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Picture This: Congress Doing the Decent Thing Permitting the Victims of Their Ex-lover's Cyberbullying to Go to Court under a Revised Communications Decency Act.

John V. Kelly

I. Introduction

Ending a relationship is painful. As the cliché tells/has it: "love can make most do crazy things." So too, can the break up. For some, the break up hurts so much that revenge becomes a driving force. Many men humiliate and harass their exes by disclosing images or videos of their exes in compromising positions.¹ However, the converse is also true where jilted women in turn may seek to humiliate their former partners. Men and women turn to internet message boards and websites to post and reveal various flaws and shortcomings of their former lovers.² Today the problem is far more pervasive with access to the internet, the quick upload and download speeds, larger data storage devices, and the explosive growth of sites devoted to user generated content.

¹ Doe v. Peterson, 2011 U.S. Dist. LEXIS 30637 (E.D. Mich. Mar. 24, 2011); Peterson v. Moldofsky, 2009 U.S. Dist. LEXIS 90633 (D. Kan. Sept. 29, 2009)(noting "*See In re Thomas*, 254 B.R. 879, 885 (D.S.C. 1999) (concluding that the defendant's mailing of sexually explicit pictures of his ex-girlfriend to her new fiance was "so extreme and outrageous that it exceeded all possible bounds of decency"); Lucas v. Lucas, 2008 N.J. Super. Unpub. LEXIS 254, 2008 WL 2696838, at *3 (N.J. Super. Ct. App. Div. July 11, 2008) (declaring, in a case involving a restraining order, that the defendant's act of posting nude pictures of his wife on his car door window where they could be seen by the public was egregious); McGowan v. O'Rourke, 391 N.J. Super. 502, 918 A.2d 716, 719 (N.J. Super. Ct. App. Div. 2007) ("The act of mailing graphic pornographic pictures to a third-party and implying that they may be sent to the victim's workplace and her son is egregious."); Del Mastro v. Grimado, 2005 WL 2002355, at *3 (N.J. Super. Ct. Ch. Div. Aug. 19, 2005) (stating that "the distribution of sexually explicit pictures of [the plaintiff] in Christmas cards to approximately 100 of her family members . . . is sufficiently extreme to constitute outrageous conduct"); *see also* Greenhorn v. Marriott Int'l, Inc., 258 F. Supp. 2d 1249, 1262 (D. Kan. 2003) (finding that the defendant's exposure of himself to plaintiff was extreme and outrageous); Miller v. Bircham, Inc., 874 F. Supp. 337, 341 (D. Kan. 1995) (same)".; *See also* Floyd v. Dodson, 1984 OK Civ App 57 (Okla. Ct. App. 1984); Taylor v. Franko, 2011 U.S. Dist. LEXIS 75128 (D. Haw. July 11, 2011); Coton v. Televised Visual X-Ography, Inc., 740 F. Supp. 2d 1299, 1302 (M.D. Fla. 2010); Hudson v. Windholz, 202 Ga. App. 882 (Ga. Ct. App. 1992); Hudson v. Montcalm Pub. Corp., 190 Ga. App. 629 (Ga. Ct. App. 1989); Shields v. Gross, 58 N.Y.2d 338 (N.Y. 1983)

² 54 Clev. St. L. Rev. 115, 122

Vengeful exes are heading to the internet more and more frequently with the intent to embarrass or harm their reputation.

With the near limitless power and voice of the internet, this form of cyberbullying goes too far with no real adequate remedy. The victims of cyberbullying are often left to pick up the pieces of their shattered and broken lives and damaged reputations. These actions often have severe consequences including humiliation, loss of reputation, being disowned from ones family, harm to their professional career, disruption or destruction of new relationships including marriages.³ The effects reach not only the intended victim, but parents, friends and other loved ones as well.⁴ The victims are usually undercompensated or worse not compensated at all because many of the civil remedies available do not adequately address the conduct that occurs on the internet. Even though dire consequences can await the bullies such as jail time and civil liability because most of the "bullies" do not have the resources to compensate the victims for the wrongs they caused. Often, however, the bullies use major social networking websites or pornographic sites, and other internet businesses to inflict the harm, but these "deep pockets" are almost always shielded by the Communication Decency Act 47 USC §230.⁵ This note argues for a more adequate civil remedy for the victims of cyberbullying and less protection for those websites which facilitate bullying.

Part II of this note discusses relevant background issues, a brief overview of the Communication Decency Act 47 USC §230, an overview of certain cases which illustrate the shortcomings of the law as it is, and other technology and internet related Acts passed by

³ Danielle Keats Citron, *Essay: Law's Expressive Value in Combating Cyber Gender Harassment*, 108 Mich. L. Rev. 373, 384 (2009).

⁴ Terri Day, *ARTICLE: The New Digital Dating Behavior - Sexting: Teens' Explicit Love Letters: Criminal Justice or Civil Liability*, 33 Hastings Comm. & Ent. L.J. 69, 90 (2010).

⁵ *Zeran v. America Online*, 958 F. Supp. 1124, 1133 (E.D. Va. 1997).

congress. Part III argues for federal legislation to address the shortcomings of the current laws. Part IV concludes this note.

II. Background

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls;
Who steals my purse steals trash; 'tis something, nothing,
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches of me my good name,
Robs me of that which not enriches him,
And makes me poor indeed. William Shakespeare, Othello III⁶

As Shakespeare wrote, damage done to reputation can be the most harmful of all wrongs.

The victims of cyberbullying feel powerless, "in addition to feeling lonely, humiliated, and insecure, like victims of traditional bullying, cyberbullying victims also experience heightened feelings of anger, frustration, and depression."⁷ Even with the full force of the law behind a victim of cyberbullying with traditional non-internet related causes of action, the victim is not likely to be adequately redressed.⁸ For example, many internet websites which facilitate the bullies goals are allowed to escape liability even when the victim tells the website to remove the damaging post because it is untrue and the website refuses to take down the false posting. This is due to the immunity granted to internet service providers under the Communication Decency Act 47 USC §230.⁹ The harms done to the victim are sometimes unable to be righted through the current legal framework. There are at least 15 common law causes of action which may apply in these situations. They include: Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Invasion of Privacy, Public Disclosure of private facts, Intrusion upon

⁶ Ryan Savage, *ARTICLE: E-COMMERCE: Between a Rock and a Hard Place: Defamation and Internet Service Providers*, 2 *Asper Rev. Int'l Bus. & Trade L.* 107 (2002).

⁷ Karly Zande, *ARTICLE: WHEN THE SCHOOL BULLY ATTACKS IN THE LIVING ROOM: USING TINKER TO REGULATE OFF-CAMPUS STUDENT CYBERBULLYING*, 13 *Barry L. Rev.* 103, 112 (2009).

⁸ See generally *Id.*

⁹ *Doe v. Peterson*, 2011 U.S. Dist. LEXIS 30637 (E.D. Mich. Mar. 24, 2011).

seclusion, Right of Publicity, False Light, Unreasonable publicity given to a person's private life, Defamation, Slander/libel, Child Pornography Prevention Act (In the cases dealing with couples under 18), Copyright, Extortion and Tortious interference with a contractual or business relationship.¹⁰ Other claims include fraud, forgery and contractual - where an ex-husband forged a release to have his wife's sexually explicit photos placed in several pornographic magazines.¹¹

While the claims may seem to create the potential for redress for a victim, in most cases the victim is not adequately compensated for the harm suffered because the bully has little if any funds to sustain a judgment against them and/or the facilitators, the internet websites and businesses, are protected because the Communications Decency Act 47 U.S.C. 230 pre-empts any cause of action against them shielding them from liability.¹² Moreover, available to the defendants are numerous affirmative defenses which include, for example, the doctrine of *pari delicto* which bars suit at law or equity where the party seeking relief is himself involved in the wrong doing.¹³ For example, in the case of pornographic postings of the victim, the victim was a

¹⁰ *See generally* Doe v. Peterson, 2011 U.S. Dist. LEXIS 30637 (E.D. Mich. Mar. 24, 2011); Peterson v. Moldofsky, 2009 U.S. Dist. LEXIS 90633 (D. Kan. Sept. 29, 2009); In re Thomas, 254 B.R. 879, 885 (D.S.C. 1999) ; Lucas v. Lucas, 2008 N.J. Super. Unpub. LEXIS 254, 2008 WL 2696838, at *3 (N.J. Super. Ct. App. Div. July 11, 2008) ; McGowan v. O'Rourke, 391 N.J. Super. 502, 918 A.2d 716, 719 (N.J. Super. Ct. App. Div. 2007); Del Mastro v. Grimado, 2005 WL 2002355, at *3 (N.J. Super. Ct. Ch. Div. Aug. 19, 2005); Greenhorn v. Marriott Int'l, Inc., 258 F. Supp. 2d 1249, 1262 (D. Kan. 2003); Miller v. Bircham, Inc., 874 F. Supp. 337, 341 (D. Kan. 1995); Floyd v. Dodson, 1984 OK Civ App 57 (Okla. Ct. App. 1984); Taylor v. Franko, 2011 U.S. Dist. LEXIS 75128 (D. Haw. July 11, 2011); Coton v. Televised Visual X-Ography, Inc., 740 F. Supp. 2d 1299, 1302 (M.D. Fla. 2010); Hudson v. Windholz, 202 Ga. App. 882 (Ga. Ct. App. 1992); Hudson v. Montcalm Pub. Corp., 190 Ga. App. 629 (Ga. Ct. App. 1989); Shields v. Gross, 58 N.Y.2d 338 (N.Y. 1983).

¹¹ Hudson v. Windholz, 202 Ga. App. 882 (Ga. Ct. App. 1992).

¹² Zeran, 958 F. Supp. at 1133 (E.D. Va. 1997).

¹³ Doe v. Peterson, 2011 U.S. Dist. LEXIS 30637 (E.D. Mich. Mar. 24, 2011).

willing participant in the images or videos posted and this defense is sometimes raised with varying success.¹⁴

Judges and legal scholars agree that reform for cyberbullying is needed.¹⁵ This reform must come at the federal level due to the expansive reach of the Communications Decency Act 47 U.S.C. 230. These offenses go to the very core of an individual's identity and often hurt more than simple in person bullying because in the virtual world the means and methods of humiliation and tortious conduct is near limitless and the duration of the bullying ongoing and pervasive.¹⁶ One scholar contends that there needs to be an online civil rights statute.¹⁷

A. The Communications Decency Act 47 USC §230

Courts construing Section 230 shed light on congress's intent. "The section is generally recognized as Congress's response to a New York State court decision, *Stratton Oakmont, Inc. v. Prodigy Services Co.* In this case, the court held that an online computer service could be held responsible as a "publisher" for allegedly libelous statements that an anonymous person posted to a bulletin board that Prodigy operated, even though Prodigy was not aware of those statements."¹⁸ "The policy underlying the CDA is the promotion of "the continued development of the Internet and other interactive computer services ... ' 47 USC §230(b)(1). To ensure that web site operators and other interactive computer services would not be crippled by lawsuits

¹⁴ See *Doe v. Peterson*, 784 F. Supp. 2d 831, 839 (E.D. Mich. 2011).

¹⁵ William H. Frievogel, *Article: Does the Communications Decency Act Foster Indecency?*, 16 *Comm. L. & Pol'y* 17, 41 (2011).

¹⁶ Zande, *supra* note 7, at 110.

¹⁷ Danielle Keats Citron, *Cyber Civil Rights*, 89 *B.U.L. Rev.* 61 (2009).

¹⁸ 1995 WL 323710 (N.Y. Sup. Ct. 1995) reargument denied, 1995 WL 805178 (N.Y. Sup. Ct. 1995). See also *Zeran v. Am. Online Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), cert. denied, *Zeran v. Am. Online, Inc.*, 524 U.S. 937 (1998).

arising out of third-party communications, the Act provides interactive computer services with immunity."¹⁹ Other policy rationales include:

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.²⁰

However, the act's effect goes beyond the original intent. The act essentially shields all interactive computer services and information content providers from liability. The relevant part of the act which pertains to civil liability provides:

(c) Protection for "Good Samaritan" blocking and screening of offensive material.

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

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of-- (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].²¹

The terms interactive computer services and information content providers are defined terms under the act which mean:

(2) Interactive computer service. The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including

¹⁹ Doe v. MySpace, Inc, 474 F. Supp. 2d 843, 847 (W.D. Tex. 2007).

²⁰ 47 U.S.C. § 230(b)(2)-(5)

²¹ 47 U.S.C. § 230(c)

specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider. The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.²²

Under the CDA, however, all ISPs are treated the same, even if they have some level of involvement in the posting. For example, in *Batzel v. Smith*, Smith sent a false email to the Museum Security Network, a group focused on stolen art.²³ The email claimed, that Batzel descended from a high ranking Nazi official and she had in her possession possible stolen artwork.²⁴ However, Smith could not send the email directly to the group, instead it went through a moderator who resent the email to the group.²⁵ Thus, the internet service provider had some degree of involvement posting the message. The CDA also requires no affirmative response by the ISP, even when it receives specific and repeated notice that a defamatory statement has been posted on or through its network.²⁶ A common theme in the case law that follows this section is the under compensation and/or dismissal of many claims brought by very injured plaintiffs. Some cases are completely dismissed due to the CDA.

B. Zeran v. America Online

The facts of *Zeran v. America Online* are straight forward. Zeran was the victim of cyberbullying, where someone perpetrated a malicious hoax on him through the internet services

²² 47 U.S.C. § 230(f)(2)-(3).

²³ *Batzel v. Smith*, 333 F.3d 1018, 1020-1021 (9th Cir. 2003).

²⁴ *Batzel v. Smith*, 333 F.3d 1018, 1021 (9th Cir. 2003).

²⁵ *Id.*

²⁶ Sarah Duran, *Hear No Evil, See No Evil, Spread No Evil: Creating a Unified Legislative Approach to Internet Service Provider Immunity*, 12 U. Balt. Intell. Prop. L.J. 115, 133-134 (2004).

of America Online.²⁷ "An unknown person or persons, acting without Zeran's knowledge or authority, affixed Zeran's name and telephone number to a series of notices on AOL's electronic "bulletin board" advertising t-shirts and other items with slogans glorifying the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma in which 168 people were killed."²⁸ This event is better known as the Oklahoma City Bombing of April 19, 1994 in which Timothy McVeigh was put to death for his involvement. "Predictably, Zeran received numerous disturbing and threatening telephone calls from people outraged with the posted notice."²⁹ For nearly three weeks Zeran was receiving threatening phone calls at an interval of two per minute and he and his home were placed on police surveillance for his own protection and it was not until three weeks later did the threatening calls subside to about 15 per day.³⁰ Zeran sued claiming AOL was negligent.³¹

AOL moved for judgment on the pleadings under the CDA 47 U.S.C. 230.³² Thus the only question was "whether the CDA preempts any state common law cause of action Zeran may have against AOL resulting from its role in the malicious hoax perpetrated via AOL's electronic bulletin board."³³ Zeran did not contest that AOL is an interactive computer service as defined by the CDA and the court held it is clear that AOL meets the statutory definition of such a service.³⁴ Also, Zeran does "claim that the bogus notices were anything but information provided by another information content provider."³⁵ Thus, the court further winnowed "the preemption issue

²⁷ Zeran v. America Online, 958 F. Supp. 1124, 1126 (E.D. Va. 1997).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 1128.

³¹ *Id.* at 1126.

³² Zeran, 958 F. Supp. at 1129.

³³ *Id.*

³⁴ *Id.* at 1131.

³⁵ *Id.* at 1132.

reduces to the question whether a state cause of action for negligent distribution of defamatory material directly conflicts with the CDA's prohibition against treating an Internet provider as a "publisher or speaker".³⁶ "Put another way, the question is whether imposing common law distributor liability on AOL amounts to treating it as a publisher or speaker. If so, the state claim is preempted."³⁷ The court recognized that Congress' intent was to overrule *Oakmont, Inc. v. Prodigy Services Co.* and that it was codified in the act as discussed in the preceding section supra.³⁸

The court held the state common law claim was preempted and thus unable to be brought giving *Zeran* no recourse for the cyberbullying that was done to him.³⁹ The Court reasoned:

Clearly, then, distributor liability discourages Internet providers from engaging in efforts to review online content and delete objectionable material, precisely the effort Congress sought to promote in enacting the CDA. Indeed, the most effective means by which an Internet provider could avoid the inference of a "reason to know" of objectionable material on its service would be to distance itself from any control over or knowledge of online content provided by third parties. This effect frustrates the purpose of the CDA and, thus, compels preemption of state law claims for distributor liability against interactive computer service providers.⁴⁰

This may be true; the statute itself is unclear and the legislative history is unenlightening on this point. However, the language seems broad enough to preclude a finding that a service is a publisher merely because it makes efforts to restrict content.⁴¹

C. Doe v. Peterson

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 1134.

³⁹ *Zeran*, 958 F. Supp. at 1135.

⁴⁰ *Id.*

⁴¹ David R. Sheridan, *Article: Zeran v. Aol and the Effect of Section 230 of the Communication Decency Act upon Liability for Defamation on the internet*, 61 Alb. L. Rev. 147, 160 (1997).

In *Doe v. Peterson*, plaintiff Doe four months before her 18th birthday was requested by her 18 year old boy friend M.G., who was in the military, to send nude and sexually explicit photographs of herself to him.⁴² Plaintiff complied with the request by using a digital camera with a timer and then uploading the images on her father's computer and emailing them to her boyfriend in May 2007.⁴³ The couple eventually split.⁴⁴

Around December 2008, Plaintiff was notified the images of her appeared on Imagebeaver.com and later on submityourex.com.⁴⁵ Plaintiff emailed both sites and demanded the pictures be removed.⁴⁶ Both sites complied.⁴⁷ In May 2009 the images surfaced on exgfpics.com and plaintiff was informed by her sister that people at school were talking about it.⁴⁸ Plaintiff asked her now former boyfriend about the posting of her pictures who denied posting the pictures, but would attempt to find out who did.⁴⁹ He was unable to determine who did upload the pictures to the website, but emailed the website demanding the images be taken down.⁵⁰ Plaintiff herself emailed in June demanding the images be taken down, but the pictures never were.⁵¹

The Plaintiff initiated the suit against the owner Erik Peterson, the website owner and operator.⁵² The Court considered and granted summary judgment on all of the claims except for two. Two of the claims the Court granted summary judgment on was the intrusion upon

⁴² *Doe v. Peterson*, 784 F. Supp. 2d 831, 839 (E.D. Mich. 2011).

⁴³ *Id.* at 834.

⁴⁴ *Id.* at 835.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 836.

⁵² *Id.*

seclusion claim and public disclosure of private facts because the images were already portrayed on two other public websites.⁵³ Of the two claims that remained one was a violation of the Child Pornography prevention act because she was still a minor at the time she took the photographs.⁵⁴ Where the court held there was enough evidence to reach a jury on the issue of whether the defendant knowingly posted sexually explicit pictures of a minor.⁵⁵

D. Peterson v. Moldofsky, Taylor v. Franko, and Hudson v. Montcalm Pub. Copr.

In Peterson v. Moldofsky, defendant Moldofsky had an intimate relationship with Piper Peterson.⁵⁶ During the course of their relationship, Plaintiff permitted Defendant to take pictures of her engaged in sexually explicit acts with other couples.⁵⁷ The couple eventually had a falling out and in acts of revenge, Moldofsky emailed sexually explicit images of Peterson to Peterson's mother, co-workers, boss, ex-husband, and current boyfriend.⁵⁸ The court granted all but two claims for summary judgment.⁵⁹ The emotional distress claim remained as did the public disclosure of private facts.⁶⁰ The other claims were dismissed because the Defendant was permitted to be there and take the pictures.⁶¹

In Taylor v. Franko, Franko, the defendant, permitted entry of a default judgment against him.⁶² Taylor and Franko had an intimate relationship and she permitted Franko to take images of her engaged in sexual acts.⁶³ Franko eventually proposed to Taylor.⁶⁴ Taylor rejected the

⁵³ *Id.* at 840-43.

⁵⁴ *Id.* at 839-40.

⁵⁵ *Id.* at 840.

⁵⁶ Peterson v. Moldofsky, 2009 U.S. Dist. LEXIS 90633, *1 (D. Kan. Sept. 29, 2009).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See generally Id.*

⁶⁰ *See Id.*

⁶¹ *See Id.*

⁶² Taylor v. Franko, 2011 U.S. Dist. LEXIS 75128 *1 (D. Haw. July 11, 2011).

⁶³ *Id.*

proposal and the couple split.⁶⁵ Franko eventually peppered the sexually explicit images all over the internet along with Taylor's contact information.⁶⁶ Taylor began getting unwanted phone calls and emails requesting sexual encounters.⁶⁷ The phone calls even came in at work, and the calls were directed to some co-workers, when the caller could not reach the Plaintiff.⁶⁸ All of this caused the Plaintiff great embarrassment.⁶⁹ The court only granted her damages on three counts.⁷⁰

In *Hudson*, Plaintiff and her ex-husband, Gordon, were divorced, yet continued on a romantic relationship together.⁷¹ During the continued relationship Mrs. Hudson met and began seeing her current husband. She saw the two men simultaneously.⁷² Her ex-husband eventually found out and felt betrayed.⁷³ The Defendant, Gordon, then began a spree of conduct intended to humiliate Mrs. Hudson which includes: Mr. Gordon distributed a number of sexually explicit photographs of Ms. Hudson, and he threatened to send these photographs to her boss and every real estate agency in Atlanta.⁷⁴ He sent nude photographs of her to two magazines and forged a model release form.⁷⁵ Two weeks before the marriage of Mr. and Ms. Hudson, Mr. Hudson found in his mailbox a copy of one of the magazines.⁷⁶ This caused Ms. Hudson extreme

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at *3-4.

⁶⁷ *Id.* at *6.

⁶⁸ *Id.* *7-8.

⁶⁹ *Id.* at *9.

⁷⁰ *Id.* at *13-14.

⁷¹ *Hudson v. Windholz*, 202 Ga. App. 882, 882-883 (Ga. Ct. App. 1992).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Hudson v. Windholz*, 202 Ga. App. 882, 882-883 (Ga. Ct. App. 1992).

⁷⁵ *Id.* at 883.

⁷⁶ *Id.* at 883.

emotional distress, driving her to almost cancel her wedding.⁷⁷ On the wedding day, a plant was sent to the couple with another explicit photograph inside.⁷⁸ After traveling to her daughter's wedding, Ms. Hudson's mother returned home to Florida to find a copy of the explicit magazine had been given to her.⁷⁹ Someone had broken into Ms. Hudson's car and glued sexually explicit images to the dash board.⁸⁰ The sequence of events caused extreme emotional distress in Ms. Hudson.⁸¹

In this action the publisher of the Magazine in which Mrs. Hudson appeared was also sued but was released from the suit because she relied in good faith on a release forged by Defendant Gordon and the Plaintiff's themselves signed a release from liability to obtain the fraudulent release.⁸²

E. Doe v. Myspace

There are several cases named Doe v. Myspace.⁸³ Each case involves an underage girl, who created a Myspace profile claiming she was eighteen years old or more.⁸⁴ After creating a profile, the girls unwittingly met, chatted with, and agreed to meet with online predators.⁸⁵ During the meetings the girls were sexually assaulted.⁸⁶ The parents of these girls then sued

⁷⁷ *Id.* at 883.

⁷⁸ *Id.* at 883.

⁷⁹ *Id.* at 883.

⁸⁰ *Id.* at 883.

⁸¹ *Hudson v. Windholz*, 202 Ga. App. 882, 883 (Ga. Ct. App. 1992).

⁸² *Hudson v. Montcalm Pub. Corp.*, 190 Ga. App. 629, 633 (Ga. Ct. App. 1989).

⁸³ *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 845 (W.D. Tex. 2007) aff'd, 528 F.3d 413 (5th Cir. 2008); *Doe v. MySpace, Inc.* 175 CA App 4th 561 (2009).

⁸⁴ *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 846 (W.D. Tex. 2007).

⁸⁵ *Id.*

⁸⁶ *Id.*

Myspace for failing to protect them.⁸⁷ Myspace moved to dismiss pursuant to rule 12 because the CDA gave Myspace immunity.⁸⁸ And the courts have granted the dismissal.⁸⁹

F. Other Acts of Congress Concerning the Internet and Technology.

Congress has enacted several acts which touch upon the internet and technology and provide the victims who are harmed with an adequate civil remedy, while not frustrating the growth of the internet. Three such acts are the Computer Fraud and Abuse Act (CFAA),⁹⁰ The Child Pornography Prevention Act,⁹¹ and the Digital Millennium Copyright Act (DMCA).⁹² Both the Computer Fraud and Abuse Act and the Child Pornography Prevention act even criminalizes the conduct it seeks to prevent while giving the victims an adequate civil remedy with which to bring suit under.^{93 94}

The Computer Fraud and Abuse Act seeks to prevent computer damage and unauthorized access to a computer system.⁹⁵ The Child Pornography Prevention Act seeks to prevent production, transmission, and possession of child pornography.⁹⁶ The Computer Fraud and Abuse Act provides: "Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief."⁹⁷ This in addition to criminalizing the breaking and entering into computer systems the act provides the victim an adequate civil remedy. The Child

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 18 USC § 1030.

⁹¹ 18 USC § 2252A.

⁹² 17 USC § 512.

⁹³ 18 USC § 1030(b)-(c), (g).

⁹⁴ 18 USC § 2252A(b), (f).

⁹⁵ *See generally* 18 USC § 1030.

⁹⁶ *See generally* 18 USC § 2252A.

⁹⁷ 18 USC § 1030(g).

Pornography Prevention Act provides: "In general. Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A may commence a civil action for the relief set forth in paragraph (2)."⁹⁸ Also affording the victims their day in court to attempt to right the injustice they have suffered and compensate them for their loss. Both of these acts adequately serve the twin aims of deterrence and compensating victims for their loss.⁹⁹ Congress' goal in enacting the Computer Fraud and Abuse Act was to create fluid act that is not rigid to allow the law to adapt to bring as many would be defendants to justice with letting as few as possible slip through the cracks of the law.¹⁰⁰ The goal of the Child Pornography Prevention Act is to prevent and protect the children from extremely damaging behavior and to compensate them and assist them coping with the abuse if they should fall victim to child pornography.¹⁰¹

The Digital Millennium Copyright Act like the Communications Decency Act concerns internet service providers.¹⁰² However, unlike the Communications Decency Act, the immunity provided the Digital Millennium Copyright Act is not absolute.¹⁰³ The Digital Millennium Copyright Act provides specific steps which need to be taken in order to receive the immunity.¹⁰⁴

(c) Information residing on systems or networks at direction of users.

(1) In general. A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider--

(A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

⁹⁸ 18 USC § 2252A(f).

⁹⁹ *See generally* 18 USC § 1030; *See generally* 18 USC § 2252A.

¹⁰⁰ *Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 926, 936 (E.D. Tex. 1999).

¹⁰¹ *United States v. MacEwan*, 445 F.3d 237, 250 (3d Cir. 2006).

¹⁰² *See* 17 USC § 512.

¹⁰³ *See* 17 USC § 512.

¹⁰⁴ 17 USC § 512(c).

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.¹⁰⁵

Most noteworthy of the Digital Millennium Copyright act is the notice and take down provisions of the act.¹⁰⁶ The act permits a copyright owner to notify an internet service provider of infringing content on their server.¹⁰⁷ The act outlines specific actions and steps which must be undertaken by the copyright owner to comply with Act by providing the internet service provider with appropriate and specific notice.¹⁰⁸ Once notified, an internet service provider must act "expeditiously to remove" the infringing material to qualify for the immunity.¹⁰⁹ The Policy behind the Digital Millennium Copyright Act is to continue to promote development of the internet while protecting the rights of copyright owners and encourage the copyright owners to use digital formats without fear of piracy.¹¹⁰ The act takes into account not only the promotion and growth of the internet and technology but potential victims who may be harmed by the use of that technology.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Duran, *supra* note 26, at 126.

III. Argument

As the foregoing cases in illustrate, the plaintiffs who suffer extreme harms are under compensated or not compensated at all. The victims must cope with their injuries everyday of their lives. After enduring embarrassment and harassment through no fault of their own the court room door is slammed shut in their faces. While, the actual bully is usually brought to justice, it is the facilitators who escape justice's grasp.¹¹¹ The facilitators, who give the bullies the voice and forum, continuously evade liability. These facilitators continue to avoid liability even after they are alerted to the false and/or damaging nature of the content they are hosting, and remain obstinate to the facts and refuse to act.¹¹² If they can continue to skirt liability there is no deterrence for them to prevent these sorts of injuries from occurring and no deterrence for failing to protect the innocent.

In these cases they must have an affirmative duty to act. They aid and abet the bullies by giving them a voice and the means to truly hurt their intended victim. With the advent of the internet the effects are far more reaching than in the days prior to the internet causing even more anguish upon the victims. Compare *Hudson*, supra, where the court stated "had Mr. Gordon not personally distributed the Gallery issue to Ms. Hudson's relatives and employer, she might never have known that it existed, thereby never incurring any damages. Mr. Windholz also feared that the introduction of the other far more explicit photographs of Ms. Hudson in a suit against Gallery would injure Ms. Hudson's character more severely than had the publication of the relatively innocuous nude photograph in Gallery"¹¹³ with the far reaching effects of *Zeran*¹¹⁴ and

¹¹¹ See *Zeran*, 958 F. Supp. at 1124; *Myspace*, 474 F. Supp. 2d at 843; *Peterson*, 784 F. Supp. 2d at 831.

¹¹² See *Zeran*, 958 F. Supp. at 1124; *Myspace*, 474 F. Supp. 2d at 843; *Peterson*, 784 F. Supp. 2d at 831.

¹¹³ *Hudson*, 202 Ga. App. at 882-884 (Ga. Ct. App. 1992).

Taylor supra.¹¹⁵ In Hudson, the audience who viewed the explicit images of Ms. Hudson was quite limited.¹¹⁶ The group was limited to the few subscribers to the small magazine and those who the defendant actually sent the images to.¹¹⁷ Where with the internet, the number of potential viewers is limited by only the number of internet connections throughout the world. For example in *Zeran*, it was not long before radio stations got wind of the prank and began broadcasting it to the listeners and countless others saw the actual post on the internet.¹¹⁸

While Congress acted to protect the development of the internet in passing the Communications Decency Act and arguably successfully did so.¹¹⁹ Congress failed to predict the effects the Communications Decency Act would have on victims of vengeful acts as the cases, *supra*, indicate. Congress must not ignore the pain and agony suffered by these victims anymore. The Communications Decency Act does not need to be repealed but merely amended because its original goal of promoting the growth and progress of the internet is still a goal worth promoting, but not at the utter expense of an individual's reputation. What Congress should do is remove the absolute publisher immunity and replace it with a limited immunity similar to that of the Digital Millennium Copyright Act.¹²⁰ Moreover, the act should add a criminal bullying section and create a civil remedy for the victims of such defaming conduct by cyberbullies similar to that of the Computer Fraud and Abuse Act and the Child Pornography Prevention Act.¹²¹ And as one commentator contends, there must be an Online Civil Rights Act.¹²² As with most civil rights

¹¹⁴ See *Zeran*, 958 F. Supp. at 1124.

¹¹⁵ *Taylor v. Franko*, 2011 U.S. Dist. LEXIS 75128 *1 (D. Haw. July 11, 2011).

¹¹⁶ *Hudson*, 202 Ga. App. at 882-884 (Ga. Ct. App. 1992).

¹¹⁷ *Id.*

¹¹⁸ See *Zeran*, 958 F. Supp. at 1128.

¹¹⁹ 47 U.S.C. § 230(a).

¹²⁰ 17 USC § 512(c).

¹²¹ See generally 18 USC § 1030; See generally 18 USC § 2252A.

¹²² Citron, *supra* note 17.

acts there should be attorney's fees and costs available to the prevailing victim.¹²³ This will serve the twin aims of both deterrence for would be future offenders and the ability to compensate the victims, while still maintaining the original goals of the Communications Decency Act, promoting the growth and progress of the internet.¹²⁴

The publisher immunity should not be entirely removed. It should be given a reasonable grace period. Where after 48 hours of notice the publisher must remove the content or lose their immunity permitting victims to not only go after the bully, but those who stubbornly aid the bully as well. Much akin to the Notice and Takedown provisions of the Digital Millennium Copyright Act, which provides:

Elements of notification.

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

¹²³ 42 U.S.C. § 1988.

¹²⁴ 47 U.S.C. § 230(a).

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.¹²⁵

The Digital Millennium Copyright Act states the necessary prerequisites for providing notice and the Communications Decency Act should be no different. The court in *Zeran* was quick to point out that "the simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law."¹²⁶ While, the Court is correct that such notice cannot turn a publisher into a distributor, however, Congress can remove the immunity granted to such publishers when presented with adequate notice of the wrong and defamatory content. One key difference between the Digital Millennium Copyright Act and the proposal would be to incorporate a hard set amount of time with which to comply with the takedown notice, 48 hours instead of expeditiously as in the Digital Millennium Copyright Act.¹²⁷ The reason being the more time a damaging image or story is up, the more potential reputational harm, i.e. immeasurable harm to the victim. Furthermore, this would prevent internet service providers from dragging their feet when the simple act of removing the content can act to alleviate some of the emotional distress of the victim. Moreover, the hard coded time creates certainty and clarity and emphasizes the immediate and lasting nature the harm. Also, creating the hard set time will create clarity and prevent courts from being bogged down as to whether a defendant acted "expeditiously."¹²⁸

¹²⁵ 17 USC § 512(c)(3).

¹²⁶ *Zeran v. Am. Online, Inc.*, II, 129 F.3d 327, 332 (4th Cir. 1997).

¹²⁷ 17 USC § 512(c).

¹²⁸ *Duran*, supra note 26, at 132.

The Digital Millennium Copyright act has been criticized for the effects of its Notice and Takedown provisions.¹²⁹ "A bigger concern, from a public policy standpoint, is that it strongly compels an ISP to take materials down and ask questions later."¹³⁰ While this "take down first ask questions later"¹³¹ may be criticized as making copyright owners superior to the goals of promoting the internet, this unequal position should be welcomed for victims of defamation and cyberbullying because harms done to one's reputation is truly immeasurable unlike the harm of infringing upon one's copyright. The reputation of a cyberbully victim is so much more valuable when compared to the infringed rights of a copyright holder that this same criticism would be seriously undermined.

The Digital Millennium Copyright act has also been criticized because it "runs afoul of the First Amendment's guarantee of free speech."¹³² "Legislation that allows an ISP to take down another's speech before the speaker has a chance to argue against removal is clearly a restriction on speech."¹³³ Again, with the victims of cyberbullying the notice and take down provisions would not run afoul of the First Amendment's guarantee of free speech because the defaming nature of the speech is simply not protected because it is harming the reputation of the victims or the content is not protected because of the right to privacy violations of the victim. Also, other criticisms include that such a threat of loss of immunity will cause many risk-averse internet service providers with legitimate defenses and arguments to take down materials that are not

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 133.

¹³³ *Id.*

infringing.¹³⁴ Here to, the difference turns on the harm caused by the cyberbully versus the would be infringer, and the damaged suffered by reputational harm to victim is not quantifiable.

Furthermore, by adding a criminal provision Congress would recognize the great reputation harms perpetrated upon the victims as Shakespeare so elegantly put it above, the victims are being robbed of not just their monetary value, they are being robbed of something that is truly immeasurable, something that goes to the essence of who they are, their very core, their reputation. Congress should criminalize these acts which seek revenge and to humiliate and embarrass the victim along with degrading their reputation. By doing this and imposing stiff jail sentences upon bullies, future instances of bullying will be deterred because bullies will realize and actually be able to see that their actions have consequences that society recognizes and does not want to be a part of. By adding the criminal element congress will bring the Communications Decency Act more in line with the Computer Fraud and Abuse Act and the Child Pornography Prevention Act.¹³⁵ Both are acts which are influenced and guided by modern technology.¹³⁶ Both criminalize the conduct it seeks to prevent while simultaneously giving the victims a recognized civil remedy.¹³⁷

By giving the victim a recognized civil remedy the, Plaintiff will no longer need to play a guessing game as to what claims will stick. As one judge eloquently put it, Plaintiffs must employ a "double barrel" shotgun approach in an attempt to hit upon a claim which relief may be granted.¹³⁸ They know definitively that a claim is available to them and that they can recover their damages. This will also have the public policy effect of making plaintiff's attorneys more

¹³⁴ *Id.*

¹³⁵ *See generally* 18 USC § 1030; *See generally* 18 USC § 2252A.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 737 (N.D. Ohio 2007) aff'd, 551 F.3d 412 (6th Cir. 2008).

willing to take the cases of the aggrieved victims to enforce their rights because an element of certainty is added.

Congress' goal in enacting the Computer Fraud and Abuse Act was to create fluid act that is not rigid to allow the law to adapt to bring as many would be defendants to justice with letting as few as possible slip through the cracks of the law.¹³⁹ Due to the goal to attempt to reach as many would-be defendants as possible, courts have had difficulty in interpreting what the expansive language of the Computer Fraud and Abuse Act actually means.¹⁴⁰ Even terms Congress felt would be self-explanatory, such as exceeding authorized access, prove difficult for courts to interpret or even agree upon the meaning of such undefined terms.¹⁴¹ However, in the context of cyberbullying, the expansive nature of such a proposed change would not be a detriment and the same problems of interpretation will not apply. Courts under the Computer Fruad and Abuse Act have struggled interpreting the act because the conduct sought to be deemed wrong is largely undefined.¹⁴² Where instead under an amended Communications Decency Act, the wrong conduct is straight forward and clear, which is any defaming, wrongful, reputational related harm posted on the internet. Many state courts have clear laws on what is wrongful speech and content, which harms an individuals reputation.¹⁴³ Congress can codify one of the many very well thought out defamation laws of a state. Moreover, the expansive nature is desired and a good thing under the proposed changes to the Communications Decency Act

¹³⁹ *Shaw*, 91 F. Supp. 2d at 936 (E.D. Tex. 1999).

¹⁴⁰ See Garrett D. Urban, *NOTE: CAUSING DAMAGE WITHOUT AUTHORIZATION: THE LIMITATIONS OF CURRENT JUDICIAL INTERPRETATIONS OF EMPLOYEE AUTHORIZATION UNDER THE COMPUTER FRAUD AND ABUSE ACT*, 52 Wm. & Mary L. Rev. 1369 (2011); Cyrus Y. Chung, *NOTE: THE COMPUTER FRAUD AND ABUSE ACT: HOW COMPUTER SCIENCE CAN HELP WITH THE PROBLEM OF OVERBREADTH*, 24 Harv. J. Law & Tec 233 (2010).

¹⁴¹ Chung, *supra* note 140, at 237.

¹⁴² See Chung, *supra* note 140, at 237; Urban, *supra* note 140.

¹⁴³ *Taylor Building Corp. v. Benfield*, 507 F. Supp. 2d 832 (S.D. Ohio 2007).

because the wronged conduct will be clear and it will be desirous to bring as many facilitators and bullies to justice.

One criticism of the Child Pornography Prevention Act, is that it goes too far in that it criminalizes acts or images where no children were harmed or the defendant never even actually viewed or possessed child pornography. For example in 2009, a 39 year old prolific collector of Japanese Magna Art, a popular Japanese art style, plead guilty to the possession of obscene visual representations of sexual abuse of children.¹⁴⁴ Some of his art collection displayed children engaged in sex acts.¹⁴⁵ This was a man who was a fan of the art style so much he got his hands on anything he could related to this artistic style not thinking any of the art would be condemned.¹⁴⁶ The artistic style and even the sexual images in question are common place in Japan and Asia, as the style is "huge" over there as one expert on Japanese Magna noted.¹⁴⁷ This marks the first time someone was convicted for possessing only cartoon art without any evidence that the defendant also collected or viewed actual child pornography.¹⁴⁸ The proposed changes to the Communications Decency Act, while it will be broad will not suffer from the same problems because the changes would require an affirmative step by both cyberbullies and internet service providers. The cyberbullies must take action to post content aimed at embarrassment or create reputational related harm to the victim, and the facilitators or internet service providers must disregard clear notice from the victims and fail to take down the harmful post.

¹⁴⁴ U.S. Manga Obscenity Conviction Roils Comics World, *Wired*, May 28, 2009, available at <http://www.wired.com/threatlevel/2009/05/manga-porn/> (last visited December 5, 2011).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

The United States Code 42 U.S.C. § 1988 codifies attorney's fees for the prevailing party in civil rights actions.¹⁴⁹ "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances."¹⁵⁰ "It is sufficient to comment that the very purpose of awarding attorneys' fees in civil rights cases is to assure that private enforcement remains available to those citizens who have little or no money with which to hire an attorney."¹⁵¹ The rights of the victims of cyberbullying in these instances are being degraded and violated and the victims often feel powerless and alone.¹⁵² "In addition to feeling lonely, humiliated, and insecure, like victims of traditional bullying, cyberbullying victims also experience heightened feelings of anger, frustration, and depression."¹⁵³ The law should help the powerless by ensuring access to effective counsel. And furthermore, it will ensure the private enforcement of victims' rights to even those who have little or no money to hire an attorney, because these helpless victims should not go on without being assisted and their rights vindicated.

Ideally this reform would not be necessary, but the sad truth is for whatever reason vengeance, humiliation and embarrassment becomes a driving force to harm a person one once loved. When this less than ideal situation occurs the law should act to assist in providing justice for the victims and not turn a blind eye. Thus, this reform proposal would help remedy the blind eye the law takes. The new face of the Communications Decency Act will hopefully look something like this: A jilted lover decides to cyberbully their ex and post a video of the two of them engaging in sexual acts on the internet, the ex learns the video is online and complies with

¹⁴⁹ 42 U.S.C. § 1988.

¹⁵⁰ *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989).

¹⁵¹ *Pennsylvania v. O'Neill*, 431 F. Supp. 700, 708 (E.D. Pa. 1977).

¹⁵² *Zande*, supra note 7.

¹⁵³ *Id.*

the notice provision of the act and notifies the internet service provider of the damaging content demanding its removal. The internet service provider has 48 hours to comply with the demand. If the internet service provider does comply with the demand, the internet service provider gets to keep its immunity, but the bully faces jail time and civil liability under the act. However, should the internet service provider fail to act and remove the damaging content, in addition to the jail time the bully faces and civil liability, the internet service provider loses its immunity and the victim can also file suit against the internet service provider under the act's civil liability section as well. And once the victim prevails under either scenario, the defendants should be ordered to pay the attorney's fees and costs related to the litigation of protecting and enforcing the victim's rights.

Given the state of the law, and the endless parade of uncompensated victims having the courtroom door slammed in their faces, Congressional Action is necessary to address an imbalance in the law. The proposed changes will both serve the original intent behind the CDA and the goal of compensating the victim.

IV. Conclusion

The federal government must act to create a type of federal anti-cyberbullying statute which criminalizes the conduct of not only the bully, but those who facilitate the bully's handy work without attempting to correct or stop the bully's behavior. The statute should also create a private cause of action as well, similar to other cyber crime statutes such as the Computer Fraud and Abuse Act, Digital Millennium Copyright Act and the Child Pornography Prevention Act. This will give not only law enforcement officials the tools necessary to prosecute the bullies, but also create a one size fits all civil remedy that is easy to apply so that the victims, who are often severely injured in several respects to be compensated swiftly.