230 applies to a person who forwards an e-mail to a broader audience. Tom Cremers founded and ran the Museum Security Network, which serves “as a source of information for cultural property protection professionals.”<sup>119</sup> Cremers maintained a mailing list and website for the Network. The mailing list was moderated—members could not send messages directly to the list.<sup>120</sup> Instead, people interested in having their messages distributed to the list would e-mail them to Cremers. Cremers then collected those messages he deemed appropriate for distribution into a single document, together with his own comments and excerpts of relevant news articles.<sup>121</sup> The document would then be sent to the mailing list and posted to the website.

In 1999, Cremers received an e-mail from Bob Smith, a building contractor, who claimed that a woman for whom he had done work, Ellen Batzel, was a descendant of a Nazi official and owned paintings that Smith believed had been looted during World War II.<sup>122</sup> Cremers made a few insubstantial edits to the message and then included it in a document sent to the mailing list and posted to the website.<sup>123</sup>

Batzel sued Cremers, alleging that the e-mail Cremers had sent to the list was false and defamatory. The Ninth Circuit held that Cremers was at least a “user,” if not a “provider” of an interactive computer service, and that Cremers was not an “information content pro-

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118 No court has explicitly gone this far, but some commentators have assumed the result. See Walter Pincus, *The Internet Paradox: Libel, Slander & the First Amendment in Cyberspace*, 2 GREEN BAG 2D 279, 279 (1999) (assuming that under § 230, a newspaper would not be liable for its online articles).

119 *About the MSM*, MUSEUM SECURITY NETWORK, [http://www.museum-security.org/?page\\_id=4072](http://www.museum-security.org/?page_id=4072) (last visited Sept. 24, 2011); see *Batzel v. Smith*, 333 F.3d 1018, 1021 (9th Cir. 2003).

120 See *Batzel*, 333 F.3d at 1021.

121 See *id.*

122 See *id.*

123 See *id.* at 1022.

vider' with respect to the information in question," namely Smith's e-mail.<sup>124</sup> The court thus held that Cremers was immune under § 230, so long as a reasonable person in his position "would conclude that [Smith's e-mail] was provided for publication on the Internet."<sup>125</sup> The court remanded the case for a determination on this factual question.<sup>126</sup> One judge dissented, arguing that "[w]e should hold that the CDA immunizes a defendant only when the defendant took no active role in selecting the questionable information for publication" and that "Cremers is *not* entitled to CDA immunity because Cremers actively selected Smith's e-mail message for publication."<sup>127</sup>

The California Supreme Court case involved somewhat different circumstances. Ilena Rosenthal directs the Humantics Foundation for Women, which is primarily devoted to spreading "the message of the dangers of breast implants" through its website and other media.<sup>128</sup> Rosenthal's self-professed "long term nemesis"<sup>129</sup> is Quackwatch, "an international network of people who are concerned about health-related frauds, myths, fads, fallacies, and misconduct."<sup>130</sup> Quackwatch, which also has an extensive website, was founded and is operated by Stephen Barrett.<sup>131</sup> Terry Polevoy operates a similar website called HealthWatcher.<sup>132</sup> Tim Bolen, on the other hand, is a "Crisis Management Consultant" and public relations specialist, who is on Rosenthal's side in asserting that it is the "watchers," rather than the supposed "quacks," who are the real problem.<sup>133</sup> Like Rosenthal, he calls himself a "nemesis of the now failing quackbuster operation,"<sup>134</sup> including Barrett<sup>135</sup> and Polevoy.<sup>136</sup>

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124 *Id.* at 1030–31.

125 *Id.* at 1034.

126 *See id.* On remand, the district court granted summary judgment to Cremers on res judicata grounds and never resolved the § 230 issue. *Batzel v. Smith*, 372 F. Supp. 2d 546 (C.D. Cal. 2005).

127 *Batzel*, 333 F.3d at 1038, 1040 (Gould, J., concurring in part and dissenting in part).

128 HUMANTICS FOUNDATION, <http://www.humanticsfoundation.com> (last visited Sept. 24, 2011); *see Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006).

129 HUMANTICS FOUNDATION, *supra* note 128.

130 *Quackwatch Mission Statement*, QUACKWATCH, <http://www.quackwatch.org/00AboutQuackwatch/mission.html> (last visited Sept. 24, 2011).

131 *See Barrett*, 146 P.3d at 513.

132 *Id.*; *see Canadian Quackery Watch*, HEALTHWATCHER, <http://healthwatcher.net/Quackerywatch/about.html> (last visited Sept. 24, 2011).

133 BOLEN REPORT, <http://www.bolenreport.com> (last visited Sept. 24, 2011).

134 *Who is Tim Bolen*, BOLEN REPORT, *supra* note 133.

135 *See Tim Bolen, Failed MD Stephen Barrett*, QUACKPOT WATCH, <http://www.quackpotwatch.org/quackpots/quackpots/barrett.htm> (last visited Sept. 24, 2011).

At some point, Bolen sent Rosenthal an e-mail, containing an article, labeled “Opinion by Tim Bolen,” in which he alleged that Polevoy had stalked the producer of a Canadian alternative medicine radio show.<sup>137</sup> On August 14, 2000, Rosenthal posted messages on two Usenet newsgroups,<sup>138</sup> each containing the contents of the e-mail she had received from Bolen.<sup>139</sup> The newsgroup postings also contained the original subtitle, “Opinion by Tim Bolen,” but were posted from Rosenthal’s account.<sup>140</sup>

Polevoy sued Rosenthal for defamation on the basis of the newsgroup postings. The California Supreme Court held that § 230 applied in this situation to preclude the suit.<sup>141</sup> The court began by joining the *Zeran* court and others in holding that Rosenthal’s notice of the defamatory content made no difference.<sup>142</sup> The court then held that because Rosenthal was a “user of an interactive computer service” under the statute, and the e-mail from Bolen was “information provided by another information content provider,” the immunity applied.<sup>143</sup> In so holding, the court explicitly rejected the active/passive distinction advanced in the *Batzel* dissent.<sup>144</sup>

## 2. Why Protect Users?

At the outset, one might wonder if the interpretive difficulties in attempts to cabin user immunity could have been avoided had Congress simply limited the immunity to interactive service “providers,” rather than also including “users.” As the California Supreme Court noted:

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136 See Tim Bolen, “Stalker” Polevoy; *The Quackbuster’s Nut Case*, QUACKPOT WATCH, <http://www.quackpotwatch.org/opinionpieces/stalkerpolevoy.htm> (last visited Sept. 24, 2011).

137 *Barrett v. Rosenthal*, 146 P.3d 510, 514 (Cal. 2006).

138 See *Arista Records LLC v. USENET.com*, 633 F. Supp. 2d 124, 129–30 (S.D.N.Y. 2009) (“The USENET network . . . is a global system of online bulletin boards on which users (or ‘subscribers’) may post their own messages or read messages posted by others.”); see generally *id.* at 129–31 (“The USENET and How It Works”).

139 *Barrett*, 146 P.3d at 514.

140 *Id.*

141 *Id.* at 513.

142 *Id.* at 517.

143 *Id.* at 515 (quoting 47 U.S.C. § 230(f)(2) (2006)); see also *Phan v. Pham*, 105 Cal. Rptr. 3d 791, 793 (Ct. App. 2010) (extending *Barrett* to also immunize a defendant who added introductory language to the e-mail he forwarded, inviting the recipients “to read the following comments” and stating that “[e]verything will come out to the daylight”).

144 *Barrett*, 146 P.3d at 527–29.

[I]ndividuals do not face the massive volume of third-party postings that providers encounter. Self-regulation is a far less challenging enterprise for them. Furthermore, service providers, no matter how active or passive a role they take in screening the content posted by users of their services, typically bear less responsibility for that content than do the users. Users are more likely than service providers to actively engage in malicious propagation of defamatory or other offensive material.<sup>145</sup>

While many providers should be regarded as intermediaries and many users should be regarded as original speakers, the categories do not map onto one another, and Congress was right not to limit immunity to providers. There are significant situations in which “users” are acting as intermediaries. For example, a blogger is an intermediary with respect to the comments left on her blog. It is the company hosting the blog, however, that is the provider of the interactive computer service, because it is that company that provides the service that “enables computer access by multiple users to a computer server.”<sup>146</sup> The blogger is a user of that service. Indeed, any time the operator of a website leases server capacity from another company, it might be construed as a user, rather than provider, of an interactive computer service.

Moreover, moderators, those with authority to delete or edit the postings of others, are clearly users, but also intermediaries. Moderators might be acting on behalf of providers, but need not be true agents of the providers.<sup>147</sup> Imposing liability on moderators could just as readily lead to collateral censorship as imposing liability on the service provider. A moderator who is liable for failing to delete a post upon notice will tend to err on the side of deletion. Such liability could well discourage users from serving as moderators in the first place, contrary to the clear purpose of § 230 to remove disincentives to filtering content. Indeed, Congress may well have had moderators specifically in mind in including “users” among those eligible for immunity under § 230.<sup>148</sup>

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145 *Id.* at 526.

146 47 U.S.C. § 230(f)(2); *see* *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (“A web site . . . ‘enables computer access by multiple users to a computer server,’ namely, the server that hosts the web site. Therefore, web site operators . . . are providers of interactive computer services within the meaning of Section 230.” (quoting 47 U.S.C. § 230(f)(2))).

147 *See, e.g., Frequently Asked Questions: Badges*, *supra* note 57 (describing the ability of user-moderators to delete inappropriate comments).

148 In one of only three paragraphs in the Conference Report on § 230, the conference committee wrote: “The conferees do not intend, however, that these protections from civil liability apply to so-called ‘cancelbotting,’ in which recipients of a

### 3. Distinguishing Among Users

If some users, but not all, should be eligible for immunity, it may be tempting to try to classify the users themselves in order to draw this distinction. The distinction advocated by the *Batzel* dissent was between users that actively select material for publication and those that passively permit publication to occur.<sup>149</sup> Under such a rule, Cremers would be denied immunity because he had actively selected Smith's e-mail for inclusion in the periodic compilation that he sent out.<sup>150</sup> The *Batzel* majority rejected this distinction,<sup>151</sup> as did the California Supreme Court in *Barrett*.<sup>152</sup>

As courts have recognized, the active/passive distinction is flawed. To begin with, there is little or no support for such a distinction in the statutory language, which does not define "user" or otherwise provide any indication that the term has limits not applicable to a "provider."<sup>153</sup> More importantly, the distinction is blurry to nonexistent in many contexts.<sup>154</sup> For example, how are we to regard the conduct of a blogger who moderates the comments posted to her blog? Is she actively selecting the ones that are published? Or is she screening out the remainder? Would it matter whether most comments are approved, or most denied? Similarly, imposing liability on active users could be troublesome for search engines, which after all are supposed to be pulling valuable needles from the Internet haystack.

The *Batzel* majority's alternative focus on whether information has been "provided" to the intermediary is better, but this distinction also proves to be flawed. For one thing, the *Batzel* court's interpretation of "provided" was potentially far too broad, covering any "circum-

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message respond by deleting the message from the computer systems of others without the consent of the originator or without having the right to do so." 142 CONG. REC. 1959 (1996); see also Eric Schlachter, *War of the Cancelbots!*, ERIC GOLDMAN WEBSITE, [http://eric\\_goldman.tripod.com/articles/cancelbotarticle.htm](http://eric_goldman.tripod.com/articles/cancelbotarticle.htm) (last visited Sept. 24, 2011). One might infer from this language that Congress did intend to immunize individuals who deleted a message and *did* have the right to do so. Moderators are the primary example of such individuals.

149 *Batzel v. Smith*, 333 F.3d 1018, 1036–41 (9th Cir. 2003) (Gould, J., concurring in part and dissenting in part).

150 *Id.* at 1041.

151 *Id.* at 1032 (majority opinion).

152 *Barrett v. Rosenthal*, 146 P.3d 510, 529 (Cal. 2006).

153 *Id.* at 526–27.

154 *Batzel*, 333 F.3d at 1032 ("Such a distinction between deciding to publish only some of the material submitted and deciding *not* to publish some of the material submitted is not a viable one. The scope of the immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance.").

stances in which a reasonable person in the position of the service provider or user would conclude that the information was *provided for publication on the Internet* or other ‘interactive computer service.’<sup>155</sup> This language could be interpreted to mean that an apparent intention to publish on the Internet is enough, regardless of whether the publication was intended to occur through the intermediary or not.<sup>156</sup>

But even if we narrow the interpretation to include only circumstances in which material is provided for publication through the service provider or user, the test still fails to make a crucial distinction. Surely I don’t deserve immunity for spreading gossip simply because the e-mail in which I first read the gossip included the instruction, “Spread the word!” Granting immunity in this situation would serve no purpose except to encourage me to spread content without regard to its substance. But if that is the goal, what difference does it make whether the sender wanted me to spread the message or not? Neither the active/passive distinction nor a focus on “providing” is a satisfactory approach to limiting user immunity.

### B. “Development of Information”

As an alternative to focusing on “users,” courts have also tried to distinguish first-party from third-party conduct by looking to the definition of the term “information content provider,” and its inclusion of entities that are “responsible . . . in part[ ] for the . . . development of [the] information.”<sup>157</sup> This focus on what it means to “develop” information, however, has also led courts astray.

Section 230 only immunizes service providers with respect to “information provided by *another* information content provider.”<sup>158</sup> Courts have reasoned that if the service provider is itself an information content provider of the relevant information, then § 230 does not preclude liability based on that information.<sup>159</sup> In turn, “information content provider” is defined to mean “any person or entity that is

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155. *Id.* at 1034 (emphasis added) (quoting 47 U.S.C. § 230(c)(1) (2006)).

156. *See Barrett*, 146 P.3d at 528 (framing the question in *Batzel* as “whether the operator should reasonably have known Smith intended his e-mail to be published on the Internet”).

157. 47 U.S.C. § 230(f)(3).

158. 47 U.S.C. § 230(c)(1) (emphasis added).

159. As described below, the statute clearly contemplates that more than one person could be an information content provider with respect to a single piece of information. In theory, one could read the statute to provide immunity with respect to the information of another even if the service provider is also an information content provider of the same information. *See Ken S. Myers, Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 163, 191–92 (2006). So inter-

responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>160</sup> Where the service provider’s actions fall well short of “creating” the information, courts have inquired into whether the service provider nevertheless is responsible for the “development” of the information, at least “in part.”<sup>161</sup>

The leading case to adopt this reasoning was the Ninth Circuit’s en banc decision in *Fair Housing Council v. Roommates.com*.<sup>162</sup> In that case, the online roommate matching service Roommates.com was sued for violating the Fair Housing Act, which *inter alia* makes it unlawful to “make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on” a protected category.<sup>163</sup> Roommates.com requires its subscribers, as a condition of signing up with the service, to state their sex, sexual orientation, and whether they would bring children to the household, among other characteristics.<sup>164</sup> Subscribers are then asked to state preferences with regard to these same three characteristics, although subscribers are free to state that they have no preference.<sup>165</sup> The answers to all of these questions become part of subscriber profiles that are displayed on the website. The Fair Housing Council alleged that the online publication of the discriminatory statements contained within the profiles was a violation of the Fair Housing Act for which the website was responsible.<sup>166</sup>

The Ninth Circuit, en banc, rejected the website’s claim that it was immune under § 230. The court reasoned that

[T]he part of the profile that is alleged to offend the Fair Housing Act and state housing discrimination laws—the information about sex, family status and sexual orientation—is provided by subscribers in response to Roommate’s questions, which they cannot refuse to answer if they want to use defendant’s services. By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers,

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preted, the immunity would have the potential to be incredibly broad, and no court has interpreted the statute in this manner. *See id.*

160 47 U.S.C. § 230(f)(3).

161 *Id.*; *see infra* note 162.

162 521 F.3d 1157 (9th Cir. 2008) (en banc).

163 42 U.S.C. § 3604(c) (2006). The Fair Housing Council also sued under the equivalent California law, which extends the prohibition to additional categories, including sexual orientation. *Roommates.com*, 521 F.3d. at 1162.

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

165 *Id.*

166 *See id.* at 1162.

Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information.<sup>167</sup>

The court found that the definition of “development” that was “suitable to the context” was that of “making usable or available.”<sup>168</sup> It found that it would “strain[ ] both credulity and English” to say that the site “has not helped in the least to develop” the challenged information.<sup>169</sup> Moreover, the court declared that “every [profile] page is a collaborative effort between Roommate and the subscriber.”<sup>170</sup>

In so holding, the court had to distinguish the earlier Ninth Circuit case of *Carafano v. Metrosplash.com*.<sup>171</sup> In that case, the plaintiff sued an online dating service after a third party created a false profile on the website that contained the plaintiff’s address and photograph alongside responses that suggested that she was looking for a sexual relationship.<sup>172</sup> Carafano argued that the dating service was not entitled to § 230 immunity because the false profile had been created in response to “62 detailed questions,” the answers to some of which involved selecting from a “menu of ‘pre-prepared responses.’”<sup>173</sup> The Ninth Circuit rejected the argument, explaining that “Matchmaker cannot be considered an ‘information content provider’ under the statute because no profile has any content until a user actively creates it.”<sup>174</sup>

Despite the apparent similarity—both cases, after all, involved profiles that simply reflected the choices selected by users—the *Roommates.com* court held that the cases were distinguishable. The en banc court wrote that the language in *Carafano* quoted above was “unduly broad,” and reiterated that “even if the data are supplied by third parties, a website operator may still contribute to the content’s illegality and thus be liable as a developer.”<sup>175</sup> The court distinguished *Carafano* by noting that “[t]he allegedly libelous content there—the false implication that Carafano was unchaste—was created and developed entirely by the malevolent user, without prompting or help from

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167 *Id.* at 1166.

168 *Id.* at 1168 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 618 (3d ed. 2002)).

169 *Id.* at 1166.

170 *Id.* at 1167.

171 339 F.3d 1119 (9th Cir. 2003).

172 *Id.* at 1121.

173 *Id.* at 1125.

174 *Id.* at 1124 (quoting statutory language in 47 U.S.C. § 230(c)(1) (2006)).

175 *Roommates.com*, 521 F.3d at 1171.

the website operator” and that the dating service had done “absolutely nothing to encourage the posting of defamatory content.”<sup>176</sup>

The distinction drawn by the Ninth Circuit certainly has a superficial appeal, and indeed, as discussed below, the distinction might be the relevant one for purposes of an inducement claim.<sup>177</sup> But “encouraging” someone to develop information and developing it yourself are quite different types of activities. Focusing on wrongful encouragement has little to do with a reasonable explication of what it means to “develop” information. The difference between *Roommates.com* and *Carafano* is supposed to have been that the housing website’s conduct was designed to elicit unlawful responses, while the dating website’s conduct was not. But the underlying conduct was essentially the same in either case, so it is hard to understand how one can be “development” and the other not.<sup>178</sup> The *Roommates.com* opinion suggested that it is perfectly natural for the same conduct to be development in one context, but not another.<sup>179</sup> The opinion gives the example of an innocuous deletion of a word versus the deletion of a crucial “not.”<sup>180</sup> The more natural interpretation of that example, however, is that in both cases, the service provider is a developer of the deletion, even if the deletion is unlawful in some situations, but not others. Focusing on the meaning of “development” is largely unhelpful to drawing the appropriate lines.

### C. “Treatment as a Publisher or Speaker”

In other cases, courts have stumbled in interpreting the portion of the statutory text that immunizes intermediaries only against liability that treats the intermediary “as [a] publisher or speaker.”<sup>181</sup> Consider the case of *Doe v. MySpace*.<sup>182</sup> In that case, the plaintiff lied about her age, thirteen at the time, in order to create a profile on the social networking website MySpace.<sup>183</sup> MySpace requires that its users be at least fourteen years old, and the profiles of those who are fourteen or fifteen are, by default, inaccessible to those who have not been invited to view them.<sup>184</sup> By claiming that she was eighteen, a claim the web-

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176 *Id.*

177 *See infra* Part IV.B.2.

178 *See Roommates.com*, 521 F.3d at 1182–84 (McKeown, J., concurring in part and dissenting in part).

179 *Id.* at 1171 n.30 (majority opinion).

180 *Id.* at 1169.

181 47 U.S.C. § 230(c)(1) (2006).

182 528 F.3d 413 (5th Cir. 2008).

183 *Id.* at 416.

184 *Id.*

site did not verify, the plaintiff was able to create a public profile. Another member, nineteen years old, viewed this profile, initiated contact with the plaintiff, and later met and sexually assaulted her.<sup>185</sup>

The girl and her parents sued MySpace for negligence. Their theory of negligence appears to have been primarily that MySpace should have had an age verification system to keep underage users from registering with the site and to keep younger users' profiles from being publicly available.<sup>186</sup> The Fifth Circuit held that § 230 barred the claim. The court characterized the plaintiffs' claim as trying to hold MySpace liable for its failure "to implement basic safety measures" that would have prevented the teenagers from communicating with each other.<sup>187</sup> The court then went on to hold that "[t]heir allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content."<sup>188</sup>

The statute, however, does not immunize intermediaries as to all causes of action that "speak to" their "role as a publisher." The statute only precludes causes of action that treat the intermediary "as a publisher or speaker" of third-party information. The court never explained how an age verification requirement would treat MySpace as the speaker of third-party information. The plaintiff's claim in this case was not one that would treat MySpace as if it had been the one claiming that the girl was eighteen. The claim faulted MySpace in its capacity as recipient of that assertion, not in its capacity as disseminator of that assertion to others. That distinction is crucial to whether MySpace should be immune from the claim.

#### IV. THE LIMITS OF INTERMEDIARY IMMUNITY

Part I described why the mitigation of collateral censorship serves as an important rationale for intermediary immunity, and Part II traced that rationale in the development of intermediary immunity in the courts. This part explains the implications of that theory for defining limits to when intermediary immunity and/or § 230 ought to apply, in the types of situations described in the previous part, among others.

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185 *Id.*

186 *See id.* at 421 (quoting the plaintiffs' attorney as having argued that "MySpace could have implemented . . . inexpensive age verification software that has been asked for by attorneys general before the lawsuit happened").

187 *Id.* at 416.

188 *Id.* at 420; *see also* *Doe II v. MySpace Inc.*, 96 Cal. Rptr. 3d 148, 156–57 (Ct. App. 2009) (following the Fifth Circuit's reasoning in a set of cases involving very similar facts).

The theory developed here does not resolve whether immunity is the right response in the core situations that immunity was meant to address. For the reasons previously described, there are likely to be real speech losses that would result from imposing liability on message board operators for the defamatory content they carry.<sup>189</sup> There are also real losses from failing to impose such liability.<sup>190</sup> Difficult tradeoffs must be made, and it is hard to know how to measure the relative tradeoffs. On one side there are the preventable harms suffered by those who have been targeted by harmful speech. On the other are the social harms that result from making it harder to, for example, criticize companies and individuals. At the margins, how are we to compare the two? Knowing when collateral censorship is a problem does not answer that question.

Focusing on collateral censorship as the rationale for immunity may at least help to sharpen the analysis in the situations in which it occurs. For example, we may want to reject immunity when collateral censorship is normatively acceptable, or even desirable. The Supreme Court has taken something of this view in the area of obscenity. A distributor of obscenity is not liable in the absence of knowledge about the materials, but the knowledge required is knowledge about the existence and general nature of the material, not that the material meets the legal definition of obscenity.<sup>191</sup> The tenor of the Court's discussion is that a defendant who traffics in "filth" takes the risk that the filth crosses the line into illegal obscenity.<sup>192</sup> Uncertainty over whether questionable material is in fact obscene undoubtedly leads cautious distributors to suppress constitutionally protected material. When what is suppressed is "filth," though, the Court seems less concerned about that potential for suppression.

Arguably, the same might be said about discriminatory statements. One possible interpretation of the outcome of the *Roommates.com* case is that it reflected a judgment that the collateral suppression of discriminatory statements might be desirable, whether or not they are protected by the First Amendment.<sup>193</sup> In this way, discriminatory statements might be more analogous to the "filth" that the Court has allowed to be suppressed, and less like the valuable true statements

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189 See *supra* Part I.

190 See *supra* note 4.

191 *Hamling v. United States*, 418 U.S. 87, 123 (1974).

192 *Id.* at 122 (citing *Mishkin v. New York*, 383 U.S. 502 (1966)).

193 See Jennifer C. Chang, Note, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969, 973-77 (2002) (describing rationales for prohibiting discriminatory advertisements of lawful housing transactions).

that might be suppressed by the imposition of defamation liability. These arguments might counsel toward either finding that § 230 does not preempt the Fair Housing Act,<sup>194</sup> or seeking to add the Fair Housing Act to the list of § 230 exemptions.<sup>195</sup>

Knowing when collateral censorship is *not* the problem, however, has clearer implications. If collateral censorship is not the problem, intermediary immunity, at least in its broadest forms, is not the right response. As previously described, the problem of collateral censorship arises from applying the same law to actors with different incentives. Thus, there are two types of situations in which collateral censorship is not implicated: when the actors have the same incentives and when different law is being applied to the two sets of actors. In the first situation, we should recognize the intermediary as not an intermediary at all, but an original speaker, with the incentives of an original speaker, who should be liable according to the rules applicable to original speakers. In the second, because the liability being applied to the intermediary is not one that would otherwise apply to original speakers, we cannot simply presume that such liability is inappropriate, based solely on the divergence of incentives. Immunity in such a situation hides important questions about the underlying substantive claim, questions that deserve analysis without the shield of immunity.

#### A. *Intermediary as Original Speaker*

That intermediaries should be responsible for their own speech is an unremarkable proposition, and one that courts have validated.<sup>196</sup> Distinguishing between intermediaries and original speakers can be

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194 See *id.* at 1001–03.

195 See James D. Shanahan, Note, *Rethinking the Communications Decency Act: Eliminating Statutory Protections of Discriminatory Housing Advertisements on the Internet*, 60 FED. COMM. L.J. 135, 154 (2007).

196 See *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162–63 (9th Cir. 2008) (en banc); see also *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1262–63 (N.D. Cal. 2006) (“No case of which this court is aware has immunized a defendant from allegations that *it* created tortious content.”). Other commentators have also called for a broader conception of the content that should be regarded as the intermediary’s own. See, e.g., Gregory M. Dickinson, Note, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POL’Y 863, 880 (2010) (advocating “liability where a website either ratifies content created by a third-party or is a coconspirator in its creation”); Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U.L. REV. 1447, 1476 (2006) (advocating that courts “hold a blogger liable as a publisher if they find that the blogger actively chose to publish a specific and defamatory third-party message”).

difficult, however. Focusing on the problem of collateral censorship helps in drawing this distinction. Because the problem of collateral censorship arises from the disconnect between the incentives faced by intermediaries and those faced by original speakers, that disconnect, or its absence, is a crucial indication of who should be understood to be a speaker and who a potentially immune intermediary. One who obtains the social benefits of speech, within a particular social context, does not need the added incentive to facilitate speech that immunity provides.

Consider again the case of Ilena Rosenthal, the woman who posted the e-mail criticizing Terry Polevoy that she received from Tim Bolen to two newsgroups.<sup>197</sup> In this context, Rosenthal was not merely assisting Bolen in his speech. She was speaking in her own right. True, the words she used were words that he had chosen, but the communicative act of posting his message to the newsgroups was hers, not his. Bolen had his reasons for writing the message, whether for self-actualization, or to build his reputation, or to garner support for his cause. All of those incentives apply equally to Rosenthal. Rosenthal may have been more removed from the factual basis for the claims made, and thus it may have been somewhat more costly for her to verify those facts. Unlike a true intermediary, however, she was under no constraints to act quickly, at least not on Bolen's behalf, nor was she faced with an impossible volume of material to verify. Indeed, she actually called the Canadian radio producer whom Polevoy allegedly stalked and asked her whether "the information in Tim Bolen's post was accurate."<sup>198</sup>

Of course, denying Rosenthal immunity will make her more cautious about her future newsgroup postings. She may no longer feel as free to post Tim Bolen's reports, or anyone else's, without first verifying the facts. And if she is unable to verify the facts, she may forgo posting altogether, for fear of liability. But if she does censor, she will be censoring herself, not Bolen. If that self-censorship is problematic, the answer is not to grant her immunity as an intermediary, but to change the underlying substantive rules of defamation law. She is situated no differently from the other targets of defamation law and deserves no special treatment in that regard.

Indeed, if it seems normatively desirable to immunize Rosenthal, why stop there? Why not then decide to immunize Bolen as well? Setting aside any possibility that Bolen himself simply fabricated this

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197 See *Barrett v. Rosenthal*, 146 P.3d 510, 513–14 (Cal. 2006).

198 *Quackbusters v. Ilena Rosenthal Declaration #1*, HUMANTICS FOUND., <http://www.humanticsfoundation.com/BvRDeclaration1.htm> (last visited Sept. 24, 2011).

story, surely the factual content that formed the basis for his article came from somewhere. It is unlikely that he would have had first-hand knowledge of these facts. If we do not want to burden Rosenthal with a legal requirement to check facts before she submits her newsgroup posting,<sup>199</sup> there seems to be little reason to want to burden Bolen with such a requirement either. Conversely, if Bolen is not permitted to simply rely on his sources when he speaks, neither should Rosenthal.

In a similar vein is the situation addressed by the Tenth Circuit in *FTC v. Accusearch Inc.*,<sup>200</sup> In that case, the FTC brought an unfair practice claim against Accusearch for selling telephone records that had been fraudulently or otherwise unlawfully obtained.<sup>201</sup> Accusearch argued that it was immune under § 230 because it had obtained the information from third-party researchers. Just as in the case of the blogger who blogs about the latest gossip, however, getting facts from a third party surely should not be enough to immunize the publication of those facts. What matters is who is stating those facts—whose speech it is. In Accusearch's case, it was clearly the one speaking. Accusearch's customers would order particular sets of data, but Accusearch would choose which third-party researcher to use to fulfill the request, and the response would appear to come from Accusearch, not the researcher used.<sup>202</sup> Accusearch was not merely enabling researchers to reach their audience. Accusearch's incentives to disclose data were no different from those of the researchers it used. As with Rosenthal, immunity would draw the line where it does not belong.

Contrast Rosenthal's and Accusearch's situations with that of Tom Cremers.<sup>203</sup> In moderating his mailing list, Cremers is operating as an intermediary, and concerns about collateral censorship apply with full force. He is not likely to obtain any of the attributional, reputational, or other social advantages of speaking that accrue to the people whose messages he posts. He no doubt gets reputational credit for being the moderator, but that credit, like advertising revenue, is largely a function of his aggregate work, and is insensitive to

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199 See Matt C. Sanchez, *The Web Difference: A Legal and Normative Rationale Against Liability for Online Reproduction of Third-Party Defamatory Content*, 22 HARV. J.L. & TECH. 301, 310 (2008) (arguing that "it would be an undue burden on online reproducers" to require that they ascertain the truth or trustworthiness of the statements they reproduce).

200 570 F.3d 1187 (10th Cir. 2009).

201 *Id.* at 1192–93.

202 *Id.* at 1191.

203 See *Batzel v. Smith*, 333 F.3d 1018, 1021–22 (9th Cir. 2003).

the choice to facilitate or reject any particular message. Moreover, he faces all of the difficulties faced by intermediaries in attempting to screen the material he makes available: he is unlikely to have ready access to relevant facts, he is faced with a potentially large volume of content, and he faces pressure to act in a timely manner. Imposing defamation liability on Cremers would give him an incentive to block speech that would not be withheld by original speakers.

### 1. Social Context

Incentives to speak exist not in the abstract, but within a particular social context. Analyzing the relevant incentives is only possible by examining the context in which the speech occurs. Both Rosenthal and Cremers took an e-mail that was sent to them and distributed it more broadly. But the context of posting to a newsgroup is not the same as the context of moderating a mailing list. Newsgroup posters have the incentives of original speakers. They post to share, debate, and engage with others. Mailing list moderators have the incentives of intermediaries. They may want to shape the discussion in various ways, but they are not direct participants in that discussion.<sup>204</sup> That difference is crucial to whether intermediary immunity is appropriate, despite the superficial technical similarity of what, for example, Rosenthal and Cremers each did.

An important part of the social context is whether others will understand the person as speaking for himself or herself, or whether the person will be understood as merely assisting the speech of others. Attribution, or the lack thereof, can matter. Important incentives to speak, such as enhancing one's reputation and, to some extent, self-fulfillment, depend on the ability of others to recognize the speaker and of the speaker to take ownership of what has been said. Attribution need not be explicit, but particularly when a message is presented as if it were that of the "intermediary," with no indication to the contrary, then others will surely treat the intermediary as an original speaker, and so should the law. Conversely, while attribution is in most cases a pre-condition to being an intermediary, attribution alone may not be sufficient. As the example of Rosenthal demonstrates, a message explicitly attributed to another might nevertheless be understood in context to be that of the person who is passing it along, as well as that of the person quoted.

The line between speaker and messenger is admittedly fuzzy, but it is a real line, one we recognize in everyday situations. It is why the

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<sup>204</sup> For a discussion of the potential liability of an intermediary for the way in which it shapes the discussion, however, see *infra* Part IV.B.2.

retort, “Don’t shoot the messenger!” is not an appropriate response to being castigated for spreading rumors. It is why the person who takes a phone message and repeats it later to the intended recipient is not treated as a “speaker” by the recipient even though he has literally spoken the words.

Defining the relevant social context can be a normative question, and not just a descriptive one. For example, it may sometimes be appropriate to make a normative choice to treat an intermediary and an original speaker as a single entity, and thus impose liability on the intermediary, despite the collateral censorship that results.<sup>205</sup> Employers, newspapers, and book publishers have all traditionally been treated in this way, with such entities understood as speaking with a single voice.<sup>206</sup> As Internet media institutions develop, one can imagine a similar social and legal choice to view certain institutions as speaking with one voice: an online newspaper is one example. The ultimate inquiry is the same, namely, whether to view an entity, descriptively and normatively, as the speaker or merely as the intermediary through which speech passes. Those that society recognizes as speakers obtain the social benefits of speech, and do not need the special protections given to intermediaries.

## 2. “Information” as Speech Act

As described above, a theory of collateral censorship tells us that we can and should distinguish between intermediaries and original speakers by looking for a divergence of incentives to speak. This section describes why the distinction tells us not only when we ought to apply intermediary immunity as a theoretical matter, but also how to interpret § 230 itself in a manner that is both coherent and leads to normatively appropriate results.

The key statutory term, largely ignored by courts and commentators up to now,<sup>207</sup> is “information.” Section 230 applies to “information provided by another information content provider.” Courts have

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205 See Balkin, *supra* note 8, at 2300–02; *cf.* *Smith v. Maryland*, 442 U.S. 735, 740–41 n.5 (1979) (noting that the determination of whether an expectation of privacy is legitimate under the Fourth Amendment might be a “normative inquiry” in appropriate circumstances).

206 See Balkin, *supra* note 8, at 2302.

207 Ken Myers has previously examined whether “information” should be deconstructed into constituent bits or considered as a whole, in determining who is responsible for the information. See Myers, *supra* note 159, at 195–97. This question is orthogonal to the distinction developed here: facts and transmissions are equally susceptible to deconstruction.

analyzed the word “provided”<sup>208</sup> and the statutory definition of “information content provider,”<sup>209</sup> but not the word “information.” Implicit in most courts’ analyses is the view that “information” means facts or data—knowledge that one might collect. But as we have seen, this interpretation is problematic. The mere fact that some third party has conveyed knowledge to me says nothing about whether it would be sensible to immunize my conveying the same knowledge to someone else. Cognizant of this problem, courts have struggled to find a limiting doctrine, but those doctrines have all been either underinclusive, overinclusive, or both.<sup>210</sup>

What matters is not the source of the facts, but the identity of the speaker. The relevant meaning of “information” is thus not “facts” or “data,” but rather “message” or “communication.”<sup>211</sup> What we want to know is not whether these are someone else’s facts, but whether this is someone else’s message. When an entity is conveying someone else’s message, that is when concerns over collateral censorship arise, and when immunity is consequently appropriate.

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208 See *Batzel*, 333 F.3d at 1032–35.

209 See *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1165–69 (9th Cir. 2008) (en banc).

210 See *supra* Part III.

211 See *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003) (holding that “the District Court correctly interpreted the word ‘information,’” where the District Court relied on the fact that “the dictionary includes ‘signal’ as a definition of ‘information’”). Compare NEW OXFORD AMERICAN DICTIONARY 891 (3d ed. 2010) (“information . . . 2 what is conveyed or represented by a particular arrangement or sequence of things”), with *id.* (“information . . . 1 facts provided or learned about something or someone”); compare *Information Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/information> (last visited Sept. 24, 2011) (“2 . . . c (1): a signal or character (as in a communication system or computer) representing data”), with *id.* (“2 a (1): knowledge obtained from investigation, study, or instruction (2): intelligence, news (3): facts, data”). But see Doug Lichtman & Eric Posner,  *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221, 254 (2006) (urging “courts to reject the analysis of *Green v. America Online* and instead to interpret section 230 such that its immunity extends to ‘information’ that is intelligible to human beings—either in the raw, or as translated by communication devices such as telephones or computers—but not to mere signals that interfere with Internet communication by shutting down computers or clogging bandwidth”). Wikipedia also supports the concept of “information” as a “signal” or “message”; its entry on “information” begins as follows: “Information in its most restricted technical sense is a message (utterance or expression) or collection of messages that consists of an ordered sequence of symbols . . . .” *Information*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Information> (last visited Oct. 7, 2011); cf. *Roommates.com*, 521 F.3d at 1168–69 (citing Wikipedia for a “far more relevant definition” of the term “development” in the context of the Internet).

The statute itself and its legislative history, such as it is, provide support for this reading of the word “information.” In the definition of “information content provider,” the statute uses the phrase “information provided through the Internet or any other interactive computer service.”<sup>212</sup> The basic units that are “provided through the Internet” are messages or transmissions, rather than facts. Similarly, the statute prohibits treating intermediaries “as the publisher or speaker of” certain “information.” Again, the fundamental unit of speech or publication is more likely to be a message than a datum.

Additional support can be found in the definition of an “interactive computer service,” which refers to “any *information* service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”<sup>213</sup> While an “information service” could refer to a service that processes data or facts, a more natural interpretation in this context is that of a service that processes messages or transmissions. That is certainly the more natural way to conceptualize the function of an Internet access service, which is specifically included in the definition of an “interactive computer service.” For a system like the Prodigy system in *Stratton Oakmont*, separate message board postings are separate pieces of “information,” even if they happen to have the same factual contents. Indeed, the original Cox-Wyden amendment limited coverage to “any information service that provides computer access to multiple users *via modem* to a remote computer server, including specifically a service that provides access to the Internet.”<sup>214</sup> The limitation “via modem,” dropped in the final bill, again evinces a concern with the mode of communication or transmission, rather than the nature of the facts or data conveyed.

The view that it is messages that the statute talks about, not facts, also helps to explain what it would mean to “creat[e] or develop[ ]” information,<sup>215</sup> an issue that the *Roommates.com* court struggled with.<sup>216</sup> Under the view of information as facts, it is hard to see what it would mean to develop a fact, beyond creating it.<sup>217</sup> After all, a fact is a fact, and while changing text might transform one fact into another, the new fact so created does not seem really to have been “developed”

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212 47 U.S.C. § 230(f)(3) (2006).

213 47 U.S.C. § 230(f)(2) (emphasis added).

214 141 CONG. REC. H8469 (daily ed. Aug. 4, 1995) (emphasis added).

215 47 U.S.C. § 230(f)(3).

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

217 See *id.* at 1168 (criticizing the dissent for failing “to explain or offer examples as to how its interpretation of the statute leaves room for ‘development’ as a separate basis for a website to lose its immunity”).

from the old one.<sup>218</sup> It makes much more sense to talk about creating and developing messages. The focus on the vehicle for communication, rather than the facts conveyed, makes it possible to distinguish readily between the act of initially creating the vehicle and that of modifying or developing it. This provides further evidence that the statute contemplates messages or transmissions as the relevant form of “information.”

### 3. Distinguishing Alternative Tests

Thus, the right approach to identifying intermediaries worthy of immunity is to determine whose speech, whose “information,” is at issue. Such a test overlaps with, but is distinct from, the various tests courts have analyzed until now.

For example, despite its intuitive appeal, the active versus passive test simply does not get at the relevant distinction. In Tom Cremers’s case and other situations involving moderated comments, moderators should be regarded as intermediaries even if they “actively” select the material they forward to the list, because they face the incentives of an intermediary and not those of an original speaker. The *Batzel* dissent was concerned that information actively selected “is information transformed. It is information bolstered, strengthened to do more harm if it is wrongful.”<sup>219</sup> It is not the selection process that bolsters information, however (information here in the sense of facts or data). The content is bolstered when an additional person speaks the same content, that is, when there is a second original speaker and a second communication of the same material. This is not to suggest that active selection does not matter. One who actively selects is more likely to be an original speaker. It is status as an original speaker, not active selection, however, which is the basis for denying intermediary immunity.

Intermediaries do assist in the transmission of communications, but such assistance is distinct from the kind of support that an original speaker provides. When multiple speakers espouse a view, the view is strengthened by gathering more supporters. Intermediaries, including moderators, do not have such a social effect. To be sure, by carrying speech that they might otherwise suppress, intermediaries do “support” the speech in one sense: they make it possible for that speech to reach a wider audience. And that dissemination will result in greater harm if the speech is wrongful. It is precisely the intermedi-

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218 See *supra* notes 178–80 and accompanying text.

219 *Batzel v. Smith*, 333 F.3d 1018, 1039 (9th Cir. 2003) (Gould, J., concurring in part and dissenting in part).

ary's role as disseminator of messages that we are trying to protect through immunity, however, and in any event, active selection makes no difference to the effectiveness of that dissemination.

Similarly, focusing on the word "provided" does not help. If I am "provided" with some gossip and asked to spread the word, I am being asked to serve not as an intermediary for the original communication or message, but as a disseminator of the contents of that message. Cremers, on the other hand, was potentially being asked not simply to spread the word about Batzel, but to assist in transmitting this particular communication to the mailing list he administered. Thus, the important distinction lies not in the interpretation of "provided" but in the interpretation of what it means to provide "information." The immunity is only sensible when "information" means a communication or message, rather than the contents of that communication.

Nor, in the absence of the right conceptualization of "information," does it make sense to focus on what it means to "develop" that information. Such a focus misses, for example, what is wrong with spreading false rumors when the substance of those rumors is taken verbatim from some third-party source. No facts have been created or developed, only repeated. But that repetition is potentially wrongful, because it is the speech of a new original speaker.

Conversely, the focus on "development" led at least one court to improperly cast as an original speaker an entity that functions as an intermediary. In the *Roommates.com* case, the Ninth Circuit found the website to be a developer of its subscribers' responses because it "requir[ed] subscribers to provide the information as a condition of accessing its service" and "provid[ed] a limited set of pre-populated answers."<sup>220</sup> If, for these reasons, the website is an "information content provider" with respect to those subscriber answers, however, then presumably it could be liable for that content under any theory of liability. Would the website then be liable in a rooming situation gone bad, if one roommate claimed the other misrepresented characteristics such as sexual orientation or other required fields in his online profile? Roommates.com simply is not an original speaker in this context, and not the one understood to be making assertions about who has what characteristics. While there may be reasons to nevertheless hold Roommates.com liable,<sup>221</sup> they are not based on attempting to

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<sup>220</sup> *Roommates.com*, 521 F.3d at 1166.

<sup>221</sup> See *supra* notes 193–95 and accompanying text (explaining why collateral censorship might be appropriate in the context of discriminatory statements); *infra* Part IV.B.2 (explaining why Roommates.com might be held liable for inducing the making of discriminatory statements).

characterize the website as a speaker. That mischaracterization flowed from the mistaken emphasis on the meaning of “development,” rather than the meaning of “information.”

#### 4. Ex Ante Clarity

One potential objection to the line drawn here and the use of social context is that such a proposal could undermine the value of immunity. After all, the purpose of immunity is to minimize the incentives for collateral censorship, and those incentives will still be significant if intermediaries need to engage in protracted legal battles in order to establish their entitlement to immunity. Intermediaries need clarity *ex ante* about what the law requires, and in particular, whether § 230 applies. Otherwise, the real or perceived legal risk might still induce collateral censorship.<sup>222</sup>

There are several responses to this objection. First, much depends on the level of generality at which lines are drawn. The proposal here is to use the concept of collateral censorship and divergent incentives to inform the interpretation of § 230, or proposals for amending it. Inquiring about incentives in each individual case would indeed lead to too much uncertainty and would undermine the immunity. For example, absent conduct that rises to the level of inducement,<sup>223</sup> the operator of a standard message board should be held to be carrying the information of others, and hence immune, even if in a specific context, the operator obtains additional subjective benefits not shared by other similarly situated operators. When entire classes of intermediaries are given immunity, based upon the roles that they serve, uncertainty is substantially reduced.

Second, the proposals here do not preclude additional prophylactic rules designed to give intermediaries more breathing room and greater certainty. Just as the Supreme Court has done in defamation law generally,<sup>224</sup> it may be appropriate to draw the line more on the side of protecting speech. Moving the line does not necessarily mean eliminating liability altogether, however.<sup>225</sup> More importantly, if we adopt prophylactic rules, we should at least recognize them as such, and consider to what extent the additional certainty justifies the false

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<sup>222</sup> See Sanchez, *supra* note 199, at 317 (“A standard as close as possible to absolute immunity is warranted because exceptions to an online reproduction exemption would allow the chilling effects to frustrate the exemption’s protection.”).

<sup>223</sup> See *infra* Part IV.B.2.

<sup>224</sup> See *supra* note 49 and accompanying text.

<sup>225</sup> Even defamation suits by public officials are possible under the “actual malice” standard. See *supra* note 49.

negatives, the situations in which liability is warranted, but the prophylactic rule fails to impose it.

Finally, the suggestion that bright-line rules are necessary in this domain assumes that it is possible to craft bright-line rules that are normatively acceptable. A bright-line rule that says intermediaries are never responsible for facts that originate elsewhere has some relatively extreme implications. It says that a blogger is not responsible for blogging about gossip heard elsewhere, even if the blogger gives no indication of the source of the gossip, or even that there is another source. It says that perhaps an online newspaper is not even responsible for facts in the stories it writes, if those facts were obtained from some unidentified source. It says that perhaps no intermediary is responsible for detecting and preventing credit card fraud, since the fraudulent credit card number has been provided by another.

Line drawing seems to be inevitable if we do not want to simply eliminate entire categories of liability altogether. The failure to draw lines has become increasingly troubling to courts, with the *Roommates.com* case probably the prime example. The framework developed here provides a way to draw those lines that best serves the underlying premise of intermediary immunity.

### B. *Intermediary as Target of Liability*

Divergent incentives to speak lie at the root of the problem of collateral censorship, which in turn is what intermediary immunity is designed to avoid. The previous section identified situations in which the service provider or user should be regarded as the original speaker, because it faces the incentives of an original speaker. This section examines situations in which the service provider is in fact operating as an intermediary, and does not share the incentives of an original speaker, but in which the particular form of liability being imposed on the intermediary makes that divergence irrelevant. In such situations, intermediary immunity is again inappropriate.

Consider again the *MySpace* case, in which the plaintiffs sought to hold MySpace liable for its alleged failure to implement reasonable age verification measures.<sup>226</sup> An age verification requirement is only coherent when imposed on intermediaries; it would be meaningless to impose the same requirement on the speakers themselves. It is the speakers' assertions, after all, that the intermediary is being asked to verify. Contrast the situation that results from imposing defamation liability. In that case, under the assumption that liability for original

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<sup>226</sup> *Doe v. MySpace, Inc.*, 528 F.3d 413, 421–22 (5th Cir. 2008).

speakers deters appropriately, we can deduce that liability for intermediaries will over-deter, based on the divergent incentives. In the case of an age verification requirement, we have no baseline by which to measure appropriate deterrence. As a result, we cannot determine from status as an intermediary alone whether imposing such a requirement on intermediaries will over-deter.

We could, of course, decide that Internet intermediaries should never be liable for the misconduct of others. This may have been the perspective of the district court in the *MySpace* case.<sup>227</sup> This is not the rule in tort law generally, however.<sup>228</sup> Before we confer such a broad immunity on Internet intermediaries, we need to consider whether this is what we really intend. For example, do we really intend to absolve Internet intermediaries of any liability for failing to take reasonable measures to deter credit card fraud? Such fraud is, after all, misconduct by others, and fraudulent credit card numbers seem to be “information provided by another information content provider.” As described above, the rationale of avoiding collateral censorship stops well short of such broad immunity; if we want greater immunity, some other justification is required.

To be sure, requiring an age verification system has significant consequences for speech. If some adults are unable to prove their age, they may be denied access to social networking websites, and their speech may thus be suppressed. This is the direct result of the legal requirement itself, however, rather than an indirect result of the divergent incentives faced by intermediaries and their users. This direct censorship may well run afoul of the First Amendment.<sup>229</sup> Moreover, even within the space allowed by the First Amendment, the difficulty of complying with an age verification requirement affects

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227 The Fifth Circuit quoted the District Court as follows:

THE COURT: I want to get this straight. You have a 13-year-old girl who lies, disobeys all of the instructions, later on disobeys the warning not to give personal information, obviously, [and] does not communicate with the parent. More important, the parent does not exercise the parental control over the minor. The minor gets sexually abused, and you want somebody else to pay for it? This is the lawsuit that you filed?

*Id.* at 421 (alterations in original).

228 *See, e.g.,* Posecai v. Wal-Mart Stores, Inc., 752 So.2d 762, 766 (La. 1999) (“[A]lthough business owners are not the insurers of their patrons’ safety, they do have a duty to implement reasonable measures to protect their patrons from criminal acts when those acts are foreseeable.”).

229 *Cf. Reno v. ACLU*, 521 U.S. 844, 876 (1997) (finding a ban on the transmission of indecent material to minors to be unconstitutional in part because of the lack of “any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults”).

whether it is a “reasonable” precaution under tort law.<sup>230</sup> These may well be good reasons not to impose such a requirement, but they are not captured by the rationales for intermediary immunity. The immunity applies even as to requirements that are reasonable under tort law and that comport with the First Amendment. When defamation law is applied to intermediaries, it can be reasonable as to original speakers, and unreasonable as to intermediaries. The reasonableness of an age verification requirement, however, is measured only with respect to intermediaries. Immunity unnecessarily, and inappropriately, short circuits that analysis.

### 1. Treatment as Publisher or Speaker

It is in this light that courts ought to interpret § 230’s prohibition on “treat[ing]” service providers and users “as the publisher or speaker” of the information of others.<sup>231</sup> By its terms, § 230 applies to claims that attempt to make intermediaries stand in the shoes of original speakers. As we have seen, the point is that this is a problem because intermediaries and original speakers have different incentives to speak. They are not interchangeable, and applying liability as if they were interchangeable has negative results for speech. But if a cause of action is not trying to treat an intermediary as a speaker, not trying to put the intermediary in the position of needing to decide whether or not to speak, then the intermediary’s incentives to speak are no longer relevant.

Thus, while it is true that the plaintiffs in the *MySpace* case were trying to hold MySpace responsible for the consequences of the user’s assertion that she was eighteen, the claim was not one that would treat MySpace “as the publisher or speaker” of that assertion. Instead, the plaintiffs were asking MySpace to act in a particular way as the *recipient* of that assertion. The difference is crucial, because liability as the recipient of information, as opposed to liability as the speaker of information, does not implicate the divergent incentives to speak.

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<sup>230</sup> The district court in the *MySpace* case appears to have been skeptical of the reasonableness of the proposed requirement:

THE COURT: So you’ve got the Attorney General of the United States saying . . . don’t put your credit card on the internet, but you want them to do it to get a free space. That’s one of the things.

. . .

THE COURT: Then a driver’s license. Do you know how many people I sentence here every Friday that have a fake driver’s license?

*MySpace*, 528 F.3d at 422.

<sup>231</sup> 47 U.S.C. § 230(c)(1) (2006).

One might argue that § 230 should be broadly interpreted to cover any liability that might suppress speech, whether or not the result of collateral censorship. Besides the potential drawbacks to such an across-the-board immunity,<sup>232</sup> this approach seems hard to defend as a matter of statutory interpretation. First, it is hard to square such a broad interpretation with the relatively narrow language of the statute. In particular, rather than preempting causes of action “arising out of” third-party speech, or some other broad language, the statute only applies to causes of action that treat the intermediary “as a publisher or speaker.” The statutory language thus tracks quite well an immunity limited to that needed to address the problem of collateral censorship. Furthermore, the sparse legislative history gives little indication that Congress had something broad in mind in passing § 230.<sup>233</sup> Moreover, that history is equivocal, given § 230’s origins as a competing bill to the speech-suppressive bill to which it was ultimately attached. Both text and legislative history caution against the legitimacy of interpreting § 230 as a broad protection for speech on the Internet.

At the same time that interpreting § 230 too broadly would be problematic, we must be careful not to interpret it too narrowly either. In determining whether a claim would treat an intermediary as a publisher or speaker, we must consider the substance of the claim alleged, and not just its form, lest the immunity be circumvented in the core situations to which it rightly applies. For example, § 230 quite clearly forecloses a defamation claim against a message board operator based on a defamatory post. The result should be no different if, rather than alleging a defamation claim, a plaintiff casts his claim as one of negligent failure to remove the post.<sup>234</sup> Such a negligence claim is substantively equivalent to one that could be brought against the original speaker: liability for failure to filter out particular content is indistinguishable from liability for publishing or speaking that content. Thus, imposing such liability on an intermediary would treat it “as a publisher or speaker,” and such a claim is properly preempted.

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232 See *supra* notes 227–28 and accompanying text.

233 See *supra* Part II.C.

234 See *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (“[A] plaintiff cannot sue someone for publishing third-party content simply by changing the name of the theory from defamation to negligence.”); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (“Although Zeran attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action.”).

In the *MySpace* case, this means that § 230 would properly preempt a claim that MySpace negligently failed to catch the luring messages themselves, but not one claiming that MySpace negligently permitted underage users to register for an account. The former claim treats MySpace as a publisher or speaker of those messages and raises the problems of collateral censorship. The latter claim avoids those problems and should rise or fall on the basis of other considerations.

As with attempting to distinguish between intermediaries acting as original speakers and intermediaries acting as intermediaries, distinguishing among claims undoubtedly requires line drawing. In this context too, one might worry that line drawing generates uncertainty, which in turn might drive up the number of meritless suits and the cost of litigation. The particular line drawing suggested here though, in distinguishing among claims, may not significantly increase the *in terrorem* effect of the threat of litigation against intermediaries. More importantly, if we really think that immunity beyond claims that treat the intermediary as a publisher or speaker is necessary, we ought to be required to define the boundaries of those preempted claims, recognize what will be lost, and defend the necessity of such broader prophylaxis. Courts have been expanding immunity without engaging in any of that analysis.

## 2. Inducement

Inducement claims are a type of claim to which intermediary immunity ought not to apply, because such claims are directly targeted at the intermediary's own acts, and do not place intermediaries in the role of speakers. If courts were to infer inducement from acts that are neutral in themselves, then such liability might become equivalent to liability imposed on original speakers. For example, if it were held to be inducement to continue to host material after notice of its alleged unlawfulness, this would effectively undermine the holding in *Zeran*, and raise the collateral censorship concerns expressed in that opinion. If, however, inducement is properly premised on a showing of "clear expression or other affirmative steps taken to foster" unlawful speech,<sup>235</sup> then the imposition of liability is not equivalent to liability imposed on original speakers, and the intermediary seeking to avoid being held liable for inducement need only avoid the affirmative acts that form the basis for an inducement

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<sup>235</sup> *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005).

claim. In this manner, the intermediary is not incentivized to engage in collateral censorship.

In the *Roommates.com* case, the Ninth Circuit seemed to have an inducement theory in mind, and used the language of inducement throughout its opinion.<sup>236</sup> Its failure to recognize this explicitly, however, caused it to miss a crucial step in its analysis, namely, whether the website's conduct should be construed as affirmative steps to promote unlawful speech. The Ninth Circuit's opinion appears premised on the assumption that a discriminatory statement, such as "I am only willing to live with straight males," would be unlawful in every case.<sup>237</sup> If this is so, then it is easy to see how providing a discriminatory answer, even as one possible choice among many, is an affirmative step taken to promote a discriminatory statement. Imposing such liability would cause the website to remove that possible answer; if selecting the answer is always unlawful, only unlawful speech has been suppressed.

In this very case, however, *Roommates.com* had not only raised § 230 as a defense, but also substantive defenses claiming that at least in many situations, the discriminatory statements are lawful. The Fair Housing Act contains an exception for "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence."<sup>238</sup> Even where the statutory exception does not apply, because no "owner" is involved, *Roommates.com* argued that the First Amendment right of intimate association protects an individual's ability to discriminate in choosing a roommate. And although the statutory exception specifically excludes discriminatory advertisements from the scope of the exception,<sup>239</sup> *Roommates.com* argued that it is unconstitutional under the First Amendment right of free speech to

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236 See *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (en banc) ("[A] website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct."); *id.* at 1169 n.24 ("Requiring website owners to refrain from taking affirmative acts that are unlawful does not strike us as an undue burden.").

237 *Roommates.com*, 521 F.3d at 1166 ("Unlawful questions solicit (a.k.a. 'develop') unlawful answers.").

238 42 U.S.C. § 3603(b)(2) (2006). Also, by regulation, advertisements that express a preference for a roommate of a particular sex are allowed "where the sharing of living areas is involved." 24 C.F.R. § 109.20 (1995).

239 42 U.S.C. § 3603(b) (applying the exemptions to "section 3604 of this title (other than subsection (c))").

prohibit the publication of a discriminatory preference that an individual is lawfully allowed to make.<sup>240</sup>

All of these arguments were ultimately rejected by the district court on remand.<sup>241</sup> But at the time that the Ninth Circuit was issuing its opinion on intermediary immunity, these questions were as yet unresolved. Had the district court construed the First Amendment differently, one possible result could have been that it is lawful to post a discriminatory preference in a true roommate situation, but not when the vacancy is in a free-standing unit. Under that construction of the First Amendment, the website's acts should no longer be regarded as inducing unlawful speech, because the lawfulness of the speech would depend on the identity and circumstances of the speaker. Moreover, it would likely be difficult for the website to verify whether any particular user was advertising a true roommate situation or not. Denying immunity under these circumstances could well lead the website to suppress lawful discriminatory statements, that is, to engage in precisely the collateral censorship that intermediary immunity is designed to avoid.<sup>242</sup>

### 3. Contract Claims

A contract claim also does not treat an intermediary as a publisher or speaker, even if the promise enforced is a promise to edit or remove content. The Ninth Circuit has recently recognized this, explaining that a contract claim “does not seek to hold [the intermediary] liable as a publisher or speaker of third-party content, but rather as the counter-party to a contract, as a promisor who has breached.”<sup>243</sup> As with an inducement claim, courts need to be careful

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240 See *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008) (stating in this context that “any rule that forbids truthful advertising of a transaction that would be substantively lawful encounters serious problems under the first amendment”). Early cases held that applying the ban on discriminatory advertisements to those who were permitted to discriminate served important signaling goals and did not violate the First Amendment. See, e.g., *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972). Those cases pre-dated the Supreme Court's recent decisions protecting truthful advertisements under the First Amendment, however, and it is hard to say whether they remain good law. See Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1886 (2006).

241 See *Fair Hous. Council v. Roommates.com, LLC*, No. CV 03-9386 (C.D. Cal. Nov. 7, 2008).

242 But see *supra* notes 193–95 and accompanying text for a discussion of why collateral censorship might be acceptable or desirable in the context of discriminatory statements.

243 *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009).

not to too readily infer a contract from ambiguous conduct, lest a contract claim become the equivalent of a defamation claim.<sup>244</sup> So long as courts require an affirmative manifestation of an intent to be bound before finding contract liability, the imposition of liability will primarily affect the incentives to make promises, rather than the incentives to suppress the speech of others. To the extent we might be worried about maintaining incentives to make promises, this is a concern as to which the intermediary is no differently situated than any other promisor. Thus, a solution directed at intermediaries would not be appropriately tailored.

A contrary view would lead to the strange result that intermediaries would not be able to make an enforceable promise to remove content. Nothing in theory or the statute distinguishes between a promise to an individual to remove a particular posting and a promise to customers generally to, for example, scan for viruses or filter spam. It may be that companies avoid making such promises whenever possible, but in the absence of a public policy reason to disfavor such promises, there is no reason to deem them unenforceable.

One potential concern could be that the mere possibility of pleading the existence of a promise to remove content could induce intermediaries to remove content upon notice. Responding to such a concern with immunity, however, threatens to throw out the baby with the bathwater. Rather than eliminating the cause of action altogether, even in situations in which the promise is clear, a heightened pleading requirement or other procedural safeguards could be used to substantially limit the impact of meritless allegations.

#### 4. Non-Uniform Standards

Another implication of the framework developed here is that it may well make sense to treat different causes of action differently. Some commentators have found it anomalous for Internet intermediaries to be largely immune from defamation claims, even after notice, but to be subject to a notice-and-takedown regime for copyright and trademark claims, for example.<sup>245</sup> But there are salient differences between defamation and intellectual property claims. For one, perhaps collateral censorship is simply more tolerable with respect to the subject of IP claims.<sup>246</sup> Moreover, IP claims may be

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244 *See id.* at 1108.

245 *See Lemley, supra* note 1, at 108–10.

246 *Cf. supra* notes 191–95 and accompanying text.

easier to verify, so that the risk of liability from declining to suppress particular content is diminished.<sup>247</sup>

More generally, some causes of action target activities that are not really “speech,” or that are speech of a very different kind from the subject of defamation law. For example, is a computer virus or other malicious code properly regarded as speech?<sup>248</sup> In such situations, the incentives to engage in the activity can be quite different from the incentives to engage in what we traditionally regard as speech. As a result, there may be less divergence between the incentives of the speaker and those of the intermediary, or any such divergence may be more easily rectified by the market, or any liability imposed on the intermediary may be more targeted toward the incentives that intermediaries face. For all of these reasons, it would be too facile to assume that the appropriate rule as to defamation liability is also the appropriate rule as to liability for network security.

Copyright law is potentially a mixed bag in this respect. Suppose for the moment that our focus were entirely on the distribution of full-length musical or audiovisual works. To the extent that distributing such a work (as opposed to creating it) is an act of “speech,” the incentives to speak may be low, and easily shared by, or sharable with, an intermediary. Indeed, notice that if current § 230 law were applied directly to copyright law, the file-sharing users themselves might argue that they were immune, since, after all, the files they share are merely “information provided by another information content provider,” namely other file sharers, or even the copyright holders themselves. The dissonance between such an argument and the intent of § 230 is the result of different interests being at stake with respect to file sharers and speakers. Defamation law aims to eliminate only false speech, but the very point of copyright law is to restrict the dissemination of valuable speech. Thus, while it might or might not be a good idea to make intermediaries responsible for file sharing, the considerations are different in this context than in the context of liability for defamatory speech, and immunity appropriate in one context may not be appropriate in the other.

Still, copyright law covers much more than the file sharer, and includes within its ambit other possible uses of copyrighted work, from quotes and samples, to satires and tributes. In many of those contexts, speech and the usual incentives to speak are quite present, and we should indeed be concerned that intermediary liability will

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247 On the other hand, the availability of statutory damages increases the risk. See Lemley, *supra* note 1, at 111.

248 See Lichtman & Posner, *supra* note 211, at 254.

result in the suppression of lawful, socially desirable speech.<sup>249</sup> Depending on whether one focuses on the file sharer or the remixer, copyright law might seem less amenable or more amenable to intermediary immunity. We might, for example, want stronger intermediary immunity for claims of infringement on the derivative works right than for claims of infringement on the public distribution right. We may not want to treat all of copyright law in the same way with respect to intermediary liability, let alone copyright and defamation law together.

#### CONCLUSION

Intermediary immunity can and should play an important role in protecting speech on the Internet. Immunity prevents the application of laws targeted at original speakers to intermediaries that lack the incentives of original speakers to speak. Immunity can thus be used to avoid the collateral censorship of lawful, socially desirable speech that poses a real or perceived risk of liability to intermediaries. At the same time, immunity can and should be limited. When intermediaries are actually original speakers, and have the incentives of original speakers, immunity is no longer appropriate. Similarly, immunity as to causes of action that are specifically targeted at intermediaries inappropriately prejudices the reasonableness of such liability.

Even ardent supporters of intermediary immunity would be well served to recognize its limits. When immunity becomes unbounded, it begins to seem increasingly unfair, stimulating calls to cut back on the immunity, or even eliminate it entirely. The framework developed here demonstrates how, without any need to amend current law, we can limit the immunity while still serving its core purposes.

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249 See Urban & Quilter, *supra* note 34, at 666–67; see also Dan Frosch, *Venting Online, Consumers Can Land in Court*, N.Y. TIMES, June 1, 2010, at A1 (describing attempts to use copyright to control the posting of negative reviews of doctors).

