

# KNOW YOUR CYBERSHIELD

An examination of the background, interpretations and implications of Section 230 of the 1996 Communications Decency Act, and its effect on the world of student media.

Student evaluations posted on the Internet described a professor at a San Francisco college as “mentally ill,” “incompetent” and a “homomaniac.”



A commenter posing as a university professor insulted one of the professor’s students in a message posted on a student newspaper Web site.

If these remarks were published as letters to the editor in a printed student newspaper, the publication would be subject to the traditional rules of defamation law. But when such comments appear in an online publication — for example, as letters to the editor or postings to a comment board — the publication often will avoid liability.

Why would an online publication be held to a lower standard of liability than a print version? A federal law passed in 1996 provides the answer.

Section 230 of the Communications Decency Act states that providers and users of interactive computer services are not liable for posting information provided by other sources.

For the student media, this could mean broad immunity for content that is created by non-staff members. The statute most likely protects online student media from liability for defamatory comments posted by others to its discussion boards. But it is also possible that the immunity applies to other “outside” content, such as advertisements, letters to the editor, syndicated columns and even articles from freelancers.

But there are some pitfalls to avoid. If students add content to material provided by others or rewrite sentences as part of the editing process, for example, a court could conclude that the student newspaper helped to “create” the information. In that case, the publication could be liable. Student journalists and school administrators should be aware of the protection Section 230 may of-

fer — as well as its limits — when they venture into cyberspace.

## Cybershield background

Before considering the application of Section 230 to the student media, it is important to understand why the law was passed. Prior to the CDA, courts applied the traditional rules of libel law to the Internet. Internet service providers could be held liable for what they disseminated as either “publishers” or “distributors,” depending on their level of editorial control.

For example, *publisher liability* applies to reporters, authors, editors and publishers as well as the publications they work for. Publishers are fully liable for defamation because they are “creatively involved in the process of publication” and it is fair to assume that they know about any libelous information.

*Distributor liability* applies to commercial printers, bookstores, libraries and news vendors. Distributors are liable only if they know or have reason to know that information is defamatory. They are not required to independently investigate material before they distribute it. The lower standard is justified by distributors’ lack of control over the information they disseminate.

In applying these standards to the Internet, courts treated ISPs that monitored the content of their message boards as publishers. As such, these ISPs were liable for any defamatory content posted to their services. By contrast, ISPs that took no steps to screen messages posted to their forums were treated as distributors. These companies were not liable for defamatory content posted by users. Two cases illustrate this point.

In *Cubby v. CompuServe*, the court determined that the ISP CompuServe was a distributor because it found that the company did not take steps to monitor the content of its discussion forums. As a distributor, CompuServe would be liable only if it knew or had reason to know of defamatory material posted to its service. In *Cubby*, the court

found that CompuServe was not liable for defamatory postings because the company had no reason to know about them.

In contrast, in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, a court found that the ISP Prodigy was a publisher because Prodigy held itself out to the public as a “family oriented network” and advertised that it monitored its bulletin boards and used filtering software to screen “offensive” messages. The court found that Prodigy exercised editorial control much like a newspaper or magazine and should therefore be treated as a publisher. As such, the court found Prodigy liable for defamatory postings.

The *Prodigy* rule had the potential for exposing ISPs to tremendous liability — but only when ISPs took steps to control the content of their discussion forums. Members of Congress feared that after *Prodigy*, many ISPs would choose not to monitor their discussion forums in order to avoid liability. Section 230 of the CDA was designed to overrule *Prodigy* and ensure that ISPs would not be treated as publishers for material posted to their discussion forums, even when an ISP exercised some editorial control.

Congress passed Section 230 as part of the CDA in 1996. This section of the law is entitled, “Protection for Private Blocking and Screening of Offensive Material.” Section 230(c), which is labeled “Protection for ‘good samaritan’ blocking and screening of offensive material” states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” The law goes on to state that protection applies even when moderators take steps to screen certain material from discussion forums. Specifically, the law states, “no provider or user of an interactive computer service provider shall be liable on account of . . . any action voluntarily taken in good faith to restrict access to . . . material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected. . . .”

## Court interpretation

Courts have produced a substantial body of case law applying Section 230 to the rapidly evolving mix of entities interacting in cyberspace. Generally, courts have taken

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a broad view of who is entitled to Section 230's protections and how far those protections extend. The Fourth Circuit set the tone in *Zeran v. America Online, Inc.*, the first case to interpret the law. That court found Section 230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."

Over the next decade, the *Zeran* court's analysis was almost universally adopted by other federal and state courts. Recently, however, some courts have backed away from *Zeran*'s broadest language. The Ninth Circuit, for instance, recently declared Section 230 does not grant "a general immunity from liability deriving from third-party content." But at a minimum, almost all courts agree Section 230 applies when a suit (1) against a provider or user of an interactive computer service (2) would treat the defendant as a publisher or speaker of information provided by another information content provider.

### (1) WHO IS PROTECTED

Section 230 protection applies to any "provider or user of an interactive computer service." The statute defines an interactive computer service as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server," specifically including services provided by libraries and educational institutions.

As discussed above, the earliest cases applying Section 230 dealt with large ISPs, such as AOL, that directly connected customers to the Internet; it is clear such companies are covered as "providers." More recently, courts have expanded their definition of "providers" to include Web sites and e-mail lists, whether they are operated by large corporations or by individuals.

Moreover, the statute also provides full protection to any user of an interactive computer service who merely re-posts content from someone else. By definition, any Web site uses such services to connect with readers. Thus, any Web site or e-mail list — including online student publications — should be covered.

### (2) SCOPE OF PROTECTION

Even for those who qualify for Section 230 immunity, the law's protection is limited in two main ways. The law protects only against certain types of legal claims, and it

applies only to content provided by someone other than the person claiming immunity.

#### Types of claims

Section 230 provides immunity from any cause of action that would treat service providers or users as publishers of content provided by someone else, regardless of how a claim is phrased. This immunity obviously extends to defamation claims, as a person bringing such a suit must always prove the defendant published the information. This also includes protection from claims such as fraud, negligence and false light when those claims arise from information in third-party content. The immunity does not, however, protect against lawsuits dealing with federal criminal statutes or any intellectual property violations, including copyright.

While the statute specifically mentions publisher liability, the first court to interpret the law held that it also shields ISPs from distributor liability. In *Zeran*, the plaintiff sued AOL after an anonymous user posted several messages advertising "offensive" T-shirts that made reference to the 1995 bombing of the federal building in Oklahoma City. The phony messages urged readers to call the plaintiff to order the shirts, and the plaintiff sued for negligence after receiving many insulting calls and death threats. The plaintiff argued AOL should be held liable as a distributor because it failed to remove the defamatory messages quickly enough after the plaintiff complained.

But the court held Section 230 prohibits any causes of action that would place ISPs in a publisher role. "[L]awsuits 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." Distributors, while held to a lower standard of liability than publishers, are still "a type" of publisher. If AOL were held liable as a distributor, the company would have an obligation to investigate every complaint of a defamatory posting and decide whether to publish or remove the statement, thrusting it into a publisher's role. Given the volume of messages, such a rule would impose an "impossible burden" on ISPs, likely prompting them to avoid screening messages and to remove messages upon complaint (whether legitimate or not) rather than risk liability. This is what Section 230 was designed to prevent. Therefore, the court found Section 230 bars



**In 1996, Congress passed Section 230 of the Communications Decency Act, affording protection to any "provider or user of an interactive computer service."**

lawsuits based on both distributor and publisher liability.

Section 230 does not apply, however, to claims challenging conduct beyond a publisher's traditional editorial functions. For instance, although service providers cannot be liable for refusing to remove third-party content, they might be liable if they promise to remove content and then fail to do so. In *Barnes v. Yahoo!*, Barnes sued Yahoo for failing to remove a fake profile Barnes' ex-boyfriend had created, which included nude pictures of Barnes. Barnes alleged a Yahoo official promised to "personally walk [Barnes' complaints] over to the division responsible for stopping unauthorized profiles and they would take care of it." When, two months later, Yahoo still had not acted, Barnes filed suit.

The Ninth Circuit said Section 230 did not preclude Barnes' breach-of-contract claim because the claim alleged conduct — Yahoo's decision to make and then break a promise — that was separate from Yahoo's role as a publisher. The court emphasized, though, that "a general monitoring policy, or even an attempt to help a particular person" would not create liability, and that Web sites can avoid liability by stating that they are not making any legally binding promises.

### Source of challenged content

The other major limitation on Section 230 immunity is it applies only when "another content provider" wrote the content in question. Although this distinction is simple in theory, it can become complicated in practice.

At one extreme, Web site owners will always be responsible for content they create. For instance, the court in *Anthony v. Yahoo!* said Yahoo had no immunity against a claim

alleging that the company had created fake profiles on its online dating service in order to make the service more attractive to subscribers. In addition, the court said Yahoo could also be liable if it were shown the company deliberately misrepresented real but expired profiles as profiles of currently active users. In a sense, were such allegations proven true, it would be Yahoo, not the original users, “creating” the misleading implication that the users still were active.

At the other end of the spectrum, service providers are not liable merely for passing along someone else’s expression. In *Zeran*, the message writer was an anonymous user, who was clearly a distinct entity from AOL. A federal district court in *Blumenthal v. Drudge* ruled Section 230 immunity also covered information posted by an independent contractor whom AOL paid and promoted. AOL paid gossip columnist Matt Drudge \$3,000 a month in exchange for his agreement to make the *Drudge Report* available to all AOL customers for one year. The contract gave AOL the right to remove content if it violated the company’s “standard terms of service.” The court held AOL was not liable for allegedly defamatory information in the *Drudge Report*, stating that Congress chose to provide immunity even when the ISP “has an active, even aggressive role in making available content provided by others.”

The *Blumenthal* court did suggest, however, that an ISP could be liable if it shared responsibility for creating content. The text of Section 230 also suggests this is true. The statute defines a content provider as one responsible for the “creation or development” of content “in whole or in part.”

The precise point where a service provider or user becomes a partial content creator has yet to be determined. In *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, the Tenth Circuit made clear a service provider will not lose immunity simply by deleting inaccurate information. In *Ben Ezra*, the plaintiff argued AOL was liable for defaming the company because it published incorrect stock figures. Other companies provided the stock figures, but AOL sometimes deleted incorrect stock symbols and alerted the companies when it discovered errors; the plaintiff argued this made AOL a content provider. The court rejected this argument, holding that AOL was not developing or creating information, but only making some data unavailable.

At least one court has said Section 230 also protects providers who select or highlight outside content. In *Batzel v. Smith*, the operator of an e-mail list distributed a message he received from Bob Smith. In the e-mail, Smith claimed Ellen Batzel, a former employer, had inherited stolen art from her grandfather. Smith claimed Batzel had bragged that her grandfather was “one of Adolph Hitler’s right-hand men.” Batzel denied Smith’s claims and sued Smith and Ton Cremers, the list operator, for defamation. The Ninth Circuit ruled Cremers could not be held liable merely for distributing Smith’s message over the e-mail list, even though Cremers had selected Smith’s message for distribution and had made minor edits to it.

However, the court said Cremers could be liable if — as Smith claimed — Smith had not intended his e-mail for public distribution. In that case, the e-mail would not qualify under Section 230 as content “provided” by another party unless Cremers reasonably believed Smith intended the e-mail for online publication. Such ambiguities are unlikely to arise in the context of a student newspaper’s comment boards or other areas where it is clear users are submitting content for public display. But student media sites might not have Section 230 immunity for posting private e-mails or other materials not provided for online publication (though the usual defenses to a privacy claim, such as the newsworthiness of the item, still would apply).

The Ninth Circuit provided the most detailed discussion so far of what might constitute “partial” content creation in its 2008 decision, *Fair Housing Council v. Roommates.com, LLC*. The court said an online roommate-matching service was not immune from claims that parts of its Web site violated fair-housing laws. As part of the registration process, the site required users to answer questions about their sex, sexual orientation and whether they have children or are willing to live with children. The court said the site could not claim immunity from claims that merely posing those questions violated fair housing laws (regardless of users’ answers) because the site was the “content provider” of the questions.

But the court went further, holding the site also could be liable for displaying the answers to these questions on users’ profile pages and using the answers in the site’s

search system to screen which listings users saw. The court said the site partially developed the content by posing the allegedly illegal questions and requiring users to answer them, thus “contribut[ing] materially to the alleged illegality of the conduct.” However, the majority emphasized it considered this an unusual case, driven by the fact that “Roommate’s work in developing the discriminatory questions, discriminatory answers and discriminatory search mechanism is directly related to the alleged illegality of the site.”

In contrast — and of special interest to student media operating online user forums or allowing users to post feedback or comments — the court said, merely editing user content for purposes such as shortening, correcting spelling or removing profanity generally would not jeopardize a service provider’s immunity. The only exception would be if the editors contributed to a statement’s illegality, such as by removing the word “not” from the statement “[Name] did *not* steal the artwork.” The court also said the site was not liable for discriminatory statements users wrote in the open-ended “Additional Comments” portion of their profiles. Speaking directly to Web site operators, the court wrote: “If you don’t encourage illegal content, or design your website to require users to input illegal content, you will be immune.” It remains to be seen whether courts outside the federal Ninth Circuit, which covers a number of western states, will adopt such reasoning, but allowing such “cleanup editing” would seem to be entirely consistent with the purpose underlying the CDA.

## Conclusion: Section 230’s impact on student media

Although no published decisions have directly applied Section 230 to student media, it now is well established that the statute covers virtually all Web sites.

To qualify for immunity, student media must prove that the content at issue was created by an entity distinct from the publication. Obviously, student media are “content providers” for material they create themselves, and the statute would not protect them from liability for such material. For example, student media will be liable for any defamatory content in stories written by student reporters, regardless of whether those stories appear in print or online editions.

On the other hand, publications will not be liable for user-posted comments or similar materials. Other content provided by non-staff members — such as letters to the editor — might also be protected, even though print publications have always been treated as publishers of all such content. Commentator David R. Sheridan has argued a newspaper that printed the same defamatory letter to the editor in its print and online versions would be liable only for the print version. Likewise, Section 230 might plausibly be read to protect syndicated cartoons, columns and any other material not created by the publication's staff

While such arguments are certainly reasonable given the plain language of Section 230, as of July 2009, no court has actually ruled that online publications are protected from liability based on letters to the editor or similar submissions and student media are urged to exercise caution and not to rely on Section 230 as a substitute for practicing sound journalism. The *Zeran* court rested its holding on the observation that “[i]t would be impossible for service providers to screen each of their millions of postings for possible problems.” Such logic applies equally to all message boards, whether they are maintained by student media or large service providers. In contrast, it is not only possible but routine for a publication to screen materials like letters to the editor and freelance articles. In addition, it is common practice for newspaper staff to require letter writers to sign their names and provide a phone number, so that newspaper staff may verify who the author is before the letter is printed. If similar practices are used when publishing online letters to the editor, it is possible immunity would not apply.

Regardless, students must be careful not to cross the line between host and content provider. During the editing process, students should avoid rewriting or adding content to material provided by others. A student outlet also should not ask readers to provide material the publication knows is illegal (such as discriminatory housing ads) or defamatory. In both cases, a court could find the publication liable as a partial content creator or developer.

While legal protection is strongest when students avoid making substantive revisions to material provided by others, there are many good reasons why students may hesi-

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tate to give up editorial control. Editors are supposed to fix sloppy writing, correct errors and fill in gaps in reporting. If editors stop serving these functions in an effort to avoid liability for content, the quality of student media may suffer. Inaccuracies, for example, will obviously damage the credibility of student publications. But when it comes to avoiding liability for content provided by others, student editors who avoid adding content and rewriting sentences will have stronger protection under the law. Student editors who are uncomfortable with a post — for whatever reason — will be on much safer ground if they simply remove the post entirely.

### Yet another reason to cease censorship within schools

School officials may want to think twice before censoring content posted to their Web sites, including sites hosted by student media. Section 230 of the Communications Decency Act reinforces the argument that schools that do not interfere with student press freedom will have greater protection from liability.

In many cases, the school district or school maintains the server on which a student publication's Web page is hosted. For that reason, schools may be concerned about liability for online content of the student media.

As this magazine went to press, no court had yet addressed the issue of whether schools — public or private — are covered by Section 230. But both appear to be covered by the law, which defines interactive computer service provider to include a service operated by “libraries or educational institutions.” On its face, this broad language would seem to protect all schools from liability for content posted by student journalists or others who are not school officials.

However, law professor Ray August argues that the statute provides immunity only for private organizations. August's argument is based on the fact that the title of the statute is “Protection for Private Blocking and

Screening of Offensive Material.” August states that public providers “including public universities” could be held liable as publishers for unlawful content posted to their Web sites — but only if they screen content. By his theory, public schools that screen online content would be treated as publishers of all content posted to their Web sites. Schools that do not screen online content would not be liable. Thus if avoiding liability for defamatory content is the goal, August advises public universities (and presumably public high schools) “to establish a policy of not screening materials posted by faculty, staff, or students.”

This interpretation was rejected by at least one state court, which held Section 230(c)(1) does protect government entities. But even if public schools can count on Section 230 immunity, there is another good reason why public school officials should avoid censorship on the Internet. A federal court in Virginia has held that public entities cannot use the law as an excuse to censor constitutionally protected speech. In other words, while Section 230 may prevent a public school from being held responsible for a libelous statement posted to its server by an outside user, Section 230 will offer no defense in the event of a First Amendment lawsuit if public schools censor student speech that is constitutionally protected. Government censorship, the court said, will always be subject to judicial review. Section 230 offers no defense.

As with student media, public or private schools will be protected from liability only for content that is created by others. Therefore, if school officials add content to online student publications, it is possible that the school could lose its immunity. Schools can post disclaimers to student media pages on the school's Web. But the best approach for schools wishing to protect themselves from liability for the content of student-produced publications would be to adopt policies affirming the editorial independence of student journalists.