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INTERNET GOSSIPING AND THE JURISPRUDENTIAL CLASH THAT MIGHT END IT

Paulisa Vargas

I. INTRODUCTION: IS IT TRUE THAT GOSSIP HAS AN ALLY?

Imagining discovering one day that someone is posting photos and spreading lies about you on the Internet, and though you know these lies are false they end up trashing your character and ruining your career. That is exactly what happens to many people, and is exactly what happened to Sarah Jones.¹ She was living a normal life up until that day – married, a high school English teacher, and on her free time she was a member of the Cincinnati Bengals cheerleading squad.² It was in October 2009 that Jones received the phone call that changed her life forever.³ She was informed by one of the Bengals players that they saw a posting on the gossip website, TheDirty.com, which claimed she had sex with the entire Bengals team and was seen spotted around town with one of the team’s players.⁴ When the local news got wind of the story, Jones became mortified but that did not stop TheDirty.com from publishing several more posts about the Bengals cheerleader.⁵

¹ See Pat Murphy, *Kentucky Cheerleader’s Lawsuit Punctures Website’s immunity Judge Finds Service Provider Responsible for Encouraging Content*, LEGALNEWS.COM (Jan. 13, 2012), <http://www.legalnews.com/detroit/1172654>.

² See *id.*

³ See *id.*

⁴ See *id.*

⁵ See *id.*

Every day, a handful of unlucky people are victimized by TheDirty.com and similar websites that have an open forum which allows its users to anonymously post false, and most of the time, hurtful information. What makes the situation even worse for the people that have been victimized by these websites is that due to § 230 of the Communications Decency Act (“CDA”), they are immune from any kind of liability related to the postings on their website, and have absolutely no obligation to remove those postings if a person should make a complaint to the site.⁶

In the fifteen years since its enactment, § 230 of the CDA has become one of the most intensely criticized yet most important statutes impacting online speech.⁷ Its language is simple and was intended to grant operators of websites and other interactive computer services broad protection from claims based on the speech of its third party users.⁸ However, it was not until recently that the statute’s deceptively simple language has become the source of immense confusion amongst the online community.⁹

Today, message boards, blogs, and other social networking features, allow individuals to voice their opinions and reach millions of people all around the world in just a matter of seconds. Under § 230, since these websites are merely distributors of information created by others, they are immune from liability and have no responsibility to monitor or remove the offensive content.¹⁰ Making the situation more difficult is that much of what is written on these websites is done anonymously and unsupervised by the service

⁶ Communications Decency Act (CDA) of 1996, 47 U.S.C. § 230 (2006).

⁷ Mathew Minora, *Rumor Has It That Non-Celebrity Gossip Web Site Operators Are Overestimating Their Immunity Under The Communications Decency Act*, 17 COMM.LAW CONSP. 821 (2008).

⁸ 141 CONG. REC. 22,044 (1995).

⁹ See Mathew Minora, *supra* note 7.

¹⁰ 47 U.S.C. § 230 (2006).

providers, therefore further complicating matters in determining who is responsible for the offensive conduct. Up until recently, § 230 has made suing websites virtually impossible.¹¹ However, as blogging, Facebook, and other interactive computer services became more popular, some courts have been less willing to grant immunity to operators of websites especially when the website encourages its users to post offensive material.

This paper examines the various interpretations of § 230 of the CDA and how those interpretations will affect the outcome of one of the most controversial cases, *Jones v. Dirty World Entertainment Recordings, LLC*. (“TheDirty.com”). Part II looks at the background and development of the CDA, specifically § 230. Part III examines the emerging circuit split between interpreting the CDA broadly, providing immunity to website operators or narrowly, limiting immunity for operators that have contributed to the development of offense content. In Part IV, this paper explains the *Jones v. Dirty World Entertainment Recordings, LLC* case and its possible outcome.

I. WHERE THE CDA BEGAN AND HOW THE CONFLICT STARTED

On February 1, 1995, Senator J. James Exon introduced to the Senate what he categorized as the most extensive overhaul of the telecommunications law since it was enacted in 1934 – the Communications Decency Act.¹² Senator Exon addressed the U.S. Senate and proclaimed that the Internet has become filled with online pornography and

¹¹ David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373 (2010).

¹² 141 CONG. REC. 15,505 (1995).

was a threat to the children of America.¹³ Neither Senator Exon's first bill nor his second bill contained language any resembling section 230. In fact, his legislation to combat rampant online pornography began as a revision of 47 U.S.C. § 223. His revision extended the decency standards that had already been in place to protect cable and telephone users to a new telecommunication device – the Internet.¹⁴ Furthermore, Senator Exon's primary concern was the ease with which children were able to access pornographic material on the Internet.¹⁵ Although many in the Senate agreed with Senator Exon, there were just as many that disapproved of the broad nature of his proposal.¹⁶

Senator Exon's amendment criminalized the transmittal of obscene or indecent material to anyone who knowingly uses an interactive computer service to send to a specific person or persons under 18 years of age, or uses an interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.¹⁷ Although many senators feared that the language in Senator Exon's amendment would be used to impose liability on a provider of an

¹³ *Id.* at 3,203. Senator Exon introduced his legislation by stating, "The information superhighway should not become a red light district. This legislation will keep that from happening and extend the standards of decency which have protected users to new telecommunications devices." *Id.*

¹⁴ *Id.*

¹⁵ Senator Exon reasoned that pornographic material is never more than "a few clicks away from any child with a computer." *Id.* at 16,009 (statement of Sen. Exon).

¹⁶ *See, e.g., Id.* at 16,013 (statement of Sen. Feingold). The Telecommunications Act of 1996, of which the CDA was only a part, contained a broad deregulatory scheme with the purpose of reducing the government's involvement in the telecommunications industry. *See* 142 CONG. REC. 2,042-43 (1996) (statement of Sen. Dole).

¹⁷ *See* 47 U.S.C. § 223(a)(1)(B) (2002) (prior to amendment).

interactive computer service even if it was not the generator of any offensive content, this language was largely incorporated in the final CDA.¹⁸ In order to secure its passage, Senator Exon agreed to add an uncontroversial House amendment: § 230.¹⁹

It was not until August 4, 1995, that Representative Christopher Cox proposed an amendment to Senator Exon's CDA bill called the Online Family Empowerment Amendment.²⁰ The amendment had the dual purpose of eliminating some of the wording problems of the proposed CDA, and it encouraged private efforts to deal with offensive online content because the existing legal scheme seemed to actually discourage websites from monitoring content.²¹ To further support the reasoning behind amending the CDA, Representative Cox discussed, what was at the time a recent court case, *Stratton Oakmont v. Prodigy Services Co.*, which held that if a website operator did nothing to review, screen or block offensive material posted by third parties, then the operator could not face liability for any user-generated content posted on its site.²² However, if an operator took an active role in reviewing or blocking offensive material, then the operator could face liability for the remaining user-generated material that was not blocked by the operator.²³ "[T]hat is

¹⁸ See 47 U.S.C. § 223 (2006).

¹⁹ 47 U.S.C. § 230 (2006).

²⁰ 141 CONG. REC. 22,044 (1995).

²¹ *Id.* at 22,044-46.

²² *Id.*; *Stratton-Oakmont, Inc. v. Prodigy Serv. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

²³ See *Zeran*, 129 F.3d at 331 (where the court explains that under the holding of *Stratton-Oakmont*, "computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher.").

backward,” Representative Cox stated, because “[w]e want to encourage people like Prodigy...to do everything possible...to help use control [online content].”²⁴

The Cox amendment claimed to establish two things in order to encourage people to do everything possible to help the government control online content.²⁵ First, it would protect online service providers that take an active role in filtering indecent or offensive material, from “taking on liability such as incurred in the Prodigy case.”²⁶ Second, it would “establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet...”²⁷ Congress feared that if service providers believed that they would be held liable for third party content, then it would deter them from blocking and screening offensive material.²⁸ With the *Stratton* case as an example of what Congress did not want, the House overwhelmingly approved of the Cox amendment and it was adopted into the Senator Exon’s CDA modification.²⁹ The Senate and the House passed the CDA as Title V of the broader Telecommunications Act of 1996, and it was signed into law by President Clinton on February 8, 1996 and became codified in 47 U.S.C. § 230(c):

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

²⁴ 141 CONG. REC. 22,045 (1995) (remarks of Rep. Cox).

²⁵ See 141 CONG. REC. 22,045 (1995) (remarks of Rep. Cox).

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Batzel at 1031 (noting, “a central purpose of the [CDA] was to protect from liability service providers and users who take some affirmative steps to edit the material posted. Also, the exclusion of ‘publisher’ liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message.”).

²⁹ H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.).

(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)].³⁰

It is clear about the structure of § 230(c) is that it has two separate parts. Section 230(c)(1) provides that a “provider or user of an interactive computer service shall not be treated as the publisher or speaker of any” third party content.³¹ What has sparked debates is whether or not this provision is merely descriptive or if it provides some kind of protection.³² Section 230(c)(2) provides that a “provider or user of an interactive computer service” shall not be held civilly liable because of any attempts made to restrict content or to allow users to restrict content.³³ Section 230 therefore appears to immunize certain websites from two forms of liability: (1) the partisan dilemma presented in the *Stratton* case, whereby a website could be held liable as the publisher of third party content if it attempts to filter some of the information; and (2) liability to those whose content a

³⁰ Sections 230(a) and (b), respectively, contain the congressional finds praising the advancements offered by the Internet and the congressional policy statements encouraging the development of the Internet and fighting criminal activity; *See* H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.).

³¹ 47 U.S.C. § 230(c)(1)(2006).

³² *See* discussion *infra* Part III.

³³ 47 U.S.C. § 230(c)(2) (2006).

website filters, although the content is constitutionally protected.³⁴ In general, websites would not face liability for blocking too much content or not blocking enough content.

The statute also defines the two classes of cyber-entities, “interactive computer services” and “information content providers.”³⁵ The statute’s definition provides that any participant in the entire Internet connection process is an interactive computer service.³⁶ However, if an interactive computer service or a person accessing the service creates any content, then they acquire the status of an information content provider.³⁷ Since under § 230(c)(1) interactive computer services cannot be treated as the publisher or speaker of a content provider’s content, the relevant distinction made by the two cyber-entities is one of content creation. Thus, a website is a content provider only for the content that it provides, and an interactive computer service where it allows users to add their own information.³⁸

II. JUDICIAL INTERPRETATIONS CONFLICT

³⁴ Ryan French, *Picking up the Pieces: Finding Unity after the Communications Decency Act Section 230 Jurisprudential Clash*, 72 LA. L. REV. (2012).

³⁵ 47 U.S.C. § 230(f)(2-3) (2006).

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

(3) *Information content provider*. The term “interactive 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.

³⁶ See 47 U.S.C. § 230(f)(2006).

³⁷ See *id.*

³⁸ Where courts have accepted this proposition. See, e.g., *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008).

On the day the CDA was signed into law by President Clinton, 20 plaintiffs filed suit alleging that Senator Exon's revisions of § 223 were unconstitutional because it violated the First Amendment's freedom of speech provision.³⁹ One week later, a federal court entered a temporary restraining order barring the enforcement of the broad provisions in § 223.⁴⁰ Although the anti-decency provisions were ruled unconstitutional, § 230 survived.⁴¹ However, as § 230 began to be applied in courtrooms, it inevitably became the center of a heated debate and the cause of the current jurisprudential clash.

The first case interpreting § 230 came swiftly and would later prove to be one of the most influential cases in the history of the CDA. In *Zeran v. American Online, Inc.*, the Fourth Circuit was provided with the first opportunity to interpret § 230 and examine the breadth of its safeguards for websites.⁴² In this case, the defendant raised the CDA as an affirmative defense to a defamation claim.⁴³ This suit arose when an anonymous American Online ("AOL") user posted false statements on an online message board, which led to the harassment of Zeran.⁴⁴ Zeran claimed that AOL was liable as the publisher of the defamatory material posted by a third party.⁴⁵

³⁹ *ACLU v. Reno*, 1996 U.S. Dist. LEXIS 1617 (E.D. Pa. 1996). The Supreme Court later affirmed the district court's finding of the unconstitutionality of the content-based indecency provisions contained in § 223. In the Court's decision, Justice Stevens wrote, "It is true that we have repeatedly recognized the governmental interest in protecting children from harmful material. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno*, 521 U.S. 844, 875 (1997).

⁴⁰ *Id.*

⁴¹ 47 U.S.C. § 230 (2006).

⁴² *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124 (4th Cir. 1997).

⁴³ *See id.*

⁴⁴ *See id.* at 1127.

⁴⁵ *See id.* at 1128-1129.

The Court of Appeals for the Fourth Circuit held that since AOL was a provider of interactive computer services, the CDA protected AOL from any liability.⁴⁶ The court dismissed the case on the ground that § 230 immunizes internet providers with respect to any information that has been placed on their services by third parties, and specifically provides that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴⁷

The court recognized that Congress’ purpose in creating immunity for services providers is two-fold. First, Congress in enacting the § 230 of the CDA, sought to remove disincentives which include the liability that an interactive computer service provider might have under state law if it chose to or failed to do content screening and editing after being notified of a defamatory statement made by a third party.⁴⁸ Second, Congress sought to prevent the danger that tort-based lawsuits “pose to freedom of speech in the new and burgeoning internet medium.” The court noted that the amount of information through interactive computer services is staggering and that the specter of tort liability for material posted on a provider’s system would have an obvious “chilling effect” on speech in this area.⁴⁹ Absent the immunity provided by §230, interactive computer service providers could possibly be held liable for any messages posted on their service and might choose to severely restrict the number and/or types on messages posted.⁵⁰ The court further noted

⁴⁶ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 334-335 (4th Cir. 1997).

⁴⁷ 47 U.S.C. § 230(c)(1).

⁴⁸ See *Zeran*, 129 F.3d at 331.

⁴⁹ See *id.*

⁵⁰ See *id.*

that an although Congress allowed for the enforcement of “any State law that is consistent with § 230,” it was also Congress’ intention to promote freedom of speech on the internet and therefore the immunity provided by this section must supersede any conflicting common law cause of action.⁵¹

After the holding in *Zeran*, it became clear that allocating responsibility on an anonymous forum like the Internet proved to be difficult. Many have found this to be disturbing because if websites could not be held liable for the content then who could? Following the *Zeran* decision, declaring that § 230 provides federal immunity to websites from lawsuits that seek to hold them responsible for content provided by a third party, subsequent cases have broadened the protections provided by this section.⁵² However, *Zeran* has failed to gain complete acceptance by scholars, and some courts have made it very clear that they are in strong disagreement with *Zeran*’s broad rule.⁵³

In the case of *Batzel v. Smith*, the Ninth Circuit had to determine whether or not minor alterations made by a website operator to a third party’s unpublished content constituted “creation or development of information” under the CDA.⁵⁴ The defendant in this case published sections of an allegedly defamatory e-mail, which was provided by a third party, on his website.⁵⁵ After the plaintiff, Batzel, discovered the published e-mail, she

⁵¹ *Id.* at 334; The policy goals of § 230 were added to the statutes language and states, “[I]t is the policy of the United States...to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal and State regulation. 47 U.S.C. § 230(b) (2006).

⁵² See Ryan French, *supra* note 34.

⁵³ *Id.*

⁵⁴ Batzel, 333 F.3d at 1031.

⁵⁵ *Id.* at 1020-1023.

filed suit and claimed that as a result of the publication her reputation was damaged and subsequently lost business.⁵⁶ The co-defendant, Cremers, asserted the CDA as an affirmative defense since he was the one responsible for posting the allegedly defamatory e-mail on the website.⁵⁷ The court held that the defendant was immune under the CDA because “the development of information means something more substantial than merely editing portions of an e-mail and selecting material for publication.”⁵⁸

In *Fair Housing Council of San Fernando Valley v. Roommates.com*, another Ninth Circuit decision, the court held that since the defendant violated the Fair House Act (“FHA”), a law that prohibits the discrimination on the basis of “race, color, religion, sex, familial status, or national origin, the provider is not immune under section 230.⁵⁹ In this case, the plaintiff claimed that the website operator violated the FHA because it required each subscriber to describe himself, and his preferences in roommates with regard to gender, sexual orientation and whether he had children.⁶⁰ The website operator would then use this information, in addition to other information provided by the user, to generate a profile page for other users to view.⁶¹ Although the district court held that the website operator was immune from liability under § 230, the court failed to consider whether the website’s actions violated the FHA.⁶²

⁵⁶ *Id.*

⁵⁷ *See id.* at 1030-1036.

⁵⁸ *See id.* at 1031.

⁵⁹ *See Roommates.com*, 521 F.3d at 1175-1176.

⁶⁰ *See id.* at 1164-1166.

⁶¹ *See id.* at 1161-1163.

⁶² *See Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 2004 WL 3799488 (C.D.Cal. Sept. 30, 1994).

The plaintiff appealed and the court held that § 230 immunity does not apply to acts resulting from the website's questionnaire that users were required to answer.⁶³ The court reasoned that the website user and the operator can contemporaneously act as information content providers if the website requires its users to answer specific questions.⁶⁴ The court further found that a website operator can be a partial information content provider with regard to the specific questions it requires answers, and a partial interactive service provider with regard to the "additional comment" section where users can post any information they wish.⁶⁵ Thus, the court held that where an operator requires that its subscribers divulge personal and protected information, prompt users to post discriminatory preferences, and to then choose roommates based on those preferences, the website violated the FHA and therefore not immune under section 230.⁶⁶ However, the court did find that Roommates.com was protected by the CDA from claims arising out of third-party content that was posted in the "additional comments" section.⁶⁷

One year after the *Roommates.com* case was decided, the Tenth Circuit opted a narrower reading of section 230 in *FTC v. Accusearch Inc.*⁶⁸ In this case, Abika.com, a website that had been ran by Accusearch, paid investors to obtain private phone records

⁶³ See *Roommates.com*, 521 F.3d 1157.

⁶⁴ See *id.* at 1165-1169.

⁶⁵ See *id.*

⁶⁶ See *id.* at 1169 – 1172.

⁶⁷ See *id.* at 1169-75 (noting that only "direct participation", which requires a showing that the website operator materially changed or altered the third-party content to convert an "innocuous" message into a "libelous" one, in creating the illegal content will jeopardize the providers immunity.").

⁶⁸ *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009).

that the website's operators knew to have been obtained illegally.⁶⁹ The specific records at issue in this case contain "customer propriety network information" ("CPNI"), resale of which was illegal under the Telephone Records and Privacy Protection Act of 2006 ("TRPPA").⁷⁰ As a result, the FTC filed suit against Accusearch claiming that Abika.com was engaged in "unfair" trade practices under the FTC Act.⁷¹ Accusearch's defense was that it was immune from liability under § 230.⁷² Accusearch argued that it obtains the CPNI reports from third party vendors and merely republished the reports to its customers.⁷³

Since Abika.com advertised the third party reports, processed customer payments, and delivered the subsequent reports to customers as if the reports were their own instead of a third party's, Abika.com failed to obtain immunity under § 230 after the court held that the website acted as an information content provider.⁷⁴ The court stated, "By paying its researchers to acquire telephone records, knowing that the confidentiality of the records was protected by law, it contributed mightily to the unlawful conduct of its researchers."⁷⁵ The court further stated that, "A service provider is 'responsible' for the development of offensive content only if it in some way specifically encourages development of what is offensive about the content."⁷⁶

The courts interpreting § 230 in its infancy made it clear that any involvement in the creation of defamatory content that was short of authoring the material cannot create

⁶⁹ *See id.* at 1191-1193.

⁷⁰ *See id.* at 1191- 1194.

⁷¹ *See id.*

⁷² *See id.* at 1195-1202.

⁷³ *See id.* at 1197-1198.

⁷⁴ *Id.* at 1201.

⁷⁵ *Id.* at 1200.

⁷⁶ *Id.* 1199.

website liability.⁷⁷ In *Zeran* and in the cases following, courts have refused to hold an interactive service provider liable even when it has a “high degree of awareness” of the defamatory material on the website.⁷⁸ Furthermore, courts have generally held that interactive service providers have no affirmative duty to monitor or investigate websites for any defamatory content.⁷⁹

The most recent cases, *Roommates.com* and *Accusearch*, have revealed that courts are narrowing the immunity provided by § 230.⁸⁰ These cases establish that § 230 immunity will not attach if the interactive service providers requires or encourages third parties to post defamatory material.⁸¹ However, it is important to note that both the *Roommates.com* and *Accusearch* cases dealt with online providers that were closely connected to a third

⁷⁷ See, e.g., *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (“So long as the third party willingly provides the essential publishing content, the interactive service provider receives full immunity regardless of the specific editing or selection process.”).

⁷⁸ John E.D. Larkin, *Criminal and Civil Liability for User Generated Content: Craigslist, a Case Study*, 15 J. TECH. L. & POL’Y 85, 105 (2010). When courts must determine whether a website operator should be provided with § 230 immunity, courts will generally apply what is known as the Gibson Test. Based on this approach, immunity is deemed to be appropriate if: 1) The defendant is “a provider or user of an interactive computer service;” 2) The defendant is being “treated as the publisher or speaker” of the content that is at issue; and 3) The information at issue is “provided by another content provider.”⁷⁸ Although this test provides courts some assistance in distinguishing an information content provider from an interactive service provider, the third prong raises further issues it is claimed that a third-party and an interactive service provider jointly authored the harmful content, and thus blurring the line between an information content provider and a provider of an interactive computer service. See *Gibson v. Craigslist, Inc.*, No. 08-7735, 2009 U.S. Dist. LEXIS 53246, at *9 (S.D.N.Y. June 15, 2009).

⁷⁹ See, e.g., *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) (“Congress has conferred immunity from tort liability..., even where the self-policing is unsuccessful or not even attempted.”); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (“It would be impossible for service providers to screen each of their millions of postings for possible problems.”).

⁸⁰ See *Accusearch Inc.*, 570 F.3d at 1201; *Roommates.com*, 521 F.3d at 1162.

⁸¹ See *id.*

party's illegal activity, which trumped any immunity that could have possibly been provided by § 230.⁸²

III. WILL THE CDA SAVE THEDIRTY.COM?

In *Jones v. Dirty World Entertainment Recordings, LLC.*, the Sixth Circuit Court of Appeals recently ruled that the plaintiff, Ben-Gal's cheerleader, Sarah Jones can proceed with her defamation suit against TheDirty.com.⁸³ This matter arose when TheDirty.com published several posts submitted to the site its third party users.⁸⁴

The first post appeared on the site on October 27, 2009 bearing the title "Graham Does It Again".⁸⁵ The post contained two photos of the plaintiff at a public event with a Bengals player, Shayne Graham.⁸⁶ The third party who submitted the post included text about how the plaintiff has slept with "every other Bengal Football player" and that she was a teacher.⁸⁷ Nik Richie, in keeping with his normal tradition as the site's editor and moderator, added a short but sarcastic comment regarding the Bengals football player in the photos.⁸⁸

⁸² See discussion *infra* Part IV.C.

⁸³ *Jones v. Dirty World Entertainment Recordings LLC, et. al.*, No. 12-5133 (6th Cir. May 9, 2012) (order dismissing defendant's appeal of the summary judgment ruling).

⁸⁴ *Jones v. Dirty World Entertainment Recordings LLC, et. al.*, No. 09-219, 2012 WL 70426 (E.D. Ky., N. Div. Jan. 10, 2012).

⁸⁵ *Id.* at 1009.

⁸⁶ Brief for Defendants Motion for Summary Judgment, *Jones v. Dirty World Entertainment Recordings, LLC, et. al.*, 2012 WL 70426 (E.D. Ky., N. Div. Jan. 10, 2012) (No. 09-219).

⁸⁷ *Jones*, 2012 WL 70426, at *1009.

⁸⁸ *Id.*

The second post appeared on the site on December 7, 2009.⁸⁹ This post was also submitted by a third party and included a photograph of the plaintiff which was taken from the cover of the 2007 Cincinnati Bengals cheerleader calendar on which she appeared.⁹⁰ The photograph was followed by comments made by the third party's submitter, which included revelations about the plaintiff's ex-boyfriend and how she most likely contracted several STD's from him.⁹¹ The comment also included the name of the high school where the plaintiff was teaching at the time. Nik Richie followed by commenting, "Why are all high school teachers freaks in the sack? -nik".⁹²

The last post appeared on the site on December 9, 2009.⁹³ The author of this post submitted several pictures of the plaintiff and her then-boyfriend (now husband), in addition to a comment referring to the couple as the "infected people".⁹⁴ As with the other posts, Nik Richie added a short comment, which read: "Cool tribal tat man."⁹⁵ For a second yesterday I was jealous of those high school kids for having a cheerleader teacher, but not anymore.-nik".⁹⁶ The plaintiff commenced her action against TheDirty.com and Nik Richie on December 23, 2009, for defamation, publicity in a false light and intentional infliction of emotional distress.⁹⁷

⁸⁹ *Id.* at *1009-1010.

⁹⁰ Brief for Defendant, *supra* note 86.

⁹¹ *Jones*, 2012 WL 70426, at *1009-1010.

⁹² *Id.* at *1010.

⁹³ Brief for Defendant, *supra* note 86.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *See id.*

A. DIRT FOR SALE

Defendant, Dirty World, originally began its site in 2007 as www.DirtyScottsdale.com, which had been primarily about Scottsdale Arizona.⁹⁸ The site's founder, Nik Lamas-Richie, is also the editor in chief.⁹⁹ When the DirtyScottsdale site was initially created, it was a forum for Nik Richie to express humorous tongue in cheek commentary based on his perception of the Scottsdale club scene and those people who took part in it.¹⁰⁰ When the site first began, Nik Richie (who initially kept his identity a secret) authored and posted his opinion on what he called the "fake" (a/k/a "dirty") people living in Scottsdale, which were derogatorily referred to as the "30k millionaires".¹⁰¹ This term was frequently used in this area to refer to the young people in their twenties that drove expensive cars and lived lavish lifestyles that were funded by their maxed-out credit cards.¹⁰² Nik Richie's commentary and criticism was not limited to the "30k millionaires", he also published commentary and criticism on other topics such as "beer-bong-chugging athletes, puking co-eds, drunken drivers and provocatively posing clubbers..."¹⁰³

Nik Richie's brutally honest yet humorous posts made this site popular overnight and within a short period of time the site known as www.DirtyScottsdale.com became www.TheDirty.com ("TheDirty.com") as it expanded to cover more than 50 U.S. cities

⁹⁸ ABC15, *DirtyScottsdale.com*, YOUTUBE (May 31, 2007), <http://www.youtube.com/watch?v=w27qzX3aiAo>.

⁹⁹ See Brief for Defendant, *supra* note 86.

¹⁰⁰ See YOUTUBE (May 31, 2007), <http://www.youtube.com/watch?v=w27qzX3aiAo>.

¹⁰¹ Brief for Defendant, *supra* note 86; Arizona Republic Staff, *Man Behind Thedirty.com Gets DUI, Sheds Anonymity*, AZCENTRAL (Sept. 4, 2008), <http://www.azcentral.com/ent/nightlife/articles/2008/09/04/20080904thedirtyout.html>.

¹⁰² See Brief for Defendant, *supra* note 86.

¹⁰³ *Id.*

nationwide and more than 20 cities in Canada.¹⁰⁴ With the overnight success of TheDirty.com, Nik Richie revealed his identity and was named one of the most fascinating people in 2008 by the Arizona Republic newspaper.¹⁰⁵ The newspaper specifically noted that, “what makes him interesting is that his site has prompted a dialogue about public and private space and about what is and is not celebrity.”¹⁰⁶

As the TheDirty.com continued to grow the site’s format changed dramatically. Namely, Nik Richie was no longer the creator of every post and instead the users of the site, who refer to themselves as “The Dirty Army”, are now permitted to submit their own “dirt” on the people in their area.¹⁰⁷ The “dirt”, which is now being posted by the site’s users include news, photos, videos and text on any topic.¹⁰⁸ Additionally, the users can post their own comments and criticisms about material submitted by other users.¹⁰⁹ As of September 2011, TheDirty.com has approximately 90,000 posts of a variety of topics followed by millions of comments from its users.¹¹⁰ Although many of the site’s posts are related to

¹⁰⁴ See Kashmir Hill, *The Dirty Business: How Gossipmonger Nik Richie of TheDirty.com Stays Afloat*, FORBES (November 11, 2010), <http://www.forbes.com/sites/kashmirhill/2010/11/11/the-dirty-business-how-gossipmonger-nik-richie-of-the-dirty-com-stays-afloat/>.

¹⁰⁵ See Megan Finnerty, *Valley’s 10 most Fascinating People: Nik Richie*, AZCENTRAL (Jan. 9, 2009), <http://www.azcentral.com/ent/calendar/articles/2009/01/09/20090109toparizonans-richie.html>.

¹⁰⁶ *Id.*

¹⁰⁷ Cecilia Ziniti, *A Dirty Job: TheDirty.com Cases Show the Limits of CDA Section 230*, SOCIALLYAWARE (Apr. 26, 2012), <http://www.sociallyawareblog.com/2012/04/26/a-dirty-job-the-dirty-com-cases-show-the-limits-of-cda-section-230/>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See Brief for Defendant, *supra* note 86.

“non-celebrities”, TheDirty.com also covers a variety of topics related to celebrities including Nik Richie himself.¹¹¹

The only instructions found on the site are as follow: “Tell us what’s happening. Remember to tell use Who, What, When, Where, Why”.¹¹² When submitting a post, the users are asked to enter a “title” for their submission, in addition to basic information about the material they are submitting.¹¹³ Basic information includes the “City”, “College”, and “Category” of their submission.¹¹⁴ Once a user submits their material, Nik Richie, the site’s editor, reviews the submission and rejects those that he determines as being vulgar or inappropriate for other reasons.¹¹⁵ Nik Richie has estimated that approximately ninety-percent of the material submitted by the site’s users is rejected by him for publication.¹¹⁶ However, those submissions that are approved are then reviewed by Nik Richie, and at times are edited to remove certain information that he deems are “unduly offensive”.¹¹⁷ Nik Richie adds his finishing touch by making a short, one-line comment about the post, which typically mocks the person that is the subject of the post.¹¹⁸

B. WHERE THE COURT STANDS

On August 25, 2010, the court for the Eastern District of Kentucky entered a default judgment for \$11 million against the defendants, however, the judgment was set aside after

¹¹¹ See Finnerty, *supra* note 105.

¹¹² THEDIRTY, <http://thedirty.com/submit-post/> (last visited Dec. 4, 2012).

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See Brief for Defendant, *supra* note 86.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See Hill, *supra* note 104.

the court discovered that Jones sued Dirty World Entertainment Recordings LLC, instead of the actual owners of the site (Dirty World LLC and Dirty World Entertainment LLC).¹¹⁹ Once the complaint was amended to name the proper defendants, Richie and the other named defendants moved for summary judgment, arguing that although they published facially defamatory messages on the site, they are not responsible because the content was provided by a third party.¹²⁰ The defendants argued that the CDA gives them immunity because TheDirty.com is a passive interactive service provider rather than an information content provider because Richie does not materially change, create, or modify any part of the material submitted by the site's users.¹²¹

The District Court disagreed with the defendants and ruled that TheDirty.com is not protected by § 230 of the CDA.¹²² The court found that the site encouraged the offensive material on the site and that it crossed the line of passive "host". The court reasoned that because Richie reviews the posts and adds his own comments to the users content, TheDirty.com operated as an information content provider.¹²³ Additionally, the court noted that the name of the site "hints at its gossipy content" and when it came to Richie's sarcastic comments on the site, Judge Bertelsman stated that under the principles of

¹¹⁹ Jones v. Dirty World Entertainment Recordings, LLC, et. al., No. 09-219 (E.D. Ky., N. Div. Aug. 25, 2010) (order granting default judgment); Jones v. Dirty World Entertainment Recordings, LLC, et. al., No. 09-219 (E.D. Ky., N. Div. Aug. 27, 2010) (motion for leave to file amended complaint).

¹²⁰ See Brief for Defendant, *supra* note 86.

¹²¹ *Id.*

¹²² See Jones, 2012 WL 70426, at *1012.

¹²³ See *id.*

Roommates.com and *Accusearch*, *TheDirty.com*, through the activities of Richie, “specifically encourage development of what is offensive about the content of ‘thedirty.com’ website.”¹²⁴

As of November 2012, the *Jones* case against Richie remains pending with a trial date set for January 22, 2013.¹²⁵ This potentially groundbreaking defamation lawsuit has First Amendment and technology experts closely watching the outcome of this case because it could possibly set the standard for future lawsuits against other gossip websites that contain third-party content.

C. DID THEDIRTY.COM OVERSTATE ITS IMMUNITY?

The *Jones* case highlights the difficulties the courts now face in assessing the

¹²⁴ *Id.* at 1012-1013; Judge Bertelsman further stated, “One could hardly be more encouraging of the posting of such content than by saying to one’s fans (known not coincidentally as ‘the Dirty Army’): ‘I love how the Dirty Army has war mentality.’” *Id.* at 1013.

¹²⁵ See Jim Hannah, *Former Ben-Gal Sarah Jones’ Defamation Case Proceeds*, CINCINNATI.COM (Oct. 16, 2012), <http://news.cincinnati.com/apps/pbcs.dll/artikkel?NoCache=1&Dato=20121016&Kategori=NEWS010704&Lopenr=310160126&Ref=AR&nocache=1>; Amanda Lee Myers, Sarah Jones, Ex-Cincinnati Bengals Cheerleader, Pleads Guilty to Sex With Minor, HUFFINGTONPOST.COM (October 8, 2012), http://www.huffingtonpost.com/2012/10/08/sarah-jones-ex-cincinnati_n_1949106.html. A federal judge granted a request from Jones to set a January 22, 2013 trial date, after her civil case against *TheDirty.com* was put on hold when a grand jury charged her with first-degree sexual abuse involving a student from the northern Kentucky high school where she was a teacher. On October 8, 2012, she pleaded guilty to reduced charges of sexual misconduct and custodial interference as part of a plea agreement with prosecutors. Jones said the relationship with her 17-year old former student began in February 2011, and admitted that the two had sex and lied about the relationship to police. In accepting the plea agreement, the judge granted prosecutors’ recommendation to sentence Jones to five years of diversion but no jail time, and she will not have to register as a sex offender. The diversion requires that Jones report to a probation officer and undergo random drug tests. *Id.*

activities that fall within the enlarging gray area between a passive interactive service provider and an information content provider. In this case, there may be evidence that the website is involved in soliciting tortious statements from its users, and therefore strengthening the argument that § 230 does not apply. Nevertheless, if no such evidence is discovered, Nik Richie may come out on top once again.¹²⁶

When the federal judge denied TheDirty.com's motion for summary judgment, finding that the website actively encouraged tortious conduct by others, he reasoned that under the principles of *Roommates.com* and *Accusearch*, the defendants specifically encouraged the development of offensive content.¹²⁷ However, the Ninth's Circuit's decision in *Roommates.com* actually supports the defendants' position because in that case the website required all of its users to answer questions, which the website created, regarding their sex, race, religion, etc., in order to search for housing.¹²⁸ The Ninth Circuit held that merely asking these type of discriminatory questions in a housing-related transaction could violate the FHA, without any regard to content provided by a third party user. Since the website itself was directly involved in this illegal conduct, the Ninth Circuit held that the CDA did not apply to that extent.¹²⁹

¹²⁶ See *S.C. v. Dirty World, LLC*, No.11-cv-392-dw, 2012 WL 3335284, at *4 (W.D.Mo. March 12, 2012) (holding that "merely encouraging defamatory posts is not sufficient to defeat CDA immunity." The court further states that it "distances itself from certain legal implications set forth in *Jones*. In particular, *Jones* appears to adopt a relatively narrow interpretation of CDA immunity. This is in conflict with the 'broad' interpretation recognized in this circuit. Additionally, *Jones* found that 'the name of the site in and of itself encourages the posting only of 'dirt,' that is material which is potentially defamatory'...however, the CDA focuses on the specific defamatory content at issue and not the name of the website...also...the Website if not devoted entirely to 'dirt'."

¹²⁷ See *Jones*, 2012 WL 70426, at *1012-1013.

¹²⁸ See *Roommates*, 521 F.3d at 1164-1166.

¹²⁹ See *id.* at 1175.

Furthermore, the Ninth Circuit noted that CDA immunity is not an “all or nothing” proposition and emphasized that in cases where it cannot be determined whether or not the operator encouraged the illegal activity, the case must be resolved in favor of immunity.¹³⁰ In order for the principles in *Roommates.com* to apply in the *Jones* case, the plaintiff would have to demonstrate that an aspect of TheDirty.com is unlawful and that the website on its own was unlawful without any material provided by a third party. Clearly, this is not the case here. TheDirty.com is a website that permits its users to post “dirt” about other people.¹³¹ Although Richie adds a comment to each post, the content that Jones argues is defamatory was provided from a third party, which Richie did not create or materially change its text.

Since § 230 was enacted to prevent a “chilling effect” that the threat of litigation would have on the free flow of information on the Internet, the court in consideration of public policy will most likely rule in favor of Richie in order to avoid opening the floodgates to more litigation involving § 230. Although the results required by § 230 of the CDA may seem unjust because it can unfairly grant a website complete immunity when it chooses to publish offensive material, Congress created the CDA to encourage providers to self-police

¹³⁰ *See id.* at 1174-1175. (the court stating that, “We must keep firmly in mind that this is an immunity statute we are expounding, a provision enacted to protect websites against the evil of liability for failure to remove offensive content. Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged – or at least tacitly assented to – the illegality of third parties. Where it is clear that the website directly participates in developing the alleged illegality...immunity will be lost. But in cases of enhancement by implication or development by inference...section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.”).

¹³¹ *See supra* Part IV-A.

the Internet for obscene or offensive material and further encourage freedom of speech on the Internet.¹³² This should not mean that websites should be completely immune from liability. However, the courts in deciding whether or not § 230 applies should Congress' intent in mind, and not turn it into a statute that does not impose a hindrance to future lawsuits against web sites.

IV. CONCLUSION

Congress intended that § 230 promote the continued free market development of the Internet with minimal government intervention while also encouraging interactive service providers to monitor their services for any offensive conduct. Section 230, as *Zeran* and subsequent courts that have interpreted § 230 broadly have continued to serve Congress' purposes. The Internet continues to grow in the amount of information that is available to anyone at anytime. Although some courts have objected to following the *Zeran* approach because it encourages interactive service providers to refrain from self-regulating, this is the only approach that protects the interests of both Congress and the people of this country. If courts continue to follow the narrow approach of interpreting § 230, it will have a severe "chilling effect" on the growth of information on the Internet

¹³² See *Barrett v. Rosenthal*, 40 Cal. 4th 33, 62-63, 146 P.3d 510, 529 (Cal. 2006) (concluding, "The prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet disturbing implications. Nevertheless, by its term section 230 exempts Internet intermediaries from defamation liability for republication. The statutory immunity serves to protect online freedom of expression and to encourage self-regulation, as Congress intended. Section 230 has been interpreted literally. It does not permit Internet service providers or users to be sued as 'distributors', nor does it expose 'active users' to liability. Plaintiffs are free under section 230 to pursue the originators of a defamatory Internet publication. Any further expansion of liability must await Congress action.").

because websites will be faced with the possibility of being held liable for the millions of posts that it cannot monitor. Instead, websites will resort to banning third parties from communicating their ideas on its forums, and we will be back to where it all started – *Stratton*.