

V. INTERMEDIARY LIABILITY FOR ONLINE CONTENT

A. Secondary Liability for Defamatory Content

CUBBY, INC. v. COMPUSERVE INC.

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

PETER K. LEISURE, UNITED STATES DISTRICT JUDGE

This is a diversity action for libel, business disparagement, and unfair competition, based on allegedly defamatory statements made in a publication carried on a computerized database. Defendant CompuServe Inc. ("CompuServe") has moved for summary judgment. For the reasons stated below, CompuServe's motion is granted in its entirety.

Background

CompuServe develops and provides computer-related products and services, including CompuServe Information Service ("CIS"), an on-line general information service or "electronic library" that subscribers may access from a personal computer or terminal. Subscribers to CIS pay a membership fee and online time usage fees, in return for which they have access to the thousands of information sources available on CIS. Subscribers may also obtain access to over 150 special interest "forums," which are comprised of electronic bulletin boards, interactive online conferences, and topical databases.

One forum available is the Journalism Forum, which focuses on the journalism industry. Cameron Communications, Inc. ("CCI"), which is independent of CompuServe, has contracted to "manage, review, create, delete, edit and otherwise control the contents" of the Journalism Forum "in accordance with editorial and technical standards and conventions of style as established by CompuServe."

One publication available as part of the Journalism Forum is Rumorville USA ("Rumorville"), a daily newsletter that provides reports about broadcast journalism and journalists. Rumorville is published by Don Fitzpatrick Associates of San Francisco ("DFA"), which is headed by defendant Don Fitzpatrick. CompuServe has no employment, contractual, or other direct relationship with either DFA or Fitzpatrick; DFA provides Rumorville to the Journalism Forum under a contract with CCI. The contract between CCI and DFA provides that DFA "accepts total responsibility for the contents" of Rumorville. The contract also requires CCI to limit access to Rumorville to those CIS subscribers who have previously made membership arrangements directly with DFA.

CompuServe has no opportunity to review Rumorville's contents before DFA uploads it into CompuServe's computer banks, from which it is immediately available to approved CIS subscribers. CompuServe receives no part of any fees that DFA charges for access to Rumorville, nor does CompuServe compensate DFA for providing Rumorville to the Journalism Forum; the compensation CompuServe receives for making Rumorville available to its subscribers is the standard online time usage and membership fees charged to all CIS subscribers, regardless of the information services they use. CompuServe maintains that, before this action was filed, it had no notice of any complaints about the contents of Rumorville.

In 1990, plaintiffs Cubby, Inc. ("Cubby") and Robert Blanchard ("Blanchard") (collectively, "plaintiffs") developed Skuttlebut, a computer database designed to publish and distribute electronically news and gossip in the television news and radio industries. Plaintiffs intended to compete with Rumorville; subscribers gained access to Skuttlebut through their personal computers after completing subscription agreements with plaintiffs.

Plaintiffs claim that, on separate occasions in April 1990, Rumorville published false and defamatory statements relating to Skuttlebut and Blanchard, and that CompuServe carried these statements as part of the Journalism Forum. The allegedly defamatory remarks included a suggestion that individuals at Skuttlebut gained access to information first published by Rumorville "through some back door"; a statement that Blanchard was "bounced" from his previous employer, WABC; and a description of Skuttlebut as a "new start-up scam."

Plaintiffs have asserted claims against CompuServe and Fitzpatrick under New York law for libel of Blanchard, business disparagement of Skuttlebut, and unfair competition as to Skuttlebut, based largely upon the allegedly defamatory statements contained in Rumorville. CompuServe has moved, pursuant to Fed. R. Civ. P. 56, for summary judgment on all claims against it. CompuServe does not dispute, solely for the purposes of this motion, that the statements relating to Skuttlebut and Blanchard were defamatory; rather, it argues that it acted as a distributor, and not a publisher, of the statements, and cannot be held liable for the statements because it did not know and had no reason to know of the statements. Plaintiffs oppose CompuServe's motion for summary judgment, claiming that genuine issues of material fact exist and that little in the way of discovery has been undertaken thus far.

Libel Claim

A. The Applicable Standard of Liability

Plaintiffs base their libel claim on the allegedly defamatory statements contained in the Rumorville publication that CompuServe carried as part of the Journalism Forum. CompuServe argues that, based on the undisputed facts, it was a distributor of Rumorville, as opposed to a publisher of the Rumorville statements. CompuServe further contends that, as a distributor of Rumorville, it cannot be held liable on the libel claim because it neither knew nor had reason to know of the allegedly defamatory statements. Plaintiffs, on the other hand, argue that the Court should conclude that CompuServe is a publisher of the statements and hold it to a higher standard of liability.

Ordinarily, "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." With respect to entities such as news vendors, book stores, and libraries, however, "New York courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation."

The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment. "The constitutional guarantees of the freedom of speech and of the press stand in the way of imposing" strict liability on distributors for the contents of the materials they carry.

CompuServe's CIS product is in essence an electronic, for-profit library that carries a vast

number of publications and collects usage and membership fees from its subscribers in return for access to the publications. CompuServe and companies like it are at the forefront of the information industry revolution. High technology has markedly increased the speed with which information is gathered and processed; it is now possible for an individual with a personal computer, modem, and telephone line to have instantaneous access to thousands of news publications from across the United States and around the world. While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents. This is especially so when CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe.

With respect to the Rumorville publication, the undisputed facts are that DFA uploads the text of Rumorville into CompuServe's data banks and makes it available to approved CIS subscribers instantaneously. CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so. "First Amendment guarantees have long been recognized as protecting distributors of publications Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment."

Technology is rapidly transforming the information industry. A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information. Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorville statements.

B. CompuServe's Liability as a Distributor

CompuServe contends that it is undisputed that it had neither knowledge nor reason to know of the allegedly defamatory Rumorville statements, especially given the large number of publications it carries and the speed with which DFA uploads Rumorville into its computer banks and makes the publication available to CIS subscribers. The burden is thus shifted to plaintiffs, who "must set forth specific facts showing that there is a genuine issue for trial." Plaintiffs have not set forth anything other than conclusory allegations as to whether CompuServe knew or had reason to know of the Rumorville statements, and have failed to meet their burden on this issue.

Plaintiffs have not set forth any specific facts showing that there is a genuine issue as to whether CompuServe knew or had reason to know of Rumorville's contents. Because CompuServe, as a news distributor, may not be held liable if it neither knew nor had reason to know of the allegedly defamatory Rumorville statements, summary judgment in favor of CompuServe on the libel claim is granted.

Business Disparagement Claim

Plaintiffs base the claim for business disparagement of Skuttlebut on statements published in

Rumorville in April 1990. Plaintiffs' contention is that "defendants made statements intentionally designed to discourage its [sic] own subscribers and others in the news business from associating with Skuttlebut, thus disparaging Skuttlebut's business." These statements include, *inter alia*, the allegedly defamatory remarks suggesting that plaintiffs inappropriately accessed information from Rumorville "through some back door" and describing Skuttlebut as a "new start-up scam."

New York courts rarely use the term "business disparagement" and have not articulated the elements of such a claim. New York's highest court, although not using the "business disparagement" label, has recognized a cause of action for tortious conduct similar to that alleged by plaintiffs. New York courts have applied other labels to similar conduct: "The tort of trade libel or injurious falsehood consists of the knowing publication of false matter derogatory to the plaintiff's business of a kind calculated to prevent others from dealing with the business or otherwise interfering with its relations with others, to its detriment."

Regardless of the label used, the substance of plaintiffs' "business disparagement" claim is similar to the action for defamation, as well as the action for trade libel or injurious falsehood. Under either formulation, plaintiffs would have to prove that CompuServe had knowledge or reason to know of Rumorville's publication of the allegedly disparaging statements in order to hold CompuServe liable for business disparagement. As discussed with respect to the libel claim, plaintiffs have failed to meet their burden. Summary judgment in favor of CompuServe on the business disparagement claim is therefore granted.

Unfair Competition Claim

Plaintiffs base the unfair competition claim on the statements concerning Skuttlebut that appeared in Rumorville in April 1990. Plaintiffs' theory is that Rumorville launched a "campaign of disparagement of Skuttlebut" in order to compete with Skuttlebut and retain its subscribers without reducing its fee structure.

Because the utterance of a disparaging statement must be intentional to give rise to an unfair competition claim based on disparagement, CompuServe may not be held liable on plaintiffs' unfair competition claim if it did not know or have reason to know of the Rumorville statements. As discussed with respect to the libel claim, plaintiffs have failed to meet their burden. Summary judgment in favor of CompuServe on the unfair competition claim is therefore granted.

STRATTON OAKMONT, INC. v. PRODIGY SERVICES CO.

1995 N.Y. Misc. LEXIS 229 (Sup. Ct. 1995)

Stuart L. Ain, Justice

Upon the foregoing papers, it is ordered that this motion by Plaintiffs for partial summary judgment against Defendant PRODIGY SERVICES COMPANY ("PRODIGY") is granted and this Court determines, as a matter of law, the following two disputed issues as follows:

(i) that PRODIGY was a "publisher" of statements concerning plaintiffs on its "Money Talk" computer bulletin board for the purposes of Plaintiffs' libel claims; and,

(ii) that Charles Epstein, the Board Leader of PRODIGY's "Money Talk" computer bulletin

board, acted as PRODIGY's agent for the purposes of the acts and omissions alleged in the complaint.

At issue in this case are statements about Plaintiffs made by an unidentified bulletin board user or "poster" on PRODIGY's "Money Talk" computer bulletin board on October 23rd and 25th of 1994. These statements included the following:

(a) STRATTON OAKMONT, INC. ("STRATTON"), a securities investment banking firm, and DANIEL PORUSH, STRATTON's president, committed criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page Ltd.;

(b) the Solomon-Page offering was a "major criminal fraud" and "100% criminal fraud";

(c) PORUSH was "soon to be proven criminal"; and,

(d) STRATTON was a "cult of brokers who either lie for a living or get fired."

Plaintiffs commenced this action against PRODIGY, the owner and operator of the computer network on which the statements appeared, and the unidentified party who posted the aforementioned statements. The second amended complaint alleges ten causes of action, including claims for per se libel. On this motion, Plaintiffs seek partial summary judgment on two issues, namely:

(1) whether PRODIGY may be considered a "publisher" of the aforementioned statements; and,

(2) whether Epstein, the Board Leader for the computer bulletin board on which the statements were posted, acted with actual and apparent authority as PRODIGY's "agent" for the purposes of the claims in this action.

By way of background, it is undisputed that PRODIGY's computer network has at least two million subscribers who communicate with each other and with the general subscriber population on PRODIGY's bulletin boards. "Money Talk" the board on which the aforementioned statements appeared, is allegedly the leading and most widely read financial computer bulletin board in the United States, where members can post statements regarding stocks, investments and other financial matters. PRODIGY contracts with bulletin Board Leaders, who, among other things, participate in board discussions and undertake promotional efforts to encourage usage and increase users. The Board Leader for "Money Talk" at the time the alleged libelous statements were posted was Charles Epstein.

PRODIGY commenced operations in 1990. Plaintiffs base their claim that PRODIGY is a publisher in large measure on PRODIGY's stated policy, starting in 1990, that it was a family oriented computer network. In various national newspaper articles written by Geoffrey Moore, PRODIGY's Director of Market Programs and Communications, PRODIGY held itself out as an online service that exercised editorial control over the content of messages posted on its computer bulletin boards, thereby expressly differentiating itself from its competition and expressly likening itself to a newspaper. In one article PRODIGY stated:

"We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters

it prints, the degree of nudity and unsupported gossip its editors tolerate."

Plaintiffs characterize the aforementioned articles by PRODIGY as admissions and argue that, together with certain documentation and deposition testimony, these articles establish Plaintiffs' prima facie case. In opposition, PRODIGY insists that its policies have changed and evolved since 1990 and that the latest article on the subject, dated February, 1993, did not reflect PRODIGY's policies in October, 1994, when the allegedly libelous statements were posted. Although the eighteen month lapse of time between the last article and the aforementioned statements is not insignificant, and the Court is wary of interpreting statements and admissions out of context, these considerations go solely to the weight of this evidence.

Plaintiffs further rely upon the following additional evidence in support of their claim that PRODIGY is a publisher:

(A) promulgation of "content guidelines" in which users are requested to refrain from posting notes that are "insulting" and are advised that "notes that harass other members or are deemed to be in bad taste or grossly repugnant to community standards, or are deemed harmful to maintaining a harmonious online community, will be removed when brought to PRODIGY's attention"; the Guidelines all expressly state that although "Prodigy is committed to open debate and discussion on the bulletin boards, ... this doesn't mean that 'anything goes'";

(B) use of a software screening program which automatically prescreens all bulletin board postings for offensive language;

(c) the use of Board Leaders such as Epstein whose duties include enforcement of the Guidelines, according to Jennifer Ambrozek, the Manager of Prodigy's bulletin boards and the person at PRODIGY responsible for supervising the Board Leaders; and

(D) testimony by Epstein as to a tool for Board Leaders known as an "emergency delete function" pursuant to which a Board Leader could remove a note and send a previously prepared message of explanation "ranging from solicitation, bad advice, insulting, wrong topic, off topic, bad taste, etcetera."

A finding that PRODIGY is a publisher is the first hurdle for Plaintiffs to overcome in pursuit of their defamation claims, because one who repeats or otherwise republishes a libel is subject to liability as if he had originally published it. In contrast, distributors such as book stores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue. [*Cubby Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 139.] A distributor, or deliverer of defamatory material is considered a passive conduit and will not be found liable in the absence of fault. However, a newspaper, for example, is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper and the decisions made as to the content of the paper constitute the exercise of editorial control and judgment and with this editorial control comes increased liability. In short, the critical issue to be determined is whether the foregoing evidence establishes a prima facie case that PRODIGY exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper.

Again, PRODIGY insists that its former policy of manually reviewing all messages prior to posting was changed "long before the messages complained of by Plaintiffs were posted."

However, no documentation or detailed explanation of such a change, and the dissemination of news of such a change, has been submitted. In addition, PRODIGY argues that in terms of sheer volume -- currently 60,000 messages a day are posted on PRODIGY bulletin boards -- manual review of messages is not feasible. While PRODIGY admits that Board Leaders may remove messages that violate its Guidelines, it claims in conclusory manner that Board Leaders do not function as "editors". Furthermore, PRODIGY argues generally that this Court should not decide issues that can directly impact this developing communications medium without the benefit of a full record, although it fails to describe what further facts remain to be developed on this issue of whether it is a publisher.

As for legal authority, PRODIGY relies on the *Cubby* case. There the Court found that CompuServe's product was, "in essence, an electronic for-profit library" that carried a vast number of publications, and that CompuServe had "little or no editorial control" over the contents of those publications.

The key distinction between CompuServe and PRODIGY is two fold. 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. By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and "bad taste," for example, PRODIGY is clearly making decisions as to content, and such decisions constitute editorial control. That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimize or eviscerate the simple fact that PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards. Based on the foregoing, this Court is compelled to conclude that for the purposes of plaintiffs' claims in this action, PRODIGY is a publisher rather than a distributor.

PRODIGY has virtually created an editorial staff of Board Leaders who have the ability to continually monitor incoming transmissions and in fact do spend time censoring notes. Indeed, it could be said that PRODIGY's current system of automatic scanning, Guidelines and Board Leaders may have a chilling effect on freedom of communication in Cyberspace, and it appears that this chilling effect is exactly what PRODIGY wants, but for the legal liability that attaches to such censorship.

Let it be clear that this Court is in full agreement with *Cubby*. Computer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates. It is PRODIGY's own policies, technology and staffing decisions which have altered the scenario and mandated the finding that it is a publisher.

PRODIGY's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice. For the record, the fear that this Court's finding of publisher status for PRODIGY will compel all computer networks to abdicate control of their bulletin boards, incorrectly presumes that the market will refuse to compensate for its increased control and the resulting increased exposure. Presumably PRODIGY's decision to regulate the content of its bulletin boards was in part influenced by its desire to attract a market it perceived to exist consisting of users seeking a

"family-oriented" computer service. This decision simply required that to the extent computer networks provide such services, they must also accept the concomitant legal consequences. In addition, the Court also notes that the issues addressed herein may ultimately be preempted by federal law if the Communications Decency Act of 1995 is enacted.

The Court now turns to the second issue presented here, of whether Epstein was PRODIGY's agent for the purposes of the acts and omissions alleged in the complaint. Agency is a legal relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other to so act. The starting point for an agency analysis in this case is the "Bulletin Board Leader Agreement" between PRODIGY and Epstein. This Agreement sets forth eleven specific responsibilities expected of a Board Leader including (I) the posting of a minimum of 120 notes on the bulletin board each month; (II) working with member Representatives; (III) providing monthly reports and (IV) following any additional procedures provided by PRODIGY. The Agreement also requires prior PRODIGY approval of all promotional efforts. In addition, the Agreement contains the following language.

You will be solely responsible for all of your actions as a Board Leader. While Prodigy will certainly support your actions as a Board Leader as a general matter (so long as they are not in breach of this Agreement), we will not assume any liability for anything you do (or fail to do) as a Board Leader. You hereby indemnify and agree to hold Prodigy harmless from and against all claims cost, liabilities judgments . . . arising out of or in connection with anything you do. . .

Being a Board Leader does not make you a Prodigy Services Company employee, representative or agent, and you agree not to claim or suggest that you are one.

Prodigy relies on this language to extricate itself from any alleged agency relationship with Epstein. However, talismanic language does not determine an agency relationship. The Court must look to the substance of the relationship. Where one party retains a sufficient degree of direction and control over another, a principal-agent relationship exists. In addition, whether one is an independent contractor is not determinative of whether one is an agent.

As to the substance of the relationship between PRODIGY and its Board Leaders, PRODIGY Security Officer McDowell testified that Board Leaders are required to follow the Guidelines and that PRODIGY performs a "management function" with respect to the activities of the Board Leaders. Furthermore, Epstein's Supervisor, Jennifer Ambrozek, testified that PRODIGY reviews the Guidelines with Board Leaders, who are then required to enforce the Guidelines. Board Leaders are also given a 28 page "Bulletin Board Leader Survival Guide" wherein many technical terms and procedures are explained, and the following caveat is given:

IF YOU DON'T KNOW WHAT SOMETHING IS OR WHAT IT'S SUPPOSED TO DO, LEAVE IT ALONE UNTIL YOU CAN ASK.

The aforementioned testimony by PRODIGY employees and documentation generated by PRODIGY, together with the Guidelines themselves, leave no doubt that at least for the limited purpose of monitoring and editing the "Money Talk" computer bulletin Board, PRODIGY directed and controlled Epstein's actions. Based on the foregoing, the Court holds that Epstein

acted as PRODIGY's agent for the purposes of the acts and omissions alleged in the complaint.

B. Section 230 of the Communications Decency Act of 1996

47 U.S.C. § 230 - Protection for Private Blocking and Screening of Offensive Material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

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

(1) Treatment of publisher or speaker

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

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

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

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1). {This reference to paragraph (1) should probably be a reference to paragraph (A).}

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions

As used in this section:

(1) Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

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

(3) Information content provider

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

(4) Access software provider

The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

ZERAN v. AMERICA ONLINE, INC.

129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998)

WILKINSON, Chief Judge:

Kenneth Zeran brought this action against America Online, Inc. ("AOL"), arguing that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter. The district court granted judgment for AOL on the grounds that the Communications Decency Act of 1996 ("CDA") -- 47 U.S.C. § 230 -- bars Zeran's claims. Zeran appeals, arguing that § 230 leaves intact liability for interactive computer service providers who possess notice of defamatory material posted through their services. Section 230, however, plainly immunizes computer service providers like AOL from liability for information that originates with third parties. Accordingly, we affirm the judgment of the district court.

I.

One of the many means by which individuals access the Internet is through an interactive

computer service. These services offer not only a connection to the Internet as a whole, but also allow their subscribers to access information communicated and stored only on each computer service's individual proprietary network. AOL is just such an interactive computer service. Much of the information transmitted over its network originates with the company's millions of subscribers. They may transmit information privately via electronic mail, or they may communicate publicly by posting messages on AOL bulletin boards, where the messages may be read by any AOL subscriber.

The instant case comes before us on a motion for judgment on the pleadings so we accept the facts alleged in the complaint as true. On April 25, 1995, an unidentified person posted a message on an AOL bulletin board advertising "Naughty Oklahoma T-Shirts." The posting described the sale of shirts featuring offensive and tasteless slogans related to the April 19, 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Those interested in purchasing the shirts were instructed to call "Ken" at Zeran's home phone number in Seattle, Washington. As a result of this anonymously perpetrated prank, Zeran received a high volume of calls, comprised primarily of angry and derogatory messages, but also including death threats. Zeran could not change his phone number because he relied on its availability to the public in running his business out of his home. Later that day, Zeran called AOL and informed a company representative of his predicament. The employee assured Zeran that the posting would be removed from AOL's bulletin board but explained that as a matter of policy AOL would not post a retraction. The parties dispute the date that AOL removed this original posting.

On April 26, the next day, an unknown person posted another message advertising additional shirts with new tasteless slogans related to the Oklahoma City bombing. Again, interested buyers were told to call Zeran's phone number, to ask for "Ken," and to "please call back if busy" due to high demand. The angry, threatening phone calls intensified. Over the next four days, an unidentified party continued to post messages on AOL's bulletin board, advertising additional items including bumper stickers and key chains with still more offensive slogans. During this time period, Zeran called AOL repeatedly and was told by company representatives that the individual account from which the messages were posted would soon be closed. Zeran also reported his case to Seattle FBI agents. By April 30, Zeran was receiving an abusive phone call approximately every two minutes.

Meanwhile, an announcer for Oklahoma City radio station KRXO received a copy of the first AOL posting. On May 1, the announcer related the message's contents on the air, attributed them to "Ken" at Zeran's phone number, and urged the listening audience to call the number. After this radio broadcast, Zeran was inundated with death threats and other violent calls from Oklahoma City residents. Over the next few days, Zeran talked to both KRXO and AOL representatives. He also spoke to his local police, who subsequently surveilled his home to protect his safety. By May 14, after an Oklahoma City newspaper published a story exposing the shirt advertisements as a hoax and after KRXO made an on-air apology, the number of calls to Zeran's residence finally subsided to fifteen per day.

Zeran first filed suit on January 4, 1996, against radio station KRXO. On April 23, 1996, he filed this separate suit against AOL in the same court. Zeran did not bring any action against the

party who posted the offensive messages.¹ AOL answered Zeran's complaint and interposed 47 U.S.C. § 230 as an affirmative defense. AOL then moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). The district court granted AOL's motion, and Zeran filed this appeal.

II.

A.

Zeran seeks to hold AOL liable for defamatory speech initiated by a third party. He argued to the district court that once he notified AOL of the unidentified third party's hoax, AOL had a duty to remove the defamatory posting promptly, to notify its subscribers of the message's false nature, and to effectively screen future defamatory material. Section 230 entered this litigation as an affirmative defense pled by AOL. The company claimed that Congress immunized interactive computer service providers from claims based on information posted by a third party.

The relevant portion of § 230 states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).² By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions -- such as deciding whether to publish, withdraw, postpone or alter content -- are barred.

The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.* § 230(a)(3). It also found that the Internet and interactive computer services "have flourished, to the benefit of all Americans, *with a minimum of government regulation.*" *Id.* § 230(a)(4) (emphasis added). Congress further stated that it is "the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*" *Id.* § 230(b)(2) (emphasis added).

¹ Zeran maintains that AOL made it impossible to identify the original party by failing to maintain adequate records of its users.

² The parties do not dispute that AOL falls within the CDA's "interactive computer service" definition and that the unidentified third party who posted the offensive messages here fits the definition of an "information content provider."

None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." *Id.* § 230(b)(5). Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.

Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. In this respect, § 230 responded to a New York state court decision, *Stratton Oakmont v. Prodigy Servs. Co.* There, the plaintiffs sued Prodigy for defamatory comments made by an unidentified party on one of Prodigy's bulletin boards. The court held Prodigy to the strict liability standard normally applied to original publishers of defamatory statements, rejecting Prodigy's claims that it should be held only to the lower "knowledge" standard usually reserved for distributors. The court reasoned that Prodigy acted more like an original publisher than a distributor both because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.

Congress enacted § 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision. Under that court's holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4). In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.

B.

Zeran argues, however, that the § 230 immunity eliminates only publisher liability, leaving distributor liability intact. Publishers can be held liable for defamatory statements contained in their works even absent proof that they had specific knowledge of the statement's inclusion. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 113, at 810 (5th ed. 1984).

According to Zeran, interactive computer service providers like AOL are normally considered instead to be distributors, like traditional news vendors or book sellers. Distributors cannot be held liable for defamatory statements contained in the materials they distribute unless it is proven at a minimum that they have actual knowledge of the defamatory statements upon which liability is predicated. Zeran contends that he provided AOL with sufficient notice of the defamatory statements appearing on the company's bulletin board. This notice is significant, says Zeran, because AOL could be held liable as a distributor only if it acquired knowledge of the defamatory statements' existence.

Because of the difference between these two forms of liability, Zeran contends that the term "distributor" carries a legally distinct meaning from the term "publisher." Accordingly, he asserts that Congress' use of only the term "publisher" in § 230 indicates a purpose to immunize service providers only from publisher liability. He argues that distributors are left unprotected by § 230 and, therefore, his suit should be permitted to proceed against AOL. We disagree. Assuming *arguendo* that Zeran has satisfied the requirements for imposition of distributor liability, this theory of liability is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230.

The terms "publisher" and "distributor" derive their legal significance from the context of defamation law. Although Zeran attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action. Because the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of tort liability. Restatement (Second) of Torts § 558(b) (1977); Keeton et al., *supra*, § 113, at 802. Publication does not only describe the choice by an author to include certain information. In addition, both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party -- each alleged by Zeran here under a negligence label -- constitute publication. Restatement (Second) of Torts § 577. In fact, every repetition of a defamatory statement is considered a publication.

In this case, AOL is legally considered to be a publisher. "Every one who takes part in the publication . . . is charged with publication." Even distributors are considered to be publishers for purposes of defamation law:

Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the books, newspapers, magazines, and information available to others as to be regarded as publishers. They are intentionally making the contents available to others, sometimes without knowing all of the contents -- including the defamatory content - - and sometimes without any opportunity to ascertain, in advance, that any defamatory matter was to be included in the matter published.

Id. at 803. AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity.

Zeran contends that decisions like *Stratton Oakmont* and *Cubby, Inc. v. CompuServe Inc.* recognize a legal distinction between publishers and distributors. He misapprehends, however, the significance of that distinction for the legal issue we consider here. It is undoubtedly true that

mere conduits, or distributors, are subject to a different standard of liability. As explained above, distributors must at a minimum have knowledge of the existence of a defamatory statement as a prerequisite to liability. But this distinction signifies only that different standards of liability may be applied *within* the larger publisher category, depending on the specific type of publisher concerned. See Keeton et al., *supra*, § 113, at 799-800 (explaining that every party involved is charged with publication, although degrees of legal responsibility differ). To the extent that decisions like *Stratton* and *Cubby* utilize the terms "publisher" and "distributor" separately, the decisions correctly describe two different standards of liability. *Stratton* and *Cubby* do not, however, suggest that distributors are not also a type of publisher.

Zeran simply attaches too much importance to the presence of the distinct notice element in distributor liability. The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law. To the contrary, once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting. In this respect, Zeran seeks to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability -- the publisher role.

Our view that Zeran's complaint treats AOL as a publisher is reinforced because AOL is cast in the same position as the party who originally posted the offensive messages. According to Zeran's logic, AOL is legally at fault because it communicated to third parties an allegedly defamatory statement. This is precisely the theory under which the original poster of the offensive messages would be found liable. If the original party is considered a publisher of the offensive messages, Zeran certainly cannot attach liability to AOL under the same theory without conceding that AOL too must be treated as a publisher of the statements.

Zeran next contends that interpreting § 230 to impose liability on service providers with knowledge of defamatory content on their services is consistent with the statutory purposes outlined in Part IIA. Zeran fails, however, to understand the practical implications of notice liability in the interactive computer service context. Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA. Like the strict liability imposed by the *Stratton Oakmont* court, liability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation.

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement -- from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not. Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.

Similarly, notice-based liability would deter service providers from regulating the dissemination of offensive material over their own services. Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to further possible lawsuits, service providers would likely eschew any attempts at self-regulation.

More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits. 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. In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability. Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.

BLUMENTHAL v. DRUDGE
992 F. Supp. 44 (D.D.C. 1998)

OPINION

This is a defamation case revolving around a statement published on the Internet by defendant Matt Drudge. On August 10, 1997, the following was available to all having access to the Internet:

The DRUDGE REPORT has learned that top GOP operatives who feel there is a double-standard of only reporting republican shame believe they are holding an ace card: New White House recruit Sidney Blumenthal has a spousal abuse past that has been effectively covered up.

The accusations are explosive.

There are court records of Blumenthal's violence against his wife, one influential republican, who demanded anonymity, tells the DRUDGE REPORT.

If they begin to use [Don] Sipple and his problems against us, against the Republican Party. . . to show hypocrisy, Blumenthal would become fair game. Wasn't it Clinton who signed the Violence Against Women Act?

One White House source, also requesting anonymity, says the Blumenthal wife-beating allegation is a pure fiction that has been created by Clinton enemies. [The First Lady] would not have brought him in if he had this in his background, assures the well-placed staffer. This story about Blumenthal has been in circulation for years.

Last month President Clinton named Sidney Blumenthal an Assistant to the President as part of the Communications Team. He's brought in to work on communications strategy, special projects themeing -- a newly created position.

Every attempt to reach Blumenthal proved unsuccessful.

Currently before this Court are a motion for summary judgment filed by defendant America Online, Inc. ("AOL"). The Court concludes that AOL's motion should be granted.

I. BACKGROUND

Sidney Blumenthal works in the White House as an Assistant to the President of the United States. His first day of work as Assistant to the President was Monday, August 11, 1997, the day after the publication of the alleged defamatory statement. Jacqueline Jordan Blumenthal, Sidney Blumenthal's wife, also works in the White House as Director of the President's Commission On White House Fellowships.

In early 1995, defendant Drudge created an electronic publication called the Drudge Report, a gossip column focusing on gossip from Hollywood and Washington. Access to defendant Drudge's world wide web site is available at no cost to anyone who has access to the Internet at the Internet address of "www.drudgereport.com." The front page of the web site contains the logo "Drudge Report." Defendant Drudge has also placed a hyperlink on his web site that, when activated, causes the most recently published edition of the Drudge Report to be displayed. The web site also contains numerous hyperlinks to other on-line news publications and news articles. In addition, Drudge had developed a list of regular readers or subscribers to whom he e-mailed each new edition of the Drudge Report. Plaintiffs allege that by 1997 Drudge had 85,000 subscribers to his e-mail service.

In late May or early June of 1997, defendant Drudge entered into a written license agreement with AOL. The agreement made the Drudge Report available to all members of AOL's service for a period of one year. In exchange, defendant Drudge received a flat monthly "royalty payment" of \$ 3,000 from AOL. During the time relevant to this case, defendant Drudge has had no other source of income. Under the licensing agreement, Drudge is to create, edit, update and "otherwise manage" the content of the Drudge Report, and AOL may "remove content that AOL reasonably determine[s] to violate AOL's then standard terms of service." Drudge transmits new editions of the Drudge Report by e-mailing them to AOL. AOL then posts the new editions on the AOL service. Drudge also has continued to distribute each new edition of the Drudge Report via e-mail and his own web site.

Late at night on the evening of Sunday, August 10, 1997 (Pacific Daylight Time), defendant Drudge wrote and transmitted the edition of the Drudge Report that contained the alleged defamatory statement about the Blumenthals. Drudge transmitted the report from Los Angeles, California by e-mail to his direct subscribers and by posting the full text of the Blumenthal story on his world wide web site. He then transmitted the text to AOL, which in turn made it available to AOL subscribers.

After receiving a letter from plaintiffs' counsel on Monday, August 11, 1997, defendant Drudge retracted the story through a special edition of the Drudge Report posted on his web site and e-mailed to his subscribers. At approximately 2:00 a.m. on Tuesday, August 12, 1997,

Drudge e-mailed the retraction to AOL which posted it on the AOL service. Defendant Drudge later publicly apologized to the Blumenthals.

II. AOL's MOTION FOR SUMMARY JUDGMENT

A. *The Internet*

"The Internet is a unique and wholly new medium of worldwide human communication." It enables people to communicate with one another with unprecedented speed and efficiency and is rapidly revolutionizing how people share and receive information. As Congress recognized in the Communications Decency Act of 1996, "the rapidly developing array of Internet and other interactive computer services. . . represent an extraordinary advance in the availability of educational and informational resources to our citizens."

The near instantaneous possibilities for the dissemination of information by millions of different information providers around the world to those with access to the Internet have created ever-increasing opportunities for the exchange of information and ideas in "cyberspace." This information revolution has also presented unprecedented challenges relating to rights of privacy and reputational rights of individuals, to the control of obscene and pornographic materials, and to competition among journalists and news organizations for instant news, rumors and other information that is communicated so quickly that it is too often unverified. Needless to say, the legal rules that will govern this new medium are just beginning to take shape.

B. *Communications Decency Act of 1996, Section 230*

In February of 1996, Congress made an effort to deal with some of these challenges in enacting the Communications Decency Act of 1996. Whether wisely or not, it made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others. In recognition of the speed with which information may be disseminated and the near impossibility of regulating information content, Congress decided not to treat providers of interactive computer services like other information providers such as newspaper magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others. While Congress could have made a different policy choice, it opted not to hold interactive computer services liable for their failure to edit, withhold or restrict access to offensive material disseminated through their medium.

Section 230(c) of the Communications Decency Act of 1996 provides:

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

47 U.S.C. § 230(c)(1). The statute goes on to define the term "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(e)(3). In view of this statutory language, plaintiffs' argument that the *Washington Post* would be liable if it had done what AOL did here -- publish Drudge's story without doing anything whatsoever to edit, verify, or even read it (despite knowing what Drudge did for a living and how he did it)," has been rendered irrelevant by Congress.

Plaintiffs concede that AOL is a "provider . . . of an interactive computer service" for purposes of Section 230, and that if AOL acted exclusively as a provider of an interactive computer service it may not be held liable for making the Drudge Report available to AOL subscribers. See 47 U.S.C. § 230(c)(1). They also concede that Drudge is an "information content provider" because he wrote the alleged defamatory material. While plaintiffs suggest that AOL is responsible along with Drudge because it had some role in writing or editing the material in the Drudge Report, they have provided no factual support for that assertion. Indeed, plaintiffs affirmatively state that "no person, other than Drudge himself, edited, checked, verified, or supervised the information that Drudge published in the Drudge Report." It also is apparent to the Court that there is no evidence to support the view originally taken by plaintiffs that Drudge is or was an employee or agent of AOL, and plaintiffs seem to have abandoned that argument.

AOL acknowledges both that Section 230(c)(1) would not immunize AOL with respect to any information AOL developed or created entirely by itself and that there are situations in which there may be two or more information content providers responsible for material disseminated on the Internet -- joint authors, a lyricist and a composer, for example. While Section 230 does not preclude joint liability for the joint development of content, AOL maintains that there simply is no evidence here that AOL had any role in creating or developing any of the information in the Drudge Report. The Court agrees. It is undisputed that the Blumenthal story was written by Drudge without any substantive or editorial involvement by AOL. AOL was nothing more than a provider of an interactive computer service on which the Drudge Report was carried, and Congress has said quite clearly that such a provider shall not be treated as a "publisher or speaker" and therefore may not be held liable in tort. 47 U.S.C. § 230(c)(1).

Plaintiffs make the additional argument, however, that Section 230 of the Communications Decency Act does not provide immunity to AOL in this case because Drudge was not just an anonymous person who sent a message over the Internet through AOL. He is a person with whom AOL contracted, whom AOL paid \$ 3,000 a month -- \$ 36,000 a year,

Drudge's sole, consistent source of income -- and whom AOL promoted to its subscribers and potential subscribers as a reason to subscribe to AOL. Furthermore, the license agreement between AOL and Drudge by its terms contemplates more than a passive role for AOL; in it, AOL reserves the "right to remove, or direct [Drudge] to remove, any content which, as reasonably determined by AOL . . . violates AOL's then-standard Terms of Service. . . ." By the terms of the agreement, AOL also is "entitled to require reasonable changes to. . . content, to the extent such content will, in AOL's good faith judgment, adversely affect operations of the AOL network."

In addition, shortly after it entered into the licensing agreement with Drudge, AOL issued a press release making clear the kind of material Drudge would provide to AOL subscribers -- gossip and rumor -- and urged potential subscribers to sign onto AOL in order to get the benefit of the Drudge Report. The press release was captioned: "AOL Hires Runaway Gossip Success Matt Drudge." It noted that "maverick gossip columnist Matt Drudge has teamed up with America Online," and stated: "Giving the Drudge Report a home on America Online (keyword: Drudge) opens up the floodgates to an audience ripe for Drudge's brand of reporting . . . AOL has made Matt Drudge instantly accessible to members who crave instant gossip and news

breaks." Why is this different, the Blumenthals suggest, from AOL advertising and promoting a new purveyor of child pornography or other offensive material? Why should AOL be permitted to tout someone as a gossip columnist or rumor monger who will make such rumors and gossip "instantly accessible" to AOL subscribers, and then claim immunity when that person, as might be anticipated, defames another?

If it were writing on a clean slate, this Court would agree with plaintiffs. AOL has certain editorial rights with respect to the content provided by Drudge and disseminated by AOL, including the right to require changes in content and to remove it; and it has affirmatively promoted Drudge as a new source of unverified instant gossip on AOL. Yet it takes no responsibility for any damage he may cause. AOL is not a passive conduit like the telephone company, a common carrier with no control and therefore no responsibility for what is said over the telephone wires. Because it has the right to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor. 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. In some sort of tacit *quid pro quo* arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted.

As the Fourth Circuit stated in *Zeran v. America Online, Inc.*: "Congress enacted § 230 to remove . . . disincentives to self-regulation Fearing that the specter of liability would . . . deter service providers from blocking and screening offensive material. . . . § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."

Any attempt to distinguish between "publisher" liability and notice-based "distributor" liability and to argue that Section 230 was only intended to immunize the former would be unavailing. Congress made no distinction between publishers and distributors in providing immunity from liability. As the Fourth Circuit has noted: "If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement -- from any party, concerning any message," and such notice-based liability "would deter service providers from regulating the dissemination of offensive material over their own services" by confronting them with "ceaseless choices of suppressing controversial speech or sustaining prohibitive liability" exactly what Congress intended to insulate them from in Section 230. While it appears to this Court that AOL in this case has taken advantage of all the benefits conferred by Congress in the Communications Decency Act, and then some, without accepting any of the burdens that Congress intended, the statutory language is clear: AOL is immune from suit.

SCHNEIDER v. AMAZON.COM, INC.
31 P.3d 37 (Wash. App. Ct. 2001)

Ellington, J.

Jerome Schneider wrote several books relating to taxation and asset protection. The books are for sale at the website of Amazon.com, Inc. (Amazon). In addition to enabling purchases, Amazon's website provides a forum for visitors to air their opinions about books. Amazon sets the following guidelines for comments:

While we appreciate your comments, we respectfully request that you refrain from including the following in your review:

- Profanity, obscenities, or spiteful remarks.
- Time-sensitive material (i.e., promotional tours, seminars, lectures, etc.).
- Single-word reviews. We want to know *why* you liked or disliked the book.
- Comments focusing solely on the author.
- No spoilers! Please don't reveal crucial plot elements.
- Phone numbers, mail addresses, URLs.
- Availability, price, or alternative ordering/shipping information.

Visitors to Amazon's website are informed that "Any review in violation of these guidelines may not be posted." A visitor who submits a review grants Amazon a nonexclusive royalty-free right to use the review.

Amazon posted visitors' comments about Schneider and his books. The comments were negative; one alleged Schneider was a felon. Schneider's employee complained. Amazon's representative agreed that one or more of the postings violated the guidelines and should be removed, and promised to take steps to remove the postings within one to two business days. Two days later, the posting had not been removed.

Schneider filed an action for defamation and tortious interference with a business expectancy, naming Amazon and multiple "John and Jane Does." Amazon moved to dismiss on grounds it was immune from liability under 47 U.S.C. § 230. Schneider then amended his complaint, deleting the defamation claim and alleging negligent misrepresentation, tortious interference, and breach of contract. The amended complaint alleges the anonymous postings contained "false, defamatory and/or scurrilous comments regarding Mr. Schneider and his business," and that Amazon exercises editorial discretion and decision-making authority over the posting of comments at its site.

Amazon filed a second motion to dismiss on the same grounds. The trial court granted the motion and dismissed all claims against Amazon with prejudice. Schneider filed a motion for reconsideration.

DISCUSSION

Under the Communications Decency Act of 1996 (CDA), interactive computer service

providers are immune from publisher liability. Three elements are required for § 230 immunity: the defendant must be a provider or user of an "interactive computer service"; the asserted claims must treat the defendant as a publisher or speaker of information; and the information must be provided by another "information content provider." Schneider argues none of these elements was satisfied here.

1. Amazon Is a Provider or User of Interactive Computer Services

The statute defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." Thus, to qualify for immunity, a defendant must be a provider or user of an information service or system that "enables computer access by multiple users to a computer server." Schneider argues § 230 does not extend immunity to website hosts who do not enable access to the Internet.

Internet service providers (ISP) are recognized as § 230 providers of interactive computer services. The seminal decision is *Zeran v. America Online, Inc.* We find no case addressing application of the statute to interactive website operators. But Amazon's website postings appear indistinguishable from AOL's message board for § 230 purposes. Schneider points out that website operators do not provide access to the Internet, but this is irrelevant. Under the statutory definition, access providers are only a subclass of the broader definition of interactive service providers entitled to immunity ("provides or enables computer access by multiple users to a computer server, including specifically a service . . . that provides access"). According to Schneider's complaint, Amazon's website enables visitors to the site to comment about authors and their work, thus providing an information service that necessarily enables access by multiple users to a server. This brings Amazon squarely within the definition.

Our holding derives from the plain language of the statute. It is supported by legislative history and by findings and policy statements in the statute. Congress passed § 230 "to remove the disincentives to self regulation" created by a New York state court decision holding an ISP strictly liable for unidentified third parties' defamatory comments posted on its bulletin board. As the Tenth Circuit explained in *Zeran*, Congress deliberately chose not to deter harmful online speech by means of civil liability on "companies that serve as intermediaries for other parties' potentially injurious messages."¹⁷ Congress intended to encourage self-regulation, and immunity is the form of that encouragement. We can discern no difference between website operators and ISPs in the degree to which immunity will encourage editorial decisions that will reduce the volume of offensive material on the Internet. Under the plain language of the statute, Amazon is a provider of interactive computer services for purposes of § 230(f)(2).

2. Schneider's Claims Treat Amazon as a Publisher

The next question is whether Schneider's complaint treats Amazon as a publisher. Section 230 "precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider

liable for its exercise of a publisher's traditional editorial functions--such as deciding whether to publish, withdraw, postpone or alter content--are barred." Publication includes "the failure to remove [content] . . . when first communicated by another party." In his amended complaint, Schneider alleged that "Amazon.com exercises editorial discretion and decision-making authority over the posting of comments at its site." Schneider's complaint thus treats Amazon as a publisher.

Schneider argues, however, that the statute bars only tort claims, and that his claims sound in contract, not tort. Schneider asserts he "does not seek to hold Amazon liable for initially posting the defamatory comments and reviews submitted by third parties--he seeks to recover the damages which flowed from Amazon's misrepresentations and breach [of] its agreement following the postings," because Amazon promised to remove the offensive posting, failed to do so, and reposted the reviews rather than deleting them.

We reject this analysis. First, assuming Schneider could prove existence of an enforceable promise to remove the comments, Schneider's claim is based entirely on the purported breach--failure to remove the posting--which is an exercise of editorial discretion. This is the activity the statute seeks to protect. More important, however, is the fact that § 230 does not limit its grant of immunity to tort claims: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Were the statute not clear enough, legislative history demonstrates Congress intended to extend immunity to all civil claims: "This section provides 'Good Samaritan' protections from *civil liability* for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material." Courts that have considered the question have held § 230 provides immunity to civil claims generally. Schneider's amended complaint treats Amazon as a publisher within the scope of § 230.

3. Amazon Is Not the Information Content Provider

Immunity extends only when the content is not provided by the service entity: "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." An information content provider is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."

Schneider does not claim Amazon created the information about him. Rather, he argues that because Amazon had the right to edit the posting, and because Amazon claims licensing rights in the posted material, Amazon in effect became the content provider.

Both of Schneider's arguments have been rejected. In *Ben Ezra, Weinstein, & Co. v. America Online, Inc.*, the Tenth Circuit considered whether AOL's editing of content rendered it an information content provider. AOL provided access to allegedly inaccurate information regarding Ben Ezra's publicly-traded stock. The information came from an independent stock quote provider and a software provider. AOL deleted and altered some of the information, and Ben Ezra alleged that AOL worked so closely with the independent parties in creating and developing the information that AOL was an

information content provider. The Tenth Circuit disagreed: "By deleting the allegedly inaccurate stock quotation information, Defendant was simply engaging in the editorial functions Congress sought to protect."

We agree with the circuit court's analysis. And if actual editing does not create liability, the mere right to edit can hardly do so; Schneider does not allege Amazon actually altered or edited the comments.

Schneider's licensing rights argument was rejected in *Blumenthal v. Drudge*. Blumenthal sued Drudge and AOL for allegedly defamatory statements made by Drudge in an electronic publication available to AOL subscribers under a licensing agreement. The licensing agreement provided that Drudge would "create, edit, update, and 'otherwise manage' the content of the [publication]," and AOL could "remove content that AOL reasonably determine[s] to violate AOL's then standard terms of service." The *Blumenthal* court held the statute mandates immunity.

We agree with the *Blumenthal* court as to the scope of the protection granted by § 230. Schneider attempts to distinguish *Blumenthal*, arguing Amazon's licensing rights are "significantly broader than AOL's" licensing rights. But this is irrelevant. There is no allegation that Amazon was responsible for creating or developing the negative comments. Amazon was not a content provider under the allegations in Schneider's complaint.

Because all three elements for § 230 immunity are satisfied, the trial court properly concluded § 230 bars Schneider's claims against Amazon.

CARAFANO v. METROSPLASH.COM, INC.
339 F.3d 1119 (9th Cir. 2003)

THOMAS, Circuit Judge:

This is a case involving a cruel and sadistic identity theft. In this appeal, we consider to what extent a computer match-making service may be legally responsible for false content in a dating profile provided by someone posing as another person. Under the circumstances presented by this case, we conclude that the service is statutorily immune pursuant to 47 U.S.C. § 230(c)(1).

I

Matchmaker.com is a commercial Internet dating service. For a fee, members of Matchmaker post anonymous profiles and may then view profiles of other members in their area, contacting them via electronic mail sent through the Matchmaker server. A typical profile contains one or more pictures of the subject, descriptive information such as age, appearance and interests, and answers to a variety of questions designed to evoke the subject's personality and reason for joining the service.

Members are required to complete a detailed questionnaire containing both multiple-choice and essay questions. In the initial portion of the questionnaire, members select answers to more than fifty questions from menus providing between four and nineteen options. Some of the potential multiple choice answers are innocuous; some are sexually suggestive. In the subsequent

essay section, participants answer up to eighteen additional questions, including "anything that the questionnaire didn't cover." Matchmaker policies prohibit members from posting last names, addresses, phone numbers or e-mail addresses within a profile. Matchmaker reviews photos for impropriety before posting them but does not review the profiles themselves, relying instead upon participants to adhere to the service guidelines.

On October 23, 1999, an unknown person using a computer in Berlin posted a "trial" personal profile of Christianne Carafano in the Los Angeles section of Matchmaker. (New members were permitted to post "trial" profiles for a few weeks without paying.) The posting was without the knowledge, consent or permission of Carafano. The profile was listed under the identifier "Chase529."

Carafano is a popular actress. Under the stage name of Chase Masterson, Carafano has appeared in numerous films and television shows, such as "Star Trek: Deep Space Nine," and "General Hospital." Pictures of the actress are widely available on the Internet. Along with fairly innocuous responses to questions about interests and appearance, the person posting the profile selected "Playboy/ Playgirl" for "main source of current events" and "looking for a one-night stand" for "why did you call." In addition, the open-ended essay responses indicated that "Chase529" was looking for a "hard and dominant" man with "a strong sexual appetite" and that she "liked sort of being controlled by a man, in and out of bed." The profile text did not include a last name for "Chase" or indicate Carafano's real name, but it listed two of her movies and included pictures of the actress.

In response to a question about the "part of the LA area" in which she lived, the profile provided Carafano's home address. The profile included a contact e-mail address which, when contacted, produced an automatic e-mail reply stating, "You think you are the right one? Proof it !!" [sic], and providing Carafano's home address and telephone number.

Unaware of the improper posting, Carafano soon began to receive messages responding to the profile. Although she was traveling at the time, she checked her voicemail on October 31 and heard two sexually explicit messages. When she returned to her home on November 4, she found a highly threatening and sexually explicit fax that also threatened her son. Alarmed, she contacted the police. As a result of the profile, she also received numerous phone calls, voicemail messages, written correspondence, and e-mail from fans through her professional e-mail account. Several men expressed concern that she had given out her address and phone number (but simultaneously expressed an interest in meeting her). Carafano felt unsafe in her home, and she and her son stayed in hotels or away from Los Angeles for several months.

Sometime around Saturday, November 6, Siouxfan Perry, who handled Carafano's professional website and much of her e-mail correspondence, first learned of the false profile. Perry visited the Matchmaker site, and relayed information about the profile to Carafano. Acting on Carafano's instructions, Perry contacted Matchmaker and demanded that the profile be removed immediately. The Matchmaker employee indicated that she could not remove the profile immediately because Perry had not posted it, but the company blocked the profile from public view on November 8. The following morning, Matchmaker deleted the profile.

Carafano filed a complaint against Matchmaker alleging invasion of privacy, misappropriation of the right of publicity, defamation, and negligence. The district court rejected

Matchmaker's argument for immunity under 47 U.S.C. § 230(c)(1) after finding that the company provided part of the profile content.

II

The dispositive question in this appeal is whether Carafano's claims are barred by 47 U.S.C. § 230(c)(1). Through this provision, Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party. As a result, Internet publishers are treated differently from corresponding publishers in print, television and radio.

Courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of "interactive computer service" and a relatively restrictive definition of "information content provider." Under the statutory scheme, an "interactive computer service" qualifies for immunity so long as it does not also function as an "information content provider" for the portion of the statement or publication at issue.

We recently considered whether § 230(c) provided immunity to the operator of an electronic newsletter who selected and published an allegedly defamatory e-mail over the Internet. *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003). We held that the online newsletter qualified as an "interactive computer service" under the statutory definition and that the selection for publication and editing of an e-mail did not constitute partial "creation or development" of that information within the definition of "information content provider." The *Batzel* decision joined the consensus developing across other courts of appeals that § 230(c) provides broad immunity for publishing content provided primarily by third parties. *See Green v. America Online*, 318 F.3d 465, 470-71 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000). Under § 230(c), therefore, so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.

The fact that some of the content was formulated in response to Matchmaker's questionnaire does not alter this conclusion. Doubtless, the questionnaire facilitated the expression of information by individual users. However, the selection of the content was left exclusively to the user. The actual profile "information" consisted of the particular options chosen and the additional essay answers provided. Matchmaker was not responsible, even in part, for associating certain multiple choice responses with a set of physical characteristics, a group of essay answers, and a photograph. Matchmaker cannot be considered an "information content provider" under the statute because no profile has any content until a user actively creates it. The fact that Matchmaker classifies user characteristics into discrete categories and collects responses to specific essay questions does not transform Matchmaker into a "developer" of the "underlying misinformation."

We also note that Matchmaker's decision to structure the information provided by users allows the company to offer additional features, such as "matching" profiles with similar characteristics or highly structured searches based on combinations of multiple choice questions. Without standardized, easily encoded answers, Matchmaker might not be able to offer these services. Arguably, this promotes the expressed Congressional policy "to promote the continued development of the Internet and other interactive computer services." 47 U.S.C. § 230(b)(1).

Carafano responds that Matchmaker contributes much structure and content by asking 62 detailed questions and providing a menu of "preprepared responses." However, this is a distinction of degree rather than of kind, and Matchmaker still lacks responsibility for the "underlying misinformation."

Further, even assuming Matchmaker could be considered an information content provider, the statute precludes treatment as a publisher or speaker for "*any* information provided by *another* information content provider." 47 U.S.C. § 230(c)(1). The statute would still bar Carafano's claims unless Matchmaker created or developed the particular information at issue.

In this case, critical information about Carafano's home address, movie credits, and the e-mail address that revealed her phone number were transmitted unaltered to profile viewers. Similarly, the profile directly reproduced the most sexually suggestive comments in the essay section, none of which bore more than a tenuous relationship to the actual questions asked. Thus Matchmaker did not play a significant role in creating, developing or "transforming" the relevant information.

Thus, despite the serious and utterly deplorable consequences that occurred in this case, we conclude that Congress intended that service providers such as Matchmaker be afforded immunity from suit.

**FAIR HOUSING COUNCIL OF SAN FERNANDO
VALLEY v. ROOMMATES.COM, LLC**
521 F.3d 1157 (9th Cir. 2008) (en banc)

KOZINSKI, Chief Judge:

Defendant Roommate.com, LLC operates a website designed to match people renting out spare rooms with people looking for a place to live. At the time of the district court's disposition, Roommate's website featured 150,000 active listings and received around a million page views a day. Roommate seeks to profit by collecting revenue from advertisers and subscribers.

Before subscribers can search listings or post housing opportunities on Roommate's website, they must create profiles, a process that requires them to answer a series of questions. In addition to requesting basic information--such as name, location and email address--Roommate requires each subscriber to disclose his sex, sexual orientation and whether he would bring children to a household. Each subscriber must also describe his preferences in roommates with respect to the same three criteria: sex, sexual orientation and whether they will bring children to the household. The site also encourages subscribers to provide "Additional Comments" describing themselves and their desired roommate in an open-ended essay. After a new subscriber completes the application, Roommate assembles his answers into a "profile page." The profile page displays the subscriber's pseudonym, his description and his preferences, as divulged through answers to Roommate's questions.

The Fair Housing Councils of the San Fernando Valley and San Diego ("Councils") sued Roommate in federal court, alleging that Roommate's business violates the federal Fair Housing

Act ("FHA"), 42 U.S.C. § 3601 *et seq.*, and California housing discrimination laws. The district court held that Roommate is immune under section 230 of the CDA, 47 U.S.C. § 230(c), and dismissed the federal claims without considering whether Roommate's actions violated the FHA. The court then declined to exercise supplemental jurisdiction over the state law claims. Councils appeal the dismissal of the FHA claim.

Analysis

Section 230 of the CDA immunizes providers of interactive computer services¹ against liability arising from content created by third parties. 47 U.S.C. § 230(c). This grant of immunity applies only if the interactive computer service provider is not also an "information content provider," which is defined as someone who is "responsible, in whole or in part, for the creation or development of" the offending content. *Id.* § 230(f)(3).

A website operator can be both a service provider and a content provider: If it passively displays content that is created by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is "responsible, in whole or in part" for creating or developing, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays but be subject to liability for other content.

Section 230 was prompted by a state court case holding Prodigy responsible for a libelous message posted on one of its financial message boards. See *Stratton Oakmont v. Prodigy Servs. Co.* Under the reasoning of *Stratton Oakmont*, online service providers that voluntarily filter some messages become liable for all messages transmitted, whereas providers that bury their heads in the sand and ignore problematic posts altogether escape liability.

In passing section 230, Congress sought to spare interactive computer services this grim choice. In other words, Congress sought to immunize the *removal* of user-generated content, not the *creation* of content. Indeed, the section is titled "Protection for 'good samaritan' blocking and screening of offensive material."

With this backdrop in mind, we examine three specific functions performed by Roommate that are alleged to violate the Fair Housing Act and California law.

1. Councils first argue that the questions Roommate poses to prospective subscribers during the registration process violate the Fair Housing Act and the analogous California law. Councils allege that requiring subscribers to disclose their sex, family status and sexual orientation "indicates" an intent to discriminate against them, and thus runs afoul of the FHA and state law.

Roommate created the questions and choice of answers, and designed its website registration process around them. Therefore, Roommate is undoubtedly the "information content provider" as to the questions and can claim no immunity for posting them on its website, or for forcing subscribers to answer them as a condition of using its services.

Here, we must determine whether Roommate has immunity under the CDA because Councils have at least a plausible claim that Roommate violated state and federal law by merely

¹ Today, the most common interactive computer services are websites. Councils do not dispute that Roommate's website is an interactive computer service.

posing the questions. We need not decide whether any of Roommate's questions actually violate the Fair Housing Act or California law, or whether they are protected by the First Amendment or other constitutional guarantees; we leave those issues for the district court on remand. Rather, we examine the scope of plaintiffs' substantive claims only insofar as necessary to determine whether section 230 immunity applies. However, we note that asking questions certainly *can* violate the Fair Housing Act and analogous laws in the physical world. For example, a real estate broker may not inquire as to the race of a prospective buyer, and an employer may not inquire as to the religion of a prospective employee. If such questions are unlawful when posed face-to-face or by telephone, they don't magically become lawful when asked electronically online. The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet.²

The CDA does not grant immunity for inducing third parties to express illegal preferences. Roommate's own acts--posting the questionnaire and requiring answers to it--are entirely its doing and thus section 230 of the CDA does not apply to them. Roommate is entitled to no immunity.

2. Councils also charge that Roommate's development and display of subscribers' discriminatory preferences is unlawful. Roommate publishes a "profile page" for each subscriber on its website. The page describes the client's personal information--such as his sex, sexual orientation and whether he has children--as well as the attributes of the housing situation he seeks. The content of these pages is drawn directly from the registration process: For example, Roommate requires subscribers to specify, using a drop-down menu provided by Roommate, whether they are "Male" or "Female" and then displays that information on the profile page. Roommate also requires subscribers who are listing available housing to disclose whether there are currently "Straight male(s)," "Gay male(s)," "Straight female(s)" or "Lesbian(s)" living in the dwelling. Subscribers who are seeking housing must make a selection from a drop-down menu, again provided by Roommate, to indicate whether they are willing to live with "Straight or gay" males, only with "Straight" males, only with "Gay" males or with "No males." Similarly, Roommate requires subscribers listing housing to disclose whether there are "Children present" or "Children not present" and requires housing seekers to say "I will live with children" or "I will not live with children." Roommate then displays these answers, along with other information, on the subscriber's profile page. This information is obviously included to help subscribers decide which housing opportunities to pursue and which to bypass. In addition, Roommate itself uses this information to channel subscribers away from listings where the individual offering housing has expressed preferences that aren't compatible with the subscriber's answers.

The dissent tilts at windmills when it shows, quite convincingly, that Roommate's *subscribers* are information content providers who create the profiles by picking among options

² The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. Rather, it has become a dominant--perhaps the preeminent--means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.

and providing their own answers. There is no disagreement on this point. But, the fact that users are information content providers does not preclude Roommate from *also* being an information content provider by helping "develop" at least "in part" the information in the profiles. The party responsible for putting information online may be subject to liability, even if the information originated with a user.

Here, the 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, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information. And section 230 provides immunity only if the interactive computer service does not "creat[e] or develop[]" the information "in whole or in part." *See* 47 U.S.C. § 230(f)(3).

Our dissenting colleague takes a much narrower view of what it means to "develop" information online, and concludes that Roommate does not develop the information because "[a]ll Roommate does is to provide a form with options for standardized answers." But Roommate does much more than provide options. To begin with, it asks discriminatory questions that even the dissent grudgingly admits are not entitled to CDA immunity. Not only does Roommate ask these questions, Roommate makes answering the discriminatory questions a condition of doing business. When a business enterprise extracts such information from potential customers as a condition of accepting them as clients, it is no stretch to say that the enterprise is responsible, at least in part, for developing that information. For the dissent to claim that the information in such circumstances is "created solely by" the customer, and that the business has not helped in the least to develop it, strains both credulity and English.³

Roommate also argues that it is not responsible for the information on the profile page because it is each subscriber's action that leads to publication of his particular profile--in other words, the user pushes the last button or takes the last act before publication. We are not convinced that this is even true, but don't see why it matters anyway. The projectionist in the theater may push the last button before a film is displayed on the screen, but surely this doesn't make him the sole producer of the movie. By any reasonable use of the English language, Roommate is "responsible" at least "in part" for each subscriber's profile page, because every such page is a collaborative effort between Roommate and the subscriber.

³ The dissent spends some time explaining that certain portions of the user profile application are voluntary. We do not discuss these because plaintiffs do not base their claims on the voluntary portions of the application, except the "Additional Comments" portion, discussed below. The dissent also soft-pedals Roommate's influence on the mandatory portions of the applications by referring to it with such words as "encourage" or "encouragement" or "solicitation." Roommate, of course, does much more than encourage or solicit; it forces users to answer certain questions and thereby provide information that other clients can use to discriminate unlawfully.

Similarly, Roommate is not entitled to CDA immunity for the operation of its search system, which filters listings, or of its email notification system, which directs emails to subscribers according to discriminatory criteria. Roommate designed its search system so it would steer users based on the preferences and personal characteristics that Roommate itself forces subscribers to disclose. If Roommate has no immunity for asking the discriminatory questions, as we concluded above, it can certainly have no immunity for using the answers to the unlawful questions to limit who has access to housing.

Roommate's search function is designed to steer users based on discriminatory criteria. Roommate's search engine thus differs materially from generic search engines such as Google, Yahoo! and MSN Live Search, in that Roommate designed its system to use allegedly unlawful criteria so as to limit the results of each search, and to force users to participate in its discriminatory process. In other words, Councils allege that Roommate's search is designed to make it more difficult or impossible for individuals with certain protected characteristics to find housing--something the law prohibits. By contrast, ordinary search engines do not use unlawful criteria to limit the scope of searches conducted on them, nor are they designed to achieve illegal ends--as Roommate's search function is alleged to do here. Therefore, such search engines play no part in the "development" of any unlawful searches.

It's true that the broadest sense of the term "develop" could include the functions of an ordinary search engine--indeed, just about any function performed by a website. But to read the term so broadly would defeat the purposes of section 230 by swallowing up every bit of the immunity that the section otherwise provides. At the same time, reading the exception for co-developers as applying only to content that originates entirely with the website--as the dissent would seem to suggest--ignores the words "development . . . in part" in the statutory passage "*creation or development in whole or in part.*" 47 U.S.C. § 230(f)(3). We believe that both the immunity for passive conduits and the exception for co-developers must be given their proper scope and, to that end, we interpret the term "development" as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness.

In an abundance of caution, and to avoid the kind of misunderstanding the dissent seems to encourage, we offer a few examples to elucidate what does and does not amount to "development" under section 230 of the Communications Decency Act: If an individual uses an ordinary search engine to query for a "white roommate," the search engine has not contributed to any alleged unlawfulness in the individual's conduct; providing *neutral* tools to carry out what may be unlawful or illicit searches does not amount to "development" for purposes of the immunity exception. Similarly, a housing website that allows users to specify whether they will or will not receive emails by means of *user-defined* criteria might help some users exclude email from other users of a particular race or sex. However, that website would be immune, so long as it does not require the use of discriminatory criteria. A website operator who edits user-created content retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner that contributes to the alleged illegality--such as by removing the word "not" from a user's message reading "[Name] did *not* steal the artwork" in order to transform an innocent message into a libelous one--is directly involved in the alleged illegality and thus not immune.

Here, Roommate's connection to the discriminatory filtering process is direct and palpable: Roommate designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and presence of children. Roommate selected the criteria used to hide listings, and Councils allege that the act of hiding certain listings is itself unlawful under the Fair Housing Act. We need not decide the merits of Councils' claim to hold that Roommate is sufficiently involved with the design and operation of the search and email systems--which are engineered to limit access to housing on the basis of the protected characteristics elicited by the registration process--so as to forfeit any immunity to which it was otherwise entitled.

Roommate's situation stands in stark contrast to *Stratton Oakmont*, the case Congress sought to reverse through passage of section 230. There, defendant Prodigy was held liable for a user's unsolicited message because it attempted to *remove* some problematic content from its website, but didn't remove enough. Here, Roommate is not being sued for removing some harmful messages while failing to remove others; instead, it is being sued for the predictable consequences of creating a website designed to solicit and enforce housing preferences that are alleged to be illegal.

We take this opportunity to clarify the reasoning undergirding our holding in *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003), as we used language there that was unduly broad. In *Carafano*, we correctly held that the website was immune, but incorrectly suggested that it could never be liable because "no [dating] profile has any content until a user actively creates it." As we explain above, 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. Providing immunity every time a website uses data initially obtained from third parties would eviscerate the exception to section 230 for "develop[ing]" unlawful content "in whole or in part."

We believe a more plausible rationale for the unquestionably correct result in *Carafano* is this: The 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 the website operator. To be sure, the website provided neutral tools, which the anonymous dastard used to publish the libel, but the website did absolutely nothing to encourage the posting of defamatory content. The claim against the website was, in effect, that it failed to review each user-created profile to ensure that it wasn't defamatory. That is precisely the kind of activity for which Congress intended to grant absolution with the passage of section 230.

By contrast, Roommate both elicits the allegedly illegal content and makes aggressive use of it in conducting its business. Roommate does not merely provide a framework that could be utilized for proper or improper purposes; rather, Roommate's work in developing the discriminatory questions, discriminatory answers and discriminatory search mechanism is directly related to the alleged illegality of the site. Unlike *Carafano*, where the website operator had nothing to do with the user's decision to enter a celebrity's name and personal information in an otherwise licit dating service, here, Roommate is directly involved with developing and enforcing a system that subjects subscribers to allegedly discriminatory housing practices.

The salient fact in *Carafano* was that the website's classifications of user characteristics did absolutely nothing to enhance the defamatory sting of the message, to encourage defamation or to make defamation easier: The site provided neutral tools specifically designed to match

romantic partners depending on their voluntary inputs. By sharp contrast, Roommate's website is designed to force subscribers to divulge protected characteristics and discriminatory preferences, and to match those who have rooms with those who are looking for rooms based on criteria that appear to be prohibited by the FHA.

3. Councils finally argue that Roommate should be held liable for the discriminatory statements displayed in the "Additional Comments" section of profile pages. At the end of the registration process, the subscriber is presented with a blank text box, in which he can type as much or as little about himself as he wishes.

Roommate publishes these comments as written. It does not provide any specific guidance as to what the essay should contain, nor does it urge subscribers to input discriminatory preferences. Roommate is not responsible, in whole or in part, for the development of this content, which comes entirely from subscribers and is passively displayed by Roommate. This is precisely the kind of situation for which section 230 was designed to provide immunity.

We must keep firmly in mind that this is an immunity statute we are expounding, a provision enacted to protect websites against the evil of liability for failure to remove offensive content. Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged--or at least tacitly assented to--the illegality of third parties. Where it is very clear that the website directly participates in developing the alleged illegality--as it is clear here with respect to Roommate's questions, answers and the resulting profile pages--immunity will be lost. But in cases of enhancement by implication or development by inference--such as with respect to the "Additional Comments" here--section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.

In light of our determination that the CDA does not provide immunity to Roommate for all of the content of its website and email newsletters, we remand for the district court to determine whether the alleged actions for which Roommate is not immune violate the Fair Housing Act.

McKEOWN, Circuit Judge, with whom RYMER and BEA, Circuit Judges, join, concurring in part and dissenting in part:

With more than 1.3 billion Internet users and over 158 million websites in existence, the question of webhost liability is a significant one. The majority's unprecedented expansion of liability for Internet service providers threatens to chill the robust development of the Internet that Congress envisioned. The majority condemns Roommate's "search system," a function that is the heart of interactive service providers. By exposing every interactive service provider to liability for sorting, searching, and utilizing the all too familiar drop-down menus, the majority has dramatically altered the landscape of Internet liability. Instead of the "robust" immunity envisioned by Congress, interactive service providers are left scratching their heads and wondering where immunity ends and liability begins.

To be sure, the statute is not a perfect match against today's technology. The Web 2.0 version

is a far cry from web technology in the mid-1990s. Nonetheless, the basic message from Congress has retained its traction, and there should be a high bar to liability for organizing and searching third-party information. The bipartisan view in Congress was that the Internet, as a new form of communication, should not be impeded by the transference of regulations and principles developed from traditional modes of communication.

In the end, the majority offers interactive computer service providers no bright lines and little comfort in finding a home within § 230(c)(1). I respectfully part company with the majority as to Part 2 of the opinion because the majority has misconstrued the statutory protection under the CDA for Roommate's publishing and sorting of user profiles. The plain language and structure of the CDA unambiguously demonstrate that Congress intended these activities--the collection, organizing, analyzing, searching, and transmitting of third-party content--to be beyond the scope of traditional publisher liability. The majority's decision, which sets us apart from five circuits, contravenes congressional intent and violates the spirit and serendipity of the Internet.

Specifically, the majority's analysis is flawed for three reasons: (1) the opinion conflates the questions of liability under the FHA and immunity under the CDA; (2) the majority rewrites the statute with its definition of "information content provider," labels the search function "information development," and strips interactive service providers of immunity; and (3) the majority's approach undermines the purpose of § 230(c)(1) and has far-reaching practical consequences in the Internet world.

To begin, it is important to recognize what this appeal is not about. At this stage, there has been no determination of liability under the FHA. In dissenting, I do not condone housing discrimination; I simply underscore that the merits of the FHA claim are not before us.

The entire opinion links Roommate's ostensibly reprehensible conduct (and that of its users) with an unprecedented interpretation of the CDA's immunity provision. The majority condemns Roommate for soliciting illegal content, but there has been no determination that Roommate's questions or standardized answers are illegal. Instead of foreshadowing a ruling on the FHA, the opinion should be confined to the issue before us--application of § 230(c)(1) to Roommate. The district court has not yet ruled on the merits of the FHA claim and neither should we.

Application of § 230(c)(1) to Roommate's Website

Because our focus is on the term "information content provider," and what it means to create or develop information, it is worth detailing exactly how the website operates, what information is at issue and who provides it.

To become a member of Roommates.com, a user must complete a personal profile by selecting answers from dropdown menus or checking off boxes on the screen. The profile includes "location" information; details about the residence, and the "rental details." The last section of the profile is the "Household Description" section, which includes the total number of occupants in the home, their age range, gender, occupation, level of cleanliness, whether they are smokers, and whether children or pets are present.

The remaining sections of the registration process are completely optional; a user who skips them has created a profile based on the information already provided. At his option, the user may select an emoticon to describe the "household character," and may upload images of the room or

residence. Next, users may, at their option, specify characteristics desired in a potential roommate. If nothing is selected, all options are included. The final step in the registration process, which is also optional, is the "Comments" section.

Users may choose an optional "custom search" of user profiles based on criteria that they specify, like the amount of monthly rent or distance from a preferred city. Based on the information provided by users during the registration process, Roommate's automated system then searches and matches potential roommates.

Roommate's users are "information content providers" because they are responsible for creating the information in their user profiles and, at their option -- not the website's choice -- in expressing preferences as to roommate characteristics. The critical question is whether Roommate is itself an "information content provider," such that it cannot claim that the information at issue was "provided by another information content provider." A close reading of the statute leads to the conclusion that Roommate is not an information content provider for two reasons: (1) providing a drop-down menu does not constitute "creating" or "developing" information; and (2) the structure and text of the statute make plain that Congress intended to immunize Roommate's sorting, displaying, and transmitting of third-party information.

Roommate neither "creates" nor "develops" the information that is challenged by the Councils, i.e., the information provided by the users as to their protected characteristics and the preferences expressed as to roommate characteristics. All Roommate does is to provide a form with options for standardized answers. Listing categories such as geographic location, cleanliness, gender and number of occupants, and transmitting to users profiles of other users whose expressed information matches their expressed preferences, can hardly be said to be creating or developing information. Even adding standardized options does not "develop" information. Roommate, with its prompts, is merely "selecting material for publication," which we have stated does not constitute the "development" of information. The profile is created solely by the user. Indeed, without user participation, there is no information at all. The drop-down menu is simply a pre-categorization of user information before the electronic sorting and displaying that takes place via an algorithm. If a user has identified herself as a non-smoker and another has expressed a preference for a non-smoking roommate, Roommate's sorting and matching of user information are no different than that performed by a generic search engine.

Displaying the prompt "Gender" and offering the list of choices, "Straight male; Gay male; Straight female; Gay female" does not develop the information, "I am a Gay male." The user has identified himself as such and provided that information to Roommate to publish. Thus, the user is the sole creator of that information; no "development" has occurred. In the same vein, presenting the user with a "Preferences" section and drop-down menus of options does not "develop" a user's preference for a non-smoking roommate.

The thrust of the majority's proclamation that Roommate is "developing" the information that it publishes, sorts, and transmits is as follows: "[W]e interpret the term 'development' as referring not merely to augmenting the content generally, but to materially contributing to its unlawfulness." This definition springs forth untethered to anything in the statute.

The majority's definition of "development" epitomizes its consistent collapse of substantive liability with the issue of immunity. The majority's immunity analysis is built on substantive

liability: to the majority, CDA immunity depends on whether a webhost materially contributed to the unlawfulness of the information. Whether the information at issue is unlawful and whether the webhost has contributed to its unlawfulness are issues analytically independent of the determination of immunity. Grasping at straws to distinguish Roommate from other interactive websites such as Google and Yahoo!, the majority repeatedly gestures to Roommate's potential substantive liability as sufficient reason to disturb its immunity. But our task is to determine whether the question of substantive liability may be reached in the first place.

The irony is that the majority would have us determine "guilt" or liability in order to decide whether immunity is available. This upside-down approach would knock out even the narrowest immunity offered under § 230(c) -- immunity for defamation as a publisher or speaker.

Another flaw in the majority's approach is that it fails to account for all of the other information allegedly developed by the webhost. For purposes of determining whether Roommate is an information content provider vis-a-vis the profiles, the inquiry about geography and the inquiry about gender should stand on the same footing. Both are single word prompts followed by a drop-down menu of options. If a prompt about gender constitutes development, then so too does the prompt about geography. And therein lies the rub.

Millions of websites use prompts and drop-down menus. Inquiries range from what credit card you want to use and consumer satisfaction surveys asking about age, sex and household income, to dating sites, e.g., match.com, sites lambasting corporate practices, e.g., ripoffreports.com, and sites that allow truckers to link up with available loads, e.g., getloaded.com. Some of these sites are innocuous while others may not be. Some may solicit illegal information; others may not. But that is not the point. The majority's definition of "development" would transform every interactive site into an information content provider and the result would render illusory any immunity under § 230(c).

For example, the majority purports to carve out a place for Google and other search engines. But the modern Google is more than a match engine: it ranks search results, provides prompts beyond what the user enters, and answers questions. In contrast, Roommate is a straight match service that searches information and criteria provided by the user, not Roommate. It should be afforded no less protection than Google, Yahoo!, or other search engines.

The majority then argues that "providing *neutral* tools to carry out what may be unlawful or illicit searches does not amount to 'development.'" But this effort to distinguish Google, Yahoo!, and other search engines from Roommate is unavailing. Under the majority's definition of "development," these search engines are equivalent to Roommate. Google "encourages" or "contributes" (the majority's catch phrases) to the unlawfulness by offering search tools that allow the user to perform an allegedly unlawful match. If a user types into Google's search box, "looking for a single, Christian, female roommate," and Google displays responsive listings, Google is surely "materially contributing to the alleged unlawfulness" of information created by third parties, by publishing their intention to discriminate on the basis of protected characteristics. In the defamation arena, a webhost's publication of a defamatory statement "materially contributes" to its unlawfulness, as publication to third parties is an element of the offense. At bottom, the majority's definition of "development" can be tucked in, let out, or hemmed up to fit almost any search engine, creating tremendous uncertainty in an area where

Congress expected predictability.

Because the statute does not define "development," we should give the term its ordinary meaning. "Development" is defined in Webster's Dictionary as a "gradual advance or growth through progressive changes." Defining "development" in this way keeps intact the settled rule that the CDA immunizes a webhost who exercises a publisher's "traditional editorial functions -- such as deciding whether to publish, withdraw, post-pone, or alter content."

Applying the plain meaning of "development" to Roommate's sorting and transmitting of third-party information demonstrates that it was not transformed into an "information content provider." In searching, sorting, and transmitting information, Roommate made no changes to the information provided to it by users.

The majority blusters that Roommate develops information, because it "requir[es] subscribers to provide the information as a condition of accessing its services," and "designed its search system so it would steer users based on the preferences and personal characteristics that Roommate itself forces subscribers to disclose." That Roommate requires users to answer a set of prompts to identify characteristics about themselves does not change the fact that the users have furnished this information to Roommate for Roommate to publish in their profiles. Nor do Roommate's prompts alter the fact that users have chosen to select characteristics that they find desirable in potential roommates, and have directed Roommate to search and compile results responsive to their requests. Moreover, tagging Roommate with liability for the design of its search system is dangerous precedent for analyzing future Internet cases.

Even if Roommate's prompts and drop-down menus could be construed to seek out, or encourage, information from users, the CDA does not withhold immunity for the encouragement or solicitation of information. The CDA does not countenance an exception for the solicitation or encouragement of information provided by users.

Carafano presented circumstances virtually indistinguishable from those before us, yet the majority comes to the exact opposite conclusion here in denying immunity for sorting and matching third-party information provided in response to webhost prompts. The website in *Carafano* asked its users sixty-two detailed questions and matched users according to their responses. We held that § 230(c)(1) immunized the dating service, and flatly rejected the proposition that matching, sorting, and publishing user information in response to webhost prompts abrogated CDA immunity. Now the majority narrows *Carafano* on the basis that Matchmaker did not prompt the allegedly libelous information that was provided by a third party. But the majority makes this distinction without *any* language in the statute supporting the consideration of the webhost's prompting or solicitation.

The structure of the statute also supports my view that Congress intended to immunize Roommate's sorting and publishing of user profiles. An "interactive computer service" is defined to include an "access software provider." § 230(f)(2). The statute defines an "access software provider" as one that provides "enabling tools" to "filter," "screen," "pick," "choose," "analyze," "digest," "search," "forward," "organize," and "reorganize" content. § 230(f)(4)(A)-(C).

By providing a definition for "access software provider" that is distinct from the definition of an "information content provider," and withholding immunity for "information content providers," the statute makes resoundingly clear that packaging, sorting, or publishing third-

party information are not the kind of activities that Congress associated with "information content providers." Yet these activities describe exactly what Roommate does: Roommate "receives," "filters," "digests," and "analyzes" the information provided by users in response to its registration prompts, and then "transmits," "organizes," and "forwards" that information to users in the form of uniformly organized profiles. Roommate is performing tasks that Congress recognized as typical of entities that it intended to immunize.

At a minimum, the CDA protects the search criteria employed by websites and does not equate tools that "filter," "screen," "pick," "choose," "analyze," "digest," "search," "forward," "organize," and "reorganize" with the "creation or development" of information.

Ramifications of the Majority Opinion

I am troubled by the consequences that the majority's conclusion poses for the ever-expanding Internet community.

Significantly, § 230(e) expressly exempts from its scope certain areas of law, such as intellectual property law and federal criminal laws. Notably, the CDA does not exempt the FHA and a host of other federal statutes from its scope. The absence of a statutory exemption suggests that Congress did not intend to provide special case status to the FHA.

Anticipating the morphing of the Internet and the limits of creative genius and entrepreneurship that fuel its development is virtually impossible. However, Congress explicitly drafted the law to permit this unfettered development. Had Congress discovered that, over time, courts across the country have created more expansive immunity than it originally envisioned under the CDA, Congress could have amended the law. But it has not.

The consequences of the majority's interpretation are far-reaching. To the extent the majority strips immunity because of sorting, channeling, and categorizing functions, it guts the heart of § 230(c)(1) immunity. Countless websites operate just like Roommate. These sites, and their attendant display, search, and inquiry tools, are an indispensable part of the Internet. Putting a lid on the sorting and searching functions of interactive websites stifles the core of their services.

To the extent the majority strips immunity because the information or query may be illegal under some law, this circumstance puts the webhost in the role of a policeman for the laws of the fifty states and the federal system. The burden of filtering content would be unfathomable.

To the extent the majority strips immunity because a site solicits content, the result is a direct restriction on the free exchange of ideas and information on the Internet. Online news organization routinely solicit third-party information. Were the websites to face host liability for this content, "vast quantities of valuable information be eliminated from websites."

To the extent the majority strips immunity because a website "materially contributed" to the content or output of a website by "specialization" of content, this approach would essentially swallow the immunity provision. The combination of solicitation, sorting, and potential for liability would put virtually every interactive website in this category. Having a website directed to Christians, Muslims, gays, disabled veterans, or childless couples could land the website provider in hot water.

Because the decision today will ripple through the billions of web pages already online, and

the countless pages to come in the future, I would take a cautious, careful, and precise approach to the restriction of immunity, not the broad swath cut by the majority. I respectfully dissent and would affirm the district court's judgment that Roommate is entitled to immunity under § 230(c)(1) of the CDA, subject to examination of whether the bare inquiry itself is unlawful.

Subsequent History: Despite having lost on its claim that it was immune from liability under Section 230, Roommate.com was ultimately victorious in the suit filed against it. This occurred because the Ninth Circuit determined, on the merits of the housing discrimination claim, that neither the Federal Fair Housing Act nor the California Fair Employment and Housing Act applied to the selection of roommates. According to the court: "Because precluding individuals from selecting roommates based on their sex, sexual orientation and familial status raises substantial constitutional concerns, we interpret the FHA and FEHA as not applying to the sharing of living units. Therefore, we hold that Roommate's prompting, sorting and publishing of information to facilitate roommate selection is not forbidden by the FHA or FEHA."

BARNES v. YAHOO!, INC.
570 F.3d 1096 (9th Cir. 2009)

O'SCANNLAIN, Circuit Judge:

In late 2004, Cecilia Barnes broke off a lengthy relationship with her boyfriend. He responded by posting profiles of Barnes on a website run by Yahoo!, Inc.

Barnes did not authorize her now former boyfriend to post the profiles. The profiles contained nude photographs of Barnes and her boyfriend, taken without her knowledge, and some kind of open solicitation, whether express or implied is unclear, to engage in sexual intercourse. The ex-boyfriend then conducted discussions in Yahoo's online "chat rooms," posing as Barnes and directing male correspondents to the fraudulent profiles he had created. The profiles also included the addresses, real and electronic, and telephone number at Barnes' place of employment. Before long, men whom Barnes did not know were peppering her office with emails, phone calls, and personal visits, all in the expectation of sex.

In accordance with Yahoo policy, Barnes mailed Yahoo a copy of her photo ID and a signed statement denying her involvement with the profiles and requesting their removal. One month later, Yahoo had not responded but the undesired advances continued; Barnes again asked Yahoo by mail to remove the profiles. Nothing happened. The following month, Barnes sent Yahoo two more mailings. During the same period, a local news program was preparing to broadcast a report on the incident. A day before the air date, Yahoo broke its silence; its Director of Communications, a Ms. Osako, called Barnes and asked her to fax the previous statements she had mailed. Ms. Osako told Barnes that she would "personally walk the statements over to the division responsible for stopping unauthorized profiles and they would take care of it." Barnes claims to have relied on this statement and took no further action regarding the profiles. Approximately two months passed without word from Yahoo, at which point Barnes filed this lawsuit against Yahoo. Shortly thereafter, the profiles disappeared from Yahoo's website.

Barnes' complaint against Yahoo is somewhat unclear, but it appears to allege two causes of

action under Oregon law. First, the complaint suggests a tort for the negligent provision or non-provision of services which Yahoo undertook to provide. For the sake of brevity, we refer to this tort as a "negligent undertaking." Barnes also refers in her complaint to Yahoo's "promise" to remove the indecent profiles and her reliance thereon to her detriment. We construe such references to allege a cause of action under section 90 of the Restatement (Second) of Contracts.

After Yahoo removed the action to federal court, it moved to dismiss the complaint. Yahoo contended that section 230(c)(1) of the Communications Decency Act renders it immune from liability.

Section 230, also known as the Cox-Wyden Amendment ("the Amendment"), begins with a statement of policy. The statute is designed at once "to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material." *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

Though we keep these goals in mind, we must closely hew to the text of the statutory bar on liability in construing its extent. Section 230(c) has two parts. Yahoo relies exclusively on the first part, which bars courts from treating certain internet service providers as publishers or speakers. Looking at the text, it appears clear that neither this subsection nor any other declares a general immunity from liability deriving from third-party content, as Yahoo argues it does. "Subsection (c)(1) does not mention 'immunity' or any synonym." Our recent *en banc* decision in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, rested not on broad statements of immunity but rather on a careful exegesis of the statutory language.

Following this approach, one notices that subsection (c)(1) precludes liability only by means of a definition. "No provider or user of an interactive computer service," it says, "*shall be treated* as the publisher or speaker of any information provided by another information content provider." Subsection 230(e)(3) makes explicit the relevance of this definition, for it cautions 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." Bringing these two subsections together, it appears that subsection (c)(1) only protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.

Barnes did not contest that Yahoo is a provider of an interactive computer service, and we have no trouble concluding that it qualifies as one. Nor is there any dispute that the "information content" at issue was provided by another "information content provider." The flashpoint in this case is the meaning of the "publisher or speaker" part of subsection (c)(1).

The question before us is how to determine when, for purposes of this statute, a plaintiff's theory of liability would treat a defendant as a publisher or speaker of third-party content.

The cause of action most frequently associated with section 230 is defamation. This is not surprising because Congress enacted the Amendment in part to respond to a New York decision, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, which held that an internet service provider could be liable for defamation. But the language of the statute does not limit its application to defamation cases. Indeed, many causes of action might be premised on the publication of what one might call "information content." A provider of information services might get sued for violating anti-discrimination laws, for fraud, negligent misrepresentation, and ordinary

negligence, or even for negligent publication of advertisements that cause harm to third parties. Thus, what matters is not the name of the cause of action--defamation versus negligence--what matters is whether the cause of action inherently requires the court to treat the defendant as the "publisher or speaker" of content provided by another. To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a "publisher or speaker." If it does, section 230(c)(1) precludes liability.

Publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content. Thus, a publisher reviews material submitted for publication, perhaps edits it for style or technical fluency, and then decides whether to publish it. Which leads us to whether Barnes, in her negligent undertaking claim, seeks to treat Yahoo as a "publisher or speaker" of the indecent profiles in order to hold Yahoo liable.

The Oregon tort that Barnes claims Yahoo committed derives from section 323 of the Restatement (Second) of Torts, which states: One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Barnes argues that this tort claim would not treat Yahoo as a publisher. She points to her complaint, which acknowledges that although Yahoo "may have had no initial responsibility to act, once [Yahoo,] through its agent, undertook to act, [it] must do so reasonably." According to Barnes, this makes the undertaking, not the publishing or failure to withdraw from publication, the source of liability. Under this theory, Barnes' cause of action would evade the reach of section 230(c) entirely because it treats Yahoo not as a publisher, but rather as one who undertook to perform a service and did it negligently.

We are not persuaded. As we implied above, a plaintiff cannot sue someone for publishing third-party content simply by changing the name of the theory from defamation to negligence. Nor can he or she escape section 230(c) by labeling as a "negligent undertaking" an action that is quintessentially that of a publisher. The word "undertaking," after all, is meaningless without the following verb. That is, one does not merely undertake; one undertakes *to do* something. And what is the undertaking that Barnes alleges Yahoo failed to perform with due care? The removal of the indecent profiles that her former boyfriend posted on Yahoo's website. But removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove. In other words, the duty that Barnes claims Yahoo violated derives from Yahoo's conduct as a publisher--the steps it allegedly took, but later supposedly abandoned, to de-publish the offensive profiles. It is because such conduct is *publishing conduct* that we have insisted that section 230 protects from liability "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online."

Barnes argues that, even if subsection 230(c)(1) applies to this tort in a general sense, it does not cover her claim because she is suing Yahoo as a distributor, not as a publisher. This argument asks us to join an ongoing academic debate, which has developed in response to the

Fourth Circuit's *Zeran* opinion, on whether "publisher" in subsection 230(c)(1) means only "primary publisher" or both "primary publisher" and "distributor," also known as a "secondary publisher," for purposes of defamation liability.

In our view, we need not resolve the dispute at all, because it has little to do with the meaning of the statutory language. Section 230(c)(1) precludes courts from treating internet service providers as publishers not just for the purposes of defamation law, with its particular distinction between primary and secondary publishers, but in general. The statute does not mention defamation, and we decline to read the principles of defamation law into it.

Leaving no stone unturned, Barnes reminds us that the statutory purpose of the Amendment is to encourage websites affirmatively to police themselves, not to provide an excuse for doing nothing. This argument from statutory purpose has more force to it, because section 230(c) is, after all, captioned "Protection for 'good samaritan' blocking and screening of offensive material." It would indeed be strange for a provision so captioned to provide equal protection as between internet service providers who do nothing and those who attempt to block and screen offensive material.

A closer look at the whole of section 230(c), we believe, makes sense of this apparent contradiction. Subsection (c)(1), by itself, shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties. Subsection (c)(2), for its part, provides an additional shield from liability, but only for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene . . . or otherwise objectionable." Crucially, the persons who can take advantage of this liability are not merely those whom subsection (c)(1) already protects, but *any* provider of an interactive computer service. Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue, can take advantage of subsection (c)(2) if they act to restrict access to the content because they consider it obscene or otherwise objectionable. Additionally, subsection (c)(2) also protects Internet service providers from liability not for publishing or speaking, but rather for actions taken to restrict access to obscene or otherwise objectionable content.

Thus, we must reject Barnes' contention that it does violence to the statutory scheme to bar her suit for negligent undertaking. To summarize, we hold that section 230(c)(1) bars Barnes' claim, under Oregon law, for negligent provision of services that Yahoo undertook to provide. The district court properly granted Yahoo's motion to dismiss that cause of action.

Barnes' complaint could also be read to base liability on section 90 of the Restatement (Second) of Contracts, which describes a theory of recovery often known as promissory estoppel. Liability for breach of promise is different from liability for negligent undertaking. The "principal criteria" that determine "when action renders a promise enforceable" under this doctrine are: "(1) a promise[;] (2) which the promisor, as a reasonable person, could foresee would induce conduct of the kind which occurred[;] (3) actual reliance on the promise[;] (4) resulting in a substantial change in position."

In most states, including Oregon, "[p]romissory estoppel" is not a 'cause of action' in itself; rather it is a subset of recovery based on breach of contract and serves as a substitute for consideration." Thus, aside from consideration, ordinary contract principles usually apply. When

A sues B for breach of contract, A is alleging that B violated an obligation that B intended to be legally enforceable. In promissory estoppel cases, courts simply infer that intention not from consideration but from a promise that B could have foreseen would induce A's reliance.

Against this background, we inquire whether Barnes' theory of recovery under promissory estoppel would treat Yahoo as a "publisher or speaker" under the Act.

As we explained above, subsection 230(c)(1) precludes liability when the duty the plaintiff alleges the defendant violated derives from the defendant's status as a publisher or speaker. In a promissory estoppel case, as in any other contract case, the duty the defendant allegedly violated springs from a contract--an enforceable promise--not from any non-contractual conduct or capacity of the defendant. Barnes does not seek to hold Yahoo liable as a publisher of third-party content, but rather as the counter-party to a contract, as a promisor who has breached.

How does this analysis differ from our discussion of liability for the tort of negligent undertaking? After all, even if Yahoo did make a promise, it promised to take down third-party content from its website, which is quintessential publisher conduct, just as what Yahoo allegedly undertook to do consisted in publishing activity. The difference is that the various torts we referred to above each derive liability from behavior that is identical to publishing or speaking: publishing defamatory material; publishing material that inflicts emotional distress; or indeed attempting to de-publish hurtful material but doing it badly. To undertake a thing, within the meaning of the tort, *is* to do it.

Promising is different because it is not synonymous with the performance of the action promised. That is, whereas one cannot undertake to do something without simultaneously doing it, one can, and often does, promise to do something without actually doing it. Contract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication. Contract law treats the outwardly manifested intention to create an expectation on the part of another as a legally significant event. That event generates a legal duty distinct from the conduct at hand, be it the conduct of a publisher, of a doctor, or of an overzealous uncle.

Furthermore, a court cannot simply infer a promise from an attempt to de-publish. For, as a matter of contract law, the promise must "be as clear and well defined as a promise that could serve as an offer, or that otherwise might be sufficient to give rise to a traditional contract supported by consideration." Thus a general monitoring policy, or even an attempt to help a particular person, on the part of an interactive computer service does not suffice for contract liability. This makes it easy for Yahoo to avoid liability: it need only disclaim any intention to be bound.

Therefore, we conclude that, insofar as Barnes alleges a breach of contract claim under the theory of promissory estoppel, subsection 230(c)(1) of the Act does not preclude her cause of action. We do not reach the question whether Barnes has a viable contract claim or whether Yahoo has an affirmative defense under subsection 230(c)(2) of the Act.