

2011

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Eric Taubel

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### Recommended Citation

Eric Taubel, *The ICS Three-Step: A Procedural Alternative for Section 230 of the Communications Decency Act and Derivative Liability in the Online Setting*, 12 MINN. J.L. SCI. & TECH. 365 (2011).

Available at: <https://scholarship.law.umn.edu/mjlst/vol12/iss1/13>

Taubel E. The ICS Three-Step: A Procedural Alternative for Section 230 of the Communications Decency Act and Derivative Liability in the Online Setting. *Minnesota Journal of Law, Science & Technology*. 2011;12(1):365-390.

## Note

### The ICS Three-Step: A Procedural Alternative for Section 230 of the Communications Decency Act and Derivative Liability in the Online Setting

*Eric Taubel\**

#### I. INTRODUCTION

In late 2006, submarine sandwich purveyor Quiznos invited its customers to participate in the “Quiznos vs. Subway TV Ad Challenge” by creating and submitting their own advertisements that compared the quality of Quiznos’ subs with those of their chief rival, Subway.<sup>1</sup> The user generated advertisements were submitted to and available on the website meatnomeat.com.<sup>2</sup> Subway immediately filed suit against Quiznos,<sup>3</sup> alleging that the ads contained false and misleading

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\*J.D. Candidate 2011, University of Minnesota Law School; M.A. 2007, University of Virginia; B.A., 2005, University of Georgia.

1. *Doctor’s Assocs. v. QIP Holders, L.L.C.*, No. 3:06-cv-1710, 2007 U.S. Dist. LEXIS 28811, at \*3–4 (D. Conn. Apr. 18, 2007); *see also* Louise Story, *Can a Sandwich Be Slandered?*, N.Y. TIMES, Jan. 29, 2008, at C1.

2. While the www.meatnomeat.com domain name that was used for the contest now directs users to the Quiznos home page, a number of users posted their ads to YouTube as well. *See, e.g.*, Createmovement, *Anything for Quizno’s*, YOUTUBE, <http://www.youtube.com/watch?v=3RaUApp8w1o> (last visited Jan. 23, 2011) (woman prefers man with Quiznos sub); Dianeroone, *Quiznos Contest Ad*, YOUTUBE, <http://www.youtube.com/watch?v=d9w0wAw5Kb8> (last visited Jan. 23, 2011) (market researcher prefers Quiznos); Junno1616, *Quiznos Commercial*, YOUTUBE, <http://www.youtube.com/watch?v=nzFK797DjM> (last visited Feb. 4, 2010) (guy sells Subway gift card to buy Quiznos); Pu4f, *Quiznos vs Subway*, YOUTUBE, [http://www.youtube.com/watch?v=\\_xv2tS63kPI](http://www.youtube.com/watch?v=_xv2tS63kPI) (last visited Jan. 23, 2011) (parodying the infamous diner scene in *When Harry Met Sally*); xxxunderthegunxxx, *Quiznos Commercial*, YOUTUBE, <http://www.youtube.com/watch?v=GKaMdH6RbMw> (last visited Jan. 23, 2011) (guy prefers eating sandwich to kissing girl).

3. Subway also named as a defendant iFilm, the website company running and hosting the contest. iFilm “was an online archive of short films, movie trailers, and other video clips of interest.” The site has since been sold and no longer operates as a video clip website.

information in violation of the Lanham Act.<sup>4</sup> Quiznos and iFilm filed a motion to dismiss for failure to state a claim upon which relief can be granted<sup>5</sup> claiming immunity under § 230 of the Communications Decency Act of 1996 (CDA).<sup>6</sup> The court denied the motion, holding that the immunity provision was an affirmative defense and as such not valid grounds for a dismissal.<sup>7</sup> This holding was contrary to the approach adopted by many of the courts that have addressed the issue, which holds that the immunity provisions of § 230 can form the basis of a 12(b)(6) motion.<sup>8</sup>

Congress passed the CDA in 1996.<sup>9</sup> A smaller provision within the CDA, the Internet Freedom and Family Empowerment Act,<sup>10</sup> provided immunity to interactive computer services (ICS)<sup>11</sup> from being held liable for torts committed by users of the service.<sup>12</sup> Courts have interpreted this immunity in a broad and sweeping manner,<sup>13</sup> making it

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<http://en.wikipedia.org/wiki/IFilm> (last visited Nov. 2, 2008). Wikipedia generally does not meet the standards of reliability required for scholarly work, *but cf.* Amy Bauer, Note, *Blogging on Broken Glass: Why the Proposed Free Flow of Information Act Needs a Specific Test for Determining When Media Shield Laws Apply to Bloggers*, 10 MINN. J.L. SCI. & TECH. 747, 771 n.6 (2009) (arguing that Wikipedia is an appropriate source for newer technologies and information sources).

4. 15 U.S.C. §1125 (2006); *Doctor's Assocs.*, 2007 U.S. Dist. LEXIS 28811, at \*1.

5. FED. R. CIV. P. 12(b)(6).

6. 47 U.S.C. § 230 (2006).

7. *Doctor's Assocs.*, 2007 U.S. Dist. LEXIS 28811, at \*6.

8. *See, e.g.*, *Universal Comm'n. Sys. v. Lycos*, 478 F.3d 413 (1st Cir. 2007); *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735, 2009 U.S. Dist. LEXIS 53246 (S.D.N.Y. June 15, 2009); *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 564 F. Supp. 2d 544 (E.D. Va. 2008); *Global Royalties, Ltd. v. Xcentric Ventures, L.L.C.*, No. 07-956-PHX-FJM, 2007 U.S. Dist. LEXIS 77551 (D. Ariz. Oct. 10, 2007); *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348 (E.D. Tex. Dec. 27, 2006); *MCW, Inc. v. BADBUSINESSBUREAU.COM, L.L.C.*, No. 3:02-CV-2727-G, 2004 U.S. Dist. LEXIS 6678 (N.D. Tex. Apr. 19, 2004).

9. Codified in scattered sections of Title 47 of the United States Code.

10. 47 U.S.C. § 230 (2006).

11. "The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2) (2006).

12. 47 U.S.C. § 230(c)(2) (2006).

13. *See, e.g.*, *Doctor's Assocs. v. QIP Holders, L.L.C.*, No. 3:06-cv-1710,

nearly impossible for any plaintiff to successfully hold an ICS liable for the tortious behavior of a third party. Early cases applied the immunity to access software providers,<sup>14</sup> such as America Online, CompuServe, and Prodigy.<sup>15</sup> Courts are increasingly applying immunity to web-based applications as well, such as Yahoo!, Craigslist, CafePress, MySpace, and Facebook.<sup>16</sup>

While the application and scope of the immunity granted is in legal flux,<sup>17</sup> the more interesting legal issue surrounding § 230 is the extent to which the immunity granted may serve as a basis for a 12(b)(6) motion to dismiss. Some courts have held that the immunity granted in § 230 should be interpreted as an affirmative defense, thereby precluding a 12(b)(6) motion.<sup>18</sup> A number of other courts have held that immunity under § 230 is valid grounds for a 12(b)(6) motion to dismiss.<sup>19</sup>

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2007 U.S. Dist. LEXIS 28811, at \*5 (D. Conn. Apr. 18, 2007).

14. 47 U.S.C. § 230(f)(4). These companies are often referred to as Internet Service Providers (ISPs), however, that language is not used in § 230. Section 230 divides the Internet into: interactive computer services (ICSs), information content providers (ICPs), and access software providers. 47 U.S.C. § 230(f)(2)–(4).

15. See Ken S. Meyers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 163 app. (2006) (charting the development of § 230 jurisprudence, of key importance in the disproportionately high number of cases in the early years of § 230 case law that names Internet Service Providers as the defendant. In the first 4 years 6 out of 12 cases name AOL as the defendant.).

16. See *Barnes v. Yahoo!, Inc.*, No. 05-36189, 2009 U.S. App. LEXIS 20053 (9th Cir. June 22, 2009) *amended by Barnes v. Yahoo!, Inc.*, No. 05-36189, 2009 U.S. App. LEXIS 21308 (9th Cir. Sept. 28, 2009); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill.2009); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009); *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735, 2009 U.S. Dist. LEXIS 53246 (S.D.N.Y. June 15, 2009); *Riggs v. MySpace Inc.*, No. 3:2008-247, 2009 U.S. Dist. LEXIS 37109 (W.D. Pa. May 5, 2009); *Curran v. Amazon.com, Inc.*, No. 2:07-0354, 2008 U.S. Dist. LEXIS 12479 (S.D.W. Va. Feb. 19, 2008); *Doe II v. MySpace Inc.*, 96 Cal. Rptr. 3d 148, (Cal. Ct. App. 2009); *Finkel v. Facebook, Inc.*, No. 102578/09, N.Y. slip op. (N.Y. Sup. Ct. Sept. 16, 2009).

17. *Compare Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1167–68 (9th Cir. 2008) (holding § 230 did not apply to a website which allowed users to engage in discriminatory housing practices) *with Chi. Lawyers' Comm. for Civ. Rights Under Law v. Craigslist*, 519 F.3d 666, 671–72 (7th Cir. 2008) (holding § 230 as a bar to claims arising under the Fair Housing Act).

18. *E.g.*, *Barnes v. Yahoo!, Inc.*, 565 F.3d 560, 562 (9th Cir. 2009), *amended by Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009) and *Barnes v. Yahoo!*, No. 05-36189, 2009 U.S. App. LEXIS 20053 (9th Cir. June 22, 2009); *Doctor's Assocs.*, 2007 U.S. Dist. LEXIS 28811, at \*6; *Novak v. Overture Servs.*, 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004).

19. *E.g.*, *Gibson*, 2009 U.S. Dist. LEXIS 53246, at \*6; *Nemet Chevrolet*,

This issue highlights the current tension between new technologies and the historically driven rules of American law. New technologies present both opportunities and challenges to the American legal system.<sup>20</sup> In the case of immunity from derivative liability,<sup>21</sup> technological advances have made applying old legal standards difficult, if not impossible. In fact, the drafters of § 230 seemed to recognize this reality, and created a grant of immunity to online publishers and distributors that far exceeded any protection available to traditional publishers and distributors.<sup>22</sup> In doing so Congress was attempting to enforce a series of policy choices that essentially all, at core, recognized the Internet's promise and possibility was tied to its openness.<sup>23</sup>

While these policy concerns which also motivate the desire to enlarge (or at least not constrict) § 230 immunity are wise and should be heeded, at present they risk subverting the legal rights of plaintiffs. A bright-line rule that ICSs are granted complete immunity to any action in which they are to be held liable as the speaker or publisher of content generated by a third party is judicially useful. This approach, however, neglects the evolutionary reality of Internet content.<sup>24</sup> In the

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Ltd. v. Consumeraffairs.com, Inc., 564 F. Supp. 2d 544, 550 (E.D. Va. 2008); Global Royalties, Ltd. v. Xcentric Ventures, L.L.C., No. 07-956-PHX-FJM, 2007 U.S. Dist. LEXIS 77551, at \*5-6 (D. Ariz. Oct. 10, 2007); Doe v. Bates, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348, at \*9-10 (E.D. Tex. Dec. 27, 2006).

20. See, e.g., David Liebow, Note, *DWI Source Code Motions after Underdahl*, 11 MINN. J.L. SCI. & TECH. 853 (2010) (analyzing the issue of access to the Intoxilyzer 5000 source code in Minnesota); J. Robert Schlimgen, Note, *Virtual World, Real Taxes: A Sales and Use Tax Adventure Through Second Life Starring Dwight Schrute*, 11 MINN. J.L. SCI. & TECH. 877 (2010) (analyzing the problems posed by virtual worlds on the legal issue of taxation).

21. Being held liable for the actions committed by users of the interactive service provided.

22. See Varty Defterderian, Note, *Fair Housing Council v. Roommates.com: A New Path for Section 230 Immunity*, 24 BERKELEY TECH. L.J. 563, 570 (2009) (citing *Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006)); Cecilia Ziniti, Note, *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, 587 (2008) (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997)).

23. See 47 U.S.C. § 230(b) (2006).

24. See Kerry Coffman & Andrew Odlyzko, *The Size and Growth Rate of the Internet*, FIRST MONDAY, Oct. 1998, at 1, available at [http://131.193.153.231/www/issues/issue3\\_10/coffman/index.html](http://131.193.153.231/www/issues/issue3_10/coffman/index.html).

years immediately following the passage of § 230, the identification of an ICS was relatively straightforward.<sup>25</sup> The task has, over time, become a more fact-intensive analysis.<sup>26</sup> This necessarily precludes its use as the basis of a 12(b)(6) motion. That is, in many cases there exists a material question of fact as to whether the defendant is an ICS or whether the defendant has in fact become a content provider.<sup>27</sup> To the extent this is a question to be resolved the use of § 230 as the basis for a 12(b)(6) motion seems inappropriate.

This Note argues that a uniform approach should be crafted that does not force plaintiffs to plead around § 230 immunity, yet still allows for judicial efficiency when it is clear on the face of the complaint that the defendant is entitled to § 230 immunity. Part I of this Note examines the legislative history and intent of § 230, the scope and history of § 230's application, the standards for evaluating whether an affirmative defense is appropriately brought under a 12(b)(6) motion, and finally the current split in approaches as to whether § 230 can support a 12(b)(6) motion to dismiss. Part II assesses the strengths and weaknesses of allowing § 230 to form the basis of a 12(b)(6) motion to dismiss, and the strengths and weakness of classifying § 230 as an affirmative defense that cannot support a motion to dismiss. This Note concludes that courts should adopt a standard that § 230 is an affirmative defense that cannot support a 12(b)(6) motion, but—using the court's power to request a response<sup>28</sup>—should force plaintiffs to address the defense prior to the opening of discovery.

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25. The very language of § 230 indicates the extent to which the drafters were targeting Internet access providers. 47 U.S.C. § 230(f)(2) (2006) (“[i]ncluding specifically a service or system that provides *access to the Internet* . . . .”) (emphasis added).

26. See, e.g., *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1166–67 (9th Cir. 2008).

27. *Id.*

28. FED. R. CIV. P. 7(a)(7).

## II. BACKGROUND

## A. LEGISLATIVE HISTORY AND INTENT OF THE COMMUNICATIONS DECENCY ACT

Congress passed the Telecommunications Act of 1996<sup>29</sup> in an attempt to regulate the Internet, which was still in its infancy.<sup>30</sup> Congress was partially motivated to change the telecommunications regulatory scheme by the recent decision of a New York trial court in *Stratton Oakmont, Inc. v. Prodigy Services*.<sup>31</sup>

In *Stratton Oakmont*, Prodigy, an internet service provider, was held liable for the libelous statement of a third party posted to a bulletin board<sup>32</sup> hosted on Prodigy's network.<sup>33</sup> Prodigy held itself out as a family friendly portal to the Internet that heavily monitored and edited the content appearing on its various bulletin boards. The court analogized the role of Prodigy to that of a newspaper, and using a publisher theory of liability found for the plaintiff.<sup>34</sup> This result threatened the open nature of the Internet by incentivizing internet service providers to either heavily censor content or completely deny users the ability to contribute content.

The first two subsections of § 230 expressly reveal (a) the congressional findings relating to the provision, as well as, (b)

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29. Pub. L. No. 104-104, 110 Stat. 133 (1996) (codified as amended in scattered sections of 47 U.S.C.).

30. Remarks on Signing Telecommunications Act of 1996, 32 WEEKLY COMP. PRES. DOC. 215 (Feb. 8, 1996).

31. *Stratton Oakmont v. Prodigy Servs.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at \*3-4 (N.Y. Sup. Ct. May 25, 1995). The congressional approval of such action can be seen in 47 U.S.C. § 230(b)(3) (2006). See H.R. REP. NO. 104-458, at 194 (1996), reprinted in 1996 U.S.C.C.A.N. 10 ("One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.").

32. "Computer bulletin boards are public areas on an electronic network where users may post messages and read messages previously posted by others." Edward J. Naughton, Note, *Is Cyberspace A Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 GEO. L.J. 409, 441 (1992) (Citing Loftus E. Becker, Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 CONN. L. REV. 203, 211-12 (1989)).

33. *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, at \*17-18.

34. *Id.* at \*10-11.

the policy rationales undergirding the enactment of the provision.<sup>35</sup> These sections read as a strong legislative rebuke of the decision in *Stratton Oakmont*. These sections have been invoked in litigation that extends beyond the immunity provided in § 230.<sup>36</sup>

The immunity granting provision of § 230 of the CDA provides:

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

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.<sup>37</sup>

In passing the CDA, Congress attempted to balance two competing interests, the growing concern that the Internet posed a potential threat to children, and the sense that the Internet’s potential lay largely in its unrestricted nature.<sup>38</sup> Congress attempted to achieve this balance by passing an amendment to 47 U.S.C. § 223<sup>39</sup> which would outlaw indecent communication over the Internet, with a standalone provision (what would become § 230) that provided immunity to ICSs who sought to help curb indecent and obscene material by

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35. 47 U.S.C. § 230(a)-(b) (2006).

36. *See, e.g.,* Ashcroft v. ACLU, 535 U.S. 564, 566 (2002) (citing 47 U.S.C. § 230(a)(3) as evidence of the United States policy goals with respect to the Internet); Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co., 534 U.S. 327, 360 (2002) (Thomas, J. concurring in part and dissenting in part)(citing 47 U.S.C. § 230(b)(1) as evidence of Congressional policy with respect to the Internet).

37. 47 U.S.C. § 203(c)(1) (2006).

38. *Compare* S. REP. NO. 104-23, at 59 (1995) (“The information superhighway should be safe for families and children. The Committee has been troubled by an increasing number of published reports of inappropriate uses of telecommunications technologies to transmit pornography, engage children in inappropriate adult contact, terrorize computer network users through “electronic stalking” and seize personal information.”), *with* 47 U.S.C. § 230(a)(1)-(5) (2006) (showing that while the Senate committee had concerns about families that use the Internet, the Code finds that the Internet has flourished to the benefit of all citizens with minimal regulation); *see also* Meyers, *supra* note 15, at 172–74.

39. “Title V—known as the “Communications Decency Act of 1996” (CDA)—contains provisions that were either added in executive committee after the hearings were concluded or as amendments offered during floor debate on the legislation. . . . They are informally described as the “indecent transmission” provision and the “patently offensive display” provision.” *Reno v. ACLU*, 521 U.S. 844, 858–59 (1997).



taking an active editorial role.<sup>40</sup> The concern that animated Congress to enact § 230 was a fear that absent a safe harbor provision ICSs would not actively police content for fear of being held to have derivative liability as a publisher.<sup>41</sup>

The tandem served as an attempt to manage these competing interests by making the Internet safe for families, without stifling “[t]he rapidly developing array of Internet and other interactive computer services available to individual Americans [which] represent an extraordinary advance in the availability of educational and informational resources to our citizens.”<sup>42</sup> This balance, however, was upset when the Supreme Court struck down § 223 as unconstitutional in *Reno v. ACLU*.<sup>43</sup> The decision in *Reno* thus left open only one half of the regulatory scheme designed to make the Internet both safe for children and safe from overreaching government involvement.

#### B. THE SCOPE AND APPLICATION OF § 230 IMMUNITY

In the 1997 case *Zeran v. America Online*, the Fourth Circuit became the first appellate court to interpret the scope of § 230 immunity.<sup>44</sup> Relying largely on the legislative history and intent written into § 230, the *Zeran* court held that § 230 granted wide immunity to ICSs,<sup>45</sup> and subsequent case law has

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40. Meyers, *supra*, note 15, at 165, 172–74; *see also* Doe v. Bates, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348, at \*11 (E.D. Tex. December 27, 2006) (“The legislative history further buttresses the Congressional policy against civil liability for Internet service providers. One key proponent of an amendment containing the language of § 230 at issue explained that the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so.”) (citation and internal quotation marks omitted).

41. *E.g.*, Doe v. Am. Online, Inc., 718 So. 2d 385, 389 (Fla. Dist. Ct. App. 1998).

42. 47 U.S.C. § 230(a)(1) (2006).

43. *Reno*, 521 U.S. at 882 (“We agree with the District Court’s conclusion that the CDA places an unacceptably heavy burden on protected speech . . .”).

44. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

45. *See, e.g., id.*; Defterderian, *supra* note 22, at 569–70; Ziniti, *supra* note 22, at 585; Eric Goldman, *Ninth Circuit Mucks Up 47 USC § 230 Jurisprudence... AGAIN!?*—Barnes v. Yahoo, TECH. & MARKETING L. BLOG (May 13, 2009, 8:04 PM), [http://blog.ericgoldman.org/archives/2009/05/ninth\\_circuit\\_m.htm](http://blog.ericgoldman.org/archives/2009/05/ninth_circuit_m.htm); Eric Goldman, *47 USC 230 Can Support 12b6 Motion to Dismiss*—Gibson v. Craigslist, TECH. & MARKETING L. BLOG (June 18, 2009, 6:41 PM), [http://blog.ericgoldman.org/archives/2009/06/47\\_usc\\_230\\_can.htm](http://blog.ericgoldman.org/archives/2009/06/47_usc_230_can.htm); Paul Alan

upheld that broad grant to include causes of action beyond defamation.<sup>46</sup> Central to the broad construction of § 230 was the holding in *Zeran* that Congress did not intend to draw a distinction between distributors and publishers with respect to the safe harbor provision.<sup>47</sup> While much of the early scholarly reaction to *Zeran* questioned the legitimacy of its interpretation of congressional intent, more recent scholarship has embraced the *Zeran* decision and challenged any perceived encroachment on the broad grant of § 230 immunity.<sup>48</sup>

In addition to being the first appellate court to address § 230 immunity, the *Zeran* court also set forth the test to determine if a defendant is due immunity under § 230.<sup>49</sup> Under the *Zeran* test, courts must answer three questions:<sup>50</sup> (1) whether a defendant is an ICS;<sup>51</sup> (2) whether the content at issue was posted or contributed by a third party; and (3) whether the plaintiff's cause of action attempts to treat the defendant as the speaker/provider of the content at issue.<sup>52</sup>

In the years since the passage of the CDA, the Internet has changed from a passive experience, where “users observed,

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Levy, *Can a Section 230 Immunity Defense Be Raised on a Motion to Dismiss?*, CONSUMER L. & POL'Y BLOG (MAY 8, 2009, 7:01 PM), <http://pubcit.typepad.com/clpblog/2009/05/can-a-section-230-immunity-defense-be-raised-on-a-motion-to-dismiss.html>; Eugene Volokh, *Craigslist Not Liable for Shooting That Used a Gun Sold Via Craigslist Ad*, VOLOKH CONSPIRACY (June 17, 2009, 12:41 PM), <http://volokh.com/posts/1245256918.shtml>.

46. See Ziniti, *supra* note 22, at 587 n.34 (citing Christopher Butler, *Plotting the Return of an Ancient Tort to Cyberspace: Towards a New Federal Standard of Responsibility for Defamation for Internet Service Providers*, 6 MICH. TELECOMM. TECH. L. REV. 247, 248, 254–56 (2000)).

47. “Any attempt to distinguish between “publisher” liability and notice-based “distributor” liability and to argue that Section 230 was only intended to immunize the former would be unavailing. Congress made no distinction between publishers and distributors in providing immunity from liability.” *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.C. 1998); Ziniti, *supra* note 22, at 588.

48. Compare Butler, *supra* note 46, at 250 (questioning *Zeran*'s outcome in light of congressional intent), with Defterderian, *supra* note 22, 577–82 (showing that Butler's earlier analysis of *Zeran* questions the validity of the decision while Defterderian's later analysis is less critical).

49. *Zeran*, 129 F.3d at 330.

50. The *Zeran* court did not explicitly label these as a three-part test. Ziniti, *supra* note 22, at 586; see also *Nemet Chevrolet, Ltd. v. Consumer Affairs, Inc.*, 564 F. Supp. 2d 544, 548 (E.D. Va. 2008).

51. 47 U.S.C. § 230(f)(2) (2006).

52. *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 39 (Wash. Ct. App. 2001); Ziniti, *supra* note 22, at 586; Defterderian, *supra* note 22 at 567.

found, and exchanged content passively” to an active experience where “users creat[e] and generat[e] content for public or semi-public view.”<sup>53</sup> In the early days of the Internet, the question of what constituted an ICS was invariably clearer. However, the shift away from ICSs as portals to the Internet,<sup>54</sup> combined with the rise of web-based content providers<sup>55</sup> and Web 2.0,<sup>56</sup> makes the question of who can claim § 230 immunity more difficult.<sup>57</sup> No longer are people greeted online by the mid-90s catch-phrase, “You’ve got mail!” Rather than using a dial-up modem and an internet service provider, people are permanently connected to the Internet. The way users engage the Internet has changed from passive and consumptive to active and generative. In this new environment, the key distinction, for § 230 purposes, of who created the content is anything but straightforward.

The proliferation and alteration of the purposes and uses of the Internet has decreased the ease of delineating the speech of users from that of ICSs. As in *Fair Housing Council v. Roommates.com*, courts will hold liable those ICSs who induce a third party to commit tortious actions.<sup>58</sup> In *Roommates.com* the court held Roommates.com liable for violations of the Fair Housing Act, due to illegally discriminating in housing selection based on race. The court reasoned that because Roommates.com offered users pull-down menus where they could select the race, sex, sexual orientation, and parental status of potential roommates that Roommates.com was a content provider and the speaker of the discriminatory content.<sup>59</sup>

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53. Ziniti, *supra* note 22, at 590.

54. *E.g.*, AOL, EarthLink, Prodigy, etc.

55. *E.g.*, Craigslist, eBay, Yahoo!, etc.

56. *See generally* Tim O’Reilly, *What is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, COMM. & STRATEGIES, First Quarter 2007, at 17. (defining Web 2.0 as a platform that delivers continually updated software whose utility depends on the interaction of its users).

57. For a discussion of the changes the Internet has undergone since the passage of the Communications Decency Act of 1996, with particular emphasis on the rise of Web 2.0 and user created content see Ziniti, *supra* note 22, at 590–94.

58. *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1169 (9th Cir. 2008).

59. Some commentators have argued that this distinction ultimately invokes the logic of the *Stratton* court, for example, see Defterderian, *supra*

This turn in § 230 jurisprudence and shift in the way the Internet is used highlights the increasing difficulty in determining whether a defendant constitutes an ICS.<sup>60</sup> Moreover, the logic of *Roommates.com* turns the first inquiry under *Zeran* of whether the defendant is an ICS<sup>61</sup> and therefore due immunity into a two-level inquiry, looking first to whether the defendant is an ICS, and then to whether the ICS was active or passive in the creation of the content in question.<sup>62</sup>

### C. THE CURRENT SPLIT IN APPROACHES TO § 230 AND MOTIONS TO DISMISS

For the most part, academic commentary has focused on the substantive shape and scope of § 230 immunity, while largely ignoring its procedural implications.<sup>63</sup> Given the nature of the inquiry, there are essentially two approaches to the question of whether § 230 can support a 12(b)(6) motion: either it can or it cannot.<sup>64</sup>

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note 22, at 575.

60. *Perfect 10 v. Google*, No. CV 04-9484 AHM (SHx), 2008 U.S. Dist. LEXIS 79200, at \*24 (C.D. Cal. July 16, 2008) (“The question whether any of Google’s conduct disqualifies it for immunity under the CDA will undoubtedly be fact-intensive. Neither party has proffered evidence sufficient for the Court to determine at this stage whether Google is entitled to CDA immunity.”).

61. This is a weighing of whether the defendant is either an ICS or an ICP. For definitions see 47 U.S.C. § 230(f)(2)-(3).

62. *See Roommates.com*, 521 F.3d at 1162–63 (9th Cir. 2008); Defterderian, *supra* note 22, at 566.

63. *See supra* Part I.B.

64. There are, of course, intermediary approaches. Some courts will consider the filing of a 12(b)(6) motion to dismiss invoking the immunity clause of § 230 as a Rule 56 summary judgment motion. *See, e.g., Zango, Inc. v. Kaspersky Lab, Inc.*, No. C07-0807-JCC, 2007 U.S. Dist. LEXIS 97332, at \*4 (W.D. Wash. Aug. 28, 2007), *aff’d*, 568 F.3d 1169 (9th Cir. 2009) (“Although initially presented as a motion under Rule 12(b)(6), Defendant Kaspersky USA’s motion is properly reviewed as a motion for summary judgment under Rule 56 because “matters outside the pleading [we]re presented to and not excluded by the court.”); *Novak v. Overture Servs.*, 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004) (holding that a court should generally look at a motion to dismiss based on § 230 immunity to be interpreted as either a 12(c) motion to dismiss or a summary judgment motion). Other courts, while recognizing the procedural benefits of a Rule 12(c) or Rule 56 motion, will hear the 12(b)(6) so long as it does not disadvantage the plaintiff. *See, e.g., Global Royalties, Ltd. v. Xcentric Ventures, L.L.C.*, No. 07-956-PHX-FJM, 2007 U.S. Dist. LEXIS 77551, at \*6 (D. Ariz. Oct. 10, 2007) (“We take a practical approach. If we thought plaintiff were [sic] procedurally disadvantaged, we would deny defendant’s motion and require one under Rule 56. . . . Whether we construe this motion as one under Rule 12(b)(6) or as an unenumerated 12(b) motion, we agree that the CDA defeats the defamation claim.”).

The difficulty, however, in this straightforward question arose recently in *Barnes v. Yahoo!* before the Ninth Circuit Court of Appeals.<sup>65</sup> The court initially held that § 230 was an affirmative defense that plaintiffs were not required to plead around:

Although the district court dismissed this case under Rule 12(b)(6), section 230(c) provides an affirmative defense. The assertion of an affirmative defense does not mean that the plaintiff has failed to state a claim, and therefore does not by itself justify dismissal under Rule 12(b)(6). Neither the parties nor the district court seem to have recognized this, but Yahoo ought to have asserted its affirmative defense by responsive pleading, which is the normal method of presenting defenses except for those specifically enumerated in Rule 12(b). It might then have sought judgment on the pleadings under Rule 12(c) . . . . We hasten to clarify, all the same, that section 230 is an affirmative defense and district courts are to treat it as such.<sup>66</sup>

This particular portion of the decision was roundly criticized.<sup>67</sup> This portion of the decision was subsequently removed by the Ninth Circuit, sitting *en banc*.<sup>68</sup>

The approach arguing against the use of a 12(b)(6) motion rests largely on the contention that the immunity provision of § 230 serves as an affirmative defense.<sup>69</sup> This argument contends that to allow the use of § 230 as the basis for a 12(b)(6) motion is to consider facts beyond the four corners of the complaint,<sup>70</sup> which plaintiffs should not be required to

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65. *Barnes v. Yahoo!, Inc.*, 565 F.3d 560 (9th Cir. 2009), *amended by*, 570 F.3d 1096 (9th Cir. 2009).

66. *Id.* at 562 (citations omitted).

67. See Andrew R. Boertz, *Ninth Circuit Amends Barnes v. Yahoo Decision; Resolves Split as to Application of the Communications Decency Act*, ADLAW BY REQUEST (June 23, 2009), <http://www.adlawbyrequest.com/2009/06/articles/in-the-courts/ninth-circuit-amends-barnes-v-yahoo-decision-resolves-split-as-to-application-of-the-communications-decency-act/>; Goldman, *Ninth Circuit Mucks Up 47 USC 230 Jurisprudence....AGAIN!?*—*Barnes v. Yahoo*, *supra* note 45; Levy, *supra* note 45 (“The Ninth Circuit’s discussion of this point is dictum, and we can hope that, when controlling authority is cited, trial courts and other panels on the Court of Appeals will get it right.”).

68. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009).

69. See, e.g., *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003); *Curran v. Amazon.com*, No. 2:07-0354, 2008 U.S. Dist. LEXIS 12479, at \*32–33 (S.D. W. Va. Feb. 19, 2008); *Novak*, 309 F. Supp. 2d at 452.

70. *Contra Doe v. Am. Online, Inc.*, 718 So. 2d 385, 388 (Fla. Dist. Ct. App. 1998) (stating that the lower court did not err in referencing information outside the four corners of the complaint when granting a 12(b)(6) motion to dismiss on the basis of § 230).

plead around—at least at this early stage in the litigation process.<sup>71</sup>

The second approach argues that a 12(b)(6) motion is the appropriate avenue for the assertion of § 230 immunity<sup>72</sup> because the grant of immunity prevents the plaintiff from establishing a set of facts that could afford the plaintiff relief.<sup>73</sup> Some courts have held that, while affirmative defenses generally are beyond the scope of the complaint, there are situations in which the facts alleged in the complaint are sufficient to allow the affirmative defense to form the basis of a 12(b)(6) motion—such as when the affirmative defense is the violation of a statute of limitations.<sup>74</sup> In fact, a number of courts have found that § 230 similarly can be an affirmative defense that is discernable based on the facts alleged in a complaint.<sup>75</sup>

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71. *GTE Corp.*, 347 F.3d at 657 (“Affirmative defenses do not justify dismissal under Rule 12(b)(6); litigants need not try to plead around defenses.”).

72. It is important to recognize that this approach does not change the status of immunity in § 230 as an affirmative defense, but rather argues that the affirmative defense can be found on the face of the complaint. *See, e.g.*, *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 564 F. Supp. 2d 544, 550 (E.D. Va. 2008); *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735, 2009 U.S. Dist. LEXIS 53246, at \*6 (S.D.N.Y. June 15, 2009). Moreover, when courts have recognized other affirmative defenses as the bases for 12(b)(6) motions to dismiss, they tend to invoke affirmative defenses which necessarily appear on the face of complaint. Rhynette Northcross Hurd, Note, *The Propriety of Permitting Affirmative Defenses to Be Raised by Motions to Dismiss*, 20 MEM. STATE U.L. REV. 411, 412–13 (1990). Thus, courts are particularly likely to allow a 12(b)(6) based on a statute of limitations defense, an immunity defense, or a statute of frauds defense. *Id.* at 413. These exceptions are, however, not absolute and courts often hold that questions of fact require further consideration. *Id.* at 413, n.11.

73. *MCW, Inc. v. BADBUSINESSBUREAU.COM*, No. 3:02-CV-2727-G, 2004 U.S. Dist. LEXIS 6678, at \*21 (N.D. Tex. Apr. 19, 2004).

74. *Goodman v. PraxAir, Inc.*, 494 F.3d 458, 464 (4th Cir. Md. 2007) (citing *Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993)) (discussing asserting the validity of a statute of limitations affirmative defense as the basis for a 12(b)(6) motion when sufficient facts are alleged in the complaint).

75. *See, e.g.*, *Nemet*, 564 F. Supp. 2d at 550 (“The Complaint focuses largely on Defendant’s publication of these comments by third-parties, therefore it is reasonable for the Court to conclude that Plaintiffs seek to hold Defendants responsible either as publishers or as speakers of third party content.”).

## D. SUMMARY

In 1996 Congress attempted comprehensive regulation of the burgeoning Internet through two separate pieces of legislation.<sup>76</sup> The acts sought to balance the competing interests of child protection and free and open communication.<sup>77</sup> In *Reno* the court struck down the prohibition on indecent and patently offensive communication on the Internet.<sup>78</sup> What remained of the regulatory scheme crafted by Congress was the immunity granted to ICSs who took an active role in controlling content.<sup>79</sup>

There is little consensus among courts over how to handle the question of whether § 230 can support a 12(b)(6) motion. Some courts have construed the safe harbor of § 230 as a complete bar to legal action, allowing the invocation of the immunity in a 12(b)(6) motion to dismiss.<sup>80</sup> Other courts have held that the immunity is not a total bar to liability, but rather serves as an affirmative defense which is properly raised in an answer.<sup>81</sup> The ambiguity created by these differing approaches reduces reliability and consistency and creates incentives for forum shopping. A uniform approach to the question is necessary.

## III. ANALYSIS

Allowing a defendant to use the immunity provision of the CDA to form the basis of a motion to dismiss is not without merit. The approach allows for judicial economy, honors the legislative intent, and is in-line with recent Supreme Court jurisprudence on the question of pleading sufficiency. However, this approach is not without its pitfalls. Allowing § 230 to form the basis of a 12(b)(6) motion is manifestly unfair to plaintiffs inasmuch as it requires them to anticipate a possible defense and then address it in their complaint. Additionally, allowing § 230 to form the basis of a 12(b)(6) motion subverts judicial

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76. *See supra* Part I.A.

77. *Id.*

78. *Reno v. ACLU*, 521 U.S. 844, 882 (1997).

79. It is of note that the title of the specific subsection of § 230 reads, "Protection for 'Good Samaritan' blocking and screening of offensive material." 47 U.S.C. § 230(c) (2006).

80. *See supra* Part I.B.

81. *See, e.g., Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003).

efficacy in that it prevents courts from conducting a full and thorough analysis of the issues as required by *Zeran*. Finally, this approach fails to recognize that the changing landscape of the Internet has made answering the question of whether a defendant is an ICS a fact-intensive inquiry that requires more evaluation than is required in a motion to dismiss.

At present there is not a uniform approach to how courts should handle a defendant's motion to dismiss based on the immunity grant in § 230. This confusion creates problems with respect to predictability and also incentivizes forum shopping. Thus, it is important to adopt a uniform approach to the issue. This Note argues that when a defendant moves to dismiss under 12(b)(6), the court should use its authority under rule 7(a)(7) of the Federal Rules of Civil Procedure to request that the plaintiff specifically address the question of § 230 immunity. The court should then rule on the motion as a 12(c) motion on the pleadings. This approach does not force plaintiffs to plead around § 230 and yet still preserves judicial economy and defendant resources.

#### A. BENEFITS OF ALLOWING § 230 TO FORM THE BASIS OF A MOTION TO DISMISS

Three strong arguments exist in favor of allowing § 230 to serve as the basis of a 12(b)(6) motion to dismiss. First, allowing defendants to invoke § 230 in a 12(b)(6) motion promotes judicial economy by preventing cases that are clearly precluded from moving forward. Second, allowing § 230 to form the basis of a 12(b)(6) motion honors the policy goals behind the CDA by preserving a broad grant of immunity. Finally, allowing § 230 to form the basis of a 12(b)(c) motion aligns with recent Supreme Court decisions *Ashcroft v. Iqbal*<sup>82</sup> and *Bell Atlantic v. Twombly*,<sup>83</sup> which suggest that § 230 immunity can appropriately sustain a 12(b)(6) motion to dismiss.

##### 1. Judicial Economy

Allowing § 230 to form the basis of a 12(b)(6) motion promotes judicial economy in two ways: (1) courts can dismiss cases that will never win, even if they state a cognizable claim,<sup>84</sup> and (2) courts can prevent strategic behavior by

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82. 129 S. Ct. 1937 (2009).

83. 550 U.S. 544 (2007).

84. See *MCW, Inc. v. BADBUSINESSBUREAU.COM*, No. 3:02-CV-2727-



plaintiffs attempting to manipulate the pleading rules in order to force the hand of the defendant.<sup>85</sup>

First, given the scope of § 230, most claims arise when a plaintiff seeks to have the defendant remove content created by a third party.<sup>86</sup> It is clear that in these situations the defendant is entitled to § 230 immunity. That is, both the plaintiff and defendant will readily agree that the defendant is an ICS, the content was posted or created by a third party, and the only causes of action available to the plaintiff are those which would hold the defendant liable as either a speaker or a publisher. In such a scenario, the *Zeran* test is met, and no amount of discovery would be able to prove otherwise.<sup>87</sup>

The second concern arises when a strategic plaintiff is able to use the threat of discovery as a mechanism for strong-arming a defendant into a settlement in which they agree to remove the offending content.<sup>88</sup> In this way the plaintiff is able to accomplish his goal, in spite of the fact that legally it is the wrong result. Such abuse transforms the courts from arbiters of justice into tools for relief to be wielded by those plaintiffs with the necessary means and knowledge. Not surprisingly, these cases have drawn extensive coverage from legal bloggers, who not only ardently oppose any increased regulation of the Internet by legislatures but also are suspicious of legal decisions that potentially weaken the legal protection of ICSs. These bloggers have criticized the perceived weakening of § 230 immunity by courts limiting its use as the basis for a 12(b)(6)

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G, 2004 U.S. Dist. LEXIS 6678, at \*24 (N.D. Tex. Apr. 19, 2004).

85. Boortz, *supra* note 67 (“Thus, the CDA-as-an-affirmative-defense theory would create an incentive for defendants to settle cases for which they ought to receive protection, and create an incentive for plaintiffs to bring cases in the Ninth Circuit strictly for this reason.”).

86. See, e.g., *Barnes v. Yahoo!, Inc.*, 565 F.3d 560, 562 (9th Cir. 2009), *amended by*, 570 F.3d 1096 (9th Cir. 2009); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 327 (4th Cir. 1997).

87. *Zeran*, 129 F.3d at 330.

88. See Andrew R. Boortz, *Can the CDA Support 12(b)(6) Motion to Dismiss? Ninth Circuit Says ‘No’; New York District Court Says ‘Yes.’*, ADLAW BY REQUEST (June 19, 2009), <http://www.adlawbyrequest.com/2009/06/articles/in-the-courts/can-the-cda-support-12b6-motion-to-dismiss-ninth-circuit-says-no-new-york-district-court-says-yes/>. This strategic behavior by plaintiffs would also cut against the policy concerns announced in § 230, specifically the incentive to develop new technologies.

motion.<sup>89</sup>

The primary argument stemming from this concern is that if a 12(b)(6) motion were not available, strategic plaintiffs would be able to seek alternative relief through the legal system.<sup>90</sup> Even though the court would be incapable of granting actual relief through an order, as the defendant would be immunized by § 230, the plaintiff could exploit the threat of costly discovery to fashion their own relief.<sup>91</sup> Since removing the availability of 12(b)(6) would require that defendants file an answer to the complaint, the process of defending suits would be enlarged for ICSs.<sup>92</sup> Defending suits would thus become both more costly and time intensive.<sup>93</sup> Additionally, preventing a 12(b)(6) motion in cases of § 230 immunity would incentivize ICSs to settle claims which would ultimately fail.<sup>94</sup> The threat of discovery would then serve as an end-around on the immunity provision.

Finally, there is a strong argument that the liberal rules allowing parties to amend their pleadings—courts generally allow plaintiffs leave to cure procedural defects in their complaints—supports the proposition that § 230 should be available to form the basis of a 12(b)(6) motion.<sup>95</sup> The rationale

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89. See, e.g., Goldman, *47 USC 230 Can Support 12b6 Motion to Dismiss*—Gibson v. Craigslist, *supra* note 45; Goldman, *Ninth Circuit Mucks Up 47 USC 230 Jurisprudence....AGAIN!?*—Barnes v. Yahoo, *supra* note 45; Levy, *supra* note 45; Volokh, *supra* note 45.

90. Even in the current climate where a majority of courts hold that a 12(b)(6) is available, plaintiffs can find ways to strategically manipulate the legal system to get around the immunity provisions of § 230. Recently, plaintiffs have attempted to avoid the reach of § 230, and still get relief from ICSs, by filing suit against the person(s) who created the content on the offending ICS, and then requesting, as relief, the elimination of the offending content. These plaintiffs obtain a default judgment against the ICS user who posted the offending content, then take the order for injunctive relief and seek to enforce it upon the offending ICS. This strategy functions as an end-around the immunity of § 230 by allowing plaintiffs to gain the relief they initially sought, without ever having to litigate either the applicability of § 230 to the ICS or the merits of the underlying claim. Eric Goldman, *A New Way to Bypass 47 USC 230? Default Injunctions and FRCP 65*, TECH. & MARKETING L. BLOG (Nov. 10, 2009), [http://blog.ericgoldman.org/archives/2009/11/a\\_new\\_way\\_to\\_by.htm](http://blog.ericgoldman.org/archives/2009/11/a_new_way_to_by.htm).

91. See Boortz, *supra* note 88. This strategic behavior by plaintiffs would also cut against the policy concerns announced in § 230, specifically the incentive to develop new technologies. See 47 U.S.C. § 230(b)(3) (2006).

92. Levy, *supra* note 45.

93. *Id.*

94. Boortz, *supra* note 85.

95. *Cf.* Hurd, *supra* note 72, at 426.

invoked by courts for allowing use of §230 as an affirmative defense—the elements necessary to sustain the defense appear on the face of the complaint<sup>96</sup>—however, can be used to prevent the ability of the plaintiff to amend the complaint, since it is a legal (§ 230 immunity) and not procedural defect.<sup>97</sup>

## 2. Policy Goals

There are also strong policy rationales for allowing § 230 to form the basis of a 12(b)(6) motion. The strongest policy rationales for allowing a 12(b)(6) motion based on § 230 to defeat an otherwise valid claim are contained within the statutory language of the CDA.<sup>98</sup> By passing the CDA, Congress hoped to effectuate five key policy goals: (1) promote the growth and evolution of the Internet and interactive media,<sup>99</sup>(2) preserve the unregulated nature of the Internet,<sup>100</sup> (3) increase user control over content,<sup>101</sup> (4) remove barriers to software and other programs that allow parents to regulate and filter the content their children may access,<sup>102</sup> and (5) regulate the Internet to the extent that criminal laws (specifically obscenity laws) are enforced.<sup>103</sup>

Allowing plaintiffs to engage in protracted legal disputes by barring a 12(b)(6) motion would severely encumber policy goals one and three. ICSs would clamp down on expression for fear of increased liability: “[f]aced with potential liability for each message republished by their services, interactive computer service providers might choose to *severely* restrict the number and type of messages posted. Congress considered the weight of speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.”<sup>104</sup>

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96. See, e.g., *Doe v. Am. Online, Inc.*, 718 So. 2d 385, 388 (Fla. App. 1998).

97. *Id.* at 389 (holding that “the complaint cannot be amended to overcome *section 230* immunity.”) (emphasis in original). *But see* *Novak v. Overture Servs.*, 309 F. Supp. 2d 446, 453 (E.D.N.Y. 2004) (“If Plaintiff wishes to substantively amend his claims, he must do so in accordance with the federal rules of civil procedure and the Court’s individual practice rules.”).

98. 47 U.S.C. § 230 (2006).

99. *Id.* § 230(b)(1).

100. *Id.* § 230(b)(2).

101. *Id.* § 230(b)(3).

102. *Id.* § 230(b)(4).

103. *Id.* § 230(b)(5).

104. *Zeran v. America Online, Inc.*, 129 F. 3d 327, 331 (4th Cir. 1997) (emphasis added).

ICSs would be severely disincentivized, under a system where litigating content liability issues is protracted and costly, from developing more services and technologies because of the potential for greater and greater liability. Moreover, this regime would frustrate the third enunciated goal<sup>105</sup>—increased user control over content—insomuch as ICSs would be especially reluctant to develop and offer any services or technology where users would have greater input or control. Expanding user content would expand the universe of content that the ICSs would have to regulate and control in order to prevent potential suits which they would have to defend at least through the discovery stage. Additionally, allowing cases to move to discovery could undercut the free and open nature of the Internet by forcing ICSs to take an overly proactive role in filtering, editing, and controlling the content published.<sup>106</sup>

### 3. *Iqbal* and *Twombly*

The recent decisions by the Supreme Court, with respect to the detail required in a pleading, suggest that plaintiffs must, in order to meet the new 12(b)(6) burden, plead around § 230 or risk being dismissed from court.<sup>107</sup> In *Twombly* the Court held that a complaint can withstand a motion to dismiss only once it has pled sufficient factual content to allow the Court to reasonably infer that the defendant is liable for the alleged malfeasance.<sup>108</sup> *Twombly* further held that naked allegations absent “further factual enhancement”<sup>109</sup> and “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements of law” would not be enough to sustain a complaint against a motion to dismiss.<sup>110</sup>

In the wake of *Twombly* and the uncertainty of its application,<sup>111</sup> the Supreme Court ruled in *Iqbal* that the

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105. 47 U.S.C. § 230(b)(3) (2006).

106. *But see* 47 U.S.C. 230(c)(2)(a) (2006) (granting immunity to ICSs that “voluntarily take[] [action] 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 . . .”).

107. *See* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

108. *Twombly*, 550 U.S. at 556.

109. *Iqbal*, 129 S. Ct. at 1949.

110. *Twombly*, 550 U.S. at 555.

111. *See, e.g.*, Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 6–11 (2010); Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After Bell Atlantic Corp.*

plausibility standard in *Twombly* required a two prong approach.<sup>112</sup> In the first prong, the Court in *Iqbal* required that courts determine which allegations are nonconclusory and as such due a presumption of truth under the standards of a motion to dismiss.<sup>113</sup> Under the second prong, after making those initial determinations, the Court then proceeds to the *Twombly* plausibility test.<sup>114</sup> Given the higher bar established in *Iqbal*<sup>115</sup> it might be argued that most, if not all, plaintiffs will be unable to defeat a § 230 based motion to dismiss, since on the face of the complaint it is likely that the elements of the defense will appear and thereby destroy the plausibility of relief.<sup>116</sup>

#### B. BENEFITS OF CASTING § 230 AS AN AFFIRMATIVE DEFENSE

The primary benefit to barring the safe harbor provisions of § 230 from forming the basis of a 12(b)(6) motion is that it preserves pleading integrity by allowing the plaintiff to bring the action and make her case, without forcing complex pleadings. Making 12(b)(6) unavailable to defendants wishing to invoke a § 230 immunity defense also cures three problems implicit in allowing a 12(b)(6) motion based on § 230: first, allowing a 12(b)(6) motion is incongruous with notice pleading;<sup>117</sup> second, the use of § 230 as the basis of a 12(b)(6) motion misapprehends the nature of motions to dismiss;<sup>118</sup> and third, in practice (if not in theory as well) the use of 12(b)(6) cuts short the *Zeran* test. Finally, holding the § 230 immunity to be an affirmative defense inapplicable in a 12(b)(6) motion is

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v. *Twombly* and *Ashcroft v. Iqbal*, 94 MINN. L. REV. 505, 513 (2010).

112. Tymoczko, *supra* note 111, at 506.

113. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009).

114. *Id.*

115. A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 445–46 (2008).

116. This analysis however, likely carries the point too far. Such an interpretation of *Iqbal* would vitiate the requirement that affirmative defenses be affirmatively stated inasmuch as this interpretation would allow a defendant to raise any affirmative defense on a 12(b)(6) motion. This in turn would require plaintiffs to not only raise every conceivable affirmative defense in order to raise their complaint from possible to the probable, but also to support each with more than conclusory statements of law.

117. *See, e.g., Twombly*, 550 U.S. at 570; *Curran v. Amazon.com*, 2008 U.S. Dist. LEXIS 12479, \*6–7 (citing *Twombly*, 550 U.S. at 555–56).

118. *Cf. Hurd, supra* note 72, at 422–24.

more likely to promote justice, in light of changes in the manner in which users interact with the Internet.<sup>119</sup>

### 1. Incongruities with Current Pleading Regime

The Federal Rules of Civil Procedure require that a plaintiff must provide, “[a] short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>120</sup> The Supreme Court has held that this requirement means that pleaders need only plead “[e]nough facts to state a claim to relief that is plausible on its face.”<sup>121</sup> By allowing an affirmative defense to form the basis of a 12(b)(6) motion, courts essentially require plaintiffs to anticipate and plead around the invoked immunity section. The statements and averments thus required by pleaders would assuredly constitute more than a short plain statement of facts, and would similarly contain more than the necessary facts to state a facially plausible claim.<sup>122</sup>

### 2. Nature of a 12(b)(6) Motion

A motion to dismiss tests the sufficiency of the claim brought, and is granted when the pleader can prove no set of facts that would entitle the pleader to relief.<sup>123</sup> A 12(b)(6) motion is successful when the complaint fails to advance a claim that, even if true, would allow the court to grant some form of relief to the petitioner. By contrast, the assertion of an affirmative defense functions not as a denial of wrongdoing, but rather as a mechanism for avoiding liability.<sup>124</sup> Thus, the invocation of an affirmative defense as evidence of the lack of a stated claim is at the best counterintuitive, and more likely nonsensical.<sup>125</sup> This suggests that the question of the degree to which a defendant is due § 230 immunity is a question requiring discovery to resolve.<sup>126</sup>

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119. See generally O'Reilly, *supra* note 56 (explaining the development of the Internet from Web 1.0 to Web 2.0).

120. FED. R. CIV. P. 8(a)(2).

121. *Twombly*, 550 U.S. at 570.

122. See *supra* note 116 and accompanying text.

123. See, e.g., Hurd, *supra* note 72, at 424–25.

124. *Id.* at 422–23.

125. An affirmative defense admits that there is a claim, but offers a reason why liability should not attach. A motion to dismiss argues that the plaintiff has failed to state a cognizable legal claim upon which relief can be granted.

126. *Curan v. Amazon.com, Inc.*, 2008 U.S. Dist. LEXIS 12479, \*31 (2008);

Additionally, motions to dismiss are to be adjudicated exclusively on the claims and allegations contained in the complaint.<sup>127</sup> Since plaintiffs will rarely (if ever) allege the necessary facts to support an affirmative defense, it is procedurally problematic for courts to allow the immunity provisions of § 230 to form the basis of a 12(b)(6) motion.<sup>128</sup> That is, plaintiffs will often allege that in order for the court to successfully grant the motion to dismiss on the grounds of an affirmative defense, the court would have to look beyond the four corners of the complaint, which according to the plaintiff would be inappropriate.<sup>129</sup>

### 3. Full Scope of the *Zeran* Test

Courts that allow the immunity provisions of § 230 to form the basis of a 12(b)(6) motion do so at the expense of a full and developed analysis of the *Zeran* standard.<sup>130</sup> The *Zeran* test requires a three part inquiry that assesses whether the defendant is an ICS, the content was posted by a third party, and if the plaintiff's cause of action seeks to hold the defendant liable as either a speaker or publisher of that content.<sup>131</sup> Courts that allow the defendant to invoke § 230 at the 12(b)(6) stage often hold that the status of the defendant as an ICS is clear from the face of the complaint.<sup>132</sup> This, however, ignores the remaining two questions. A finding that the defendant is an ICS does not necessarily mean the other two questions will be answered affirmatively as well.<sup>133</sup>

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*see also* Michael Erdman, *Court: Section 230 Is an Affirmative Defense, Thus It's (Generally) Not an Appropriate Basis For a Motion To Dismiss*, ONLINE LIABILITY BLOG (Feb. 26, 2008), <http://onlineliabilityblog.com/2008/02/26/court-section-230-is-an-affirmative-defense-thus-its-generally-not-an-appropriate-basis-for-a-motion-to-dismiss/>.

127. *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 564 F. Supp. 2d 544, 548 (E.D. Va. 2008).

128. *Id.* *See supra* note 116 (arguing that to require plaintiffs to plead around affirmative defenses would fundamentally undermine the current pleading regime).

129. *Contra Nemet*, 564 F. Supp. 2d at 547–48 (“In addition to the complaint, the court may also examine documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.”) (citations omitted) (internal quotation marks omitted).

130. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

131. *See supra* Part I.B.

132. *See, e.g., Nemet*, 564 F. Supp. 2d at 544.

133. While it is decidedly easier to answer the second and third questions

*Nemet* presents a clear example of this problem.<sup>134</sup> The *Nemet* court held that, “[t]he crucial inquiry for determining immunity is the role of the Defendant as it pertains to the statements at issue in the Complaint.”<sup>135</sup> Although the court engaged in an exhaustive discussion of the first element—the extent to which the defendant can be considered an ICS vis-à-vis an information content provider—the court only briefly considered the extent to which the second and third elements are met.<sup>136</sup> The court succinctly found that, “[t]he complaint identifies the third-party information content providers. . . . The complaint focuses largely on Defendant’s publication of these comments by third-parties, therefore it is reasonable for the court to conclude that Plaintiffs seek to hold Defendant responsible either as publishers or as speakers of third party content.”<sup>137</sup> In shortchanging the final two questions of the *Zeran* analysis, courts risk over broadening the scope of § 230 by removing integral limits on its application.<sup>138</sup>

#### 4. Newly Fact-Intensive Inquiry

The shift in the manner in which users engage the Internet and the rise of Web 2.0<sup>139</sup> has made the identification of an ICS a more difficult task. The influx of user generated content (UGC) has substantially blurred the lines.<sup>140</sup> Moreover, the application of § 230 in a blanket manner to any claim arising out of a suit against any defendant that can make a colorable

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(if the content in question posted by a third party and if the plaintiff seeking to hold the defendant liable as either speaker or publisher, respectively), it is nonetheless important to consider them. *Roommates.com* provides a good example where the most interesting and legally complex portion of the decision dealt with the second question about who should be considered the author of the published content. *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157 (9th Cir. 1998).

134. *Nemet*, 564 F. Supp. 2d at 544.

135. *Id.* at 548.

136. *Id.* at 548–49.

137. *Id.* at 550.

138. *Cf. Roommates.com*, 521 F.3d at 1171 (noting that applying the statute to all cases where data obtained from third parties is at issue would functionally retard the purpose and intent of the statute).

139. O’Reilly, *supra* note 56, at 18–19.

140. *See, e.g., Doctor’s Assocs. v. QIP Holders, L.L.C.*, No. 3:06-cv-1710, 2007 U.S. Dist. LEXIS 28811, at \*4 (D. Conn. Apr. 18, 2007) (the first ‘example’ videos were likely generated by Quiznos, but the sites actual content was generated by users, which made the distinction between ICS and information content provider quite blurry).



argument that they constitute an ICS may push the application of § 230 well beyond the congressional intent that motivated the grant of immunity.<sup>141</sup>

C. AN ALTERNATIVE: ANSWERING THE ANSWER AND JUDGMENT ON THE PLEADINGS

Generally, when an affirmative defense is asserted in a 12(b)(6) motion, the court will address the motion as either a summary judgment motion<sup>142</sup> or a rule 12(c)<sup>143</sup> motion on the pleadings.<sup>144</sup> In *Zeran*, the leading case on § 230 immunity, the court found in favor of the defendant on a 12(c) motion.<sup>145</sup> These avenues are generally unnecessary when the plaintiff does not challenge the defense, or the facts underlying it.<sup>146</sup>

The jumbled mix of approaches to the application of § 230 requires action to create uniformity. Courts should first require that the assertion of § 230 immunity be raised in an answer, and not on a 12(b)(6) motion. Second, courts should use the power granted to them under the Federal Rules of Civil Procedure to request a reply by the plaintiff to the answer of a defendant.<sup>147</sup> This approach would be consistent with what some have called a “three-step pleading scheme.”<sup>148</sup> The courts would give both parties an opportunity to adequately address the issue without opening of the costly process of discovery.<sup>149</sup>

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141. See, e.g., *Zango, Inc. v. Kaspersky Lab Inc.*, 568 F.3d 1169, 1178–79 (9th Cir. 2009) (Fisher, J., concurring).

142. FED. R. CIV. P. 56.

143. FED. R. CIV. P. 12(c).

144. *Novak v. Overture Servs.*, 309 F. Supp. 2d 446, 451 (E.D.N.Y. 2004).

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

146. *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003).

147. FED. R. CIV. P. 7(a)(7).

148. Michael T.G. Long, Comment, *The Replying Game: Making the Case for Adopting the Fifth Circuit's Use of Particularized Replies in § 1983 Actions*, 34 SETON HALL L. REV. 389, 420 (2003).

149. This approach was initially advocated by the 5th Circuit Court of Appeals in the area of qualified immunity. See *Schultea v. Wood*, 47 F.3d 1427, 1428 (5th Cir. 1995); see also Long, *supra* note 148, at 420. This approach has been at least accepted, if not endorsed by the U.S. Supreme Court. *Crawford-El v. Britton*, 523 U.S. 574, 597–98 (1998) (“[T]he trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district judge has two primary options prior to permitting any discovery at all. First, the court may order a reply to the defendant’s or a third party’s

The 7(a)(7) and 12(c) approach is a better alternative to simply converting the 12(b)(6) to a rule 56 motion, inasmuch as it functions similarly to a 12(b)(6) and closes litigation at an early stage. A rule 56 motion would allow plaintiffs to open up discovery and in doing so this approach would be encumbered by the same drawbacks related to removing the availability of the 12(b)(6) motion.<sup>150</sup> Indeed, even critics of decisions which strip away the availability of a 12(b)(6) motion agree that the transition to a system in which defendants answer and simultaneously file a 12(c) motion will not substantially increase costs or burdens on time.<sup>151</sup>

This “three-step pleading scheme” is able to achieve the benefits of the two approaches laid out above. It is able to achieve judicial efficiency without exposing defendants to unnecessary discovery costs.<sup>152</sup> Additionally, by delaying the start of discovery, while allowing plaintiffs to meet their case, the three-step approach is better able to accomplish the policy goals in § 230.<sup>153</sup> In allowing for both the plaintiff and the defendant to lay out their respective cases on the issue of § 230 immunity, the court is also able to better effectuate the spirit of notice pleading.<sup>154</sup> Moreover, the fuller development of the record makes conducting the *Zeran* test<sup>155</sup> in its full extent more likely. The richer record also allows for a more nuanced weighing of the evidence with respect to Web 2.0 defendants.

#### IV. CONCLUSION

Granting a 12(b)(6) motion before a plaintiff has the opportunity to argue that the defendant is beyond the scope of § 230 seems patently unfair. At the same time, allowing plaintiffs to manipulate the federal rules of civil procedure and

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answer under Federal Rule of Civil Procedure 7(a), or grant the defendant’s motion for a more definite statement under Rule 12(e).”).

150. See *supra* Part II.A.i. But see *Zango, Inc. v. Kaspersky Lab Inc.*, 568 F.3d 1169, 1172 n.2 (9th Cir. 2009).

151. Goldman, *Ninth Circuit Mucks up 47 USC 230 Jurisprudence...AGAIN!?*—*Barnes v. Yahoo*, *supra* note 45. Goldman does argue, however, that a slow moving or ‘cautious’ judge may allow discovery to open even as a 12(c) motion pended before the court.

152. Cf. *Crawford-El*, 523 U.S. at 597–98.

153. 47 U.S.C. § 230(b)(1)-(5) (2006).

154. If notice pleading can be said to exist in the wake of *Iqbal* and *Twombly*. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

155. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

the legal process lacks judicial economy and saps judicial efficacy. The current split in approaches to this issue incentivizes plaintiff forum shopping, and given the lack of decisions at the Court of Appeals level, engenders unpredictability in the system. In order to mitigate these concerns, courts should adopt the "three-step pleading scheme" advocated in this article. That is, courts should convert a rule 12(b)(6) motion to dismiss to rule 12(c) motion on the pleadings, and under rule 7(a)(7) request a reply to the answer, thereby giving the plaintiff the opportunity to dispute the invocation of the affirmative defense. This allows for both fairness and judicial economy by removing all cases which are captured by the grant of immunity in § 230 and allowing those cases with genuine questions of fact (as related to the status of the defendant under § 230) to move forward.