Section 230 of the Communications Decency Act: A "Good Samaritan" Law Without the Requirement of Acting as a "Good Samaritan"

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When Congress enacted Section 230 of the Communications Decency Act, it made an implicit deal with every Interactive Computer Service (ICS): at least attempt to clean your website of defamatory or otherwise illegal third-party content in exchange for immunity from vicarious liability. However, the majority of courts applying Section 230 have since construed this aptly-titled "good Samaritan" law as a grant of blanket ICS immunity, offering protection regardless of whether an ICS actually regulates or edits its website. This piece analyzes an aparent split among the circuit courts, and explains that blanket ICS immunity does not square with Congress' underlying intent of encouraging ICS self-regulation. In the end, this article highlights four potential scenarios in which an ICS could lose its Section 230 "good Samaritan" immunity status when it does not act like a "good Samaritan."

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I. INTRODUCTION 122
II. THE FIRST AMENDMENT AND HOW IT APPLIES TO DIFFERENT COMMUNICATION PLATFORMS: WHY THE INTERNET ENJOYS SO MUCH PROTECTION 128
III. SECTION 230 AS INTERPRETED BY VARIOUS FEDERAL AND STATE COURTS 131
IV. FROM *ZERAN* TO *CHICAGO LAWYERS'*: A POSSIBLE CIRCUIT SPLIT AS TO WHETHER SECTION 230 IS A GRANT OF CONDITIONAL OR UNCONDITIONAL ICS IMMUNITY 133
V. CONDITIONAL ICS IMMUNITY AND THE ICS SELF-EDITING REQUIREMENT MIGHT BE BETTER APPROACHES TO FACILITATING CONGRESS' INTENT BEHIND SECTION 230 136
VI. TEST SUITE 139
VII. CONCLUSION 144

I. INTRODUCTION

The Internet has become one of the most ubiquitous and accessible forms of modern communication.[2] For the past twenty years,[3] the "World Wide Web"[4] has spawned a proliferation[5] of expression thanks to recent developments in social media such as Facebook.[6] Today, the Internet is comprised of an elaborate system of interconnectivity,[7]

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[2] *See Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 566 (2002) (quoting 47 U.S.C. § 230 (a)(3) (1994 ed., Supp. V)) ("The Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 117 S.Ct. 2329, 2334, 138 L.Ed.2d 874 (1997) ("The Internet is a unique and wholly new medium of worldwide human communication."); *Blumenthal v. Drudge*, 992 F.Supp. 44, 48 ("[The Internet] enables people to communicate with one another with unprecedented speed and efficiency and is rapidly revolutionizing how people share and receive information.").

[3] With the introduction of the Mosaic web browser in 1993, the World Wide Web began to experience a monumental amount of expansion with a 341,634% annual growth rate of service traffic. *Available at* http://www.pbs.org/opb/nerds2.0.1/timeline/90s.html.

[4] *See Reno*, 521 U.S. at 852 ("The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites.").

[5] *See generally* Cecilia Ziniti, *The Optimal Liability System for Online Service Providers: How* Zeran v. America Online *Got it Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 589-90 (2008) (Citing Kevin Kelly, We Are the Web, Wired, Aug. 20, 2005, at 96, available at http://www.wired.com/wired/archive/13.08/tech.html) ("Overall, the web grew to over 600 billion pages—over 100 pages per person on earth.").

[6] *Id.* at 590 ("[End-users] keep in touch not just using email, but by creating detailed, content-filled profile pages on [social networking] sites like Myspace and Facebook.").

[7] *See Blumenthal*, 992 F.Supp., at 48 (citing *Am. Civil Liberties Union v. Reno*, 929 F.Supp.

known as "Web 2.0,"[8] through which end-users no longer simply access, but instead create and edit, online content.[9] Like newspapers, the Internet is treated as a "vast library" of information and speech.[10] As a result, expression that occurs over the Internet tends to receive greater First Amendment protection than does speech that takes place through other communication platforms.[11] Herein lies a dilemma surrounding the Internet: to what extent can the Internet, and the speech that occurs over the Internet, be regulated?

Attempts to regulate the Internet have often failed. In 1996, Congress introduced the Communications Decency Act ("CDA"),[12] which banned obscene and indecent material displayed to minors over any telecommunications device, including the Internet, whether or not the material was displayed for a "commercial" purpose.[13] In *Reno v. American Civil Liberties Union*, the United States Supreme Court struck down the CDA, in part, because it constituted an overbroad and vague form of content-based speech suppression.[14] In response, Congress attempted to draft a narrower law by enacting the Child Online Protection Act ("COPA"),[15] which only punished indecent material displayed on the Web with a "commercial" purpose.[16] However, the Supreme Court again responded, in *Ashcroft v. American Civil Liberties Union*, by affirming a preliminary injunction against the enforcement of COPA, under strict scrutiny analysis, due to the existence of less restrictive, and potentially more efficient, alternative

824, 830 (E.D.Pa 1996)) ("The Internet is 'not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks.'").

[8] *See generally* Ziniti, *supra* note 5, at 590 (quoting Tim O'Reilly, Not 2.0?, O'Reilly Radar, Aug. 5, 2005, http://radar.oreilly.-com/archives/2005/08/not_20.html) ("Loosely defined, Web 2.0 embodies interactive service providers that leverage users' collective intelligence and make the web, not the PC, 'the platform that matters.'").

[9] *See Blumenthal*, 992 F.Supp. at 48 ("[T]he users of Internet information are also its producers."); *See also* Ziniti, *supra* note 5, at 590, 592 ("In Web 2.0, for example, online services do not simply give users access to the web and a voice online--rather, they help find, manage, and explore the data within the web to make it useful.").

[10] *Reno*, 521 U.S. at 853.

[11] *See, e.g., Id.* at 868-70 (unlike regulations of broadcast, regulations of the Internet are subject to heightened First Amendment scrutiny); *see also Blumenthal*, 992 F.Supp. at 48 ("The Internet is fundamentally different from traditional . . . mass communication . . . .").

[12] 47 U.S.C. § 223.

[13] 47 U.S.C. §§ 223(a)(1), (d)(1).

[14] *Reno*, 521 U.S. at 858-60, 874-76 (Court noted the CDA must pass heightened First Amendment scrutiny due to its application to the plaintiffs, who were various Internet content providers).

[15] 47 U.S.C. § 231.

[16] 47 U.S.C. §231(a).

methods of regulating such Internet speech.[17]

Reno and *Ashcroft* reveal seemingly futile attempts to impose content-based restrictions on speech that occurs over the Internet. However, both cases involved indecent expression, a constitutionally protected form of speech under the First Amendment.[18] Defamation,[19] on the other hand, is unprotected under the First Amendment.[20] For example, a newspaper can face intermediary liability when it prints defamatory content, whereby the newspaper is deemed to have "published" the defamation.[21] Much like newspapers, an Internet interactive computer service ("ICS")[22] could face intermediary liability for the illegal (and often defamatory) content posted on its site by third parties.[23] Such intermediary liability was once so sweeping that it arose whenever an ICS simply had notice of the defamatory or otherwise illegal content featured on its website.[24] An ICS could also face intermediary liability for editing or screening its website for illegal content, as the performance of editorial control implicated a publisher-like status for the ICS regarding the illegal content.[25] Consequently,

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[17] *Ashcroft*, 535 U.S. at 564 ("[F]ilters are less restrictive means than COPA . . . [as] [t]hey impose selective restrictions on speech at the receiving end, not universal restrictions at the source . . . [and] filtering software may well be more effective than COPA . . . .").

[18] *Ashcroft*, 535 U.S. at 604 (Stevens, J., dissenting) ("COPA seeks to limit protected speech.").

[19] *See New York Times Co. v. Sullivan*, 376 U.S. 254, 262 (1964) (defamation is generally understood as a false statement of fact concerning a person that causes some form of harm to the person and his/her reputation).

[20] *See, e.g., Sullivan*, 376 U.S. at 283 (defamation of a public official requires "actual malice," meaning knowledge or reckless lack of investigation as to the defamatory nature of the content); Gertz v. Robert Welch, Inc., 418 U.S. 323, 353 (1974) (defamation of a private person requires "negligence" as to the defamatory nature of the content).

[21] *See, e.g., Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (discussing potential penalties and liabilities imposed on newspapers whenever news or commentary is "published").

[22] 47 U.S.C. § 230(f)(2) ("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 . . . . ").

[23] *See, e.g., Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct.) (ICS held accountable for defamatory content posted on their website by an anonymous third-party), *superseded by statute*, 47 U.S.C. § 230.

[24] *See Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (defendant ICS not liable because it did not know, or have reason to know, of defamatory content on its website).

[25] *See Stratton Oakmont*, 1995 WL 323710 at *5-6 (defendant ICS treated as a publisher when it created an editorial staff to monitor and edit website).

the "chilling effect"[26] of intermediary liability generated a strong disincentive to ICS self-regulation, meaning an ICS had no reason to edit or screen of its website for illegal or offensive content posted by third parties.[27]

In response, Congress switched gears from sanctioning Internet speech to instead eradicating the aforementioned disincentive to self-regulation caused by ICS intermediary liability.[28] This new Congressional approach was codified in Section 230 of the CDA.[29] Section 230(c)(1) establishes a "good Samaritan" exception to ICS intermediary liability, under which an ICS is not to be treated as a "publisher" of the illegal or otherwise offensive content posted on its website by a third party end-user, or what the CDA refers to as another "information content provider."[30] Section 230(c)(2) also protects an ICS against any civil liability should the ICS engage in self-regulation, or make "good faith" efforts to edit its website by blocking, screening, or restricting access to such illegal or otherwise harmful content.[31] As a result, an ICS would no longer face intermediary liability whenever they chose to edit or screen their website for illegal content, or whenever the ICS had notice of such illegal content appearing on its site.[32]

The enactment of Section 230 has lead to a potential split among federal courts as to the extent of protection an ICS may enjoy before suffering any intermediary liability.[33] The Fourth Circuit, in *Zeran v. America Online*, went so far as to hold that Section 230 affords an ICS

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[26] *See Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) ("[L]ike strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.").

[27] *Id.* ("[N]otice-based liability would deter service providers from regulating the dissemination of offensive material over their own services.").

[28] *Zeran*, 129 F.3d at 331 ("Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.").

[29] 47 U.S.C. § 230(c) ("Protection for 'good Samaritan' blocking and screening of offensive material").

[30] 47 U.S.C. § 230(c)(1) ("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 U.S.C. § 230(f)(3) ("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.").

[31] 47 U.S.C. § 230(c)(2).

[32] *See Zeran*, 129 F.3d at 330 ("[Section] 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.").

[33] *See* JERRY KANG, COMMUNICATIONS LAW & POLICY 331, 335-38, 351-54 (4th ed. 2012) (noting a lack of unity among federal courts regarding Section 230's scope of enforcement).

blanket "immunity"[34] from any such liability, regardless of whether or not the ICS takes any steps toward self-regulation (hereinafter "unconditional ICS immunity").[35] On the other hand, the Seventh Circuit, in *Chicago Lawyers' Committee For Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, noted that Section 230 does not necessarily afford an ICS unconditional immunity from intermediary liability, and that it might be permissible to *require* an ICS to edit or screen its website of illegal or offensive content in order to earn the "good Samaritan" protections of Section 230 (hereinafter "conditional ICS immunity").[36]

In the aftermath of *Chicago Lawyers'*, there appears to be a potential "contraction" of Section 230's scope of enforcement caused by a split among the courts.[37] Policy considerations surround the choice between imposing either unconditional or conditional ICS immunity.[38] Some scholars seem to posit that, on balance, *Zeran* is a correct approach.[39] Other scholars opine that *Zeran* is a flawed and overbroad application of Section 230 that strays too from Congress' intent.[40] Amid this discussion, albeit somewhere on the outskirts, other individuals even analogize an ICS to an unwitting property owner; likening the punishment of an ICS for the illegal or offensive content posted on its website by third party end-users to the punishment of real

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[34] *Zeran*, 129 F.3d at 330 ("By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.").

[35] *Id.* (holding that America Online did not act negligently, and was therefore not liable, in refusing to retract defamatory content posted on their message board by an anonymous user).

[36] *Chicago Lawyers' Comm. For Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669-70 (7th Cir. 2008).

[37] *See generally* KANG, *supra* note 33, at 331, 335-38, 351-54 (noting such "contraction" in light of the disparate approaches in *Zeran* and *Chicago Lawyers'*, as well as other cases that did not read Section 230 as a grant of unconditional ICS immunity).

[38] *Compare Blumenthal*, 992 F.Supp. at 51 ("Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious material."), *with* David Lukmire, *Can the Courts Tame the Communications Decency Act?: The Reverberations of Zeran v. America Online*, 66 N.Y.U. Ann. Surv. Am. L. 371, 399 (2010) ("[S]ome types of claims, such as those involving civil rights, may simply be important enough from a policy perspective to defeat section 230 immunity.").

[39] *See generally* Ziniti, *supra* note 5, at 616 (arguing that *Zeran* constitutes a "minimal interference scheme" that is preferable to alternative approaches in applying Section 230).

[40] *See Barrett v. Rosenthal*, 114 Cal. App. 4th 1379, 1395 (2004) ("The view of most scholars who have addressed the issue is that Zeran's analysis of section 230 is flawed, in that the court ascribed to Congress an intent to create a far broader immunity than that body actually had in mind or is necessary to achieve its purposes."), *rev'd*, *Barrett v. Rosenthal*, 40 Cal. 4th 33 (2006).

property owners for the anonymous graffiti sprayed on the outer walls of their building.[41]

In response, some questions follow from this form of reasoning by analogy. Did the real property owner create a wall for the purpose of inviting the "graffiti" of unknown people? Did the real property owner financially benefit by providing a speech platform on the face of its building? Common sense dictates that the answer to both of these questions would surely be no. As Cicilia Ziniti notes, ("[Internet] [s]ervice providers are not like shop-owners, who logically should not face liability for libelous graffiti others put on the walls of their stores."[42] Ziniti continues, "Instead . . . [Internet service] providers sort the graffiti, encourage it, arrange it by category, make money by putting relevant ads next to it, and repackage and redistribute it for display on other shop's walls—instantly." An ICS can benefit by providing an interactive communication platform through which end-users, often anonymously, spread their "graffiti," sometimes with offensive or illegal repercussions. Since an ICS functions as a unique conduit of free expression, quite unlike that of an everyday property owner, an ICS should not be afforded the same defenses given to real property owners seeking to keep their walls clean of graffiti.

Inapt analogies aside, this paper attempts to synthesize and resolve the issue above, not by determining whether an ICS should be held accountable for illegal third party content, but whether or not an ICS should find total refuge under a "good Samaritan" law without the requirement of acting as a "good Samaritan." Is *Chicago Lawyers'* correct in noting that Section 230 could be construed in a way that facilitates conditional ICS immunity? If so, at what point does an ICS lose its Section 230 immunity status? The following analysis highlights four potential exceptions to Section 230, whereby an ICS might not be able to claim immunity status, as well as provides an overall examination of Section 230 as follows: (II) the First Amendment's application across different communication platforms, and why the Internet receives so much First Amendment protection; (III) Section 230's "good Samaritan" protections and how those protections have been interpreted by federal and state courts to

[41] *See* Posting of "Daniel" to TechDirt Blog, There's A Good Reason Why Online Sites Shouldn't Be Liable For The Actions Of Its Users, http://www.techdirt.com/article.php?sid=20060908/163844#c19 (Sept. 8, 2006, 18:10 PST), *questioned in* Ziniti, *supra* note 5 at 583, 616 ("Should businesses be liable for the graffiti on their walls? No it's the one who put it there who should be in trouble.").

[42] Ziniti, *supra* note 5 at 616.

preserve the heightened First Amendment rights of an ICS; (IV) a review of the circuit split that exists between *Zeran* and *Chicago Lawyers*' regarding whether Section 230 could be interpreted as to *require* that an ICS act like a "good samaritan" and thereby facilitate the approach of conditional ICS immunity; (V) a synthesis of relevant case law and secondary sources that reveal why conditional ICS immunity might be the better approach to facilitating the Congressional intent behind Section 230; and (VI) a test suite that reveals why conditional ICS immunity represents a more accurate interpretation of Congress' intent and the more effective application of Section 230.

II. THE FIRST AMENDMENT AND HOW IT APPLIES TO DIFFERENT COMMUNICATION PLATFORMS: WHY THE INTERNET ENJOYS SO MUCH PROTECTION

One of the core principles of the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, [and] that a free press is a condition of a free society."[43] In *New York Times Co. v. Sullivan*, the Supreme Court further expounded that there exists "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[44] As for such expression being *uninhibited*, the Court noted that government regulation is the very sort of invasion of free speech that the First Amendment was intended to repel.[45] However, it would be false to state that we rarely see governmental regulation of speech that occurs on different communication platforms.[46]

The extent to which speech may be regulated by the government often depends on the particular communication platform involved, as a longstanding doctrine in the law of media and communications is that "each medium of expression presents special First Amendment problems."[47] Consequently, there exists a gradation of constitutional

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[43] *Miami Herald*, 418 U.S. at 252.

[44] *New York Times v. Sullivan*, 376 U.S. at 270 (citing *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949)).

[45] *Id.* (The First Amendment exacts "a command that the government itself shall not impede the free flow of ideas . . . .").

[46] *See, e.g., Action for Children's Television v. F.C.C.*, 58 F.3d 654 (D.C. Cir. 1995) (upholding time-channeling restrictions as to when indecent programming may be broadcasted); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994) (upholding local programming must-carry provisions on cable operators).

[47] *F.C.C. v. Pacifica*, 438 U.S. 726, 748 (1978) (citing Joseph Burstyn, Inc. v. Wilson, 343

safeguards among the major media platforms (radio, broadcast, cable, telephony and the Internet).[48] On one end, newspapers receive some of the strongest First Amendment protection among major media platforms, as newspapers have been historically treated as "surrogates for the public."[49] On the other end, radio and broadcast receive perhaps the least First Amendment protection because of "spectrum scarcity" – the concept that there is only a finite amount of electromagnetic spectrum (commonly known as broadcast airwaves) over which broadcasters enjoy a virtual monopoly.[50] Spectrum scarcity was one justification for Congress, via the Federal Communications Commission (FCC), to permissibly require licenses from broadcasters, thereby constitutionally restricting broadcasters' freedom of speech.[51]

To better illustrate the gradation of First Amendment protection, spectrum scarcity has also played a role in government-imposed requirements (beyond that of a license) placed on broadcasters, but not other media providers.[52] In addition, the government may regulate the "content" of a given broadcast, not because of spectrum scarcity, but because of the unique characteristics of broadcast as noted by the Supreme Court in *FCC v. Pacifica*: broadcast's uniquely pervasive ability to enter the home and become accessible by children.[53]

U.S. 495, 502-503 (1952).

[48] *See generally* KANG, *supra* note 33, at 56-57, 61, 86 (noting "[t]he difference the medium makes" in how technological differences between media platforms can result in differing levels of first amendment protections among those platforms).

[49] *Miami Herald*, 418 U.S. at 251.

[50] *See Nat'l Broad. Co. v. United States*, 319 U.S. 190, 212-213 (1943); *see also Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367 (1969); *see also* KANG, *supra* note 33, at 1-6, 36-41, 49-51, 56-57 (discussing the concept of "spectrum scarcity" as a justification for regulating broadcast via licensing requirements).

[51] *Nat'l Broad. Co.*, 391 U.S. at 226-227 (justification of spectrum scarcity as well as content neutrality of license requirement prompts rational basis, not strict or intermediate scrutiny, by which government-imposed burdens on speech were deemed reasonable and constitutional); *see also* KANG, *supra* note 33 at 49-51 (discussing spectrum scarcity and the constitutionality of licensing requirements as seen in *Nat'l Broad. Co. v. United States*).

[52] *Compare Red Lion*, 395 U.S. at 390 (Supreme Court upheld the "fairness doctrine"—requiring broadcasters to give equal coverage to both sides of a discussion on public issues—in order to ensure a fair and balanced "marketplace of ideas"), with *Miami Herald*, 418 U.S. at 258, (Supreme Court struck down a "right of reply" statute—requiring newspaper vendors to provide political officials, who were assailed by their political counterparts, with the chance to respond, in kind, to that political attack—because imposing a "right of reply" on newspapers was an impermissible form of government interference on the editorial control and judgment of newspapers"); *see also* KANG, *supra* note 33, at 86 (distinguishing the restrictions placed on broadcast, on account of spectrum scarcity, as opposed to print and cable television which are not affected by spectrum scarcity).

[53] *Pacifica*, 438 U.S. at 748-49 (noting that content-based regulations of broadcasters do not

However, *Pacifica* does not apply to other communication mediums, including telephony[54] and cable[55]. *Pacifica* also does not apply to the Internet because "the Internet is not as 'invasive' as [broadcast] radio or television"[56] and "the receipt of information on the Internet requires a series of *affirmative steps* more deliberate and directed than merely turning a dial . . .."[57]

As such, the Internet "constitute[s] a unique medium. . . located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet."[58] It is because of the Internet's vast "social utility"[59] that content-based restrictions on Internet speech receive the full scope of First Amendment scrutiny.[60] The emergence of "immunity" laws like Section 230 evidence an attempt by Congress to promote Internet development[61] by protecting Internet speech while combating the "chilling effects" noted in *Zeran*.[62] However, the explosive growth in social media, along with a growing number of gossip-based[63] websites and ICS-facilitated defamation[64],

prompt a heightened form of strict scrutiny First Amendment analysis due to broadcasts pervasiveness and accessibility by children).

[54] *See F.C.C. v. Sable Commc'ns of California,, Inc. v. F.C.C.*, 492 U.S. 115, 127 (1989) (flat ban of dial-a-porn held unconstitutional, in part, because *Pacifica* does not apply to telephony).

[55] *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 815 (2000) ("There is . . . a key difference between cable television and the broadcasting media, which is the point on which this case turns: Cable systems have the capacity to block unwanted channels on a household-by-household basis.").

[56] *See Reno*, 521 U.S. at 869.

[57] *Id.* at 854 (emphasis added).

[58] *Id.* at 851.

[59] *See* Ziniti, *supra* note 5, at 591 ("Scholars and courts alike have recognized the vast social utility the Internet and search engines provide under these new interaction models").

[60] *Reno*, 521 U.S. at 871 ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.")

[61] 47 U.S.C. § 230(b)(1) ("It is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services . . . ").

[62] *See Zeran*, 129 F. 3d. at 330-33; *See also Blumenthal*, 992 F.Supp. at 51 ("Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.").

[63] *See* William H. Freivogel, *Does the Communications Decency Act Foster Indecency?*, 16 COMM. L. & POL'Y 17, 40 (2011) (*Citing* Kelly Heybaer, *Shhh! The Rise of Real-people Internet Gossip Sites*, NJ.COM, June 24, 2008, http://blog.nj.com/digitallife/2008/06/heard_a_juicy_rumor_about.html) ("In recent years, a proliferation of gossipy Web sites invite people to post complaints or rumors about bad neighbors (GossipReport.com), bad boyfriends (TheDirty.com), bad colleagues (GossipReport.com), and "bad girls" on campus (JuicyCampus.com).").

[64] *See, e.g., Blumenthal*, 992 F.Supp. at 51 (criticizing ICS immunity when ICS promotes gossip-based news source(s) that defame others).

reveal that courts might be hanging on to an outdated sense of Internet protectionism[65].

III. SECTION 230 AS INTERPRETED BY VARIOUS FEDERAL AND STATE COURTS

Under the Pre-Section 230 regime, there were key distinctions that applied to the determination of whether an ICS should be subject to intermediary liability. Traditionally, courts looked at whether a particular ICS was a "publisher,"[66] possessing some form of editorial control over third party content posted on its website, or a "distributor,"[67] possessing no editorial control but still subject to intermediary liability if the ICS knew or had reason to know of the illegal or offensive content appearing on its site.[68] Under this old regime, so long as an ICS had "notice" of defamatory or illegal statements or content posted on its website by third parties, that ICS could be held accountable for such content.[69]

Under either standard (publisher or distributor), as noted in *Zeran*, a "chilling effect on the freedom of Internet speech," along with "disincentives to [ICS] self-regulation," would result from "[t]he specter of [ICS tort] liability. . ."[70] Congress' responded by enacting the "good Samaritan" safe harbor provisions of Section 230, in order to encourage ICS self-regulation without the fear of resulting liability.[71]

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[65] *See* Lukmire, *supra* note 38, at 410 (citing Brief of Appellee Yahoo!, Inc. at 34-36, Barnes v. Yahoo, Inc., 570 F.3d 1096 (9th Cir. 2009) (No. 6:05-CV-926-AA).) ("Defendants invoking section 230 are quick to selfishly . . . imply . . . that imposing liability in their case risks eroding free speech or sabotaging legitimate commercial interests. These fears may be overblown.").

[66] *See, e.g., Stratton Oakmont*, 1995 WL 323710 at *5-6, 10 (defendant-ICS PRODIGY liable for libelous third party statements posted on its website based on PRODIGY being deemed a "publisher" with editorial control over its computer bulletin boards).

[67] *See, e.g., Cubby*, 776 F. Supp. at 139-141 (discussing the standard for vicarious liability concerning a "distributor," who must have some form of actual or constructive knowledge of the defamatory or offensive content on its website in order to be liable for such content).

[68] *Id.* at 139 ("New York courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation."). *See also* KANG, *supra* note 33 at 309 (citing Restatement of Torts, Second § 581(1) Comment (c)) ("These distributors (sometimes called "secondary publishers") could not be subject to liability unless they *knew or had reason to know* of the defamatory content.").

[69] *See, e.g. Cubby*, 776 F.Supp. at 141 (discussing notice as a requisite for ICS liability).

[70] *Zeran*, 129 F.3d at 330-33 (highlighting the pitfalls of ICS liability while noting that "Congress enacted § 230 to remove . . . disincentives to self-regulation . . . [f]earing that the specter of liability would . . . deter service providers from blocking and screen offensive material.").

[71] *See* 47 U.S.C. § 230(b)(4) ("It is the policy of the United States . . . to remove

To facilitate Congress' apparent intent, many federal courts have interpreted Section 230 to afford rather broad protection to an ICS. In *Blumenthal v. Drudge*, the United States District Court for the District of Columbia found no liability for an ICS (AOL), despite AOL's contractual relationship with both the third party creator—an Internet gossip provider—of defamatory comments posted on AOL's comment board and with the board managers tasked with monitoring and editing AOL's comment boards for any such illegal content.[72] The D.C. Circuit went on to state that Section 230 grants immunity "even where the [ICS] has an active, even aggressive role in making available content prepared by others."[73]

On this point, some courts have stated that the premise behind Section 230 is that "State-law plaintiffs may hold liable the person who *creates or develops* unlawful content, but not the interactive computer service provider who merely enables that content to be posted online."[74] However, as noted in *Blumenthal*, an ICS might lose its immunity status if it "ha[s] any role in creating or developing" the illegal or offensive content found on its website.[75] For instance, in *FHA of San Fernando v. Roomates.com*, defendant-ICS Roommates.com implemented mandatory "preference" sections and drop-down menus by which homeowner end-users could filter out potential co-tenants on the basis of race, gender, sexual orientation and parental status.[76] In a limited opinion,[77] the Ninth Circuit found Roommates.com could not claim Section 230 immunity,[78] as they "encourage[d]"[79] potentially illegal content in violation the Fair

disincentives for the development and utilization of blocking and filtering technologies . . . .").

[72] *Blumenthal*, 992 F.Supp. at 49-53.

[73] *Id.* at 52.

[74] *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (citing *Doe v. Myspace, Inc.*, 528 F.3d 413, 419 (5th Cir. 2008) (emphasis added)).

[75] *See Blumenthal*, 992 F.Supp. at 50 ("[Section 230] would not immunize [an ICS] with respect to any information [that ICS] developed or created . . . .").

[76] *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1161-62, 1169-1171 (9th Cir. 2008) (en banc), *dismissed on other grounds in Fair Housing Council of San Fernando Valley v. Roommate.com LLC*, 666 F.3d 1216 (9th Cir. 2012).

[77] *Id.* (the Ninth Circuit's holding was limited to the issue of CDA immunity and did not reach the issue of whether Roommate.com's activities actually violated the FHA).

[78] *Id.* at 1166-67 (by encouraging such discriminatory content, "Roommate[s.com] becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information . . . .").

[79] *Id.* at 1175 ("The message to website operators is clear: If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune.").

Housing Act ("FHA").[80] The dissent questioned this wording as an invitation of liability whenever an ICS "encourages"[81] or "solicits" illegal or offensive third party content on its website.[82]

Consequently, courts might be willing to implement a "bad faith exception"[83] to Section 230, whereby an ICS could lose its Section 230 immunity status if it exercises too much control[84] by "encourag[ing]"[85], "solicit[ing]"[86] or partaking in the "creat[ion] or develop[ment]"[87] of the illegal or offensive third party content on its website. Nevertheless, *Blumenthal* and *Roommates.com* reveal the broad immunity afforded to an ICS, as well as the vague standards and high threshold a plaintiff must meet in order to bypass ICS immunity.[88] A resolution to the disparate approaches of *Zeran* and *Chicago Lawyers'*, discussed below, might clarify this issue by effectuating Congress' intent and thereby leading to the proper enforcement of Section 230.

IV. FROM *ZERAN* TO *CHICAGO LAWYERS'*: A POSSIBLE CIRCUIT SPLIT AS TO WHETHER SECTION 230 IS A GRANT OF CONDITIONAL OR UNCONDITIONAL ICS IMMUNITY[89]

Again, in *Zeran*, the Fourth Circuit held that Section 230 provides unconditional immunity from any liability that would otherwise be imposed on an ICS based on illegal content derived from third party users of that website or service.[90] *Zeran* held that an ICS is not

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[80] *Id.* at 1164-67 1169-71 (majority opinion) (Roommates.com subject to potential liability because mandatory drop-down menus solicited discrimination by "forc[ing] subscribers to divulge protected characteristics and discriminatory preferences . . . prohibited by the FHA").

[81] *Id.* at 1185 (McKeown, J., dissenting) ("The majority condemns Roommate for soliciting illegal content . . . ").

[82] *Roommates.com*, F.3d at 1178 (McKeown, J. dissenting) ("[T]he CDA does not withhold immunity for the encouragement or solicitation of information").

[83] Lukmire, *supra* note 38, at 408 ("[C]ourts may be willing to police the boundaries of section 230 immunity, and that a bad faith exception does not present a great doctrinal obstacle.").

[84] *See generally* Lukmire, *supra* note 38, at 408 ("[Roommates.com] indicate[s] that there are limits to the control that websites may have over third-party content if they are to claim section 230 immunity.").

[85] *Roommates.com*, 521 F.3d. at 1175; *Id* at 1178, 1185 (McKeown, J., dissenting).

[86] *Id.* at 1178, 1185 (McKeown, J., dissenting).

[87] *Blumenthal*, 992 F.Supp. at 50.

[88] *See* KANG, *supra* note 33, at 351-54 (noting a lack of clarity in the aftermath of *Roommates.com* while compiling a list of potentially "relevant factors" as to whether or not an ICS took part in the "development" of illegal content featured on its website).

[89] *See* KANG, *supra* note 33, at 331, 335-38, 351-54.

[90] *Zeran*, 129 F.3d at 330.

required to edit its website—by blocking or screening illegal or offensive content—in order to be afforded "good Samaritan" protection; that protection applies whether or not an ICS chooses to engage in self-regulation.[91] Likewise, other courts have recognized that Section 230 provides a broad grant of federal *immunity* to ICS's or Internet Service Providers ("ISPs").[92] To date, *Zeran*'s approach of unconditional ICS immunity seems to be followed by the majority of circuit courts.[93]

However, in *Chicago Lawyers'*, Judge Easterbrook stated on behalf of the Seventh Circuit: "[t]here is yet another possibility: perhaps § 230(c)(1) forecloses any liability that depends on deeming the.†.†. [ICS] a 'publisher'—defamation law would be a good example of such liability—while permitting the states to regulate ISPs in their capacity as intermediaries."[94] Judge Easterbrook seems to be suggesting that state laws could *require* an ICS, as an intermediary rather than a publisher of third party content, to engage in self-regulation in order to earn the "good Samaritan" protections of Section 230.[95] The precedential value of this statement comes from the fact that Section 230 provides for federal preemption of any state law inconsistent with Section 230.[96] However, Section 230(e)(3) states that as long as a state law is consistent with Section 230, then Section 230 will in no way prevent that consistent state law from being enforced.[97] It appears that Judge Easterbrook was implying that state law requiring ICS self-regulation, a form of conditional ICS immunity, might be "consistent" with Section 230 and therefore not subject to federal preemption.[98]

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[91] *Id.* at 330-33.

[92] *See, e.g., Carafano v. Metrosplash.com*, 339 F.3d 1119, 1122 (9th Cir. 2003) ("Through this provision, Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party.").

[93] *See, e.g. Univ.Commc'n. Sys.v. Lycos, Inc.*, 478 F.3d 413, 415 (1st Cir. 2007); *Green v. Am. Online*, 318 F.3d. 465, 470 (3d Cir. 2003); *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.* 206 F.3d. 986 (10th Cir. 2000); *see also* KANG, *supra* note 33, at 331 ("[t]he clear majority of courts addressing the issue [of whether or not Section 230 affords immunity to ICSs] have followed the reasoning in *Zeran*.").

[94] *Chicago Lawyers'*, 519 F.3d at 670.

[95] *Id.*; *see also* KANG, *supra* note 33, at 335-38 (noting that Judge Easterbrook rejected the "maximalist approach" seen in cases like *Zeran*, which afford unconditional immunity to ICSs).

[96] 47 U.S.C. § 230(e)(3).

[97] *Id.* ("Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No Cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this Section.").

[98] *Chicago Lawyers'*, 519 F.3d at 670 ("§ 230(e)(2) never requires ISPs to filter offensive

The question then becomes whether or not Section 230 is a grant of conditional or unconditional ICS immunity. Could an ICS be required to undertake affirmative steps of self-regulation in order to receive the "good Samaritan" safe harbor afforded by Section 230? In other words, does the dicta of *Chicago Lawyers'* represent a statement of precedential value or simply a moment of judicial pondering by Judge Easterbrook? The case law is far from expansive on the subject of how state courts interpret Section 230 or how state legislatures enact laws pursuant to Section 230. Moreover, *Chicago Lawyers'* only noted that "perhaps" states could enact Section 230-consistent laws that require an ICS self-regulation.[99]

In *Barrett v. Rosenthal*, the Supreme Court of California did not require that a website edit its content in order to be afforded "good Samaritan" protection.[100] In *Doe v. America Online, Inc.*, the Supreme Court of Florida likewise found no such requirement existed, and it further held that a state law requiring such measures was inconsistent with Section 230 and therefore preempted.[101] The predominance of state court decisions regarding the application of Section 230 tends to reveal no more than what *Zeran* held: Section 230 provides complete immunity for both publishers and distributors of third party content.[102]

Even so, the precedential value of state laws and state court interpretations of a federal law such as Section 230 would be persuasive authority at best. While *Zeran* remains the commanding voice of the circuit court majority, the Ninth Circuit whispers support of *Chicago Lawyers'* and the enforcement of conditional ICS immunity.[103] Despite this potential "contraction"[104] of ICS immunity, there remains a split among the circuit courts, with *Zeran* holding rank as the leading authority. Examining this split of opinion, though, will tackle the underlying issue concerning Section 230's enforcement: how to advance the Congressional intent behind Section 230 by avoiding the aforementioned disincentives to ICS self-regulation.

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content, and thus § 230(e)(3) would not preempt state laws or common-law doctrines that induce or require ISPs to protect the interest of third parties . . . for such laws would not be 'inconsistent with' this understanding of §230(c)(1)).").

[99] *Chicago Lawyers'*, 519 F.3d at 670.

[100] *Barrett*, 40 Cal. 4th at 48, 55 (2006).

[101] *Doe v. America Online, Inc.*, 783 SO.2d 1010, 1015, 1017 (2011).

[102] *Zeran*, 129 F.3d at 330.

[103] *See Roommates*, 521 F.3d. at 1172, note 33 ("Consistent with our opinion, the Seventh Circuit explained the limited scope of section 230(c) immunity.").

[104] KANG, *supra* note 33, at 331, 335-38, 351-54.

V. CONDITIONAL ICS IMMUNITY AND THE ICS SELF-EDITING REQUIREMENT MIGHT BE BETTER APPROACHES TO FACILITATING CONGRESS' INTENT BEHIND SECTION 230

The Congressional intent and legislative history of Section 230 reveal an overall purpose of incentivizing ICS self-regulation.[105] As noted in *Zeran*, "[a]nother important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services."[106] In *Zeran*, the court went on to state that "Congress enacted § 230 to remove the disincentives to self[-]regulation" that previously existed.[107] Even the express wording of Section 230 states that the law's underlying purpose is "to remove disincentives for the development and utilization of blocking and filtering technologies . . . ."[108]

Nevertheless, Judge Easterbrook submits that if Section 230 unconditionally immunizes every ICS, then Congress might be fostering a "do-nothing" approach among ICSs.[109] Ironically, under *Zeran*, an ICS would face new disincentives to self-regulation because an ICS would enjoy the full panoply of protections afforded under Section 230 regardless of whether or not it engages in any form of self-regulation.[110] Judge Easterbrook hit an important point by showing how the *Zeran* approach of granting unconditional ICS immunity does not seem to square with the plain language and chosen name of Section 230—a "good Samaritan" law.[111]

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[105] *See Blumenthal*, 992 F.Supp. at 52 ("In some sort of tacit *quid pro quo* arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet . . . ."); *see also Barrett*, 40 Cal. 4th at 50-51 (citing 141 CONG. REC. H8469-H8470 (daily ed. Aug. 4 1995) (statement of Rep. Cox) ("Both the terms of section 230(c)(1) and the comments of Representative Cox [a supporter of Section 230] reflect the intent to promote active screening by service providers of online content provided by others.").

[106] *Zeran*, 129 F.3d at 331.

[107] *Id.*

[108] 47 U.S.C. § 230(b)(4).

[109] *Chicago Lawyers'*, 519 F.3d at 670 ("As precautions are costly, not only in direct outlay but also in lost revenue from the filtered customers, ISPs may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1).").

[110] *Id.* ("[Section 230] as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law."); *See also Blumenthal*, 992 F.Supp. at 52 (ICS immune from liability "even where the self-policing is... not even attempted.").

[111] *Id.* (Yet § 230(c)... the title "Protection for 'Good Samaritan' blocking and screening of offensive material," hardly an apt description if its principal effect is to induce ISPs to do

Other courts and scholars have noted criticism of *Zeran*. In *Barett v. Rosenthal*, the California Supreme Court stated that "several academic commentators . . . [have] the view that immunizing Internet service providers from 'distributor' liability would actually frustrate the objective of self-regulation, because no liability would flow from failing to screen for defamatory content."[112] Additionally, other legal scholars have noted that unconditional ICS immunity, while a laudable approach at promoting free speech, would nevertheless conflict with Congress' aim of combating the disincentives to ICS editing and "good Samaritan" conduct, as well as the overall goal of encouraging ICS self-regulation.[113] These scholars have noted that *Zeran*'s upholding of unconditional ICS immunity conflicts with the Congressional intent that the *Zeran* court actually recognized: the immunity is not unconditional, but based on an ICS blocking or screening its website for illegal or otherwise offensive content.[114]

Among these scholars, William H. Freivogel asserts that the *Zeran* approach causes a disincentive to ICS self-regulation because an ICS, knowing it enjoys unconditional immunity, will choose to cut costs and neither edit nor screen its website for illegal or offensive third party content.[115] As such, Mr. Freivogel argues that *Zeran* contradicts Congress' underlying intent of promoting ICS self-regulation.[116] Consequently, as Mr. Freivogel writes, "the Communications Decency Act, in effect, fosters indecency rather than decency."[117]

Mr. Freivogel also posits that a correct response to this disincentive to ICS self-regulation is to rely on a comment issued by Ninth Circuit

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nothing about the distribution of indecent and offensive materials via their services.").

[112] *Barrett*, 40 Cal. 4th at 68 (citing Brian C. McManus, *Rethinking Defamation Liability for Internet Service Providers*, 35 SUFFOLK U. L. REV., 647, 668 (2001)).

[113] Ian C. Ballon, Zeran v. AOL: Why the Fourth Circuit Is Wrong, J. Internet L. (Mar. 1998), available at http://library.findlaw.com/1999/Feb/2/127916.html ("While the elimination of all third party liability for defamation would be generally consistent with the goal of promoting unfettered free speech online, it is inconsistent with the objective of encouraging online screening and blocking (or what the Fourth Circuit referred to as self-regulation).").

[114] *Id.* ("[t]he Fourth Circuit's finding [in Zeran] that Congress intended to promote unfettered free speech is inconsistent with the stated purpose, acknowledged in Zeran, of immunizing providers from liability for blocking or screening content.").

[115] Freivogel, *supra* note 63, at 45 (2011) ("Judge Easterbrook was surely correct in arguing that *Zeran's* broad interpretation of Section 230 provides an incentive for computer services to provide no review or oversight of the content of third-party postings."); *id.* ("If there is no [ICS] liability . . . it makes economic sense to save the money and resources that review would entail.").

[116] *Id.* ("the broad *Zeran* interpretation runs counter to Congress' goal of encouraging computer services to police their sites and take down objectionable content.").

[117] *Id.*

Chief Judge Alex Kozinski, who stated that " '[o]ne solution' to this situation . . . is that a computer service loses its Section 230 immunity 'if [it] willingly want[s] to set up not knowing who are the original content providers.'"[118] In other words, an ICS that turns a blind eye to the illegal or offensive third party content posted on its website might be unable to find safe harbor under Section 230's "good Samaritan" protections.

In addition to Chief Judge Kozinski's comments, as well as the potential Section 230 exceptions of "bad faith"[119] and state laws that impose a requirement of ICS self-regulation,[120] another potential method for evading ICS immunity exists in the form of *promissory estoppel*.[121] According to the Ninth Circuit, promissory estoppel constitutes a state law contract claim that Section 230 does not necessarily preclude.[122] For example, in *Barnes v. Yahoo*, the issue was whether Yahoo was liable for the indecent and defamatory (fake) profile of plaintiff-Barnes that was posted by Barnes' ex-boyfriend on a website run by Yahoo.[123] After Barnes' several attempts to contact Yahoo and her continual requests that the fake profile be removed, Yahoo's Director of Communications assured Barnes that Yahoo would "take care of it" (i.e., remove the fake profile), but then later failed to do so.[124]

After hearing the evidence, the *Barnes* court refused to treat Yahoo as a "publisher or speaker" of the fake profile, and held that Yahoo was therefore immune under Section 230.[125] However, the court found that Section 230 would not preempt Barnes' state law contract claim of promissory estoppel—Yahoo's failed "promise" of removing the indecent profile, and Barnes' reliance on that promise.[126] *Barnes*

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[118] *Id.* at 42 (quoting The Hon. Alex Kozinski, Remarks at the 22dn Annual Media and Law Conference, Kansas City, Mo. (Apr. 17, 2009)).

[119] Lukmire, *supra* note 38, at 411.

[120] *Chicago Lawyers'*, 519 F.3d at 670.

[121] *See* KANG, *supra* note 33 at 338 (noting the "promise of promissory estoppel… to get around [Section] 230 immunity.").

[122] *Barnes v. Yahoo!, Inc.*, 570 F. 3d 1096, 1109 (9th Cir. 2009) (plaintiff's state law claim of promissory estoppel neither barred nor preempted by Section 230).

[123] *Id.* at 1098-99, 1107-08 (the fake profile contained Barnes' phone number and addresses, along with nude photos of Barnes and express and implied solicitations of sex with strangers).

[124] *Id.*

[125] *Id.* at 1108-09 (upholding the broad interpretation of Section 230 that affords an ICS with immunity from liability as a publisher of third party content).

[126] *Id.* ("[Section 230] creates a base-line rule: no liability for publishing or speaking the content of other information service providers. Insofar as Yahoo made a promise with the constructive intent that it be enforceable, it has implicitly agreed to an alteration in such

reveals that plaintiffs might be able to avoid Section 230 ICS immunity by suing an ICS under contract principles, rather than as a publisher or distributor, wherever the ICS promises to remove defamatory or illegal content, but then fails to do so.[127]

In all, as a matter of upholding Congress' intent to encourage ICS self-regulation, a synthesis of the aforementioned sources reveals that an ICS could lose its Section 230 "good Samaritan" immunity status by either (1) engaging in "bad faith"[128] by "encourag[ing]"[129] or "solicit[ing],"[130] or partaking in the "creat[ion] or develop[ment],"[131] illegal or offensive third party content; (2) "willingly" implementing a system in which the ICS does not screen for the identity of third party users who post illegal or offensive content on its website;[132] (3) promising to remove illegal or offensive content from its website, but then failing to do so;[133] or (4) failing to engage in self-regulation, as required by Section 230-consistent state laws.[134]

VI. TEST SUITE

The aforementioned exceptions to ICS ("good Samaritan") immunity can be applied to the following case:

In *Blumenthal v. Drudge*, AOL had entered into a contractual relationship with Matt Drudge, who managed the Drudge Report, a gossip-based publication featuring articles focusing on the arena of American politics and Hollywood.[135] Under the AOL-Drudge contract, the Drudge Report was to be delivered to all members of AOL services for one year.[136] Eventually, Drudge published an edition of the Drudge Report that circulated on AOL websites, featuring allegedly

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baseline.").

[127] *See* Lukmire, *supra* note 38 at 402 ("Although promissory estoppel might only emerge as a claim in situations where an . . . [ICS] promised to remove something and failed to do so, Barnes might open up the door to plaintiffs who come up with viable promissory estoppel claims.").

[128] Lukmire, *supra* note 38, at 408.

[129] *Roommates.com*, 521 F.3d 521 F.3d. at 1175; *Id* at 1178, 1185 (McKeown, J., dissenting).

[130] *Id.* at 1176-78, 1178, 1185 (McKeown, J., dissenting).

[131] *Blumenthal*, 992 F.Supp. at 50.

[132] Freivogel, *supra* note 63, at 45 (quoting The Hon. Alex Kozinski, Remarks at the 22nd Annual Media and Law Conference, Kansas City, Mo. (Apr. 17, 2009)).

[133] *Barnes*, 570 F.3d at 1108-09.

[134] *Chicago Lawyers'*, 519 F.3d at 670.

[135] *Blumenthal*, 992 F.Supp. at 47.

[136] *Id.*

defamatory comments about the Blumenthals.[137] Drudge later publicly apologized for the allegedly defamatory statements, retracted the story from the Drudge Report, and requested that AOL also retract the story from their website services.[138] Blumenthal, thereafter, sued both AOL and Drudge for defamation.[139]

Despite this symbiotic relationship between AOL and Drudge, the court upheld AOL's immunity based on the aforementioned view that Congress intended to insulate an ICS from intermediary liability even if the ICS had an "active, even aggressive role in making available content prepared by others."[140] The *Blumenthal* court came to this holding by relying on *Zeran*'s broad interpretation of Section 230, noting that immunity must be granted to an ICS in order to promote Congress' intent of combating the disincentive to ICS self-regulation.[141] Parsing through the dicta of this holding, it appears that the *Blumenthal* court—which made its decision before *Barnes*, *Chicago Lawyers'* and *Roomates.com*—believed it had no choice but to adhere to *Zeran* and grant AOL immunity, even if such immunity was undeserved.[142]

As noted in Part (V) of this paper, though, the *Zeran* interpretation of Congress' intent as to the application of Section 230 actually misses the mark. Judge Easterbrook's statements in *Chicago Lawyers'* underscored the fact the unconditional ICS immunity will also create a disincentive to ICS self-regulation.[143] As Judge Easterbrook noted in *Chicago Lawyers'*, perhaps Section 230 is not a grant of unconditional of ICS immunity but rather a grant of conditional ICS immunity permitting the requirement that an ICS implement at least some form of "good Samaritan" self-regulation.[144] In any event, the aforementioned scenarios in which an ICS could lose its Section 230 immunity status are applied to *Blumenthal* as follows.

Under the first scenario, it would have to be shown that AOL

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[137] *Id.* (the Drudge Report edition featured a news story about a reported domestic spousal abuse scandal involving a White House aid, the plaintiff in *Blumenthal*).

[138] *Id.* at 48.

[139] *Id.* at 47.

[140] *Id.* at 52.

[141] *Blumenthal*, 992 F.Supp. at 51-52.

[142] *Id.* at 52-53 ("While it appears to this Court that AOL in this case has taken advantage of all the benefits conferred by Congress in the Communications Decency Act, and then some, without accepting any of the burdens that Congress intended, the statutory language is clear: AOL is immune from suit . . . .").

[143] *Chicago Lawyers'*, 519 F.3d at 670.

[144] *Id.* at 670.

engaged in "bad faith"[145] by "encourag[ing]"[146], "solicit[ing]"[147] and/or partaking in the "creat[ion[or develop[ment]"[148] of Drudge's defamatory article. The parties entered into a mutually beneficial and profitable relationship, whereby AOL exercised some editorial control over the Drudge Report through its affiliated services.[149] While the *Blumenthal* court held that AOL was not a "creat[or] or develop[er]" of the defamatory content issued by Drudge,[150] that would not foreclose the possibility that AOL encouraged or solicited content that was likely to be defamatory by promoting a "source of unverified instant gossip"[151] in Drudge.

However, *Blumenthal* is arguably distinguishable from *Roomates.com*, where the defendant-ICS encouraged, and designed a website that facilitated, illegal content.[152] In addition, similar allegations were struck down in *Global Royalties, Ltd v. Xcentric Ventures, LLC*, where an ICS's affiliation with a third party likely to spread defamatory content was insufficient to trump Section 230 immunity.[153] Yet, *Global Royalties* premised immunity on the basis that the defendant-ICS did not *directly solicit* the defamatory content.[154] This reinforces the aforementioned issues surrounding burgeoning gossip websites and ICS-facilitated defamation. It is important to note that, before relying on a *Zeran*, the *Blumenthal* court recognized how AOL was facilitating foreseeable defamation, only to then claim immunity once such defamation occurred.[155] Now, some 16

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[145] Lukmire, *supra* note 38, at 408.

[146] *Roomates.com*, 521 F.3d. at 1175; *Id* at 1178, 1185 (McKeown, J., dissenting).

[147] *Id.* at 1176-78, 1178, 1185 (McKeown, J. dissenting).

[148] *Blumenthal*, 992 F.Supp. at 50.

[149] *Id.* at 47, 51 (AOL has "certain editorial rights" over Drudge Report).

[150] *Id.* at 50 ("AOL was nothing more than a provider of an interactive computer service on which the Drudge Report was carried . . . .").

[151] *Blumenthal*, 992 F.Supp. at 47, 50-51 (AOL knew Drudge to be a source of gossip and touted him as such to AOL subscribers); *See also* Lukmire, *supra* note 38 at 408 (noting how courts might consider whether an ICS "invite[s] defamatory content.").

[152] *Roommates.com*, 521 F.3d at 1161-62, 1166-67, 1169-1171.

[153] *See, e.g., Global Royalties, Ltd v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 932-933 (D. Ariz. 2008) (defendant ICS, Ripoff Report, was not liable for third party defamatory content feautred on its website because it did not directly solicit the defamatory content); *see also* Lukmire, *supra* note 38, at 395 ("Despite Ripoff Report's obvious encouragement, the court held the website was not responsible for "creation or development" because it had not solicited [the defamatory content].").

[154] *Global Royalties*, 521 F.3d., at 933.

[155] *Blumenthal*, 992 F.Supp. at 51 ("Why should AOL be permitted to tout someone as a gossip columnist or rumor monger who will make such rumors and gossip 'instantly accessible' . . . and then claim immunity when that person, as might be anticipated, defames

years after *Blumenthal* was decided, a court might be willing to combat the spread of Internet gossip and ICS-facilitated defamation by denying ICS immunity when it encourages or solicits content that is likely to defame, and does so defame, another.[156]

AOL would clearly not be liable under the second scenario as it did not "willingly" implement a system in which it does not screen for the identity of third party users who post illegal content on its website.[157] Rather, AOL had an open contractual relationship with Drudge and reposted Drudge's editions of the Drudge Report on various AOL websites.[158]

Under the third scenario of "promissory estoppel,"[159] AOL could lose its Section 230 immunity. In *Blumenthal*, AOL's contract with Drudge had a provision stating that AOL would remove "any content that AOL reasonably determine[s] to violate AOL's then standard terms of service."[160] AOL also maintained editorial rights, including the right to change and/or remove content provided by Drudge. [161] While the facts are not entirely clear on this issue, Blumenthal could argue that once AOL received notice from Drudge that the Blumenthal article was defamatory and should be retracted,[162] some form of promissory estoppel-like liability—perhaps under the premise that Blumenthal became an third party beneficiary[163] of the AOL-Drudge agreement that such defamatory content should be retracted—might have arisen for AOL.

Lastly, under the fourth liability scenario espoused by *Chicago*

another?").

[156] *See* Lukmire, supra note 38, at 408 ("Although the Global Royalties court ruled that Ripoff Report enjoyed immunity because it did not solicit particular defamatory content, future courts might reject this analysis as overly formalistic, focusing instead on the site's apparent awareness [or invitation] of the offending material.").

[157] Freivogel, *supra* note 63 at 42 (quoting The Hon. Alex Kozinski, Remarks at the 22nd Annual Media and Law Conference, Kansas City, Mo. (Apr. 17, 2009)).

[158] *Blumenthal*, 992 F.Supp. at 47-48.

[159] *Barnes*, 570 F.3d at 1098-99.

[160] *Blumenthal*, 992 F.Supp at 47.

[161] *Id.* at 51.

[162] *Id.* at 48.

[163] However, Blumenthal would likely lose this argument, as he would probably be considered an incidental beneficiary of the AOL-Drudge agreement. *See generally Jones v. Aetna Casualty and Surety Co.*, 26 Cal.App.4th 1717, 1719 (Cal. Crt. App. 1994) (citing Cal. Civ. Code § 1559) ("While [California law] provides for enforcement of a contract by a third party beneficiary, a third party may qualify as a beneficiary only where the contracting parties intended to benefit the third party and such intent appears on the terms of the contract. The statute excludes enforcement of a contract by persons incidentally or remotely benefitted by it.").

Lawyers', assuming a state law required AOL to block and screen its website for illegal or offensive content in order to receive protection under Section 230, then AOL might lose its "good Samaritan" status and be subject to potential liability. AOL had notice of the defamatory nature of the Drudge Report at issue, and AOL received this notice from the content creator of that defamatory content.[164] This makes *Blumenthal* distinguishable from cases like *Stratton Oakmont*[165] and *Cubby*,[166] which premised notice-based liability on such notice coming from potential plaintiffs.[167] As such, AOL's editorial control over the Drudge Report, combined with AOL's notice that the Drudge Report might feature potentially defamatory content, could subject AOL to the requirement of blocking or editing that content in order to receive Section 230 protection. If Judge Easterbrook's statement in *Chicago Lawyers'* was interpreted correctly, then a state law requiring this "good Samaritan" conduct by AOL would not be preempted under federal law.[168]

Overall, this test suite reveals that an ICS *could* lose its "good Samaritan" immunity status if its conduct falls into any one of the four aforementioned exceptions to Section 230. This does not mean that an ICS would become automatically liable. Instead, it only means that, should one of these four exceptions occur, the ICS would no longer have an affirmative defense of unconditional immunity. It is important to note that *Zeran* occurred when "the legal rules that . . . govern . . . [the Internet] [were] just beginning to take shape."[169] However, *Zeran* not only appears to be overbroad and contrary to Congress' intent, it also appears to be outdated, as *Zeran* took place before the advent of Web 2.0[170] and the rise of Internet speech as we know it today.[171]

A stark reality of modern communication online is that, along with its vast "social utility,"[172] the Internet creates numerous problems

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[164] *Blumenthal*, 992 F.Supp. at 47-48.

[165] *Stratton Oakmont*, 1995 WL 323710 at *5-6.

[166] *Cubby*, 776 F. Supp. 135, 141.

[167] *Stratton Oakmont*, 1995 WL 323710 at *5-6; *Cubby*, 776 F. Supp. 135, 141.

[168] *Chicago Lawyers'*, 519 F.3d at 670.

[169] *Blumenthal*, 992 F.Supp., at 49.

[170] *Cf.* Ziniti, *supra* note 5, at 590-91 ("Web 2.0" and social media . . . have developed and entered the mainstream since Zeran defined the scope of § 230 immunity.").

[171] *Cf.* Ziniti, *supra* note 5, at 590 ("[T]he way people interact with the web has changed. At the time of Zeran, Web users observed, found, and exchanged content passively . . . . Users now play a much more active role in creating and generating content for public or semi-public view.").

[172] *See* Ziniti, *supra* note 5, at 591.

relating to the civil, privacy and reputational rights of individuals.[173] To make matters worse, the rapid growth in online gossip websites[174] implicates ICS immunity despite the potential facilitation of such defamation by an ICS.[175] When anonymous "John Doe" defendants post illegal or offensive content online, it can lead to injured plaintiffs having no feasible avenue for recourse.[176] With this in mind, an ICS should not enjoy unconditional Section 230 immunity status when it does not act like a "good Samaritan"—due to its own "bad faith"[177]—thereby undeservedly defeating the claims of injured plaintiffs.[178] Rather than automatically enforcing ICS immunity, Courts should first entertain legitimate causes of action before applying Section 230.[179] If a plaintiff's claim falls within one of the four aforementioned exceptions to ICS immunity, then a court may consider the merits of that claim rather than dismissing it outright. This new approach should wrangle in Section 230 and thereby promote Congress' underlying intent of promoting ICS self-regulation.

VII. CONCLUSION

In conclusion, Congressional intent and sound policy dictate that an ICS should act like a "good Samaritan" in order to enjoy Section 230 "good Samaritan" immunity status. An ICS that engages in bad faith can, and should, be held accountable. The Internet no longer requires

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[173] *Blumenthal*, 992 F.Supp. at 49 (The Internet "present[s] unprecedented challenges relating to rights of privacy and reputational rights of individuals, to the control of obscene . . . materials . . . [as well as] rumors and other information . . . that . . . is too often unchecked and unverified.").

[174] *See* Freivogel, *supra* note 63, at 40 (*Citing* Kelly Heybaer, *Shhh! The Rise of Real-people Internet Gossip Sites*, NJ.COM, June 24, 2008, http://blog.nj.com/digitallife/2008/06/heard_a_ juicy_rumor_about.html).

[175] *See Blumenthal*, 992 F.Supp., at 51.

[176] *See* Lukmire, *supra* note 38 at 403 (citing Jason C. Miller, Who's Exposing John Doe? Distinguishing Between Public and Private Figure Plaintiffs in Subpoenas to ISPs in Anonymous Online Defamation Suits, 13 J. Tech. L. & Pol'y 229, 246 (2008)) ("[P]laintiffs may have trouble obtaining personal jurisdiction over a "John Doe" defamer of unknown origin.").

[177] Lukmire, *supra* note 38, at 411.

[178] *See Chicago Lawyers'*, 519 F.3d at 670 ("Why should a law designed to eliminate ISPs' liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?"); *see also* Lukmire, *supra* note 38 at 411 (One thing is for certain: unless courts narrow their interpretations of section 230, deserving plaintiffs will be without redress.").

[179] *See* Lukmire, *supra*, note 38, at 410 ("[B]efore deciding whether an online entity is immune . . . courts should consider whether section 230 should apply based on the theory of liability advanced by the plaintiff.").

the same Congressional protectionism it once did.[180] Moreover, an ICS is nothing like an unwitting property owner, who should not be liable for the "graffiti" sprayed on the walls of its building.[181] Rather, an ICS creates the very platform through which virtual graffiti is distributed to the public, sometimes with dire consequences. We should not forget that an underlying purpose to Section 230 is to promote ICS self-regulation and ensure that the virtual graffiti does not become too unpleasant. As Chief Judge Kozinski wrote, "The Communications Decency Act was not meant to create a lawless no-man's land on the Internet."[182] Upon further analysis of the relevant precedent, commentary of various jurists and scholars, and the precise wording of Congress—naming Section 230 a "good Samaritan" law —this article, and the test suite above, demonstrates just why conditional ICS immunity is a more accurate construction of Congress' intent and a more effective application of Section 230 of the Communication *Decency* Act.

[180] *See, e.g.*, Lukmire, *supra* note 38, at 410 ("fears [of ICS liability] might be overblown."].

[181] Ziniti, *supra* note 5, at 616.

[182] *Roommates.com*, 521 F.3d. at 1164 (majority) (espousing the *Chicago Lawyer's* limited reading of Section 230, which is meant to incentivize ICS self-regulation but not grant unconditional ICS immunity in the process).