

## CACHE-22: THE FINE LINE BETWEEN INFORMATION AND DEFAMATION IN GOOGLE'S AUTOCOMPLETE FUNCTION<sup>♦</sup>

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### INTRODUCTION

Anyone who has conducted a Google search in the last several years has probably noticed Google's autocomplete feature. The popular search engine function uses an algorithm to automatically suggest search terms to complete queries as the user types in the search box.<sup>1</sup> These search suggestions are based on a user's search history, popular search queries, and a number of other objective factors.<sup>2</sup> Autocomplete is an exceedingly valuable search tool, as it helps users access more relevant and targeted content with fewer keystrokes.<sup>3</sup>

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<sup>1</sup> *Autocomplete*, GOOGLE, <https://support.google.com/websearch/answer/106230?hl=end> (last visited Feb. 21, 2016) (explaining how Google's autocomplete function operates).

<sup>2</sup> *Id.*

<sup>3</sup> Danny Sullivan, *How Google Instant's Autocomplete Suggestions Work*, SEARCH ENGINE

Despite its benefits, autocomplete has recently become the subject of legal controversy.<sup>4</sup> The algorithmically generated results can be defamatory if they associate an individual or company's name with criminal, shameful, unsavory conduct.<sup>5</sup> Even assuming the negative connotation is false, the suggestion alone has the power to cause irreversible reputation damage.<sup>6</sup>

Around the world, Google has been sued for defamation based on the content made available by its autocomplete function.<sup>7</sup> In response, Google has argued that it cannot be legally responsible since its search suggestions are generated algorithmically without any human involvement.<sup>8</sup> Several foreign courts, however, have found Google liable, forcing it to either remove the defamatory material upon request or modify its autocomplete algorithm.<sup>9</sup>

The United States has yet to adjudicate the issue of whether a search engine may be liable for defamation based on content algorithmically generated by its autocomplete function. In the United States, website operators and other interactive computer service providers are generally immune from liability for third-party material pursuant to § 230 of the Communications Decency Act ("Section

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LAND (Apr. 6, 2011, 6:27 PM), <http://searchengineland.com/how-google-instant-autocomplete-suggestions-work-62592>.

<sup>4</sup> Aside from being criticized for facilitating defamation, Google has also been criticized by social interest groups for suggesting terms that are racist, discriminatory, and otherwise offensive. Tom Chatfield, *Is Google Autocomplete Evil?*, BBC.COM (Nov. 6, 2013), <http://www.bbc.com/future/story/20131106-is-google-autocomplete-evil>. The United Nations recently kicked off a campaign, which uses Google's autocomplete suggestions to show how gender inequality is a worldwide problem. Victoria Taylor, *Powerful UN Ad Campaign Uses Google Searches to Show Gender Inequality*, N.Y. DAILY NEWS (Oct. 23, 2013, 5:01 PM), <http://www.nydailynews.com/life-style/campaign-google-searches-show-sexism-article1.1494436>.

<sup>5</sup> David Angotti, *Court Orders Google Autocomplete Changes: Japanese Man Defamed by Algorithm*, SEARCH ENGINE J. (Mar. 26, 2012), <http://www.searchenginejournal.com/google-autocomplete-defamation-case/41864/> ("It could lead to irretrievable damage such as a loss of job or bankruptcy just by showing search results that constitute defamation or a violation of the privacy of an individual person or small and medium-sized companies.").

<sup>6</sup> For example, Bettina Wulff, the former first lady of Germany sued Google for defamation after a search of her name autocompleted with terms such as "prostitute" and "red-light past." Rumors that Mrs. Wulff used to be a prostitute had been circulating since she met her husband, Christian Wulff, the former president of Germany. Mrs. Wulff denied that these rumors were true. She claimed that Google's autocomplete amplified these rumors, causing her serious emotional distress. See Konrad Lischka, *Blaming the Algorithm: Defamation Case Highlights Google's Double Standard*, SPIEGEL ONLINE INT'L (Sept. 10, 2012, 4:00 PM), <http://www.spiegel.de/international/germany/defamation-case-by-bettina-wulff-highlights-double-standard-at-google-a-854914.html>.

<sup>7</sup> Peter S. Vogel, *Google Autocomplete's Brushes With Libel*, E-COMMERCE TIMES (Aug. 25, 2014, 9:03 AM), <http://www.ecommercetimes.com/story/80941.html> (providing a chronology of international defamation cases and their outcomes).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

230”).<sup>10</sup> Section 230 prohibits any Internet service provider from being treated as the “publisher” or “speaker” of user-generated material, as long as it does not personally “create or develop” the content.<sup>11</sup> Because autocomplete search suggestions are made up entirely of real queries entered by users, it would appear as though search engines would qualify for § 230’s safe harbor. However, recent developments in case law have narrowed the scope of the statute, and may give plaintiffs potential arguments to overcome this immunity.<sup>12</sup>

Given the nature of autocomplete<sup>13</sup> and the state of the law regarding secondary liability,<sup>14</sup> a court could reasonably find that, by creating an algorithm to analyze and display user-generated search queries as suggested search terms, search engines are participating in the “creation and development” of the content. If this occurs and a search engine such as Google is found liable, it will either have to rework its autocomplete function to ensure that its search suggestions provide no potentially defamatory information, or eliminate the function altogether.<sup>15</sup> Either of these alternatives would contravene the purpose of § 230(c) and eliminate an extremely useful and popular search tool.<sup>16</sup> Therefore, courts should adopt a broad construction of § 230 to allow Google to avoid liability for the results of its autocomplete algorithm.<sup>17</sup>

This Note will analyze Google’s potential liability for defamation based on content generated by its autocomplete algorithm.<sup>18</sup> To begin this analysis, Part I will provide an overview of how autocomplete operates and why its results have given rise to defamation claims. Further, this section will chronicle recent examples of defamation suits that have developed in the international context. Part II will then explore the legislative history of § 230 and outline the evolution of its judicial interpretation and application, identifying and comparing some of the predominant approaches taken by various courts of appeal. In Part III, this Note will discuss how courts should respond if an individual or company is allegedly defamed by Google’s autocomplete

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<sup>10</sup> 47 U.S.C. § 230(c)(1) (2012) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”).

<sup>11</sup> *Id.* See also 47 U.S.C. § 230(f)(3) (2012).

<sup>12</sup> See *infra* Part III.A.

<sup>13</sup> See *infra* Part I.

<sup>14</sup> See *infra* Part II.

<sup>15</sup> Marvin Ammori, *The “New” New York Times: Free Speech Lawyering in the Age of Google and Twitter*, 127 HARV. L. REV. 2259, 2287 (2013) (“Without CDA 230 [protection], speech platforms would likely have to engage in considerable prescreening of all speech on their sites or abandon their models altogether.”).

<sup>16</sup> See *infra* Part III.A.

<sup>17</sup> See *infra* Part III.B.

<sup>18</sup> Although many search engines employ an autocomplete function, this Note will focus exclusively on Google.

feature. A court confronted with this issue must consider the potential implications on First Amendment protected speech and Internet development. This Note proposes that the most applicable legal test is one that asks whether Google took affirmative steps to induce the dissemination of defamatory material. Part III will also explain why an intent-based liability scheme would protect Internet service providers, thus fostering innovation and protecting open online speech. This section will also raise some potential counterarguments to the proposed standard and its broad application. Finally, this Note will dispel these counterarguments and demonstrate why the legal framework proposed in this Note is the only appropriate approach.

## I. AUTOCOMPLETE TECHNOLOGY AND THE POTENTIAL FOR DEFAMATION

### A. *How Autocomplete Works*

Autocomplete was originally implemented to help people with disabilities by reducing the number of keystrokes needed to complete a word or sentence.<sup>19</sup> It quickly became clear, however, that autocomplete served a purpose for all Internet users.<sup>20</sup> Autocomplete operates in such a way that when a user inputs the first letter or word into the search bar, it predicts one or more possible words to fill the query.<sup>21</sup> If the user intends to type what appears in the list, he may select it. If not, the user must type in the next letter of the word. As each additional letter is entered into the search box, autocomplete automatically alters the search suggestions contained in the drop-down menu.<sup>22</sup> Once the word or phrase that the user intends to search appears, he can select it and press “Enter” to complete the search.<sup>23</sup>

Autocomplete search suggestions are all real searches completed by search engine users.<sup>24</sup> These suggestions are generated by an algorithm that takes into account a number of objective factors, such as a user’s previous searches and popular search queries.<sup>25</sup> Other criteria are also factored into the algorithm, such as the user’s location and a

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<sup>19</sup> Press Release, Google Auto-Complete Tarnishing Online Business Reputations, Journalism.co.uk (July 12, 2012), <http://www.journalism.co.uk/press-releases/google-auto-complete-tarnishing-online-business-reputations/s66/a549831/>.

<sup>20</sup> *Id.*

<sup>21</sup> *Autocomplete*, *supra* note 1.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Sullivan, *supra* note 3.

<sup>25</sup> *Id.* Although Google has not disclosed the exact algorithm behind its autocomplete feature, it is generally understood that Google takes into account three main factors: personalization, search volume, and query freshness.

search term's "freshness."<sup>26</sup> In addition, the algorithm automatically detects and filters out a small set of search terms related to pornography, violence, hate speech, and copyright infringement.<sup>27</sup> Users may also report offensive or inappropriate search suggestions on Google's "Help" page.<sup>28</sup>

Defamation suits may arise from the statements that automatically appear in Google's search box as Internet users input their search queries.<sup>29</sup> A search of an individual's name or business may reveal unwanted negative search suggestions.<sup>30</sup> These suggestions have the potential to be false and damaging.<sup>31</sup> Even though the content of Google's search suggestions is entirely based on information input by third-party users, plaintiffs have sued Google on the grounds that autocomplete contributes to the creation and dissemination of the defamation.<sup>32</sup> Some Plaintiffs' arguments have been based on the fact that Google uses an algorithm to aggregate, synthesize, and reconstitute input query data prior to publishing it in its autocomplete search suggestions.<sup>33</sup> Google also consistently updates and improves its algorithm.<sup>34</sup> Plaintiffs argue that by using artificial intelligence—which Google itself creates and maintains—to actively facilitate searches, Google does more than simply convey third-party information<sup>35</sup> and should therefore be liable for any resulting defamation.<sup>36</sup> This argument has proved viable in a number of foreign jurisdictions.<sup>37</sup>

### B. *Recent Examples of Defamation Lawsuits Abroad*

Despite Google's claim that it has no control over its autocomplete suggestions, other countries have held it liable for defamation. For

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<sup>26</sup> *Id.* ("Freshness" reflects a term's short-term popularity. If a term has a sudden surge in popularity, it may appear as a search suggestion, even if it has not gained long-term popularity).

<sup>27</sup> Nicholas Diakopoulos, *Sex, Violence, and Autocomplete Algorithms*, SLATE (Aug. 2, 2013, 11:43 AM), [http://www.slate.com/articles/technology/future\\_tense/2013/08/words\\_banned\\_from\\_bing\\_and\\_google\\_s\\_autocomplete\\_algorithms.html](http://www.slate.com/articles/technology/future_tense/2013/08/words_banned_from_bing_and_google_s_autocomplete_algorithms.html).

<sup>28</sup> *Autocomplete*, *supra* note 1.

<sup>29</sup> To make a valid defamation claim, a plaintiff would have the burden of proving that the opposition of the plaintiff's name with the suggested word or phrase in a search suggestion was defamatory. Defamation laws vary from state to state; however, the underlying elements remain the same. In general, a plaintiff must prove: (1) a false and damaging statement concerning another person or entity, (2) unprivileged publication to a third party, (3) fault on the part of the publisher amounting to intent or negligence, and (4) actual injury. *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977).

<sup>30</sup> Google Auto-Complete Tarnishing Online Business Reputations, *supra* note 19.

<sup>31</sup> *Id.*

<sup>32</sup> *See* Angotti, *supra* note 5. *See also infra* Part I-B.

<sup>33</sup> *Yeung Sau Shing Albert v. Google, Inc.*, [2014] 4 H.K.L.R.D. 493, 495 (C.F.I.).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Vogel, *supra* note 7.

example, an Italian businessman sued Google in 2011 after a search of his name autocompleted with “truffa” and “truffatore,” meaning “fraud” and “conman,” respectively.<sup>38</sup> In response, Google claimed<sup>39</sup> that it was protected from liability under the safe harbor provision of the E-Commerce Directive.<sup>40</sup> The court rejected Google’s argument, holding that Google was still liable for the search suggestions.<sup>41</sup> Following the court’s ruling, Google was ordered to filter out the defamatory search suggestions.<sup>42</sup>

This issue resurfaced in 2012 in a Japanese district court.<sup>43</sup> In this case, the plaintiff claimed that when Google users typed his name into the search box, it would automatically suggest criminal acts he did not commit.<sup>44</sup> He argued that these autocomplete results “caused him to lose a job and prevented him from finding gainful employment.”<sup>45</sup> Google responded that it could not be liable because it “does not determine these terms manually.”<sup>46</sup> The court ruled against Google, ordering it to alter the results relating to the individual plaintiff.<sup>47</sup>

Similarly, in 2013 a German court found Google liable for the content of its search suggestions.<sup>48</sup> In this case the plaintiff, the founder of a nutritional supplements company, sued Google after a search suggestion associated his name with “Scientology” and “fraud.”<sup>49</sup> Here, Google argued that the words were “automatically generated by the frequency with which other people were looking for such keywords” and therefore it could not be liable.<sup>50</sup> The court nevertheless found

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Directive 2000/31/EC, arts. 12-15 of the European Parliament and of the Council of 8 June 2000 on Electronic Commerce, 2000 O.J. (L 178). The E-Commerce Directive establishes limitations on the liability of intermediary service providers. In particular, the Directive protects three categories of intermediaries: “mere conduits” that provide Internet access, “caching” services that provide temporary storage of that information for the sole purpose of making ongoing transmission more efficient, and “hosting” services for user-submitted content where the provider has neither knowledge nor control over the content being transmitted or stored. Pablo Baistrocchi, *Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce*, 19 SANTA CLARA COMPUT. & HIGH TECH L.J. 111 (2002).

<sup>41</sup> Vogel, *supra* note 7.

<sup>42</sup> *Id.*

<sup>43</sup> Dara Kerr, Japanese Court Besmirches Google’s Autocomplete Feature, C-NET (March 26, 2012), <https://www.cnet.com/news/japanese-court-besmirches-googles-autocomplete-feature/>.

<sup>44</sup> David Angotti, *supra* note 5.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Julie Deisher-Edwards, *Germany Court Orders Google to Remove Defamatory Autocomplete Results*, JURIST (May 14, 2013, 11:05 AM), <http://jurist.org/paperchase/2013/05/germany-court-orders-google-to-remove-defamatory-autocomplete-results.php>.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

Google liable and ordered it to respect the plaintiff's request to remove the defamatory autocomplete entries.<sup>51</sup> The court reasoned that although search engine operators are not regularly required to verify content generated by an algorithm, once they are notified of defamatory content, they are required to remove it.<sup>52</sup>

In the most recent case, a Hong Kong court ruled that plaintiff Albert Yeung, founder and chairman of Hong Kong-based conglomerate Emperor Group, could sue Google for defamation based on its autocomplete suggestions.<sup>53</sup> In this case, a search of the plaintiff's name automatically suggested adding the word "triad," a term associated with organized crime.<sup>54</sup> Google contended that it was not the "publisher" of its autocomplete results;<sup>55</sup> rather, it claimed it was a "mere passive facilitator of the information," since the automatic search processes required no human input, operation, and manipulation.<sup>56</sup> On the other hand, Yeung argued that even if Google's autocomplete function were automated, it could still be liable as the "publisher" of the defamatory search suggestions because it actively facilitated their publication.<sup>57</sup> The court found that there was a "good arguable case"<sup>58</sup> that Google was a publisher with respect to the content appearing in its search suggestions.<sup>59</sup> Therefore, the court allowed Yeung's case to proceed to trial.<sup>60</sup>

There have been no cases in the United States that squarely address Google's liability for defamation based on its automated search suggestion feature.<sup>61</sup> The presumption is that no autocomplete defamation suit brought in a United States court could survive a motion to dismiss.<sup>62</sup> The United States courts generally take a free speech-

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Yeung Sau Shing Albert v. Google, Inc.*, [2014] 4 H.K.L.R.D. 493 (C.F.I.).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 494.

<sup>57</sup> *Id.* at 512.

<sup>58</sup> The "good arguable case" test is the standard of proof required to overcome a summary dismissal application in certain international jurisdictions. Thomas Chan, *Google to Appeal Against Jurisdiction in Tycoon's Lawsuit*, SOUTH CHINA MORNING POST (Oct. 30, 2014, 9:29 AM), <http://www.scmp.com/news/hong-kong/article/1627777/google-appeal-against-jurisdiction-tycoons-lawsuit>.

<sup>59</sup> *Yeung Sau Shing Albert v. Google, Inc.*, [2014] 4 H.K.L.R.D. 493, 495 (C.F.I.).

<sup>60</sup> *Id.*

<sup>61</sup> A similar claim was brought in *Obado v. Magedson*, No. 13-2382 (JAP), 2014 WL 3778261 (D.N.J. July 31, 2014) but did not squarely address Google's liability for its autocomplete search terms.

<sup>62</sup> Hank Burgoyne, *Could Suggested Search Defamation Survive the CDA?*, LAWYERS.COM (Oct. 16, 2014), <http://internet-law.lawyers.com/blogs/archives/31546-could-suggested-search-defamation-survive-the-cda.html>.

protective approach to defamation law.<sup>63</sup> In addition, the United States grants substantial legal protection to Internet service providers.<sup>64</sup> However, recent constructions of § 230 could give plaintiffs potential avenues to overcome this statutory immunity.<sup>65</sup>

## II. THE HISTORY AND INTERPRETATION OF CDA § 230 IMMUNITY

### A. *Background and Purpose*

Congress enacted the Communications Decency Act (CDA) in 1996 with the original purpose of regulating pornographic and obscene material on the Internet.<sup>66</sup> Although parts of the CDA have been struck down as unconstitutional limitations on free speech, § 230 has remained intact.<sup>67</sup> Section 230(c)(1) provides 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.”<sup>68</sup> The statute defines an “interactive service provider” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.”<sup>69</sup> Under the statute, “information content provider” means “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>70</sup> The former definition has been applied to various Internet providers, websites, and search engines, so as to immunize them from civil liability for claims arising from user-generated content.<sup>71</sup>

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<sup>63</sup> See generally *supra* note 29.

<sup>64</sup> See *infra* Part III.

<sup>65</sup> See *infra* Part II.B.

<sup>66</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, Title V, 110 Stat. 56. (1996). See also S.REP. NO. 104-23, para. 8 (1995). Some legislators refer to the CDA as the “Great Cyberporn Panic of 1995.” MANJUNATH PENDAKUR & ROMA M. HARRIS, CITIZENSHIP AND PARTICIPATION IN THE INFORMATION AGE 200 (2002).

<sup>67</sup> The CDA originally included a provision criminalizing the transmission of obscene or indecent communications by means of telecommunications device, or sending patently offensive communications through use of interactive computer service, to persons under age 18. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) *citing* 47 U.S.C. § 223. The Supreme Court found that these restrictions were unconstitutional restraints on free speech under the First Amendment. *Id.* at 844. The court also noted that the vagueness of the provision’s content-based free speech regulation raised special First Amendment concerns because of the “obvious chilling effect on free speech.” *Id.* at 871–72 (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991)).

<sup>68</sup> 47 U.S.C. § 230(c)(1) (2012).

<sup>69</sup> 47 U.S.C. § 230(c)(2) (2012).

<sup>70</sup> 47 U.S.C. § 230(c)(3) (2012).

<sup>71</sup> See, e.g., *Klayman v. Zuckerberg*, 910 F.Supp.2d 314 (D.D.C. 2012) (holding that a social networking website which gives users the ability to create, upload, and share various types of information is an interactive computer service provider); *Parker v. Google, Inc.*, 422 F.Supp.2d



Before § 230 was adopted, courts did not treat interactive computer services any differently than traditional information providers.<sup>72</sup> Under common law, publishers such as newspapers and magazines would be liable for defamatory content contained in their publications, regardless of their knowledge of that content.<sup>73</sup> On the other hand, distributors such as libraries or bookstores could only be liable if they had actual knowledge of the defamation.<sup>74</sup> Applying this traditional liability scheme to interactive computer services presented some unique problems, as evidenced in the *Stratton Oakmont, Inc. v. Prodigy Servs. Co.* and *Cubby, Inc. v. CompuServe, Inc.* decisions.<sup>75</sup>

In *Cubby*, in 1991, a New York district court held that interactive computer service providers were subject to traditional doctrines of secondary liability for their hosted content.<sup>76</sup> Defendant CompuServe was an Internet service provider that offered access to a number of electronic news forums.<sup>77</sup> CompuServe did not operate its forums, but instead hired independent companies to “manage, review, create, delete, and otherwise control [their] content.”<sup>78</sup> One of its forums, the Journalism Forum, operated by Cameron Communications, Inc. (CCI), contained content from a daily newsletter, Rumorville USA.<sup>79</sup> Cubby noticed Rumorville USA’s success and decided to create a similar, competing database.<sup>80</sup> In response, Rumorville USA posted disparaging comments about Cubby on its site.<sup>81</sup>

After seeing Rumorville USA’s posts, Cubby initiated a defamation action against CompuServe.<sup>82</sup> Cubby argued that CompuServe was a “publisher” of the defamatory statements and, as such, should be subject to liability for Rumorville USA’s comments.<sup>83</sup> CompuServe responded that it was acting as a “distributor” rather than a

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492 (E.D. Pa. 2006) (“[T]here is no doubt that Google qualifies as an ‘interactive computer service’ and not an ‘information content provider.’”); *Kimzey v. Yelp, Inc.*, 21 F.Supp.3d 1120 (W.D. Wash. 2014) (finding that an Internet website that hosted online reviews of businesses by customers was an interactive computer service provider within the meaning of the CDA, rather than an information content provider, and thus was entitled to immunity from business’ action for libel).

<sup>72</sup> See, e.g., *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

<sup>73</sup> See, e.g., *id.*; *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct., May 24, 1995).

<sup>74</sup> See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1026 (9<sup>th</sup> Cir. 2003) (citing *Blumenthal v. Drudge*, 992 F.Supp. 44, 29 (D.D.C. 1998)).

<sup>75</sup> *Cubby, Inc.*, 776 F. Supp. at 140.

<sup>76</sup> *Id.* at 137.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 138.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 139.

“publisher,” and therefore could not be held liable because it did not have actual knowledge of the defamatory nature of the alleged content.<sup>84</sup> CompuServe further claimed that it should not be held liable because it did not manage the posts, review any comments, or receive any payments from those using the forum.<sup>85</sup> The district court agreed with CompuServe, finding that CompuServe was not liable for defamation because it did not exercise editorial control over the alleged content.<sup>86</sup> The court reasoned that CompuServe was acting as a traditional “distributor,” like a library or bookstore, and therefore should be considered a “distributor” for the purposes of defamation law.<sup>87</sup>

The problems created by *Cubby* are especially apparent when read in conjunction with the later *Stratton Oakmont* decision.<sup>88</sup> In *Stratton Oakmont*, a New York state court found an Internet service provider liable for content posted by a third-party on one of its electronic bulletin boards.<sup>89</sup> In the 1994 case, a securities investment banking firm, Stratton Oakmont, Inc., and its president sued Prodigy, the owner and operator of a computer network, for defamation after an anonymous user posted a number of negative statements about Stratton Oakmont on Prodigy’s online bulletin board.<sup>90</sup> The anonymous posts alleged that the company was a “cult of brokers who either lie for a living or get fired[,]” and that its president was a “soon to be proven criminal.”<sup>91</sup> The court granted Stratton Oakmont’s motion for summary judgment, holding Prodigy liable for the defamatory content posted on its message board.<sup>92</sup> The court reasoned that Prodigy exercised editorial control over the message boards by promulgating and enforcing content guidelines for users and by using a screening system designed to remove offensive language.<sup>93</sup> By making a “conscious choice . . . to gain the benefits of editorial control,” Prodigy became a publisher, rather than a mere distributor, of the information.<sup>94</sup>

By enacting § 230, Congress specifically intended to overrule decisions such as *Stratton Oakmont* that imposed liability on interactive computer service providers for third-party content.<sup>95</sup> Under the pre-

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84 *Id.*

85 *Id.* at 137.

86 *Id.* at 141.

87 *Id.*

88 *See* *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct., May 24, 1995).

89 *Id.*

90 *Id.* at \*1.

91 *Id.*

92 *Id.* at \*2.

93 *Id.* at \*4.

94 *Id.* at \*5.

95 S. Rep. No. 140-230 (1996), <https://www.gpo.gov/fdsys/pkg/CRPT-104srpt230/html/CRPT->

CDA holdings, interactive computer services that actively regulated the dissemination of offensive material on their services were considered “publishers” and as such, could be subject to liability.<sup>96</sup> On the other hand, those interactive computer services that did *not* monitor their services were considered “distributors” of the content and, thus, could avoid liability.<sup>97</sup> Congress feared that the rulings would create disincentives for service providers to screen and block offensive material.<sup>98</sup> Thus, section § 230(c)(2) states:

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to [information provided by another information content provider].<sup>99</sup>

As the language of the statute indicates, Congress sought to encourage interactive computer services to screen their content and to provide their users with means of limiting their exposure to certain types of material.<sup>100</sup> Under § 230, an interactive computer service could no longer be deemed a “publisher” simply on account of its editorial and self-regulatory functions.<sup>101</sup>

Another equally important purpose of § 230 was to foster open communication and freedom of speech on the Internet.<sup>102</sup> The advent of the Internet introduced a “unique and wholly new medium of worldwide human communication” that revolutionized the way people share and receive information.<sup>103</sup> In its statutory findings, Congress stated, “[t]he

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104srpt230.htm (“One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”).

<sup>96</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4<sup>th</sup> Cir. 1997).

<sup>97</sup> *Id.* at 331.

<sup>98</sup> 47 U.S.C. § 230(b)(4) (2012).

<sup>99</sup> 47 U.S.C. § 230(c)(2) (2012).

<sup>100</sup> 47 U.S.C. § 230(b)(4) (2012) (stating that it’s United States policy “to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.”).

<sup>101</sup> *Zeran*, 129 F.3d at 330.

<sup>102</sup> *Id.* at 330–31.

<sup>103</sup> *Id.* at 334 (quoting *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 850 (1997)).

rapidly developing array of Internet and other interactive computer services . . . represent[s] an extraordinary advance in the availability of educational and informational resources to our citizens.”<sup>104</sup> It also found that interactive computer services “offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”<sup>105</sup> In enacting § 230, Congress wanted “to promote the continued development of the Internet and other interactive computer services . . . [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>106</sup>

Congress recognized that allowing interactive computer service providers to be sued for defamation based on third-party generated content would frustrate its policy objectives.<sup>107</sup> Interactive computer service providers function as conduits through which millions of different content providers create and disseminate information.<sup>108</sup> As a result, the amount of information that flows through these sources is “staggering.”<sup>109</sup> Congress realized that “tort liability in an area of such prolific speech would have an obvious chilling effect.”<sup>110</sup> It would be impractical for interactive computer service providers to screen all of its content for potential defamation.<sup>111</sup> Therefore, in order to avoid liability, they would be forced to severely limit what and where users could post.<sup>112</sup> Congress sought to prevent this type of restraint on Internet speech by enacting the CDA’s immunity provision.<sup>113</sup>

## B. Application of § 230 to Third-Party Content

### 1. *Zeran v. AOL*

The first case to interpret and apply § 230 in the context of online message boards was *Zeran v. AOL*.<sup>114</sup> In *Zeran*, the plaintiff Kenneth Zeran brought a defamation action—disguised as a negligence action<sup>115</sup>—against American Online, Inc. (AOL) after an anonymous

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<sup>104</sup> 47 U.S.C. § 230(a)(1) (2012).

<sup>105</sup> 47 U.S.C. § 230(a)(3) (2012).

<sup>106</sup> 47 U.S.C. § 230(b)(1)–(2) (2012).

<sup>107</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997).

<sup>108</sup> *Id.* at 331.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *See id.* at 330.

<sup>115</sup> *Id.* at 332 (“Although Zeran attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action.”).

third party posted advertisements for items with tasteless slogans regarding the recent Oklahoma City bombing on an AOL bulletin board.<sup>116</sup> Without his knowledge or permission, the third party provided Zeran's name and home phone number as a contact for interested buyers.<sup>117</sup> After receiving several angry phone calls and death threats, Zeran contacted AOL asking the company to remove the message and post a retraction.<sup>118</sup> AOL agreed to take down the post, but, as a matter of company policy, refused to post a retraction.<sup>119</sup>

The district court granted AOL's motion for judgment on the pleadings on the grounds that AOL was immune under § 230.<sup>120</sup> On appeal, Zeran conceded that AOL was not the "publisher" of the defamatory messages,<sup>121</sup> and instead argued that AOL was liable as a "distributor."<sup>122</sup> He reasoned that § 230 provided immunity to interactive computer service providers acting as "publishers" of third-party content, but that the immunity did not extend to interactive computer service providers acting as "distributors."<sup>123</sup> Distributors of defamatory content could still be liable if they acquired actual knowledge of its existence.<sup>124</sup> Zeran argued that because he provided AOL with sufficient notice of the defamatory messages appearing on the company's bulletin board, the service provider should be held liable.<sup>125</sup> The Fourth Circuit rejected Zeran's argument and affirmed the district court's grant of judgment on the pleadings.<sup>126</sup> The court reasoned that Zeran's theory of liability attached too much significance to the presence of notice.<sup>127</sup> Notice is not enough to transform an interactive computer service provider from a publisher to a distributor under the law.<sup>128</sup> If anything, receiving notice automatically puts the service provider into the traditional publisher role, forcing it to decide whether to issue, amend, or remove the post.<sup>129</sup> Regardless, the court found that Zeran's theory of distributor liability was a subset of the "larger publisher category," meaning it would be foreclosed by § 230

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116 *Id.* at 329.

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.* at 329–30.

121 *See id.* at 333.

122 *Id.* at 331.

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.* at 329–30.

127 *Id.* at 332.

128 *Id.*

129 *Id.* at 332–33.

anyway.<sup>130</sup>

In reaching its decision, the *Zeran* court emphasized the legislative history behind § 230.<sup>131</sup> It found that notice liability would defeat the purpose of § 230 because it would incentivize service providers to suppress Internet speech and refrain from site-regulation.<sup>132</sup> If distributors did not have immunity, they would have to remove all potentially defamatory statements in order to avoid litigation.<sup>133</sup> This would lead to the exact result Congress intended to prevent when it enacted the statutory provision.<sup>134</sup>

## 2. *Fair Housing v. Roommates.com* and the “Material Contribution” Test

Although § 230’s protections are broad in scope, they are not absolute. Section 230 shields service providers from liability for defamatory content produced by third-party information content providers.<sup>135</sup> However, they may lose this immunity if a court finds them responsible for the “creation or development” of the content provided through their services.<sup>136</sup> Courts have adopted different standards for determining when an interactive service provider is responsible for its hosted content.<sup>137</sup> For example, in 2008 the Ninth Circuit held that the defendant in *Fair Hous. Council of San Fernando Valley v. Roommates.com* (“*Roommates.com*”) acted as a direct publisher of materials when it categorized and directed users to specific information.<sup>138</sup> *Roommates.com* operated a website that helped people find roommates online.<sup>139</sup> To use the site, subscribers had to create a profile with basic information, including name, location, gender, sexual orientation, etc.<sup>140</sup> They provided this information through a series of questions with pre-populated answers in dropdown menus.<sup>141</sup> In addition to basic information, the website also allowed users to post any other information about themselves or their roommate preferences in an “Additional Comments” section.<sup>142</sup>

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<sup>130</sup> *See id.*

<sup>131</sup> *Id.* at 331.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *See id.*

<sup>135</sup> 47 U.S.C. § 230(c)(1).

<sup>136</sup> 47 U.S.C. § 230(f)(3) (2012).

<sup>137</sup> *See, e.g., Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008).

<sup>138</sup> *Id.* at 1165–66.

<sup>139</sup> *Id.* at 1157.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

Plaintiff Fair Housing Council (FHC) brought an action against the site, alleging that it violated fair housing laws by allowing discrimination through its questionnaires and comments.<sup>143</sup> In response, Roommates.com argued that under § 230's safe harbor provision it could not be liable for content posted on the website by third-parties as long as it did not create or develop any of the discriminatory information. The Ninth Circuit affirmed the lower court's decision to grant Roommates.com immunity for the information provided in the Additional Comments section, on the grounds that Roommates.com was not at all responsible for the creation or development of that content.<sup>144</sup> It did not alter users' posts or provide any guidance as to what information the responses should contain, and was therefore immune from liability for any defamatory statements made in that section.<sup>145</sup> However, the Ninth Circuit reversed the lower court's decision regarding the information provided in the dropdown menus.<sup>146</sup> The court held that by generating a list of pre-populated answers and providing specific information for user profiles, Roommates.com acted as an information content provider rather than a "passive transmitter" of information.<sup>147</sup> Because Roommates.com materially contributed to the alleged illegality of the conduct at issue, it could not claim protection under § 230.<sup>148</sup>

### 3. *Batzel v. Smith* and the "Provided" Test

Six years after *Roommates.com*, the Ninth Circuit adopted a different approach to § 230 immunity in *Batzel v. Smith*.<sup>149</sup> In *Batzel*, one of the defendants, Robert Smith, was working as a handyman at plaintiff Ellen Batzel's home in North Carolina.<sup>150</sup> While he was working there, Smith became suspicious that Batzel had paintings which were looted during World War II and that were the rightful legacy of the Jewish people.<sup>151</sup> Smith sent an email message to the Museum Security Network to express his concern that Batzel was in possession of stolen artwork.<sup>152</sup> Ton Cremers, the sole operator of the Museum Security Network (the "Network") and former Director of Security at Amsterdam's famous Rijksmuseum, received Smith's

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1166.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).

<sup>150</sup> *Id.* at 1021.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

message and decided to distribute it through the Network's listserv.<sup>153</sup> He also posted the listserv, with Smith's message included, on the Network's website.<sup>154</sup> After seeing the post online, Smith contacted a subscriber to the listserv explaining that he did not intend for his e-mail to be published on the Internet and, had he realized that it would, he would not have sent it in the first place.<sup>155</sup> Cremers eventually learned of Smith's confusion and apologized.<sup>156</sup> In the meantime, however, Batzel discovered the post and brought an action for defamation against Cremers, Smith, and the Netherlands Museum Association.<sup>157</sup> In response, Cremers filed a motion to strike under the California anti-SLAPP statute,<sup>158</sup> and a motion to dismiss for lack of personal jurisdiction.<sup>159</sup> The district court denied both motions.<sup>160</sup> In reaching its decision, the district court concluded that § 230 immunity did not apply under the circumstances because "only services that provide access to the Internet as a whole [were] covered."<sup>161</sup> Cremers appealed to the Ninth Circuit Court of Appeals.<sup>162</sup>

After exploring the legislative history behind § 230, the Ninth Circuit approved a broad application of "interactive computer service," holding that both a website and listserv would fit the definition.<sup>163</sup> However, the court found that § 230 immunity was limited to information "provided by *another* information content provider."<sup>164</sup> Therefore, the court turned its analysis to whether Cremers, by creating and developing Smith's email message, could be considered an independent information content provider.<sup>165</sup> The court determined that because Cremers merely selected and made minor alterations to the email, he could not be considered a content provider for § 230

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<sup>153</sup> *Id.* at 1021–22.

<sup>154</sup> *Id.* at 1022.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* Batzel had also alleged in her complaint that Mosler, Inc. ("Mosler") was vicariously liable for her reputational injuries because Cremers had been acting as Mosler's agent by paying Cremers to display its logo on the Network's website and in its listserv. *Id.* at 1023.

<sup>158</sup> Cal. Civ. Proc. Code § 425.16 (2015).

<sup>159</sup> *Batzel*, 333 F.3d at 1023.

<sup>160</sup> *Id.* The district court also granted summary judgment in favor of Mosler on the vicarious liability claim, which Batzel appealed. *Id.*

<sup>161</sup> *Id.* at 1030.

<sup>162</sup> *Id.* at 1026.

<sup>163</sup> *Id.* at 1030 ("There is, however, no need here to decide whether a listserv or website itself fits the broad statutory definition of 'interactive computer service,' because the language of § 230(c)(1) confers immunity not just on 'providers' of such services, but also on 'users' of such services.").

<sup>164</sup> *Id.* at 1031.

<sup>165</sup> *Id.*



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purposes.<sup>166</sup> Because selecting and editing content are part of a publisher's traditional functions, and because § 230 was intended to free publishers from liability, Cremers's actions as a publisher could not divest him of § 230 protections.<sup>167</sup>

In most cases, the court's conclusion that Cremers was not an information "content provider would end matters."<sup>168</sup> However, this particular set of facts presented a unique issue that the Ninth Circuit chose to address.<sup>169</sup> In this case, Smith insisted that he never imagined his email would be posted on an international board.<sup>170</sup> The key question therefore became whether Smith actually "provided" his email within the intended meaning of § 230.<sup>171</sup> The structure and purpose of § 230(c)(1) indicates that Congress intended the immunity to "appl[y] only with regard to third-party information provided *for use on the Internet* or another interactive computer service."<sup>172</sup> Therefore, the Ninth Circuit held that:

[A] service provider or user is immune from liability under § 230(c)(1) when a third person or entity that created or developed the information in question furnished it to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other "interactive computer service."<sup>173</sup>

The court vacated the district court's order denying Cremers's anti-SLAPP motion and remanded to the district court to determine whether § 230 applies under this new standard.<sup>174</sup> If a reasonable person in Cremers's position would have believed that Smith intended the email to be published on the Network's listserv and website, then Cremers would not be liable for defamation based on the content of the email.<sup>175</sup>

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<sup>166</sup> *Id.* at 1031-32.

<sup>167</sup> *Id.* ("As we have seen, a central purpose of the Act was to protect from liability service providers and users who take some affirmative steps to edit the material posted. Also, the exclusion of "publisher" liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message.")

<sup>168</sup> *Id.* at 1032.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 1033.

<sup>173</sup> *Id.* at 1034.

<sup>174</sup> *Id.* at 1035.

<sup>175</sup> *Id.*

#### 4. *Jurin v. Google* and the “Neutrality” Test

In *Jurin v. Google*, the plaintiff owned a company that “market[ed] and [sold] its trademarked ‘Styrotrim’ building material to homeowners, contractors, and those in the construction and remodeling industries.”<sup>176</sup> The defendant, Google, operated the AdWords service, in which it suggested popular search terms as keywords to advertisers through its keyword suggestion tool.<sup>177</sup> Advertisers could then pay a fee to bid on selected keywords in an effort to appear as a “Sponsored Link” on a results page.<sup>178</sup> As part of its AdWords program, Google suggested the trademarked name “Styrotrim” as a keyword.<sup>179</sup> This allowed the plaintiff’s competitors to bid on the keyword “Styrotrim,” thus allowing them to appear as a “Sponsored Link” whenever anyone searched for “Styrotrim.”<sup>180</sup> As a result, the plaintiff sued Google on a number of grounds, including violation of the Lanham Act, negligent and/or intentional interference with contractual relations and prospective economic advantage, fraud, and unjust enrichment associated with the operator’s allegedly unauthorized use of trademark.<sup>181</sup> Google moved to dismiss the allegations,<sup>182</sup> arguing that it is immune under § 230 as an interactive computer service provider.<sup>183</sup> In response, the plaintiff argued that through its keyword suggestion tool, Google “participate[s] in the content of the advertisements, [thus] rendering [it] an ‘information content provider’ outside of the protection of the CDA.”<sup>184</sup>

The U.S. District Court for the Eastern District of California found that Google met the definition of a protected interactive computer service provider and therefore was immune from liability for the plaintiff’s causes of action.<sup>185</sup> It reasoned that Google did not provide the content of the “Sponsored Link” advertisement; it merely provided a space and service for which it charged a fee.<sup>186</sup> The court found that the AdWords feature was essentially a “neutral tool.”<sup>187</sup> It merely offered options that advertisers could adopt or reject at their discretion.<sup>188</sup>

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<sup>176</sup> *Jurin v. Google*, 695 F.Supp.2d 1117, 1120 (E.D. Cal. 2010).

<sup>177</sup> *Id.* at 1119.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 1120.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 1117.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 1122. *See also* 47 U.S.C. § 230(f)(3) (2012).

<sup>184</sup> *Jurin*, 695 F.Supp.2d at 1122.

<sup>185</sup> *Id.* at 1123.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* (citing *Goddard v. Google, Inc.*, 640 F.Supp.2d 1193, 1197–98 (N.D. Cal. 2009)).

Therefore, Google was immune under § 230(c).<sup>189</sup>

### III. GOOGLE'S POTENTIAL LIABILITY FOR DEFAMATION

#### A. The "Inducement" Test

To determine Google's liability for potentially defamatory search suggestions generated through its search engine autocomplete function, a court must determine whether § 230 immunity applies.<sup>190</sup> In other words, a court must find whether Google, through its autocomplete function, is responsible for the "creation or development" of the content.<sup>191</sup> If a such a case was brought, the court would have to determine which standard is most applicable to Google's autocomplete.<sup>192</sup> Courts should adopt a test that premises liability on an interactive computer service provider's intentional conduct in obtaining the alleged third-party content. Specifically, a court should ask whether Google, in developing its autocomplete algorithm, took affirmative steps to prioritize the display of objectionable content in its search suggestions in order to encourage the dissemination of such content. Under this standard, Google could potentially be liable if it actively collected, organized, and published third-party searches in an attempt to spread offensive or unlawful information.

The court applied a similar test to an interactive computer service provider in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*<sup>193</sup> in a copyright infringement action.<sup>194</sup> Although *Grokster* did not squarely address § 230, it is an appropriate example of the application of the proposed legal standard. In *Grokster*, defendants Grokster and Streamcast distributed free software that allowed users to share electronic files through peer-to-peer networks.<sup>195</sup> The peer-to-peer networks enabled users to share files without requiring the files to pass through a central server.<sup>196</sup> While these peer-to-peer networks could "be used to share any type of digital file, they were mostly used to share copyrighted music and video files without authorization."<sup>197</sup> A group of movie studios and other copyright holders (collectively "MGM") sued

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<sup>189</sup> *Id.*

<sup>190</sup> See generally Fair Hous. Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008); Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4<sup>th</sup> Cir. 1997).

<sup>191</sup> 47 U.S.C. § 230(f)(3) (2012).

<sup>192</sup> Edward Fenno & Christina Humphries, *Protection Under CDA § 230 and Responsibility for "Development" of Third-Party Content*, 28 COMM. LAW. (2011) (outlining the development of § 230 case law and the legal standards that have emerged therefrom).

<sup>193</sup> *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 919.

<sup>196</sup> *Id.* at 919–20.

<sup>197</sup> *Id.* at 913.

the defendants, alleging that they violated the Copyright Act by intentionally distributing software to users to infringe on copyrighted works.<sup>198</sup> In response, the defendants argued that they could not be liable as a matter of law because they qualified for the safe harbor established by the Supreme Court in *Sony Corp. of Am. v. Universal City Studios, Inc.*<sup>199</sup> in 1984.<sup>200</sup> The *Sony* safe harbor protects technology developers or distributors who know, or have reason to know, that their products are being widely used for infringing purposes, as long as the technologies have, or are capable of, “substantial non-infringing uses.”<sup>201</sup> The district court in *Grokster* granted summary judgment in favor of the defendants, holding that they were not liable for the alleged copyright infringement.<sup>202</sup> The Ninth Circuit affirmed on the grounds that *Sony* shielded the defendants from liability.<sup>203</sup>

In a unanimous opinion delivered by Justice Souter, the Supreme Court vacated the lower court’s ruling.<sup>204</sup> Rather than focusing on whether the defendants could establish that their software were capable of substantial non-infringing uses, the Supreme Court focused its analysis on the defendants’ intent.<sup>205</sup> In doing so, the Court expressly adopted an “inducement” test, derived from common law and modern patent law, to determine whether the defendants could be liable for the copyright infringement of their users.<sup>206</sup> In applying the rule, the Court held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”<sup>207</sup> Under this test, mere knowledge of potential infringement would not be sufficient to subject a distributor to liability.<sup>208</sup> Rather, plaintiffs would have to point to specific examples of “purposeful, culpable expression and conduct” to meet the threshold of “inducement.”<sup>209</sup> The Court reasoned that this approach struck a balance between protecting creative copyright and fostering technological innovation.<sup>210</sup>

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198 *Id.*

199 *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

200 *Id.*

201 *Id.* at 442.

202 *Grokster*, 545 U.S. at 927.

203 *Id.*

204 *Id.* at 916.

205 *See Grokster*, 545 U.S. 913.

206 Kent Schoen, *Metro-Goldwyn-Mayer v. Grokster: Unpredictability in Digital Copyright Law*, 5 NW. J. TECH. & INTELL. PROP. 156, 161 (2006).

207 *Grokster*, 545 U.S. at 937–38.

208 *Id.* at 937.

209 *Id.*

210 *Id.* at 914.

Based on the record presented, the Supreme Court found that the defendants' "unlawful objective [was] unmistakable."<sup>211</sup> The evidence showed that both Grokster and Streamcast marketed and promoted their software programs as replacements for Napster, a known source of copyright infringement.<sup>212</sup> For example, the defendant Streamcast explicitly introduced its product Morpheus to potential advertisers as a product "which is similar to what Napster was."<sup>213</sup> Similarly, the defendant, Grokster, called its software "Swaptor," an apparent derivative of the name Napster, and inserted digital codes into its website so that Internet users who searched the terms "Napster" or "free filesharing" would be automatically directed to the Grokster website.<sup>214</sup> The defendants' intent to induce infringement was also evidenced by their internal communications.<sup>215</sup> For example, one of Streamcast's internal emails stated that its "goal is to get in trouble with the law and get sued. It's the best way to get in the new[s]."<sup>216</sup> Moreover, under both defendants' business models, the companies stood to make more money from infringing uses.<sup>217</sup> The Court found that the defendants' actions collectively amounted to "affirmative steps taken to foster infringement," and therefore, they could not claim protection under the *Sony* safe harbor.<sup>218</sup>

A test that analyzes an interactive computer service's intent in obtaining and displaying third-party content is more amenable to adjudicating defamation in the context of ever-evolving web tools. By looking at the actual conduct of the service provider, courts can distinguish between those services which attempt to provide a public service, and those that actively attempt to disseminate malicious content. On the other hand, an approach that focuses merely on Google's control or degree of contribution would extend liability to interactive computer services that simply encourage *relevant* content, regardless of that content's propensity for harm. This would extend liability too far given the extent to which Internet features can currently be controlled. In effect, no interactive computer service that "published"

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<sup>211</sup> *Id.* at 916.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 924 (internal quotation marks omitted).

<sup>214</sup> *Id.* at 925.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* (alteration in original) (internal quotation marks omitted).

<sup>217</sup> *Id.* at 926. The companies did not receive any revenue from users, who could download the software for free. *Id.* Instead, the defendants raised money by selling advertising space. As the number of users increased, the advertising space became more valuable. *Id.* Here, the evidence showed that the increased volume of users was a direct function of free access to copyrighted works. *Id.* Therefore, the defendants continued to encourage and promote the sharing of copyrighted works in order to generate income. *Id.* However, the court found that profiting off of the infringement standing alone would not prove "inducement." *Id.* at 937.

<sup>218</sup> *Id.* at 937.

information through an algorithm would ever be immune under the statute because an algorithm's inputs and outputs can always be controlled by its provider. To hold all these service providers liability would restrict First Amendment speech in the context of the Internet and hinder innovation, running counter to Congress's intent in § 230.<sup>219</sup>

Applying the inducement test to Google, the company would certainly avoid liability. Google cannot be liable for the content of its autocomplete search suggestions because it does not prioritize the publication of offensive content.<sup>220</sup> Google's only clear intent is to provide users with fast, convenient, and comprehensive search tools, in order to enhance the quality of their online experiences.<sup>221</sup> Google's algorithm takes into account purely objective factors, including personalization, freshness, search volume, and traffic.<sup>222</sup> Although Google selectively determines its algorithmic inputs and is presumably aware that these inputs are likely to yield some offensive or unlawful results, it does not take any steps to encourage or induce these results.<sup>223</sup> In creating its search suggestions, Google merely retrieves indexed material relevant to what searchers are researching, indifferent to whether the material has positive or negative connotations.<sup>224</sup> It is irrelevant that Google operators may have knowledge that defamatory material is constantly being re-published in its search suggestions.<sup>225</sup> Under the proposed inducement test, liability would not be predicated on a search engine's knowledge of the alleged defamation. In order to make out a viable claim, plaintiffs would have to demonstrate that Google actively encouraged the unlawful, defamatory, or otherwise offensive content. Unless discovery reveals evidence of purposeful defamation, Google will be immune from liability pursuant to § 230.

### B. Counterarguments

One potential counterargument is that Google, by actively censoring certain results from its autocomplete suggestions, exercises control over the content, and thus may be considered a "publisher" under § 230.<sup>226</sup> For example, Google excludes a narrow class of search queries related to pornography, violence, hate speech, and other

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<sup>219</sup> 47 U.S.C. § 230 (2012).

<sup>220</sup> See generally *Autocomplete*, *supra* note 1.

<sup>221</sup> *Id.*

<sup>222</sup> Sullivan, *supra* note 3.

<sup>223</sup> See *Google's Liability For Defamatory Autocomplete Text*, PACE LEGAL ONLINE BUS. (July 1, 2013), <http://pacelegal.com.au/googles-liability-defamatory-autocomplete-text/>.

<sup>224</sup> *Id.*

<sup>225</sup> See *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

<sup>226</sup> See Seema Ghatnekar, *Injury By Algorithm: A Look Into Google's Liability for Defamatory Autocompleted Search Suggestions*, 33 LOY. L.A. ENT. L. REV. 171 (2013), <http://digitalcommons.lmu.edu/elr/vol33/iss2/3>.

offensive content.<sup>227</sup> It also specifically blocks certain “piracy related” terms such as BitTorrent, torrent, utorrent, and RapidShare from its suggestions.<sup>228</sup> This exercise of “editorial control” over its autocomplete suggestions could arguably bring Google within the ambit of a “publisher.”<sup>229</sup>

This argument fails because it disregards a core function of § 230: to encourage computer services to screen third-party content and provide users with means of limiting their exposure to certain types of material.<sup>230</sup> If an interactive computer service voluntarily takes action “in good faith to restrict access to or availability of material that [may be considered] . . . obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable,”<sup>231</sup> it is immune from liability pursuant to § 230. The editorial criteria that Google embeds in its algorithm tacitly reflect Google’s inclination to protect its users from socially deviant suggestions.<sup>232</sup> Google cannot be considered a “publisher” simply by virtue of its well-intentioned regulatory control over its autocomplete search suggestions.<sup>233</sup> Nevertheless, under the newly proposed legal standard, Google’s liability for defamation would not turn on its “editorial control” over the content.<sup>234</sup>

Opponents may also argue that such a broad application of § 230 immunity is no longer necessary to promote the continued development of the Internet.<sup>235</sup> The Internet has grown and developed exorbitantly since § 230 was originally enacted,<sup>236</sup> and thus it “no longer need[s] to

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<sup>227</sup> *Autocomplete*, *supra* note 1. For more information regarding which specific words Google and Bing censor from their suggestions, see Diakopoulos, *supra* note 27.

<sup>228</sup> Diakopoulos, *supra* note 27.

<sup>229</sup> Ghatnekar, *supra* note 226. “[I]t’s an active and iterative process to improve the algorithm and filter out shocking or offensive suggestions. A committee meets periodically to review complaints and suggest changes to the engineering team, which then works to tweak, tune, and bake that into the next version of the algorithm.” Diakopoulos, *supra* note 27.

<sup>230</sup> S. REP. NO. 104-230 (1996).

<sup>231</sup> 47 U.S.C. § 230(c)(2)(A) (2012).

<sup>232</sup> See Diakopoulos, *supra* note 27.

<sup>233</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

<sup>234</sup> See *supra* Part II.A.

<sup>235</sup> See *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1189 (9th Cir. 2008).

The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. Rather, it has become a dominant—perhaps the preeminent—means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.

*Id.* at 1164 n.15.

<sup>236</sup> Michael Burke, Note, *Cracks in the Armor?: The Future of the Communications Decency Act and Potential Challenges to the Protections of Section 230 to Gossip Web Sites*, 17 B.U. J.

be coddled and catered to by courts.”<sup>237</sup> Further, because the Internet will undoubtedly continue to thrive as a center of commerce and communication, regardless of liability for information content providers, some argue that courts must limit the amount of protection given to providers of online services.<sup>238</sup> This argument is invalid. The issues surrounding Google’s liability for its autocomplete suggestions demonstrate the need for a broad application of immunity.<sup>239</sup> The ubiquity of the Internet has created new challenges for interactive computer services “seeking to police, filter and display vast quantities of [third-party generated] content in a mature and evolving online environment.”<sup>240</sup> The plethora of content generated by millions of users per day forces publishers figure out how to sort and present this content in a meaningful way.<sup>241</sup> However, given the vast quantity of information circulating in cyberspace, online service intermediaries cannot resort to manual fact checking, as traditional editors did.<sup>242</sup> The dramatic increase in the volume of “user content on the Internet requires new and increasingly complex tools for exercising . . . traditional editorial functions.”<sup>243</sup> Google’s use of “purely algorithmic” factors<sup>244</sup> helps concentrate the massive amounts of information on the Internet so that users can conduct more focused and conclusive searches.<sup>245</sup>

In addition, opponents may argue that these automated search results were not at all what Congress intended to protect in enacting § 230. Because algorithmic outputs do not represent human expression, they do not amount to “speech,” and therefore, they are not deserving of any special legal protection.<sup>246</sup> By this reasoning, restraining Google

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SCI. & TECH. L. 232, 234 (2011) (“In December 1996, there were an estimated thirty-six million regular Internet users, or only 0.9% of the world’s population. As of December 2009, there were an estimated 1.8 billion regular Internet users, or 26.6% of the world’s population. The increase in Internet use has been even more dramatic within the United States. As of 1996, approximately 16.7% of the United States population used the Internet. By 2008, this number had increased to 75.8% of the population. While such regulations may have been necessary to protect the Internet during its developing stages, the need for such regulations is no longer apparent.”).

<sup>237</sup> *Id.* at 251.

<sup>238</sup> *Id.* at 235.

<sup>239</sup> *Id.*

<sup>240</sup> Appellee’s Answering Brief at 30, *Levitt v. Yelp! Inc.*, 765 F.3d 1123 (9th Cir. 2014) (No. 11-17676).

<sup>241</sup> *Id.* at 30.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 30–31.

<sup>244</sup> *Autocomplete*, *supra* note 1.

<sup>245</sup> Sullivan, *supra* note 3.

<sup>246</sup> Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1451 (2013) (quoting Tim Wu, *Free Speech for Computers?*, N.Y. TIMES, June 20, 2012, at A29) (“[A]s a general rule, nonhuman or automated choices should not be granted the full protection of the First Amendment, and often should not be considered ‘speech’ at all.”). See generally Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495 (2013).



and censoring its autocomplete search suggestions would not contradict the legislative purpose of § 230. However, while some algorithm-based outputs may not be considered “speech,” autocomplete outputs are distinguishable in that they contain an underlying substantive message.<sup>247</sup> Because Google uses “popularity” as one of its main criteria, each search suggestion can be said to represent the collective ideas of billions of Google users.<sup>248</sup> Although Google itself is not the “speaker” of the content of its search suggestions, these suggestions may nonetheless be considered “speech.”<sup>249</sup> The argument that algorithm-based outputs are protected speech is supported by the “marketplace of ideas” theory of freedom of expression.<sup>250</sup> The marketplace of ideas construct is premised on the idea that “the ideas that end up the most widely accepted will tend to be truer than the ideas of any one individual. Many actively engaged minds, in other words, will tend to be better at identifying truth than any single mind, including one’s own.”<sup>251</sup> Google’s autocomplete algorithm serves to fuel the marketplace of ideas by collecting and organizing the ideas of millions and directing Internet users to the most commonly requested information.<sup>252</sup> It facilitates Internet searches so that users can gain fast, convenient, and comprehensive access to speech.<sup>253</sup> To extend liability to Google for its automated search suggestions would impose a significant barrier to the promotion of the marketplace of ideas. Therefore, in light of the First Amendment interests at stake, courts

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247 The First Amendment presumptively covers algorithmic outputs that communicate some message or opinion to its audience. *See* Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 W.L. 21464568 at \*4 (W.D. Okla. May 27, 2003) (concluding that Google’s rankings of pages were constitutionally protected opinions); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007).

248 *See* Fergal Gallagher, *How Many Users Does Google+ Really Have?*, TECH TIMES (May 6, 2015, 5:49 pm), <http://www.techtimes.com/articles/51205/20150506/many-users-google-really.html/>.

249 Benjamin, *supra* note 246, at 1451.

250 The “marketplace of ideas” metaphor was first articulated in Justice Holmes’s dissent in *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting). Although this theory represents only one of the many rationales behind the First Amendment, it is the most well known and most commonly invoked by Supreme Court jurisprudence. *See, e.g.*, *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367 (1969); Benjamin, *supra* note 246, at 1455; Eugene Volokh, *Freedom of Speech and Information Produced Using Computer Algorithms*, VOLOKH CONSPIRACY (June 21, 2012, 11:59 PM), <http://volokh.com/2012/06/21/freedom-of-speech-and-information-produced-using-computer-algorithms/>.

251 Gregory Brazeal, *How Much Does a Belief Cost?: Revisiting the Marketplace of Ideas*, 21 S. CAL. INTERDISC. L.J. 1, 3 (2011). It is premised on the idea that “opinions in the marketplace are available for all to enjoy” and that “truth can only be found if society hears all opinions.” Michael J. Ballanco, *Searching for the First Amendment: An Inquisitive Free Speech Approach to Search Engine Rankings*, 24 GEO. MASON U. CIV. RTS. L.J. 89, 92 (2013).

252 Nicholas Diakopoulos, *AlgoBeat: The Compendium of Publicly Significant Algorithms*, KNIGHT NEWS CHALLENGE (Mar. 18, 2014, 11:28 PM), <https://www.newschallenge.org/challenge/2014/submissions/algobeat-the-compendium-of-publicly-significant-algorithms>.

253 *Id.*

should adopt the proposed “inducement” test to ensure that search suggestions stay protected.

#### CONCLUSION

Since 2008, Google’s autocomplete technology has been commended as a valuable tool, which expedites and streamlines Internet searches.<sup>254</sup> However, that same technology has been heavily criticized for facilitating the dissemination of defamatory material.<sup>255</sup> Across the world, Google has been sued for defamation based on content generated in its autocomplete search suggestions.<sup>256</sup> Given the vast number of people Google’s search suggestions could potentially affect, it is only a matter of time before a suit of its kind reaches a United States court.<sup>257</sup> If a similar lawsuit is brought against Google in the United States, a court will have to decide whether to grant Google immune from any liability based on § 230. It is imperative that courts approach this issue cautiously, given the widespread implications a ruling may have on the freedom of speech and Internet censorship.

Since the first interpretation in *Zeran*,<sup>258</sup> courts have adopted a number of different—yet related—legal standards to determine whether § 230 should apply.<sup>259</sup> However, in the unique context of Google’s autocomplete feature, most of these tests are impractical models for liability.<sup>260</sup> For example, the “material contribution” test described in *Roommates* improperly predicates liability on the substance of the alleged content, rather than the service provider’s conduct in creating or developing that content.<sup>261</sup> The test suggests that Google, as an algorithm creator, could be liable for categorizing and channeling third-party information if the outputs of that categorization were somehow

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<sup>254</sup> See *supra* Part I.

<sup>255</sup> See *supra* Part III.

<sup>256</sup> See *supra* Part I.B.

<sup>257</sup> Whether Google is an “interactive computer service” or “information content provider” under § 230 has been litigated many times across all different jurisdictions. The outcome has generally been that Google is an “interactive computer service” and as such cannot be liable as the “publisher” of its search results. However, the issue of whether Google can be liable for search suggestions algorithmically generated though its autocomplete function is a novel one. At first glance, one might question why autocomplete should be treated differently than search results under the law. However, as this Note recognizes, Google plays a more active role in developing the content displayed in its automated search suggestions than its search results. See generally Donal Scott, *Searching, Suggesting and Speaking: Does a Company have Recourse for Defamation on Google?*, The Student Journal of Law, <https://sites.google.com/site/349924e64e68f035/issue-6/searching-suggesting-and-speaking-does-a-company-have-recourse-for-defamation-on-google>.

<sup>258</sup> *Zeran v. Am. Online, Inc.*, 129 F. 3d 327 (4th Cir. 1997)

<sup>259</sup> See *supra* Part II.

<sup>260</sup> See *supra* Part II.

<sup>261</sup> *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1176–89 (9th Cir. 2008) (McKeown, J., dissenting).

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illegal.<sup>262</sup> The *Jurin* “neutrality” test is likewise unsuitable because it falsely assumes that there is such a thing as a “neutral tool” on the Internet.<sup>263</sup> Even so-called “generic” search functions are created by humans with the specific aim of returning results that the designers had in mind.<sup>264</sup> Under the proposed inducement test, Google could not be liable solely by specifically tailoring its autocomplete algorithm “to create a specific type of experience for users.”<sup>265</sup> Rather, Google could only lose its immunity if it specifically tailored its algorithm with the intent to encourage the dissemination of defamatory material. Such an approach adequately protects the interests of technological innovation and free online speech without giving Google free reign to defame.

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<sup>262</sup> As argued by the dissent in *Roommates*, “this approach improperly collapses the question of underlying substantive liability with the question of whether a site created or developed the information at issue, an inquiry that should not depend on the substance of the content.” Eric Weslander, *Murky “Development”: How the Ninth Circuit Exposed Ambiguity Within the Communications Decency Act, and Why Internet Publishers Should Worry*, 48 WASHBURN L.J. 267, 295 (2008).

<sup>263</sup> *Jurin v. Google, Inc.*, 695 F.Supp. 2d 1117 (E.D. Cal. 2010)

<sup>264</sup> Eric Weslander, *Murky “Development”: How the Ninth Circuit Exposed Ambiguity Within the Communications Decency Act, and Why Internet Publishers Should Worry*, 48 WASHBURN L.J. 267 (2008).

<sup>265</sup> *Id.*

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