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DEATH BY A THOUSAND DUCK BITES IN A NO-MAN'S LAND: NAVIGATING SECTION 230'S SCOPE AND IMPACT IN A CHANGING INTERNET AND WORLD

By Val Rigodon†

ABSTRACT

Section 230 of Title 47 of the United States Code,[1] colloquially known as Section 230, is hailed by many as the law that created the internet.[2] It was conceived to promote the growth of the internet by protecting internet platforms from liability for third-party speech that was out of their control.[3] However, while the internet has changed and grown more intrusive in everyday life, Section 230 has not grown to reflect that.[4] It has been broadened in a way that allows internet platforms to escape liability.[5] People are not generally able to hold internet platforms accountable for harms that were facilitated or caused by the internet platforms.[6] At the same time, laws created to abrogate Section 230's powers have been disastrous to both internet platforms and people who use them.[7] Section 230 has proven itself essential to protecting internet

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[1] 47 U.S.C. § 230 (2018).

[2] *See, e.g.*, Jeff Kosseff, *Section 230 Created the Internet as We Know It. Don't Mess with It*, L.A. TIMES (Mar. 29, 2019, 3:05 AM), https://perma.cc/L26K-JH6W; *see also* Stephen Englberg, *Twenty-Six Words Created the Internet. What Will It Take to Save It?*, PROPUBLICA (Feb. 9, 2021, 2:00 PM), https://perma.cc/7ACX-S4A6.

[3] *See* Englberg, *supra* note 2.

[4] *See* KATHLEEN ANN RUANE, HOW BROAD A SHIELD? A BRIEF OVERVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT 2-3 (2018), https://perma.cc/AU8V-3KJB.

[5] *Id.*

[6] *See, e.g.*, Daniel v. Armslist, LLC, 386 Wis. 2d 449, 484 (2019) (holding that the interactive computer service operator of a firearms advertising website was an operator and not an information content provider therefore could not be held liable for the injuries suffered by the victim of a mass shooting).

[7] *See, e.g.*, Claire Lampen, *Sex Workers and Advocates Explain Why the House's Online Sex-Trafficking Bill is Bulls**t*, DAILY DOT (May 21, 2021, 10:57 PM), https://perma.cc/P6D3-R85J.

speech.[8] While it is still an important and necessary law, it sorely needs to "get with the times."[9] This Note discusses Section 230's scope and how it can be used to protect internet platforms as well as people.

I. INTRODUCTION

In October 2016, men looking for sex and drugs started to visit Matthew Herrick.[10] They would linger outside his apartment building, his workplace, and some even tried to barge into his home.[11] Herrick had absolutely no idea who these men were or why they were visiting him.[12] He often had to call for police intervention, because the men would get violent when asked to leave.[13] They insisted that they had

[8] *Meet Section 230: 'The Most Important Law Protecting Internet Speech,'* POLITIFACT, https://perma.cc/5MHY-Y27H (last visited Apr. 12, 2022).

[9] *See, e.g.*, Danielle Citron, *Tech Companies Get a Free Pass on Moderating Content*, SLATE (Oct. 16, 2019, 4:47 PM), https://perma.cc/Q46D-CZBM.

[10] First Amended Complaint Demand for Jury Trial at ¶¶ 49-50, Herrick v. Grindr, LLC, No.17-CV-00932, 2017 WL 744605 (S.D.N.Y. Feb 8, 2017), [hereinafter *Herrick v. Grindr, LLC Complaint*].

[11] *Id.* ¶¶ 55, 56, 65.

[12] *Id.*

[13] *Id*. ¶¶ 59, 64, 65.

messaged with him on a dating app called Grindr[14] and negotiated hardcore sex scenarios with him or drug exchanges.[15] Herrick, as it turned out, was being impersonated on the app by his abusive ex-boyfriend, Oscar Juan Carlos Gutierrez.[16] Gutierrez had created multiple dating profiles using Herrick's name, photos, and contact information using terms like "Gang Bang Now!" and "Raw Pig Bottom."[17]

Herrick alerted Grindr of the impersonation and harassment.[18] Grindr responded with: "Thank you for your report."[19] Between November 2016 to January 2017, Herrick made over 50 complaints to Grindr and filed dozens of police reports about the harassment.[20] At one point, Herrick was able to receive a temporary restraining order against Grindr compelling it to "immediately disable all impersonating profiles created under Plaintiff's name or with identifying information related to Plaintiff, Plaintiff's photograph, address, phone number, email account or place of work, including but not limited to all impersonating accounts under the control [of Plaintiff's malefactor]."[21] Yet even after the restraining order was received, Grindr did nothing.[22] Over 1,100 strangers would visit Herrick during this ordeal.[23]

Finally, Herrick decided to sue Grindr for injunctive relief and recovery on numerous claims including: product liability arising out of defects in design, manufacture, inspection, testing, failure to warn, and breach of warranty; general and gross negligence; copyright infringement; intentional and negligent infliction of emotional distress; and negligent misrepresentation.[24]

Herrick's legal team argued that there were numerous ways for Grindr to protect Herrick.[25] First, Grindr could have employed photo recognition software to detect and block certain photos from being repeatedly uploaded.[26] Second, Grindr could have blocked the use of cer-

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[14] *The World's Largest Social Networking App for Gay, Bi, Trans, and Queer People*, GRINDR, https://perma.cc/XD5N-FZXK (last visited Oct. 1, 2021).

[15] Herrick v. Grindr, LLC Complaint, *supra* note 10, ¶¶ 50, 54, 55, 60.

[16] Carrie Goldberg, *Herrick v. Grindr: Why Section 230 of the Communications Decency Act Must Be Fixed*, LAWFARE (Aug. 14, 2019, 8:00 AM), https://perma.cc/9QHZ-PUTW.

[17] Herrick v. Grindr, LLC Complaint, *supra* note 10, ¶¶ 49-51.

[18] *Id.* ¶¶ 8, 70.

[19] *Id.* ¶ 71.

[20] *Id.* ¶ 68.

[21] *Id.* ¶ 75.

[22] *See id.* ¶ 78.

[23] *Id.* ¶ 49 (noting that Herrick's ordeal lasted from October 2016 through March 2017).

[24] *Id.* ¶ 13.

[25] *Id.* ¶ 86.

[26] *Id.* ¶¶ 79, 84.

tain phrases like Mr. Herrick's address.[27] Third, Grindr could have used geolocation technology or Gutierrez's Internet Protocol ("IP") address to block him from the app.[28] Lastly, it could have also implemented various authentication technologies to add extra security for visitors.[29] Similar dating apps, like Scruff[30] and Jack'd,[31] have the ability to "identify the offending user . . . [and] locate and remove the offending profiles and ban IP addresses and specific devices from creating new profiles."[32] All of this is known, because when Herrick's abuser moved to those apps to continue the abuse, Herrick complained to the apps, and within 24 hours, the impersonating profiles were removed.[33] Faced with Herrick's lawsuit, Grindr claimed that they were within their rights when they did nothing, because they were protected from all liability under Section 230.[34] In the following sections, this Note will discuss Section 230's scope (Part II), limitations (Part III), applications (Part IV), as well as possible solutions to fixing some of its limitations (Part V).

II. SECTION 230: A BRIEF OVERVIEW

Section 230 is a simple piece of legislation that has been the source of many controversies since its creation in 1996.[35] It was added as an amendment to Title V of the Telecommunications Act of 1996,[36] also called the Communications Decency Act.[37] Section 230(c)(1) states that "[n]o 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."[38] This statute has been broadly interpreted to mean that Interactive Computer Services ("ICS") are not liable for

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[27] *Id.* ¶¶ 80, 83.

[28] *Id.* ¶¶ 85, 45.

[29] *Id.* ¶¶ 85-86.

[30] SCRUFF, https://perma.cc/DP7P-B5G2 (last visited Feb. 17, 2022).

[31] JACK'D, https://perma.cc/7ABH-YR6P (last visited Feb. 17, 2022).

[32] Herrick v. Grindr, LLC Complaint, *supra* note 10, ¶ 45.

[33] Tyler Kingkade & Davey Alba, *A Man Sent 1,000 Men Expecting Sex and Drugs to His Ex-Boyfriend Using Grindr, A Lawsuit Says*, BUZZFEED (Jan. 10, 2019, 12:24 PM), https://perma.cc/Q5NY-NJMF.

[34] Grindr Holding Co.'s Mem. of L. in Support of Its Motion to Dismiss Plaintiff's First Amended Compl. at 1, Herrick v. Grindr, LLC, No. 17-CV-00932, 2017 WL 744605 (S.D.N.Y. July 26, 2017), [hereinafter *MTD memo in Herrick v. Grindr, LLC*].

[35] *See generally* 47 U.S.C. § 230 (2018).

[36] *See generally* Telecommunications Act of 1996, Pub. L. No. 104-104, S. 652, 104th Cong. (1996); *see also* Sara L. Zeigler, *Communications Decency Act of 1996 (1996)*, THE FIRST AMEND. ENCYCLOPEDIA (2009), https://perma.cc/N2KL-MPS4 (last visited Feb. 7, 2022).

[37] *Id*.

[38] 47 U.S.C. § 230(c)(1) (2018).

third-party speech uploaded to their sites.[39] ICS refer to any information service that allows multiple users to access a server.[40] This could mean websites, applications, social media, and other such services.[41] An information content provider is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service."[42] This refers to both ICSs and people using the internet, and in practice, this would mean that a company such as Facebook, for example, could not be sued if someone posts something illegal.[43]

The second provision, 230(c)(2), known as the *Good Faith* provision,[44] is almost a reiteration of the first provision. It states that an ICS cannot be held liable for:

> (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).[45]

This provision was created to smooth the inconsistencies between the offline and the online definitions of *publisher* and *distributor*.[46] Publishers are analogous to magazines or book editors.[47] They monitor their platforms, exercise editorial control over posts, and enforce content guidelines.[48] Distributors are analogous to bookstores or newspaper

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[39] *See CDA 230: Legislative History*, ELEC. FRONTIER FOUND. [hereinafter *CDA 230: Legislative History*], https://perma.cc/C2XS-FMKE (last visited Feb. 7, 2022).

[40] 47 U.S.C. § 230(f)(2) (2018).

[41] *See generally* RUANE, *supra* note 4.

[42] 47 U.S.C. § 230(f)(3) (2018).

[43] *See* Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google is About to Change*, NPR (Mar. 21, 2018, 5:17 PM), https://perma.cc/6DZ8-NWDZ.

[44] *See* Ashley Johnson & Daniel Castro, *The Exceptions to Section 230: How Have the Courts Interpreted Section 230?*, INFO. TECH. & INNOVATION FOUND. (Feb. 22, 2021), https://perma.cc/736X-GA76.

[45] 47 U.S.C. § 230(c)(2) (2018).

[46] *CDA 230: Legislative History, supra* note 39.

[47] *See* Eugene Volokh, *47 U.S.C. § 230 and the Publisher/Distributor/Platform Distinction*, REASON MAG. (May 28, 2020, 11:44 AM), https://perma.cc/YJ58-M9L9.

[48] DMLP Staff, *Stratton Oakmont v. Prodigy*, DIGIT. MEDIA L. PROJECT (Oct. 15, 2007), https://perma.cc/567E-47ZL (holding that Prodigy, an internet platform, was a publisher because it exercised a level of control over the content published on its website, and thus could be held liable for that content).

stands as they have "no knowledge and [wield] no control over" information posted to their platforms, nor do they have the opportunity to review that information.[49]

Before Section 230 was adopted, distributors generally were not held liable for third-party content, but publishers were.[50] Since publishers were supposed to monitor their content, they could be punished if they allowed visitors to post something that might incite a lawsuit.[51] As millions of people flocked to the internet, manually moderating millions of comments, content, and posts became a heavy burden for publishers.[52] They would either have to strictly monitor every piece of content uploaded to their platforms, or stop moderating completely and let their site possibly be consumed by bad actors.[53] Legislators recognized this issue and added the provision stating that as long as publishers made a *good faith* effort to moderate their content, they would also be protected from liability.[54] Section 230 is not applicable to federal criminal law, intellectual property law, or sex trafficking cases.[55]

A. Shortcomings/Limitations of Section 230

In *Herrick v. Grindr*, Grindr argued that it could not be held liable for the way Gutierrez used the app.[56] Herrick, in turn, argued that he was not suing them for Gutierrez's usage, but because of the flaws in Grindr's design that allowed such a thing to happen, as well as its apathetic response.[57] Both the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit agreed with

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[49] DMLP Staff, *Cubby v. Compuserve*, DIGIT. MEDIA L. PROJECT (Oct. 15, 2007), https://perma.cc/RPD8-Q9SG (describing how a court found that an internet website named Compuserve that allowed people to publish content on forums and electronic bulletin boards had no knowledge or control over what users published).

[50] DMLP Staff, *supra* note 48.

[51] *Id.*

[52] *See* Casey Newton, *The Trauma Floor: The Secret Lives of Facebook Moderators in America*, VERGE (Feb. 25, 2019, 8:00 AM), https://perma.cc/YY3T-N9RX.

[53] Marguerite Reardon, *Section 230: How it Shields Facebook and why Congress Wants Changes*, CNET (Oct. 6, 2021, 5:00 AM), https://perma.cc/7WHM-KXSM ("Some call for liability protections to go away entirely, while others want to alter or refine the protections. Other bills entirely strip away liability protections and would have companies earn those protections by showing they're politically neutral in how they moderate content.").

[54] *CDA 230: Legislative History*, *supra* note 39.

[55] Ashley Johnson & Daniel Castro, *The Exceptions to Section 230: How Have the Courts Interpreted Section 230?*, INFO. TECH. & INNOVATION FOUND. (Feb. 22, 2021), https://perma.cc/D6ZC-UK3G.

[56] MTD memo in Herrick v. Grindr, LLC, *supra* note 34, at 15-6.

[57] Herrick v. Grindr, LLC Complaint, *supra* note 10, at 4.

Grindr and dismissed the case.[58] Some saw this as a win for free speech.[59] But was it really?

When people think about Section 230, they think about free speech.[60] It has been hailed as "The Most Important Law Protecting Internet Speech."[61] It is also known as the "twenty-six words that created the internet."[62] The plain language of the statute states "[i]t is the policy of the United States--(1) to promote the continued development of the Internet and . . . (2) to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation . . . ."[63] Because of Section 230, websites that allow visitors' input can exist without fear that they will be held liable for their visitors' words.[64] Websites can become platforms for controversial and radical opinions without taking any of the legal blame that might accompany those opinions.[65] This has allowed the internet to become the sprawling marketplace of ideas that it is today.[66]

Section 230 has a dedicated and avid fanbase for good reason.[67] Some have predicted that if Section 230 were removed or limited, there would be an immediate chilling effect across the internet.[68] ICSs would either severely censor their visitors or shut down entirely.[69] ICSs who would not succumb to the pressure might see themselves facing lawsuit after lawsuit from their millions of visitors and may be forced to shut

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[58] Herrick v. Grindr, LLC, 765 F. App'x 586, 593 (2d Cir. 2019) (holding that there was insufficient causation between Herrick's injuries and Grindr's actions).

[59] *See, e.g.,* Jamie Williams, *Victory! Second Circuit Affirms Dismissal of Latest Threat to Section 230*, ELEC. FRONTIER FOUND. (Apr. 8, 2019), https://perma.cc/FYN9-23B5 (arguing that protecting intermediaries like Grindr protects users); *see also* Eric Goldman, *Important Section 230 Ruling from the Second Circuit–Herrick v. Grindr*, TECH. & MKTG. L. BLOG (Mar. 28, 2019), https://perma.cc/2EM2-QMCP (arguing that the ruling strengthens Section 230).

[60] *See Section 230 of the Communications Decency Act*, ELECTRONIC FRONTIER FOUND., [hereinafter *Section 230 of the Communications Decency Act*], https://perma.cc/EJ6B-CS2Y (last visited Oct. 1, 2021).

[61] *CDA 230: Legislative History*, *supra* note 39.

[62] *See* Anshu Siripurapu, *Trump and Section 230: What to Know*, COUNCIL ON FOREIGN REL. (Dec. 2, 2020, 7:00 AM) https://perma.cc/F3FP-GQ2D.

[63] 47 U.S.C. § 230 (2018).

[64] *See* Selyukh, *supra* note 43.

[65] *See id.*

[66] *See Infographic: Why CDA 230 Is So Important*, ELEC. FRONTIER FOUND. [hereinafter *Infographic for CDA 230*], https://perma.cc/8FDS-L6Y7 (last visited Mar. 20, 2022).

[67] *See, e.g.*, *EFF Involvement*, ELEC. FRONTIER FOUND. [hereinafter *EFF Involvement*], https://perma.cc/UK2F-FGJH (last visited Mar. 20, 2022).

[68] *See, e.g.,* Derrick E. Bambauer, *How Section 230 Reform Endangers Internet Free Speech*, BROOKINGS (July 1, 2020), https://perma.cc/PC9R-Q7UL.

[69] *Infographic for CDA 230*, *supra* note 66.

down that way.[70] Additionally, Internet Service Providers ("ISPs") who would try to comply with a new limited Section 230 might have to instate costly moderation measures that would hinder their growth.[71] This would be especially detrimental to new ISPs who don't have the money or power to protect themselves from liability.[72] Bills such as the Stop Enabling Sex Traffickers Act and the Fight Online Sex Trafficking Act ("SESTA-FOSTA") proved this theory to be correct, when many websites started shutting down their operations in the wake of bill's passage.[73] However, what does Grindr's faulty design and complaint system have to do with free speech?

B. Does Section 230 apply?

In this author's opinion, Herrick had a clear claim against Grindr.[74] That doesn't mean it was a strong or winning claim, but at the very least Herrick deserved his day in court.[75] While Gutierrez's abuse may have triggered the suit, Herrick was complaining about Grindr for its own content and design.[76] However, because of Section 230 the case was dismissed on summary judgment.[77]

This is a recurring pattern for plaintiffs attempting to find accountability for an ICS's design choices and actions.[78] Courts are more inclined to rule in favor of immunity, as was evidenced when the Ninth Circuit stated: "[C]lose cases . . . 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

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[70] *See id.*

[71] *See* Katie Schoolov, *Why Content Moderation Costs Billions and is So Tricky for Facebook, Twitter, YouTube and Others*, CNBC (Feb. 27, 2021), https://perma.cc/PGL7-HF8M (stating that content moderation can cost a website a lot of money).

[72] *Id*.

[73] *See* Susan Yoshihara, *Websites Shutting Down Across the Internet After Congress Passes Sex-Trafficking Law*, LIFESITE (Apr. 4, 2018, 10:17 AM), https://perma.cc/YA7N-7R98 (describing the passage of SESTA-FOSTA which resulted in many websites shutting down rather than contend with the new law).

[74] *But see* Herrick v. Grindr LLC, 765 F. App'x 586, 589 (2d Cir. 2019) (affirming the district court's judgment and stating that Herrick's claims were derived from Grindr's operation and design, neither of which are subject to regulation under Section 230, and hence were without merit).

[75] *But see id*.

[76] *Id*. at 590-91.

[77] *Id*. at 592-93.

[78] *See generally CDA 230: Key Legal Cases,* ELEC. FRONTIER FOUND., https://perma.cc/P68Q-WRTP (last visited Oct. 1, 2021).

encouraged—or at least tacitly assented to—the illegality of third parties."[79]

Such broad interpretation has allowed Section 230 to expand beyond its purpose. Yet, as the Ninth Circuit in *Barnes v. Yahoo!, Inc.* has pointed out, the statute does not declare "general immunity from liability deriving from third-party content,"[80] nor does the statute mention the word or a synonym of "immunity."[81] Still, the courts are wary of encroaching on Section 230, and are unwilling to make nuanced decisions on a case-by-case basis.[82]

It should be noted that 1996 was a much different time than 2021.[83] The internet has become a different place.[84] Speech and innovation are no longer the only things at stake.[85] No one could have predicted that a website initially created to rate college girls by attractiveness would eventually go on to instigate genocide.[86] An overly broad interpretation of Section 230 may embolden bad-acting ICSs.[87] For example, one website tried to defend its sale of its visitors' confidential information by claiming that it merely displayed the alleged illegal services that were "provided by third-party researchers."[88]

The Ninth Circuit warned that "[t]he Communications Decency Act was not meant to create a lawless no-man's-land on the Internet."[89]

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[79] Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1174 (9th Cir. 2008) (holding that Roommates.com was not immune under Section 230 for using questionnaires solicited discriminatory preferences from users like sex, sexual orientation, and family status). In this case, the answers would then be used to match visitors with housing and roommates based on their preferences. *Id.* at 1161-62. It is illegal under the Fair Housing Act to offer or refuse to offer housing based on such characteristics. *Id.* at 1164.

[80] Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100 (9th Cir. 2009) (holding that Yahoo! was immune from liability under Section 230 when it failed to remove harassing and offensive content about the plaintiff that was posted by another visitor to the site).

[81] *Id.*

[82] *See id.*; *see also* Danielle Citron, *Tech Companies Get a Free Pass on Moderating Content*, SLATE (Oct. 16, 2019, 4:47 PM), https://perma.cc/K3D2-YSRV.

[83] Renault Clio, *'90s vs Now: You'll Never Believe How Technology Has Transformed in 20 Years*, METRO (Aug. 22, 2018, 11:23 AM), https://perma.cc/D7DB-LH3A.

[84] *Id*.

[85] *See* Paul Mozar, *A Genocide Incited on Facebook, With Posts from Myanmar's Military*, N.Y. TIMES (Oct. 15, 2018), https://perma.cc/8R9H-ANQF.

[86] *See id*.

[87] *See, e.g.*, Fed. Trade Comm'n v. Accusearch Inc., 570 F.3d 1187 (10th Cir. 2009) (holding that Accusearch was not immune under Section 230 for displaying confidential telephone records, because Accusearch solicited the illegal records, paid researchers to acquire the records, and charged customers who wished to acquire the records; Accusearch's actions were not neutral, and thus were not protected); *see* RUANE, *supra* note 4, at 2, 3.

[88] *Accusearch*, 570 F.3d at 1191.

[89] Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1164 (9th Cir. 2008).

III. APPLYING SECTION 230

There is obviously a line between the Ninth Circuit's proverbial "ten-thousand duck bites" and its "no-man's land," but where is it, and how does one walk it?

Rather than changing the text of the statute itself, the author believes that the answer may lie in the judicial system. The courts seem to have a difficult time determining when content is created by a third-party and when an ICS itself is a developer of information.[90] If the courts can create a standard way to distinguish third-party speech from ICS speech, then Section 230 could possibly be safely reigned in without harming the purpose of the statute.[91]

A. Current Test

There is an existing three-prong test meant to determine whether an ICS is protected by Section 230, but it is just a basic analysis of the statute.[92] The first question is whether the defendant is a provider of an ISP; second, whether the claim is based on information provided by a third-party information content provider; and third, whether the claim treats the defendant as the publisher and/or speaker of the information.[93] If the answer is yes to all three, the defendant is protected by Section 230.[94] This test, however, does not help in situations where the ICS's content and a third-party's content are intertwined.[95]

B. Ninth Circuit: Fair Housing Council of San Fernando Valley v. Roommates.com

Fair Housing Council of San Fernando Valley v. Roommates.com is among the few cases where courts have not allowed Section 230 to be used as a defense.[96] Roommates.com required visitors to disclose their sex, sexual orientation, and whether they had children in order to use

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[90] *See, e.g.*, Lemmon v. Snap, Inc., 995 F.3d 1085, 1093-94 (9th Cir. 2021). (The Ninth Circuit grapples with the ways in which Snap's Snapchat Speed-Filter may be both the developer's content and third-party content based on its different functions).

[91] *See CDA 230: Legislative History*, *supra* note 39; *see Roommates.com*, 521 F.3d at 1171. Section 230 has been interpreted to protect ICSs from liability stemming from third-party speech. There is currently no standard method to determine when speech stems from an ICS and when it doesn't. Section 230 does not protect ICSs from liability from their own speech. *See id.* at 1171-72.

[92] *See* RUANE, *supra* note 4, at 1-2.

[93] *See id.*

[94] *See id*. at 2.

[95] *See, e.g.*, Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1174-75 (9th Cir. 2008).

[96] *See id*. at 1175.

their housing ad website.[97] If they did not disclose this information, they were not allowed to use the website.[98] The visitors also had to fill in whether they were willing to live with certain sexes, sexualities, or with children.[99] Such preferences are impermissible under the Federal Fair Housing Act[100] as well as Californian housing laws,[101] so the Fair Housing Council brought suit against Roommates.com.[102]

Additionally, subscribers to Roommates.com would answer questions and Roommates.com would assemble the answers into a profile page, which would include the subscriber's pseudonym and preferences.[103] Subscribers can choose the free service, which allows them to create their own profile page, and search and message other profiles based on their preferences, as well as receive periodic emails from Roomate.com when another profile appears to match their profile; those who pay a monthly fee can also read emails from other subscribers and comments that other subscribers add onto their profile.[104] The Ninth Circuit found that Section 230 did not "grant immunity for inducing third parties to express illegal preferences."[105] Rather than using the three-prong test, the court had to determine whether Roommates.com was a developer of information within the meaning of Section 230 or merely neutrally hosting third-party information.[106] It was clear that they published third-party content, but the claim was based on how much influence they had in publishing that content.[107]

The Ninth Circuit considered Roommates.com to be a developer of information, and thus not entitled to protection under Section 230.[108] The concurring judges argued that Roommates.com had merely provided a neutral standardized form for visitors to use or misuse.[109] The majority countered that "development" does not necessarily only apply to "content that originates entirely with the website."[110] An ICS's contents

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[97] *See id*. at 1161.

[98] *See id*. at 1166.

[99] *See id*. at 1161.

[100] *See* Fair Housing Act, 42 U.S.C. § 3601 (1968).

[101] Cal. Gov't. Code § 12955 (2022).

[102] *Roommates.com* 521 F.3d at 1161-62.

[103] *Id*.

[104] *Id*. at 1162.

[105] *Id*. at 1165.

[106] *Id*. at 1174.

[107] *Id*. at 1168 (stating "a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct" while determining whether it was actually developing the content).

[108] *Id*. at 1166.

[109] *Id*. at 1168 (McKeown, Rymer & Bea, J.J.J., concurring).

[110] *Id*. at 1167.

need not exist in a vacuum. Instead, a developer "contributes materially to the alleged illegality of the conduct."[111] The majority contrasted this with another feature on Roommates.com that was protected under Section 230.[112] The "Additional Comments" section was a blank text box that also could be used to specify what a visitor was looking for.[113] The majority called this a "neutral tool" much like Google's search engine,[114] since it could be used by anyone for potentially illegal conduct; thus, Roommates.com was not responsible, even in part, for any content displayed in users' "Additional Comments" sections.[115]

Along with deciding whether an ICS was acting in the capacity of a publisher of third-party content, there is also the issue of deciding whether it was a developer or a neutral tool.[116] This is a sign of Section 230's ever broadening scope. The statute can be interpreted to mean that as long as the claim had nothing to do with a third-party's speech, a claim would be allowed into court.[117] That was not the case in *Roommates.com*.[118] The Court provided further examples for such development, explaining:

> A website operator who edits user-created content—such as by correcting spelling, removing obscenity or trimming for length—retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner that contributes to the alleged illegality—such as by removing the word "not" from a user's message reading "[Name] did *not* steal the artwork" in order to transform an innocent message into a libelous one—is directly involved in the alleged illegality and thus not immune.[119]

C. Sixth Circuit: Jones v. Dirty World Entertainment Recordings LLC and Algorithmic Bias

In a 2014 holding by the Court of Appeals for the Sixth Circuit, *Jones v. Dirty World Entertainment Recordings LLC* further explained

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[111] *Id*. at 1168.

[112] *Id.* at 1173 (stating that the other feature was the "Additional Comments" section).

[113] *Id*.

[114] *Id.* at 1175.

[115] *Id*. at 1174.

[116] *See id*. at 1171.

[117] The plain language of the statute only talks about publishers or speakers and does not talk about developers versus neutral tools. *Cf.* 47 U.S.C. § 230.

[118] *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).

[119] *Id.* at 1169 (alternation in original).

that material contribution "does not mean merely taking action that is necessary to the display of allegedly illegal content. Rather, it means being responsible for what makes the displayed content allegedly unlawful."[120] While the distinction is clear in terms of libel, the lines become blurry when applied to the way people are supposed to interact with online platforms.[121]

As an example, in *Jones*, a website owner was sued for publishing defamatory posts that were sent to him by third parties.[122] He selected, edited, and added his own commentary to the posts.[123] The Sixth Circuit found that such activity was protected by Section 230, because the platform did not develop the defamatory statements itself.[124] However, the platform encouraged such submissions by instructing visitors to "Tell us what's happening. Remember to tell us who, what, when, where, why," and called submitters "THE DIRTY ARMY."[125] If a site encourages visitors to submit defamatory content, and visitors fulfill that request, who should be held liable for the defamatory content?

If a person exploits a flaw or blind spot in a website's platform and causes harm, did the ICS create that harm? Are flaws and blind spots considered neutral? With technologies like geolocation, facial recognition, algorithms, and other tools at their disposal, the ICSs are able to contribute a lot more to content than the simple forum pages of the past.[126] Algorithmic bias is a well-known phenomenon in which an "algorithmic decision creates unfair outcomes that unjustifiably and arbitrarily privilege certain groups over others."[127]

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[120] Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398, 410 (6th Cir. 2014).

[121] *See, e.g.*, *id.*

[122] *See id.* at 401.

[123] *Id*. at 403.

[124] *See id*. at 415.

[125] *Id.* at 402.

[126] *See* ALGORITHMIC BIAS EXPLAINED: HOW AUTOMATED DECISION-MAKING BECOMES AUTOMATED DISCRIMINATION, GREENLINING INST. (2021), https://perma.cc/QKJ9-NPTV [hereinafter GREENLINING INST. Report]; *see also* Nicol Turner Lee et al., *Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms*, BROOKINGS (May 22, 2019), https://perma.cc/3M83-M852; *see also* Chris Hoffman, *The Many Ways Websites Track You Online*, HOW-TO GEEK (Sep. 28, 2016, 11:00 AM), https://perma.cc/5CC7-ZKMS; *see also* Siw Grinaker, *Websites: Past and Present*, ENONIC (Jan. 16, 2019), https://perma.cc/T5G5-9SBV (describing how, in the past, websites relied on basic code and web development that was limited to what their visitors chose to input, and content and presentation were created together). Today, the two are developed more independently with an "oscillation between content and presentation," and a lot more focus is placed on user experience design. *Id.* Coding systems are much more multifaceted using multiple applications and systems as well. *Id.*

[127] GREENLINING INST. Report, *supra* note 126.

Algorithms can "accidentally" perpetuate racism, sexism, classism, medical inequities, criminal justice inequities, and more.[128] They are not necessarily designed to do so on purpose, but their data and programming skew them towards biased conclusions.[129] If left unchecked, these algorithmic failings can have measurable real-world consequences.[130] For example, Amazon attempted to use an algorithm to evaluate resumes and applications.[131] Because Amazon had a history of hiring mainly men, the algorithm learned that pattern and replicated it by excluding women based on their names, schools, and other data points.[132]

Many social media platforms use algorithms to keep people as engaged as possible by predicting and displaying content that each individual visitor finds interesting.[133] The content is derived from third parties, yet the algorithm that displays it "lives" within the platform.[134] If, for example, a person begins to engage with "eating disorder" content, an engagement algorithm will begin to find and display similar content to that person.[135] Section 230 offers no guidance on how to separate the third-party content from the ICS's design choice.[136] And as the Sixth Circuit's decision in *Jones*[137] demonstrated, the courts also have trouble separating the two. Should an algorithm be considered a neutral tool or a developer's material contribution? Should the definition change based on how it is used?

The Ninth Circuit's holding in *Roommates.com* suggests the latter.[138] A standardized questionnaire is neutral until it is manipulated to

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[128] Nicole Turner Lee et al., *supra* note 126.

[129] *See* Damini Gupta & T. S. Krishnan, *Algorithmic Bias: Why Bother?*, CAL. MGMT. REV. (Nov. 17, 2020), https://perma.cc/3KN7-B8LQ.

[130] *See* Herrick v. Grindr, LLC Complaint, *supra* note 10, ¶¶ 80, 83.

[131] *See, e.g.,* Kalinda Ukanwa, *Algorithmic Bias Isn't Just Unfair — It's Bad for Business*, BOS. GLOBE (May 23, 2021), https://perma.cc/AU7J-F6E6.

[132] *Id*.

[133] *See* Sang Ah Kim, *Social Media Algorithms: Why You See What You See*, 2 Geo. L. Tech. Rev. 147, 148 (2017), https://perma.cc/6PLQ-XLBS ("To keep users engaged for as long and as frequently as possible, social media platforms want to make their news feeds interesting and relatable to users. It becomes crucial to predict what individual users, or groups of users, may find interesting.").

[134] *Id*.

[135] Donie O'Sullivan et. al., *Instagram Promoted Pages Glorifying Eating Disorders to Teen Accounts*, CNN BUS. (Oct. 4, 2021, 7:28 PM), https://perma.cc/F32B-CBHK.

[136] *Cf.* 47 U.S.C. § 230 (2018).

[137] Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398, 410 (6th Cir. 2014).

[138] Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1157 (9th Cir. 2008) (explaining that Roommates.com was not protected under Section 230 because it created a questionnaire to match visitors with roommates based on their preferences of sex, sexual orientation, and family status which is illegal under the Fair Housing Act).

retrieve illegal information.[139] The algorithms and other similar tools are usually neutrally designed.[140] Hence, the ICSs do not need to take any affirmative steps to manipulate them in favor of legality or illegality, because it is the data fed into the algorithm that presents the problem.[141] It is when specific design flaws are exploited, either by a third-party or with a third-party's content, that the flaws can be spotted.[142] By then, it is too late.[143]

D. Texas Supreme Court: The Facebook Case

As with everything else concerning Section 230, there is little guidance on how to handle new technologies like social media algorithms and engagement features. In 2019, the Ninth Circuit found that recommendations and notifications were content-neutral tools used to facilitate communications.[144] Recommendations are driven by algorithms.[145]

In 2021, the Texas Supreme Court held in *In re Facebook, Inc.* that the claims that Facebook "intentionally or knowingly benefit[ted] from participating in a [trafficking] venture"[146] and "assist[ed] and facilitat[ed] the trafficking of [Plaintiffs] and other minors on Facebook" were not barred under Section 230.[147] Because Facebook's algorithms are designed to "direct users to persons they likely want to meet," Facebook was allegedly benefitting from directing traffickers to potential victims.[148]

The Ninth Circuit and Texas rulings were only three years apart. Both of these rulings refer to technologies that are far more advanced than the ones that were in popular use in 1996.[149] Where they are similar is that both courts tend to require affirmative participation in illegality.[150] Most courts don't look favorably on passivity or negligence when

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[139] *Id.*

[140] Gupta & Krishnan, *supra* note 129.

[141] *See id.*

[142] *See* Ukanwa, *supra* note 131.

[143] *See id.*

[144] Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1096 (9th Cir. 2019).

[145] *See* Zeynep Tufekci, *How Recommendation Algorithms Run the World*, WIRED (Apr. 22, 2019, 6:00 AM), https://perma.cc/299K-FUH7.

[146] *In re* Facebook, Inc., 625 S.W.3d 80, 96 (Tex. 2021) (citations omitted), *cert. denied sub nom.* Doe v. Facebook, Inc., 142 S. Ct. 1087 (2022).

[147] *Id.* at 97.

[148] *Id.*

[149] *Cf.* Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398, 401 (6th Cir. 2014) (referring to the technology that did not exist in 1996).

[150] Gupta & Krishnan, *supra* note 128. The Ninth Circuit held that algorithms, recommendations, and notifications were content neutral meant only to facilitate communication and were protected by Section 230. In contrast, the Texas Supreme Court found that the Fa-

it comes to liability, and instead seem to want ICSs to take affirmative actions towards illegality.[151] This rigid view does not seem to allow for redress of harms derived from a seemingly "passive" design on the ICS.[152] Yet the courts have been unable to draw a clear line for when a design has changed from a passive tool into an active tool, or when a passive tool has done enough harm to warrant a successful liability claim.[153]

E. Wisconsin Supreme Court: Daniel v. Armslist, LLC

In *Daniel v. Armslist, LLC*, Zina Daniel Haughton filed for an order of protection against her ex-husband, Radcliffe Haughton, after he assaulted and threatened to kill her.[154] The order of protection prevented Radcliffe Haughton from purchasing a firearm for four years.[155] However, Radcliffe Haughton was able to use Armslist.com to post an ad seeking to purchase a gun, view an offer from a private gun seller, contact them, and meet offline to purchase the firearm.[156] To do so, he didn't have to register for an account or upload any identifying information.[157] The next day, after purchasing the gun, he killed three people, including Zina Daniel Haughton, in a mass shooting before killing himself.[158] Zina Daniel Haughton's daughter and estate administrator, Yasmeen Daniel, sued Armslist.com for its negligent design.[159] Yasmeen Daniel claimed that the Armslist.com website design had several blind spots that allowed for the tragedy to happen.[160] She suggested numerous measures Armslist.com could have taken to prevent such tragedies from happening, including requiring people to register for an account.[161] The Wisconsin Supreme Court dismissed the claim in favor of Armslist.com, be-

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cebook recommendation feature was active and made Facebook a direct participant in however it was used. Section 230 did not protect Facebook in that case. Both courts looked at the same technology and determined whether the plaintiff received relief based on whether the court believed the technology was passive or active. *See* Ukanwa, *supra* note 130.

[151] The Ninth Circuit did not find the defendant in *Dyroff v. Ultimate Software Group* liable because it determined the defendant's technology to be passive. 934 F.3d 1093, 1099 (9th Cir. 2019). The Texas Supreme Court did find the defendant in *In Re Facebook, Inc.* to be liable because it determined the defendant's technology to be an active participant in the crime. 625 S.W.3d at 96; *see* Ukanwa, *supra* note 131.

[152] *In re* Facebook, Inc., 625 S.W.3d 80, 96 (Tex. 2021).

[153] *Id*.

[154] Daniel v. Armslist, LLC, 386 Wis. 2d 449, 458-59 (2019).

[155] *Id.* at 459.

[156] *Id.*

[157] *Id.* at 460-61.

[158] *Id.* at 459.

[159] *Id.* at 449, 457, 461.

[160] *See id.* at 460-61.

[161] *Id.* at 460-61.

cause the claim "derive[d] from its role as a publisher" of third-party content.[162] That is, Armslist.com did not develop the ad that eventually led to Radcliffe Haughton illegally purchasing a firearm.[163]

Radcliffe Haughton exploited the glaring flaws in Armslist.com designs which led to four lost lives.[164] The Wisconsin Supreme Court ruled that Armslist.com is only "a forum on which third parties could post" and while it may have known that illegal conduct could take place on those forums, it still had immunity from liability under Section 230.[165]

IV. BRINGING NEGLIGENCE CLAIMS AGAINST ICSS

Where flawed product claims have failed, other negligence claims might be able to take root. At its basic level, negligence is "a failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances."[166] When the World Wide Web was created, there was nothing to compare ICSs or the internet to because they were completely new and unique.[167] Therefore, it was difficult for lawmakers to determine what standard of care ICSs should be held to and, for a while, conflicting case law was being created.[168] Section 230 relieved the courts from some of that burden by giving ICSs a broad protection from the actions of third-parties.[169] However, as technology changes, as it becomes more intrusive and active in day-to-day life, ICSs' responsibilities to people need to be updated and clarified.[170]

In contrast to the *Armslist.com* case, some courts have been able to find certain, supposedly neutral, ICS actions as crossing the line into negligence.[171]

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[162] *Id.* at 482.

[163] *Id.* at 483-84.

[164] *Id*. at 459-60.

[165] *Id*. at 482-84; *Choose an Account Type*, ARMSLIST FIREARMS MARKETPLACE [hereinafter ARMSLIST], https://perma.cc/3WH8-GLG6 (last visited Feb. 12, 2022) (explaining why the website created subscription paywalls that force visitors to create accounts and charges them monthly to use the website: "the financial, emotional, human, and other costs of the never-ending legal assaults on Armslist have made it impossible for us to keep the site free in the way it was in the past").

[166] *Negligence*, LEGAL INFO. INST., https://perma.cc/PU48-UCJS (last visited June 26, 2021).

[167] *See* Cecilia Kang, *Congress, Far From 'a Series of Tubes,' Is Still Nowhere Near Reining in Tech*, N.Y. TIMES (Dec. 11, 2021), https://perma.cc/NLU8-EKCA.

[168] *CDA 230: Legislative History*, *supra* note 39; *see also* Volokh, *supra* note 47.

[169] 47 U.S.C. § 230 (2018); *see also* RUANE, *supra* note 4, at 1.

[170] *See* Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398, 401 (6th Cir. 2014).

[171] *See generally* Lemmon v. Snap, Inc., 995 F.3d 1085, 1094 (9th Cir. 2021) (finding that Snap was liable for negligence for the creation of the speed-filter and that ICSs can be held liable "even for their 'neutral tools,' so long as plaintiffs' claims do not blame them for the content that third parties generate with those tools").

A. Ninth Circuit: Lemmon v. Snap, Inc.

Compared with internet technologies, the law is slow to update and quick to become outdated. Existing legal analysis tests can easily become useless. In *Lemmon v. Snap, Inc.*, the Ninth Circuit found that the defendant, the social media company Snap, could be liable for its "unreasonable and negligent" design decisions regarding Snapchat, an image capturing application the company owns.[172] The app allows people to capture photos and videos that can be modified by Snapchat filters.[173] These filters are created and owned by Snap for use on Snapchat.[174] One filter, called the speed-filter, displays a person's speed, much like a speedometer.[175] In 2017, three young men died in a car accident while allegedly attempting to use the speed-filter to record speeds over 100 mph.[176] The District Court for the Central District of California deemed the speed filter to be a neutral tool and dismissed the charges.[177] The Ninth Circuit also found the speed filter to be neutral, but reversed the district court's decision noting that "case law has never suggested that internet companies enjoy absolute immunity from all claims related to their content-neutral tools."[178] This was a surprising decision that held an ICS accountable for a neutral tool without infringing on Section 230's purpose.[179] The Ninth Circuit interpreted the statute's plain language without attempting to give an ICS extra protection.[180]

B. California Court of Appeal: Bolger v. Amazon.com, LLC

In another example, Amazon, the online-retail supergiant, had a long winning streak when it came to lawsuits targeting its negligence.[181] Some sellers advertised faulty or dangerous products on Amazon, and buyers sued Amazon after suffering harm.[182] Amazon argued that it only published third-party ads and had no part in developing them.[183] Ama-

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[172] *Id.* at 1087-91.

[173] *Id.* at 1088.

[174] Jennifer Roback, *SELF-MADE BILLIONAIRES Who owns Snapchat?*, U.S SUN (Nov. 16, 2021, 3:10PM), https://perma.cc/5EHD-72NN.

[175] *See Lemmon,* 995 F.3d at 1088-89.

[176] *See id.* at 1088-90.

[177] Lemmon v. Snap, Inc., 440 F. Supp. 3d 1103, 1105 (C.D. Cal. 2020), *rev'd and remanded*, 995 F.3d 1085 (9th Cir. 2021).

[178] Lemmon v. Snap, Inc., 995 F.3d 1085, 1094-95 (9th Cir. 2021).

[179] *Id*.

[180] *See generally id.*

[181] Jay Greene, *Burning Laptops and Flooded Homes: Courts Hold Amazon Liable for Faulty Products*, WASH. POST (Aug. 29, 2020), https://perma.cc/QYG7-JJ4X.

[182] *Id*.

[183] Bolger v. Amazon.com, LLC, 267 Cal. Rptr. 3d 601, 610 (Ct. App. 2020).

zon did not "manufacture, distribute, or sell" the items.[184] The California Court of Appeal decided that Amazon indeed had a role in "the vertical distribution of consumer goods"[185] because it often "retrieved the product from its warehouse and supplied it to the consumer [and] . . . compels the consumer to interact directly with Amazon . . . ."[186] Therefore, in such claims, Section 230 does not protect Amazon from liability.[187]

It is unclear whether Amazon could have passed the material contributor threshold, the neutral tool threshold, or the three-prong test.[188] Like Armslist, Amazon is an ICS and does not play a part in creating sellers' ads. However, because Amazon interacts with the merchandise offline—even if it has no part in creating or selling certain items—the California Court of Appeal held it strictly liable in products liability claims.[189] Therefore, in *Bolger*, the California Court of Appeal did not rule on whether the defendant, Amazon, was a developer or not.[190] What distinguished this Amazon suit from other cases is that there were real world physical items being handled by Amazon, and these products were faulty or dangerous.[191] It seems that the courts may have had an easier time ruling for the plaintiff in the Amazon case since there was something tangible involved.

It is not controversial to state that the law regulating digital technology is outdated and has allowed for some heinous situations, unless one applies this statement to Section 230.[192] Then, the conversation becomes about how Section 230 is flawless and must not be touched.[193] Avid supporters of Section 230 fear that if it were changed in any way,

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[184] *Id*.

[185] *Id.* at 613.

[186] *Id*. at 616.

[187] *Id*. at 620.

[188] *See* Fed. Trade Comm'n v. LeadClick Media, LLC, 838 F.3d 158, 173 (2d Cir. 2016) (setting out the three-prong test and "finding that '[Section 230] shields conduct if the defendant (1) "is a provider or user of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat the defendant as the publisher or speaker of that information."'"(quoting Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 19 (1st Cir. 2016)).

[189] *Bolger*, 267 Cal. Rptr. 3d at 627.

[190] *Id*.

[191] *Id*. at 604.

[192] *See, e.g.*, Daniel Malan, *The Law Can't Keep Up with New Tech. Here's How to Close the Gap*, WORLD ECON. F. (June 21, 2018), https://perma.cc/LHX4-3CK2; *see also* Julia Griffith, *A Losing Game: The Law Is Struggling To Keep Up with Technology*, J. OF HIGH TECH L. BLOG (Apr. 12, 2019), https://perma.cc/HH28-ASRM; *see also EFF Involvement*, *supra* note 67; *see also* Bambauer, *supra* note 68.

[193] *EFF Involvement*, *supra* note 67; *see also* Bambauer, *supra* note 68.

the internet as it is known would be irreparably harmed.[194] Those fears are well founded.[195]

V. SESTA-FOSTA

The Stop Enabling Sex Traffickers Act and the Fight Online Sex Trafficking Act ("SESTA-FOSTA"),[196] passed in 2018, was a law created to reduce sex and human trafficking by holding ICSs liable if they are found to promote prostitution, internationally or domestically.[197] In such cases, Section 230's protection would no longer apply to them.[198] The effects of this law on the internet were immediate.[199] Websites began to remove all sexual content, including pornography and explicit art.[200] They began to over-moderate and remove large portions of their websites meant for adult sexual material.[201]

While larger websites may be able to avoid the loss of some of their user base, smaller websites may not.[202] They may be forced to shut down if faced with a lawsuit.[203] In the case of over-moderation because of SESTA-FOSTA, more important and chilling was the effect that the law would have on the people it was meant to protect, leading to sex workers and their allies rising up against the bill when it was first introduced stating that it would harm them.[204] They claimed that it "increased their exposure to violence and left [them] . . . without many of the tools they use to keep themselves safe."[205] They no longer had safe online spaces "to vet the backgrounds of clients and consult with peers to determine whether a client is safe."[206] Instead of helping sex trafficking

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[194] Bambauer, *supra* note 68.

[195] *See, e.g.*, Matt Baume, *How Queer Adult Comic Artists Are Being Silenced by FOSTA-SESTA*, THEM. (Apr. 22, 2020), https://perma.cc/4VB5-R257.

[196] Stop Enabling Sex Trafficking Act ("SESTA") and the Fight Online Sex Trafficking Act ("FOSTA"), 18 U.S.C. § 2421A (2018).

[197] Phillip Tracy, *Trump Signs Controversial 'Sex-Trafficking' Bill That Could Hurt the Future of the Internet*, DAILY DOT (Mar. 24, 2018), https://perma.cc/B9GW-6R4R.

[198] *See id.*

[199] *Id.*

[200] *See* Ana Valens*, Craigslist Shuts Down Its Personals Section, Blaming 'Sex-Trafficking' Bill,* DAILY DOT (May 21, 2021, 8:48 PM), https://perma.cc/B6W7-5ZPM (describing how Craigslist had a section of their website devoted to personals and missed connections which was frequently filled with posts looking for sexual partners and how Craigslist specifically named SESTA-FOSTA as the reason it removed those sections).

[201] *See id; see also* Yoshihara, *supra* note 73; Schoolov, *supra* note 75.

[202] *See* Yoshihara, *supra* note 73; Schoolov, *supra* note 75.

[203] *Id.*

[204] *See* Lampen, *supra* note 7.

[205] DANIELLE BLUNT & ARIEL WOLF, ERASED: THE IMPACT OF FOSTA-SESTA & THE REMOVAL OF BACKPAGE 4 (2020), https://perma.cc/BR6F-QZL8.

[206] Tracy, *supra* note 197.

victims, the law would drive them and traffickers underground where it would create even more dangerous circumstances.[207]

An opponent of the bill, Kimberly Mehlman-Orozco, also pointed to the lack of "empirical research or even theoretical evidence suggesting this law will reduce instances of sex trafficking."[208] The law was merely a way for politicians to try to gain positive attention from constituents without doing the actual work of fighting sex trafficking in a meaningful way.[209] In sum, SESTA-FOSTA, as an attempt to abrogate Section 230's protection, became a failure.[210] It only harmed ISPs, internet visitors, and the sex workers it was supposed to protect.

This precedent does not bode well for future legislation that attempts to follow in SESTA-FOSTA's footsteps.[211] The Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020 (EARN IT)[212] was supposed to be SESTA-FOSTA for child sex abuse material but it never left the Senate floor.[213] West Virginia Senator Joe Manchin also proposed the idea of a similar bill that would target drug trafficking, but it did not receive enough votes. [214]

Advocates for sex workers see SESTA-FOSTA as a great big "I told you so" to the face of those who wish to see Section 230's power reigned in.[215] This is understandable given the way the predictions and theories about its abrogation were so heartily fulfilled.

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[207] *Id.*

[208] Lucy Wiesner, *Good Intentions and Unintended Consequences: SESTA/FOSTA's First Two Years*, 93 TEMP. L. REV. 151, 165 (2020).

[209] Ricky Riley, *How FOSTA-SESTA Legislation is Wreaking Havoc on the Lives of Sex Workers*, BLAVITY (Jan. 2, 2019, 5:47 PM), https://perma.cc/48BE-QAEA ("Here we have a law they are afraid to touch, because they don't want [it] to [appear] they're going against trafficking and protecting children . . . . That tells me they are willing to disenfranchise me as a consensual sex worker in order to save face." (second alteration in original)).

[210] *Id.*; *see also* Tracy, *supra* note 197; *see also* Valens, *supra* note 200.

[211] *See* Tracy, *supra* note 197; *see also* Valens, *supra* note 200.

[212] *See generally* EARN IT Act of 2020, S. 3398, 116th Cong. (2019-2020).

[213] *S. 3398 (116th): EARN IT Act of 2020*, GOVTRACK, https://perma.cc/UUF5-WTNC (last visited June 10, 2022).

[214] *S. 4758 (116th): See Something, Say Something Online Act of 2020*, GOVTRACK https://perma.cc/4TDX-R7HY (last visited June 10, 2022); Manchin, Cornyn Bill to Require Companies Report Illicit Online Drug Sales, JOE MANCHIN (Sept. 29, 2020), https://perma.cc/A6GP-F7H5.

[215] *See* Emma Llanso & Sasha Moss, *Frequently Asked Questions: Section 230, Sex Trafficking, and Current Legislation*, CTR. FOR DEMOCRACY & TECH. (Jan. 22, 2018), https://perma.cc/N6BC-SYWX; *see also* Dean DeChiaro, *Advocates for Sex Workers Vindicated in Section 230 Debate by New GAO Report*, ROLL CALL (June 29, 2021, 6:30 AM), https://perma.cc/NHQ9-M8CW.

VI. WHAT SHOULD COME NEXT?

How does one walk the line between one-thousand duck bites and a lawless no-man's land? One has to wonder whether digital tools, neutral or not, should even be protected by Section 230, or whether the protection should stop at third-party speech. The Ninth Circuit recently stated that the "case law has never suggested that internet companies enjoy absolute immunity from all claims related to their content-neutral tools."[216] This is true. The purpose of Section 230 was to regulate the publication of the third-party content; it was not created to regulate developer content or neutral tools.[217]

Alternative theories to circumventing Section 230 do not involve the internet at all. Instead, they aim to address the roots that lead to harmful conduct on the internet.[218] For example, the opponents of SESTA-FOSTA say that decriminalizing sex work would go far in protecting sex trafficking victims and sex workers.[219] Without fear of prosecution, those who are a part of the sex trade, either as a sex trafficking victim or a sex worker, will feel more comfortable to report crimes against them. [220]

This author believes that social services could also protect people from bad acting third parties who would misuse an ICS to cause harm. This could possibly look like stronger support for survivors of intimate partner violence, creating more awareness about cyber abuse, and other preventative measures. It could also mean stronger legislation for cyber abuse and educating law enforcement on how to handle cyber abuse cases. Law enforcement is notorious for either not knowing how to deal with cyber-crime or not taking it seriously.[221] Training them on how to handle internet crimes and altercations could be another way to protect people from harm. This would be a long-term solution meant to prevent ICS abuse and negligence.

The solution to determining whether a feature is a developer's content or a neutral tool may lie with the courts and how they interpret Section 230, rather than changing the statute itself. Currently, ambiguous

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[216] Lemmon v. Snap, Inc., 995 F.3d 1085, 1094 (9th Cir. 2021).

[217] *See* 47 U.S.C § 230 (2018); *see CDA 230: Legislative History*, *supra* note 40.

[218] *See generally* BLUNT & WOLF, *supra* note 205, at 38-39.

[219] *But cf. id*. at 38.

[220] *Id*.

[221] Amanda Hess, *Why Women Aren't Welcome on the Internet*, PACIFIC STANDARD (June 14. 2017), https://perma.cc/ZXY5-559P. *See, e.g*, Danielle Citron, *Cops Don't Take Harassment of Women Seriously—Especially Online*, TIME (Oct. 17, 2014, 12:41 PM), https://perma.cc/7JV9-D3FK.

cases are always resolved on the side of the ICS.[222] In this author's opinion, for the purposes of applying Section 230, a developer should not be a static definition, but instead should be analyzed on a case-by-case basis depending on reasonableness. Hypothetically, these factors may include: the type of ICS, its userbase, the harm, revenue, standards, and practices of similar ICSs.

Grindr, an application worth millions of dollars,[223] should be able to implement basic safety features that every similar app implements, and be responsive to its users, especially where one has obtained a court order against it.[224] A 16-year-old's blog should not. Determinations made on a case-by-case basis would alleviate fears about smaller start-up platforms being destroyed, while larger platforms escape.[225] If this analysis were adopted, it would only apply in situations where it is ambiguous whether the ICS is a developer or an owner of a neutral tool. It would not automatically hold any ICS liable for whatever tort it is being accused of but would simply allow the case to be heard rather than being automatically dismissed.

Critics of such a proposed solution might state that courts cannot reliably determine reasonableness, or that ICSs should not be forced to predict the way their software may be misused.[226] ICSs might react in the same way as they did to SESTA-FOSTA and over-moderate, or shut down to escape potential liability.[227] This may be true, but the alternative of allowing ICSs to cause or facilitate preventable harm while under the protection of Section 230 is not a favorable outcome either.[228]

Again, this note is not calling for ICSs to be sued into oblivion, but only that the viable plaintiffs may see their day in court. There is still a chance they might lose. Just like the gun lobby has greatly broadened

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[222] *See, e.g.*, Daniel v. Armslist, LLC, 386 Wis. 2d 449, 484 (2019); *see also* Goldberg, *supra* note 16.

[223] Mike Isaac, *Grindr Sells Stake to Chinese Company*, N.Y. TIMES (Jan. 11, 2016), https://perma.cc/AQ6P-CY6C.

[224] *Cf.* Herrick v. Grindr, LLC Complaint, *supra* note 10, ¶¶ 49, 68, 71, 75, 78.

[225] *See* Selyukh, *supra* note 43.

[226] *See generally* BLUNT & WOLF, *supra* note 205, at 2; *see also CDA 230: Legislative History*, *supra* note 39; *see also* DeChiaro, *supra* note 215.

[227] *See, e.g.*, Bambauer, note 68; *see also Infographic for CDA* 230, *supra* note 66.

[228] *See, e.g.*, DMLP Staff, *supra* note 49; *see also* O'Sullivan et. al., *supra* note 135; Gupta & Krishnan, *supra* note 129.

the scope of the Second Amendment,[229] so too might ICSs broaden the scope of Section 230, given their experience and revenue.[230]

Additionally, ICSs should be able to predict the way their products are used. Such predictions are common practice among manufacturers and importers of general use products in order to market, sell, or import a product.[231] These predictions don't have to be extensive, only reasonable.[232] The ICSs would either have to solve potential problems or issue warnings letting visitors know of the potential dangers. Warning people about the software they are using in a clear and understandable way should be common practice. [233]

Finally, this proposed solution, if implemented, would not affect the publishers of third-party speech. It also does not redefine the scope of Section 230. ICSs would still be protected against liability from third party speech and would only need to monitor the content that they themselves develop. Yet if this solution still infringes on Section 230, then perhaps it is time to rethink how broadly Section 230 should apply.

VII. CONCLUSION

Asking ICSs to be safer in how they deal with their visitors by modifying Section 230 should not be the end of internet free speech.[234] Requiring a website for firearms classifieds to register its visitors' addresses should not be the end of the website, and in fact, it is not: Armslist.com, the defendant in *Daniel v. Armslist, LLC*, now has two subscription options for visitors at $6.99 or $30 per month.[235] It states that this is an attempt to make the website better for "law abiding Ameri-

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[229] *See* Michael Waldman, *How the NRA Rewrote the Second Amendment*, POLITICO (May 19, 2014), https://perma.cc/BJ4J-DSM4 (describing how the NRA through lobbying and political organizing, expanded the meaning of the right to bear arms beyond the security of a free state and to include the protection of hearth and home).

[230] *See* Omri Wallach, *How Big Tech Makes Their Billions*, VISUAL CAPITALIST (July 6, 2020), https://perma.cc/6UQW-3J3U.

[231] *See* 15 U.S.C. § 2087; *see, e.g.*, *General Use Products: Certification and Testing*, U.S CONSUMER PROD. SAFETY COMM'N [hereinafter *General Use Products: Certification and Testing*], https://perma.cc/72N7-R6J4 (last visited Feb. 12, 2022) (requiring that importers of general products must certify in a written document that their product complies with the USCPS's rules).

[232] *General Use Products: Certification and Testing*, *supra* note 232 (allowing manufacturers and importers to reasonable testing programs to comply with the USCPS's testing requirements).

[233] *Cf.* Alex Hern, *I Read All the Small Print on the Internet and It Made Me Want to Die*, GUARDIAN (Jun. 15, 2015), https://perma.cc/XU3F-67XM; *see also* Natasha Lomas & Romain Dillet, *Terms and Conditions Are the Biggest Lie of Our Industry*, TECHCRUNCH (Aug. 21, 2015, 1:21 PM), https://perma.cc/GW3X-5FAF.

[234] *See generally EFF Involvement*, *supra* note 67.

[235] ARMSLIST, *supra* note 165.

cans" in the face of scams and troublesome users.[236] It also states that the "never-ending legal assaults" no longer allow the website to remain free,[237] since Armslist.com has been involved in multiple legal battles, even with Section 230 protection.[238] Could this suggest that Section 230 serves as life support for websites that simply are not viable?

Section 230 is not perfect—it deserves the same amount of consideration and critical analysis as any other law. While its benefits are enormous, there will always be room for improvement and renovation. Times are changing. The internet is changing. The stakes are so much higher than either a thousand duck bites or a lawless no-man's land, and they will only continue to grow. The law should reflect that.

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[236] *Id*.

[237] *Id*.

[238] *See* Chris Mueller, *'Reckless and Unlawful': Lawsuit Filed Against Online Gun Marketplace After Harrison Woman's Death*, POST CRESCENT (Oct. 5, 2020), https://perma.cc/7BEL-7GKR; *see also Stokinger v. Armslist*, BRADY (Oct. 28, 2018), https://perma.cc/R9MH-2QJY.