

Immoral Immunity: Using a Totality of the Circumstances Approach To Narrow the Scope of Section 230 of the Communications Decency Act

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In an effort to remove the disincentives to self-regulation created by the decision in Stratton Oakmont, Inc. v. Prodigy Services Co., and to avoid the onslaught of litigation that would otherwise likely have ensued, Congress passed § 230 of the Communications Decency Act in 1996. With the tremendous and unforeseeable growth the internet experienced immediately thereafter, and continues to encounter today, what should have been a simple mechanism to allow innocent internet service providers (ISPs) to edit and delete content without fear of being charged as publishers has evolved into a relentlessly broad shield that protects contemptible conduct by ISPs who knowingly and purposefully encourage the posting of defamatory content. This Note argues that the original purpose of § 230 is continuously and unnecessarily abused by courts, which tend to interpret § 230 as providing a blanket immunity for ISPs, and that websites created specifically to induce or encourage tortious content should be prohibited from invoking such immunity. In the end, this Note concludes that a compromise could be reached by using a totality of the circumstances approach to determine when a website should be held liable for third-party content.

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INTRODUCTION

In 1996, when Congress promulgated § 230 of the Communications Decency Act (CDA)¹ to immunize internet service providers (ISPs) from liability for content created by a third party, there was no way to fathom the breadth of affairs it would grow to encompass. With the internet in its earliest stages of development, blogs, instant messaging, and social networking sites were merely seeds of ideas yet to blossom in the heads of technology developers around the world. While these innovations have undoubtedly eased communication and interaction, they have also

1. 47 U.S.C. § 230(c)(1) (2006).

been abused both in their use and in their creation. This Note examines the immunity courts have interpreted § 230 as providing, argues that websites created specifically to induce or encourage tortious content should be prohibited from invoking such immunity, and proposes that courts adopt a totality of the circumstances approach to determine when a website should be liable for third-party content.

Part I will explore the history of ISP liability and what led Congress to enact the CDA. Part II will consider the early interpretations of the CDA and uncover how courts have used § 230 to create immunity from liability for ISPs. Part III will review the relatively recent Ninth Circuit opinion in *Fair Housing Council v. Roommates.com, LLC*,² and its implications for future cases interpreting § 230. Additionally, this Part will apply a hypothetical posed in the opinion to two existing websites in order to demonstrate its possible use in future case law.

Part IV will present the application of the totality of the circumstances approach for determining when a website should be liable for tortious content posted by a third party. It will introduce various factors that courts may wish to consider when using the totality of the circumstances approach. This Part also will apply each factor to two hypothetical websites: one that would likely remain immune after the scope of § 230 is appropriately narrowed, and another that would be prohibited from invoking immunity under a narrower § 230.

I. BACKGROUND AND HISTORY OF 47 U.S.C. § 230

Congress enacted § 230 of the CDA in 1996, in an effort to foster free expression on the rapidly growing internet and to protect ISPs who chose to moderate their web forums from liability for third-party content.³ Specifically, Congress aimed to overturn the decision in *Stratton Oakmont, Inc. v. Prodigy Services Co.*⁴ and “any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”⁵ Though Congress’s initial objective may certainly have been legitimate, courts have interpreted § 230 as a blanket immunity that protects both ISPs who do not remove content they know to be tortious and those whose sole purpose is to solicit such tortious content.⁶

2. 521 F.3d 1157 (9th Cir. 2008) (en banc).

3. Anita Ramasastry, *Is an Online Encyclopedia, Such as Wikipedia, Immune from Libel Suits? Under Current Law, the Answer Is Most Likely Yes, but That Law Should Change*, FIND-LAW, Dec. 12, 2005, at 2–3, <http://writ.news.findlaw.com/ramasastry/20051212.html>.

4. 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995) (order granting partial summary judgment).

5. NTS AM. JUR. 2D *Computers and the Internet* § 62 (2006).

6. David L. Hudson Jr., *Taming the Gossipmongers*, A.B.A. J., July 1, 2008, at 2, available at

A. *STRATTON OAKMONT, INC. V. PRODIGY SERVICES CO.*

Prodigy Services' "Money Talk" message board provided the catalyst for the decision that spawned § 230 of the CDA. Prodigy hosted Money Talk, the top financial message board in the country at the time, on its popular computer network.⁷ An anonymous user posted statements on Money Talk alleging criminal and fraudulent behavior by Stratton Oakmont, Inc. ("Stratton") and Daniel Porush, Stratton's president.⁸ Originally, Prodigy advertised that it "exercised editorial control" over message board posts, but by the time the anonymous user posted these defamatory comments Prodigy had altered its policies.⁹ Nonetheless, Stratton alleged that Prodigy edited content on its message boards in a manner that rendered it a publisher for purposes of liability.¹⁰

The Supreme Court of Nassau County, New York heard the case to determine whether Prodigy exercised sufficient editorial control over the Money Talk message board to render it a publisher, thus imposing on it the same responsibilities as a newspaper.¹¹ The court found that Prodigy did in fact operate as a publisher, holding that "[b]y 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."¹² Though the court acknowledged that its decision might be preempted by the then-impending enactment of the CDA, it seemed more concerned with the "chilling effect" that content editing by a website operator may have on the freedom of communication on the internet.¹³ The concern about impeding free speech on the internet was shared by Congress, though its approach to remedying this concern was in stark contrast to the *Stratton Oakmont* decision.

B. SECTION 230: CONGRESS'S RESPONSE TO *STRATTON OAKMONT*

Both the House and the Senate intended § 230 of the CDA to overrule *Stratton Oakmont's* imposition of liability on ISPs who screen or edit libelous statements on their websites.¹⁴ Congress recognized that the internet presented an extraordinary opportunity for greater "availability

http://abajournal.com/magazine/taming_the_gossipmongers/.

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

8. *Id.*

9. *Id.* at *2.

10. *Id.*

11. *Id.* at *3.

12. *Id.* at *4 (citation omitted).

13. *Id.* at *5.

14. Robert D. Brownstone & Chad Woodford, *Web Sites' CDA § 230 Immunity: An Ever-Expanding Universe?*, PRIVACY & DATA PROTECTION LEGAL REP., Dec. 2006, at 1, available at http://www.fenwick.com/docstore/Publications/EIM/Deco6Privacy_website.pdf.

of educational and informational resources.”¹⁵ Moreover, Congress believed the internet could provide “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”¹⁶ Accordingly, when writing the statute, Congress aimed “to promote the continued development of the Internet” and “preserve the vibrant and competitive free market” that the internet created.¹⁷

Congress’s objection to the *Stratton Oakmont* decision appears most clearly in § 230(c) of the Act, the “Good Samaritan” subsection. This subsection 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.”¹⁸ Additionally, the Good Samaritan subsection creates a protection from liability for those who edit or remove “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable”¹⁹ content on their web pages, a protection that explicitly overrules the holding in *Stratton Oakmont*. Since Congress could not contemplate the wealth of blogs or anonymous message boards that would eventually invoke this immunity, the statute leaves much to be desired with regard to the limits of the protection from liability. This left open the opportunity for courts to interpret the statute very broadly, which would prove to have significant implications on privacy and reputation for future generations.

II. EARLY INTERPRETATIONS OF 47 U.S.C. § 230

Faced with the task of implementing Congress’s aims and determining ISP liability, the courts did in fact interpret the statute broadly, believing such an interpretation to be in line with the statute’s purpose of fostering free expression on the internet. The first court to address the issue was the Court of Appeals for the Fourth Circuit in *Zeran v. America Online, Inc.*²⁰ The plaintiff in *Zeran* received numerous threatening phone calls after someone created a post with *Zeran*’s name and contact information, selling offensive merchandise that exploited and mocked the tragic Oklahoma City bombing.²¹ Though *Zeran* alerted America Online (AOL) on multiple occasions over the course of a few days, AOL did not immediately remove the post and refused to monitor similar posts in the future.²²

15. 47 U.S.C. § 230(a)(1) (2006).

16. *Id.* § 230(a)(3).

17. *Id.* § 230(b)(1)–(2).

18. *Id.* § 230(c)(1).

19. *Id.* § 230(c)(2)(A).

20. 129 F.3d 327 (4th Cir. 1997).

21. *Id.* at 329.

22. *Id.*

The court held that the plain language of § 230 creates a “federal immunity” to lawsuits seeking to hold an ISP liable for information originating from a third party.²³ Therefore, suits where an ISP might be liable “for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content—are barred.”²⁴ The court believed this holding to be in line with Congress’s aims in promulgating § 230, stating: “Congress made a policy choice . . . 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.”²⁵ Yet by using the word “immunity” to describe the protection from liability § 230 conferred on ISPs, the *Zeran* court set a dangerous precedent that would come to encompass many more internet operators than Congress presumably intended to protect.

After the *Zeran* court construed § 230 as a grant of immunity, the critical issue for many courts became whether the defendant internet operator was an “interactive computer service”²⁶ to whom the immunity applied, or an “information content provider”²⁷ to whom it did not. In *Carafano v. Metrosplash.com, Inc.*, the court found that soliciting data through a questionnaire did not constitute “a significant role in creating, developing, or ‘transforming’ the relevant information.”²⁸ In that case, a man living in Berlin, Germany, created a fake Matchmaker.com profile for Carafano, a celebrity, which included her address and phone number.²⁹ After receiving numerous threatening and sexually harassing voicemails and faxes, Carafano contacted Matchmaker.com, who refused to immediately take down the profile.³⁰ The court found that Matchmaker.com was not an “information content provider,” but an “interactive computer service” that allows the public to post information on its website and thus did not incur liability for those posts.³¹

Courts utilized the holding in *Zeran* to require something more than passive communication or awareness of the posts to treat the ISP as an “information content provider.” Some courts required the plaintiff to demonstrate how the actions of the ISP constituted the development or creation of the information in question.³² Other courts were concerned

23. *Id.* at 330.

24. *Id.*

25. *Id.* at 330–31.

26. *See* 47 U.S.C. § 230(f)(2) (2006).

27. *See id.* § 230(f)(3).

28. 339 F.3d 1119, 1125 (9th Cir. 2003).

29. *Id.* at 1121.

30. *Id.* at 1121–22.

31. *Id.* at 1124.

32. *See* Ben Ezra, Weinstein & Co. v. Am. Online, Inc., 206 F.3d 980, 985 (10th Cir. 2000) (finding that the defendant’s communications with third parties did not “constitute the development or

with whether the defendant was a “publisher or speaker” under § 230(c)(1).³³ Even making minor alterations to the subject matter in question was held to be an insufficient provision of the content, since the term “[p]rovided” suggests, at least, some active role by the ‘provider’ in supplying the material to a ‘provider or user of an interactive computer service.’³⁴ Regardless of the precise approach, nearly every court that confronted the issue of ISP liability seemed to agree that “§ 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law.”³⁵

While the *Zeran* court’s finding of a “federal immunity” in the language of § 230 may be overly broad, these early holdings may have been necessary to comply with Congress’s stated aim of encouraging the internet’s growth and development. Had courts held any number of these prominent ISPs liable for third-party content, the internet may not have grown as large and as rapidly as it did. Companies like AOL have undoubtedly played a tremendous role in the growth and development of the internet, and if the government had stepped in and imposed liability on them for a third party’s abuse of the technology they created, many of these companies would probably have shut down. Even if the companies had managed to survive, it would have required such tremendous effort on their part to control and edit the growth that it would have been significantly impeded. Companies such as AOL, MySpace, and Craigslist have drastically changed and developed the internet’s landscape, and this development should be encouraged and rewarded rather than hindered and punished. Requiring companies of this magnitude and influence to act as both parents and police to those utilizing the technologies would deter such companies—and new companies formed in the same vein—from innovating, out of fear of liability for any abuse of the technology by a third party.

However, we are no longer in the early stages of the internet’s development. Congress created § 230 of the CDA based on a simplistic

creation of the stock quotation information”); *see also* *Hy Cite Corp. v. Badbusinessbureau.com L.L.C.*, 418 F. Supp. 2d 1142, 1148 (D. Ariz. 2005) (“[T]he pertinent question is whether users posting on Defendants’ website are the sole providers of the allegedly wrongful content, or whether Defendants can be considered to have created or developed any of the allegedly wrongful content posted on the . . . website.”).

33. *See Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (holding that since GTE is not a “publisher or speaker” as § 230(c)(1) uses those terms, it cannot be liable to those harmed by the third party’s offensive material); *see also* *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003) (“By its terms, § 230 provides immunity to America Online as a publisher or speaker of information originating from another information content provider.”).

34. *Batzel v. Smith*, 333 F.3d 1018, 1032 (9th Cir. 2003).

35. *GTE Corp.*, 347 F.3d at 660.

and utopian version of the internet, one whose “incentivizing structure optimistically presumes rational actors and a baseline of common decency.”³⁶ Congress was rightly concerned with protecting internet magnates like AOL from vicarious liability, and § 230 has certainly succeeded in such protection. The unfortunate result of this safety net, however, is that it now extends beyond legitimate companies to those who abuse its protection. Such internet operators model themselves as “interactive computer services” rather than “information content providers” by claiming they merely provide a forum for defamatory content, rather than actually creating the content themselves.³⁷ While they may refrain from actually creating the content, they nonetheless play a pivotal role in soliciting the defamatory material and should be significantly distinguished from true “interactive computer services” like AOL.

Recognizing this disparity and the complications it brings with regard to the immunity conferred by courts, more recent decisions have questioned the extent of the protection § 230 actually provides. In *Hy Cite Corp. v. Badbusinessbureau.com*, a seller of dinnerware and cookware brought suit against operators of a website called the “Rip-off Report” who allegedly posted false and defamatory consumer complaints.³⁸ The purpose of the Rip-off Report was to inform website visitors of complaints against particular companies.³⁹ The court found that the allegations against the defendants “arguably could support a finding that Defendants are ‘responsible . . . for the creation or development of information’ provided by individuals submitting Rip-off Reports in response to Defendants’ solicitation” and accordingly held that the defendants were not entitled to immunity under § 230.⁴⁰

Even when courts ultimately find that § 230’s protection from liability applies, they are careful to warn, in dicta, of the dangers of an overly broad conferral of such protection. As the court in *Chicago Lawyers’ Committee for Civil Rights Under Law v. Craigslist, Inc.* expressed: “Subsection (c)(1) does not mention ‘immunity’ or any synonym.”⁴¹ The *Chicago Lawyers’ Committee* court used the holding in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*⁴² to highlight the limited role of § 230(c)(1).⁴³ It also objected to interpreting § 230(c)(1) as

36. Brittan Heller, Note, *Of Legal Rights and Moral Wrongs: A Case Study of Internet Defamation*, 19 YALE J.L. & FEMINISM 279, 284 (2007).

37. See Hudson, *supra* note 6.

38. 418 F. Supp. 2d at 1144-45.

39. *Id.* at 1145.

40. *Id.* at 1149 (alteration in original) (quoting 47 U.S.C. § 230(f)(3)).

41. 519 F.3d 666, 669 (7th Cir. 2008).

42. 545 U.S. 913 (2005) (holding that those who distribute devices with the object of promoting their use to infringe copyright are liable for the resulting acts of infringement by third parties).

43. *Chi. Lawyers’ Comm.*, 519 F.3d at 670.

granting absolute immunity from liability for third-party content,⁴⁴ stating: “Section 230(c)(1) is general. Although the impetus for the enactment of § 230(c) as a whole was a court’s opinion holding an information content provider liable[] as a publisher, . . . a law’s scope often differs from its genesis.”⁴⁵

III. THE *ROOMMATES.COM* OPINION AND WHAT IT MEANS FOR THE FUTURE OF IMMUNITY UNDER § 230

As the growth and subsequent development of new forms of communication changed the landscape of the internet as we knew it, courts seemed increasingly concerned about continuing to read § 230 as granting blanket immunity for ISPs. It was one thing to recognize this development; it was quite another to know what to do about it. Yet not every court desired to remain overly cautious forever. Faced with the opportunity to appropriately limit the immunity provided by § 230, the Ninth Circuit issued a decision that could have a tremendous impact on the future of ISP liability.

A. *FAIR HOUSING COUNCIL v. ROOMMATES.COM, LLC*

In the case that dared to take a new approach to ISP liability under § 230, defendant Roommate.com, LLC (“Roommate”)⁴⁶ operated (and continues to operate) the popular website roommates.com, which serves to match potential roommates based on commonalities.⁴⁷ Members of the service create profiles containing information about themselves and their roommate preferences.⁴⁸ A free membership allows users to search the profiles and send “roommail” messages to other users.⁴⁹ The fee-based membership allows users the additional benefits of reading other members’ “Additional Comments” and reading “roommail” sent to them by other users.⁵⁰

The Fair Housing Council alleged that Roommate’s website violated the Fair Housing Act (FHA) and various state laws because, inter alia, it (1) published its membership questionnaires, (2) published and distributed its member profiles via email, and (3) published content

44. *Id.*

45. *Id.* at 671.

46. Although the website’s URL is the pluralized “roommates.com,” the company goes by the singular name “Roommate.com, LLC.” When the Ninth Circuit first heard the case, it mistakenly pluralized the company name. *See Fair Hous. Council v. Roommates.com, LLC*, 489 F.3d 921 (9th Cir. 2007). Upon rehearing the case en banc, the court drew attention to this error, *see Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1161 n.2 (9th Cir. 2008) (en banc), but did not alter the case name.

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

48. *Id.*

49. *Id.* at 1162.

50. *Id.*

provided by its members in the “Additional Comments” portion of the member profiles.⁵¹ The district court granted Roommate’s motion for summary judgment, holding that the CDA barred the Fair Housing Council’s FHA claim.⁵² The Fair Housing Council appealed the dismissal of the FHA claim and Roommate cross-appealed the denial of attorneys’ fees and costs.⁵³ The Court of Appeals for the Ninth Circuit considered whether Roommate qualified for immunity from liability for the alleged FHA violations.⁵⁴

The panel held, and the en banc court affirmed, that an entity could not qualify for immunity under § 230 when it is “‘responsible, in whole or in part, for the creation or development of [the] information’ at issue.”⁵⁵ Accordingly, with regard to publication of its membership questionnaires, the panel reasoned that Roommate was indeed “‘responsible’” for the membership questionnaires and therefore did not qualify for immunity from liability.⁵⁶ Since Roommate “creat[ed] or develop[ed]” the questionnaire forms and corresponding answer choices, Roommate became a content provider, and content providers are not immune from liability under § 230.⁵⁷

While acknowledging that it was a slightly more difficult issue,⁵⁸ the panel held that Roommate was also not immune from liability under § 230 for publishing and distributing member profiles generated from the questionnaire answers.⁵⁹ The panel reasoned, “By categorizing, channeling and limiting the distribution of users’ profiles, Roommate provides an additional layer of information that it is ‘responsible’ at least ‘in part’ for creating or developing.”⁶⁰ Accordingly, Roommate is not “merely a facilitator of expression by individuals” and therefore does not qualify for immunity under § 230.⁶¹ The en banc court clarified this point further by pointing out the fact that Roommate filtered its listings and email notifications according to discriminatory criteria, thus rendering it a developer and eliminating the possibility of invoking § 230 immunity.⁶² “If Roommate has no immunity for asking the discriminatory

51. *Id.*; *Roommates.com*, 489 F.3d at 926.

52. *Roommates.com*, 521 F.3d at 1162; *Roommates.com*, 489 F.3d at 924.

53. *Roommates.com*, 521 F.3d at 1162.

54. *Roommates.com*, 489 F.3d at 926.

55. *Id.* (quoting 47 U.S.C. § 230(c), (f)(3) (2006)); *see also* *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

56. *Roommates.com*, 521 F.3d at 1167.

57. *Id.*; *see* 47 U.S.C. § 230(f)(3).

58. *Roommates.com*, 489 F.3d at 927.

59. *Id.* at 929.

60. *Id.* (quoting 47 U.S.C. § 230(c), (f)(3)); *see also* *Batzel*, 333 F.3d at 1031.

61. *Roommates.com*, 489 F.3d at 929.

62. *Roommates.com*, 521 F.3d at 1167.

questions . . . it can certainly have no immunity for using the answers to the unlawful questions to limit who has access to housing.”⁶³

With regard to Roommate’s potential liability for publishing material in the “Additional Comments” section, the panel held, and the en banc court affirmed, that Roommate did not “create or develop” the answers to that section of its questionnaire, and therefore was immune from liability for publishing those responses.⁶⁴ Since Roommate’s open-ended question did not suggest any particular information that the members should provide, it did not “encourage or enhance any discriminatory content created by users.”⁶⁵ Additionally, Roommate did not use any of the provided information to create limitations or channels of access to the listings.⁶⁶ Thus, with regard to the “Additional Comments,” Roommate was entitled to invoke the immunity from liability for third-party content provided by § 230.⁶⁷

In Judge Kozinski’s panel opinion, he considered, in dicta, the reaches of *Carafano* by discussing a hypothetical website called “harassthem.com,” whose slogan would be “Don’t Get Mad, Get Even.”⁶⁸ This website would post “private, sensitive, and/or defamatory information about others” that it encouraged visitors to divulge.⁶⁹ Such a website would suggest that the poster “provide dirt on the victim, with instructions that the information need not be confirmed, but could be based on rumor, conjecture or fabrication.”⁷⁰ Judge Kozinski expressed doubt that the logic of *Carafano*, whereby an ISP is not liable for soliciting individual users’ information expressed in the provider’s questionnaire,⁷¹ would protect the operator of a website like harassthem.com.⁷² Since it would be specifically soliciting harassing and defamatory content, the website operator could be responsible for creation or development of such content.⁷³ While acknowledging that *Carafano*’s limits were not immediately applicable to the case at hand, Judge Kozinski concluded his discussion of the hypothetical by pointing out that “*Carafano* did not consider whether the CDA protected such websites, and we do not read that opinion as granting CDA immunity to

63. *Id.*

64. *Id.* at 1173–74; see also 47 U.S.C. § 230(c), (f)(3); *Batzel*, 333 F.3d at 1031.

65. *Roommates.com*, 521 F.3d at 1174.

66. *Id.*

67. *Id.*

68. *Roommates.com*, 489 F.3d at 928.

69. *Id.*

70. *Id.*

71. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

72. *Roommates.com*, 498 F.3d at 928.

73. *Id.*

those who actively encourage, solicit and profit from the tortious and unlawful communications of others.”⁷⁴

B. REACTION TO THE DECISION

Almost immediately after *Roommates.com*, legal bloggers and scholars across the country published their responses and mused about what it might mean for the future of the CDA.⁷⁵ Though there were both positive and negative reactions to the opinion, all seemed to agree that it could potentially have very significant consequences for future courts’ interpretations of § 230 and the extent of ISP protection it provides. These consequences were of great concern to those critical of the opinion. Despite Judge Kozinski’s repeated assurances to the contrary,⁷⁶ some of these skeptics read the opinion as being in direct conflict with precedent.⁷⁷ Others were concerned that the opinion would wrongly encourage government regulation of internet speech and encourage private litigation that could potentially stifle the freedom of expression that currently exists on the internet.⁷⁸ Some worried that the opinion would dissuade ISPs from “providing structured searches of user-supplied content,”⁷⁹ while others believed that “some interactive web site operators [may] refrain from allowing users to post content out of fear of litigation and liability under this court’s theory of inducement of speech.”⁸⁰ Finally, some critics failed to see the benefit in refusing immunity to those ISPs who encourage tortious content, claiming that “[i]f there arose a Web site where the owner’s announced purpose was to have third-party users post false and defamatory content about people, presumably the risk of injury to potential victims would be little, if any, given the disclosure about the nature of the site’s posts.”⁸¹

Although much of the response to the opinion was negative, some legal scholars optimistically recognized its potential for discarding the blanket immunity previous courts had held the CDA created. Such bloggers saw the opinion as continuing the trend toward disallowing

74. *Id.*

75. See, e.g., Posting of Eugene Volokh to the Volokh Conspiracy, *New and Interesting 47 U.S.C. § 230 Content Provider Immunity Opinion*, <http://volokh.com/posts/1179255772.shtml> (May 15, 2007, 15:02 EST).

76. See *Roommates.com*, 489 F.3d at 928.

77. See, e.g., Posting of Eric Goldman to Technology & Marketing Law Blog, *Roommates.com Denied 230 Immunity by Ninth Circuit En Banc (With My Comments)*, http://blog.ericgoldman.org/archives/2008/04/roommatescom_de_1.htm (Apr. 3, 2008).

78. See *En Banc 9th Circuit Panel Rejects Section 230 Immunity in Roommates.com Case*, *TECH L.J.*, Apr. 3, 2008, <http://www.techlawjournal.com/topstories/2008/20080403.asp> [hereinafter *Panel Rejects Section 230 Immunity*].

79. Posting of Eric Goldman, *supra* note 77.

80. *Panel Rejects Section 230 Immunity*, *supra* note 78.

81. Howard J. Bashman, *When Should a Commercial Web Site Be Held Liable for User-Generated Content?*, *LAW.COM*, May 21, 2007, <http://www.law.com/jsp/article.jsp?id=1179479108731>.

websites that encourage and solicit tortious content from exploiting the immunity provided by § 230.⁸² Even while acknowledging its tremendous potential, supporters nonetheless admit that the case presents a difficulty in determining who is liable for providing the tortious content.⁸³ There are many ways for sites to solicit content or structure the way users input data, and since the opinion refrains from endorsing a bright-line rule that would address this issue, there is much to be determined by future cases in this area of the law.

The Ninth Circuit's opinion is quite narrow and limited, and although it "is not a substantial retrenchment of the preexisting law under 47 U.S.C. § 230, . . . it does suggest that when the outlets try to channel the speech in likely illegal directions, they may be liable for the result of that channeling."⁸⁴ The opinion's ambiguities could prove to be both a blessing and a curse. While the opinion's exact role in the future of determining ISP liability for third-party content remains to be seen, it may indeed "create a steady stream of appeals that [will] let Kozinski further amplify his views on 230."⁸⁵ Accordingly, I have selected two controversial web sites as case studies to examine the possible application of the *Roommates.com* opinion to sites known to publish tortious content created by third parties.

I. *JuicyCampus*

Juicycampus.com ("JuicyCampus") was a website where users, who were primarily college students, posted anonymous, uncensored, and often defamatory information about their peers. The website shut down on February 5, 2009, claiming that though the site became tremendously popular and was continuing to grow rapidly, it had experienced a decrease in ad revenue because of the bad economy and could no longer afford to operate.⁸⁶ Matt Ivester, a Duke University alumnus, founded JuicyCampus in August 2007⁸⁷ with the stated purpose of "enabling online anonymous free speech on college campuses."⁸⁸ Despite this seemingly legitimate aim, Ivester's encouragement for users to "Keep It Juicy" and features such as letting users vote on the "juiciest," most

82. See, e.g., Posting of Daniel J. Solove to Concurring Opinions, *Does the Roommates.com Case Affect CDA § 230 Immunity for JuicyCampus?*, http://www.concurringopinions.com/archives/2008/04/fair_housing_co.html (Apr. 5, 2008, 10:55 EST).

83. *Id.*

84. Posting of Eugene Volokh, *supra* note 75.

85. Posting of Eric Goldman, *supra* note 77.

86. See A Juicy Shutdown, <http://juicycampus.blogspot.com/2009/02/juicy-shutdown.html> (Feb. 4, 2009, 11:47 EST).

87. Jillian Gordon, *JuicyCampus Creator, Matt Ivester*, SATURDAY NIGHT MAG., Oct. 2008, available at <http://www.snmag.com/MAGAZINE/Destination-Success/JuicyCampus-Creator-Matt-Ivester.html>.

88. Sunny Hostin, *Online Campus Gossips Won't Show Their Faces*, CNN.COM, Apr. 11, 2008, <http://www.cnn.com/2008/CRIME/03/17/sunny.juicy/>.

provocative posts (that would then appear at the beginning of the site based on their ranking), seemed to suggest the true purpose of the site was to solicit tortious content.⁸⁹

Instead of defending JuicyCampus as a legitimate website, Ivester seemed to revel in the controversy. He refused to provide comments for legitimate news sources such as *CNN*⁹⁰ and *Newsweek*,⁹¹ while granting exclusive interviews to student-run publications like the *Daily Bruin*⁹² and *Saturday Night Magazine*.⁹³ He also started a JuicyCampus blog where he posted and commented on all the press the website received.⁹⁴ As long as he continued making money from the site's advertisers, Ivester seemed unconcerned with any possible liability, consistently claiming immunity from liability under § 230.⁹⁵

On its face, JuicyCampus appears to be the type of website Judge Kozinski warned would not be immune under the CDA, because it "actively encourage[d], solicit[ed], and profit[ed] from the tortious and unlawful communications of others."⁹⁶ Just as in Judge Kozinski's "harassthem.com" example, JuicyCampus users were encouraged to "provide private, sensitive and/or defamatory information about others" that "need not be confirmed, but could be based on rumor, conjecture or fabrication."⁹⁷ Ivester admitted that he wanted and encouraged people to post controversial things on the site, even with regard to sensitive subjects such as race.⁹⁸ Asked about when, if ever, he would consider removing a post, he said there were three circumstances where the site would do so: if users posted (1) spam (i.e., one's "favorite chocolate chip cookie recipe"); (2) contact information (but only if it included a phone number or address); or (3) hate speech.⁹⁹ While admitting hate speech was "a trickier one," Ivester claimed the site's policy was to remove posts where people were "just being negative and hating on a certain race or

89. See, e.g., Richard Morgan, *A Crash Course in Online Gossip*, N.Y. TIMES, Mar. 16, 2008, at ST 7, available at http://www.nytimes.com/2008/03/16/fashion/16juicy.html?pagewanted=1&_r=1&ei=5087&em&en=099611f51958dfcf&ex=1205812800.

90. See Posting of Sunny Hostin, *supra* note 88.

91. See Jessica Bennett, *What You Don't Know Can Hurt You*, NEWSWEEK, Dec. 17, 2007, at 48, available at <http://www.newsweek.com/id/74322>.

92. See Julia Erlandson, *Campus Gossip Web Sites Satisfy Curious Students While Bringing up Legal Issues*, DAILY BRUIN, Feb. 4, 2008, available at <http://dailybruin.com/news/2008/2/4/campus-gossip-web-sites-satisfy-curious-students-w/>.

93. See Gordon, *supra* note 87.

94. See Official JuicyCampus Blog, <http://juicycampus.blogspot.com/> (last visited Apr. 26, 2010).

95. *Id.*

96. *Fair Hous. Council v. Roommates.com, LLC*, 489 F.3d 921, 928 (9th Cir. 2007).

97. *Id.*

98. Meghan Lisson, *JuicyCampus Founder Defends His Controversial Website*, ABC NEWS, Oct. 9, 2008, <http://abcnews.go.com/OnCampus/Story?id=5985372&page=4>.

99. *Id.*

hating on gay people, or Jews, or whoever it might be.”¹⁰⁰ In practice, however, this policy seemed to be more of a façade, since the JuicyCampus site was replete with abhorrently racist posts.¹⁰¹ After the *Roommates.com* opinion, however, it appears a site like JuicyCampus may not be able to hide under the shield of the CDA quite as easily as Ivester had claimed.¹⁰²

Even those who supported Judge Kozinski’s opinion and vehemently opposed sites like JuicyCampus were skeptical of how far the opinion would reach.¹⁰³ The primary concern centered around the open-endedness of the gossip and rumor solicited by JuicyCampus: “Although JuicyCampus.com wants students to spread gossip and rumor, not all gossip and rumor are defamatory or invasive of privacy. Only some of the comments on JuicyCampus are tortious.”¹⁰⁴ While this may be true, this line of reasoning presupposes that all the answers solicited by Roommate’s questionnaires were discriminatory, which they likely were not. Although the questionnaires provided users with the option to discriminate based on race, sexual orientation, gender, and whether a potential match had children, Roommate never *required* users to provide discriminatory answers to these questionnaires. For example, had a user chosen neutral or all-encompassing answers to the questions, essentially indicating no preference and thus no discrimination, they would not be in violation of the FHA. Though JuicyCampus similarly did not *require* users to post tortious content, it did encourage and solicit such information. Accordingly, it may well have been in the category of websites Judge Kozinski considered likely to fall outside the scope of the immunity provided by the CDA. With JuicyCampus no longer in business, such a lawsuit is pure speculation, but other similar websites will likely rise from JuicyCampus’s ashes.¹⁰⁵ It is only a matter of time before such a case ends up in court.

100. *Id.*

101. Brian McNeil, *UVa Student Council Unhappy with JuicyCampus.com*, CULPEPER STAR-EXPONENT (Culpeper, Va.), Apr. 14, 2008, http://www2.starexponent.com/cse/business/local/article/uva_student_council_unhappy_with_juicycampuscom_03_26_08_cse/12315/ (“Remarks that are blatantly racist, sexist and vulgar are the norm.”).

102. See Official Juicy Campus Blog, *supra* note 94.

103. See Posting of Daniel J. Solove, *supra* note 82 (“As much as I’d like to see JuicyCampus be held responsible for the content it facilitates, I don’t think that the *Roommates.com* decision is [the] knight coming to the rescue.”).

104. *Id.*

105. In fact, at least one already has. See CollegeConvo, <http://collegeconvo.com> (last visited Apr. 26, 2010) (“[Y]ou can use CollegeConvo to: View Up to the Minute News your school may not want you to know about, such as a controversial relationship involving a student sleeping with a professor to earn an A in a class[:] Gossip with students to find out about the latest dirt, parties, and rumors from your campus . . .”).

2. *Don't Date Him Girl*

Dontdatehimgirl.com (“DDHG”) is a website owned and operated by Tasha Cunningham.¹⁰⁶ The website’s purported aim is to help its users “share their experiences with each other in hopes of helping others who are struggling with similar relationship problems.”¹⁰⁷ However, when the site began, it had the more questionable goals of functioning as a “cost-effective weapon in the war on cheating men” and “allow[ing] sisters to share their experiences with cheating men by posting pictures and other information about them.”¹⁰⁸ Cunningham founded the website in 2005, claiming to provide a platform for women to come together to alert each other about men who cheat in relationships.¹⁰⁹

DDHG users anonymously create profiles of men they have dated, which typically include detailed allegations of the men’s unfaithful behavior, attacks on their personal and moral character, and photos to help other women more easily identify such men (and avoid them).¹¹⁰ One popular post describes a man named “C.J. Mitchell, ‘Michael, Charles Woodro Mitchell, Charles Itchell [sic]’” as a cheat and a pathological liar who has been married many times.¹¹¹ While women may create such profiles for free and post them anonymously, men who wish to defend themselves after finding their profiles on the site are charged a \$4.99 “processing fee” to post a sort of rebuttal, which will merely appear alongside the larger, potentially defamatory posting.¹¹² Though the women who post on the site may choose to delete the profiles if they wish to recant their statements, Cunningham will not edit the posts or remove them herself.¹¹³ Though some of the content posted on the site may contain truthful statements, the site as a whole is a cesspool of damaging prevarications written by scorned women looking for an outlet to vent their frustrations. As one blogger wrote, “[C]oddling women into thinking they’ve found the answer in the form of wildly exciting web

106. See Citizen Media Law Project, *Hollis v. Cunningham*, <http://www.citmedialaw.org/threats/hollis-v-cunningham/> (last visited Apr. 26, 2010). She was formerly known as Tasha Joseph. See *id.*

107. Don’t Date Him Girl, About DDHG, <http://www.dontdatehimgirl.com/about> (last visited Apr. 26, 2010).

108. Rachel Kramer Bussel, *Don’t Date Him, Girl— But Don’t Write About It Online Either*, BLACK TABLE, Sept. 7, 2005, <http://www.blacktable.com/busselo50907.htm>.

109. *Cheating Men Caught Online*, MSNBC.COM, Sept. 30, 2005, <http://www.msnbc.msn.com/id/9543001/> (providing a portion of the transcript of a conversation between Cunningham and the host of “Countdown,” Keith Olbermann).

110. See Don’t Date Him Girl, <http://dontdatehimgirl.com> (last visited Apr. 26, 2010).

111. Don’t Date Him Girl Top 100 Posts, http://dontdatehimgirl.com/top_100/ (last visited Apr. 26, 2010).

112. Bussel, *supra* note 108.

113. *The Early Show: DontDateHimGirl.com Lawsuit* (CBS News television broadcast July 6, 2006), available at <http://www.cbsnews.com/video/watch/?id=1779908n>.

posts simply offers them a brief respite topped with a dollop of false hope and a sprinkling of sexist assumptions.”¹¹⁴

Application of the *Roommates.com* decision to a case involving DDHG is not merely hypothetical, because Todd Hollis, a man with multiple allegedly defamatory profiles on the site, has filed such a case.¹¹⁵ The facts of the case, as alleged in Hollis’s complaint,¹¹⁶ seemed to present the perfect opportunity for a court to consider the scope of the Ninth Circuit’s holding in *Roommates.com*.¹¹⁷ A court could conceivably consider Cunningham’s encouragement of the posting of detailed accounts of men’s alleged infidelities and their photos, combined with the profit she made from advertisements and the “processing fee” she charged men to post rebuttals, as “actively encourag[ing], solicit[ing], and profit[ing] from the tortious and unlawful communications of others.”¹¹⁸ Unfortunately, however, Hollis never got a chance to argue his case on the merits. Hollis originally filed the complaint in a Pennsylvania court, but the court dismissed the case for lack of jurisdiction, finding that the site, which was run from Florida, did “not perform a significant amount of commercial business over the Internet,” and did not have sufficient minimum contacts with Pennsylvania.¹¹⁹

Had the Pennsylvania court permitted Hollis to proceed with his argument, Cunningham would have likely raised similar defenses to those discussed above with regard to a hypothetical JuicyCampus case, most notably that DDHG did not require users to post false and/or defamatory information on the site, but merely permitted them to do so. Yet Cunningham does not seem to have created the site for such innocent postings, nor does she appear to encourage them. Accordingly, DDHG should not be allowed to invoke the immunity provided by § 230.

IV. APPLYING THE TOTALITY OF THE CIRCUMSTANCES APPROACH TO DETERMINE ISP LIABILITY UNDER § 230

Up until the emergence of what is known as “Web 2.0,” § 230 seemed to provide courts with a rather clear test to determine the

¹¹⁴. Bussel, *supra* note 108.

¹¹⁵. Complaint, Hollis v. Joseph, No. GD06-12677 (Pa. Ct. Common Pleas June 28, 2006), available at <http://howappealing.law.com/HollisCivilActionComplaint.pdf>.

¹¹⁶. *See id.*

¹¹⁷. *See* Posting of Matthew Heller to THR, Esq., *Don't Date Him, He May Use 9th Circuit Precedent To Sue for Defamation*, <http://reporter.blogs.com/thresq/2007/12/posted-by-mat-3.html> (Dec. 10, 2007, 10:11 EST).

¹¹⁸. *See* Fair Hous. Council v. Roommates.com, LLC, 489 F.3d 921, 928 (9th Cir. 2007).

¹¹⁹. Hollis v. Joseph, No. GD06-012677 (Pa. Ct. Common Pleas Apr. 5, 2007). Hollis refiled his complaint in Florida district court, *see* Complaint, Hollis v. Cunningham, No. 1:07-cv-23112-CMA (S.D. Fla. Nov. 30, 2007), and in June of 2008 the case was dismissed with prejudice by stipulation of both parties after a confidential settlement was reached. *See* Citizen Media Law Project, Hollis v. Cunningham, *supra* note 106.

liability of ISPs for third-party content. In a time when chat rooms and message boards were at the forefront of web advances, Congress sought to protect the dot-com magnates that were paving the way for the growth of the internet. The CDA appeared to do just that, at least insofar as content created by third parties was concerned. Today, however, the advent of blogs, wikis, and social-networking sites has increased the available outlets for free speech. Though this has undoubtedly benefited society in countless ways, it has also provided a platform for those who choose to abuse these privileges.

In terms of regulation, the internet is an outlier compared to its much more restricted media counterparts.¹²⁰ Though some may argue that it does not deserve such a privileged position,¹²¹ the internet is a unique medium that merits—and in fact demands—an equally unique approach to regulation. The critical part of this acknowledgment, however, is that the internet should be subjected to regulation in some form. While nonpareil in its existence, the internet is not so sacrosanct as to warrant complete freedom from regulation and responsibility, and the blogosphere is a particularly suspect area. Though a story published in the *National Enquirer* may be widely regarded as less legitimate than one published in the *New York Times*, it can be infinitely more difficult for the common internet user to accurately distinguish between the credibility of a story posted anonymously on one blog and another such story on a different blog. “The mainstream media have ethical rules regarding people’s privacy. . . [but] bloggers come in all shapes, sizes, and ethical configurations, and many don’t follow any conventional code.”¹²² Since gossip, rumor, and defamatory content are prime fodder for ISPs and their users (especially anonymous ones), websites that specifically encourage the posting of such tortious material should be required to prove the worth of the website’s overall content through a totality of the circumstances approach.

Prior to the decision in *Miranda v. Arizona*, courts used the totality of the circumstances approach to determine if a defendant’s privilege against self-incrimination had been violated.¹²³ Today, it is commonly used as a standard to determine if hearsay can be used to establish

120. Saul Levmore, Dean, Univ. of Chi. Law Sch., Address at Chicago’s Best Ideas Lecture Series: The Internet’s Anonymity Problem (Nov. 11, 2008), available at <http://webcast-law.uchicago.edu/podcast/levmore111108.mp3>.

121. See, e.g., *id.* (“[T]he low cost of access [to the internet] suggests that we should be especially worried about the firewall problem.”).

122. DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 59 (2007).

123. See 384 U.S. 436, 502 (1966) (Clark, J., dissenting in part and concurring in the result in part) (“The rule prior to today . . . depended upon a ‘totality of circumstances . . .’” (quoting *Haynes v. Washington*, 373 U.S. 503, 514 (1963))).

probable cause for an arrest or search warrant.¹²⁴ It requires a case-by-case assessment of the facts surrounding an issue. A totality of the circumstances approach is the opposite of a bright-line rule because there is no single deciding factor. Rather, a court must consider the whole picture, which includes all the facts and the context, in order to make its decision. Though this approach lacks predictability, it appears perfectly suited to apply to the ever growing and developing internet since it is nearly impossible to make a bright-line rule that would cover all possible issues. Though the exact factors a court must consider will depend on the circumstances of each individual case, there are some that stand out as immutable and applicable to any case considering the liability of an ISP. In order to best demonstrate the possible application of each factor, set forth below, I use JuicyCampus as an illustration of a site that would not be afforded immunity under this approach, and Craigslist¹²⁵ as an illustration of a site that would.

A. EXPLICIT AND IMPLIED PURPOSE OF THE WEBSITE

Both express and implied purpose are important factors to consider when determining liability for third-party content. If courts begin to hold more websites liable for tortious content posted by third parties, ISPs will likely do everything in their power to avoid such liability by making it seem as though users who post such content are abusing the site and are not conforming with its stated purpose. Accordingly, it will be critical for courts to determine if a site's stated purpose is in accordance with its actual purpose. While many factors may be considered to determine this issue, the easiest method may be to examine the site's content. Where a reasonable person could foresee that a significant portion of the third-party content on the website may be tortious, the website should not be allowed to invoke immunity under § 230. What constitutes a "significant portion" will be up to each court to decide, and will likely be dependent on the severity of the third-party content. Accordingly, assuming the site's stated purpose is legitimate, if a significant portion of the content correlates with that stated purpose, then the site as a whole is likely immune. If, however, a significant portion of the site's content is of a tortious nature, then the site should not be immune from liability for this content, as it is likely to be encouraging the tortious content.

JuicyCampus's implied purpose would cut against immunity under the totality of the circumstances approach. Although JuicyCampus claimed its purpose was to enable online anonymous free speech for

124. BLACK'S LAW DICTIONARY 1628 (9th ed. 2009).

125. See Craigslist, www.craigslist.org (last visited Apr. 26, 2010). Craigslist began in 1995 as a series of emails about events in San Francisco and now serves as an online classifieds database. Craigslist, About—Factsheet, <http://www.craigslist.org/about/factsheet> (last visited Apr. 26, 2010).

college students, its actual purpose went much further. The site's employees constantly prodded users to "Keep It Juicy," which implied the posting of gossip and rumor. The prompt worked effectively, as JuicyCampus was comprised almost entirely of potentially libelous private matter of no public concern. Accordingly, though its stated purpose seems benign (in part due to its vagueness), the actual purpose of JuicyCampus weighs in favor of not granting the site immunity provided by § 230. In contrast to the JuicyCampus site, considering the likely low number of tortious posts on Craigslist, and the fact that the site as a whole does not exist for the purpose of creating a forum for potentially tortious posts, this factor weighs in favor of immunity under § 230 for Craigslist.

B. BALANCING FREEDOM OF SPEECH WITH PRESERVATION OF REPUTATION

One of the most difficult and pressing concerns for courts in narrowing the scope of § 230 immunity is balancing freedom of speech with the need to protect an individual's privacy and right to seek redress for the harm done by the posting of tortious content. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."¹²⁶ However, despite the opinions of some,¹²⁷ the freedom of speech is not absolute.¹²⁸ While facts and opinions should certainly be protected in order to foster healthy debate, gossip need not be so, and lies are already unprotected if they are defamatory. Such tortious content has the potential to damage one's reputation significantly, and individuals often hold reputation in the highest regard. Protecting an individual's reputation also serves a greater societal function: "By ensuring that people are accountable for their actions, reputation gives people a strong incentive to conform to social norms and to avoid breaking people's trust."¹²⁹ Using a bright-line test to determine ISP liability would render it next to impossible to give proper credence to one's reputation. A totality of the circumstances approach, however, would allow courts to balance freedom of speech with the preservation of one's reputation as one of the factors to consider in determining ISP liability for third-party content.

126. U.S. CONST. amend. I.

127. Justice Hugo Black is often regarded as a defender of the First Amendment for his absolutist approach to the freedom of speech. See HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 115 (2006).

128. See, e.g., *Miller v. California*, 413 U.S. 15 (1973) (holding that the First Amendment does not protect obscenity and establishing a test for what constitutes obscene material); *United States v. O'Brien*, 391 U.S. 367 (1968) (holding that a criminal prohibition against burning draft cards did not violate the First Amendment, because its effect on speech was only incidental); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that public officials may sue for libel only if the statements were published with "actual malice").

129. SOLOVE, *supra* note 122, at 32.

Despite its declaration that it was merely providing a platform for freedom of speech, JuicyCampus encouraged just the kind of salacious and defamatory posts for which it became infamous. Posts discussing who is the “biggest sorority slut” or which guys on campus are rumored to have the most STDs, are not deserving of the protection afforded by the First Amendment. Such crude, obscene content has no merit and tremendous power to do irreparable damage to one’s reputation and mental health, as evidenced by many JuicyCampus victims. After discovering users had written posts calling her promiscuous and ugly and claiming she was a racist, and that these posts had then been viewed over one thousand times, one college freshman lost weight, had trouble sleeping, and would call her parents in the middle of the night crying.¹³⁰

Although not all of the content of Craigslist postings is worthy of First Amendment protection, taken as a whole, Craigslist does not appear to be a forum created specifically to require or encourage people to post discriminatory information.¹³¹ Even those Craigslist posts that contain potentially tortious content should not invite liability for the entire site since Craigslist does not in any way encourage such posts. Thus, after weighing freedom of speech with the preservation of an individual’s reputation, this factor would not weigh in favor of immunity under § 230 for a site like JuicyCampus, while this factor would weigh in favor of immunity for a site like Craigslist.

C. WEBSITE’S BENEFIT TO SOCIETY

Closely related to the previous factor is that of the website content’s benefit to society. If there is a significant portion of potentially defamatory and damaging information on a site that provides little to no benefit to society as a whole, then the site should not be allowed to hide under the shield of the CDA. This is of particular significance because “not all speech is of equal First Amendment importance. It is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection.’ . . . In contrast, speech on matters of purely private concern is of less First Amendment concern.”¹³² Accordingly, where a site is rampant with blatant lies or even content on matters of purely private concern, it should not be immune from liability for that content.

Chelsea Gorman, a student at Vanderbilt University, wished to keep the traumatizing rape she had survived as a freshman so secret that only

130. Posting of Sunny Hostin, *supra* note 88.

131. See, e.g., Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671–72 (7th Cir. 2008) (“Nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination . . .”).

132. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (footnote omitted) (quoting First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).

a few of her very closest friends knew about it.¹³³ JuicyCampus, however, denied her that privacy. Under the headline “Chelsea Gorman Deserved It,” an anonymous JuicyCampus user wrote, “what could she expect walking around there alone. everyone thinks she’s so sweet but she got what she deserved. wish i had been the homeless guy that f***** her. [sic]”¹³⁴ Far from being rare, posts like this one were all too prevalent on the JuicyCampus site. Since content of this nature cannot possibly be considered matter of public concern, websites like JuicyCampus that are made up almost entirely of such posts should not be afforded the same protection as a site where such content is rare or non-existent. In contrast, while such postings may exist on Craigslist, they appear with far less frequency than they did on JuicyCampus. Where a significant portion of the website’s content consists of material that serves little to no benefit to society, either because it is comprised of lies, rumor, and gossip or because it is private matter of no public concern, the website should not be immune from liability for tortious material posted by third parties.

D. ANONYMITY

When determining an ISP’s liability for third-party content, it may also be important for courts to consider the extent to which users of the site publish content anonymously. Anonymity can be very useful, as it can encourage users to more authentically represent themselves and their true feelings without fear of rebuke or ostracism. This benefit is tainted, however, because anonymity also affords users a freedom from responsibility for their words. People are much more likely to misbehave when they will not be held accountable for their actions.¹³⁵ Websites that encourage people to air their grievances anonymously facilitate an immature way of handling the situation and deny people the opportunity to sort through their issues in a more personal and direct manner. Further, if people are unable to hide behind anonymity when airing their grievances, it could reduce the number of Jane Doe–John Doe tort suits resulting from this information. Such suits do not only expend significant judicial resources because of the extraordinary subpoena effort required to properly name a defendant, but they are also somewhat ineffective because they result in heightened public knowledge of the tortious material at issue.¹³⁶ Though an allowance of anonymity need not be dispositive of a site’s illegitimate purpose, where a site requires

133. Eamon McNiff & Ann Varney, *College Gossip Crackdown: Chelsea Gorman Speaks out*, ABC NEWS, May 14, 2008, <http://abcnews.go.com/2020/story?id=4849927&page=1>.

134. *Id.*

135. SOLOVE, *supra* note 122, at 140.

136. See Drake Bennett, *Time for a Muzzle*, BOSTON GLOBE, Feb. 15, 2009, at C1, available at http://www.boston.com/bostonglobe/ideas/articles/2009/02/15/time_for_a_muzzle/.

anonymity, rather than merely making it an option, a court may rightly be suspicious as to the legitimacy of the site's purpose. Consistent with this idea, JuicyCampus only allowed anonymous postings, while Craigslist allows anonymity only with regard to hiding one's contact information from the public, while still requiring posters to provide contact information in order to register. Although this contact information is not necessarily verified and thus could be inaccurate or created solely to meet registration requirements, it would at least provide someone who wished to take issue with the poster a mechanism to be able to do so directly and discretely, rather than have to submit a public reply.

E. RESPONSE TO REMOVAL REQUESTS

Many victims of tortious content posted on the internet claim that their requests for the website operator to remove the content were either refused or ignored. Under *Stratton Oakmont*, an ISP's refusal to remove or edit third-party content was understandable; if the ISP did remove or edit certain content, it could be held liable for other content that it did not remove.¹³⁷ Under the CDA, however, ISPs are expressly protected from this kind of liability. Accordingly, where an ISP receives a reasonable request to remove the potentially tortious third-party content, such a request should be honored. This simple action would also help deter lawsuits by encouraging potential plaintiffs to first exhaust the informal mechanisms for dealing with the problem.

A recently decided case, *Barnes v. Yahoo!, Inc.*, provides additional motivation for ISPs to either immediately respond to removal requests or, alternatively, ignore them completely.¹³⁸ In *Barnes*, the plaintiff's ex-boyfriend created a fake profile in her name, on which he posted nude photos of her and led viewers to believe she was soliciting casual sexual encounters.¹³⁹ The profile included her contact information at work, so strangers began calling, emailing, and even showing up in person at the plaintiff's workplace with expectations of casual sex.¹⁴⁰ Barnes contacted Yahoo! and requested they take down the profile, but they did not.¹⁴¹ After repeated requests for removal, Yahoo!'s Director of Communication contacted Barnes and said "she would personally walk the statements over to the division responsible for removing unauthorized profiles and that these profiles would in fact be removed."¹⁴² When Barnes eventually discovered that the profile had not

137. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (order granting partial summary judgment).

138. See No. 05-926-AA, 2009 WL 4823840 (D. Or. Dec. 11, 2009).

139. *Id.* at *1.

140. *Id.*

141. *Id.*

142. *Id.*

been removed, she filed suit.¹⁴³ Though the trial court initially found that § 230(c) protected Yahoo! from any liability,¹⁴⁴ the Ninth Circuit affirmed in part and reversed in part, finding that Barnes's negligent undertaking claim was barred by the CDA, but that her promissory estoppel claim was not.¹⁴⁵ On remand, the trial court denied Yahoo!'s motion to dismiss, holding that Barnes alleged sufficient facts to meet the criteria for a promissory estoppel claim.¹⁴⁶

In light of *Barnes*, ISPs will likely be more careful than ever when addressing requests to remove defamatory third-party content. Most likely, in an effort to evade liability, ISPs will ignore these requests altogether. Thus, it is imperative that courts consider an ISP's refusal to remove content it suspects to be tortious a factor in determining whether the website should be granted immunity. JuicyCampus was infamous for refusing to remove posts even after learning that the information may be untrue,¹⁴⁷ while Craigslist employs a function that allows users themselves to immediately flag prohibited postings. After a certain number of flags, some types of postings are removed automatically and others are subject to further review.¹⁴⁸

F. WILLINGNESS TO ALLOW SEARCH ENGINES TO INDEX THE CONTENT

Search engines have become a significant resource on the internet, with approximately 213 million unique searches occurring every day.¹⁴⁹ Indexing is how search engines generate results for users' searches. If a site is indexed, all of the site's content is sorted by the search engine and then stored as a list of keywords that are searchable by the search engine's users. It is in the best interest of a website to be indexed by search engines, particularly the largest search engines like Google and Yahoo!, because doing so will result in more visits and new users for the site. Thus, when a website refuses to allow search engines to index the individual posts on the site, a court may suspect that the ISP is aware of the inappropriate and tortious nature of its content. Essentially, refusing

143. *Id.* at *2.

144. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009).

145. *Id.* at 1109.

146. *Barnes*, 2009 WL 4823840, at *5.

147. *See* Official JuicyCampus Blog: Juicy Terms and Conditions, <http://juicycampus.blogspot.com/2007/12/juicy-terms-and-conditions.html> (last visited Apr. 26, 2010) (“[O]ur Terms and Conditions do not require us to delete a post simply because the subject of the post tells us that it’s defamatory.”); *see also* Posting of Eugene Volokh to the Volokh Conspiracy, *JuicyCampus Lawyer Responds About the New Jersey Attorney General’s Investigation*, <http://volokh.com/2008/04/10/juicycampus-lawyer-responds-about-the-new-jersey-attorney-generals-investigation/> (Apr. 10, 2008, 23:27 EST) (“Juicy Campus’s Terms and Conditions simply do not say that Juicy Campus will delete offensive posts.”).

148. *See* Craigslist, Flags and Community Moderation, http://www.craigslist.org/about/help/flags_and_community_moderation (last visited Apr. 26, 2010).

149. Danny Sullivan, Search Engine Watch, Searches Per Day (Apr. 6, 2006), <http://searchenginewatch.com/2156461>.

to have the site indexed by search engines gives the impression that the website has something to hide. Not surprisingly, JuicyCampus blocked its posts from being indexed by search engines like Google,¹⁵⁰ while over 32 million Craigslist pages have been Google-indexed.¹⁵¹

G. FINANCIAL GAIN

Though some websites that exist primarily to solicit tortious content may do so purely out of interest in “stirring the pot” or some other illegitimate purpose, many of these ISPs are looking for financial gain. The primary source of revenue for such websites will likely be through advertisements. Since advertisers are more likely to advertise on popular sites, and controversy can often increase a website’s popularity, ISPs seeking to increase their profit will be incentivized to maximize the salaciousness of the material posted on the site. Where a website encourages the posting of tortious content in order to maximize its profit, the ISP should be suspect with regard to its liability for such content. By way of example, JuicyCampus profited from general ad revenue while Craigslist’s profit comes only from charging for specific types of advertisements (e.g., advertisements for jobs or real estate ads from licensed brokers).¹⁵²

H. ADDITIONAL FACTORS

The above factors are not intended to be an exhaustive list. There are many factors that may be relative only to a few sites, and case law will certainly shape the way new sites promote and establish themselves in order to avoid liability. This is the greatest benefit of the totality of the circumstances approach, as it allows courts to adapt the law to the continuous change in the landscape of the internet. As the possibilities for the growth and development of the internet are infinite, using a totality of the circumstances approach to determine ISP liability for tortious content created by third parties not only accepts the challenges that will arise from such growth, but in fact embraces them.

CONCLUSION

Just as there was no way for Congress to foresee the incredible growth of the internet and subsequent abuse of the protection afforded by the CDA in the time since its enactment, it would be impossible to

150. Associated Press, *Juicy Backlash: Many Students Are Fighting Back Against Unpopular Website*, CHI. TRIB., Feb. 19, 2008, at 3, available at <http://www.chicagotribune.com/news/nationworld/chi-juicy-campus-090205-ht,0,1620251.story>.

151. See Statistics About Craigslist.org, <http://serversiders.com/craigslist.org> (last visited Apr. 26, 2010).

152. See Craigslist, About—Factsheet, *supra* note 125.

project where the internet will go from here. Nonetheless, it is imperative that courts disallow an overly broad extension of the CDA's protection by refusing to grant immunity to those who solicit or encourage the posting of tortious content. In order to accommodate new technological developments, and in an effort to prevent the chilling of speech, courts should adopt a totality of the circumstances approach to best distinguish those who should be immune from liability under § 230 and those who should not.