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User-Generated Pornography on the Internet: Why Victims of Porn 2.0 Need Internet Service Providers to No Longer Be Unjustifiably Immunized by the Communications "Decency" Act

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USER-GENERATED PORNOGRAPHY ON THE INTERNET: WHY VICTIMS OF PORN 2.0 NEED INTERNET SERVICE PROVIDERS TO NO LONGER BE UNJUSTIFIABLY IMMUNIZED BY THE COMMUNICATIONS "DECENCY" ACT

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I. INTRODUCTION

In the past twenty-five to thirty years, Internet usage has increased at lightning speed.[1] In a 1995 survey, only 14% of adults (those individuals age eighteen and over) reported that they had ever used a computer to connect to the Internet on a regular basis.[2] In stark comparison, a recent survey reported that as of May 2011, 78% of adults (those individuals age eighteen and over) now use the Internet regularly.[3] When considering only those individuals who live in high-income households (those households making $75,000 or more a year), the number of adults using the Internet regularly jumps to 96%.[4]

Among those adults who are now using the Internet regularly, the Internet is increasingly

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1 *See infra* notes 2-4 and accompanying text.

2 *Internet Adoption*, PEW INTERNET & AM. LIFE PROJECT SURVEY, http://www.pewinternet.org/Trend-Data/Internet-Adoption.aspx (last visited Nov. 29, 2011) (explaining that the 14% of adults who reported in 1995 that they had ever used a computer to connect to the Internet included those individuals who said that they had ever used "a home, work or school computer and modem to connect to computer bulletin boards, information services such as CompuServe or Prodigy, or computers at other locations").

3 *Who's Online: Internet User Demographics*, PEW INTERNET & AM. LIFE PROJECT SURVEY, http://www.pewinternet.org/Static-Pages/Trend-Data/Whos-Online.aspx (last visited Nov. 29, 2011).

4 *Id.*

being utilized as a way to get news, shop, socialize, and network.[5] While the "Millennial Generation" (those individuals born in 1977-1992) is still significantly more likely than older generations to engage in several online activities, such as social networking and blogging, older generations are making notable gains in these areas.[6] For example, in recent years, the fastest rate of growth in social networking came from the "G.I. Generation" (those individuals born before 1937).[7] Between 2008 and 2010, the rate of social network site usage for the G.I. Generation quadrupled from 4% to 16%.[8] While younger Internet users remain the most active participants in social networking services and other online activities, some Internet activities are becoming more uniformly popular across all age groups.[9] The most uniformly popular uses of the web being email and search engines.[10]

Undoubtedly, the continuous development of Internet technologies and uses – including the introduction of Web 2.0 – has contributed to the substantial growth in Internet usage over time. "Web 2.0" is commonly used to refer to "applications that facilitate interactive information sharing, interoperability, user-centered design, and collaboration."[11] One of the significant features of these Web 2.0 technologies is that they allow users to upload their own ("user-

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5 *See* Kristen Purcell, *Search and email still top the list of most popular online activities*, PEW INTERNET & AM. LIFE PROJECT SURVEY, 2 (Aug. 9, 2011), http://pewinternet.org/~/media//Files/Reports/2011/PIP_Search-and-Email.pdf (reporting that between 2002 and 2011 there was an increase in the number of Internet users who use the web to get news, buy products, and go on social networking sites).

6 *See* Kathryn Zickuhr, *Generations 2010*, PEW INTERNET & AM. LIFE PROJECT SURVEY, 2 (Dec. 16, 2010), http://pewinternet.org/~/media//Files/Reports/2010/PIP_Generations_and_Tech10.pdf (reporting that in addition to use of social networking sites, "Milliennials" also surpass older generations when it comes to the use of instant messaging, using online classifieds, listening to music, playing online games, reading blogs and participating in virtual worlds).

7 *Id.* at 3.

8 *Id.*

9 *Id.* at 2 (reporting that the Internet activities that are becoming more uniformly popular across all age groups include email, search engine use, seeking health information, getting news, buying products, making travel reservations or purchases, doing online banking, looking for religious information, rating products, services, or people, making online charitable donations, and downloading podcasts).

10 Purcell, *supra* note 5, at 2 (reporting that as of May 2011, "92% of online adults use search engines to find information on the Web and . . . 92% use email"); Zickuhr, *supra* note 6, at 11 (reporting that as of 2010, 87% of online adults use search engines and 94% use email).

11 KENT D. STUCKEY, INTERNET AND ONLINE LAW § 8.01 (2011), *available at* Lexis 1-8 ALMIOL § 8.01 (quoting another source) (citation omitted).

generated") content onto the Internet for other users to see.[12] The immensely popular websites Facebook,[13] YouTube,[14] and Wikipedia[15] are all examples of Web 2.0 applications.[16]

Web 2.0 has also led to the development of more explicit websites – sometimes referred to as "Porn 2.0"[17] – where users upload pornographic materials that they have created onto the Internet.[18] Naturally, once these user-generated materials have been uploaded, they are potentially available for anyone who logs onto the Internet to see.[19] Thus, in light of the extreme popularity of Porn 2.0 websites,[20] postings on these sites can have detrimental and long-lasting effects on a person's reputation,[21] career,[22] mental health, etc., and have led to harassment and threats of violence.[23]

There are a number of reasons why an individual would upload their own pornographic

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12 *See generally* Tim O'Reilly, *What is Web 2.0*, O'REILLY MEDIA INC. (Sept. 30, 2005), http://oreilly.com/web2/archive/what-is-web-20.html.

13 FACEBOOK, https://www.facebook.com (last visited Oct. 25, 2011).

14 YOUTUBE, http://www.youtube.com (last visited Oct. 25, 2011).

15 WIKIPEDIA, http://www.wikipedia.org (last visited Oct. 25, 2011).

16 *See Web 2.0*, WIKIPEDIA, http://en.wikipedia.org/wiki/Web_2.0 (last visited Nov. 29, 2011).

17 See PORNOTUBE, INC., http://PornoTube.com (last visited Nov. 30, 2011), REDTUBE, http://www.RedTube.com (last visited Nov. 30, 2011), and YOUPORN, http://www.YouPorn.com (last visited Nov. 30, 2011) for examples of Porn 2.0 websites.

18 *See generally* Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 799 (2008); Ariel Ronneburger, *Sex, Privacy, and WebPages: Creating A Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP. 1, 2 (2009).

19 *See* Ronneburger, *supra* note 18, at 8.

20 Alexa.com, a website that measures the popularity of websites, calculates that one of the most popular Porn 2.0 websites, YouPorn, is the eighty-second most visited site in the world, and the eighty-eighth most visited site in the United States. *See Youporn.com Site Info*, ALEXA, http://www.alexa.com/siteinfo/youporn.com (last visited Nov. 29, 2011).

21 *See* A.G. Sulzberger, *In Small Towns, Gossip Moves To the Web, and Turns Vicious*, N.Y. TIMES, Sept. 20, 2011, at A1, *available at* 2011 WLNR 18650902 (describing how anonymous posts on an online community forum damaged a couple's reputation in the community, and ultimately lead to the couple's decision to relocate).

22 *See* Ellen Nakashima, *Harsh Words Die Hard on the Web*, WASH. POST, Mar. 7, 2007, at A1, *available at* 2007 WLNR 28542997 (discussing how posts about female law students on an anonymous Internet defamation website resulted in threats of sexual violence and possible damage to the students' professional reputations); Jeff Tyler, *Get yourself a little online privacy*, MARKETPLACE MONEY (Mar. 2, 2007), http://marketplace.publicradio.org/display/web/2007/03/02/an_online_identity/ (interviewing an ivy league law student who claimed that vulgar comments made about her on an online discussion board made it difficult for her to find a job).

23 *See* Brittan Heller, Note, *Of Legal Rights and Moral Wrongs: A Case Study of Internet Defamation*, 19 YALE J.L. & FEMINISM 279, 282-83 (2007) (detailing how a well-known software programmer reacted to receiving anonymous online threats of sexual violence by canceling her scheduled public speaking events).

materials onto the Internet.[24] Unfortunately, time and experience has demonstrated that their intentions are not always innocent.[25] These sites are sometimes intentionally used as instruments for humiliation and revenge by jealous co-workers, scorned ex-partners, etc. For example, in 2004 when Cecilia Barnes broke up with her long-term boyfriend, he turned to the Internet for revenge and posted fake Internet profiles in Ms. Barnes' name, posting nude photos of Barnes and solicitations for sexual intercourse.[26] Ms. Barnes only became aware of these unauthorized profiles and their content after she started to receive emails and phone calls from strangers soliciting her for sex.[27]

Unfortunately, experiences like Ms. Barnes' are not uncommon and as the number of user-generated websites has grown, it has become increasingly easy for Internet users to post pornographic materials of people who did not consent to the materials' circulation.[28] Of course, almost every adult in America has heard of celebrities, such as Pamela Anderson, who have sex tapes on the Internet despite the celebrity's highly publicized efforts to suppress the videos.[29] However, in the case of unauthorized Porn 2.0 postings, celebrities are in a different a position compared to non-celebrities. For starters, celebrities generally have better financial resources to

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24 *See* Bartow, *supra* note 18, at 813.

25 *See id.*; *see, e.g.*, *Ex girlfriend revenge!*, IHATESTACEY.COM, http://www.ihatestacy.com/ (last visited on Oct. 11, 2011) (a site that purportedly allows users to view private photos of the website author's ex-girlfriend after the viewer refers a minimum number of people to the site); *Get Revenge On Your Ex*, GETREVENGEONYOUREX, http://www.getrevengeonyourex.com/ (last visited Oct. 11, 2011) (a website that advertises to users that they can "Produce The Evidence [They] Need Or Just Humiliate [Their] Ex Like Never Before!" by offering to digitally alter photos that a user has uploaded to create a "special photo" such as a "photograph of [their] ex with another person, in a compromising pose, being violated or anything else [the user] can think of!"); *Revenge Pics Of You Ex*, FREE-REVENGE-IDEAS.COM, http://www.free-revenge-ideas.com/Revenge-Pics-Of-Your-Ex.html (last visited Oct. 11, 2011) (a website "designed" to allow users to share photos and stories about their exes and encourages users to upload the "funniest or meanest" of these materials).

26 *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1098 (9th Cir. 2009).

27 *See id.*

28 *See* Ronneburger, *supra* note 18, at 3.

29 *See* Ann W. O'Neill, *Big Names Lose a Few Rounds During a Litigious Year*, L.A. TIMES, Dec. 28, 1997, at B1, *available at* 1997 WLNR 5646344 (reporting that although Pamela Anderson and her husband, Tommy Lee, "spent an extraordinary amount of time" trying to suppress a sex tape from the couple's honeymoon from being released, the video was ultimately made available to subscribers to certain adult websites and would be released in hard copy in the future).

fund litigation.[30] Additionally, from a purely economic standpoint, one can question whether celebrities actually suffer any damage as a result of the unauthorized release of their explicit materials.[31] For example, when Paris Hilton and Kim Kardashian's sex tapes were "leaked" to the public, each of these celebrities not only experienced a new level of fame, but they both reportedly cut a deal for a percentage of the proceeds.[32]

In comparison, a non-celebrity is unlikely to experience any benefit – commercial or otherwise – when they become a victim of an unauthorized and explicit posting on the Internet. However, they are very likely to experience the destructive consequences of these sites.[33] The unfortunate reality is that for a victim of Porn 2.0, the potential for recovery is extremely limited, and the road to any recovery at all will be challenging.[34]

II. POTENTIAL RECOVERY AGAINST THE POSTING PARTY

When a person becomes the victim of an unauthorized Porn 2.0 posting, they may be able to bring suit for damages under traditional tort theories such as defamation, invasion of privacy, and intentional infliction of emotional distress.[35] Some courts have already applied these traditional tort theories to redress economic, reputational, or privacy-based injuries arising from

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30 *See* Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 895 (2006).

31 *Id.* ("[G]iven the value of publicity and the tapes themselves, one might question what harm celebrities suffer from this type of 'embarrassing' disclosure.").

32 *See* IAN C. BALLON, E-COMMERCE AND INTERNET LAW § 12.07[8][C] (2d ed. 2011), *available at* Westlaw ECOMMINTLAW (stating that the sex tape involving celebrities Kim Kardashian and Ray J was released "amid rumors that the participants had cut a deal for a percentage of the proceeds"); McClurg, *supra* note 30 ("Paris Hilton reportedly cashed in on the sex tape that made her a household name."); *see also* Richard Johnson, *Happy Ending*, N.Y. POST, May 1, 2007, at 12, *available at* 2007 WLNR 8222999 (reporting that Kim Kardashian dropped her lawsuit against Vivid Entertainment over the release of her sex tap with Ray J in exchange for $5,000,000).

33 *See generally* sources cited *supra* notes 21-23.

34 *See* discussion *infra* Parts II and III.

35 *See* discussion *infra* Part II.A-C.

conduct on the Internet.[36] However, applying these theories to conduct on the Internet has posed some challenges because cybertorts do not involve the traditional categories of injury covered by tort law "such as automobile accidents, slip and fall mishaps, medical malpractice, or injuries due to dangerously defective products."[37]

Thus, as a threshold matter, it is prudent to recognize some of the general procedural challenges that arise when a Porn 2.0 victim desires to bring an action in tort against his or her primary tortfeasor due to the special context of cybertorts and the general nature of tort law.[38] For example, because tort law is created by state law,[39] where a Porn 2.0 victim files suit, and thus which state's law applies to his/her action, will determine whether the victim can even attempt to pursue a particular cause of action.[40] Further, the law applicable to a particular suit will also determine a Porn 2.0 victim's burden of proof because causes of action in tort vary among the states where they are recognized. Lastly, even where a particular cause of action is recognized under the governing law, a Porn 2.0 victim might have difficulty naming the appropriate defendant due to issues of online anonymity and pseudonymity.[41]

When an unauthorized Porn 2.0 posting is made anonymously, a victim of the post may apply to have a court "serve a *subpoena duces tucum* ([or] 'John Doe subpoena') directed to [an] Internet service provider[] to unveil the identity of [the] anonymous [poster]."[42] However, generally speaking, "[c]ourts will not issue a *subpoena duces tecum* unless the ISP gives notice

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36 *See* MICHAEL L. RUSTAD, INTERNET LAW IN A NUTSHELL 143 (2009).

37 *Id.*

38 *See infra* text accompanying notes 39-41.

39 *See* RESTATEMENT (SECOND) OF TORTS § 5 cmt. a (1977); BALLON, *supra* note 36, at §§ 12.02[1], 37.01.

40 *See* BALLON, *supra* note 32, at §§ 12.02[1], 37.01.

41 *See id.* at §§ 1.06[2], 12.02[1]; *see also* RUSTAD, *supra* note 36, at 169 (discussing the difficultly of pursuing online libel suits for anonymous website postings); Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 268 (2005) ("[T]he relative anonymity the Internet fosters makes remedies against primary malfeasors less effective than in the brick-and-mortar context.").

42 RUSTAD, *supra* note 36, at 169.

to the anonymous speaker and an opportunity to be heard."[43] In effect, this means that a Porn 2.0 victim has to wait to see if a court will order the ISP to unveil the identity of the anonymous poster while the court balances the rights of the anonymous poster against a Porn 2.0 victim's right to vindicate his or her tort rights and remedies.[44] Ultimately, there is no guarantee that a court will find the balance to tip in favor of a Porn 2.0 victim.[45] In one case, the court not only refused to issue a subpoena to compel the anonymous Internet speakers' identities, but also "issued a protective order noting these persons demonstrated intent to remain anonymous by refraining from disclosing their identities with their email addresses."[46]

Assuming that a Porn 2.0 victim is able to overcome these threshold challenges to bringing an action in tort based on conduct in the Internet, they may have a cause of action for defamation, invasion of privacy, and/or intentional infliction of emotional distress. The substance of each of these tort theories, and their potential application in the Porn 2.0 context to a primary tortfeasor – i.e., the person who first posts the explicit content on the Internet - is described in detail below.[47]

A. Defamation:

Under certain circumstances, a victim of an unauthorized posting on a Porn 2.0 website may successfully pursue a claim of defamation against the party who originally posted the unauthorized content on the Internet.[48] Particularly, this common law tort may be utilized to redress any statements in the unauthorized posting that injured the Porn 2.0 victim's reputation in

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43 *Id*.
44 *See id.* at 169-171.
45 *But see* Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 101, 108 n.31 (2011) ("Absent specific efforts to hide their IP address, however, users can often be identified through records kept by intermediaries.").
46 *See id.* at 170 (discussing Anderson v. Hale, 2001 WL 503045 (N.D. Ill. 2001)).
47 *See* discussion *infra* Part II.A-C.
48 *See* discussion *infra* Part II.A.

the community.[49]

Defamation is defined as "the act of harming the reputation of another by making a false statement to a third person."[50] When such statements are made in a fixed medium – such as the Internet – they are actionable under the defamation tort of libel.[51] Libel generally requires: "[(1)] a false and defamatory statement concerning another; [(2)] an unprivileged publication to a third party; [(3)] fault amounting at least to negligence on the part of the publisher; and [(4)] either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."[52]

Courts have recognized that certain defamatory statements are so extreme that "special harm" i.e., "loss of something having economic or pecuniary value"[53] – need not be proven by a plaintiff.[54] These extreme statements are considered "*per se* defamatory."[55] "An attack on the integrity and moral character of a [plaintiff] is libelous *per se*."[56] Additionally, courts have held that "[f]alse statements and distorted pictures that disgrace plaintiffs or injure their careers,

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49 RUSTAD, *supra* note 36, at 169.

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

51 *See* Wesley Burrell, *I Am He As You Are He As You Are Me: Being Able to Be Yourself, Protecting the Integrity of Identity Online*, 44 LOY. L.A. L. REV. 705, 717 (2011); *see also* RESTATEMENT (SECOND) OF TORTS § 568(1) (1977) ("Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.").

52 RESTATEMENT (SECOND) OF TORTS § 558 (1977). *But see* Carolyn Kelly MacWilliam, Annotation, *Individual and Corporate Liability for Libel and Slander in Electronic Communications, Including E-mail, Internet and Websites*, 3 A.L.R.6TH 153 § 4 (2005) (providing that in an action for electronic defamation, some courts have held that a plaintiff "must make a demand in writing to the party that published a defamatory statement prior to bringing the action").

53 RESTATEMENT (SECOND) OF TORTS § 569 cmt. b (1977) ("The words 'actionable *per se*' are used . . . to denote the fact that the publication is of such a character as to make the publisher liable for defamation although no special harm results from it, unless the defamatory matter is true or the defamer was privileged to publish it.").

54 *See id.* at §§ 558, 569 cmt. b.

55 *Id*.

56 Wilson v. IBP, Inc., 558 N.W.2d 132, 139 (Iowa 1996).

constitute defamation *per se*."[57] When a statement is of such a nature that it falls within one of these "established categories of *per se* defamation, 'the law presumes that damages will result, and they need not be alleged or proven.'"[58] In other words, a defamatory statement that is actionable *per se* may result in liability for defamation even though the plaintiff has not suffered any loss of economic or pecuniary value.[59] Further, where a plaintiff can establish that a defendant's statements are defamatory *per se*, proof of falsity and malice will also be presumed.[60]

In the context of an unauthorized Porn 2.0 posting, this means that a victim of the posting may be able to establish that the challenged posting was libelous *per se* if the content of the posting was altered, or in any way distorted, before it was uploaded onto the internet.[61] For example, *X*, may have a successful libel claim against her ex-boyfriend, *Y*, if *Y* used Photoshop (or any other photo editing program or tools) to alter a photo of *X* and then posted the altered photo on the Internet. If *X* can establish that the altered photo attacked *X*'s integrity and moral character, disgraced *X*, and/or injured *X*'s career, *Y*'s posting of the altered photograph may amount to libel *per se*.[62] As a result, a court would presume that each of the prima facie elements of *X*'s libel claim exist.[63] This is the result that a court found where the defendant had altered a photograph of the plaintiff - to make it appear that the plaintiff intentionally exposed her breasts -

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57 Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 87 (2009) (citing cases); *see also Wilson*, 558 N.W.2d at 139 (quoting Lara v. Thomas, 512 N.W.2d 777, 785 (Iowa 1994)) ("In addition, we have recognized that 'slanderous imputations affecting a person in his or her business, trade, profession, or office are also actionable without proof of actual harm.'").

58 Zherka v. Amicone, 634 F.3d 642, 645 (2d Cir. 2011) (quoting Liberman v. Gelstein, 80 N.Y.2d 429, 435 (N.Y. 1992)).

59 RESTATEMENT (SECOND) OF TORTS §§ 558, 569 cmt. b (1977).

60 Kiesau v. Bantz, 686 N.W.2d 164, 175 (Iowa 2004) (citing Vinson v. Linn-Mar Cmty. Sch. Dist., 360 N.W.2d 108, 115-16 (Iowa 1995)) ("In statements that are libelous *per se*, falsity, malice, and injury are presumed and proof of these elements is not necessary.").

61 Citron, *supra* note 57, at 87 (citing cases).

62 *See generally* sources cited *supra* notes 56-57.

63 *See Kiesau*, 686 N.W.2d at 175, 178.

and then e-mailed the picture to the plaintiff's colleagues.[64] Once the jury found that the altered photograph of the plaintiff was libelous *per se*, the court acknowledged that the law conclusively presumed the existence of damage to the plaintiff's reputation.[65] Thus, the court proceeded to allow the jury to award the plaintiff damages without requiring that she prove any actual damage to her reputation.[66]

On the other hand, a victim of an unauthorized Porn 2.0 posting will be less likely to succeed on a claim of libel if they cannot establish that the content of the posting has never been altered.[67] In order for a statement to be actionable as defamation, the statement must be both false and defamatory.[68] As the commentary to the RESTATEMENT (SECOND) OF TORTS explains: "There can be no recovery in defamation for a statement of fact that is true, although the statement is made for no good purpose and is inspired by ill will toward the person about whom it is published and is made solely for the purpose of harming him."[69] Thus, no matter how malicious the posting party's motives were, if the content of a Porn 2.0 post has never been altered or distorted, the post will need to have a false caption (or similar description, title, etc.) in order for the post to satisfy the falsity element of defamation.[70]

In sum, because a plaintiff can only recover on a claim of defamation if the offending statements are both false and defamatory,[71] a Porn 2.0 victim's potential recovery on a claim of defamation is limited. In order for a Porn 2.0 victim to have a viable defamation claim, he or she

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64 *Id.* at 169-70, 178 (upholding the district court's finding of libel *per se* after finding substantial evidence existed to support the jury's finding).

65 *Id.*

66 *Id.*

67 *See infra* text accompanying notes 68-69.

68 RESTATEMENT (SECOND) OF TORTS § 581A cmt. a (1977) ("To create liability for defamation there must be publication of matter that is both defamatory and false.").

69 *Id.* (also noting however that "[s]everal states have constitutional or statutory provisions" under which "truth of a defamatory statement of fact is not a defense if the statement is published for 'malicious motives' or if it is not published for 'justifiable ends' or on a matter of public concern").

70 *See generally id.*

71 *See generally id.*

will ultimately need to establish that before the offending photo or video was posted onto the Internet, the posting party edited the original content of the post. Without a showing that such content was distorted, altered, etc., the unauthorized post cannot be considered defamatory without being accompanied by some false caption, title, description, etc.[72]

B. Invasions of Privacy:

In some instances, a victim of an unauthorized Porn 2.0 posting may be able to bring suit alleging an invasion of his or her common law right to privacy.[73] Generally speaking, there are four recognized common law privacy torts,[74] three of which involve claims based on the public disclosure of private information: (1) intrusion upon seclusion, (2) public disclosure of private facts, and (3) publicity which places the plaintiff in a false light.[75] These three potential causes of action are discussed individually below.[76]

1. Intrusion upon Seclusion:

The tort of unreasonable intrusion concerns invasions of a person's interest in solitude or seclusion.[77] Generally speaking, to establish a cause of action for unreasonable intrusion, a plaintiff must establish: (1) the existence of "an intentional intrusion by the defendant;" (2) that the intrusion was "into a matter which the plaintiff has a right to keep private;" and (3) that the

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72 *See supra* text accompanying notes 67-70.

73 *See* discussion *infra* Part II.B.

74 *See* Patricia Sanchez Abril, *"A Simple, Human Measure of Privacy": Public Disclosure of Private Facts in the World of Tiger Woods*, 10 CONN. PUB. INT. L.J. 385, 389 (2011); *see also* RESTATEMENT (SECOND) OF TORTS § 652A (1977).

75 BALLON, *supra* note 32, at § 12.02[3][A].

76 *See* discussion *infra* Part.II.B.2. I have chosen not to discuss the substance and potential application of the fourth recognized privacy tort - appropriation of the plaintiff's name or likeness – in this paper because celebrities, which are not the focus of the paper, almost exclusively use this cause of action. *See* McClurg, *supra* note 30, at 895 (acknowledging that while the right of publicity and appropriation claims are not reserved for celebrities, they are commonly only used by celebrities).

77 *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. a (1977) ("The . . . invasion of privacy covered by [intrusion upon seclusion] . . . consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.").

intrusion was made "by the use of a method which is objectionable to the reasonable person."[78] Thus, whether an unreasonable intrusion claim can be sustained, depends on the particular circumstances of the case, including whether the defendant acted intentionally, whether the alleged conduct constitutes an intrusion, and whether the plaintiff had a reasonable expectation of privacy in the space allegedly intruded by the defendant.[79]

One context in which a plaintiff may have a viable claim for unreasonable intrusion is where the alleged tortfeasor took photos or videos of the plaintiff – without the plaintiff's knowledge or consent - while the plaintiff was alone in their bedroom or bathroom.[80] Courts have routinely held that individuals have a reasonable expectation of privacy when they are alone in these private areas.[81] Thus, for example, if *A* installs a hidden video camera in *B*'s shower and records *B* while she is taking a shower, *A* has intentionally intruded *B*'s privacy. Under these facts, *A* may be subject to liability to *B* for tortuous intrusion, regardless of the content of the videotape,[82] and regardless of whether *A* later publishes the videotape.[83] Instead, *A*'s potential liability results from his act of recording of *B*, without her knowledge or consent, despite *B*'s

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78 62A AM. JUR. 2D *PRIVACY* § 39 (2011) (citing cases).

79 *See generally id.*

80 *See generally In re* Marriage of Tigges, 758 N.W.2d 824, 827 (Iowa 2008) (finding that the respondent wife "had a reasonable expectation that her activities in the bedroom of the home were private when she was alone in that room"); State v. Perez, 779 N.W.2d 105, 111 (Minn. Ct. App.) (finding that the "[defendant]'s wife had a reasonable expectation of privacy from being surreptitiously videotaped by him while she was alone in their shared bathroom."), *review denied*, A09-704, 2010 Minn. LEXIS 327 (Minn. June 15, 2010); Clayton v. Richards, 47 S.W.3d 149, 155 (Tex. App. 2001) ("When a person goes into the privacy of the bedroom, he or she has a right to the expectation of privacy in his or her seclusion.").

81 *See* cases cited *supra* note 80.

82 *See Tigges*, 758 N.W.2d at 830 ("The intentional, intrusive, and wrongful nature of [the defendant]'s conduct is not excused by the fact that the surreptitious taping recorded no scurrilous or compromising behavior.").

83 RESTATEMENT (SECOND) OF TORTS § 652B cmt. a (1977); *see also Tiggs*, 758 N.W.2d at 830 ("[The Plaintiff] had no burden to prove the videotape was published to a third party without her consent."); *Clayton*, 47 S.W.3d at 156 ("The fact that no later exposure occurs does not negate that potential and permit willful intrusion by such technological means into one's personal life in one's bedroom.").

reasonable expectation of privacy under the circumstances.[84]

Consequently, in the context of a Porn 2.0 victim, where the content of the unauthorized posting was recorded without the victim's knowledge or consent, the victim may have a viable claim for unreasonable intrusion.[85] A Porn 2.0 victim may also have a viable claim for unreasonable intrusion where the alleged tortfeasor obtained the content of the posting through the unauthorized access of the victim's computer,[86] or email.[87] For example, in 2010, two students at Rutgers University in Piscataway, New Jersey, Dharun Ravi and Molly Wei, were charged with multiple counts of invasion of privacy for secretly placing a camera in another student's dormitory room and later transmitting the encounter on the Internet.[88] The day after the content was streamed over the Internet, the other student, Tyler Clementi, jumped to his death from the George Washington Bridge.[89] Wei has already entered into a plea deal that dropped the two counts of invasion of privacy against her in exchange for her testimony against Ravi, Clementi's roommate and the person who allegedly set up the online video.[90] However, a New Jersey Superior Court Judge, Judge Glenn Berman, has already denied Ravi's motion to dismiss the charges in his indictment.[91] Whether Ravi will be found guilty for invasion of privacy is still

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84 *See Tiggs*, 758 N.W.2d at 830 ("The wrongfulness of the [defendant's] conduct springs not from the specific nature of the recorded activities, but instead from the fact that [the plaintiff]'s activities were recorded without her knowledge and consent at a time and place and under circumstances in which she had a reasonable expectation of privacy.").

85 *See supra* notes 80, 82-84 and accompanying text.

86 *See* BALLON, *supra* note 32, at § 12.02[3][B].

87 RUSTAD, *supra* note 36, at 174.

88 Press Release, Middlesex County Prosecutor's Office, Two Rutgers students charged with invasion of privacy (Sept. 28, 2011), http://www.co.middlesex.nj.us/prosecutor/PressRelease/ (follow "Two Rutgers students charged with invasion of privacy" hyperlink).

89 Winnie Hu, *Legal Debate Swirls Over Charges in a Student's Suicide*, N.Y. TIMES, Oct. 2, 2010, at A15, *available at* 2010 WLNR 19567582.

90 Henrick Karoliszyn & Larry McShane, *Tyler Clementi's parents give woman accused of driving son to suicide a break*, N.Y. DAILY NEWS, May 6, 2011, at 10, *available at* 2011 WLNR 9105870.

91 Sue Epstein, *Tyler Clementi suicide case: Defense attorneys appeal ruling that blocked review of personal writings*, THE STAR-LEDGER, Nov. 22, 2011, at 17, *available at* 2011 WLNR 24288511.

to be determined and a trial date has been scheduled for February 2012.[92] In the mean time, an appeals court has tentatively agreed to listen to arguments from Ravi's attorneys as to why it should overturn Judge Berman's decision not to dismiss the indictment.[93] If Ravi is ultimately found guilty of invasion of Clementi's privacy, however, the maximum sentence that could be imposed is five years.[94]

Of course, whether the content of an unauthorized posting was recorded without the victim's knowledge or consent, and/or through the unauthorized access of the victim's computer, a Porn 2.0 victim's potential recovery is not premised on the fact that the posting party uploaded certain content onto the Internet.[95] Instead, whether a Porn 2.0 victim will be will be able to sustain a cause of action for unreasonable intrusion ultimately depends on the circumstances under which the alleged tortfeasor obtained the content of his or her posting.[96] Nonetheless, since a Porn 2.0 victim's potential recovery is generally limited, under the proper facts, a Porn 2.0 victim may utilize this theory to recover tort damages from the posting party.

2. Public Disclosure of Private Facts:

On its face, the tort of public disclosure of private facts – which is implicated when private and highly offensive information is publicly disclosed without authorization[97] - is a perfect cause of action to remedy a victim of an unauthorized Porn 2.0 posting.[98] The public disclosure tort requires: (1) a public disclosure, (2) that the facts disclosed were private, (3) that the facts disclosed would be highly offensive and objectionable to a reasonable person, and (4)

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92 *Id*.
93 *Id*.
94 Elizabeth M. Jaffe, *Cyberbullies Beware: Reconsidering Vosburg v. Putney in the Internet Age*, 5 CHARLESTON L. REV. 379, 383 (2011) ("The cyberbullies, Ravi and Wei, were both charged by the New Jersey District Attorney's Office with invasion of privacy; however, under New Jersey law, 'the most serious charges carry [only] a maximum sentence of five years.'").
95 *See supra* note 83 and accompanying text.
96 *See supra* text accompanying notes 78-80.
97 *See* Abril, *supra* note 74, at 390.
98 *See generally* McClurg, *supra* note 30, at 887, 887-88, 897-99.

that the facts disclosed were not of legitimate public concern.[99] A victim of an unauthorized Porn 2.0 posting could more than likely establish the first three of these elements.[100] Uploading content onto the Internet would unquestionably constitute a public disclosure, and the sexual nature of the content undoubtedly constitutes a set of private facts the disclosure of which would be objectionable to a reasonable person.[101]

However, a Porn 2.0 victim may be unable to find relief in the public disclosure tort due to the fourth element that a plaintiff must prove: the fact that the information disclosed was not newsworthy or of public concern.[102] The challenge that this fourth element presents is rooted in the Supreme Court's strict interpretations of the First Amendment to the United States Constitution. The First Amendment "generally bars the government from controlling the communication of information (either by direct regulation or through the authorization of private lawsuits), whether the communication is 'fair' or not."[103] Thus, if information about an individual, albeit its private nature, is determined to be "in the public interest," disclosure of such information may not actionable, because the First Amendment grants the public the "right to know" about such information.[104]

While the Supreme Court has never drawn a bright-line rule that a state can never punish

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99 *See* Michaels v. Internet Entm't Grp., Inc., 5 F. Supp. 2d 823, 839 (C.D. Ca. 1998). *See generally* RESTATEMENT (SECOND) OF TORTS § 652D (1977).

100 *See infra* note 101 and accompanying text.

101 It should be noted that once such content has been uploaded onto the Internet, naturally the content is no longer considered "private," and thus any further postings of such content would not be actionable under the tort of public disclosure. *Compare Michaels*, 5 F. Supp. 2d at 840-41 (holding that the plaintiff celebrity couple had a right of privacy that extended to their sexual activities despite the fact that one of them was previously depicted in a widely distributed sex-tape with a third-party to the action), *with* Lee v. Penthouse Int'l, Ltd., No. CV96 7069SVW (JGX), 1997 WL 33384309, at *6-7 (C.D. Cal. Mar. 19, 1997) (finding that the plaintiff celebrity couple's explicit photographs were no longer private facts because the same photographs had previously been published).

102 *See generally* Abril, *supra* note 74, at 390; McClurg, *supra* note 30, at 888 ("In practice, however, this claim, known as the tort of 'public disclosure of private facts,' offers only a slight chance of recovery by plaintiffs.").

103 Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of A Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1051 (2000) (footnote omitted). *See generally* U.S. CONST. amend. I.

104 BALLON, *supra* note 32, at § 12.05[4][B][i].

truthful speech,[105] the Court has adopted an extremely demanding standard for when a state can punish truthful speech.[106] The Supreme Court announced in *Smith v. Daily Mail Publishing Co.*,[107] and has since affirmed, that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[108] Courts have struggled to apply this standard,[109] and scholars have argued that in effect, the Court may have left the public disclosure tort unconstitutional under the First Amendment.[110]

In sum, in the context of an unauthorized Porn 2.0 posting, a victim may choose to bring suit against the party who posted the unauthorized content under a theory that the posting party publicly disclosed the victim's private information. However, like any other plaintiff seeking to bring a public disclosure claim, a Porn 2.0 victim will bear a heavy burden in light of the onerous standard that the Supreme Court has announced in light of the First Amendment.[111] However, ultimately, it seems that non-celebrities explicit materials should not, and could not, qualify as matters of public concern even under the Court's *Daily Mail* standard.

3. Showing Plaintiff in a False Light

The tort of false light invasion of privacy protects a person's interest "in not being made

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105 *See* Florida Star v. B.F.J., 491 U.S. 524, 533 (1989) ("Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment.").

106 *See infra* notes 107-108 and accompanying text.

107 443 U.S. 97 (1979).

108 *Florida Star*, 491 U.S. at 533 (alteration in original) (quoting *Daily Mail*, 443 U.S. at 103).

109 *See* Abril, *supra* note 74, at 393 ("Subsequent courts have struggled with the contours of 'public significance,' 'public concern,' and 'newsworthiness,' particularly in the context of celebrities. A judgment of the legitimacy and social value of information is often circular, as it can be determined by the market's demand and curiosity regarding the subject at hand.").

110 *See* McClurg, *supra* note 30, at 888 ("Given the current state of the law, it is quite possible that the public disclosure tort is 'unconstitutional' under the First Amendment.").

111 *See supra* notes 105-110 and accompanying text.

to appear before the public in an objectionable false light or false position."[112] In order for the publicity given to the plaintiff to be considered "objectionable," the publicity must be highly offensive to a reasonable person.[113] Thus, a false light cause of action only arises "when the defendant knows that the plaintiff, as a reasonable [person], would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity."[114]

In practice, there are four elements to a false light claim: (1) a false representation; (2) the representation gave "publicity" to the allegedly false matter; (3) the matter disseminated has a high degree of offensiveness; and (4) actual malice.[115] Thus, as a threshold matter, in order for a representation to be actionable under a theory of false light invasion, the representation must be false.[116] In the context of a Porn 2.0 victim, satisfying this threshold element may be challenging. Like a Porn 2.0 victim who seeks to establish a claim of defamation, a victim seeking to establish a false light invasion claim will need to prove that the content of the unauthorized posting was altered or distorted (or that any text accompanying the content is false). However, at the same time, a Porn 2.0 victim will only be able to recover under a false light theory if the victim can prove that despite the falsity of the challenged posting, the public is aware that he or she is the particular individual that is falsely depicted in the posting.[117]

C. Intentional Infliction of Emotional Harm:

Finally, when an unauthorized Porn 2.0 posting is made to intentionally cause the non-

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112 RESTATEMENT (SECOND) OF TORTS § 652E cmt. b (1977); *see also* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) (citing William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 400 (1960)) ("'The interest protected' in permitting recovery for placing the plaintiff in a false light 'is clearly that of reputation.'").

113 RESTATEMENT (SECOND) OF TORTS § 652E cmt. c (1977).

114 *Id.*

115 *See* Russell G. Donaldson, Annotation, *False light invasion of privacy -- cognizability and elements*, 57 A.L.R.4TH 22, § 2[a] (1987).

116 *See* Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 134 (1st Cir. 2000); Levesque v. Doocy, 557 F. Supp. 2d 157, 164 (D. Me. 2008) ("Only statements that are provable as false are actionable under defamation or false light invasion of privacy."); State v. Carpenter, 171 P.3d 41, 53 (Alaska 2007) ("Because opinions cannot be proved false, they cannot give rise to false light liability.").

117 Donaldson, *supra* note 115, at § 22.

consenting participant to suffer emotional distress, such distress may form a basis for the victim to recover tort damages from the posting party.[118] Generally speaking, an individual is subject to tort liability for the severe emotional distress that they intentionally or recklessly cause to another though their "extreme and outrageous conduct."[119] Thus, in order to establish a cause of action for the intentional infliction of emotional distress, a plaintiff must establish that: "(1) the defendant . . . acted intentionally or with reckless disregard of the consequences; (2) the defendant's conduct . . . [was] extreme or outrageous; (3) [they] . . . suffered severe emotional distress; and (4) the defendant's conduct . . . [was] the cause of such emotional distress."[120]

Courts have only found liability for intentional infliction of emotional harm when the alleged conduct "produces distress so severe that no reasonable man could be expected to endure it, and which itself is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[121] In the general context of the Internet, courts have found conduct amounting to this demanding standard when plaintiffs have alleged "[v]arious types of online harassment . . . including threats of violence, the publication of a victim's sensitive information, and disparaging racial remarks."[122]

In light of the popularity[123] and the potentially severe consequences of Porn 2.0 websites,[124] it is certainly plausible that that under the proper facts, a court may find that a

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118 Note that in most jurisdictions, even if a victim's severe emotional distress was not inflicted intentionally or recklessly, the victim may be able to recovery for the negligent infliction of their emotional harm. *See* RESTATEMENT (SECOND) OF TORTS § 313 (1965).

119 *Id.* at § 46(1).

120 Jay M. Zitter, Annotation, *Claims for Vicarious and Individual Liability for Infliction of Emotional Distress Derived from Use of Internet and Electronic Communications*, 30 A.L.R.6TH 241, § 2 (2008).

121 Snyder v. Phelps, 131 S. Ct. 1207, 1221 (2011) (internal quotation marks omitted); *see* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

122 Citron, *supra* note 57, at 88 (citing cases).

123 *See supra* note 20.

124 *See supra* notes 21-23 and accompanying text.

scorned co-worker or ex-lover who posts explicit photos or videos of another on the Internet, is liable for the emotional distress they may cause as a result. However, whether a Porn 2.0 victim suffers distress so severe as to make it actionable, will ultimately depend on the circumstances surrounding the particular unauthorized posting including the outrageousness surrounding the unauthorized posting.[125]

D. Conclusion:

A victim of an unauthorized Porn 2.0 posting may seek to recover tort damages from the party who first posted the content on the Internet through traditional tort claims of defamation, invasion of privacy, and intentional infliction of emotional distress.[126] However, a victim who chooses to bring such claims will undoubtedly face various procedural and substantive challenges including questions of the cognizability of a particular tort claim under state law,[127] the potential inability to identify a primary tortfeasor who has posted anonymously,[128] and/or demonstrating a heavy burden of proof.[129]

Even if a Porn 2.0 victim is ultimately successful in bringing a tort action against their primary tortfeasor, the monetary amount of their recovery will likely be unable to compensate the victim for the damages that they have sustained.[130] Further, any recovery that a Porn 2.0 victim may receive from the posting party, will do nothing to remedy the root of plaintiff's damages: the unauthorized posting will still be available for anyone who logs onto the Internet to see.

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125 *See supra* text accompanying note 121.
126 *See* discussion *supra* Part II.A-C.
127 *See supra* notes 40-41 and accompanying text.
128 *See supra* notes 42-47 and accompanying text.
129 *See* discussion *supra* Part II.A-C.
130 *See* Ronneburger, *supra* note 18, at 3.

III. POTENTIAL RECOVERY AGAINST INTERNET SERVICE PROVIDERS

Theoretically, an Internet Service Provider ("ISP")[131] is in a better position to remedy a victim of an unauthorized Porn 2.0 positing than the party who originally posted the content on the Internet. Generally speaking, advances in information technology have made it increasingly cost effective for these intermediaries to monitor the activities of those who use their networks more closely.[132]

When an individual discovers that he or she is the victim of an unauthorized Porn 2.0 posting, understandably, one of the individual's foremost concerns is the immediate removal of the posting from the Internet. But notably, an ISP is capable of preventing, from the onset, the distribution of the unauthorized content on a website that the ISP hosts. For example, when a user uploads content for distribution through a Porn 2.0 website, the ISP for the site could simply require verified consent from all participants in the photo/video before the content can be made available for other users to see. However, if unauthorized content does end up on Porn 2.0 site, the ISP who hosts the site can prevent the content from further dissemination on the Internet in ways that the posting party cannot.[133] For example, an ISP could refuse to send the packets of information containing the unauthorized content, it could delete the content completely, or the ISP could edit the photo or video (and any captions) so that the non-consenting participant is no longer recognizable.[134] Moreover, unlike an Internet user, an ISP can easily be identified and it has the resources to pay money damages and thereby compensate Porn 2.0 victims for harm that they have suffered as a result of an unauthorized Porn 2.0 posting.[135]

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131 For the remainder of this paper, I use the term "ISP" to broadly refer to those "interactive computer services" that are potentially immune under § 230. *See supra* text accompanying notes 138-41.

132 Mann & Belzley, *supra* note 41, at 268.

133 Wu, *supra* note 45, at 107.

134 *See id.* at 107-08.

135 *See id.* at 108.

However, in practice, once unauthorized materials are uploaded onto the Internet, there is no legal mechanism by which a Porn 2.0 victim can require an ISP to take down the unauthorized posting.[136] Further, even if a Porn 2.0 victim does complain to an ISP about the continued availability of an unauthorized posting, the ISP may still be shielded from any third-party liability under the Communications Decency Act ("CDA").

Enacted in 1996, the CDA was passed to "promote the continued development of Internet and other interactive computer services."[137] In order to effectuate this purpose, § 230 of the CDA includes the following "Good Samaritan" provision: "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."[138] The CDA goes on to define the phrase "interactive computer service" to mean "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[139] Further, the phrase "information content provider" is defined by the CDA as, "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[140] Thus, the language of § 230 draws an important distinction between an ISP who merely publishes information provided by third parties and is therefore protected by the Act's provisions, and the party who actually creates or develops the same information who is not protected by the Act.[141]

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136 Ronneburger, *supra* note 18, at 11.
137 Communications Decency Act of 1996 ("CDA"), 47 U.S.C.A. § 230(b)(1) (West 2011).
138 *Id.* at § 230(c)(1).
139 *Id.* at § 230(f)(2).
140 *Id.* at § 230(f)(3).
141 MCW, Inc. v. Badbusinessbureau.com, No. Civ.A.3:02 CV 2727 G, 2004 WL 833595, at *8 (N.D. Tex. Apr. 19, 2004).

The protection provided to ISPs by § 230 however is not unlimited.[142] Section 230(e)(1) explicitly provides that "[n]othing in [§ 230] shall be construed to impair the enforcement of [47 U.S.C.S. §§ 223 or 231] (relating to obscenity) or [18 U.S.C.S. §§ 1460 *et seq.* or §§ 2251 *et. seq.*] (relating to sexual exploitation of children) . . . , or any other Federal criminal statute."[143] As a result, an ISP will not be protected by § 230 with respect to content distributed the ISP's services that is considered obscene and/or involves certain underage victims.[144]

Courts that have interpreted § 230 outside of the context of obscenity or child pornography generally have done so broadly, finding that the section immunizes ISPs for any harm caused by third-party content disseminated through the ISP's service.[145] For example, § 230 has been applied to "preempt claims for defamation, negligence, negligent misrepresentation, negligent undertaking, intentional infliction of emotional distress, harassment, tortuous interference with contractual relations or business expectancy, breach of contract, privacy and publicity claims, unjust enrichment, aiding and abetting, . . . strict product liability, state consumer protection . . . and unfair competition laws," to name only a few.[146]

The leading case in the construction of § 230 was *Zeran v. American Online, Inc.*, where the Court of Appeals for the Fourth Circuit broadly interpreted § 230 to immunize ISPs from negligence claims premised on liability for a third-party's acts of defamation.[147] The plaintiff in *Zeran* received multiple threatening phone calls in response to messages - posted on an American Online ("AOL") bulletin board – that advertised t-shirts mocking the Oklahoma City

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142 *See* CDA at § 230(e).

143 *Id.* at § 230(e)(1).

144 *But see* Doe v. MySpace, Inc., 558 F.3d 413 (5th Cir. 2008) (holding that defendant MySpace was entitled to § 230 immunity and had no duty to implement basic safety measures to prevent sexual predators from communicating with minors on its website).

145 *See* Carafano v. Metrosplash.com. Inc., 339 F.3d 1119, 1123 (9th Cir. 2003) (citing cases); Barnes v. Yahoo!, Inc., No. Civ. 05-926-AA, 2005 WL 3005602, at *2 (D. Or. Nov. 8, 2005), *overruled by* Barnes v. Yahoo! Inc., 570 F.3d 1096 (9th Cir. 2009).

146 BALLON, *supra* note 32, at § 37.05[1][C] (footnotes omitted) (citing cases).

147 *See* Zeran v. American Online, Inc., 129 F.3d 327 (4th Cir. 1997).

bombing and included the plaintiff's name and contact information.[148] Zeran alerted AOL on multiple occasions that it was an anonymous third-party, and not he, who posted the offensive messages.[149] However, despite Zeran's efforts, AOL did not immediately remove the posts, and in accordance with the company's policies, AOL refused to post a retraction.[150] In response, Zeran brought a negligence action against AOL, but the district court granted judgment for AOL on the grounds that § 230 barred Zeran's claims.[151] On appeal, Zeran argued, among other things, that § 230 did not shield AOL because the provider possessed actual notice of the defamatory material that was posted through the use of the provider's services.[152] The Fourth Circuit disagreed, reading the plain language of § 230 to create a "federal immunity" for service providers with respect to "any cause of action that would make [them] liable for information originating with a third-party user of the service."[153] Reasoning that this holding was consistent with Congress' intent in enacting § 230, the court stated: "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."[154]

In light of the Fourth Circuit's broad holding in *Zeran*, and the plain language of § 230, courts have repeatedly held that § 230 immunizes an ISP from simply hosting user-generated content.[155] However, the rationale announced in *Zeran* has also been applied by courts to immunize ISPs from third-party liability. These are circumstances where an ISP went beyond

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148 *Id*. at 329.
149 *Id*.
150 *Id*.
151 *Id*. at 328.
152 *Id*.
153 *Id*. at 330.
154 *Id*. at 330-31.
155 Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 419-20 (1st Cir. 2007) (reasoning that it was irrelevant that "the 'construct and operation' of the [defendant's Internet message board] might have some influence on the content of the postings."); Parker v. Google, Inc., 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006) (reasoning that in "each instance raised by plaintiff's tort claims, [defendant Internet search engine] either archived, cached, or simply provided access to content that was created by a third party."), *aff'd*, 242 F. App'x 833 (3d Cir. 2007).

simply hosting third-party content.[156] For example, courts have held that ISPs are immunized where the ISP reposted third-party content onto other websites, even where the plaintiff alleged that the ISP modified the content of the original posting.[157] Similarly, courts have held that ISPs are immunized where they merely exercise their editorial rights, which courts have found to broadly include the rights to "make minor changes to the spelling, grammar and length of third-party content,"[158] and the rights to "[D]ecide whether to publish, withdraw, postpone or alter [third-party] content."[159] Additionally, courts have held that ISPs are immunized under § 230 despite the fact that the service paid for, and even advertised, a third-party's illegal content,[160] or despite the fact that the service failed to remove a third-party's illegal content even after the original author of such content expressly asked the service to remove the content.[161]

More recent court decisions have reexamined the scope of the protection provided by § 230. Several courts have held that ISPs are not protected by § 230 where they have intentionally elicited illegal content from their users.[162] For example, in *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C*, the district court found that the plaintiff's allegations that the

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156 *See infra* text accompanying notes 157-61.

157 *See* Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003) (finding the defendant website operator immunized under § 230 where the plaintiff alleged the defendant re-posted a third-party's allegedly defamatory email under the reasoning that the defendant "did no more than select and make minor alterations" to the email); Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 295 (D.N.H. 2008) (finding the defendant website operator immunized under § 230 even though the operator re-posted an allegedly false and unauthorized personal advertisement about the plaintiff on other websites after making "slight" modifications to the ad).

158 *See* Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1070, 1184 (9th Cir. 2008).

159 *Batzel*, 333 F.3d at 1031 n.18 (citing Zeran v. American Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)).

160 *See* Blumenthal v. Drudge, 992 F. Supp. 44, 50-51 (D.D.C. 1998) (finding that defendant AOL was immune under § 230 with respect to allegedly defamatory statements that were made by a third-party gossip columnist with whom AOL had a license agreement where AOL had promoted the third-party to its subscribers and potential subscribers as a specific reason to subscribe to AOL's services).

161 *See* Global Royalties, Ltd. v. Xcentric Ventures, LLC, 544 F. Supp. 2d 929, 932 (D. Ariz. 2008).

162 *See Roommates.Com*, 521 F.3d at 1165 (where an *en banc* court for the Ninth Circuit held that § 230 did not immunize a website operator who "both elicit[ed] the allegedly illegal content and ma[de] aggressive use of it in conducting its business."); NPS, LLC v. StubHub, Inc., No. 06-4874-BLS1, 2009 WL 995483 (Mass. Supp. Jan. 26, 2009) (holding that the defendant website ticket reseller was not entitled to § 230 immunity with respect to plaintiff's tortious interference claim where there was evidence that the defendant contributed to illegal ticket scalping by the site's users).

defendant website operator posted false and defamatory statements on its site, "arguably could support a finding that [the] Defendants are responsible . . . for the creation or development of information provided by [third-party users] in response to [the] Defendants' solicitation."[163] One Circuit court has found that an ISP was not protected by § 230 where the ISP specifically promised to take down allegedly legal content.[164] Additionally, even courts that have ultimately held that § 230 applied to immunize an ISP under the present circumstances have cautioned, in dicta, of the potential dangers from an overbroad reading of such protection.[165] For example, in *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, the Court of Appeals for the Seventh Circuit acknowledged that despite case law to the contrary, "Subsection (c)(1) does not mention 'immunity' or any synonym."[166]

In the future, hopefully more courts will follow these courts' lead in narrowing the scope of § 230's protection.

IV. A TIME FOR CHANGE

Broad interpretations of § 230's grant of protection may have been necessary at first. Admittedly, one of the announced purposes of § 230's protection is "to promote the continued development of the Internet and other interactive services."[167] However, the Internet is no longer in its initial stages of development,[168] and nowhere in the language of § 230 did Congress use the

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163 Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 418 F. Supp. 2d 1142, 1149 (D. Ariz. 2005).

164 *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1109 (9th Cir. 2009) (holding that § 230 did not preclude the plaintiff's promissory estoppel claim where plaintiff alleged to have detrimentally relied on defendant's promise to take down third-party content that had been posted on the defendant's site).

165 *See* Ali Grace Zieglowsky, *Immoral Immunity: Using A Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act*, 61 HASTINGS L.J. 1307, 1314 (2010).

166 519 F.3d 666, 669 (7th Cir. 2008). However, *Chicago Lawyers'* was not the first time the Seventh Circuit has questioned whether § 230 creates any form of "immunity." *See* Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003) (which explained "why § 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts.").

167 CDA at § 230(b)(1).

168 *See generally supra* text accompanying notes 1-16.

all-encompassing word "immunize."[169] Further, time has shown that individuals use the Internet, including Porn 2.0, as a tool of embarrassment and revenge.[170] Time has further shown that ISPs use § 230 as a shield for their own ill motives.[171] Yet despite this change in circumstances, the actual language of § 230, and the realities of Porn 2.0 and § 230, courts have generally continued to broadly construe § 230's grant of protection and have provided ISPs with almost absolute protection.[172]

Contrary to the Ninth Circuit's holding in *Zeran*, the plain language of § 230 does not provide ISPs with "immunity" with respect to liability for information originating with third-parties. This sweeping protection is entirely the product of the courts. The plain language of § 230 protects ISPs with respect to third-party content, the creation and development of which the service is not responsible for, in whole or in part.[173] Further, § 230 protects those good faith ISPs who voluntarily restrict access to, or the availability of, third-party content distributed through their service.[174] The language of the CDA certainly does not protect ISPs who, arguably in bad faith, do not take affirmative action to remove third-party content when they have actual notice that such content may be illegal. Thus, at the very least, Porn 2.0 victims should be able to find relief in the form of a requirement that ISPs – who have actual notice from a victim of Porn 2.0 - take affirmative steps to remove illegal and unauthorized content being distributed through their service. Those ISPs who have received notice of illegal content on their site, should no longer be shielded by courts' overbroad interpretations of § 230.

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169 *See generally* CDA at § 230.
170 *See* sources cited *supra* note 25.
171 *See* sources cited *supra* notes 157-161.
172 *See supra* text accompanying notes 146, 157-61.
173 CDA at § 230(c)(1), (f)(3).
174 *Id.* at § 230(c)(2)(A).