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Laws in Conversation: What the First Amendment Can Teach Us About Section 230

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I want to thank Professor Olivier Sylvain for inspiring this Note through his Information Law Survey course and for his guidance throughout the note-writing process. I would also like to thank the members of IPLJ, particularly Nicole Kim, for their valuable assistance and input throughout the writing process. Finally, thank you to my wonderful husband Patrick Griffin for his constant love and support. 1 See, e.g., Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997); infra Part II. 2 Id.

Laws in Conversation: What the First Amendment Can Teach Us About Section 230

Haley Griffin*

As the law surrounding regulation of online intermediaries developed, the First Amendment and Section 230 emerged as two central players. Though different bodies of law, their jurisprudence intersects at several points: both display procedural interactions, implicate free speech concerns, apply to intermediaries engaged in publisher and editorial behaviors, and consider good faith and scienter. However, despite these commonalities, discussion of the First Amendment and Section 230 has largely been siloed.

This Note places First Amendment and Section 230 jurisprudence in conversation with one another to determine which specific intermediary behaviors are addressed by each law. Although many cases discuss "traditional editorial functions," this Note articulates that the First Amendment is relevant in only a limited subset of cases.[1] Further, what constitutes a "traditional editorial function" under Section 230 has expanded significantly since the statute was first enacted in 1996, creating a problematic paradox.[2]

In response to the close relationship between the First Amendment and Section 230, this Note proposes courts return their attention to the seminal Section 230 case of Zeran v. America Online,

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1 *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997); *infra* Part II.

2 *Id.*

Inc. *This Note explains how this shift in focus can prevent Section 230's "traditional editorial" act formulation from swallowing Section 230's intended scope (taking the First Amendment along with it). It further encourages courts to adopt the four traditional publisher functions identified by the Fourth Circuit in* Zeran*: publishing, editing, withdrawing from publication, and postponing publishing. Additionally, this Note suggests courts look to First Amendment law concerning editorial judgements to elucidate and characterize truly "traditional" editorial functions.*

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INTRODUCTION

Consider a social media site engaged in targeted advertising. This site collects data on users' actions—the types of content each

user engages with, the length of time spent on content while scrolling, and even the other sites users visit. The site aggregates this data, compares it with data taken from other users, and chooses which advertisements to display to users on its website accordingly. In doing so, the social media site maximizes the efficacy of advertisements it shows to users.

Now imagine this social media site is faced with a lawsuit for a certain advertisement. After being shown the advertisement, a user purchased the featured product and was subsequently injured by the product. Now, the user seeks to sue the social media site for bringing the product to his attention. It surprises most to realize that, not only might this social media site assert immunity under a statute enacted in 1996, but also that it could potentially assert immunity under the First Amendment as well.

As this example makes apparent, courts currently face a challenging task applying old laws to novel online behaviors. Further, the legal principles courts apply in these circumstances developed in the shadow of the modern internet, making it more challenging to identify what behaviors should and should not be protected. This Note examines the two biggest players in online intermediary law—the Communications Decency Act ("CDA") Section 230 and the First Amendment.[3] It compares the application and evolution of these laws and attempts to identify exactly what constraints do and *should* exist for these online actors who play such a central role in our lives.

Section 230 and the First Amendment are two of the most significant players in the development of the online environment. These bodies of law frequently intersect with and implicate one another. For instance, free speech values are often raised in discussions surrounding Section 230, and Section 230 has played a significant role in shaping how First Amendment jurisprudence has evolved—or failed to evolve—over time. However, despite the substantial interplay, discussions concerning each of these topics are often siloed.

Further, a comparison of the two bodies of law demonstrates how Section 230 caselaw evolved to include an affirmative

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3 *See* 47 U.S.C. § 230; U.S. CONST. amend. I.

protection for intermediaries who act as editors—a protection that has eclipsed, and even outgrown the protection afforded to editors that already exists under the First Amendment. While none of this is necessarily problematic on its own, this Note asserts that, because the protection for editors under Section 230 arose within the context of online "editing" behavior, this protection has become overly broad and ambiguously contoured. This creates a risk for conclusory opinions that frame novel intermediary behaviors as "traditional" editing behaviors, without seriously inquiring whether a behavior is truly one "traditionally" performed by an editor.

In Part I, this Note provides background on Section 230 and First Amendment law in the context of internet speech and identifies the ways in which each implicates the other. Part II investigates the interplay between Section 230 and the First Amendment, and the discrete ways in which each affects the other. Because intermediaries' functions influence how they are treated by courts, this Note will first elucidate six main types of cases involving online intermediaries—ranging from the basic case of an offending third party posting on a simple online forum, to cases involving algorithms that target speech to specific individuals. In Part III, this Note proposes that to provide a definitive limitation on protection for editorial acts, courts should explicitly ground their analyses of "editorial" behavior in the language of *Zeran v. America Online, Inc.*, characterizing the traditional publisher functions as "deciding whether to publish, withdraw, postpone or alter content."[4] Because the Section 230 inquiry has essentially collapsed into an inquiry of whether the intermediary has engaged in publisher activity, courts should look to First Amendment cases involving print and broadcast media to identify the contours of editor activities under Section 230. Further, *Miami Herald Publishing Co. v. Tornillo* may be instructive in defining editorial judgements in the First Amendment context, framing editorial judgements as, "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair."[5]

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

5 418 U.S. 241, 258 (1974).

I. OUTLINING INTERNET LAW

A. Communications Decency Act, Section 230(c)

1. Background

Section 230's origins are unexpectedly humble. The statute was inspired by a New York Supreme Court case, *Stratton Oakmont v. Prodigy Services Co*.[6] At the time, Prodigy was a computer network that hosted an online bulletin board where users gathered to discuss financial news.[7] Individuals could post statements on the bulletin board and the site encouraged users to abide by Prodigy's "content guidelines" when doing so.[8] Prodigy would review, edit, and even remove statements considered offensive or in "bad taste."[9] Indeed, Prodigy held itself out as a "family-oriented" website.[10] However, a post disparaging a securities investment banking firm, Stratton Oakmont, managed to slip through Prodigy's controls.[11] Stratton Oakmont sued, alleging *per se* libel.[12] The court agreed with Stratton Oakmont, reasoning that, because Prodigy had gone out of its way to exert editorial control over the content on its website, it was responsible as a publisher for defamatory content hosted on the site.[13]

However, members of Congress saw the *Prodigy* ruling as problematic. They considered how Prodigy was punished for doing a good thing—going out of its way to screen offensive material to create a family-friendly space online.[14] As a result, the drafters of Section 230 took concrete steps to remove the disincentives *Stratton Oakmont* placed on intermediaries to regulate offensive third-party

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6 Stratton Oakmont v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995); *see* S. REP. NO. 104-230, at 194 (1996) (Conf. Rep.); *see also Zeran*, 129 F.3d at 331.

7 *See Stratton Oakmont*, 1995 WL 323710, at *1.

8 *Id.* at *2.

9 *Id.*

10 *Id.* at *2, *5.

11 *Id.* at *2.

12 *Id.* at *1.

13 *Id.* at *4.

14 S. REP. NO. 104-230, at 194 (1996) (Conf. Rep.).

content.[15] Section 230 was ultimately enacted in 1996.[16] Section 230 was part of the broader CDA, which criminalized the "knowing transmission of obscene or indecent" speech to minors.[17] Much of this statute was struck down by the Supreme Court just one year after its enactment, as is was deemed far too broad a restriction of free speech under the First Amendment.[18] However, Section 230 has remained intact.[19]

Section 230(c) provides "[p]rotection for 'Good Samaritan' blocking and screening of offensive material."[20] As the statute dictates, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[21] The availability of "Good Samaritan" immunity under this provision turns on whether the challenged intermediary is an "interactive computer service" or an "information content provider."[22] Interactive computer services are entitled to immunity, while information content providers are not.[23] An intermediary is considered an information content provider if it is "responsible, in whole or in part, for the creation or development of" the challenged content.[24]

2. Scope

This section provides a brief overview of the evolution of Section 230 jurisprudence and clarifies the statute's scope and applicability.

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15 *Id.*

16 *See id.*; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

17 Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 844 (1997) (internal quotations omitted) (quoting 47 U.S.C.A. § 223(a)(1)(B)(ii) (West)).

18 *See id.* at 857, 867–69.

19 47 U.S.C. § 230.

20 *Id.* at § 230(c).

21 *Id.* at § 230(c)(1).

22 *See* Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC., 521 F.3d 1157, 1162 (9th Cir. 2008).

23 *Id.*

24 *Id.* (internal quotations omitted) (quoting 47 U.S.C. § 230(f)(3)).

a) Early Cases Providing Protection to Intermediaries

Section 230(c)'s first application was in the 1997 case of *Zeran v. America Online, Inc.*, and the statute has been interpreted broadly since.[25] Plaintiff Zeran sued America Online ("AOL") when a third party posted inflammatory advertisements on AOL's bulletin board.[26] The third party falsely attributed these statements to Zeran, causing an influx of vitriol to Zeran's home.[27] Zeran filed suit, alleging AOL "unreasonably delayed" removing the advertisements and did not properly monitor for similarly harmful posts going forward.[28] AOL asserted Section 230 as a defense.[29] The defense was successful.[30] The Fourth Circuit found Zeran's complaint attempted to treat the intermediary as a publisher—meaning Section 230 clearly protected AOL.[31] Focusing in part on Section 230(b)(2)'s statement of policy, to "preserve the vibrant and competitive free market . . . *unfettered by Federal or State Regulation*,"[32] the court found AOL not liable.[33]

One year later in *Blumenthal v. Drudge*, the D.C. District Court found Section 230(c) to shield AOL from liability in another defamation action.[34] There, AOL posted a news article written by Matt Drudge to its electronic news board.[35] The court relied heavily on the Fourth Circuit's opinion in *Zeran* to reach its conclusion.[36] Unlike *Zeran*, where the relationship between the third party and AOL

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25 129 F.3d 327, 328 (4th Cir. 1997); *see Roommates.Com*, 521 F.3d at 1179; *see also* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123–24 (9th Cir. 2003); Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203, 213, 246–50 (2018); Madeline Byrd & Katherine J. Strandburg, *CDA 230 for a Smart Internet*, 88 FORDHAM L. REV. 405, 408–09 (2019).

26 *Zeran*, 129 F.3d at 329.

27 *See id.*

28 *Id.* at 328.

29 *Id.* at 329.

30 *Id.* at 335.

31 *Id.* at 333.

32 *Id.* at 330 (emphasis added by *Zeran* court) (quoting 47 U.S.C. § 230(b)(2)).

33 *Id.* at 335.

34 992 F. Supp. 44, 52–53 (D.D.C. 1998).

35 *Id.* at 47–48.

36 *Id.* at 51 (stating that the *Zeran* court "provided a complete answer to plaintiffs' primary argument, an answer grounded in the statutory language and intent of Section 230.").

was that of a user and a provider,[37] here, AOL was in a licensing agreement with Drudge, paying him $36,000 annually for his content.[38] However, despite the lack of anonymity, affiliation, and even the profitable relationship between Drudge and AOL, the court found Section 230 conferred immunity on AOL.[39]

b) Cases Not Providing Protection

i. Pre-*Roommates*

In the law's early years, not all intermediaries asserting Section 230(c) immunity actually received it.[40] In the 2006 case of *Anthony v. Yahoo!, Inc.*, plaintiff Anthony alleged defendant Yahoo! created fake profiles on Yahoo!'s online dating site "to trick people like Anthony into joining the service and renewing their memberships."[41] Yahoo! also allegedly misled Anthony by maintaining profiles of former users no longer active on the platform.[42] The Northern District of California held that Section 230(c) did not protect Yahoo!.[43] Because "[t]he CDA only immunizes 'information provided by *another* information content provider,'" Yahoo! was not immunized for fake profiles it created.[44] As for the profiles Yahoo! allegedly wrongfully maintained, the plaintiff attempted to hold Yahoo! liable for misrepresentations accompanying the profiles—rather than the profiles themselves—and Section 230 did not apply.[45]

The way the court in *Anthony* distinguished between a third party's protected content and an intermediary's unprotected affirmative acts foreshadowed the rationale for the material contribution test to come.

ii. Post-*Roommates*: The Material Contribution Test

The material contribution test provides courts with a concrete way to determine when intermediaries' conduct strays outside

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37 *Zeran*, 129 F.3d at 330–31.
38 *Blumenthal*, 992 F. Supp. at 51.
39 *Id.* at 52–53.
40 *See infra* notes 41–45.
41 421 F. Supp. 2d 1257, 1259 (N.D. Cal. 2006).
42 *Id.* at 1260.
43 *Id.* at 1263.
44 *Id.* (quoting 47 U.S.C. § 230(c)(1)).
45 *See id.*

Section 230's shield. The test is premised on the idea that Section 230 does not shield intermediaries from liability if they participate in the "development" of unlawful content.[46] In 2008, the Ninth Circuit in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* first set forth the test, stating:

> [W]e interpret the term "development" as referring not merely to augmenting the content generally, but to *materially contributing to its alleged unlawfulness*. In other words, a website helps to develop unlawful content, and thus falls within the exception to [S]ection 230, *if it contributes materially to the alleged illegality of the conduct*.[47]

Since its inception, the material contribution exception has been employed in a variety of contexts.[48] For instance, in *Doe v. Internet Brands, Inc.*, the Ninth Circuit determined that attempting to hold a defendant intermediary liable for negligent failure to warn did not treat the defendant as a publisher or speaker of user content, meaning Section 230 did apply.[49] In *Fair Housing Council of San Fernando Valley v. Roommates.com*, platform Roommates.com's requirement that users answer screening questions pertaining to protected identities under the Fair Housing Act (such as age, sexual orientation, and family status) as a condition of using their platform constituted a material contribution to the site's illegality.[50] This meant Section 230 did not protect Roommates.com's use of their questionnaire.[51]

In *Barnes v. Yahoo!, Inc.*, the Ninth Circuit's opinion never specifically used the words, "material contribution," but nonetheless looked to whether the plaintiff attempted to treat the defendant intermediary as a "publisher or speaker."[52] The court affirmed the

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46 Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC., 521 F.3d 1157, 1167–68 (9th Cir. 2008).

47 *See id.* (emphasis added).

48 *See, e.g.*, *infra* notes 49–53.

49 824 F.3d 846, 851 (9th Cir. 2016).

50 521 F.3d at 1169–70.

51 *See id.* at 1165.

52 570 F.3d 1096, 1101 (9th Cir. 2009).

lower court's decision to grant a motion to dismiss as to a negligent undertaking claim, but reversed on the promissory estoppel claim.[53]

B. First Amendment Case Law

The First Amendment of the United States Constitution protects the right to free speech, stating, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[54] Many may think of the First Amendment as a bedrock principle of American jurisprudence. However, as Tim Wu highlights, the First Amendment only rose to prominence beginning in the early twentieth century.[55] First Amendment jurisprudence is rooted in the context of safeguarding political speech, especially political criticism.[56] However, it has since expanded to encompass the speech of corporations, including corporate speech aimed at selling products to consumers.[57] A brief explanation of First Amendment law follows to provide context for the discussion of the First Amendment rights of online intermediaries in Part II.

1. Commercial Speech Generally

Commercial speech—"speech that does no more than propose a commercial transaction"[58]—is protected by the First Amendment.[59] As the Supreme Court stated in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement."[60] The protection for commercial speech is

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53 *See id.* at 1105–06, 1109.

54 U.S. CONST. amend. I.

55 *See* Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. (Sept. 1, 2017), https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete **[**https://perma.cc/5D2K-RQKB**]**.

56 *See id.*

57 *See infra* notes 58–60.

58 United States v. United Foods, Inc.*,* 533 U.S. 405, 409 (2001).

59 Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*,* 425 U.S. 748, 770 (1976).

60 *Id.*

theoretically less broad than the protection available for political speech. However, in recent times, First Amendment protections for advertisements have become increasingly robust and apparent.[61]

In *Sorrell v. IMS Health*, the Supreme Court granted certiorari to answer the question of whether a law infringed upon the First Amendment rights of pharmaceutical sales companies.[62] The law prohibited: (1) "pharmacies, health insurers, and similar entities from selling prescriber-identifying information, absent the prescriber's consent"; and (2) "pharmaceutical manufacturers and pharmaceutical marketers" from using "prescriber-identifying information for marketing . . . unless the prescriber consents."[63] The Court found this law placed an "aimed, content-based burden"[64] on specific actors known as detailers—pharmaceutical manufacturer employees who use patient information to improve sales and marketing activities.[65] Because the statute limited the detailers' access to the data they required to perform their jobs, the detailers' speech had been impermissibly burdened. [66] Accordingly, heightened scrutiny was required. [67]

a) Editorial Judgments

Editorial judgments are a type of commercial speech that receive First Amendment protections.[68] Simply put, editorial judgment is the discretion exercised by publishers (traditionally newspapers and printing processes) throughout the course of the editorial process.[69] The protection for editorial judgments arose from a series of cases involving compelled speech in print and television media. In a seminal compelled-speech case, *Miami Herald Publishing Co. v. Tornillo*, the plaintiff newspaper challenged the constitutionality of

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61 *See infra* notes 78–88.
62 564 U.S. 552, 561–62 (2011).
63 *Id.* at 559.
64 *Id.* at 564.
65 *Id.* at 558.
66 *Id.* at 564.
67 *Id.* at 565–66.
68 *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 391 (1973).
69 *See id.* at 386.

a right-of-reply statute.[70] The statute in question required newspapers that "assailed . . . [the] personal character" of a political candidate to print the reply of the attacked candidate in "as conspicuous a place" as the original article and without charge if the candidate requested.[71] In striking down the statute as violative of the First Amendment, the Supreme Court stated: "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."[72]

Courts have considered the concept of editorial judgments outside the context of newspapers as well—for example, in *Turner Broadcasting System, Inc. v. FCC*,[73] a case involving broadcasting systems, and in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[74] a case involving the curation of a St. Patrick's Day parade. Courts have recognized that online intermediaries can engage in editorial judgments as well, and are thus sometimes awarded First Amendment protection for their editorial judgments.[75]

b) The Public Forum Doctrine

The public forum doctrine provides that a private entity can be liable for violating an individual's First Amendment rights if the private entity's functions are sufficiently similar to that of a public entity.[76] This definition first originated in the 1946 case of *Marsh v. Alabama*, in which the Supreme Court held that a corporation operating a company town violated a group of Jehovah's Witnesses' First Amendment rights when it barred distribution of religious literature in the town's streets.[77] In more recent years, some have posited that a similar rule should apply to social media companies

70 418 U.S. 241, 241 (1974).
71 *Id.* at 244.
72 *Id.* at 258.
73 512 U.S. 622, 622 (1994).
74 515 U.S. 557, 575–76 (1995).
75 *See, e.g.*, Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433, 437–38 (S.D.N.Y. 2014).
76 *See* Lee v. Katz, 276 F.3d 550, 554–55 (9th Cir. 2002).
77 326 U.S. 501, 508–09 (1946).

because they represent "the new 'public squares' of the internet age."[78] In the case of *Prager University v. Google, LLC*, conservative media organization PragerU brought suit alleging First Amendment violations when several of its videos were tagged as only appropriate for restricted mode, or were otherwise demonetized on YouTube (a Google subsidiary).[79] The Ninth Circuit summarily rejected this argument, distinguishing the sweeping role of the company town in *Marsh* from the comparatively limited function of YouTube.[80] Although in recent years conservatives have begun pushing for this conceptualization of the First Amendment in the social media context, progressives have long expressed similar concerns regarding the power private entities now exert over citizens' First Amendment rights.[81]

The limited applicability of the public forum doctrine is exemplified in *Manhattan Community Access Corp. v. Halleck*.[82] In this case, the plaintiffs claimed injury when the Manhattan Neighborhood Network ("MNN") "temporarily suspended Halleck from using the public access channels" after MNN was forced to "field[] multiple complaints about the film's content."[83] Although MNN was technically a private entity, it appeared to have a public quality as well.[84] New York State law required cable operators to "set aside channels on their cable systems for public access," and required these public access channels to be free and available on a "first-come, first-served" basis.[85] The cable operators running the public access channels were allowed to designate a private entity to operate them—MNN was that private entity.[86] Plaintiffs asserted that MNN was engaged in a specifically public function, and therefore should

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78 Genevieve Lakier, *The Great Free-Speech Reversal*, ATLANTIC (Jan. 27, 2021), https://www.theatlantic.com/ideas/archive/2021/01/first-amendment-regulation/617827/ [https://perma.cc/8NJS-HKSV] (quoting Senator John Cornyn).

79 951 F.3d 991, 995–96 (9th Cir. 2020).

80 *See id.* at 998.

81 *See* Lakier, *supra* note 78.

82 139 S. Ct. 1921 (2019).

83 *Id.* at 1927.

84 *Id.* at 1926.

85 *Id.* (citing N.Y. COMP. CODES, R. & REGS. tit. 16, §§ 895.1(f), 895.4(b), (c)(4), (6) (2018)).

86 *See id.* at 1926–27 (citing N.Y. COMP. CODES, R. & REGS. tit. 16 § 895.4(c)(1) (2018)).

qualify as a state actor for purposes of the plaintiff's First Amendment suit.[87] Despite this assertion, the Court declined to hold that MNN fell into the narrow category of entities that are both private and subject to liability as state actors.[88]

One recent development hinting at an expanded role for the public forum doctrine is Justice Thomas' concurrence in the Supreme Court's denial of certiorari in *Biden v. Knight First Amendment Institute at Columbia University*.[89] Plaintiffs sued then-president Donald Trump for blocking their access to Trump's Twitter account.[90] Plaintiffs asserted that Trump's Twitter account was a public forum and, as a result, their First Amendment rights were violated when they were prohibited from interacting with the online space.[91] Justice Thomas did not accept the plaintiffs' position without reservation.[92] However, he did use his concurrence to explore the ways in which digital platforms may be assigned liability for stifling speech—one being treatment as a common carrier,[93] and the other being treatment as a place of public accommodation.[94] While these two conceptualizations of liability have yet to be explored by case law, Justice Thomas' concurrence may certainly spark further development in this area.

C. Algorithms

1. Protection for Intermediaries Employing Algorithms

Online intermediaries may receive protection for their use of algorithms under Section 230, the First Amendment, or both. Before examining the state of the law and scholarship surrounding algorithmic results, it is helpful to define the concept of algorithms and explain what is encompassed in algorithmic activity.

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87 *See id.* at 1928.

88 *See id.* at 1928–30.

89 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring).

90 *Id.*

91 *Id.*

92 *See id.* at 1222 ("[B]ecause unbridled control of the account resided in the hands of a private party, First Amendment doctrine may not have applied to respondents' complaint of stifled speech.").

93 *See id.* at 1224.

94 *Id.* at 1223–24.

a) Types of Algorithms

In her article, *Platforms, The First Amendment and Online Speech: Regulating the Filters*, Sofia Grafanaki provides a useful set of definitions for algorithms.[95] Grafanaki identifies two main categories of algorithms: content moderation algorithms and content navigation algorithms.[96] Content moderation algorithms address "whether content is allowed to exist on the platform."[97] One such algorithm may, for instance, screen and block content that violates a website's terms of use.[98] Alternatively, content navigation algorithms are algorithms that actively assist user interactions with a site.[99] Content navigation algorithms can be further broken down into two subcategories: "algorithms that select content that is *trending*" and "personalization algorithms."[100] Algorithms that select trending content promote content with which the public at large has already engaged.[101] Personalization algorithms, on the other hand, use information gathered to create digital approximations of each individual.[102] Approximation algorithms then pair individuals with content that other similarly-situated users also enjoyed.[103]

2. Section 230's Treatment of Algorithms

a) A Brief Overview

The Second Circuit's decision in *Force v. Facebook* was the most recent decision analyzing algorithmic activity under Section 230.[104] There, the plaintiffs brought federal anti-terrorism claims against Facebook when members of their families were killed by agents of Hamas.[105] The plaintiffs sought to hold Facebook liable

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95 *See* Sofia Grafanaki, *Platforms, the First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111, 137 (2018).

96 *Id.*

97 *Id.* at 138.

98 *See, e.g.*, Langdon v. Google, Inc., 474 F. Supp. 2d 622, 626 (D. Del. 2007).

99 *See* Grafanaki, *supra* note 95, at 141.

100 *Id.* at 151.

101 *See id.* at 118.

102 *See id.* at 155–56.

103 *See id.* at 156.

104 934 F.3d 53, 57 (2d Cir. 2019).

105 *Id.*

for their family members' deaths, asserting that Hamas used the platform to recruit new members and incite action in current members.[106] Among other things, plaintiffs attempted to hold Facebook responsible for its "matchmaking" function, which "uses algorithms to suggest content to users."[107] Examples of this algorithmic "matchmaking" included Facebook's "friend suggestions," which are "based on analysis of users' existing social connections on Facebook and other behavioral or demographic data," as well as Facebook's use of targeted advertising.[108]

The Second Circuit found Facebook's matchmaking activities to be "publisher" activities, and thus, were shielded by Section 230(c).[109] To frame Facebook's activities in this light, the court reasoned that making "connections . . . among speakers, content, and viewers of content," is an essential function of online publishers.[110] As such, the court reasoned the immunity of Section 230(c) should not give way simply because a publisher has "become especially adept at performing the functions of publishers."[111]

Facebook found additional refuge in the material contribution test.[112] The court noted that Facebook was not responsible for "developing" third-party content for a few reasons.[113] First, the court noted that Facebook did not "edit (or suggest edits) for the content that its users . . . publish[ed]."[114] Second, following the D.C. Circuit' reasoning in *Marshall's Locksmith Service v. Google*, the court found that the algorithms Facebook employed were content neutral.[115] Third, the court rejected the plaintiffs' assertion that the algorithms making content more "visible, available, and usable"

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106 *See id.* at 57, 59.

107 *Id.* at 65.

108 *Id.*

109 *See id.* at 66.

110 *Id.*

111 *Id.* at 67; *see also id.* at 70 (describing these functions as ones "Facebook believes will cause the user to use Facebook as much as possible") (internal quotations omitted).

112 *See id.* at 69 (internal quotations omitted).

113 *See id.* at 69–70.

114 *Id.*

115 *Id.* at 70 (meaning by "content neutral" that they did not discriminate based on the content with which they interacted); *see also* Marshall's Locksmith Serv., Inc. v. Google, LLC, 925 F.3d 1263, 1267–68 (D.C. Cir. 2019).

constituted a development of information under Section 230(f)(3).[116] In the same vein, the court found that Facebook's possible intentions behind employing these algorithms, including showing users content to increase engagement, were simply an "essential part of traditional publishing."[117]

In his dissent, Justice Katzmann presented a hypothetical to illustrate why he disagreed with the majority's reasoning:

> Suppose that you are a published author. One day, an acquaintance calls. "I've been reading over everything you've ever published," he informs you. "I've also been looking at everything you've ever said on the Internet. I've done the same for this other author. You two have very similar interests; I think you'd get along." The acquaintance then gives you the other author's contact information and photo, along with a link to all her published works. He calls back three more times over the next week with more names of writers you should get to know.

Now, you might say your acquaintance fancies himself a matchmaker. But would you say he's acting as the *publisher* of the other author's work?[118]

Justice Katzmann believed that the majority, based on their reasoning, would be forced to agree this hypothetical individual is a publisher.[119] He, on the other hand, would not.[120] Justice Katzmann was not alone in his skepticism over the majority's application of Section 230. In the Supreme Court's denial of certiorari in *Malwarebytes, Inc. v. Enigma Software Group, USA, LLC*, Justice Thomas identified a number of cases that have interpreted Section 230 broadly, conferring "sweeping immunity" on the affected intermediaries.[121] Without deciding anything, Thomas warned that "[e]xtending [Section] 230 immunity beyond the natural reading of

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116 *Force*, 934 F.3d at 70 (internal quotations omitted).
117 *Id.* (internal quotations omitted) (emphasis omitted).
118 *Id.* at 76 (Katzmann, J., concurring in part and dissenting in part).
119 *See id.*
120 *See id.*
121 141 S. Ct. 13, 13, 18 (2020).

the text can have serious consequences," and foreshadowed that "in an appropriate case, it behooves [the Supreme Court] to" decide the correct interpretation of Section 230.[122]

In reaching its decision, the court in *Force v. Facebook* referenced *Carafano v. Metrosplash.com*.[123] This Ninth Circuit case arose when an unknown person created an internet dating service profile pretending to be the plaintiff.[124] The offender used this fraudulent profile to elicit sexually and physically threatening communications from other individuals online.[125] The court found the defendant website not liable for appropriation of the right of publicity, defamation, and negligence on Section 230(c) grounds.[126] The court rested heavily on the fact that website *users* were the ones inputting the information to the website's elicited questions.[127] It specifically noted that, although users did generate content only after being prompted by the website's introductory questionnaire, users were still given full control over the selection of content.[128]

b) First Amendment

Regarding whether algorithmic outputs specifically should be protected speech under the First Amendment, case law is relatively limited.[129] However, there are a few notable cases that have set the tone for the debate to follow.

In *SearchKing, Inc. v. Google*, *Technology, Inc.*, the District Court tackled the question of "whether a representation of the relative significance of a web site as it corresponds to a search query is

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122 *Id.* at 18.

123 *Force*, 934 F.3d at 66–67 (referencing Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003)).

124 *Carafano*, 339 F.3d at 1121.

125 *Id.*

126 *Id.* at 1125.

127 *See id.* at 1124.

128 *See id.*

129 For examples of the only other cases at the time which addressed whether the First Amendment protects algorithmic outputs, see, e.g., Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 436 (S.D.N.Y. 2014) (citing Langdon v. Google, Inc., 474 F. Supp. 2d 622 (D. Del. 2007); Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003).

a form of protected speech."[130] Plaintiff website SearchKing alleged their PageRank—the number assigned by defendant Google indicating a particular site's relevancy and responsiveness to a given query—was improperly lowered from a high of two, to a low of "no rank."[131] Addressing whether Google's PageRank was a protected opinion under the First Amendment, the court evaluated the distinction between an algorithm's results and the algorithm itself.[132] The court rejected the plaintiff's assertion that the algorithm behind the PageRank system was objective (in that it is a replicable, fixed system) and accordingly should not be considered an opinion.[133] It instead accepted Google's framing, that an algorithm turns on a subjective evaluation of various factors to arrive at its ultimate results.[134] However, not all accept the District Court's analysis in this case.[135]

Subsequently, a New York district court faced a distinct but related issue in *Zhang v. Baidu.com*.[136] There, the plaintiff alleged his content was being blocked by Chinese language search engine, defendant Baidu.[137] The complaint further alleged that Baidu was engaged in targeting and blocking pro-democracy content.[138] Rather than alleging Baidu was a neutral conduit, the court noted that plaintiffs specifically sought to hold Baidu liable for consciously choosing to favor certain political opinions over others.[139] Because the complaint was addressed to the latter "editorial judgments," it was dismissed on First Amendment grounds.[140]

In *E-ventures Worldwide, LLC v. Google, Inc.*, a Florida district court accepted the argument that Google's PageRanks and removal of sites from search results altogether was equivalent to "decisions

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130 2003 WL 21464568, at *1.
131 *Id.*
132 *Id.* at *3.
133 *Id.* at *4.
134 *Id.* at *3–4.
135 *See* Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1528 (2013) (characterizing *Search King* as "an unpublished dismissal with limited precedential value").
136 10 F. Supp. 3d 433, 436 (S.D.N.Y. 2014).
137 *Id.* at 435.
138 *Id.*
139 *Id.* at 440–41.
140 *Id.* at 443–44.

by a newspaper editor regarding which content to publish, which article belongs on the front page, and which article is unworthy of publication," and thus protected by the First Amendment as a "fundamental" matter.[141] Part III of this Note will conduct a closer look at similar case law.

D. Similarities Between Section 230 and the First Amendment

The laws surrounding the First Amendment and Section 230(c) have several key conceptual intersections. Section 230(c) has been recognized as implicating First Amendment concerns[142] and vice versa.[143] This Note will use the parallels between these two bodies of law to propose a solution to the ambiguous and expansive coverage currently afforded by Section 230.

1. Procedural interaction

One way in which Section 230 and the First Amendment interact is on a baseline, procedural level. In his article lauding Section 230 as "[b]etter [t]han the First Amendment," Eric Goldman distinguishes Section 230's protections from those afforded by the First Amendment.[144] Standing against those who assert that Section 230 is "redundant with the First Amendment,"[145] Goldman asserts Section 230 offers extra procedural benefits to affected intermediaries, in addition to its substantive benefits.[146]

Framing Section 230 as a statute that "enhance[s]" free speech protections afforded by the First Amendment,[147] Goldman highlights five procedural advantages that intermediaries receive from the statute: (1) facilitating dismissal earlier in the litigation process; (2) providing a higher degree of predictability for litigants than under the First Amendment; (3) preventing plaintiff plead-arounds; (4)

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141 No. 2:14-cv-646-FtM-PAM-CM, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017).

142 Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 407 (2017).

143 Cary Glynn, Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2028 (2018).

144 Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 33 (2019).

145 *Id.* at 34.

146 *Id. at* 34–35.

147 *Id.* at 35.

mooting conflicts of law at the state level; and (5) facilitating constitutional avoidance.[148]

The broad, additional layer of protection for intermediaries under Section 230 is not enthusiastically endorsed by all. By providing this procedural shield, Section 230 has foreclosed the judiciary from a meaningful opportunity to shape the law surrounding intermediaries' interactions with user content.[149] In this way, one may argue Section 230's procedural shield has caused the related First Amendment law to sit underdeveloped, inhibiting opportunities for the judiciary to address arguably more salient speech and technology-related issues.

2. Policy Concerns with Speech

Courts have been quick to associate Section 230 with the First Amendment's free speech values.[150] In *Zeran v. America Online, Inc.*, the court highlighted Congress' "desire to promote unfettered speech on the Internet" in deciding to grant immunity to intermediary AOL.[151] Other courts have taken up this theme as well in granting Section 230 immunity to intermediaries.[152] Some scholars go a step further than the courts, arguing that Section 230 is, in fact, necessitated by, or redundant of, the First Amendment in the context of defamation.[153]

However, the courts' conflation of Section 230 and First Amendment values is not without its critics.[154] Danielle Keats Citron and Mary Anne Franks point to the fact that one of Section 230(b)(4)'s policy goals include "remov[ing] disincentives for the

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148 *Id.* at 39–44.

149 *See* Olivier Sylvain, *Recovering Tech's Humanity*, 119 COLUM. L. REV. F. 252, 253, 280 (2019).

150 *See* Citron & Wittes, *supra* note 142, at 407 (citing Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 18 (1st Cir. 2016)).

151 129 F.3d 327, 334 (4th Cir. 1997).

152 *See, e.g.*, *Backpage.com*, 817 F.3d at 23.

153 *See, e.g.*, Glynn, note 143, at 2028; Julio Sharp-Wasserman, *Section 230(c)(1) of the Communications Decency Act and the Common Law of Defamation: A Convergence Thesis*, 20 COLUM. SCI. & TECH. L. REV. 195, 240 (2018).

154 Citron & Wittes, *supra* note 142, at 408 ("The judiciary's long insistence that the CDA solely reflected 'Congress' desire to promote unfettered speech on the internet' . . . ignores its text and history.").

development and utilization of blocking and filtering technologies," arguing against this now-common practice of equating Section 230 with the First Amendment.[155]

Furthermore, there is the separate but related observation that "unfettered" speech online does not necessarily mean valuable, First Amendment-protected speech is being maximized.[156] Raising the phenomena of "troll armies," "flooding," and "propaganda robots," Tim Wu asserts the antiquated assumptions that form the basis of First Amendment jurisprudence are ill-equipped to address online speech attempting to silence politically controversial speech.[157] Invoking the contrast between attention scarcity and the unlimited supply of speech that exists today, Wu observes how an abundance of speech can be, and is weaponized to silence competing viewpoints—a phenomena foreign to the twentieth-century environment in which First Amendment jurisprudence was developed.[158]

Regardless of these considerations, scholars and the public alike are still quick to associate the policy considerations behind Section 230 with the First Amendment.[159] This association informs the debate about proposed reforms to Section 230. For instance, some see the Protecting Americans from Dangerous Algorithms Act ("PADAA")—a piece of legislation which would repeal Section 230 immunity for amplification of harmful speech—as sufficient to trigger First Amendment scrutiny.[160] Other recent efforts to reform Section 230 have been met with similar concerns.[161]

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155 Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 61–62 (2020).

156 *See* Wu, *supra* note 55.

157 *Id.*

158 *Id.*

159 *See* James Grimmelmann, *No ESC*, RECORDER (Nov. 10, 2017, 2:00 AM), https://www.law.com/therecorder/sites/therecorder/2017/11/10/no-esc/ [https://perma.cc/T6RZ-3AAL] (exploring why debates about Section 230 so often intersect with debates surrounding the First Amendment).

160 Daphne Keller, *One Law, Six Hurdles: Congress's First Attempt to Regulate Speech Amplification in PADAA*, CTR. FOR INTERNET & SOC'Y (Feb. 1, 2021, 5:00 AM), https://cyberlaw.stanford.edu/blog/2021/02/one-law-six-hurdles-congresss-first-attempt-regulate-speech-amplification-padaa [https://perma.cc/U6T9-D3UW].

161 *See, e.g.*, Sophia Cope & Aaron Mackey, *The PACT Act Is Not the Solution to the Problem of Harmful Online Content*, ELEC. FRONTIER FOUND. (July 30, 2020), https://www.eff.org/deeplinks/2020/07/pact-act-not-solution-problem-harmful-online-

3. Application to Publishers and Editors

Another similarity between Section 230 and the First Amendment is the laws' conceptualization of online intermediaries within the framework of publishers, editors, or sometimes both. In the context of the Section 230(c), "Good Samaritan" blockers cannot be treated as the "*publisher* or speaker of any information provided by another information content provider."[162] In the First Amendment context, this takes the form of protection for editorial judgments.[163] These separate inquiries have tended to blend in practice. From the beginning, the court in *Zeran* found Section 230 bars "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."[164] More recently, the court in *Force v. Facebook* considered whether Facebook engaged in editing when deciding whether Facebook had materially contributed to the content's alleged illegality for purposes of immunity under Section 230.[165] Additionally, Citron and Franks emphasize the importance of only allowing providers treated as "publishers" or "speakers" to receive immunity.[166]

4. Good Faith and Scienter

Section 230 does not have a scienter requirement.[167] This differs from First Amendment case law; in the publishing context, the First Amendment inquiry turns in part on a distributing intermediary's knowledge.[168] However, recently, some have questioned whether inquiring into the knowledge, or more broadly, into the mindset of the

content [https://perma.cc/2BAB-LQCA] (addressing First Amendment concerns with the PACT Act).

162 47 U.S.C. § 230(c)(1) (emphasis added).

163 *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 386 (1973).

164 Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398, 407 (6th Cir. 2014) (quoting Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)).

165 934 F.3d 53, 69–70 (2d Cir. 2019).

166 Citron & Wittes, *supra* note 142, at 416.

167 Goldman, *supra* note 144, at 38.

168 *See infra* notes 170–175.

defendant intermediary may be appropriate for achieving a more equitable outcome in Section 230 cases.[169]

In the traditional, non-online setting, the First Amendment analysis for defamation liability differs depending upon whether the defendant entity is considered a "publisher" or a "distributer."[170] In the case of publishers, if a principal-agent relationship exists between the creator of the defamatory content and the printer or seller of the content, the principal may be found liable for the defamatory content.[171] However, in *Smith v. People of the State of California*, the Supreme Court struck down an ordinance instituting strict liability for booksellers possessing "any obscene or indecent writing, (or) book."[172] As Michael Spencer explains in his scholarship, the court reasoned that the ordinance tended "to hinder the freedoms of speech and press," and ultimately found it could not stand.[173] As a result, a distinction was drawn between distributors, who are only liable for defamation if they "know or ha[ve] reason to know of its defamatory character," and publishers, who are liable regardless of whether they know or have reason to know of the defamatory nature of the content at issue.[174] This distinction still persists for those operating in print media.[175]

However, in the context of Section 230 and online service providers, the distinction between distributors and publishers was erased by the court in *Zeran*.[176] The court found there was nothing in *Prodigy* or *Cubby v. CompuServe* to support distinguishing distributors from publishers under defamation law, thus collapsing that preexisting distinction for intermediaries claiming immunity under Section 230.[177]

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169 *See infra* notes 170–175.

170 Michael H. Spencer, *Defamatory E-Mail and Employer Liability: Why Razing* Zeran v. America Online *Is a Good Thing*, 6 RICH. J.L. & TECH. 25, at para. 6 (2000).

171 *Id.* at para. 4 (citing RESTATEMENT (SECOND) OF TORTS § 578 (AM. L. INST. 1977); BLACK'S LAW DICTIONARY 417 (6th ed. 1990); 50 AM. JUR. 2D *Libel and Slander* § 375 (1995)).

172 361 U.S. 147, 148 (1959).

173 Spencer, *supra* note 170, at para. 5.

174 *Id.* at para. 6.

175 Sylvain, *supra* note 25, at 212.

176 Spencer, *supra* note 170, at paras. 5–6.

177 *Id.* (citing Zeran v. Am. Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997)).

While it is true that Section 230 does not explicitly inquire into the challenged intermediary's mindset or knowledge, some have highlighted the title of Section 230(c), "Protection for Good Samaritan Blockers," as a potential foothold for judicial reform.[178] Proponents suggest courts use Section 230(c)'s title—which refers to "Good Samaritan blocking and filtering of offensive content"[179]—as a "'tool[] available for the resolution of doubt' about the meaning of the statute" to find Section 230(c) should apply exclusively to those who engage in good faith efforts to filter out illegal content.[180] Although Section 230 jurisprudence has, for the most part, excluded intermediaries' intentions and knowledge from the legal analysis, such considerations may come into play again if these suggestions for reform begin to see traction.

5. Next Steps Based on Section 230 and the First Amendment's Intersections

Considering both the legal uncertainty regarding treatment of intermediaries' algorithmic activities, and the similarities between Section 230(c) and the First Amendment on this issue, this Note proposes a solution based on a nuanced comparison of both bodies of law. Conversation about the relationship between the First Amendment and Section 230 has been largely limited to a debate over Section 230's implications on the First Amendment, and how proposed Section 230 reform should accordingly respond. This Note proposes a different trajectory. Instead, these seemingly-problematic similarities can be used constructively. By drawing on both First Amendment and Section 230 case law, this proposed solution articulates a fresh understanding of intermediaries' functions and roles, and what that means for both First Amendment and Section 230 jurisprudence and scholarship going forward.

To begin, this Note will more closely compare and contrast the conceptualization of intermediaries engaging in algorithmic activities as publisher/editors in both contexts to identify trends and places

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178 *See* Mary Anne Franks, *How the Internet Unmakes Law*, 16 OHIO ST. TECH. L.J. 10, 21 (2020); Citron & Wittes, *supra* note 142, at 416.

179 47 U.S.C. § 230(c).

180 Citron & Wittes, *supra* note 142, at 416–17 (2017); *see also* Sylvain, *supra* note 25, at 214.

of agreement and disagreement. Then, it will use the synthesis of these two bodies of law and scholarship to propose how courts and the legislature should understand whether algorithmic outputs are protected by the First Amendment going forward.

II. WHAT A COMPARISON OF SECTION 230 AND FIRST AMENDMENT CASES ILLUSTRATES

A. Types of Online Intermediary Cases

Cases addressing online intermediary behaviors can be divided into six general categories. Because these behaviors shape how courts treat intermediaries, it is useful to identify and categorize them at the outset. This creates a framework for analyzing Section 230's and the First Amendment's applications across a variety of cases with a special focus on algorithmic activities.

The first category concerns cases that seek to hold the defendant liable for third-party content posted on a straight forward forum or message board.[181] The second category includes cases where an intermediary is sued for its use of an electronic form—that is, a pre-made template for third-party speech.[182] The third, fourth, and fifth categories primarily concern algorithmic behavior, and include, respectively: (1) cases in which the intermediary has performed minor editorial acts;[183] (2) cases involving content navigation algorithms in the search result placement context;[184] and (3) cases involving content personalization algorithms.[185] The final category concerns cases in which an intermediary has engaged in content moderation—either by hand or by algorithm—resulting in delisting a plaintiff from its collection of search engine results.[186] This Part will begin by taking each type of Section 230 case in turn, noting how Section 230 and the First Amendment are applied to each subset of cases, and will end by identifying a problematic feature of Section

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181 *See* cases cited *infra* notes 187–197.
182 *See* cases cited *infra* notes 198–202.
183 *See* cases cited *infra* notes 208–217.
184 *See* cases cited *infra* notes 218–226.
185 *See* cases cited *infra* notes 227–236.
186 *See* cases cited *infra* notes 237–250.

230 jurisprudence, made apparent by a First Amendment comparison.

1. Postings on an Online Forum

The most canonical Section 230 cases are those where an intermediary is sued for hosting offensive third-party content on a simple, forum-like online space. The first of these cases, filed just over a month after Section 230 became law, was *Zeran v. America Online, Inc.*, discussed above, involving an early online "bulletin board."[187]

Jones v. Dirty World involved an online gossip forum.[188] The owner and operator of the website, defendant Nik Lamas-Richie, edited each submission to his website before it was posted (deleting "nudity, obscenity, threats of violence, profanity, and racial slurs,") and would post a "one-line comment . . . with 'some sort of humorous or satirical observation.'"[189] He also responded to user comments as himself.[190] The court found that Section 230 protected Richie for both his deletions and his personal comments on the posts.[191] Expressing the reasoning behind its decision, the court repeatedly stated its belief that one of Section 230's primary purposes is promoting free speech on the internet.[192] However, the First Amendment itself was never mentioned in the court's analysis.[193]

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187 *See supra* notes 26–33 and accompanying text; *see also* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1098 (9th Cir. 2009) (addressing a complaint against defendant Yahoo!, when an offending third party created fake, abusive profiles on the site and used them to make offensive posts); Herrick v. Grindr LLC, 765 F. App'x 586, 588 (2d Cir. 2019) (addressing a complaint against defendant Grindr when an abusive partner also abused the site's capacity to create online profiles).

188 *See* Jones v. Dirty World Ent. Recordings LLC*,* 755 F.3d 398, 402–03 (6th Cir. 2014).

189 *Id.* at 403.

190 *See id.* at 403–04.

191 *See id.* at 417.

192 *Id.* at 407 (stating Section 230 "protects against the 'heckler's veto' that would chill free speech"); *id.* at 415 ("Congress envisioned an uninhibited, robust, and wide-open internet . . . "); *id.* at 417 (citing again "the role that the CDA plays in an open and robust internet by preventing the speech-chilling threat of the heckler's veto," explaining how "Congress envisioned a free and open internet," and how "Congress enacted § 230(c)(1) to preserve a free internet.").

193 *See generally id.*

In cases involving third-party or intermediary postings on straight forward online fora, Section 230 rules the day.[194] In some of these cases, the First Amendment, or free speech concerns in general, are never mentioned.[195] In others, like *Jones v. Dirty World*, free speech considerations receive significant attention.[196] Still in others, courts will mention the First Amendment and free speech concerns only fleetingly.[197] However, there has yet to be a case where the First Amendment is raised as a defense in and of itself as a response to these suits.

2. Electronic Forms

Similar to above are the cases where an intermediary faces the prospect of liability for operating an electronic form or template. In these cases, an intermediary has employed a set of either free-form or limited-response prompts, which third parties have utilized in committing tortious acts against the plaintiffs. The most obvious example of this type of case is *Roommates.com*.[198] Interestingly, Roommates.com did raise the First Amendment as a defense for their action.[199] However, the court, having already decided the case on the basis of Section 230, declined to take up this argument.[200]

Not all intermediaries who solicit responses through online forms have been found liable for their actions. For instance, in *Carafano v. Metrosplash*, the offending third party misused the "essay section" of defendant's questionnaire—however, the court held that the plaintiff's claims were barred by Section 230.[201] Although

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194 *See id.*

195 *See generally, e.g.*, Doe v. MySpace, Inc., 528 F.3d 413 (5th Cir. 2008); Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009); Klayman v. Zuckerberg, 753 F.3d 1354 (D.C. Cir. 2014).

196 *See Dirty World*, 755 F.3d at 407, 417.

197 *See generally, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997); Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998); Herrick v. Grindr LLC, 765 F. App'x 586 (2d Cir. 2019).

198 Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1169–70, 1176 (9th Cir. 2008).

199 *See* Appellant Roommate.Com, LLC's Third Brief on Cross Appeal at 28, Roommate.Com, LLC. v. Fair Hous. Council of San Fernando Valley, 666 F.3d 1216 (9th Cir. 2012) (No. 09-55272), 2010 WL 2751575.

200 *Roommates.Com*, 521 F.3d at 1175 n.40.

201 *See* 339 F.3d 1119, 1125 (9th Cir. 2003).

Matchmaker.com did contribute some to the unlawful content by providing the questionnaire's structure, Matchmaker.com was still not liable because it was not responsible for the "underlying misinformation."[202]

Taking the existing case law into consideration, when an intermediary faces potential liability for the way a third party used their electronic form, Section 230 appears to dominate, and little attention, if any, will be paid to First Amendment concerns.

3. Algorithm Cases

As mentioned above, Grafanaki identified three main categories of algorithms—content moderation algorithms,[203] content navigation algorithms,[204] and content personalization algorithms.[205] However, there is a fourth set of algorithms courts have recognized, dubbed "automated editorial acts."[206] This section will focus first on these "automated editorial acts," and will then examine content navigation and personalization algorithms. Content moderation algorithms and functions will then be discussed in a separate section.[207]

a) Automated Editorial Acts

In many Section 230 cases, the challenged intermediary is sued for employing an algorithm. These algorithms do not always fit squarely into the boxes of "content moderation," "content navigation," or "content personalization." Rather, they are commonly used algorithms that perform small "editorial" tasks.

Kimzey v. Yelp! Inc., involved one such algorithm.[208] There, plaintiffs alleged that defendants had created a star-based rating system and should therefore be held responsible as the "author" of a

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202 *Id.*; *see also* Prickett v. InfoUSA, Inc., 561 F. Supp. 2d 646, 649 (E.D. Tex. 2006) (finding Section 230 protected defendant website, after an offending third party completed an electronic form in such a way that incorrectly indicated that the plaintiff's business fell into the category of "Entertainers—Adult," without mentioning the First Amendment or free speech concerns).

203 Grafanaki, *supra* note 95, at 138.

204 *Id.* at 141.

205 *Id.* at 151.

206 O'Kroley v. Fastcase, Inc., 831 F.3d 352, 355 (6th Cir. 2016).

207 *See infra* notes 237–253 and accompanying text.

208 Kimzey v. Yelp!, Inc., 836 F.3d 1263, 1265 (9th Cir. 2016).

one-star rating made by a disgruntled customer.[209] However, the court granted defendants immunity under Section 230 for any harm resulting from this act, finding that because the rating system was a "neutral tool" operating on "voluntary inputs," the same reasoning from *Roommates.com* applied.[210]

Other similar, "automated editorial acts" include formatting text,[211] and creating "star symbols" and "Power Sellers" designations.[212] These are acts performed by algorithms that slightly alter or add to the complained-of third-party content.[213] But because these acts are completed by a "neutral algorithm" and act merely as neutral conduits for third-party information,[214] they are deemed "editorial acts," falling within the scope of Section 230's protection.[215]

In these cases, although the language of "editors" is used throughout, little-to-no mention is made of the First Amendment.[216] However, as is usually the case when Section 230 is involved, courts may briefly mention free speech concerns traditionally associated with the law.[217]

b) Search Result Placement

The First Amendment law on the issue of intermediary liability is more developed in cases where the contested conduct pertains to content's relevance to the world at large. One of the more notable cases in this vein is *Search King*.[218] There, as discussed above, the

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209 *Id.* at 1266–67.

210 *Id.* at 1270 (quoting Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1172 (9th Cir. 2008); *see also* Marshall's Locksmith Serv. Inc. v. Google, LLC, 925 F.3d 1263, 1265 (D.C. Cir. 2019) (finding Section 230 protected defendants Google, Microsoft, and Yahoo! for their roles in taking alphanumeric addresses provided by offending third parties and translating them into pinpoints on a map, rejecting the argument that this act constituted an impermissible "development" by the websites).

211 *O'Kroley*, 831 F.3d at 355.

212 Gentry v. eBay, Inc., 121 Cal. Rptr. 2d 703, 717 (Cal. Ct. App. 2002).

213 *Id*.

214 *Marshall's Locksmith Serv.*, 925 F.3d at 1271 (quoting Klayman v. Zuckerberg, 753 F.3d 1354, 1358 (D.C. Cir. 2014)).

215 *O'Kroley*, 831 F.3d at 355.

216 *See* cases cited in *supra* notes 211–215.

217 *See, e.g.*, Kimzey v. Yelp!, Inc., 836 F.3d 1263, 1269 (9th Cir. 2016).

218 Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003).

plaintiff Search King sued when Google decreased its "PageRank,"[219] adversely affecting Search King's business opportunities.[220] Distinguishing between an algorithm's objective, code-driven processes and the subjective value judgment associated with the ultimate output, the court found "PageRanks are opinions—opinions of the significance of particular web sites as they correspond to a search query,"[221] thus entitled to full First Amendment protections.[222]

In general, courts have expressed willingness to accept this decision's conclusion about search engine results and the First Amendment.[223] Interestingly, however, the court in *Search King* was never called on to address,[224] and did not address, whether Section 230 provided immunity for Google's PageRank system.[225] Notable too is the fact that the *Search King* court, and courts following its footsteps, accepted the results as opinions wholesale, without relying on the decision on relevance being an "editorial" judgment.[226]

c) Personalization Algorithms

Similar to content navigation algorithms are content personalization algorithms.[227] Instead of promoting or amplifying content the intermediary deems relevant to all, these algorithms promote content to particular users based on information the intermediary has obtained about the user's interests and habits.[228] If content navigation algorithms are opinions on the relevance of a particular result to their audience at large, one could argue that content

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219 *Id.* at *1.

220 *Id*.

221 *Id.* at *4.

222 *Id.* (quoting Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 852 (10th Cir. 1999)).

223 *See, e.g.*, e-ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d 1265, 1274 (M.D. Fla. 2016) ("The Court has little quarrel with the cases cited . . . for the proposition that search engine output results are protected by the First Amendment.").

224 *See* Defendant's Motion to Dismiss and Supporting Brief, Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M (W.D. Okla. Dec. 30, 2002), 2002 WL 32387991.

225 *See generally* Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003)

226 *Id.*

227 *See* Grafanaki, *supra* note 95, at 151.

228 *See id.*

personalization algorithms are opinions on the relevance of results to particular users.

One case where this type of algorithm took center stage was the aforementioned case of *Force v. Facebook*.[229] The plaintiffs alleged Facebook engaged in unlawful activity facilitated by "algorithms to suggest content to users, resulting in 'matchmaking.'"[230] The court reasoned that this matchmaking function fell squarely within the gambit of editorial decisions.[231] In doing so, the court characterized algorithmic matchmaking as simply an automated version of the decision to display particular third-party content to certain groups based on certain characteristics of those groups—the mere automation of an editorial decision.[232]

Even though Facebook's actions were clear "editorial choices,"[233] an opinion on relevance was pleaded and admitted to, and apparent similarities existed between the relevancy opinion seen in *Search King* sixteen years prior,[234] the court never mentioned the First Amendment.[235] The case was decided purely on whether the matchmaking activity was an editorial decision under Section 230.[236]

d) Content Moderation

Finally, there is the class of cases brought when an intermediary delists a plaintiff's website from their platform, usually due to a terms of use violation.[237] If this process were to take place via algorithm, the algorithm performing the task would be what Grafanaki calls a "content moderation algorithm."[238] However, in practice, the

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229 *See supra* notes 105–128 and accompanying text.

230 Force v. Facebook, Inc., 934 F.3d 53, 65 (2d Cir. 2019).

231 *Id.* at 66 (reasoning intermediaries made these decisions "since the early days of the [i]nternet").

232 *Id.* at 66–67.

233 *See id.* at 67.

234 *See* e-ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d 1265, 1274 (M.D. Fla. 2016).

235 *See generally Force*, 934 F.3d. 53.

236 *Id.* at 57.

237 *See, e.g.*, Langdon v. Google, Inc., 474 F. Supp. 2d 622, 627 (D. Del. 2007); Bennett v. Google, LLC, 882 F.3d 1163, 1165 (D.C. Cir. 2018).

238 *See* Grafanaki, *supra* note 95, at 138–39.

cases seen so far are directed at manual removals by intermediaries who have specifically singled out the plaintiff for delisting.[239] There is certainly a temptation to lump these cases together with the other search engine cases. However, these cases are distinct from cases like *Search King*, which are based on opinions about relevance.[240] This is because these cases contain an objectively verifiable statement—whether or not the terms of use have been violated—as opposed to a subjective opinion on relative relevance.

James Grimmelmann took up the question of subjective and objective falsity in his article, *Speech Engines*.[241] He explained that subjective falsity is at issue if an advisor asserts that a specific website will be most relevant to a viewer, when in fact, the advisor knows that a different recommendation would be more relevant.[242] It is telling a lie about a subjective fact. Objective falsity would be at issue if the advisor told the viewer that a recommendation was freely given, when in fact, it was paid for handsomely by an advertising company. This would be a lie about an objective truth.[243] Subjective falsity is at issue in *Search King* and *Force v. Facebook*; objective falsity is at issue in the content moderation cases.

For content moderation cases, the law has seen a mixed bag of Section 230 and First Amendment immunity for intermediaries.[244] One content moderation case is the previously mentioned case of *Baidu*.[245] There, Chinese-language search engine Baidu was sued

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239 *See, e.g.*, *Langdon*, 474 F. Supp. at 626; *Bennett*, 882 F.3d at 1165.

240 *See* Search King Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003) (finding "PageRanks are opinions—opinions of the significance of particular web sites as they correspond to a search query" and that "there is no conceivable way to prove that the relative significance assigned to a given web site is false.").

241 James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 923, 926 (2014).

242 *Id.* at 926.

243 *See id.* at 923.

244 *See generally, e.g.*, e-ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d 1265 (M.D. Fla. 2016) (finding no CDA immunity, but First Amendment protection for defendant intermediary in a content moderation case); *see also Langdon*, 474 F. Supp. 2d 622 (finding CDA immunity and First Amendment protection for a defendant intermediary in a content moderation case); *Bennett*, 882 F.3d 1163 (finding CDA immunity, but not addressing First Amendment protection for defendant intermediary in a content moderation case).

245 *See supra* notes 136–140.

for systematically blocking pro-democracy content, specifically that of the plaintiffs.[246] In response, Baidu asserted that the First Amendment provides protection for editorial judgments, including the information appearing in the search results and how it was displayed.[247]

In *Langdon v. Google*, Google asserted both Section 230 and the First Amendment as defenses.[248] On the Section 230 front, the court agreed with Google's assertion that the "screening and deletion" of content fell within the scope of immunity for "editorial decisions."[249] Additionally, under the First Amendment, the plaintiff received a second layer of protection for their exercise of "editorial control and judgment," and "freedom to exercise subjective editorial discretion."[250]

The plaintiffs in *Langdon* and *Kinderstart* both asserted that *their* First Amendment rights had been violated by the defendant intermediaries' content moderation decisions.[251] The underlying basis of these assertions aligns with the emergent idea that as "virtual public squares," online intermediaries should be liable for restricting constitutionally protected speech on their platforms.[252] The arguments were rejected in both cases.[253]

B. Editorializing by Intermediaries

Upon comparing the Section 230 and First Amendment lines of cases, one common thread emerges: courts' willingness to conceptualize intermediaries' activity as "editorializing." When courts confer immunity under Section 230 it is because the intermediaries are performing editorial tasks in connection with their publisher roles.[254] When they receive immunity under the First Amendment, it is sometimes because their actions are protected editorial

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246 Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 435 (S.D.N.Y. 2014).

247 *Id.* at 438.

248 474 F. Supp. 2d at 629–30.

249 *Id*. at 630.

250 *Id.* (internal quotations omitted).

251 *See id.* at 626; *see also* Kinderstart.com, LLC v. Google, Inc., No. C-06-2057, 2007 WL 831806, at *4 (N.D. Cal. Mar. 16, 2007).

252 *See* Lakier, *supra* note 78.

253 *See Langdon*, 474 F. Supp. 2d at 632; *Kinderstart.com*, 2007 WL 831806, at *15.

254 *See, e.g.*, Force v. Facebook, Inc., 934 F.3d 53, 67 (2d Cir. 2019).

judgments.[255] However, other times it is because the intermediaries' actions are simply expressions of an opinion—also protected by the First Amendment, but for a different reason.[256]

In sum, the intermediary's activity shapes the defense it chooses to raise and will receive. As has been shown, where intermediaries are sued for a straight forward post by a third party on their forum website, Section 230 predominates.[257] Similarly, intermediaries sued for third-party use of their electronic forms will take shelter under Section 230, not the First Amendment.[258] There exists a subset of intermediaries who display or rework information in relatively minor ways, employing "neutral" algorithms to perform "editorial act[s]."[259] These intermediaries turn to Section 230 as well.[260] There is no clear path for intermediaries who engage in content moderation—they may turn to the First Amendment, Section 230, or both.[261] When it comes to algorithms that amplify content for all, as in *Search King*, the First Amendment protection for opinions has received some acceptance as a defense.[262] However, when a content personalization algorithm came before the court in *Force v. Facebook*, Section 230 was the defense used, and little mention was made of the First Amendment.[263]

It stands to reason, then, that the nexus between the intermediary's activity and the protection it receives for "editorial" functions will help instruct how each law should apply to online intermediaries.

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255 *See* Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 435 (S.D.N.Y. 2014).

256 *See* Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003).

257 *See* cases cited *supra* notes 187–198.

258 *See supra* notes 190–205 and accompanying text.

259 *See* Marshall's Locksmith Serv., Inc. v. Google, LLC, 925 F.3d 1263, 1270–71 (D.C. Cir. 2019) (quoting Klayman v. Zuckerberg, 753 F.3d 1354, 1358 (D.C. Cir. 2014)) (citing O'Kroley v. Fastcase, Inc., 831 F.3d 352, 355 (6th Cir. 2016)).

260 *See id.* at 1272; *see also supra* notes 210–220.

261 *See supra* notes 240–256.

262 *See, e.g.*, e-ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d 1265, 1274 (M.D. Fla. 2016) ("The Court has little quarrel with the cases cited . . . for the proposition that search engine output results are protected by the First Amendment.").

263 934 F.3d 53, 67 (2d Cir. 2019).

1. Editorial Judgments in First Amendment Cases

The basis for First Amendment protection in editorial judgments arose in the print media context in the 1970s.[264] Perhaps the earliest cases signaling protection for editorial judgments were those turning on compelled speech issues, such as *Miami Herald Publishing v. Tornillo*,[265] *Turner Broadcasting Systems v. FCC*,[266] and *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*.[267] These cases established that entities could not be forced to speak, and thereby turned on the specific editorial choice to publish content.[268] However, the Supreme Court's language in *Tornillo* helped support a more expansive understanding of the protections the First Amendment provides for editors.[269] In ruling, the court in *Baidu* demonstrated the breadth of editorial protections, stating that the First Amendment protections apply "whether or not the speaker articulates, or even has, a coherent or precise message, and whether or not the speaker generated the underlying content in the first place."[270]

There are also a handful of cases where the intermediaries in question received First Amendment protection, but not for exercising editorial judgments. For instance, in *Search King*, Google successfully asserted First Amendment protection after the court found the relative importance of a search engine's results was a "statement of opinion relating to matters of public concern which does not contain a provably false factual connotation."[271] Because the plaintiffs

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264 *See* Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (describing "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair," as constituting editorial judgments).

265 *Id.*

266 512 U.S. 622 (1994).

267 515 U.S. 557 (1995).

268 Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014) (citing *Mia. Herald*, 418 U.S. 241 and *Turner*, 512 U.S. 622, for the proposition that the respective right of reply statutes "infringed on the newspaper's First Amendment right to exercise 'editorial control and judgment,'" and later referencing *Hurley*, 515 U.S. 557, saying it "reinforced that principle, and extended it well beyond the newspaper context.").

269 *See Mia. Herald*, 418 U.S. at 258.

270 *Baidu.com, Inc.*, 10 F. Supp. 3d at 437.

271 Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *2 (W.D. Okla. May 27, 2003) (internal quotations omitted).

were unable to successfully argue that the results were not objectively verifiable, First Amendment protection was granted.[272]

In general, First Amendment law surrounding online intermediaries' implementation of algorithms has begun to take shape.[273] However, as noted above, the rationale supporting the proposition that the First Amendment protects search engine results is far from uniform.[274] Ultimately, the editorial judgment of deciding whether to post content has received limited recognition; the apparently stronger and constitutionally protected argument is one where the intermediary asserts its opinion on relevance.

2. Editorial Functions in Section 230 Cases

While First Amendment protections for editorial judgements are alive and well today, the advent of Section 230 brought with it a distinct, new layer of protection for editors and editorial activity. This is because the definition of "editorial" within the Section 230 context has adapted and morphed through the years as technology has grown and changed. The result has been a definition of "editorial activity" that covers activities seemingly outside the scope of anything First Amendment jurisprudence would recognize as editorial.

To be clear, the words "edit," "editorializing," "editor," or "editorial," never appear in Section 230.[275] Rather, Section 230(c)(1) reads, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[276]

When the court in *Zeran v. America Online, Inc.* was faced with implementing Section 230 for the first time, it used language related to editing.[277] In an oft-cited line, the court stated that under Section

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272 *Id.* at *4.

273 *See, e.g.*, e-ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d 1265, 1274 (M.D. Fla. 2016); *Baidu.com, Inc.*, 10 F. Supp. 3d at 440; Langdon v. Google, Inc., 474 F. Supp. 2d 622, 630–31 (D. Del. 2007); Kinderstart.com, LLC v. Google, Inc., No. C-06-2057, 2007 WL 831806, at *13–16 (N.D. Cal. Mar. 16, 2007); *Search King, Inc.*, 2003 WL 21464568, at *2.

274 *See supra* notes 129–141 and accompanying text.

275 *See* 47 U.S.C. § 230.

276 *Id.* § 230(c)(1).

277 129 F.3d 327, 330 (4th Cir. 1997).

230, suits "seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."[278] In this way, the *Zeran* court broke "a publisher's traditional editorial functions" into four categories: deciding whether to (1) publish, (2) edit, (3) withdraw, or (4) postpone publishing.[279] *Zeran* turned on defendant AOL's decision regarding the third editorial function—whether to withdraw an offensive post.[280] The decision to withdraw content has since been recognized as "the very essence of publishing."[281] However, the second publisher function the *Zeran* court identified—editorial decision-making—took on a life of its own in the years to come.

One such extension of judicial understanding of online "editorial functions" was described in the discussion of cases dealing with the use of "automated editorial" algorithms.[282] For instance, in *Marshall's Locksmith Service, Inc. v. Google, LLC*, the conversion of third-party information into a pinpoint on a map was considered an "automated editorial act."[283] These acts, while not squarely within the scope of the rule articulated in *Zeran*—which was limited to decisions on "*whether to* publish, withdraw, postpone, or alter" publication of content[284]—seem to flow naturally from the concept of "publishing" in the abstract.

While the automated editorial algorithm cases demonstrate a slight expansion of judicial understanding of Section 230 editing performed by intermediaries, there are other cases that strain the limits of what should be considered a "traditional editorial function." For instance, the court in *Jones v. Dirty World* stated that posting otherwise non-actionable comments on third-party users' posts

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278 *Id.*; *see* Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398, 407 (6th Cir. 2014) (quoting *Zeran*, 129 F.3d at 330).

279 *See Zeran*, 129 F.3d at 330.

280 *Id.*

281 Bennett v. Google, LLC, 882 F.3d 1163, 1167 (D.C. Cir. 2018).

282 Marshall's Locksmith Serv., Inc. v. Google, LLC, 925 F.3d 1263, 1271 (D.C. Cir. 2019).

283 *Id.*; *see also* O'Kroley v. Fastcase, Inc., 831 F.3d 352, 355 (6th Cir. 2016) (characterizing decisions related to formatting text as "traditional editorial functions").

284 *Zeran*, 129 F.3d at 330 (emphasis added).

was a Section 230-protected, editorial function.[285] It remains unclear which of the four aforementioned categories of a publisher's editorial functions this activity may have fallen under. Recently, in *Force v. Facebook*, the court made no attempt to engage with the foundational editorial judgment case, *Zeran*, despite deciding Facebook's matchmaking algorithms fell within the scope of "editorial decisions."[286] Relying on *Marshall's Locksmith Service* and *O'Kroley*, as well as the sweeping immunity for editorial processes articulated in *Carafano*,[287] the court stated that deciding where third-party content should be placed was an editorial decision.[288] Even though Facebook was targeting content to users with direct specificity, this did not take its matchmaking algorithms out of Section 230's protection.[289]

Additionally, the way courts speak about editorial activities by intermediaries in the Section 230 context has shifted noticeably over time. For instance, in 2003, the *Carafano* court essentially bypassed the editorial inquiry, paving the way for Section 230 immunity for other intermediaries who employed online forms.[290] Six years later in *Nemet Chevrolet v. Consumeraffairs.com*, the court dismissed Chevrolet's complaint in part because Chevrolet failed to allege the defendant was engaged in "something more than a website operator performs as part of its traditional editorial function."[291] Further, the "editing" language initially stated in *Zeran* has transformed into

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285 755 F.3d 398, 416 (6th Cir. 2014).

286 *See generally* 934 F.3d 53 (2d Cir. 2019).

287 *See* Carafano v. Metrosplash.com, Inc., 399 F.3d 1119, 1124 (9th Cir. 2003); *see also infra* note 290 and accompanying text.

288 *See Force*, 934 F.3d at 66.

289 *Id.* at 67.

290 *See Carafano*, 339 F.3d at 1124 (concluding "[u]nder § 230(c) . . . so long as a third-party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process"); *see also* Prickett v. InfoUSA, Inc., 561 F. Supp. 2d 646, 650 (E.D. Tex. 2006) (citing with approval *Carafano*, 339 F.3d 1119).

291 591 F.3d 250, 258 (4th Cir. 2009) (citing Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)).

language related to "editorial decisions"[292] and "editorial functions."[293] In many cases, this language appears to encompass all publisher activity as specified in *Zeran*—collapsing both the publisher inquiry and the editorial function inquiry into one.[294]

C. Summarizing the Problem

1. An Expanded but Vague Understanding of "Editorializing" for Intermediaries

The emphasis on editor activity has become far more involved than the simple mention of "the decision whether to publish, withdraw, postpone, or alter content," as originally set forth in *Zeran*.[295] This has led to a lack of clarity in the law and a potentially, overly broad understanding of which online intermediary activities should be covered under Section 230. These impacts exacerbate the fact that the First Amendment, both explicitly and through the policy of "speech promotion," runs alongside the Section 230 inquiry—but is kept blocked off and underdeveloped due to the procedural protection that Section 230 provides.[296] As a result, case law interpreting Section 230—a law whose express language prohibits treating an online intermediary as a publisher—has transformed Section 230 into a law that provides affirmative protection for an intermediary performing editorial functions. This would not be much cause for concern on its face. However, the trouble lies in the fact that what constitutes an editorial judgment under Section 230 has proven itself to be a fluid concept, continuing to transform to fit the changing capabilities of modern online intermediaries, all the while purporting to be rooted in notions of "traditional" editor responsibilities. As a consequence of this fluid understanding of editor activity in the Section 230 context, the following are all examples of "traditional editorial" functions performed by online intermediaries: (1) the

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[292] e-ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d 1265, 1274 (M.D. Fla. 2016).

[293] O'Kroley v. Fastcase, Inc., 831 F.3d 352, 355 (6th Cir. 2016) (citing Jones v. Dirty World Ent. Recordings, LLC, 755 F.3d 398, 416 (6th Cir. 2014)).

[294] *See, e.g.*, Langdon v. Google, Inc., 474 F. Supp. 2d 622, 630 (D. Del. 2007) (considering a publisher's decision whether or not to publish as an editorial decision).

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

[296] *See supra* notes 144–149.

decision to withdraw an offensive post; (2) an electronic form; (3) an algorithm that converts addresses to pinpoints on a map; (4) an algorithm that automates decisions on font and ellipses placement; and (5) a matchmaking algorithm that suggests users as friends to each other after tracking online habits and interests. It is becoming increasingly clear that without any clearly demarcated barriers, the "editorial" umbrella runs the risk of becoming a fluid, conclusory catch-all.

2. Dual Protection Under Section 230 and the First Amendment

The broad "editorial" activities umbrella becomes doubly problematic when one considers the First Amendment's shadowy—but almost non-existent—role in the majority of these cases. That is, while courts briefly mention First Amendment concerns underlying Section 230 and laud the benefits of free speech on the internet when granting intermediaries immunity, Section 230 has ironically shielded the First Amendment itself from actually playing a substantive role in these cases. As Eric Goldman points out, Section 230 acts as a procedural shield, preventing these cases from ever being heard on First Amendment grounds to begin with.[297] Since intermediaries are awarded quasi-First Amendment protection for editorial judgments regardless, intermediaries need not assert their actions are either opinions nor editorial decisions within the meaning of the First Amendment. Rather, they can seek shelter under what appears to be a more flexible and ever-shifting, "editorial judgment" standard under Section 230.

The ambiguity surrounding "editorial" activities under Section 230 has borne considerable uncertainty in an already misunderstood and hotly contested area of the law. Moreover, the lack of a clearly articulated standard to determine when an activity is "editorial" has led to conclusory judicial opinions that turn on each court's wildly variable notion of what exactly an online editor "traditionally" does. The affirmative protection for editorial decisions under Section 230 further serves to muddy the law surrounding online intermediaries and First Amendment speech—which is already stunted by Section

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297 *See supra* notes 145–149.

230 through procedural means. Finally, the expansive understanding of the "editor" under Section 230 serves to provide intermediaries with a dual layer of editor-related protection if the sites can successfully argue they perform editor-adjacent activities.

III. SOLUTION GOING FORWARD: ADOPT *ZERAN*'S LANGUAGE AS THE RULE

A. Return to the Original Language in Zeran

Courts should return to the language in *Zeran* when deciding whether an activity is editorial. In *Zeran*, the court listed four main publisher functions under Section 230: (1) publishing, (2) editing, (3) withdrawing, and (4) postponing publishing.[298] When a case involves editorial conduct, that conduct should be protected, but only insofar as it is confined to editing behavior in its traditional sense. Online activities implicating editorial functions only in spirit or by analogy should receive a seriously close look if they are to be afforded protection. Although Facebook's matchmaking algorithm bears nebulous similarities to traditional editors in that they both incidentally form connections between speakers of content and viewers of content, perhaps this high-level, incidental similarity, without more, should not be enough to bring the intermediary under Section 230's protection.

B. Use First Amendment Jurisprudence as a Guide for Determining What Is a Traditional Editorial Function

Further, when courts invoke the idea of a "traditional" editorial function, they should be guided by First Amendment jurisprudence, which spells out, "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair,"[299] as hallmark features of editorial functions. First Amendment considerations already guide Section 230 jurisprudence in this area, so these explicit examples of traditional editorial activities are instructive.

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298 *See Zeran*, 129 F.3d at 330.

299 Mia. Herald Publ'g. Co. v. Tornillo, 418 U.S. 241, 258 (1974).

If the contours of Section 230 are to be clarified and solidified in this way, intermediaries engaging in an activity that is not clearly within the language or intent of Section 230 would be incentivized to make arguments more consistent with their actual functions. They would need to assert their actions are either editorial judgments or opinions deserving First Amendment protection—rather than getting the easy ride of saying their activity falls into the vast, amorphous bucket that is an "editorial decision" or "editorial function" under Section 230.

In short, courts can address concerns of Section 230's expanding scope by harkening back to the language of *Zeran*—language that forms the basis for immunity for editorial judgments under Section 230 as we know it—while keeping intact the understanding that the decision "to edit" is one typically associated with a publisher.

C. Reasons for and Against the Proposed Solution

This proposed rule would benefit judges and litigants alike by providing increased clarity and predictability in a confusing and unpredictable area of law. It would allow all parties involved to assess with greater confidence whether an activity falls within the scope of Section 230—and tailor their decisions accordingly. Another key benefit lies in allowing First Amendment jurisprudence in this area to finally develop where appropriate.

Some may oppose a more concrete rule such as this one, as it would mean that Section 230's potential scope would likely be narrowed. Those who laud Section 230 for protecting defendant intermediaries—for instance by allowing speedier dismissals and lower litigation costs—would likely protest as well.

However, these concerns (about protecting more advanced online intermediary activities, for instance) could be addressed more directly and with greater clarity through an independent piece of legislation. The case law and public criticism in the legislature and judiciary make clear that continuing to stretch a law implemented two years before Google was created and eight years before Facebook was created, is not a sustainable way to provide immunity for notoriously complicated and arguably insidious, novel technologies implemented by powerful actors.

CONCLUSION

Rather than continue to engage in the convoluted reasoning required to argue that a matchmaking algorithm is a "traditional editorial function," courts should allow Section 230 to reach only what it was meant to reach—truly basic and traditional editorial functions, as defined in the seminal case of *Zeran v. America Online, Inc*.