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WIKIMMUNITY: FITTING THE COMMUNICATIONS DECENCY ACT TO WIKIPEDIA

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TABLE OF CONTENTS

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> IT IS AN ACT OF NATURE AND IT GROWS ITSELF THROUGH OUR COLLECTIVE ACTIONS. YOU [TERRESTRIAL GOVERNMENTS] HAVE NOT ENGAGED IN OUR GREAT AND GATHERING CONVERSATION . . . .[1]

> IMAGINE A WORLD IN WHICH EVERY SINGLE PERSON ON THE PLANET IS GIVEN FREE ACCESS TO THE SUM OF ALL HUMAN KNOWLEDGE. THAT'S WHAT WE'RE DOING. [2]

I. INTRODUCTION

Wikipedia[3] is a project. Its goal is as ambitious as it is simple: to "create and distribute a free encyclopedia of the highest possible quality to every single person on the planet in their own language."[4] Contributing to this project are hundreds of thousands of volunteers scattered across the globe, with varying levels of expertise. Anyone may edit or contribute to Wikipedia, and the contribution is immediately available to the world. Therein lies both the beauty and the beast.

On the backs (or fingertips) of unpaid volunteers, Wikipedia boasts over 3.5 million articles in over 200 languages after only five years of existence. A recent study by *Nature* concluded that Wikipedia is no less accurate than *Encyclopædia Britannica*, at least in the articles it selected for comparison.[5] Yet for several months, Wikipedia carried a blatantly false biographical article on John Seigenthaler, Sr., which implicated him in the assassination of President John F. Kennedy. An anonymous user had made the edit to the Seigenthaler article as a joke, but the reputational damage it caused was anything but.

Fortunately for Wikipedia, Seigenthaler is a strong advocate for First Amendment rights of free speech, and as a journalist his response was to criticize Wikipedia in a public forum rather than to sue in court.[6] Wikipedia may not be so fortunate in the future. If it is sued for defamatory speech on its site, its defense will be the immunity provided by 47 U.S.C. § 230(c)(1), which states that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[7]

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1. John Perry Barlow, A Declaration of the Independence of Cyberspace, Feb. 8, 1996, http://homes.eff.org/~barlow/Declaration-Final.html.

2. Wikipedia, *Jimmy Wales*, http://en.wikipedia.org/wiki/Jimmy_Wales (as of Nov. 16, 2006, 23:35 GMT) (quoting Jimmy Wales).

3. Main Page – Wikipedia, the free encyclopedia, http://en.wikipedia.org/wiki/Main_Page (last visited Nov. 16, 2006).

4. Jimmy Wales, Wikimedia Mailing Lists, Wikipedia is an Encyclopedia (Mar. 8, 2005), http://mail.wikipedia.org/pipermail/wikipedia-l/2005-March/038102.html.

5. Jim Giles, *Internet Encyclopædias Go Head to Head*, 438 NATURE 900, (2005).

6. *See* John Seigenthaler, *A False Wikipedia 'Biography,'* USA TODAY, Nov. 29, 2005, at 11A, *available at* http://www.usatoday.com/news/opinion/editorials/2005-11-29-wikipedia-edit_x.htm.

7. 47 U.S.C. § 230(c)(1) (2000).

Many commentators have already suggested that Wikipedia would be able to escape liability for defamatory content pursuant to § 230(c)(1)'s immunity.[8] Unfortunately, none of these commentators provide a detailed roadmap to that conclusion, and courts interpreting § 230(c)(1) have not been precise with respect to their choice of the several alternative approaches to the statutory text. This Article is an attempt to bridge that gap by identifying and resolving the ambiguities relevant to an application of § 230(c)(1) to the unique facts of Wikipedia.

In many ways, Wikipedia embodies John Perry Barlow's vision of a user-directed and user-created cyberspace.[9] It exists purely through the efforts of its users, individuals that have the potential to include every person connected to the Internet. However, Barlow's vision that "[w]here there are real conflicts, where there are wrongs, we will identify them and address them by our means,"[10] is largely unrealized as cyberspace's population expands.[11] Sure, information wants to be free,[12] and Wikipedia certainly is free in the monetary sense, but should it also be free in the other sense — from meddling governments?[13]

With the Telecommunications Act of 1996,[14] the 104th Congress seemed to answer that question in schizophrenic fashion. It amended § 223 and created § 230 in the Communications Act of 1934. While the amendment outlawed "indecent" communications over the Internet, courts have interpreted the latter as having created a very broad immunity for qualified re-transmitters of information.[15] The Supreme Court held that the amendment to § 223 was unconstitutional,[16] leaving the liability-immunizing provisions of § 230 largely unfettered.

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8. *See, e.g.*, Anita Ramasastry, *Is an Online Encyclopedia, Such as Wikipedia, Immune from Libel Suits*, FINDLAW, Dec. 12, 2005, http://writ.news.findlaw.com/ramasastry/20051212.html; Daniel Terdiman, *Is Wikipedia Safe From Libel Liability?*, CNET NEWS.COM, Dec. 7, 2005, http://news.com.com/2100-1025_3-5984880.html; Posting of Daniel J. Solove to Concurring Opinions, *Suing Wikipedia*, http://www.concurringopinions.com/archives/2005/11/suing_wikipedia_1.html (Nov. 11, 2005, 12:33 EST).

9. *See* Barlow, *supra* note 1.

10. *Id.* ("We are forming our own Social Contract. This governance will arise according to the conditions of our world, not yours. Our world is different.").

11. *Id.*

12. *See, e.g.*, Wikipedia, *Information Wants to be Free*, http://en.wikipedia.org/wiki/Information_wants_to_be_free (as of Nov. 16, 2006, 23:35 GMT).

13. *See, e.g.*, Richard Stallman, The Free Software Definition — GNU Project, http://www.gnu.org/philosophy/free-sw.html (last visited Nov. 16, 2006) ("'Free software' is a matter of liberty, not price. To understand the concept, you should think of 'free' as in 'free speech,' not as in 'free beer.'").

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

15. *Id.*

16. Reno v. ACLU, 521 U.S. 844 (1997); *see also* Cybertelecom, 47 USC s 223 as Amended, http://www.cybertelecom.org/cda/47usc223.htm (showing the exact language struck by *Reno v. ACLU*) (last visited Nov. 16, 2006).

Although litigation has quickly flowed into the liability vacuum for speech-based causes of action to determine the boundaries, the current situation is moving towards Barlow's vision of a cyberspace free from government regulation.

Part II describes Wikipedia — how it came to exist, the policies that "govern" the Wikipedia community, and the Seigenthaler controversy that sparked a public outcry. Part III introduces the development of the Communications Decency Act. Part IV rebuts a suggestion made by Judge Easterbrook that § 230(c)(1) provides no basis for immunity at the outset. Part V breaks down § 230(c)(1) into its component parts and applies the resultant three-prong test to Wikipedia. Finally, Part VI offers a few suggestions for Wikipedia to maintain its strong position in the § 230(c)(1) analysis.

II. INTRODUCING WIKIPEDIA

A. History and Development

In March 2000, Jimmy "Jimbo" Wales, CEO of Bomis, Inc., founded an Internet encyclopedia project named Nupedia.[17] Unlike other contemporary projects aimed at providing encyclopedic content over the Internet,[18] Nupedia sought to create an encyclopedia that would be free for all to use.[19] To avoid obvious intellectual property issues, Nupedia sought to publish self-generated content. With the goal of maintaining professional-level quality, Nupedia utilized an extensive seven-step peer-review system and generally required editors to possess PhDs.[20] However, the low number of article contributions and the lengthy review process led to only twenty-four published articles on Nupedia in 2000.[21]

To facilitate the creation of new articles to feed through the review process on Nupedia, Wales and Editor-in-Chief Larry Sanger decided to launch an ancillary project using wiki technology[22] that would allow the public at large to contribute.[23] After resistance by the subject experts on Nupedia's Advisory Board to the open contribution format of the wiki, Sanger suggested launching the project under a

17. Wikipedia, *Nupedia*, http://en.wikipedia.org/wiki/Nupedia (as of Nov. 16, 2006, 23:35 GMT).

18. *See* Wikipedia, *Internet Encyclopedia Project*, http://en.wikipedia.org/wiki/Internet_encyclopedia_project (as of Nov. 16, 2006, 23:35 GMT).

19. Wikipedia, *Nupedia*, *supra* note 17.

20. *Id*.

21. *Id*.

22. *See generally* Wikipedia, *Wiki*, http://en.wikipedia.org/wiki/Wiki ("A wiki is a type of website that allows the visitors themselves to easily add, remove and otherwise edit and change some available content.") (as of Nov. 16, 2006, 23:35 GMT).

23. *See* Wikipedia, *History of Wikipedia*, http://en.wikipedia.org/wiki/History_of_wikipedia (as of Nov. 16, 2006, 23:35 GMT).

new name on its own domain.[24] Thus, Wikipedia was born on January 15, 2001 (known as "Wikipedia Day" among the Wikipedia community).[25]

In August 2002, shortly after Wales's announcement that Wikipedia would have no commercial advertisements, Wikipedia moved its URL from wikipedia.com to wikipedia.org.[26] By late 2004, Wikipedia had over one million articles, 400,000 of which belonged to the English-language version.[27] As of October 1, 2006, there are more than 5 million articles, of which about 1.4 million are in English, and over 2.6 million registered user accounts.[28]

The Wikimedia Foundation Inc., created on June 20, 2003, operates as the parent organization of Wikipedia and the other Wiki-projects (e.g., Wiktionary, Wikiquote, and Wikinews).[29]

B. Article Creation, Accretion, and "Governing" Policies

In contrast to Nupedia, when Wikipedia was launched, it allowed anyone to create or edit — anonymously — any article.[30] Indeed, its slogan was, and is, "the free encyclopedia that anyone can edit."[31]

Before the editing process can begin, someone must create the article. Often, articles begin as a "stub," usually comprising of no more than a title with a few short sentences that describe the article's subject. Stubs serve as "more info wanted" signs so that as users with relevant information come across them,[32] they can grow into full-fledged articles. As an article evolves through the many accretions left by Wikipedia users, a history page catalogues archived copies of each version. Each new version has a time stamp and either a username (if the change is made by a registered user) or an IP address (if unregis-

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24. *Id*.

25. *Id.*

26. *See id*.

27. *Id.*

28. Wikipedia, Wikipedia:Multilingual Statistics, http://en.wikipedia.org/wiki/Wikipedia:Multilingual_statistics (as of Nov. 16, 2006, 23:35 GMT); Wikipedia, Special:Statistics, http://en.wikipedia.org/wiki/Special:Statistics (last visited Nov. 16, 2006). The special statistics are updated in real time. Spammers or inactive users that make fewer than two edits register most of the user accounts. Not every user account means a new user. Some users prefer to maintain more than one user account to keep the lists of attributed contributions separate, though that is discouraged by the Wikipedia community.

29. Wikipedia, *Wikimedia Foundation*, http://en.wikipedia.org/wiki/Wikimedia_Foundation (as of Nov. 16, 2006, 23:35 GMT).

30. This policy has since changed. *See infra* Part II.C.

31. Main Page — Wikipedia, the free encyclopedia, *supra* note 3.

32. "Coming across" a developing stub is usually not an entirely random process. Registered users can create "watchlists" of articles whereby the user is notified if anyone edits one of their "watched" articles. *See* Wikipedia, Wikipedia:Stub, http://en.wikipedia.org/wiki/Wikipedia:Stub (as of Nov. 16, 2006, 23:35 GMT). Stubs may also be found via the "Recent Changes" page. Wikipedia, Special:Recent Changes, http://en.wikipedia.org/wiki/Special:Recentchanges (last visited Nov. 16, 2006).

tered).[33] One can compare any two versions to identify any single accretion and its author.

Occasionally, an article's progress is not smooth. "Edit wars" or "revert wars" occur when two or more actively editing users have opposing views regarding the content of an article. By using the history page, any user can easily revert to an earlier version of a page, thereby erasing the contributions of another.

Wikipedia also suffers, perhaps predictably, from vandalism.[34] To defend against such attacks, Wikipedia users have created a number of tools to monitor new articles and recent article edits, particularly those made by unregistered users.[35] A 2002 IBM study found that over half of all instances of vandalism were reverted within five minutes, demonstrating the tools' effectiveness.[36] However, these tools focus on more egregious forms of vandalism (e.g., spamming by unregistered users), and not on more subtle, yet equally damaging, misinformation.[37] When presented with these instances of possible non-obvious vandalism, any user may request administrator investigation (usually after reverting once or twice) on the "Requests for Investigation" page.[38] During this investigation and the ensuing discussion, the offending material may remain visible on the Wikipedia article.

With respect to living biographies, a likely site of defamation, Wikipedia considers substantive edits by the biography's subject improper.[39] The preference is for debates over substance to occur on the discussion page and not through edits to the article itself. However, the policy does encourage subjects of a biography to correct "obvious

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33. One need only go to the history page of any article, go to the earliest version, and then repeatedly click the "newer revision" arrow to see this often fascinating evolution.

34. Wikipedia vandalism is defined as any "change . . . made in a deliberate attempt to reduce the quality" of the article. Wikipedia, Wikipedia:Vandalism, http://en.wikipedia.org/wiki/Wikipedia:Vandalism (as of Nov. 16, 2006, 23:35 GMT).

35. *See* Wikipedia, Wikipedia:Recent Changes Patrol, http://en.wikipedia.org/wiki/Wikipedia:Recent_changes_patrol (as of Nov. 16, 2006, 23:35 GMT) (listing the tools available).

36. FERNANDA B. VIÉGAS ET AL., STUDYING COOPERATION AND CONFLICT BETWEEN AUTHORS WITH *HISTORY FLOW* VISUALIZATIONS 5 (2004), http://alumni.media.mit.edu/~fviegas/papers/history_flow.pdf; *see* Wikipedia, Wikipedia:Vandalism, *supra* note 34.

37. *See* Giles, *supra* note 4; *cf.* Anna Brook, *Wikipedia: Facts or Kitten-Eating Cyborgs?*, HLS RECORD, Mar. 23, 2006, *available at* http://www.hlrecord.org/home/index.cfm?event=displayArticlePrinterFriendly&uStory_id=30d2559a-46c9-48ae-9a71-bfeaffd9e6c1 ("[A] new article about a Berkman fellow entitled 'Rebecca MacKinnon is a kitten-eating cyborg' was detected and deleted within 80 seconds . . . . Other, less obvious 'inaccuracies,' such as putting the same line into MacKinnon's biography, can stay up longer, but tend to be caught eventually."). It should be noted that Wikipedia strongly discourages such "test defamation."

38. Wikipedia, Wikipedia:Requests for Investigation, http://en.wikipedia.org/wiki/Wikipedia:Requests_for_investigation (as of Nov. 16, 2006, 23:35 GMT).

39. *See* Wikipedia, Wikipedia:Autobiography, http://en.wikipedia.org/wiki/Wikipedia:Autobiography ("It is difficult to write neutrally about oneself. Therefore, it is considered proper on Wikipedia to let others do the writing.") (as of Nov. 16, 2006, 23:35 GMT).

vandalism."[40] A defamed individual may also contact Wikipedia directly to request assistance.[41]

When either an edit war or vandalism disrupts an article, any user can also ask that the page be fixed and "protected" by an administrator. Thus, administrators play a key role on Wikipedia. While any anonymous person can add content by editing an already-created article, he cannot do much else. Administrators (also known as "sysops") have additional powers, the most notable of which are: (1) to "protect" or "semi-protect" a page or edit such pages,[42] (2) to delete or undelete articles and/or their histories, and (3) to block or unblock user accounts or IP addresses.[43] To become a sysop, one must apply or be nominated and gain roughly seventy-five to eighty percent approval of voting sysops. A "bureaucrat" or "steward" then has the power to create other sysops, though only with the (voting) Wikipedia community's approval.

Thus, there are roughly four classes of Wikipedia users, each of which has different usage rights.[44] First, there are the anonymous contributors who can edit any unprotected article; their contributions are identified only by their IP addresses. Second, there are registered users who may also create new articles. Third there are the sysops, whose powers are described above, and lastly a limited number of bureaucrats and stewards. As of November 2006, there were over 2.6 million registered user accounts, over 1000 sysop accounts, and 16 active steward accounts.[45]

Wikipedia has three primary content-guiding policies. The "Neutral Point of View" policy requires that all articles "represent[] views fairly and without bias," leaving the readers to "form their own opinions."[46] The "Verifiability" policy states that "[f]acts, viewpoints, theories, and arguments may only be included in articles if they have

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40. *Id*.

41. The recipients of such e-mails are a group of volunteers within the Wikipedia community.

42. A "protected" page cannot be edited by anyone except other administrators. A "semi-protected" page can only be edited by users that have been registered for more than four days. *See* Wikipedia, Wikipedia:Protection Policy, http://en.wikipedia.org/wiki/Wikipedia:Protection_policy (as of Nov. 16, 2006, 23:35 GMT); Wikipedia, Wikipedia:Semi-Protection Policy, http://en.wikipedia.org/wiki/Wikipedia:Semi-protection_policy (as of Nov. 16, 2006, 23:35 GMT).

43. Wikipedia, Wikipedia:Administrators, http://en.wikipedia.org/wiki/Wikipedia:Administrators (as of Nov. 16, 2006, 23:35 GMT).

44. Wikipedians might disagree with this "class" characterization as it disrupts the egalitarian ethos that has made Wikipedia successful.

45. Wikipedia, Special:Statistics, supra note 28; Wikimedia, Stewards, http://meta.wikimedia.org/wiki/Stewards (as of Nov. 16, 2006, 23:35 GMT). The special statistics are updated in real time.

46. Wikipedia, Wikipedia:Neutral Point of View, http://en.wikipedia.org/wiki/Wikipedia:Neutral_point_of_view (as of Nov. 16, 2006, 23:35 GMT).

already been published by reliable and reputable sources."[47] Finally, the "No Original Research" policy states that "[a]rticles may not contain any unpublished theories, data, statements, concepts, arguments, or ideas; or any new analysis or synthesis of published data, statements, concepts, arguments, or ideas that serves to advance a position."[48] Any one of these policies taken alone would likely justify any Wikipedian in removing defamatory content; combined, they reflect an institutional intolerance for anything that may hinder the goal of creating an "encyclopedia of the highest possible quality."[49] However, numerous examples such as the Seigenthaler controversy illustrate that Wikipedia's weakness lies, if anywhere, in its enforcement and not in its policies.

C. Seigenthaler Controversy and Aftermath

On May 26, 2005, Brian Chase, an operations manager at Rush Delivery in Nashville, Tennessee, discovered Wikipedia while at work.[50] Like many who discover the open invitation to edit Wikipedia, Chase accepted the offer. Also, as with many other "contributions" made by first-time editors, Chase's edits of the John Seigenthaler, Sr. article[51] were a joke. They were also offensive, and likely defamatory. He had posted: "For a brief time, [Seigenthaler] was thought to have been directly involved in the Kennedy assassinations of both John, and his brother, Bobby. Nothing was ever proven."[52] Chase recalled, "I didn't think twice about just leaving it there because I didn't think anyone would ever take it seriously for more than a few seconds."[53]

Unlike most defamatory first-time edits, however, the one on Seigenthaler remained a part of the main, visible article for four months.[54] A Wikipedian had reviewed the change and made some very minor grammatical edits, but did not recognize the defamatory

47. Wikipedia, Wikipedia:Verifiability, http://en.wikipedia.org/wiki/Wikipedia:Verifiability (as of Nov. 16, 2006, 23:35 GMT) (emphasis omitted).

48. Wikipedia, Wikipedia:No Original Research, http://en.wikipedia.org/wiki/Wikipedia:No_original_research (as of Nov. 16, 2006, 23:35 GMT) (emphasis omitted).

49. Jimmy Wales, Wikimedia Mailing Lists, Wikipedia is an Encyclopedia, *supra* note 4.

50. Wikipedia, *John Seigenthaler Sr. Wikipedia Biography Controversy*, http://en.wikipedia.org/wiki/John_Seigenthaler_Sr._Wikipedia_biography_controversy (as of Nov. 16, 2006, 23:35 GMT).

51. Mr. Seigenthaler is a well-known, respected journalist and a Nashville native, likely why Chase targeted him. *See* Wikipedia, *John Seigenthaler Sr.*, http://en.wikipedia.org/wiki/John_Seigenthaler_Sr. (as of Nov. 16, 2006, 23:35 GMT).

52. Seigenthaler, *supra* note 6.

53. Susan Page, *Author Apologizes for Fake Wikipedia Biography*, USA TODAY, Dec. 12, 2005, at 4A, *available at* http://www.usatoday.com/tech/news/2005-12-11-wikipedia-apology_x.htm.

54. Seigenthaler, s*upra* note 6.

nature of the claim.[55] Only on September 23, 2005 did a colleague of Seigenthaler copy and paste his official biography into Wikipedia.[56] A few "mirror sites"[57] continued to carry the defamatory version for several weeks after the correction on Wikipedia.[58] The defamation remained archived and accessible on Wikipedia via the history page until October 2005, when Wales hid the information from non-sysops.

As a result of the controversy and ensuing media storm,[59] Wales (or Wikipedia, at Wales's behest) instituted two new policies.[60] First, since December 5, 2005, unregistered users have no longer been able to create new articles in the English-language version of Wikipedia.[61] While such a policy would, admittedly, not have directly prevented the Seigenthaler incident, Wales thought that it would go a long way towards preventing such incidents in the future by vastly reducing the number of new and inappropriate pages created.[62] The "new page patrol" would then have more time to review edits of existing articles and filter out the defamatory ones.[63]

Second, in February 2006, Wales created the "Office Actions" policy.[64] It allows Danny Wool, a Wikipedia steward and Foundation employee, to protect or modify any article at Wales' direction. According to this policy, a sysop undoing this Office Action may be blocked from Wikipedia entirely or may alternatively lose sysop status. Wales explained that the Foundation was receiving "an increasingly large number of phone calls and emails from people who [were] upset" and that such "short-term action" could and should "be

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55. *See* Posting of Jimmy Wales, jwales@wikia.com, to wikien-l@wikipedia.org (Dec. 5, 2005), http://mail.wikipedia.org/pipermail/wikien-l/2005-December/033880.html.

56. This version was taken down because it violated copyright, but the article was replaced with a shorter biography that did not conflict with Wikipedia's policies. *See* Wikipedia, *John Seigenthaler Sr. Wikipedia Biography Controversy*, *supra* note 50.

57. These sites, such as About.com, Answers.com, and Reference.com, scrape and present Wikipedia's content. For some Wikipedia articles, the mirrors appear prominently on a list of Google search results. Critically, the content on the mirror sites may lag by a considerable amount as the Wikipedia content is not uploaded on a real time basis.

58. Mr. Seigenthaler described the effect with the following analogy:

> When I was a child, my mother lectured me on the evils of "gossip." She held a feather pillow and said, "If I tear this open, the feathers will fly to the four winds, and I could never get them back in the pillow. That's how it is when you spread mean things about people." For me, that pillow is a metaphor for Wikipedia.

Seigenthaler, *supra* note 6.

59. *See, e.g.*, Katharine Q. Seelye, *Snared in the Web of a Wikipedia Liar*, N.Y. TIMES, Dec. 4, 2005, § 4, at 1; Seigenthaler, *supra* note 6.

60. Wikipedia, Page Creation Restrictions, http://en.wikipedia.org/wiki/Wikipedia:Wikipedia_Signpost/2005-12-05/Page_creation_restrictions (as of Nov. 16, 2006, 23:35 GMT).

61. *Id.*

62. *Id*.

63. *Id.*

64. Wikipedia, Wikipedia:Office Actions, http://en.wikipedia.org/wiki/Wikipedia:Office_Actions (as of Nov. 16, 2006, 23:35 GMT).

taken as a courtesy in order to soothe feelings and build a better encyclopedia in the long run."[65] He elaborated that "[t]here may at times be legal reasons" for such action.[66]

Wikipedia's policies and the Seigenthaler controversy provide the factual backdrop for the analysis of Wikipedia's ability to assert § 230(c)(1) immunity.

III. INTRODUCING THE COMMUNICATIONS DECENCY ACT

On February 1, 1996, Congress passed the Telecommunications Act of 1996,[67] an extensive overhaul of the telecommunications law as it had existed since 1934. The Communications Decency Act of 1996 is the short title for Title V of the larger Telecommunications Act.[68] It represented a compromise between two divergent approaches to the problem of children accessing pornography via the Internet.[69]

The first proposal was that of Senator Exon, whose legislation was a response to a July 1994 *Dateline NBC* story discussing online pedophiles and the generally "disgusting material" available on the Internet.[70] In July 1994, Exon proposed a stand-alone law meant to "modernize" obscenity regulation "for the digital world,"[71] but his proposal failed. He then proposed an amendment to 47 U.S.C. § 223, the statute governing obscene communications over traditional telephone networks. His amendment provided for fines of up to $100,000 and prison terms of up to two years for anyone who "(i) makes, creates, or solicits, and (ii) initiates the transmission of any . . . communication which is obscene, lewd, lascivious, filthy, or indecent."[72] Critically, the amendment retained the FCC's enforcement role as envisaged by the original § 223.[73] This amendment passed the Senate on June 14, 1995.[74]

The second approach was that of Representatives Cox and Wyden. Their proposed amendment to the Telecommunications Act

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65. *Id*.

66. *Id*.

67. Pub. L. No. 104-104, 110 Stat. 133 (1996).

68. *Id.* Title V (codified as amended in scattered sections of 47 U.S.C.).

69. *Compare* 141 CONG. REC. S8090 (daily ed. June 9, 1995) (statement of Sen. Exon), *with* 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). Both Congressmen speak of the end goal of protecting children.

70. Exon had collected a blue binder full of this "disgusting material" to show other senators. *See* Charles A. Gimon, *Exon Amendment Passes the Senate*, INFONATION, *available at* http://www.gimonca.com/personal/archive/exon.html (last visited Nov. 16, 2006).

71. 140 CONG. REC. S9746 (daily ed. July 26, 1994) (statement of Sen. Exon).

72. 141 CONG. REC. S8090 (daily ed. June 9, 1995) (statement of Sen. Exon).

73. *See* 47 U.S.C. § 223(b) (2000). Further, the FCC would regulate the availability of the "good faith" defense by defining the "good faith, reasonable and appropriate steps" one must have taken to "restrict access to prohibited communications." 141 CONG. REC. S8091 (daily ed. June 9, 1995) (statement of Sen. Exon).

74. Gimon, *supra* note 70.

would leave the Internet out of the reach of § 223 (by leaving it unamended) and instead create a new § 230. Cox and Wyden's primary motivation was to limit the role of the FCC in regulating Internet content.[75] They sought instead to put the onus on parents to use filtering software to protect their children. To facilitate this goal, they aimed to overrule *Stratton Oakmont, Inc. v. Prodigy Services, Co.*,[76] which had created a substantial disincentive to develop and market such software by holding Prodigy liable for defamatory comments posted by one of its users after Prodigy had advertised its content-filtering capabilities.[77] Cox and Wyden made their policy goals explicit in § 230(b), which passed the House on August 4, 1995:[78]

> (1) to promote the continued development of the Internet and other interactive computer services . . .;
>
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
>
> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
>
> (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

75. "[I]t will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government." 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

76. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y.S.2d May 26, 1995).

77. *Id;* 141 CONG. REC. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). The Cox-Wyden Amendment would "protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet . . . who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the *Prodigy* case in New York that they should not face for helping us and for helping us solve the problem." 141 CONG. REC. H8470.

78. 141 CONG. REC. H8470.

> (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.[79]

The Conference Committee, in an attempt to resolve the conflicting proposals, created a composite version (confusingly, still titled the Communications Decency Act) that eliminated Cox-Wyden's proposed limitation on FCC regulation in § 230(d), but otherwise retained the balance of both approaches — including the policy statements in § 230(b).[80] The Senate and House passed the new Communications Decency Act (as Title V of the broader Telecommunications Act) and President Clinton signed it into law one week later on February 8, 1996.[81]

In 1997, the Supreme Court held that the amendments to § 223 were unconstitutional on First Amendment grounds.[82] However, § 230 remains in full effect[83] and § 230(c)(1) has found widespread usage among "interactive computer service" defendants. Section 230(c)(1) provides that, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[84] Table 1 illustrates the expanding scope of § 230(c)(1)'s application to various potential "gatekeepers" of Internet content, and the overwhelming success experienced by defendants in avoiding that role.

IV. REBUTTING THE "DEFINITIONAL" READING OF § 230(C)(1)

If a person sued Wikipedia seeking redress for harm caused by allegedly defamatory speech, Wikipedia would likely invoke § 230(c)(1) immunity at the earliest opportunity. But before attempting to fit into the three-prong analysis discussed in Part V below, Wikipedia may first have to rebut the "definitional" reading of § 230(c)(1), according to which there is no immunity to invoke in the first place.[85] The source of this interpretation of § 230(c)(1) is dicta in

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79. 47 U.S.C. §§ 230(b)(1)–(5) (2000).

80. *See* H.R. REP. NO. 104-458, at 81–84, 86–88 (1996) (Conf. Rep.). Note that the Conference Committee left unaltered the explicit policy goals, including § 230(b)(2), which clearly referenced the original, but subsequently rejected, proposal to limit the FCC's role.

81. *E.g.*, Telecommunications Reform Updates, http://www.arl.org/info/frn/tr/frntr96.html (last visited Nov. 16, 2006).

82. Reno v. ACLU, 521 U.S. 844, 849 (1997).

83. Section 1404 of the Children Online Protection Act added the current § 230(d). It has not yet been litigated.

84. 47 U.S.C. § 230(c)(1) (2000).

85. In *Doe v. Bates*, the Plaintiff argued for the definitional reading, but failed to persuade the magistrate judge, who recommended that the court grant Yahoo!'s motion to dismiss pursuant to § 230(c)(1). Doe v. Bates, No. 5:05CV91, slip op. at 17, 31 (E.D. Tex. Jan. 18, 2006), http://www.steptoe.com/assets/attachments/1954.pdf.

Doe v. GTE Corp., where Judge Easterbrook proposed reading § 230(c)(1) as a "definitional clause rather than as an immunity from liability."[86]

Judge Easterbrook observed that the broad immunity created by other courts interpreting § 230(c)(1) was inconsistent with both the title of the act ("Communications Decency Act") and the caption of § 230(c) ("Protection for 'Good Samaritan' blocking and screening of offensive material").[87] Under the standard view propounded by the other Circuits, an interactive computer service that *does not* take precautions against offensive material (i.e., by not taking actions that transform it into an "information content provider") may be protected under § 230(c)(1), while, conversely, an interactive computer service that *does* take such precautions may look to § 230(c)(2) for immunity.[88] Judge Easterbrook objected that under such a view, § 230(c) as a whole makes interactive computer services "indifferent to the content of information they host or transmit," and thus they "may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1)."[89]

To match § 230(c) to its caption, Judge Easterbrook proposed reading (c)(1) as merely defining the class of entities eligible for the (c)(2) immunity. "[A]n entity would remain a 'provider or user' — and thus be eligible for the immunity under § 230(c)(2) — as long as the information came from someone else; but it would become a 'publisher or speaker' and lose the benefit of § 230(c)(2) if it created the objectionable information."[90] Section 230(c)(1) would serve no purpose, in his view, other than to narrow the class to which (c)(2) immunity applies.

The legislative history might support this "definitional" reading; it at least suggests that § 230(c)(1) was not meant to be the highly active provision it is today. In the original Cox-Wyden Amendment, § 230(c) contained a single paragraph that was later split into current paragraphs (c)(1) and (c)(2):

> (c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL — No provider or user of interactive computer services shall be treated as the publisher or speaker

86. Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003). While the district court dismissed the plaintiffs' claims based on § 230(c)(1), the Seventh Circuit affirmed on state law grounds and thus did not decide the applicability or validity of § 230(c)(1) immunity.

87. *Id*. at 659–660 (citing Green v. AOL, 318 F.3d 465 (3d Cir. 2003); Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003); Ben Ezra, Weinstein & Co. v. AOL, 206 F.3d 980 (10th Cir. 2000); Zeran v. AOL, Inc., 129 F.3d 327 (4th Cir. 1997)).

88. *See infra* text accompanying note 92.

89. *GTE*, 347 F.3d at 660.

90. *Id*.

> of any information provided by an information content provider. No provider or user of interactive computer services shall be held liable on account of —
>
> (1) any action voluntarily taken in good faith to restrict access to 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
>
> (2) any action taken to make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[91]

The Conference Committee made no substantive changes to the text, but changed the structure and added subcaptions to new paragraphs (c)(1) and (c)(2) :

> (c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL —
>
> (1) TREATMENT OF PUBLISHER OR SPEAKER — No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> (2) CIVIL LIABILITY — No provider or user of an interactive computer service shall be held liable on account of —
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[92]

The reference to "material described in paragraph (1)" in the current (c)(2)(B) is a hasty oversight, and should instead be a reference to

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91. 141 CONG. REC. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).
92. 47 U.S.C. § 230(c)(2) (2000).

subparagraph (A).[93] The original form of the Cox-Wyden Amendment suggests that it meant only to immunize interactive computer services for "any action voluntarily taken in good faith to restrict access." Because the change was apparently hastily made, the "definitional" reading camp (i.e., plaintiffs) might argue that Congress did not intend to change the meaning substantively when it gave the original first sentence separate billing as the current § 230(c)(1). Furthermore, there is no explanation in the Conference Report for the difference in subcaption — "treatment of publisher or speaker" for (c)(1) versus "civil liability" for (c)(2) — and this may provide grounds for arguing that Congress did not intend that the current § 230(c)(1) preempt any civil liability.

This "definitional" reading fails for several reasons. First, § 230 already has a separate definitions section, § 230(f), which suggests that if Congress had meant to define "provider or user," it would have done so there.[94] Second, the structure of § 230(c)(1) does not purport to attribute a particular meaning to the term provider or user, "but rather [functions] as a substantive prohibition" on how providers and users may be treated.[95] This structure matches that of § 230(c)(2) ("No provider or user . . . shall be held liable . . .") and suggests that § 230(c)(1) is parallel, rather than subordinate, to § 230(c)(2). Third, nothing in § 230(c)(2) suggests that its immunity hinges on status as "publisher or speaker."[96] Fourth, incorporating the § 230(c)(1) "definition" into § 230(c)(2) serves no purpose. Doing so would render the latter's immunity from liability for filtering activities unavailable to the provider only when the provider itself created the content; however, a provider is not very likely to sue itself for removing its own content.[97]

Finally, the Conference Committee's explanation of § 230 when it presented the entire Communications Decency Act to Congress contradicts Easterbrook's interpretation of § 230(c)(1) as an essentially inoperative provision. The Committee stated:

> This section provides "Good Samaritan" protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* [sic] and

93. *See id.* at n.1 (noting explicitly that the phrase "[p]robably should be 'subparagraph (A)'").

94. Doe v. Bates, No. 5:05CV91, slip op. at 15 (E.D. Tex. Jan. 18, 2006) (report and recommendation of U.S. mag. judge), http://www.steptoe.com/assets/attachments/1954.pdf.

95. *Id.*

96. *Id.* at 15–16.

97. *Id.* at 16.

> any other similar decisions which have treated such providers or users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.[98]

While the Committee's statement might have left room for Easterbrook's "definitional" reading had it ended after the first sentence, the second sentence's explicit reference to overruling *Stratton Oakmont* makes clear its intent to provide interactive computer services with immunity not just from censored customers (via (c)(2)), but also from parties injured by the uncensored content (via (c)(1)).[99] Such immunity was essential to remove the disincentive to create software tools that "maximize user control over what information is received by individuals, families, and schools who use . . . interactive computer services."[100] Without the immunity, Congress believed that interactive computer services would do nothing to help customers "control . . . what comes in and what our children see."[101] Judge Easterbrook's discomfort should not so much be with the incongruity between the caption and the text, but with Congress's assumption that Internet Service Providers ("ISPs") actually would help "control" the Internet once Congress granted such immunity.

V. FITTING § 230(C)(1) TO WIKIPEDIA

If someone sued the Wikimedia Foundation for the harm caused by a defamatory statement in an article on Wikipedia, § 230(c)(1) should be the Foundation's first line of defense.[102] Again, it states that, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[103] To determine whether

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

99. *See supra* text accompanying note 76.

100. *Id.*; *see also* 47 U.S.C. § 230(b)(3) (2000) ("It is the policy of the United States . . . to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.").

101. 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

102. Defendants commonly raise the § 230(c)(1) defense in a motion to dismiss, or failing that, in a motion for summary judgment. At least one court has asserted that § 230(c) is an affirmative defense and cannot be the basis for a Rule 12(b)(6) motion to dismiss. Doe v. GTE Corp., 347 F.3d 655, 657 (7th Cir. 2003).

103. 47 U.S.C. § 230(c)(1) (2000).

Wikipedia may escape liability pursuant to § 230(c)(1), a court would apply a three-prong test; each prong must be met in order to qualify for immunity.[104] To satisfy the first prong, Wikipedia must show itself to be the "provider or user" of an "interactive computer service." To satisfy the second prong, the cause of action from which Wikipedia is claiming immunity must treat Wikipedia as a "publisher or speaker" of the information. Finally, the third and most interesting prong requires Wikipedia to show that the "information" was "provided by another information content provider."

A. First Prong: "Provider or User of an Interactive Computer Service"

This prong presents a low bar, as Congress has defined "interactive computer service" very broadly: "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."[105] Wikipedia should easily be able to show that it is the "provider or user" of such a service.

In many cases, the plaintiff either concedes that the defendant is an "interactive computer service" or the court assumes that the defendant is one on the basis of the plaintiff's allegations.[106] All cases involving websites that permit information posting (i.e., those that have interactivity) have held that these websites are within the definition of "interactive computer service."[107] The Ninth Circuit observed that

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104. *See, e.g.*, Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 830 (Ct. App. 2002); Schneider v. Amazon.com, Inc., 31 P.3d 37, 39 (Wash. Ct. App. 2001).

105. 47 U.S.C. § 230(f)(2) (2000).

106. *See, e.g.*, Hy Cite Corp. v. badbusinessbureau.com, L.L.C., 418 F. Supp. 2d 1142, 1148 (D. Ariz. 2005); Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004). This observation holds particularly true when the defendant is an ISP or provides traditional web-hosting services. *See, e.g.*, Ben Ezra, Weinstein & Co. v. AOL, 206 F.3d 980, 984 (10th Cir. 2000); Zeran v. AOL, Inc., 129 F.3d 327, 330 n.2 (9th Cir. 1997); Gucci Am., Inc. v. Hall & Assocs., 135 F. Supp. 2d 409, 412 (S.D.N.Y. 2001).

107. *See, e.g.*, Prickett v. InfoUSA, Inc., No. 4:05-CV-10, 2006 U.S. Dist. LEXIS 21867 (E.D. Tex. Mar. 30, 2006) (publishing database information); DiMeo v. Max, 433 F. Supp. 2d 523 (E.D. Pa. 2006) (hosting message boards); Landry-Bell v. Various, Inc., No. 05-1526, 2005 U.S. Dist. LEXIS 38471 (W.D. La. Dec. 27, 2005) (allowing the posting of personal ads); Faegre & Benson, LLP v. Purdy, 367 F. Supp. 2d 1238, 1249 (D. Minn. 2005) ("Defendants . . . who run web sites on which internet users can post comments, are providers of interactive computer services."); Roskowski v. Corvallis Police Officers' Ass'n., No. Civ. 03-474-AS, 2005 WL 555398 (D. Or. Mar. 9, 2005) (stressing that there was a public forum for exchange of ideas with regard to plaintiff); Fair Hous. Council v. Roommate.com, No. CV 03-09386 PA (RZx), 2004 U.S. Dist. LEXIS 27987 (C.D. Cal. Sep. 30, 2004) (holding that Roommate.com qualified because people could post requests); MCW, Inc. v. badbusinessbureau.com, L.L.C., No. Civ. A. 3:02-CV-2727-G, 2004 WL 833595, at *9 (N.D. Tex. Apr. 9, 2004) (noting that the plaintiff did not dispute that badbusinessbureau.com qualified).

"reviewing courts have . . . adopt[ed] a relatively expansive definition of 'interactive computer service.'"[108] Indeed, the sole fact that Wikipedia stores its information "on [its] own server" might be sufficient to meet the requirement of the first prong.[109]

A plaintiff might argue that Wikipedia is not one of Congress's intended § 230(c)(1) beneficiaries because it does not "provide access to the Internet," as a traditional ISP.[110] However, the definition of "interactive computer service" in § 230(f)(2) does not refer exclusively to ISPs,[111] and should present no bar to Wikipedia here. Nearly all non-ISP defendants have successfully argued for "interactive computer service" status.[112] In the first published opinion addressing the issue, the court held that Amazon.com's service came "squarely within the definition" of an "interactive computer service."[113] The court determined that ISPs are not the exclusive beneficiaries of the immunity, reasoning that because Amazon's website "enables visitors to the site to comment about authors and their work," it "provid[es] an information service that necessarily enables access by multiple users to a server."[114]

Furthermore, as far as the first prong is concerned, immunity extends to all of the Wikipedia community. The Ninth Circuit noted that the question of whether a website fits within the definition of an "interactive computer service" need not be answered because the "language of § 230(c)(1) confers immunity not just on 'providers' of such services, but also on 'users' of such services."[115] Because Wikipedi-

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108. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003) (holding, without discussion, matchmaker.com to be an "interactive computer service").

109. *See, e.g.*, Whitney Info. Network, Inc. v. Verio, Inc., No. 2:04-cv-462-FtM-29SPC, 2006 U.S. Dist. LEXIS 1424, *6–7 (M.D. Fla. Jan. 11, 2006) ("Verio stores website information . . . on its own server.").

110. *See* 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) ("We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see.").

111. 47 U.S.C. § 230(f)(2) (2000).

112. *See infra* Part VIII.

113. Schneider v. Amazon.com, Inc., 31 P.3d 37, 40 (Wash. Ct. App. 2001).

114. *Id; see also* Barrett v. Fonorow, 799 N.E.2d 916, 922 (Ill. App. Ct. 2003) ("We reject the suggestion that Intelisoft is not a 'provider or user of an interactive computer service' merely because it does not provide Internet access."). *But see* 800-JR Cigar, Inc. v. GoTo.com, Inc., 437 F. Supp. 2d 273, 295 (D.N.J. Jul. 13, 2006) (holding that defendant was not eligible for § 230(c)(1) immunity because "as far as th[e] Court can tell, GoTo does not provide access to the Internet like service providers such as AOL"). Defendant's counsel in *800-JR Cigar* clearly did not provide the district court of New Jersey with any opinions relating to § 230(c)(1) published within the last five years.

115. Batzel v. Smith, 333 F.3d 1018, 1030 (9th Cir. 2003); *see also* Marczeski v. Law, 122 F. Supp. 2d 315, 327 (D.D.C. 2000) (dismissing plaintiff's defamation claim where defendant created an Internet chat room to discuss an alleged defamatory e-mail). A Wikipedian defendant might be able to analogize the creation of a Wikipedia article, which ex ante contains no defamatory statements, to the creation of the chat room in *Marczeski*.

ans "*must* access the Internet through some form of 'interactive computer service,'"[116] they are "users" for purposes of § 230(c)(1).[117] Recently, in *Barrett v. Rosenthal*, the California Supreme Court reaffirmed this plain-language reading of the term "user," denying the plaintiff's argument that only "passive" users of an "interactive computer service," as opposed to "active" users, are immune under § 230(c)(1).[118] Thus, any potential defendant against which a defamation plaintiff could pursue action falls within the relatively lax requirements of the first prong.

B. Second Prong: "Treated as the Publisher or Speaker"

To satisfy the second prong, Wikipedia must show that the cause of action against it treats it as a "publisher or speaker" of the defamatory information. Depending on the state, there are many potential causes of action under which Wikipedia may be sued, including defamation, negligence for failure to prevent defamation, or negligence for failure to remove defamatory information after notification.[119] As these causes of action arise under state law, they are eligible for preemption pursuant to § 230(e)(3), which provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."[120] Thus, § 230(e)(3) in conjunction with § 230(c)(1) will immunize Wikipedia from state causes of action that treat it as a "publisher or speaker" of the defamatory information. Rather than applying a rigid "in or out" test, courts evaluate the substance of the plaintiff's complaint to determine whether liability is predicated upon the defendant's "treatment" as the "publisher or speaker" of the information.[121]

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116. *Batzel*, 333 F.3d at 1031.

117. *See also* Donato v. Moldow, 865 A.2d 711, 718 (N.J. Super. Ct. App. Div. 2005) (holding first prong satisfied under either of two rationales: as the "provider" of the website, or as the "user" of the ISP or web-host).

118. *See* Barrett v. Rosenthal (*Rosenthal II*), No. S122953, 2006 WL 3346218, at *14–17 (Cal. Nov. 20, 2006) (noting that there is "no logical distinction" between a user who "actively selects information for publication" and a user who "screens submitted material, removing offensive content.") (citing *Batzel*, 333 F.3d at 1032). The court does note that "[a]t some point, active involvement in the creation of a defamatory Internet posting would expose a defendant to liability as an original source." *Id*. at *15 n.19. However, determination of "active involvement" is appropriately made under the "information content provider" analysis in the third prong rather than under an "active user" test in the first.

119. In other situations, information on Wikipedia might also give rise to causes of action based on intentional infliction of emotional distress, unfair competition, or tortious interference with business relations or contracts.

120. 47 U.S.C. § 230(e)(3) (2000).

121. *See, e.g.*, Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 537–38 (E.D. Va. 2003) (denying Noah's argument that the defendant failed the second prong because he brought his claim under Title II of the Civil Rights Act of 1964 rather than state defamation or negligence law).

Along with the other specific preemption provisions in § 230(e),[122] the second prong also requires the court to determine whether any given cause of action is one covered by the statute.[123]

State law claims against Wikipedia, such as defamation and the related negligence actions, clearly fall within the ambit of the statute,[124] as Wikipedia could only be liable based on being a "publisher" (secondary liability) or a "speaker" (direct liability) of the injurious content. Hence, Wikipedia would be immune from defamation claims, provided it met the first and third prongs.

The Fourth Circuit defined the scope of preemption for "publisher" liability broadly in the seminal § 230(c)(1) case, *Zeran v. AOL*.[125] There, the plaintiff, Zeran, sued AOL for refusing to screen for and remove defamatory bulletin board postings, even after he had notified AOL of their existence.[126] The court, affirming the grant of AOL's motion for judgment on the pleadings, characterized the causes of action covered by the second prong as those that "would place a computer service provider in a publisher's role" by seeking to "hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content."[127] The Tenth Circuit followed suit, stating that "Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."[128] These characterizations

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122. The court will first turn to § 230(e), which lists several types of law that are *not* preempted by § 230(c)(1): criminal liability pursuant to a federal statute (§ 230(e)(1)); intellectual property law (§ 230(e)(2)); consistent state law (§ 230(e)(3)); and communications privacy law (§ 230(e)(4)). The most commonly invoked provision, as noted above, is § 230(e)(3), because defamation and negligence claims arise under state law.

123. *See, e.g.*, Fair Hous. Council v. Roommate.com, No. 03-09386, 2004 U.S. Dist. LEXIS 27987, at *8 (C.D. Cal. Sep. 30, 2004) ("The [Fair Housing Act] is not among the types of laws which are specifically exempted from the CDA.").

124. Defamation is the most common cause of action presented by a plaintiff, arising in roughly fifty percent of § 230(c)(1) cases. Courts have no difficulty concluding that § 230(c)(1) also covers the related tort actions for negligence and negligence per se for failure to prevent the defamation. *See, e.g.*, Zeran v. AOL, Inc., 129 F.3d 327, 332 (4th Cir. 1997) ("Although Zeran attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action.").

125. *Id.*

126. *Id.* at 329. The anonymous posts advertised "Naughty Oklahoma T-Shirts" with "offensive and tasteless slogans" related to the Oklahoma City bombing of 1995. Those interested in purchasing the shirts were directed to call Zeran's home phone number. *Id*.

127. *Id*. at 330.

128. Ben Ezra, Weinstein and Co. v. AOL, Inc., 206 F.3d 980, 986 (10th Cir. 2000); *see also* Green v. AOL, 318 F.3d 465, 471 (3d Cir. 2003) (citing *Zeran*, 129 F.3d at 330 and *Ben Ezra*, 206 F.3d at 986 for the same proposition); DiMeo v. Max, 433 F. Supp. 2d 523, 550 (E.D. Pa May 26, 2006) ("If 'development of information' carried the liberal definition that DiMeo suggests, then § 230 would deter the very behavior that Congress sought to encourage."); Schneider v. Amazon.com, 31 P.3d 37, 41–42 (Wash. Ct. App. 2001) ("[A]ssuming Schneider could prove existence of an enforceable promise to remove the comments, Schneider's claim is based entirely on the purported breach — failure to remove

squarely cover Wikipedia's publication of a user's defamatory statement as well as a sysop or other user's subsequent decision to republish it, revert it, or simply decline to withdraw it.

Alternatively, if a defamed plaintiff has already notified Wikipedia — through e-mail, a comment on the article's discussion page, or an edit to the article itself — then he will also argue that Wikipedia was subject to a duty to remove the defamatory statement and undertake measures to prevent its reappearance.[129] In the terms of the three-prong framework, the argument would be that Wikipedia fails to meet the requirement of the second prong because the claim treats Wikipedia as a "distributor" rather than as a "publisher or speaker." *Distributors* can only be held liable for defamatory statements contained in the materials they distribute if it is proven that they were on notice or had reason to be so, whereas *primary publishers* can be held liable for defamatory statements contained in their works without proof that they had specific knowledge of the statement's inclusion.[130] The plaintiff would argue that the inclusion of the term "publisher" and exclusion of the term "distributor" in § 230(c)(1), along with the legally distinct meanings attributed to those terms in common law, demonstrates Congress's intent to limit only publisher-level liability while leaving distributor-level liability intact.[131] Courts, from the seminal *Zeran* onward, have uniformly rejected this argument, holding that distributor liability is "merely a subset" of publisher liability and thus equally susceptible to preemption by § 230(c)(1).[132]

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the postings — which is an exercise of editorial discretion. This is the activity the statute seeks to protect.").

129. Courts have not analyzed the type or level of notice necessary to trigger this putative duty because they have all held that § 230(c)(1) immunity applies before reaching the inquiry.

130. *See* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 810–11 (5th ed. 1984), *noted in Zeran*, 129 F.3d at 331. "Primary publishers" are those who play a direct role in approving the text and literally publishing the material. "Distributors" play a "secondary role in delivering and transmitting" the material "authored and published by others." *Id.* at 803, 810–11.

131. *See Zeran*, 129 F.3d at 331–32.

132. *See id*. at 332; s*ee also* Batzel v. Smith, 333 F.3d 1018, 1026 (9th Cir. 2003) ("The specific provision at issue here, 230(c)(1), overrides the traditional treatment of publishers, *distributors*, and speakers under statutory and common law.") (emphasis added); Perfect 10 v. CCBill, 340 F. Supp. 2d 1077, 1111 (C.D. Cal. 2004); Doe v. Bates, No. 5:05CV91, slip op. at 24–25 (E.D. Tex. Jan. 18, 2006) (report and recommendation of U.S. mag. judge), http://www.steptoe.com/assets/attachments/1954.pdf; Winter v. Bassett, No. 1:02CV00382, 2003 U.S. Dist. LEXIS 26904, *24–25 (M.D.N.C. Aug. 22, 2003) (holding that § 230(c)(1) imposes no duty on defendant ISPs to remove defamatory content after notice); Patentwizard v. Kinko's, 163 F. Supp. 2d 1069, 1071–72 (D.S.D. 2001); Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998); *Rosenthal II*, No. S122953, 2006 WL 3346218, at *4 (Cal. Nov. 20, 2006); Doe v. AOL, Inc., 783 So. 2d 1010, 1013–18 (Fla. 2001); Barrett v. Fonorow, 799 N.E.2d 916, 924–25 (Ill. App. Ct. 2003); Beyond Sys. v. Keynetics, Inc., 422 F.Supp.2d 523, 536 (D. Md. 2006) (stressing that "CDA immunity applies even where an ISP knew of its customers' potentially illegal activity").

A full treatment of the policy and interpretive merits of this issue is beyond the scope of this article.[133] Nevertheless, Wikipedia should be aware of the reasoning found persuasive in the few cases that have deviated from the norm. Most illustrative of the two sides of the debate is *Barrett v. Rosenthal*, where the Supreme Court of California recently overruled the California Court of Appeal's outlying holding that § 230(c)(1) did *not* disturb "distributor" liability.[134]

Plaintiffs Barrett and Polevoy sued Rosenthal after she posted, on an Internet newsgroup, a defamatory "story" about plaintiffs that she received via e-mail from a co-defendant. Critically, with respect to the issue of distributor liability, Barrett had informed Rosenthal that the story contained false and defamatory information before she posted it. The trial court faithfully applied *Zeran* and granted Rosenthal's special motion to strike Barrett and Polevoy's claims on the grounds that § 230(c)(1) immunity applied.[135]

The California Court of Appeal reversed, holding that § 230(c)(1) does not provide immunity to a defendant that knew or had reason to know of the story's defamatory nature.[136] The court of appeal raised three contentions with the trial court's reasoning. First, the court made the formal point that because primary publishers and distributors are subject to different levels of liability under defamation law,[137] the maxim of *expressio unius est exclusio alterius*[138] argues for a conclusion opposite to that of *Zeran*: "one could argue from the enumeration of publisher and speaker in § 230(c)(1) that distributor was deliberately omitted."[139] Second, the court pointed to the two formative New York state cases referred to in § 230's legislative history.[140] Whereas

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133. Indeed, several articles treat this topic as their primary subject. *See, e.g.*, Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569 (2001); Emily K. Fritts, *Internet Libel and the Communications Decency Act: How the Courts Erroneously Interpreted Congressional Intent with Regard to Liability of Internet Service Providers*, 93 KY. L.J. 765 (2004); Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335 (2005).

134. *Rosenthal II*, 2006 WL 3346218, at *1; s*ee* Barrett v. Rosenthal (*Rosenthal I*), 9 Cal. Rptr. 3d 142 (Ct. App. 2004), *depublished by* 87 P.3d 797 (Cal. 2004); *see also* Grace v. eBay Inc., 16 Cal. Rptr. 3d 192 (Ct. App. 2004) (holding distributor liability unaffected by § 230(c)(1)), *depublished by* 99 P.3d 2 (Cal. 2004); Doe v. AOL, Inc., 783 So. 2d 1010, 1021 (Fla. 2001) (Lewis, J., dissenting).

135. *See Rosenthal II*, 2006 WL 3346218, at *2.

136. *Rosenthal I*, 9 Cal. Rptr. 3d at 152.

137. *See id*. at 150; *see also* Grace v. eBay Inc., 16 Cal. Rptr. 3d 192, 199 (Ct. App. 2004).

138. A canon of construction stating that to express or include one thing implies the exclusion of the other, or of the alternative. BLACK'S LAW DICTIONARY 620 (8th ed. 2004).

139. David R. Sheridan, Zeran v. AOL *and the Effect of Section 230*, 61 ALB. L. REV. 147, 162 (1997) (cited in *Rosenthal I*, 9 Cal. Rptr. 3d at 156).

140. *Rosenthal I*, 9 Cal. Rptr. 3d at 152; *see* 141 CONG. REC. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (discussing Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Stratton Oakmont, Inc. v. Prodigy Serv. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1995)).

in *Cubby* the court held CompuServe to the standard of liability applicable to a distributor, in *Stratton Oakmont* the court held Prodigy to the standard of liability applicable to a primary publisher.[141] Significantly, § 230's sponsors and the conference committee's report made explicit their desire to overrule *Stratton Oakmont*,[142] but made no indication of wanting to "disturb the effect of the decision in *Cubby*."[143] Finally, the court disagreed with *Zeran*'s "speculative" conclusion that leaving distributor liability intact would defeat the "dual purposes" of § 230,[144] which are to (1) remove incentives on service providers to restrict speech on the Internet and (2) encourage self-regulation by service providers.[145]

The Supreme Court of California reversed again, reaffirming *Zeran*'s reasoning in sweeping fashion, citing the case almost exclusively in its denial of plaintiffs' bid to remove distributor liability from § 230(c)(1).[146] The supreme court rebutted each of the three points of contention raised by the court of appeal. First, in the context of defamation law, every party involved in the dissemination process is a "publisher," and "distributors" are merely a subset of this category.[147] While *Zeran* admits a distinction between distributors and primary publishers,[148] that distinction "signifies only that different standards of liability may be applied *within* the larger publisher category, depending on the specific type of publisher concerned."[149] Fur-

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141. Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 141 (S.D.N.Y. 1991); Stratton Oakmont, Inc. v. Prodigy Serv. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229, *5 (N.Y. Sup. Ct. 1995).

142. H.R. REP. NO. 104-458, at 193–94 (1996) (Conf. Rep.).

143. *See Rosenthal I*, 9 Cal. Rptr. 3d at 160.

144. *Id.* at 155, 162.

145. *See* Zeran v. AOL, Inc., 129 F.3d 327, 330–33 (4th Cir. 1997).

146. *Rosenthal II*, No. S122953, 2006 WL 3346218, at *1 (Cal. Nov. 20, 2006). The supreme court described the court of appeal's opinion as "[s]wimming against the jurisprudential tide." *Id.* at *6.

147. *Rosenthal II*, 2006 WL 3346218, at *7; *see* KEETON, *supra* note 130, at 803. Keeton wrote:

> Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the books, newspapers, magazines, and information available to others as to be regarded as publishers. They are intentionally making the contents available to others, sometimes without knowing all of the contents — including the defamatory content — and sometimes without any opportunity to ascertain, in advance, that any defamatory matter was to be included in the matter published.

KEETON, *supra* note 130, at 803.

148. The court in *Zeran* failed to distinguish "primary publishers" from the broad category of "publishers," but cites to Prosser where the distinction is clear. *See* KEETON, *supra* note 130, at 803.

149. *Zeran*, 129 F.3d at 332; *see Rosenthal II*, 2006 WL 3346218, at *7 ("Given that 'distributors' are also known as 'secondary publishers,' there is little reason to believe Congress felt it necessary to address them separately. There is even less reason to suppose that

thermore, the distinction between a publisher and distributor disappears, particularly in the Internet context, once notice has been given to a service provider that would otherwise be considered merely a distributor: at that point it must "make an editorial decision on how to treat the posted material," a position "traditionally occupied by publishers."[150]

Second, while the supreme court agreed with the court of appeal that the legislative record was "meager," it extracted from Representative Cox's comments an intent to include entities such as CompuServe (which was held in *Cubby* to the distributor standard) within the immunized class of publishers.[151] Additionally, the court noted that subsequent legislative history contains explicit support for the majority interpretation of § 230(c)(1): the Committee Report to the Dot Kids Implementation and Efficiency Act acknowledges that "courts have correctly interpreted section 230(c)."[152]

Finally, the supreme court summarily affirmed *Zeran*'s conclusion that three practical implications of notice liability would defeat the previously identified dual purposes advanced by § 230.[153] First, service providers would have an incentive to simply remove all messages for which they receive notice of defamatory content because they face liability for maintaining the message but not for removing it, thereby "chilling the freedom of Internet speech."[154] Second, service providers would be deterred from actively screening content on their services, as discovery would only increase the potential for liability.[155] Finally, third parties would be given a "cost-free means of manufac-

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Congress intended to immunize 'publishers' but leave 'distributors' open to liability, when the responsibility of publishers for offensive content is greater than that of mere distributors.").

150. *Rosenthal II*, 2006 WL 3346218, at *7 (citing *Zeran*, 129 F.3d at 332); *see also id.* at *8 ("The distinction proposed by the Court of Appeal, based on rules developed in the post-Gutenberg, pre-cyberspace world, would foster disputes over which category the defendant should occupy. The common law of defamation would provide little guidance.").

151. *See id.* at *9–10 ("Representative Cox said section 230 was intended to 'encourage people like . . . CompuServe . . . by . . . protect[ing] them from taking on liability such as occurred in the [*Stratton Oakmont*] case in New York that they should not face for helping us [] solve this problem.'") (citing 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)).

152. *Id.* at *10 (citing H.R. REP. NO. 107-449, at 13 (2002)).The court admitted that it was an "unusual case" where subsequent legislative history is given any weight, but that in this case it was "instructive" because it opines on judicial interpretation rather than an earlier Congressional intent. *Id*. at *10 n.17.

153. *Id.* at *11; *see also* Beyond Sys. v. Keynetics, Inc., 422 F. Supp. 2d 523, 536 (D. Md. 2006) ("Case law clearly establishes that CDA immunity applies even where an ISP knew of its customers' potentially illegal activity."); Austin v. Crystaltech Web Hosting, ¶ 15, 125 P.3d 389, 394 (Ariz. Ct. App. 2005) ("We have found no published opinions to the contrary, and find the interpretation of a federal statute by federal courts to be persuasive."); Doe v. AOL, Inc., 783 So. 2d 1010, 1014–18 (Fla. 2001) (citing *Zeran*, 129 F.3d at 331–32).

154. *Rosenthal II*, 2006 WL 3346218, at *11.

155. *Id*.

turing claims, imposing on providers 'ceaseless choices of suppressing controversial speech or sustaining prohibitive liability.'"[156]

To overcome arguments for imposing distributor liability, Wikipedia should focus on how its actions promote § 230's broad goals of unrestricted speech and self-regulation. Wikipedia should argue that its solicitous attitude toward notifications of defamation and its often quick responses (e.g., through the use of article creation and edit monitoring technologies and the Office Action policy) are laudable attempts at dealing with what courts have heretofore considered an "impossible burden."[157] On the other hand, Wikipedia's track record in reviewing postings and avoiding litigation might suggest that the "impossible burden" rationale is now less compelling, as technology makes effective self-monitoring and self-correction much easier.

The argument that Wikipedia is a "distributor" and that distributor liability is not preempted by § 230(c)(1) presents the highest bar to satisfying the second prong. However, that bar has been substantially lowered by the Supreme Court of California's recent opinion in *Barrett v. Rosenthal*. The inconclusive legislative history in the face of unanimous treatment by federal courts suggests that a court would reject arguments for distributor liability, if for no other reason than to "continue the line of uniformity."[158] In any event, even if Wikipedia satisfies the second prong, it must still meet the first and third prongs to escape liability.[159]

C. Third Prong: "Information Provided by Another Information Content Provider"

Of the three prongs, the third will present the greatest challenge to Wikipedia. This prong requires that the relevant "information" be "provided by another information content provider." The ambiguity and complexity in these terms cause this prong to be the most litigated. The third prong itself subdivides into three analytical components, which courts sometimes address separately. These components are "information," "provided" and "by another information content provider."

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156. *Id.* (citing *Zeran*, 129 F.3d at 333).

157. *Zeran*, 129 F.3d at 333.

158. Barrett v. Fonorow, 799 N.E.2d 916, 926 (Ill. App. Ct. 2003) (emphasizing the desire to maintain uniformity, particularly in the context of the Internet); s*ee also Rosenthal II*, 2006 WL 3346218, at *13 (discussing how diverging from *Zeran* would be an open invitation to forum shopping).

159. *Cf.* Optinrealbig.com, LLC v. Ironport Sys., Inc., 323 F. Supp. 2d 1037, 1046 (N.D. Cal. 2004) ("[T]he focus on distributor liability is and should be conterminous with the focus on publisher liability: content. Just like a publisher, if a distributor alters the content, then the distributor may be liable.").

Clearly, whatever has been published on Wikipedia would be categorized as "information."[160] It is also reasonably apparent that the author of the information has "provided" it to Wikipedia. The Ninth Circuit analyzed the meaning of "provided" independently in *Batzel v. Smith*, a case in which the author claimed that when he sent a defamatory e-mail to the co-defendant listserv operator, he had not intended its eventual publication.[161] The court held that the listserv operator could not claim § 230(c)(1) immunity unless the information was "furnished . . . under circumstances in which a reasonable person in the position of the [listserv operator] would conclude that the information was provided for publication on the Internet."[162] However, this "twist on the usual § 230 analysis"[163] is unlikely to hinder Wikipedia: it is almost always reasonable for Wikipedia to "conclude that the information was provided for publication on the Internet"[164] when a user posts to Wikipedia, as there is no intermediate step.

The bulk of the analysis, then, turns on the interpretation of the phrase "another information content provider." The statutory definition of 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."[165]

Because of the unique relationship between Wikipedia and its user-community, the question of whether an individual user-poster is a separate "information content provider," as opposed to somehow being a representative of Wikipedia, is unclear. If Wikipedia is determined to be the relevant "information content provider" then there is no immunity under § 230(c)(1), as Wikipedia itself will be held responsible for the defamatory content. Thus, the definition of "information content provider" raises an important threshold question in this case: what counts as the "person or entity" whose actions the court should analyze in determining whether Wikipedia is the "information content provider" under the third prong? Whereas the statute defines "person" elsewhere as "an individual, partnership, association, joint-

160. In the sole case litigating the question of what constitutes "information" for purposes of § 230(c)(1), the court determined that a "punter" (malicious software code designed to kick someone off the AOL service temporarily) deployed over an AOL chat room qualified. Green v. AOL, 318 F.3d 465, 471 (3d Cir. 2003).

161. Batzel v. Smith, 333 F.3d 1018, 1032 (9th Cir. 2003).

162. *Id*. at 1034.

163. *Id.* at 1032 ("In most cases our conclusion that [the listserv operator] cannot be considered a content provider would end matters, but this case presents one twist on the usual § 230 analysis: [the e-mail's author] maintains that he never 'imagined [his] message would be posted on an international message board or [he] never would have sent it in the first place.'").

164. *Id*. at 1034.

165. 47 U.S.C. § 230(f)(3) (2000).

stock company, trust, or corporation,"[166] neither the statute nor the cases applying and interpreting it provide much guidance as to the exact scope of the term "entity."

It is important to note that this inquiry is distinct from the question of who qualifies as Wikipedia's agent because the determination of the phrase "person or entity" does not seek to make Wikipedia directly liable for actions of others. A plaintiff would allege that Wikipedia is an "information content provider" with respect to the defamatory statement, not that the defaming user necessarily "is" Wikipedia. If "entity" in § 230(f)(3) casts a wide net, such that many people's actions qualify in the subsequent analysis of "information content provider," then immunity is small. Conversely, if "entity" is interpreted narrowly, as well as "information content provider," then § 230(c)(1)'s immunity is very broad indeed.

The Wikipedia community is self-consciously inclusive, designating all of its contributors as "Wikipedians."[167] Presumably, this inclusiveness fosters the cooperative atmosphere critical to Wikipedia's success. However, if *all* members of the Wikipedia community — that is, all contributors — are considered part of the Wikipedia "entity," then it would, by definition and by operation of the third prong, not be eligible for § 230(c)(1) immunity because Wikipedia would be the site's only contributor — there could be no "[]other information content provider." Wikipedia's self-perception notwithstanding, that particular result does not seem likely in light of the courts' treatment of other community-based "interactive computer services." For example, in the case of the dating site matchmaker.com, the court *assumed* that the user "contributing" the content (a defamatory profile) served as the "[]other information content provider" for purposes of the third prong and thus was not part of the matchmaker.com "entity."[168] A different court made the same assumption and reached the same result more recently in a similar situation, where a user (the plaintiff's ex-boyfriend) created a false Yahoo! profile with nude pictures of the plaintiff.[169]

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166. *Id.* § 153(32).

167. *See* Wikipedia, *Wikipedians*, http://en.wikipedia.org/wiki/Wikipedians ("The number of Wikipedians has grown to more than 2 million . . . plus an unknown, but quite large, number of unregistered contributors.") (as of Nov. 16, 2006, 23:35 GMT).

168. *See* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003).

169. *See* Barnes v. Yahoo!, Inc., No. 05-926-AA, 2005 U.S. Dist. LEXIS 28061 (D. Or. Nov. 8, 2005); *see also* Anthony v. Yahoo!, Inc., No. C-05-04175 RMW, 2006 WL 708572 (N.D. Cal. Mar. 17, 2006) (suggesting that Yahoo! would not be liable for the content created by subscribers to its Yahoo! Personals service); Landry-Bell v. Various, Inc., No. 05-1526, 2005 U.S. Dist. LEXIS 38471 (W.D. La. Dec. 27, 2005) (noting that adultfriendfinder.com would not be liable for the posts of its users); Fair Hous. Council v. Roommate.com, LLC, No. CV 03-09386 PA (RZx), 2004 U.S. Dist. LEXIS 27987 (C.D. Cal. Sept. 30, 2004) (holding that roommate.com cannot be liable for the nicknames or comments made by its users).

Wikipedia is similar to matchmaker.com in that a community of users creates the content that gives purpose to the community. Wikipedia is also similar to Yahoo! in that anyone can join and create content purely for the sake of sharing it with others. The difference lies in the formal organizational structure. Wikipedia lacks the sharp demarcation that, in the cases of matchmaker.com and Yahoo!, separates the profile-contributors from the sites' governing powers.[170] That point of separation in power is the logical place for distinguishing who is part of the "entity" from who merely "provides information" to it. While there are several "classes" of Wikipedians (unregistered users → registered users → sysops → bureaucrats → stewards → Jimbo),[171] the greatest jump in power comes between "registered user" and "sysop." Most significantly, at the sysop level, the user gains the power to edit "protected" pages,[172] including the pages that mandate Wikipedia's legal policies. This power to alter Wikipedia's legal policies reflects the Restatement's definition of agency, which notes that "[w]hen an agent acts with actual authority, the agent's power to affect the principal's legal relations with third parties is coextensive with the agent's right to do so, which actual authority creates."[173] Wikipedians with sysop powers are thus more analogous to matchmaker.com and Yahoo! employees, who run the matchmaker.com and Yahoo! Profile services, than to the users who merely contribute profiles to those services.[174]

Wikipedia would argue that, for purposes of § 230(f)(3), only employees of the Wikimedia Foundation should be considered as part of the Wikipedia "entity." However, "the fact that work is performed

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170. Another possible metric for distinguishing contributors from the site itself (e.g., matchmaker.com, Yahoo!) is the flow of money. Users who pay to participate in the service should not be considered the service itself, nor should those who do not benefit from the advertising revenue. This analysis finds limited applicability to Wikipedia as it is not a commercial site. However, it does collect donations, and Wikipedia might be able to argue that only the limited subset of individuals that have access to and control of the funds should be considered as its agents.

171. *See supra* text accompanying notes 42–45.

172. *See* Wikipedia, Wikipedia:List of Permanently Protected Pages, http://en.wikipedia.org/wiki/Wikipedia:List_of_permanently_protected_pages (as of Nov. 16, 2006, 23:35 GMT).

173. RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006).

174. One commentator suggests a generic taxonomy of interactive computer service users (Reader → Poster → Moderator → Administrator), and draws the line of § 230(c)(1) coverage between Poster (out) and Moderator (in). James P. Jenal, *When is a User Not a "User"? Finding the Proper Role for Republication Liability on the Internet*, 24 LOY. L.A. ENT. L. REV. 453, 478–81 (2004). While a Moderator is one who, for example, creates forums or listservs and has the power to monitor the content exchanged therein, a Poster is one who creates the content that is made available online. *Id*. Unfortunately, Jenal's taxonomy, intended to clarify the phrase "provider or user" in the first prong, does not map onto the various classes of Wikipedians with sufficient specificity to guide us in the question of who "is" Wikipedia for purposes of the third prong. A member of any class could be a Poster, and a registered user (and those above) could conceivably fit within the definition of Moderator because he can create articles.

gratuitously does not relieve a principal of liability."[175] Wikipedia may also assert that only the actions of a sysop which reflect his special administrative duties should be attributable to Wikipedia; a sysop spends the majority of his time simply browsing, reviewing, and editing as any other registered or even unregistered user might. Agency law handles such objections regarding the actions of a servant with an inquiry into whether the action in question was within the agent's "scope" of duties. Generally, "scope" is interpreted sufficiently broadly for a sysop's actions to be attributable to Wikipedia even though they *could* be performed by a non-sysop.[176]

If Wikipedia succeeds in these arguments, then the field of actions classifiable as "creation or development" by the Wikipedia "entity" drops drastically as sysops and registered users make up the vast majority of the Wikipedia community. In case this argument fails, this article continues with the analysis of the third prong by regarding the actions of the Wikimedia Foundation and all the Wikipedia sysops (and all higher-level members) as the actions of the Wikipedia "entity" under § 230(f)(3).

The court would then turn to the remainder of the "information content provider" definition[177] — specifically the phrase "responsible, in whole or in part." What follows is a previously unarticulated taxonomy of the various approaches that a court might take in interpreting the ambiguous relationship between (c)(1) and (f)(3). While each of the approaches taken alone is consistent with the text of the statute, a court's choice to apply one over another may affect the scope of immunity available to Wikipedia and will, at least, shape the parties' arguments. The interaction between (f)(3)'s "responsible, in whole or in part" and (c)(1)'s "provided by another information content provider" yields the following alternative approaches: (1) the "permissive" approach; (2) the "broad responsibility" approach; and (3) the "mutually exclusive" approach which itself depends on either (a) the "deconstructive/narrow" view, or (b) the "constructive/broad" view of what constitutes "information."

(1) *"Permissive" approach.* The most permissive approach would immunize Wikipedia in any scenario where another party is at least "responsible . . . in part" for the "creation or development" of the in-

175. RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(B) (2006). However, Wikipedia may also argue at this point that it is the Wikipedia community, and not the Wikimedia Foundation, that is benefiting from the work.

176. "An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer." *Id*. at § 7.07(2).

177. "[A]ny 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." 47 U.S.C. § 230(f)(3) (2000).

formation posted on Wikipedia, even if a Wikipedia sysop was also involved. If "another" "person or entity" (i.e., any non-sysop Wikipedian) is "responsible" for some "creation or development" of the information, then that party is an "information content provider." Then, because the text of § 230(c)(1) does not literally require that Wikipedia *not* be an "information content provider," the third prong is satisfied under this approach regardless of Wikipedia's involvement in "creation or development." No court has ever applied this broad approach, though in dicta a recent district court implied that it might be possible under (c)(1)/(f)(3)'s ambiguous guidance.[178] In any case, Wikipedia would be ill-advised to rely on it — it is far too broad and would call for immunity in almost any scenario.

(2) *Broad responsibility approach.* On the opposite end of the spectrum is the most restrictive approach, which would make Wikipedia liable if it were in any way "responsible" for the "creation or development" of the information, even if the defamatory statements were never seen by any non-sysop.

Only one court has proposed imposing liability on the basis of responsibility absent "creation or development." In *MCW v. badbusinessbureau.com*, aside from holding that the defendant itself "created and developed" the information, the court further observed that "the statute does not require a court to determine only whether a party creates or develops the information at issue. Being *responsible* for the creation or development is sufficient."[179] The court criticized more permissive approaches: "Some courts have ignored this distinction, broadening the scope of immunity to protect those who do not create or develop the information themselves, but are still responsible for the creation or development of information."[180] The court opined that even if badbusinessbureau.com had not actually created or developed the information, it was still "responsible" because it directed the disgruntled consumer to take certain photos (e.g., of the consumer in front of plaintiff's office building holding a copy of a "Rip-off Report") to include in his online posting.[181]

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178. *See* Prickett v. InfoUSA, Inc., No. 4:05-CV-10, 2006 U.S. Dist. LEXIS 21867, *16 (E.D. Tex. March 30, 2006) ("Assuming the Defendant could be considered an information content provider based on the Plaintiffs' assertions, the statute precludes treatment as a publisher or speaker for 'any information provided by another information content provider.'")

179. MCW, Inc. v. badbusinessbureau.com, L.L.C., No. 3:02-CV-2727-G, 2004 WL 833595, *10 n.12 (N.D. Tex. Apr. 19, 2004) (emphasis added).

180. *Id*. (citing Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003) with disapproval); *cf*. Brandy Jennifer Glad, *Determining What Constitutes Creation or Development of Content Under the Communications Decency Act*, 34 SW. U. L. REV. 247, 260 (2004) ("[T]he statute does not require the ISP to be solely responsible for the development or creation of the material. Rather, it only requires the ISP to be responsible 'in part' to be considered an information content provider . . . .").

181. *MCW*, 2004 WL 833595, at *10.

Unfortunately, the *MCW* court does not articulate what actions cause a defendant to be responsible for the "creation and development," and therefore be liable as an information content provider. Since no other court has discussed the meaning of responsibility in the context of (c)(1) and (f)(3), it is difficult to determine whether Wikipedia could be considered responsible under this broad approach for the content published in its article and on its discussion pages by non-sysop Wikipedians.

As a basis for finding such responsibility, one could point to Wikipedia's pervasive self-representation as "the free encyclopedia."[182] Its suffix, a derivation of the word "encyclopedia," bolsters this representation.[183] An uninitiated reader might reasonably assume that Wikipedia is more like other encyclopedias, and less like a blog, in that it "creates an impression of institutional reliability and veracity by holding itself out" as such.[184] The likelihood that a reader is uninitiated is substantial, in part because of the high visibility and accessibility of the content on Wikipedia.[185] A reader who stumbles across an article through a search may have no idea of the true nature of Wikipedia, i.e., that there is no guarantee that experts have reviewed the article.[186] Furthermore, Wikipedia very conspicuously disclaims responsibility for the content of its articles on its "General disclaimer" page.[187] Finally, Wikipedia may counter that a reader's assumption

182. *See* Main Page — Wikipedia, the free encyclopedia, http://en.wikipedia.org (last visited Nov. 16, 2006).

183. *Cf.* MGM Studios v. Grokster, 125 S. Ct. 2764, 2773 (2005) (inferring Grokster's culpability through association with Napster's "ster" suffix).

184. Ramasastry, *supra* note 7 (suggesting that Congress alter the standard for liability for reference websites like Wikipedia). Indeed, the increasing citation of Wikipedia in legal opinions and scholarly articles corresponds directly to the growing acceptance of Wikipedia as a credible source. *See, e.g.*, N'Diom v. Gonzales, 442 F.3d 494, 496 (6th Cir. 2006) (citing Wikipedia's article on Mauritania); United States v. Zajanckauskas, 441 F.3d 32, 34 n.1 (1st Cir. 2006) (citing Wikipedia's article on the Nazi SS military unit); Larry Alexander & Lawrence B. Solum, *BOOK REVIEW: POPULAR? CONSTITUTIONALISM? The People Themselves: Popular Constitutionalism and Judicial Review*, 118 HARV. L. REV. 1594 , 1601 (2005) (citing Wikipedia's article on the structure of German government); Richard A. Posner, *REVIEW: Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699, 1715 (2006) ("Justice Breyer is fluent in French. So perhaps he won't take offense if I call him a bricoleur, defined by Wikipedia as 'a person who creates things from scratch, is creative and resourceful: a person who collects information and things and then puts them together in a way that they were not originally designed to do.'").

185. Anyone not familiar with Wikipedia might stumble across its content via a search engine. For example, a search for "John Seigenthaler" on Google yields as the top result "John Seigenthaler, Sr. — Wikipedia, the free encyclopedia." Google, John Seigenthaler — Google Search, http://www.google.com/search?hl=en&q=John+Seigenthaler&btnG=Google+Search (last visited Nov. 16, 2006).

186. *See* Prickett v. InfoUSA, Inc., No. 4:05-CV-10, 2006 U.S. Dist. LEXIS 21867, *9–19 (E.D. Tex Mar. 30, 2006) (allowing the online address database operator's § 230(c) argument where it expressly claimed to "verify the information," even in the absence of any evidence that there was any such verification.).

187. Wikipedia, Wikipedia:General Disclaimer, http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer (as of Nov. 16, 2006, 23:35 GMT). Wikipedia's disclaimers

about the veracity of *any* encyclopedia is likely misplaced in the first instance — encyclopedias routinely disclaim any guarantee of accuracy.[188]

The argument that Wikipedia should be responsible because of its public representations implies that Wikipedia knows, or should know, the content of its pages. However, this implication shoehorns the policy arguments for notice-based distributor liability into the vaguer notion of "responsibility." A court hostile to § 230(c)(1)'s expansive immunity might accept this move without more discussion; however this seems unlikely as the courts have rejected these policy arguments with near unanimity in the context of the "distributor vs. publisher liability" debate explored in the analysis of the second prong.[189]

In sum, the "broad responsibility" approach presents two potential pitfalls to Wikipedia. First, the application of this vague and broad notion of "responsibility" renders unavailable the substantial precedent of the more restrictive approaches, which favors defendants. Second, it would allow a hostile court to re-entertain policy arguments that the vast majority of courts have denied in the context of the "distributor vs. publisher liability" debate. To avoid an application of the "broad responsibility" approach, Wikipedia should primarily point to its lack of judicial utilization. The only court that considered this approach actually applied the more conventional "mutually exclusive" approach discussed next.[190]

(3) *"Mutually exclusive" approach.* The "mutually exclusive" approach would immunize Wikipedia only when its actions do not constitute "creation" or "rise to the level of 'development'" of the information in question.[191] The approach envisions a mutually exclusive relationship between the "information content provider" and the "interactive computer service" entity with regard to the information at issue.[192] Thus, this approach attempts to distinguish between actions

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are far more thorough than disclaimers for other encyclopedias available online. *See id*. Note, however, that Wikipedia would not be able to disclaim liability for defamation.

188. *See, e.g.*, Encyclopædia Britannica — Usage Agreement, http://corporate.britannica.com/termsofuse.html (last visited Nov. 16, 2006) ("The services and all information, products, and other content included in or accessible from the services are provided 'as is' and without warranties of any kind."); Windows Live Encarta — Terms of Use, http://tou.live.com/en-us/default.aspx?HTTP_HOST=tou.live.com&url=/en-us (last visited Nov. 16, 2006) ("We do not guarantee the accuracy or timeliness of information available from the service.").

189. *See supra* Part V.B. The dearth of judicial and scholarly comment on the term "responsible" in § 230(f)(3) suggests that it is too narrow a base on which to stand a revival of distributor liability under § 230(c)(1)'s third prong.

190. *See* MCW, Inc. v. badbusinessbureau.com, L.L.C., No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *9–10 (N.D. Tex Apr. 19, 2004); *see also infra* note 214.

191. *See* Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003).

192. *See, e.g.*, Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003) ("Under the statutory scheme, an 'interactive computer service' qualifies for immunity so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue."); *Batzel*, 333 F.3d at 1031 ("The reference to '*another*

that make the defendant "responsible, in whole or in part" for the "creation or development" of information (thereby making the defendant the "information content provider") and actions that do not (thereby allowing the defendant to acclaim mere "interactive computer service" status).

There are two distinct views that courts have taken of the term "information" in § 230(c)(1).[193] The first view deconstructs information into its constituent pieces of authorship and attributes responsibility to each party only for the piece of information that *it* alone "created or developed." The second view considers information as a broader construction with various contributors of which only one counts as the "information content provider." Wikipedia would prefer the first because it creates a shorter path to immunity, as it only needs to show that it did not create the specific information in question. Once a court determines what it will consider as the "information," it would turn to analyzing whether Wikipedia "created or developed" that "information."

(a) *Deconstructive or narrow view.* The deconstructive view first arose in cases where plaintiffs attempted to hold defendants responsible for "creation or development" of "information" where the defendant had in fact only taken action on a subset of that information. courts have been hostile to this move in several cases. The first such case, *Ben Ezra, Weinstein, & Co. v. AOL, Inc.*, involved publication of incorrect and thus allegedly defamatory stock information provided to AOL by a reporting company with whom AOL had contracted.[194] The plaintiff argued that AOL was the "information content provider" because its selective deletion of erroneous stock information in its databases constituted "creation or development" of the database *as a whole*.[195] The Tenth Circuit declined to use AOL's deletion of specific information as a basis for holding AOL responsible for the broader information, holding instead that AOL "simply made the data unavailable and did not develop or create the stock quotation information displayed."[196] In a later case, *Gentry v. eBay, Inc.*, where eBay users auctioned fake sports memorabilia to unsuspecting buyers, the plaintiff argued that eBay was "responsible" for the sell-

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information content provider' [in § 230(c)(1)] distinguishes the circumstance in which the interactive computer service itself meets the definition of 'information content provider' with respect to the information in question."); s*ee also* Glad, *supra* note 166, at 252 ("In establishing federal immunity to defamation suits, section 230 distinguishes between ISPs, which are immune from suit, and information content providers, which are not.").

193. This inquiry is distinct from the question of whether the article constitutes "information" at all. *See supra* note 160 and accompanying text.

194. 206 F.3d 980 (10th Cir. 2000).

195. *Id*. at 985–86.

196. *Id*. at 986. The court characterized making data "unavailable" as an "exercise of its editorial and self-regulatory functions." *Id.* (citing Zeran v. AOL, Inc., 129 F.3d 327, 331 (4th Cir. 1997)).

ers' falsely reassuring Positive Feedback ratings and Power Seller designation because it created the Feedback Forum on which such false feedback was given.[197] As in *Ben Ezra*, the court objected to the plaintiff's overbroad characterization of the "information," and stated the issue more narrowly as "whether eBay acted as an information content provider with respect to the information that appellants claim is false or misleading."[198] The Ninth Circuit also denied a similarly broad view of "information" in *Carafano v. Metrosplash.com, Inc.*, where the plaintiffs argued that matchmaker.com "created or developed" the content in its user profiles because it had used a preliminary questionnaire with leading questions, some with pre-prepared answers, to facilitate profile creation.[199] The court cited *Gentry*'s more focused approach with approval, stating that "[t]he statute would still bar [the plaintiff's] claims unless matchmaker.com created or developed the *particular information at issue*."[200]

One valid criticism of the deconstructive view is that it essentially collapses the "creation or development" test into a pure "creation" test. Under a strictly deconstructive view of "information," it is impossible for a party to be liable for "development," because they are only responsible for their discrete additions. Conversely, in the case of deletions, a strictly deconstructive view is nonsensical because one cannot comprehend the meaning of a deletion without reference to its context. A court might hesitate before introducing a rule that only speaks to some but not all of a "publisher's traditional editorial functions."[201] That said, Wikipedia could respond by emphasizing that, in *Ben Ezra*, the case involved editing by deletion, not accretion, but

197. Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 834 (Ct. App. 2002).

198. *Id*. at 833 n.11. "We do not see such activities transforming eBay into an information content provider with respect to the representations targeted by appellants as it did not create or develop the underlying misinformation." *Id.* at 834 (citing *Ben Ezra*, 206 F.3d at 985–86). Admittedly, the *Gentry* court did state that "[i]t is not inconsistent for eBay to be an interactive service provider and also an information content provider; the categories are not mutually exclusive." *Id*. at 833 n.11. However, in context, this sentence reinforces the deconstructive view: it is possible for an entity to be both an interactive computer service *and* an information content provider, *but only if* the information is taken as a whole.

199. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003); *see* Prickett v. InfoUSA, Inc., No. 4:05-CV-10, 2006 U.S. Dist. LEXIS 21867, *14–15 (E.D. Tex. Mar. 30, 2006) ("The fact that some of the content was formulated in response to the Defendant's prompts does not alter the Defendant's status.") (citing *Carafano*, 339 F.3d at 1124).

200. *Carafano*, 339 F.3d at 1125 (citing *Gentry*, 99 Cal. App. 4th at 833 n.11) (emphasis added); *see Prickett*, 2006 U.S. Dist. LEXIS 21867, at *15–16 (citing *Carafano*, 339 F.3d at 1125 to allow the defendant's argument that they were not liable as they did not provide the "particular information at issue"); Novak v. Overture Servs., Inc., 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004) ("Under Section 230(c), an 'interactive computer service' qualifies for immunity so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue." (citing *Carafano*, 339 F.3d at 1123)).

201. *See* Zeran v. AOL, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (noting that "deciding whether to publish, withdraw, postpone or alter content" are examples of a "publisher's traditional editorial functions").

nevertheless the Tenth Circuit was not deterred from applying the deconstructive approach.[202]

As applied to Wikipedia, the deconstructive view presents a shorter path to immunity. If Wikipedia can persuade the court that the defamatory article is actually comprised of multiple unique pieces of authorship, then it stands in a very strong position for the analysis of the third prong because it will only have to show that it did not "create or develop" the particular defamatory statement.

(b) *Constructive or broad view.* If Wikipedia failed to persuade the court to apply the deconstructive view, the court would analyze whether Wikipedia's actions constituted "creation or development" of *the whole article*. The plaintiff would argue that the court should consider the whole article as the "information" because each article is presented as a relatively seamless whole. In fact, an uninitiated user may never realize that any given article could have scores of contributing authors.[203] Wikipedia can argue that its method of operation is unique and merits analysis under the "deconstructive" view rather than this view because the "information" is constantly changing through users' contributions. The constructive view is most readily applied when there is (a) one originating author, who (b) sends it to the defendant, (c) performs certain actions, and then (d) publishes it once. On Wikipedia, however, authorship, delivery, and publication (steps a, b, and d) are simultaneous, and *other users* perform certain actions (step c) an indefinite number of times. Additionally, on Wikipedia, unlike on other media, such an approach would be realistic, because authorships of discrete article accretions are exhaustively maintained on the associated history page.

"Creation or Development." Under either view of the mutually exclusive approach, the court will analyze whether Wikipedia's actions constituted "creation or development" of the "information" in question. Under the deconstructive view, that "information" would only be the specific defamatory statement; under the general view, it would be the whole article.

Courts have avoided granting § 230(c)(1) immunity on the basis of the third prong on only five occasions.[204] In four of the five, the

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202. Ben Ezra, Weinstein, & Co. v. AOL, Inc., 206 F.3d 980, 986 (10th Cir. 2000).

203. Perhaps a third view would consider the entirety of Wikipedia as the "information," in which case Wikipedia would undoubtedly be considered an "information content provider." This could be labeled as the "limitless view," and it is akin to the "broad responsibility" approach discussed above; it is equally unpersuasive.

204. *See* Whitney Info. Net., Inc. v. Xcentric Venture, LLC, No. 04-00047-CV-FTM-29-SPC., 2006 WL 2243041 (11th Cir. Aug. 1, 2006); Anthony v. Yahoo! Inc., 421 F. Supp. 2d 1257 (N.D. Cal. 2006); Hy Cite Corp. v. badbusinessbureau.com, L.L.C., 418 F. Supp. 2d 1142 (D. Ariz. 2005); MCW, Inc. v. badbusinessbureau.com, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595 (N.D. Tex. Apr. 19, 2004); Sabbato v. Hardy, No. 2000CA00136, 2000 Ohio App. LEXIS 6154 (Ct. App. Dec. 18, 2000).

plaintiff alleged "creation" on the part of the defendant.[205] In the Yahoo! case, the plaintiff successfully overcame Yahoo!'s motion to dismiss by alleging that Yahoo! actually created the false profiles that provided the basis for the plaintiff's fraud allegation.[206] A plaintiff suing Wikipedia would undoubtedly make the same allegation with respect to both the lone defamatory statement and the article as a whole, which, taken as true,[207] would likewise overcome an initial motion to dismiss. Wikipedia will then have to argue the "entity" issue discussed above.

Absent "creation," a plaintiff must be able to show that Wikipedia "developed" the information to defeat § 230(c)(1) immunity.[208] The plaintiff would likely allege that Wikipedia "developed" the information on the basis of: (1) facilitating the initial creation of the article; (2) facilitating and encouraging the creation of the defamatory statement; (3) inspecting and leaving published the defamatory statement; and/or (4) re-publishing and making minor edits to the statement. Fortunately for Wikipedia, showing "development" under § 230(c)(1) presents a high bar for any plaintiff to overcome.

Facilitation, without more, has never constituted "development" of the underlying information. Both Amazon.com and eBay have successfully avoided responsibility for defamatory product feedback or falsely positive user feedback on their respective services.[209] AOL has done the same with respect to content transmitted over its e-mail and chat services.[210] Perhaps the most appropriate analogy for a bio-

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205. *MCW* is the fifth, and the only case where the court held the defendant liable for "development" rather than "creation." 2004 WL 833595 at *10; *cf. infra* Part VIII.

206. *Anthony*, 421 F. Supp. 2d at 1257. The claims were for fraud and negligent misrepresentation, not for defamation. The created profiles allegedly misrepresented the popularity of Yahoo!'s online dating service. *Id*. at 1262–63 ("No case of which this court is aware has immunized a defendant from allegations that *it* created tortious content.").

207. *See, e.g.*, Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 740 (1976) ("Since we are reviewing a dismissal on the pleadings, we must, of course, take as true the material facts alleged in petitioner's amended complaint.").

208. While this is generally true, the concurring opinion in *Rosenthal II* raised the possibility of a third basis for losing § 230(c)(1) immunity where publishers "conspire with original content providers to defame." *Rosenthal II*, No. S122953, 2006 WL 3346218, at *17 (Cal. Nov. 20, 2006) (Moreno, J., concurring). For this theory to apply against Wikipedia, Justice Moreno would seem to require an explicit agreement between Wikipedia and the content provider to publish defamatory information. *Id.* at *17–18 (Moreno, J., concurring). Thus, the "conspiracy" theory of § 230(c)(1) with respect to Wikipedia would likely be subsumed within the third prong "development" analysis below to determine if there is sufficient manifestation of agreement.

209. *E.g.*, Gentry v. eBay, Inc., 99 Cal. App. 4th 816 (Ct. App. 2002); Bergraft v. eBay, Inc., No. L-566-02 (N.J. Super. Ct. Oct. 1, 2003) (unpublished order granting eBay's motion to dismiss), *available at* http://eric_goldman.tripod.com/caselaw/begraftvebay.pdf; Schneider v. Amazon.com, Inc., 31 P.3d 37 (Wash. Ct. App. 2001).

210. *See, e.g.*, Green v. AOL, 318 F.3d 465 (3d Cir. 2003); Zeran v. AOL, Inc., 129 F.3d 327 (4th Cir. 1997); Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532 (E.D. Va. 2003); Morrison v. AOL, Inc., 153 F. Supp. 2d 930 (N.D. Ind. 2001); Doe v. Oliver, 755 A.2d 1000 (Conn. Super. Ct. 2000); Doe v. AOL, Inc., 783 So. 2d 1010 (Fla. 2001).

graphical article on Wikipedia is to a profile on a service such as Roommate.com or Yahoo! Personals. In each of those cases, courts did not attribute responsibility for offensive, defamatory, or false profiles to the creators of the *system* that facilitated the creation of the *profiles*.[211]

Encouragement, however, presents a closer question. In *MCW*, the court held that the defendant-operator of badbusinessbureau.com[212] was an "information content provider" with respect to the defamatory consumer complaints that it posted[213] because it "actively encourage[ed] and instruct[ed] a consumer to gather specific detailed information" for inclusion in the "Rip-off Report" it posted on its site.[214] Wikipedia's actions, which include sysops posting occasional notes on the discussion pages of articles to clarify something, are distinguishable from those of badbusinessbureau.com in *MCW*. Badbusinessbureau.com directed its users to "take photos of (1) the owner, (2) the owner's car with license plate, (3) the owner handing out Rip-off Reports in front of [the plaintiff's] office, and (4) the [plaintiff's] sign in the background with the Rip-off Reports in hand."[215] Wikipedia's encouragement, if any, is more akin to matchmaker.com's use of free-response essay and multiple-choice questions on its initial profile-creation questionnaire in *Carafano*.[216] There, the Ninth Circuit held that mere prompts to create content do not constitute "development" of the resulting information.[217]

Only where the encouragement or direction is sufficiently specific would a court deem Wikipedia to have "developed" the defamatory statement. It should be noted, however, that the direction need not be specifically defamatory — the pictures in *MCW* might have been in-

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211. *See* Barnes v. Yahoo!, Inc., No. 05-926-AA, 2005 U.S. Dist. LEXIS 28061 (D. Or. Nov. 8, 2005); Fair Hous. Council v. Roommate.com, No. CV 03-09386 PA (RZx), 2004 U.S. Dist. LEXIS 27987 (C.D. Cal. Sep. 30, 2004); *see also* DiMeo v. Max, 433 F. Supp. 2d 523, 529–30 (E.D. Pa. 2006).

212. Rip-Off Report.com, http://www.badbusinessbureau.com (last visited Nov. 16, 2006).

213. MCW, 2004 WL 833595, at *10.

214. *Id.* at *9–10 n.10. The court disallowed immunity on several grounds. The first, mentioned here, is that badbusinessbureau.com "developed" the content. The second is that badbusinessbureau.com also "created" the content. *See id*. at *9 n.11. The last, discussed above, is that badbusinessbureau.com was also "responsible" for such "creation or development." *See supra* note 179 and accompanying text.

215. MCW, Inc. v. badbusinessbureau.com, L.L.C., No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *10 (N.D. Tex Apr. 19, 2004).

216. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003); *see also* Prickett v. InfoUSA, Inc., No. 4:05-CV-10, 2006 U.S. Dist. LEXIS 21867, *14–15 (E.D. Tex. Mar. 30, 2006) ("The fact that some of the content was formulated in response to the Defendant's prompts does not alter the Defendant's status.") (citing *Carafano*, 339 F.3d at 1124).

217. *Carafano*, 339 F.3d at 1124. *But cf.* Glad, *supra* note 180, at 264 (criticizing the Ninth Circuit's conclusion that matchmaker.com was not an "information content provider" because "not all of the questions posed by matchmaker.com were innocuous; many were sexually suggestive and facilitated the development of the defamatory content found throughout the profile").

nocuous in a separate context — it need only be specific. If Brian Chase had been prompted to post his edit to the Seigenthaler biography by a suggestion by a sysop that someone "discuss connection between Seigenthaler and Kennedy assassination," then Wikipedia would have arguably "developed" the comment that "[f]or a brief time, he was thought to have been directly involved in the Kennedy assassinations of both John, and his brother, Bobby."[218] Barring that level of specificity, however, Wikipedia should not be considered a "developer" of the information in its articles.

Inspection and the power to inspect also do not raise Wikipedia to the level of a "developer." In *Blumenthal v. Drudge*,[219] AOL contracted with Matthew Drudge to supply the Drudge Report to its members. Drudge would e-mail AOL the report, which AOL would then post to its service. AOL successfully argued for § 230(c)(1) immunity despite having reserved the right to "remove, or direct [Drudge] to remove, any content which, as reasonably determined by AOL . . . violates AOL's then-standard Terms of Service."[220] In another case involving AOL, the Third Circuit declined the plaintiff's attempt to hold AOL liable for "decisions relating to the monitoring, screening and deletion of content" because such "actions quintessentially relate[] to a publisher's role."[221] Furthermore, to the extent that one would argue for breach of a duty based on Wikipedia's knowledge of the statement, such an argument would be precluded by a determination that § 230(c)(1) covers both publisher and distributor liability.[222]

Finally, any argument that Wikipedia is responsible for the defamatory statement based on a sysop's decision to re-publish and minimally edit it will also likely fail. The plaintiff would argue that the decision to re-publish the minor edit to the statement gave it Wikipedia's imprimatur. Nevertheless, Wikipedia's act, either characterized as a decision to publish or a decision to not withdraw, fits squarely within *Zeran*'s prohibition against "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to *publish*, *withdraw*, postpone or *alter* content."[223] Similarly, in *Batzel*, the Ninth Circuit

218. Seigenthaler, *supra* note 6.

219. 992 F. Supp. 44 (D.D.C. 1998).

220. *Id*. at 51.

221. Green v. AOL, 318 F.3d 465, 471 (3d Cir. 2003); *see also* DiMeo v. Max. 433 F. Supp. 2d 523, 529–30 (E.D. Pa. 2006); D'Alonzo v. Truscello, No. 0274, 2006 Phila. Ct. Com. Pl. LEXIS 244, *15–17 (Pa. Com. Pl. May 31, 2006) (noting explicitly the difference between online-newspaper and print-newspaper publishers).

222. *See supra* Part V.B. Of course, if a court held that distributor liability was not preempted by § 230(c)(1), that would obviate any need to show "development" under the third prong.

223. Zeran v. AOL, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (emphases added); *see also DiMeo*, 433 F. Supp. 2d at 530 (explicitly interpreting "development" narrowly).

held that the defendant-operator of a listserv was not an "information content provider" with respect to an allegedly defamatory e-mail that he re-published, despite selecting it while rejecting others, and making minor alterations to it.[224] The Ninth Circuit clarified the meaning of "development of information" as "something more substantial than merely editing portions of an e-mail and selecting material for publication."[225] Indeed, by this standard, all Wikipedia needs do to avoid "information content provider" status with respect to the defamatory statement is to "retain[] its basic form and message."[226] This holds particularly true as there is no selection to publish the one defamatory statement over any others, defamatory or otherwise.

Wikipedia should thus be able to escape liability under the mutually exclusive approach because its actions are more similar to those not constituting "development" than to those that do. As discussed, each of the approaches presents challenges of varying difficulty to Wikipedia. Under each, however, Wikipedia has strong arguments that it satisfies the third prong, i.e., that the "information" is "provided by another information content provider."

VI. THOUGHTS FOR FITTING WIKIPEDIA TO § 230(C)(1)

Although Wikipedia has successfully avoided defamation litigation thus far, it might be able to continue to do so in the § 230(c)(1) framework by pursuing the following strategies:

A. Make the "Entity" Small

The term "entity" in the definition of "information content provider"[227] in § 230(f)(3) is ambiguous. The Wikimedia Foundation should undertake every effort to ensure that when a court applies the test for "creation or development," it only applies the test to the actions of the limited set of Wikimedia Foundation employees and volunteers that act as the Wikipedia "entity." As discussed above, in the absence of a clear acceptance of limited responsibility by the Wikimedia Foundation, a court may use the differences in user-rights in the continuum of user types to draw the "entity" line between "registered user" and "sysop." The Foundation should attempt to shift this line to reside between "the Wikipedia community-at-large" and "the Wikimedia Foundation." It could do so with clearer notices to the public. For example, the "General Disclaimer" page states, "Wikipedia is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups who are developing a

224. Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003).
225. *Id*.
226. *Id*.

common resource of human knowledge."[228] To shift the "entity" line, the statement could read:

> Wikipedia is an online open-content collaborative system owned by the Wikimedia Foundation. The Wikipedia Community, a voluntary association of individuals and groups, creates the content on Wikipedia with the goal of developing a common resource of human knowledge. The Wikimedia Foundation does not participate in the creation or development of the content itself.

Notices to the same effect should be made in any press releases and on related Wikipedia articles.

B. Deconstruct the "Information"

The term "information" in the definition of "information content provider" in § 230(f)(3) is also ambiguous. To make the "deconstructive" view more appealing to the court, Wikipedia should make the articles seem less complete and finished than articles in a traditional encyclopedia. One feasible way to accomplish this would be to place on each article page a "last edited by" or "mini-history" box listing the last one or two users to edit the article and a snippet of that user's edit. Ideally, this would capture the defamation by an unregistered user who was not aware of the system, and would thereby minimize the damage of a false, defamatory statement appearing in an otherwise truthful and helpful article. Failing that, the mini-history box would still make clear to would-be plaintiffs and those attempting to predict a court's view that Wikipedia is *not* just an encyclopedia made available online.

C. Avoid "Encouragement"

Encouragement is the only activity that a court has deemed to raise an "interactive computer service" to "information content provider" status.[229] All Wikipedians should be very cautious about making specific statements on discussion pages that might prompt, or be interpreted as prompting a user to post something defamatory.

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227. 47 U.S.C. § 230(f)(3) (2000) ("[A]ny 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.").

228. Wikipedia, Wikipedia:General Disclaimer, http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer (as of Nov. 16, 2006, 23:35 GMT).

229. MCW, Inc. v. badbusinessbureau.com, L.L.C., No. Civ.A.3:02-CV-2727-G, 2004 WL 833595 (N.D. Tex Apr. 19, 2004).

Wikipedia is in a much better position to claim § 230(c)(1) immunity if the defamatory statement appears to be an isolated incident of vandalism, as it most often does, rather than part of an effort to help Wikipedia in its goal of becoming a comprehensive encyclopedia. It should be recognized, however, that pursuit of this strategy may undercut the aforementioned "small entity" strategy if the guidance to avoid giving direction makes Wikipedians seem more like agents of Wikipedia than a group of scattered volunteers. This tension may be avoided if the Wikipedia community followed this guidance *sua sponte*.

D. Limit the Number of Defamers and Plaintiffs

This is the most obvious strategy and one that Wikipedia has apparently pursued with some success. Wikipedia's Recent Changes Patrol catches most defamation quite quickly, and responses to complaints by defamation victims are also swift. Limiting the ability to create new articles to registered users increases the effectiveness of the current Wikipedia Patrols and reduces the number of inappropriate new pages. Wikipedia should also consider analyzing the most common types of articles subject to defamatory modification (potentially biographies of living subjects) and limiting the ability to edit those types of articles to registered users. Of course, such a policy comes at a cost. Otherwise-valuable edits by unregistered users would not be made, and, perhaps more importantly, such a policy would undermine the open and inviting culture that has been a large factor in Wikipedia's success to date.

VII. CONCLUSION

Based on the preceding legal analysis, Wikipedia would not be liable for the injury caused by a defamatory statement appearing on its site. First, it is an "interactive computer service." Second, the claims for defamation would treat Wikipedia as a "publisher or speaker." Third, the "information" (the defamatory statement) is "provided by another information content provider" because Wikipedia did not "create or develop" it.

In reaching the above conclusion, the court will have to grapple with three key issues. First, it must determine whether § 230(c)(1)'s second prong encompasses distributor liability as well as publisher liability. This is the most policy-laden issue and thus the place where a defamed plaintiff may exert his strongest visceral argument: that Wikipedia as a gatekeeper should not be able to escape liability when it knows of harmful content within its gates and has the power to eliminate it. Nevertheless, every state and federal court considering

the issue has favored the gatekeeper, and the recent California Supreme Court decision in *Barrett v. Rosenthal* affirms this approach by criticizing the contradictory analysis performed by the lower California court.[230] Second, because Wikipedia presents a unique factual situation vis-à-vis other § 230(c)(1) cases that blurs the line between a "mere user" and the service itself, the court must determine the scope of the term "entity" in § 230(f)(3)'s definition of an "information content provider." If the scope is narrow, then the immunity will be broad, and vice versa. Third, because Wikipedia's content changes constantly at the hands of any number of users, the court must determine the level of generality to apply to the term "information" in § 230(c)(1). If the court takes a narrow view, then Wikipedia may not even need to invoke § 230(c)(1) immunity; if it takes the broad view, Wikipedia will have to argue more vigorously that its actions do not constitute "creation or development."

Though the legal analysis in this article concludes that Wikipedia will be immune in most situations, Wikipedia's goal is not legal immunity — it is to build an encyclopedia of the highest quality. While Wikipedia might take certain precautions, such as making the fractured nature of each article more apparent or making it more clear to the public that registered users and sysops are not agents or part of the Wikipedia "entity," Wikipedia's best strategy to avoid liability may simply be to avoid plaintiffs. There is a reason why no one has sued Wikipedia yet: it is amazingly responsive to claims of injury. Wikipedia's institutional flexibility and the lack of dogmatic adherence to "free speech" might be just enough to keep it on the right side of the cutting edge.

In many ways, Wikipedia is the best the Internet has to offer, as a vast repository of information, and more importantly, a highly effective collaboration model. While Congress may have been thinking more of AOL than Wikipedia, Wikipedia's actions fit perfectly within Congress's goals for § 230: to promote speech, technology, and self-regulation.

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230. *Rosenthal II*, No. S122953, 2006 WL 3346218, at *1 (Cal. Nov. 20, 2006); *Rosenthal I*, 9 Cal. Rptr. 3d 142 (Ct. App. 2004), *depublished by* 87 P.3d 797 (Cal. 2004); *see also* Grace v. eBay Inc., 16 Cal. Rptr. 3d 192 (Ct. App. 2004) (holding distributor liability unaffected by § 230(c)(1)), *depublished by* 99 P.3d 2 (Cal. 2004).

VIII. APPENDIX

CDA § 230(c)(1) Case Timeline		
Winner on § 230		Medium of Harmful Information (Reason Why Plaintiff Won Where Appropriate)
1997	D	AOL bulletin board Zeran v. AOL, 129 F.3d 327 (4th Cir. 1997)
1998	D	AOL service — Drudge Report Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998)
2000	D	AOL e-mail Doe v. Oliver, 755 A.2d 1000 (Conn. Super. Ct. 2000)
	D	AOL service — stock quotations Ben Ezra v. AOL, 206 F.3d 980 (10th Cir. 2000)
	D	Defendant-created chat room Marczeski v. Law, 122 F. Supp. 2d 315 (D. Conn. 2000)
	D	eBay auctions Stoner v. eBay, No. 305666, 2000 WL 1705637 (Cal. Super. Ct. Nov. 7, 2000)
	P	Posting on local community website (alleged "creation") Sabbato v. Hardy, No. 2000CA00136, 2000 WL 33594542 (Ohio Ct. App. Dec. 18, 2000)
2001	D	AOL chat room Doe v. AOL, 783 So. 2d 1010 (Fla. 2001)
	P	Website hosted by defendant (IP claims not precluded by § 230(c)(1)) Gucci v. Hall, 135 F. Supp. 2d 409 (S.D.N.Y. 2001)
	D	AOL e-mail Morrison v. AOL, 153 F. Supp. 2d 930 (N.D. Ind. 2001)
	D	Amazon.com product feedback Schneider v. Amazon.com, 31 P.3d 37 (Wash. Ct. App. 2001)
	P	Website domain name registered with defendant (IP claims not precluded by § 230(c)(1)) Ford Motor Co. v. Greatdomains.com, No. 00-CV-71544-DT, 2001 WL 1176319 (E.D. Mich. Sep. 25, 2001)

Winner on § 230		Medium of Harmful Information (Reason Why Plaintiff Won Where Appropriate)
2001	D	Kinko's public computer Patentwizard v. Kinko's, 163 F. Supp. 2d 1069 (D.S.D. 2001)
2002	D	eBay Feedback Forum Gentry v. eBay, 99 Cal. App. 4th 816 (Ct. App. 2002)
	D	Website domain name registered with defendant Smith v. Intercosmos Media Group, No. Civ.A. 02-1964, 2002 WL 31844907 (E.D. La. Dec. 17, 2002)
2003	D	AOL chat room Green v. AOL, 318 F.3d 465 (3rd Cir. 2003)
	D	AOL chat room Noah v. AOL, 261 F. Supp. 2d. 532 (E.D. Va. 2003)
	D	Selected contributor e-mail posted to listserv/website Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003)
	D	Matchmaker.com user profile Carafano v. Metrosplash, 339 F.3d 1119 (9th Cir. 2003)
	D	Yahoo! search results Winter v. Bassett, No. 1:02CV00382, 2003 WL 22014605 (M.D.N.C. Aug. 19, 2003)
	D	Website hosted by defendant Doe v. GTE, 347 F.3d 655 (7th Cir. 2003)
	D	Selected article re-posted on defendant's website Barrett v. Fonorow, 799 N.E.2d 916 (Ill. App. Ct. 2003)
2004	D	Google search results Novak v. Overture Services, 309 F. Supp. 2d 446 (E.D.N.Y. 2004)
	P	Report posted on consumer gripe website (alleged "creation") MCW v. Badbusinessbureau.com, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595 (N.D. Tex. Apr. 19, 2004)
	D	Advertisements on online adult entertainment guide Ramey v. Darkside Productions, No. 02-730 (GK) , 2004 U.S. Dist. LEXIS 10107 (D.D.C. May. 17, 2004)

Winner on § 230		Medium of Harmful Information (Reason Why Plaintiff Won Where Appropriate)
2004	D	Websites associated with defendant e-payment providers Perfect 10 v. CCBill, 340 F. Supp. 2d 1077 (C.D. Cal. 2004)
	D	e-mail forwarded by SpamCop Optinrealbig.com v. Ironport Systems, 323 F. Supp. 2d 1037 (N.D. Cal. 2004)
	D	Roommate.com user profiles Fair Housing v. Roommate.com, No. CV 03-09386PA(RZX), 2004 WL 3799488 (C.D. Cal. Sep. 30, 2004)
	D	Amazon.com zShops/IMDb.com Corbis v. Amazon.com, 351 F. Supp. 2d 1090 (W.D. Wash. 2004)
2005	D	Anonymous posting on defendant's political bulletin board Donato v. Moldow, 865 A.2d 711 (N.J. Super. Ct. App. Div. 2005)
	D	Selected articles re-posted on defendant's political website Roskowski v. Corvallis Police Officers, No. Civ.03-474-AS, 2005 WL 555398 (D. Or. Mar. 9, 2005)
	D	Anonymous posting on defendant's bulletin board Faegre & Benson v. Purdy, 367 F. Supp. 2d 1238
	D	Selected article re-posted on defendant's website International Padi v. Diverlink, No. 03-56478, 03-56788, 2005 WL 1635347 (9th Cir. Jul. 13, 2005)
	D	Website blocking notification by Earthlink ScamBlocker Associated Bank v. Earthlink, No. 05-C-0233-S, 2005 WL 2240952 (W.D. Wisc. Sep. 13, 2005)
	D	Website hosted by defendant Austin v. Crystaltech Web Hosting, 125 P.3d 389 (Ariz. Ct. App. 2005)
	P	Report posted on consumer gripe website (alleged "creation") Hy Cite v. Badbusinessbureau.com, 418 F. Supp. 2d 1142 (D. Ariz. 2005)

Winner on § 230		Medium of Harmful Information (Reason Why Plaintiff Won Where Appropriate)
2005	D	Yahoo! user profile Landry-Bell v. Various, No. 05-1526, 2005 U.S. Dist. LEXIS 38471 (W.D. La. Dec. 27, 2005)
2006	D	Website hosted by defendant Whitney v. Verio, No. Civ.A. 05-1526, 2005 WL 3640448 (M.D. Fla. Jan. 11, 2006)
	D	Spam originating from defendant-ISP's network Beyond Sys v. Keynetics, 422 F. Supp. 2d 523 (D. Md. 2006)
	D	Google Usenet bulletin board Parker v. Google, 422 F. Supp. 2d 492 (E.D. Pa. 2006)
	P	Yahoo! Personals profile (alleged "creation") Anthony v. Yahoo!, 421 F. Supp. 2d 1257 (N.D. Cal. 2006)
	D	User-submitted listings in defendant's online address database Prickett v. InfoUSA, No. 4:05-CV-10, 2006 WL 887431 (E.D. Tex. Mar. 30, 2006)
	D	Postings to defendant's bulletin board DiMeo v. Max, 433 F. Supp. 2d 523 (E.D. Pa. 2006)
	D	Newspaper article re-posted to defendant's website D'Alonzo v. Truscello, No. 0274, 2006 WL 1768091 (Pa. Ct. Com. Pl. May. 31, 2006)
	P	GoTo.com search results (defendant not an "interactive computer service") 800-JR Cigar v. GoTo.com, 437 F. Supp. 2d 273 (D.N.J. 2006)
	P	Report posted on consumer gripe website (alleged "creation") Whitney v. Badbusinessbureau.com, No. 04-00047-CV-FTM-29-SPC, 2006 WL 2243041 (11th Cir. Aug. 1, 2006)
	D	Selected article re-posted to usenet bulletin board Barrett v. Rosenthal, No. S122953, 2006 WL 3346218 (Cal. Nov. 20, 2006)