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# WHEN ALL YOU HAVE IS A HAMMER

Hugh T. McKeegan\*

According to some commentators, the internet has taken a beating lately. Between the repeal of net neutrality,<sup>1</sup> the ongoing scandal surrounding the misuse of social media in the 2016 elections,<sup>2</sup> and the recent passage of FOSTA/SESTA by Congress,<sup>3</sup> some in the pro-open internet community are, perhaps rightly, in a state of near panic about the harm that will be caused by stricter regulation of the internet.<sup>4</sup> On the other hand, the pro-regulation crowd may have a point: between the bots,<sup>5</sup> the

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<sup>1</sup> See Aja Romano, *Net Neutrality is Now Officially on Life Support. Here's What Happens Next*, VOX (Dec. 14, 2017, 5:52 PM), <https://www.vox.com/2017/12/14/16774148/net-neutrality-repeal-explained> (discussing background to and ramifications of the FCC's recent decision to repeal of Title II classification of internet service providers).

<sup>2</sup> See Alicia Parlapiano & Jasmine C. Lee, *The Propaganda Tools Used by Russians to Influence the 2016 Election*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/interactive/2018/02/16/us/politics/russia-propaganda-election-2016.html> (interactive online feature).

<sup>3</sup> See Mark Masnick, *House Prepared to Rush Vote on Terrible Frankenstein SESTA, Which Will Harm Trafficking Victims & the Internet*, TECHDIRT (Feb. 22, 2018, 9:32 AM), <https://www.techdirt.com/articles/20180221/23372139282/house-prepared-to-rush-vote-terrible-frankenstein-sesta-which-will-harm-trafficking-victims-internet.shtml> (discussing then pending legislation making websites criminally liable for the "knowingly assisting, supporting or facilitating" of sex trafficking).

<sup>4</sup> See Mark Masnick, *SESTA's First Victim: Craigslist Shuts Down Personals Section*, TECHDIRT (Mar. 23, 2018, 9:30 AM), <https://www.techdirt.com/articles/20180323/01080939485/sestas-first-victim-craigslist-shuts-down-personals-section.shtml#comments> (discussing initial responses to passage of SESTA).

<sup>5</sup> See John Biggs, *Twitter Has a Big Bot Problem*, TECHCRUNCH (Sept. 1, 2017), <https://techcrunch.com/2017/09/01/twitter-has-a-big-bot-problem/> (discussing bots on twitter); see also Jon Russell, *Twitter is (Finally) Cracking Down on Bots*, TECHCRUNCH (Feb. 22, 2018), <https://techcrunch.com/2018/02/22/twitter-is-finally-cracking-down-on-bots/> (discussing limited measures put in place by twitter to regulate bots).

trolls,<sup>6</sup> and the frequent hacks and leaks of consumer data,<sup>7</sup> perhaps something should be done to rein in the excesses of the online free-for-all.<sup>8</sup>

With that in mind, let's imagine a small business owner walks into your office looking for legal advice. The business can be anything you like. For our purposes, let us imagine this prospective client owns a bicycle shop. She does repairs, sells equipment, and teaches maintenance seminars. Her business is successful—not so much so that she will find her way on to a *Forbes* list in her lifetime, but she does enough business to have a few employees, pay herself a reasonable salary, and consider opening a second location. It seems that her customers are satisfied: she has many repeat patrons and has not heard any serious complaints. All in all, things seemed to be going rather well.

She has come to you because she has recently discovered her business is listed on the kind of website that allows users to search for businesses, read reviews written by other customers, and compare businesses based on some kind of aggregation of customer reviews (employing the tried-and-true “1–5 star” system). Let us call this website Reviews.com.<sup>9</sup> On the one hand, our proprietor was initially happy to see her business on this website. Positive visibility on websites like this may help attract new customers to her shop. However, the fact that proprietors have no say in whether or not a business is listed on this web service made her a little uneasy.<sup>10</sup> She can, however, sign up with Reviews.com and, to a degree, manage her image and

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<sup>6</sup> See Luke O'Brien, *The Making of an American Nazi*, THE ATLANTIC MAG. (Dec. 2017), <https://www.theatlantic.com/magazine/archive/2017/12/the-making-of-an-american-nazi/544119/> (feature story discussing the genesis and activities of a notorious right-wing troll).

<sup>7</sup> See Taylor Armerding, *The 17 Biggest Data Breaches of the 21st Century*, CSO (Jan. 26, 2018, 3:44 AM), <https://www.csoonline.com/article/2130877/data-breach/the-biggest-data-breaches-of-the-21st-century.html> (listing largest recent data breaches).

<sup>8</sup> See Adam Rosenberg, *Europe's New Internet Regulations Should Make Most Americans Jealous*, MASHABLE (Dec. 20, 2017), <https://mashable.com/2017/12/20/general-data-protection-regulation-eu-explainer/#dgEAIDDFMOqn>.

<sup>9</sup> For the purposes of this hypothetical the exact identity of the website is unimportant. There are numerous websites that provide substantially the same service. See, e.g., *About Us*, YELP, <https://www.yelp.com/about> (last visited May 23, 2018); *About Us*, ANGIE'S LIST, <https://www.angieslist.com/aboutus.htm> (last visited May 23, 2018); *About Google My Business*, GOOGLE, [https://support.google.com/business/answer/3038063?hl=en&ref\\_topic=4539639](https://support.google.com/business/answer/3038063?hl=en&ref_topic=4539639) (last visited May 23, 2018).

<sup>10</sup> See, e.g., *Can I Remove My Business Page from Yelp?*, YELP, [https://www.yelp-support.com/article/Can-I-remove-my-business-page-from-Yelp?l=en\\_US](https://www.yelp-support.com/article/Can-I-remove-my-business-page-from-Yelp?l=en_US) (last visited May 23, 2018); *How Do Providers Get on the List*, ANGIE'S LIST, <https://www.angieslist.com/faq/how-do-providers-get-list/> (last visited May 23, 2018).

presence on the website.<sup>11</sup> She can, for example, post photos and respond to customer reviews.<sup>12</sup> For a fee, Reviews.com will provide advertising services—useful, perhaps, but not the most cost-efficient option for a business in her position.<sup>13</sup> It is worth noting that various small business owners have accused some review sites, like Yelp!, of using strong-arm tactics to push their advertising services by manipulating a business’ rating unless and until the business pays for advertising.<sup>14</sup>

Regardless, she quickly discovers the most important thing Reviews.com does is aggregate and display user reviews of her business, allowing consumers to compare her shop with other, similar shops in the area.<sup>15</sup> Although Reviews.com is not the most heavily-used review aggregator (the top search engine holds that position, probably by dint of the fact that many internet users begin any online research on that platform),<sup>16</sup> many consumers use it to virtually window-shop before going out into the real world to patronize a business.<sup>17</sup> Furthermore, Reviews.com uses a proprietary algorithm to “promote” (or hide, as the case may be) customer

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<sup>11</sup> See *What is a Business Account?*, YELP, [https://www.yelp-support.com/article/What-is-a-business-account?l=en\\_US](https://www.yelp-support.com/article/What-is-a-business-account?l=en_US) (last visited May 23, 2018).

<sup>12</sup> See *Free Tools for Your Business*, YELP, [https://www.yelp-support.com/Free\\_Tools\\_for\\_Your\\_Business?l=en\\_US](https://www.yelp-support.com/Free_Tools_for_Your_Business?l=en_US) (last visited May 23, 2018).

<sup>13</sup> See *Advertising on Yelp*, YELP, [https://www.yelp-support.com/Advertising\\_on\\_Yelp?l=en\\_US](https://www.yelp-support.com/Advertising_on_Yelp?l=en_US) (last visited May 23, 2018).

<sup>14</sup> Although not exactly on point for this paper, it is interesting and worth noting that various small business owners have accused some review sites, like Yelp, of using strong-arm tactics to push their advertising services—by, for example, manipulating a business’ rating unless and until the business pays for advertising. See, e.g., *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1134 (9th Cir. 2014) (holding that using threats of economic harm by manipulating user reviews to leverage sales of advertising services constitutes at most “hard bargaining”); see also Kaylie Milliken, *Billion Dollar Bully*, PROST PRODUCTIONS, <http://www.prostfilms.com/> (last visited May 23, 2018) (documentary film arguing Yelp manipulates user ratings to force small businesses to purchase advertising services).

<sup>15</sup> See Tom Collinger, *You Don’t Want a 5-Star Review*, TECHCRUNCH (Jan. 3, 2016), <https://techcrunch.com/2016/01/03/you-dont-want-a-5-star-review/> (describing study conducted by Northwestern University that found optimal consumer response between ratings of 4.2 and 4.5 stars, and attributing weaker response to 5-star ratings to consumer skepticism).

<sup>16</sup> See Heidi Abramyk, *Top 10 Review Websites to Get More Customer Reviews on*, VENDASTA, <https://www.vendasta.com/blog/top-10-customer-review-websites> (last visited May 23, 2018) (compiling Alexa ratings for top consumer review websites).

<sup>17</sup> See *Local Consumer Review Survey 2017*, BRIGHTLOCAL, [https://www.brightlocal.com/learn/local-consumer-review-survey/?SSAID=389818&SSCID=41k2\\_10dfk](https://www.brightlocal.com/learn/local-consumer-review-survey/?SSAID=389818&SSCID=41k2_10dfk) (last visited May 23, 2018) (listing among key findings that 97% of consumers used the internet to find a local business).

reviews;<sup>18</sup> that is, reviews selected by the algorithm will be more prominently displayed while those disfavored by Reviews.com's automated ranking system will be buried and become, consequently, harder to find.<sup>19</sup> Reviews.com's algorithm seems to be based in part on other users' feedback on the usefulness of reviews (users are able to give a review a "thumbs up" or a "thumbs down" based on whether they found it useful or not) and the reputation of the reviewer on the website.<sup>20</sup> However, this is not entirely so, and Reviews.com appears to display a mix of positive and negative (i.e., high star and low star) reviews.<sup>21</sup>

Overall, her business has received positive feedback. Customers seem satisfied with the repair and maintenance work she performs on their bicycles, and her customers seem to think she sells quality products at reasonable prices. She has gotten some negative feedback, but has been able to address most of that successfully. She has come to you for legal advice, however, because of an ongoing problem with one reviewer. The Reviews.com user "Hank the Tank" apparently had more than a bad experience at her store. He claims the proprietor is "holding [his] bicycle for ransom," that she extorts money from her customers, she purposefully "fixes" things so they will break again, and that she and her employees subjected him to verbal abuse. All of which, our proprietor, assures you is false. She tells you she reported the review to Reviews.com, but because Reviews.com determined that the content does not violate any of its Terms of Service (TOS), they have declined

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<sup>18</sup> See *Why Does Yelp Recommend Reviews?*, YELP, [https://biz.yelp.com/video/yelp\\_reviews](https://biz.yelp.com/video/yelp_reviews) (last visited May 23, 2018) (short video, produced by Yelp, explaining how and why they calculate a business' rating and promote or hide reviews).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Understandably, Reviews.com, like its real-world counterpart Yelp, is concerned with providing an accurate snapshot of customer experience to its users—the reputation, and thus business, of Reviews.com depends on users finding its ratings reliable and returning to use Reviews.com over and over again. And so Reviews.com's algorithm takes into account the very real possibility that businesses might try to "slack-fill" their reviews with overwhelmingly positive feedback from friends, family, even paid reviewers by (apparently) down-grading one off reviewers, first time reviewers, etc. and promoting negative reviews to "balance" the picture. See *id.*

to take any action.<sup>22</sup> They suggested that she reach out to the disgruntled customer, as she has done with other negative reviews, and try to make things right.<sup>23</sup>

But things have gone from bad to worse. Her efforts to be conciliatory with Hank the Tank backfired, and even more blatantly false, lurid, and damaging reviews have been posted. For instance, he has updated his reviews, accusing her of trying to bribe him for a good review, and claiming that she systematically pays for positive reviews. Indeed, he alleges, many of the positive reviews are not even from real customers of the shop. Reviews.com's algorithm, for one reason or another, has promoted Hank's reviews and downgraded positive reviews from other customers, lowering the shop's rating on Reviews.com. The proprietor tells you she believes that this has harmed her business.

What should this beleaguered business owner do? Leaving aside any recourse she may have against the individual who created the objectionable reviews, what can she do about the continued existence of the postings on Reviews.com? Can our proprietor, in some way, compel Reviews.com to delete, hide, or otherwise remove the postings?

For the time being, the answer is: probably not.<sup>24</sup> Unless a website operator decides to remove objected-to material—because, for example, the material violates the website's terms of service—websites have been given broad immunity from tort liability for such content under the Communications Decency Act of 1996 (CDA),<sup>25</sup> so long as the objected-to material was created by a third-party and the website operator did not materially contribute to its development.<sup>26</sup>

The question this Note explores is: whether the current legal framework for regulating internet speech adequately balances the interests of individual speakers,

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<sup>22</sup> See *When Should I Report a Review?*, YELP, [https://www.yelp-support.com/article/When-should-I-report-a-review?l=en\\_US](https://www.yelp-support.com/article/When-should-I-report-a-review?l=en_US) (last visited May 23, 2018); see also *Content Guidelines*, YELP, <https://www.yelp.com/guidelines> (last visited May 23, 2018).

<sup>23</sup> See *What Should I Do If I Get a Negative Review of My Business?*, YELP, [https://www.yelp-support.com/article/What-should-I-do-if-I-get-a-negative-review-of-my-business?l=en\\_US](https://www.yelp-support.com/article/What-should-I-do-if-I-get-a-negative-review-of-my-business?l=en_US) (last visited May 23, 2018).

<sup>24</sup> See, e.g., *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 415 (4th Cir. 2014) (holding that the operator of a tabloid/gossip website was immune from suit because, despite encouraging and selecting for publication actionable material, the operator was himself not the creator of the objectionable content).

<sup>25</sup> See 47 U.S.C. § 230(c)(1) (2018) (“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.”).

<sup>26</sup> See *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (“In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.”).

the subjects of speech, and the websites that host the speech. More specifically, this Note suggests that the broad application of the immunity provision of § 230 of the CDA has created a “heads I win, tails you lose” dynamic resulting in the backlash now taking shape in the form of procedural circumventions of the immunity provision and the FOSTA/SESTA legislation that recently passed through Congress. As such, moderate reform should be pursued to recalibrate the balance of interests such that all interested parties have recourse to pursue or defend their rights, without eviscerating the liability shield.

Section I of this Note discusses case law prior to the enactment of § 230. Section II reviews the basic framework of the law Congress passed in response. Section III covers the legal landscape that has emerged in the 20-odd years following passage of the CDA—how the statute has been interpreted and the scope given the immunity provision by the courts. Section IV turns to focus on a case currently pending before the California Supreme Court, *Hassell v. Bird*, which presents a unique and problematic issue of circumvention of § 230 immunity. Finally, Section V argues that to more equitably balance the interests of all of the parties involved (primary speaker, target, and website operator), while preserving to the greatest extent possible the free-expression enhancing benefits of § 230, a new procedural mechanism should be implemented. This note proposes one such mechanism.

## I. EARLY DECISIONS MISAPPLIED OLD LAW TO NEW FACTS

In 1995, a decision by a state trial court in New York prompted Congress to act to regulate tort liability for speech on the internet.<sup>27</sup> The facts of the case closely track those of the hypothetical above and the facts giving rise to litigation in *Hassell v. Bird*, explored below.

Prodigy, in 1995, was an online message board that held itself out to its users as being “family-oriented.”<sup>28</sup> Prodigy explicitly compared itself to traditional newspapers, in terms of the degree of editorial control it exercised over the content available to users on its network:

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

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<sup>27</sup> See *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1995).

<sup>28</sup> *Id.* at 3.

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.<sup>29</sup>

Indeed Prodigy had put in place both active and passive screening functions, although it claimed that by 1995 the oversight of message boards on its website by human editors had been drastically reduced.<sup>30</sup> Regardless, the court concluded that Prodigy had “arrogated to itself” the traditional tools and roles of editor and publisher—enough so that the website operator could not rest its defense on the argument that its message boards were merely passive conduits for third-party communication, and so be entitled to treatment as a “distributor” rather than as a “publisher.”<sup>31</sup> The court noted that “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.”<sup>32</sup> At the time, under the prevailing common law defamation doctrine, this ruling made sense.<sup>33</sup>

A brief overview of the standard common law principles at work will explain why. For a plaintiff to succeed in an action alleging defamation by a primary speaker, he or she must prove the defendant: 1) made a false or defamatory statement concerning another (i.e., the plaintiff); 2) that the statement was communicated to a third party; 3) that the speaker evidenced fault rising to at least the level of negligence; and 4) actionability of the statement irrespective of special harm or the existence of special harm.<sup>34</sup>

A third party involved with the communication of a defamatory statement (as opposed to those who innocently receive or hear a defamatory statement) may also be subject to liability, depending on that party’s level of involvement with the creation and distribution of the defamatory content. A person or entity deemed to be a “publisher” bears the same liability for a defamatory statement as the primary

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<sup>29</sup> *Id.* at 4.

<sup>30</sup> *Id.* at 7–8 (noting also that manual screening of postings was “no longer feasible” because the volume of postings had climbed to approximately 60,000 per day).

<sup>31</sup> *Id.* at 10–11.

<sup>32</sup> *Id.* at 13 (referencing *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) (stating CompuServe was entitled to distributor treatment because it did not review the content of third-party contributions prior to that material appearing on its website)).

<sup>33</sup> See RESTATEMENT (SECOND) OF TORTS § 577(1) (AM. LAW INST. 1977) (defining publication as “communication intentionally or by a negligent act to one other than the person defamed”).

<sup>34</sup> See *id.* § 558.



speaker.<sup>35</sup> On the other hand, a “distributor” is liable only to the extent that the distributor knows, or has reason to know, of the tortious content of a communication.<sup>36</sup> For example, libraries and newsstands are typically not liable if they distribute defamatory material, unless a plaintiff can prove the distributor knew the material was defamatory at the time of distribution.<sup>37</sup> Finally, common carriers of communications (e.g., telephone and telegraph companies) are subject to what is referred to as “conduit liability,” where the public utility “under a duty to transmit messages is privileged to do so, even though it knows the message to be false and defamatory” unless the carrier has actual or constructive knowledge that the sender has no privilege to send and publish the defamatory message.<sup>38</sup>

Applied to the realm of digital communications, individual users posting messages on websites are, of course, primary speakers. Similarly, those companies that maintain the essential architecture and infrastructure of the Internet are, like telephone and telegraph companies, conduits. What is less clear, and what is relevant here, is whether a website operator falls into the publisher or distributor category. The court in *Stratton-Oakmont*, working from the principles sketched out above, came down on the side of treating the website in that case as a publisher.<sup>39</sup>

On the other hand, the court in *CompuServe*, decided a few years before *Stratton-Oakmont*, found that the defendant-website was merely a distributor.<sup>40</sup> There, CompuServe hosted various content on its website, but delegated the creation and editing of the content to third-party publishers.<sup>41</sup> When sued over the content of some of the material hosted on its website, CompuServe successfully rested its defense on the fact that it had taken no part in the creation of the defamatory content

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<sup>35</sup> *See id.* § 578.

<sup>36</sup> *See id.* § 581(1).

<sup>37</sup> *Id.* at cmts. d and e.

<sup>38</sup> *Id.* § 612.

<sup>39</sup> *See Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, at 13.

<sup>40</sup> *See Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991) (“[T]he appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorville statements.”).

<sup>41</sup> *Id.* at 140 (describing the relationship between CompuServe and the content provider, Rumorville).

and had no knowledge or notice of the allegedly defamatory statements.<sup>42</sup> In reaching its decision, the court likened CompuServe to a library.<sup>43</sup> The key distinction between Prodigy and CompuServe, therefore, was the degree to which the website assumed editorial control over the content it displayed—Prodigy had retained such functions, and so was liable, whereas CompuServe had delegated those functions to the content providers, rendering itself a “passive conduit” in the eyes of the court.

What was left unanswered by *Stratton-Oakmont* and *CompuServe* was how to determine the threshold level of editorial control required before publisher liability would attach. That particular question, however—of whether to treat a website as a publisher or a distributor—was taken out of the hands of the courts when Congress passed the Communications Decency Act in 1996, legislatively overruling the *Stratton-Oakmont* decision.

## II. CONGRESS MOVES TO PROTECT WEBSITES FROM EXCESSIVE LIABILITY

Section 230 sets out a framework for the treatment of online communications that is relatively simple, if somewhat counter-intuitive.<sup>44</sup> Specifically, § 203(c) provides that:

- (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

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<sup>42</sup> *Id.* at 141 (“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.”).

<sup>43</sup> *Id.* at 140 (“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.”).

<sup>44</sup> See 47 U.S.C. § 230(c) (2018).

otherwise objectionable, whether or not such material is constitutionally protected . . . .<sup>45</sup>

Thus, before looking any deeper, the ghost of *Stratton-Oakmont* is clear in § 230(c): Congress intended to prevent one party from being treated as the speaker of content produced by another party, and Congress affirmatively rejected finding liability where action is taken to clean up rude or obscene material.

Looking then to the definitions provided in § 230(f), we find that Congress divided the ecosystem of participants on the Internet into three categories: interactive computer services, information content providers, and access software providers.<sup>46</sup> An “Interactive Computer Service” is “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”<sup>47</sup> 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.”<sup>48</sup> An “Information Content Provider,” then, is distinguished from the means by which content is transmitted or displayed and relates only to the identity of the party that creates or develops content. Finally, an “Access Software Provider” is a provider of software that performs any number of a non-exhaustive list of tasks including: displaying, filtering, transmitting, or analyzing content.<sup>49</sup> That is, an example of an “Access Software Provider” would be Google, which produces Chrome, or Microsoft, which produces Internet Explorer.

The categorization of actors in the Internet ecosystem is the foundation for § 230(c)’s broad immunity grant: § 230(c)(1) provides that “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.”<sup>50</sup> Thus, § 230(c)(1) effectively immunizes website operators from traditional publisher liability.<sup>51</sup>

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<sup>45</sup> *Id.* (emphasis added).

<sup>46</sup> *Id.* § 230(f).

<sup>47</sup> *Id.* § 230(f)(2).

<sup>48</sup> *Id.* § 230(f)(3).

<sup>49</sup> *Id.* § 230(f)(4).

<sup>50</sup> *Id.* § 230(c)(1).

<sup>51</sup> *Id.*; see also *Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398, 406 (6th Cir. 2014) (noting that “[a]lthough § 230(c)(1) does not explicitly mention immunity or a synonym thereof, this and other

Furthermore, § 230 provides that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”<sup>52</sup> Thus, § 230 bars a claim if “(1) the defendant . . . is an interactive computer service provider (2) the particular information at issue was provided by another information content provider and (3) the claim seeks to treat the defendant as a publisher or speaker of that information.”<sup>53</sup>

### III. EDITORIAL DECISIONS ARE NOT NECESSARILY MATERIAL CONTRIBUTION

With the exception of the Supreme Court’s striking of a provision, not relevant here, that created criminal liability for the transmission of “indecent” content to minors,<sup>54</sup> courts reviewing § 230 cases have generally found that the statute grants broad immunity to so-called “Interactive Computer Services.”<sup>55</sup> Indeed, according to one empirical study, from 1997–2009, § 230 preempted at least one claim in approximately 60% of cases where § 230 was raised.<sup>56</sup> Courts have gone to some length, as well, by interpreting the “findings” and “policy” sections of the CDA, to seat Congress’ rationale for creating the CDA squarely within the framework of protecting the vibrant, free speech based, democratic environment of the Internet from being stifled by the “specter of tort liability.”<sup>57</sup>

Thus, the Fourth Circuit, in *Zeran v. America Online, Inc.*, an early CDA case, found the defendant, Interactive Computer Service, immune from liability for defamatory postings made about the plaintiff by an anonymous user of the defendant’s service.<sup>58</sup> In that case, the defamatory postings in question alleged that Zeran was selling t-shirts making light of the bombing of the Federal Building in

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circuits have recognized the provision to protect internet service providers for the display of content created by someone else”).

<sup>52</sup> 47 U.S.C. § 230(e)(3).

<sup>53</sup> See *Dirty World*, 755 F.3d at 409.

<sup>54</sup> See *Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>55</sup> See David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L. REV. 373, 411 (2010).

<sup>56</sup> *Id.* at 415.

<sup>57</sup> See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“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.”).

<sup>58</sup> *Id.* at 328 (affirming judgement of district court).

Oklahoma City; the postings further directed readers to call Zeran to obtain a shirt.<sup>59</sup> Needless to say, Zeran began to receive thousands of angry and threatening phone calls, especially after the posting was picked up by a radio DJ in Oklahoma City.<sup>60</sup> Zeran notified America Online and was told that the offending account would soon be closed.<sup>61</sup> However, the account remained active for some time, and it was not until an Oklahoma City newspaper published a story exposing the hoax and the radio station issued an on-air apology, that the inundation of threatening calls began to subside.<sup>62</sup> Significantly, in his suit against America Online, Zeran highlighted the fact that America Online had actual notice of the defamatory content of the postings, and so should be subject to distributor—rather than publisher—liability.<sup>63</sup> The Fourth Circuit, however, not impressed with this argument, held instead that distributor liability is merely a species of publisher liability and that, for the purposes of the CDA, a broad definition of publisher, encompassing publishers and distributors, was applicable.<sup>64</sup>

In so holding, the Court of Appeals for the Fourth Circuit reasoned that allowing distributor liability claims to go forward, in the context of Internet communication, would essentially swallow the immunity provision created by the CDA, putting website operators in the position of traditional print media:

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 continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on

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<sup>59</sup> *Id.* at 329.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 331.

<sup>64</sup> *Id.* at 332.

interactive computer services would create an impossible burden in the Internet context.<sup>65</sup>

On the other hand, although the Fourth Circuit arguably pushed the boundary of the scope of the immunity provision beyond the plain language of the statute, other courts have worked to sharpen the analysis of what level of involvement in the development or creation of content by an Interactive Computer Service pushes it over the line into becoming an Information Content Provider.<sup>66</sup>

In the leading case on that issue, *Fair Housing Council v. Roommates.com, LLC*, the Court of Appeals for the Ninth Circuit found that the defendant website, Roommates.com, was not entitled to immunity under § 230 of the CDA.<sup>67</sup> The court decided that the immunity provision did not apply because by requiring users to complete a questionnaire containing prompts that elicited discriminatory responses the website “developed” information and was therefore itself an “information content provider” subject to liability.<sup>68</sup> Specifically, the questionnaire forced users of the website to answer, in addition to benign requests for information like name and email address, questions regarding the user’s status with regard to and preference in a roommate based on sex, sexual orientation, and whether they will bring children to the household.<sup>69</sup> In discussing the creation and interpretation of § 230, the Ninth Circuit addressed the seemingly odd result of *Stratton-Oakmont*—namely that censoring the content of some messages made Prodigy liable for all of the content posted on its message boards; whereas a more passive operator like CompuServe

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<sup>65</sup> *Id.* at 333.

<sup>66</sup> *See, e.g.,* *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (“The ‘development of information’ therefore means something more substantial than merely editing portions of an e-mail and selecting material for publication.”); *see also* *Jones v. Dirty World Entm’t Recordings, LLC*, 755 F.3d 398, 413–14 (6th Cir. 2014) (rejecting the district court’s “specific encouragement” test because it “elided the crucial distinction between, on the one hand, taking actions . . . that are necessary to the display of unwelcome and actionable content and, on the other hand, responsibility for what makes the displayed content illegal or actionable”).

<sup>67</sup> *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1165 (9th Cir. 2008) (“Roommate’s own acts . . . are entirely its doing and thus section 230 of the CDA does not apply to them. Roommate is entitled to no immunity.”).

<sup>68</sup> *Id.* at 1166 (“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.”).

<sup>69</sup> *Id.* at 1165.

was able to escape liability—as explaining the fundamental rationale behind Congress’ decision to pass the law.<sup>70</sup> Namely, “[i]n passing section 230, Congress sought to spare interactive computer services this grim choice” between complete exposure to liability for any exercise of editorial functions or complete abdication of control of the content users could post to their website.<sup>71</sup> “In other words, Congress sought to immunize the *removal* of user-generated content, not the *creation* of content.”<sup>72</sup> It was on this basis that the Ninth Circuit found that by requiring that users respond to questions that prompted discriminatory answers, Roommates.com had participated in the development of content that violated the Fair Housing Act.<sup>73</sup> The court reasoned that, “The FHA makes it unlawful to ask certain discriminatory questions for a very good reason: Unlawful questions solicit (a.k.a. ‘develop’) unlawful answers. Not only does Roommates.com ask these questions, Roommates.com makes answering the discriminatory questions a condition of doing business.”<sup>74</sup> On that basis, the court concluded that Roommates.com was not entitled to § 230 immunity. Other circuits have since adopted the “material contribution” test developed by the Ninth Circuit in *Roomates.com*.<sup>75</sup>

To summarize, the CDA—enacted to protect the free-exchange of communication on the internet from the potentially stifling effects of the *Stratton-Oakmont* ruling—grants a website operator broad immunity against tort claims arising from content posted on its website by a third-party, regardless of whether the website operator has taken on none, some, or all of the traditional editorial functions of a print publisher, so long as the website operator has not materially contributed to the creation of the content.<sup>76</sup> Ostensibly, this was done, as the court in *Roommates.com* reasoned, to relieve website operators of the “grim choice” website

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<sup>70</sup> *Id.* at 1163.

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

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1165, 1168 (relying on a Wikipedia definition of “[web] content development” to arrive at a “context appropriate meaning of the term” that ties development of content to “the process of researching, writing, gathering, organizing and editing information”). *But see* *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (“The development of information therefore means something more substantial than merely editing portions of an email and selecting material for publication.”).

<sup>74</sup> *Roommates.com*, 521 F.3d at 1166.

<sup>75</sup> *See* *Jones v. Dirty World Entm’t Recordings, LLC*, 755 F.3d 398, 413 (6th Cir. 2014) (collecting cases).

<sup>76</sup> *See, e.g., Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (“Taken together, these provisions bar state-law plaintiffs from holding interactive computer service providers legally responsible for information created and developed by third parties.”).

operators were left with following *Stratton-Oakmont* and *CompuServe*; that is, the choice between editing content and becoming liable on the one hand, or doing nothing at all and having no control over content uploaded to its website.<sup>77</sup>

Congress, according to § 230(c)(2)(A), perhaps thought of it in somewhat different terms—namely, encouraging websites to develop newer and better filtering and editing tools.<sup>78</sup> Either way it comes to the same result: websites can be held liable when they create or directly participate in the creation of unlawful content, but are likely to be found immune from tort liability if they exercise only limited editorial functions.<sup>79</sup>

#### IV. DEFAULT JUDGMENTS AND THE CIRCUMVENTION OF CDA IMMUNITY

Somewhat ironically, it is arguably the very success of the CDA at shielding website operators from tort liability for the defamatory content of their users' communications that laid the groundwork for *Hassell v. Bird* and the potential for significant erosion of that very same protection. To understand why, we first need to look at one of the ways plaintiffs have sought to outflank the liability shield of § 230.

In *Blockowicz v. Williams*, plaintiffs filed suit against defendants Williams and Ramey for allegedly defamatory statements posted on the website ripoffreport.com, among others.<sup>80</sup> The Blockowiczs obtained a default judgment when Williams and Ramey failed to respond, and the district court issued a permanent injunction ordering the defendants to remove the objectionable postings.<sup>81</sup> Unsurprisingly, the defendants never complied with the injunction.<sup>82</sup> The Blockowiczs contacted the websites where the objectionable posts appeared; most complied with their request to remove the postings, however, ripoffreport.com did not.<sup>83</sup> The Blockowiczs

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<sup>77</sup> See *Roommates.com*, 521 F.3d at 1163.

<sup>78</sup> See 47 U.S.C. § 230(c)(2)(A) (2018) (providing protection from liability for good faith effort to screen or block offensive material).

<sup>79</sup> See, e.g., *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1019 (N.Y. 2011) (editor selected defamatory email/letter to publish; wasn't held liable because the "information" was created by a third party).

<sup>80</sup> *Blockowicz v. Williams*, 630 F.3d 563, 564 (7th Cir. 2010).

<sup>81</sup> *Id.* at 565.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 564.



returned to the district court and sought and were denied a motion for third-party enforcement of the injunction against ripoffreport.com, on the theory that, by refusing to remove the offending posts, ripoffreport.com was in “active concert or participation” with the original creators of the posts.<sup>84</sup> The Seventh Circuit affirmed the district court’s denial of the Blockowicz’s motion.<sup>85</sup> The Seventh Circuit noted that “the Blockowicz assert that even if Xcentric (the website operator) did not aid and abet the defendants under Rule 65(d)(2)(C), the district court should have invoked its inherent authority to bind Xcentric . . . to the injunction, or otherwise secure removal of the defendants’ statements from ROR.”<sup>86</sup> Because the Blockowicz failed to raise this argument before the district court, the Seventh Circuit deemed it waived.<sup>87</sup>

With only minor distinctions, the route the Blockowicz unsuccessfully pursued was similar to the way the courts in *Hassell v. Bird* exploited to order a website to remove defamatory postings without prior notice or opportunity to be heard.<sup>88</sup> There, like our hypothetical bike shop owner, the plaintiff claimed that postings from a disgruntled client on Yelp.com were defamatory.<sup>89</sup> In short, the client, Ava Bird, made allegations that, if true, her lawyer, Dawn Hassell, had committed malpractice in the handling of her personal injury case.<sup>90</sup> Hassell disputed Bird’s characterization of her handling of the case.<sup>91</sup> Like the Blockowicz, Hassell filed suit and obtained a default judgment against Bird.<sup>92</sup> Unlike the Blockowicz, however, when Hassell asked for the trial court to order Yelp to enforce the

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<sup>84</sup> *Id.* at 565–66.

<sup>85</sup> *Id.* at 570.

<sup>86</sup> *Id.* at 569.

<sup>87</sup> *Id.* (finding in addition to waiving the argument, the Blockowicz’s contention was unpersuasive because review of a district court’s use of inherent authority is given the abuse of discretion standard).

<sup>88</sup> See *Hassell v. Bird*, 203 Cal. Rptr. 3d 203, 220 (Cal. Ct. App. 2016) (“[A] trial court does have the power to fashion an injunctive decree so that the enjoined party may not nullify it by carrying out the prohibited acts with or through a nonparty to the original proceeding.”).

<sup>89</sup> *Id.* at 208–09.

<sup>90</sup> *Id.* at 209.

<sup>91</sup> *Id.* at 210.

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

injunction, the trial court agreed.<sup>93</sup> On appeal of the order by Yelp, the appeals court noted that:

Neither party cites any authority that applies 47 United States Code section 230 to restrict a court from directing an Internet service provider to comply with a judgment which enjoins the originator of defamatory statements posted on the service provider's Web site. We note, however, that section 230 explicitly provides that '[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.' . . . As discussed above, California law authorizes a trial court to issue an injunction preventing the repetition of statements that have been adjudged to be defamatory by the trier of fact . . . California law also empowers the court to enforce its judgment by ordering that an injunction run to a nonparty through whom the enjoined party may act.<sup>94</sup>

Although the standard for a court to order a third-party to assist in the enforcement of an injunction may vary between jurisdictions and forums, there is no doubt that, broadly speaking, a court has the authority to make such orders as are necessary to compel respect for its orders and enforce its judgments.<sup>95</sup>

This result, at least as it stands following the decision of the Court of Appeals, is troubling because it creates a precedent under which a party's legitimate First Amendment interests in certain speech—i.e. Yelp's interest in making available to consumers honest and accurate reviews of businesses—may be abrogated without notice or process because being subjected to a court's order to censor speech is not technically the same as being held liable for the speech itself.<sup>96</sup> That is, the plaintiff in *Hassell* found a strategy that leaves intact the liability protection of § 230, insofar as liability is confined to damages, but effectively neuters the free speech enhancing

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<sup>93</sup> *Id.* at 211.

<sup>94</sup> *Id.* at 225–26.

<sup>95</sup> See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (“Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose . . . submission to their lawful mandates.”) (quoting *Anderson v. Dunn*, 19 U.S. 204, 227 (1821)).

<sup>96</sup> See Yelp Inc.'s Opening Brief on the Merits at 28–29, *Hassell v. Bird*, No. S235968, 2016 WL 7667922 (Cal. Nov. 21, 2016) (“The appellate court's faulty reasoning ignores Yelp's important role as an online publisher and its strong interest in developing and maintaining a trusted resource that provides helpful consumer reviews to the public, including critical reviews that dissatisfied clients post.”).

aims of the statute.<sup>97</sup> In other words, rather than allowing websites and website operators to remain the “gatekeepers” who are immunized by statute from tort liability for content they do not create, the *Hassell v. Bird* ruling would sideline website operators: they would remain beyond the reach of (most) tort suits but would be powerless to oppose intrusion into the management of their platform by judicial fiat.

## V. A PROPOSED MECHANISM FOR RECALIBRATING THE BALANCE OF INTERESTS

Maybe *Hassell v. Bird* is not such a bad direction for internet law to take. There is a tenable argument that § 230 immunity protects bad actors and has singularly contributed to the oftentimes toxic environment found in many corners of the web.<sup>98</sup> That is, by giving site operators immunity for third-party generated content, § 230 creates the space for “Bad Samaritans” who help create the environment in which bullying, harassment, and all other manners of toxic speech are fostered, but are then able to wash their hands of toxic content when litigation follows—so long as such site operators stop short of crossing the “material contribution” threshold. If an individual targeted by such speech cannot identify the primary speaker, he or she may be left with no recourse. Perhaps, then, website operators should be made to bear at least some of the costs associated with hosting objectionable third-party content. After all, nothing in this scheme suggests that website operators would be subjected to any great increase in costs by being required to comply with removal orders. Indeed, many service providers already delete or de-index content found to be defamatory without being subjected themselves to any order.<sup>99</sup>

On the other hand, the result in *Hassell v. Bird* is troubling because the entire basis for the removal order—that is, the finding that Ava Bird’s reviews of Dawn Hassell’s handling of her case were defamatory—was reached via default judgment.

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<sup>97</sup> See *id.* at 27 (arguing that the court of appeals’ decision “ignored Yelp’s interest in its own website permitting California courts to view a non-party’s conduct solely through the lens of a plaintiff’s unopposed characterizations of the defendant’s alleged conduct, without regard to the separate interests of the non-party”).

<sup>98</sup> See Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1131–32 (2011) (discussing the obstacles created by § 230 for victims of cyber-torts).

<sup>99</sup> See Eugene Volokh & Paul Alan Levy, *Dozens of Suspicious Court Cases, With Missing Defendants, Aim at Getting Web Pages Taken Down or Deindexed*, WASH. POST: VOLOKH CONSPIRACY (Oct. 10, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/10/10/dozens-of-suspicious-court-cases-with-missing-defendants-aim-at-getting-web-pages-taken-down-or-deindexed/?utm\\_term=.a6f59dbfdee2](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/10/10/dozens-of-suspicious-court-cases-with-missing-defendants-aim-at-getting-web-pages-taken-down-or-deindexed/?utm_term=.a6f59dbfdee2) (discussing general policy of websites to remove content found to be defamatory).

That is, although subject to a “prove up” hearing, Hassell’s allegation that the reviews were defamatory in nature was never actually contested.<sup>100</sup> Indeed, it is not so hard to imagine a state of affairs wherein those with financial means will be able to use the *Hassell v. Bird* pathway—sue the author, obtain a default or consent judgment, then enjoin website—to scrub the Internet of any content they object to.<sup>101</sup> Indeed, such suits brought by so-called “reputation management” companies already exist in limited form.<sup>102</sup> *Hassell v. Bird* would provide a ready roadmap for more of the same.<sup>103</sup>

Fortunately, a pair of legal mechanisms already exist that could be combined and adapted to recalibrate internet libel law. Specifically, anti-SLAPP (“Strategic Lawsuit Against Public Participation”) laws are already used to protect the rights of speakers from lawsuits designed to harass and intimidate critics.<sup>104</sup> In its most basic sense, an anti-SLAPP law permits a defendant to move to strike a lawsuit that arises from some act connected to the defendant’s right to speak about public issues.<sup>105</sup> Once the defendant makes such a showing, the burden shifts to the plaintiff to show that he or she is likely to prevail on the merits of the claim.<sup>106</sup> On the other hand, cost and fee-shifting provisions are used in various contexts to dissuade frivolous claims and encourage meritorious ones.<sup>107</sup> Assuming the California Supreme Court (and others in the future) permit injunctions to run to non-party website operators, these mechanisms could be combined to discourage meritless lawsuits against negative online postings, permit and encourage website operators to defend valuable speech,

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<sup>100</sup> See *Hassell v. Bird*, 203 Cal. Rptr. 3d 203, 220 (Cal. Ct. App. 2016).

<sup>101</sup> See Eugene Volokh, *California Supreme Court Will Decide: Can Court Order Yelp to Take Down Defendant’s Post, Though Yelp Wasn’t Even a Party to the Lawsuit?*, WASH. POST: VOLOKH CONSPIRACY (Sept. 21, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/21/california-supreme-court-will-decide-can-court-order-yelp-to-take-down-defendants-post-though-yelp-wasnt-even-a-party-to-the-lawsuit/?utm\\_term=.2e9a97efb119](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/21/california-supreme-court-will-decide-can-court-order-yelp-to-take-down-defendants-post-though-yelp-wasnt-even-a-party-to-the-lawsuit/?utm_term=.2e9a97efb119).

<sup>102</sup> See Volokh & Levy, *supra* note 99.

<sup>103</sup> *Id.*

<sup>104</sup> See Sean P. Trende, *Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem*, 44 DUQ. L. REV. 607, 642–44 (2006) (providing an overview of state anti-SLAPP laws and arguing in favor of a federal statute).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See, e.g., 28 U.S.C. § 1447 (2018) (providing for the possibility of fee- and cost-shifting where a case removed to federal district court is remanded to state court).

and allow meritorious plaintiffs some means of redress without eviscerating the free-speech promoting aims of the CDA.

Specifically, a procedure could be established whereby a non-party website operator, given adequate notice of an order for the removal of postings found to be defamatory, may file a motion challenging the removal order.<sup>108</sup> In a manner similar to the anti-SLAPP procedure, the website operator would have to make a showing of a protected interest in the speech, at which point the burden would shift to the party seeking removal to demonstrate ongoing harm. Limited discovery may be permitted. In cases where the website operator prevails, recovery of fees and costs from the party seeking the removal of the content should be allowed.

By permitting removal orders, but leaving otherwise untouched § 230 immunity, anti-SRO procedures would allow victims of online abuse to get some measure of redress for the harm they suffer in cases where the primary speaker is unidentifiable or chooses not to defend, as is often the case.<sup>109</sup> However, by allowing website operators to challenge such orders, and possibly recover fees and costs, an anti-SRO process would specifically encourage websites to defend speech, rather than just removing immediately in the face of a defamation judgment, and it would discourage SLAPP-type lawsuits. Of course, an anti-SRO process would not be a panacea, but it would allow plaintiffs to vindicate their interests while also addressing a growing body of litigation that seeks to circumvent the important immunity provided by the CDA.

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<sup>108</sup> Let's call it an anti-Strategic Removal Order, or anti-SRO, process.

<sup>109</sup> Of course, in cases where the primary speaker defends his or her speech, the proposed process would hardly ever be used; that is, it is likely any settlement or judgment in the plaintiff's favor would require the defendant-speaker to remove the objected-to content.