

# Protecting the E-Marketplace of Ideas by Protecting Employers: Immunity for Employers Under Section 230 of the Communications Decency Act

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I.	INTRODUCTION.....	494
II.	BACKGROUND: THE INTERNET AND DEFAMATION LAW .....	497
	A. <i>In Praise of the Internet</i> .....	497
	B. <i>Defamation Law and the Internet Before Section 230</i> .....	498
	1. The Basic Tort of Defamation.....	498
	2. Liability for Publishers Who Assist Speakers .....	499
	3. The Doctrine of <i>Respondeat Superior</i> as Applied to Defamation.....	501
	4. Judicial Decisions on Internet Defamation Before the CDA.....	501
	C. <i>Congress Responds to Protect Expansion of the Internet</i> .....	503
III.	JUSTIFYING EMPLOYER IMMUNITY .....	507
	A. <i>Congressional Intent to Include Employers</i> .....	507
	B. <i>Liability Under Respondeat Superior Despite Section 230</i> ..	509
	C. <i>Imposing Liability Contrary to Federal Policy</i> .....	511
	D. <i>Responding to the Objections</i> .....	514

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## IV. CONCLUSION..... 515

## I. INTRODUCTION

Unlike the antiquated system of posting a defamatory flier on a signpost or publishing a slanderous article in the local newspaper, in today's Internet era, a spiteful person may post defamatory information on the Internet with great ease and anonymity, reaching a vastly larger community.<sup>1</sup> The amorphous characteristics and constant expansion of the Internet greatly increases the potential damage to one's reputation caused by defamation while keeping the speaker relatively safe from liability.<sup>2</sup> The key, for electronic defamation tortfeasors, is the use of Internet Service Providers ("ISPs") who allow persons to stealthily travel on the information superhighway.<sup>3</sup> As a response to this problem, defamation law, which is largely common law and governed primarily by the States,<sup>4</sup> entered the electronic realm in an attempt to curb the potential abuses of information technology. Realizing a growing concern for cyber-defamation, courts were willing to impart traditional common law tort principles into the digital realm and hold ISPs liable as publishers.<sup>5</sup> This judicial intervention into the Internet directly conflicted with the continued growth and unrestricted access to the knowledge and discourse available on the Internet.<sup>6</sup>

At the same time, the influx of Internet technology into the workplace sparked immense debate among legal scholars regarding its potential ramifications. Yet, these scholars focus minuscule attention on what impact such technology will have on the traditional employer concern of defamation suits.<sup>7</sup> While "electronic mail ('e-mail') and Internet use in the

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1. Bruce P. Smith, *Cybersmearing and the Problem of Anonymous Online Speech*, COMM. LAW., Fall 2000, at 3-4.

2. *Id.* at 3. For an obvious example see *Patentwizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069 (D.S.D. Sept. 27, 2001). In *Kinko's*, an unknown individual went to one of defendant's stores, rented a computer with access to the Internet and defamed plaintiffs in a chat room. *Id.* at 1070. Under this system, it is "possible for a Kinko's user to log onto the Internet under a pseudonym, without fear that other Internet users will be able to trace his or her online statements back to him or her in the real world." *Id.*

3. Smith, *supra* note 1, at 4.

4. RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:1 (2d ed. 2001).

5. *See infra* Part I.B.4.

6. *See infra* Part I.C.

7. *See, e.g.*, Mark Ishman, Comment, *Computer Crimes and the Respondeat Superior Doctrine: Employer Beware*, 6 B.U. J. SCI. & TECH. L. 6 (2000) (discussing the problems arising because of computers in the workplace while dedicating minimal discussion to cybersmearing and providing no discussion of defamation).

workplace have experienced tremendous growth in the last five years,”<sup>8</sup> employers are also one of the traditional defendants in defamation actions and the target of a recent increase in defamation suits brought by former employees.<sup>9</sup> Many of these suits are based on unflattering reference letters to potential employers or negative comments regarding former employees to customers.<sup>10</sup> A growing trend in defamation lawsuits is to base such claims on internal workplace communications which defame a co-worker, including “the reasons for an employee’s discharge, statements made in internal performance evaluations, statements made during corporate office meetings, in internal correspondence and memoranda, and in internal security reports.”<sup>11</sup> With access now available from the workplace to the Internet, internal and external electronic bulletin boards, user groups, internal and external e-mail, chat rooms, electronic libraries, and intranet and extranet systems,<sup>12</sup> the door is wide open for the publication of defamatory statements. Employees with ready access to these fora may implicate an employer in tort liability with a simple click of the mouse. Despite this potential liability, employers continue to provide this access free of charge to their employees.<sup>13</sup>

This brings us to the conflict at issue in this discussion. While we credit employers for providing employees with free access, such access comes at a price to the public because employers are one of the traditional purveyors of defamatory comments. To complicate matters, Congress stepped in to counteract judicial interference with Internet growth through defamation suits by enacting the Communications Decency Act (CDA), which is codified at § 230 of the United States Code.<sup>14</sup> In pertinent part, § 230 declares 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>15</sup> This new Section provides broad

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8. *Id.* at para. 5.

9. “[A]pproximately one-third of all defamation actions reported today are suits filed by fired employees against their former employers. A prominent plaintiff’s employment lawyer recently put the matter succinctly: ‘Spread the word. Every wrongful discharge must be looked at as a defamation case.’” SMOLLA, *supra* note 4, at § 15:2.

10. *Id.* at § 15:3.

11. *Id.* at § 15:4. *See, e.g.*, Meloff v. N.Y. Life Ins. Co., 240 F.3d 138 (2d Cir. 2001) (reviewing \$1,250,000 defamation verdict based on a supervisor’s e-mail suggesting credit card fraud as the basis for plaintiff’s discharge).

12. Interview with Gavin Day, Information Technology Director, Dataflux Corporation, in Raleigh, N.C. (Nov. 11, 2000) (on file with Author).

13. Terry Schau, *Internet Use: Here, There, and Everywhere*, OCCUPATIONAL OUTLOOK QUARTERLY, Winter 2000-01, at 42-44.

14. Communications Decency Act § 509, 47 U.S.C. § 230 (Supp. V 1999).

15. 47 U.S.C. § 230(c)(1).

federal immunity for ISPs when defamatory material of a third party is published using their services,<sup>16</sup> and further provides immunity should the ISP exercise editorial control over the content by deleting potentially offensive material.<sup>17</sup> The purpose of § 230, according to Congress, is to deregulate the Internet and to allow ISPs to self-govern the content.<sup>18</sup>

With the passage of § 230, Congress rendered employers immune for the same tort which employers are so closely associated, opening the gates to employer electronic defamation. At least one commentator suggests that employers should not be capable of invoking the immunity available under § 230 because it would allow employers to defame with impunity.<sup>19</sup> The theory is that subjecting employers to potential liability will encourage them to monitor and restrict the ability of employees to send defamatory e-mails and Internet postings.<sup>20</sup>

Unfortunately, this argument is misguided in many respects. First, it is evident from the language and legislative history of the Act that Congress intended employers to be covered under § 230.<sup>21</sup> Indeed, holding employers liable would be directly contrary to the purposes of the CDA.<sup>22</sup> Moreover, § 230 immunity is only as broad as the language of the statute allows, and employers are only immune under § 230 for content published by third parties.<sup>23</sup> If the content is published by an employee acting within the scope of his or her employment, then the employer would be liable as the original publisher of the content under the doctrine of *respondeat superior*, not a third party, and thus the immunity will not apply.<sup>24</sup> Finally, the absence of immunity under § 230 places several federal interests at risk, including labor relations and employee privacy.<sup>25</sup> Congress took the right step in protecting the Internet as the electronic marketplace of ideas by protecting employers under § 230.

Part I of this discussion will explore the relevant background information regarding the extreme importance the Internet plays in advancing the marketplace of ideas, and how the expansion of defamation

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16. *Id.*

17. 47 U.S.C. § 230(c)(2).

18. 47 U.S.C. § 230(b)(2), (4); 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

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

20. *Id.*

21. See *infra* Part II.A.

22. *Id.*

23. See *infra* Part II.B.

24. See *infra* Part III.B.

25. See *infra* Part II.C.

law covering acts committed on the Internet restricts continued growth. In addition, the underlying theories of liability under defamation tort law and congressional reaction to the expansion of defamation law to cover the Internet will be discussed. Next, Part II will demonstrate that Congress intended employers to be immune under § 230 as ISPs and provide the substantial justifications for such a position; namely, aside from the limited immunity under § 230 because of vicarious liability, imposing liability on employers in the absence of § 230 is inconsistent with other federal policies and causes increased invasions of employee privacy. Finally, Part III addresses a few objections to employer immunity.

## II. BACKGROUND: THE INTERNET AND DEFAMATION LAW

The Internet serves to educate and advance Americans by providing a vast electronic library of information and discourse. At the same time, because of its structure, the Internet allows for the relatively unrestricted and anonymous proliferation of defamatory and offensive material. Due to users' anonymity, the law of defamation is capable of holding only ISPs liable and provides an inadequate deterrent to protect against the harms of defamation. Given the difficulty of government regulation of the Internet and the potential harm to its continued growth by such regulation, Congress demonstrated restraint and limited government interference with the passage of § 230, while providing the Internet with the resources to self-govern.

### A. *In Praise of the Internet*

The success of the Internet spawned a new era in information dissemination. Although the Internet failed to eliminate the socioeconomic disparity between those who have access to information and those that do not, this gap is slowly shrinking with the ability of the lesser advantaged to gain access through public facilities or the workplace.<sup>26</sup> The Internet serves as a broad forum for the expression of viewpoints and advertisement of commercial goods.<sup>27</sup> As the Supreme Court recognized, the Internet "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers."<sup>28</sup> As Justice Stevens commented:

This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of

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26. Smith, *supra* note 1, at 3.

27. Reno v. ACLU, 521 U.S. 844, 853 (1997).

28. *Id.*

chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.<sup>29</sup>

In addition, commercial benefits of Internet access exist for employers. "The benefits produced by using the Internet and e-mail in the workplace are impressive."<sup>30</sup> "However, with change come problems."<sup>31</sup> Despite the growth, the Court is also leery of government efforts to regulate this forum. "[T]he growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition . . . we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it."<sup>32</sup> Boundaries to this marketplace exist and defamation law serves to restrict the flow of falsehoods in this new medium by expanding to cover the Internet realm.

### B. *Defamation Law and the Internet Before Section 230*

Since the underlying concern in this discussion involves defamation law, a review of relevant tort theory is appropriate. Aside from the general theories of defamation liability based on publication, the doctrine of *respondeat superior* plays an especially important role in defamation law when discussing employer liability. In addition, a review of court decisions attempting to apply defamation law to the Internet prior to the enactment of § 230 will guide the discussion regarding the development of the statute.

#### 1. The Basic Tort of Defamation

As with most tort law, the law of defamation is a "creature of state tort law," and as such varies from state to state.<sup>33</sup> "It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense."<sup>34</sup> Despite the ambiguity, general principles may be gleaned from the common law across the fifty states. The tort of defamation is intended to protect the reputation of an individual within the community.<sup>35</sup> Spoken or written words which are injurious to a person's reputation may subject the speaker or writer to liability.<sup>36</sup> Defamation requires that a speaker of a defaming comment communicate the comment

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29. *Id.* at 870.

30. Ishman, *supra* note 7, para. 6.

31. Susan M. Ballantine, *Computer Network Trespasses: Solving New Problems with Old Solutions*, 57 WASH. & LEE L. REV. 209, 210 (2000).

32. *Reno*, 521 U.S. at 885.

33. SMOLLA, *supra* note 4, at § 1:1.

34. WILLIAM L. PROSSER, *THE LAW OF TORTS* 737 (4th ed. 1971).

35. *Id.*

36. *Id.* at 751.

to someone other than the person who is defamed.<sup>37</sup> A plaintiff establishes a prima facie case of defamation when he demonstrates:

- (a) a false and defamatory statement concerning [the plaintiff];
  - (b) an unprivileged publication to a third party;
  - (c) fault amounting at least to negligence on the part of the publisher;
- and
- (d) either actionability of the statement irrespective of the special harm or the existence of special harm caused by publication.<sup>38</sup>

The speaker must make the defaming statement to a third party, not the person being defamed. “This element of communication is given the technical name of ‘publication’ . . . . It is not enough that the words are uttered . . . unless they are in fact overheard.”<sup>39</sup> Publication of the defamatory statement may be made intentionally, however negligent publication is sufficient; strict liability for publication of a defamatory statement is, relatively, a thing of the past.<sup>40</sup>

## 2. Liability for Publishers Who Assist Speakers

Those who assist in publication of the defamatory statement are generally seen as publishers for purposes of defamation law and thus subject to liability. “[E]very one who takes part in the publication, as in the case of the owner, editor, printer, vendor, or even carrier of a newspaper is charged with publication . . . .”<sup>41</sup> In addition, “[e]very repetition of the defamation is a publication in itself.”<sup>42</sup> If someone repeats the defaming

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37. *Id.* at 737.

38. RESTATEMENT (SECOND) OF TORTS § 558 (1976). The fourth element is the requirement that the plaintiff show damages, either by demonstrating a pecuniary loss, or by showing the defamation falls within a *per se* special harm for which the plaintiff is automatically entitled to damages. *Id.* at § 710; PROSSER, *supra* note 34, at 766; SMOLLA, *supra* note 4, at § 15:18.

39. PROSSER, *supra* note 34, at 766.

40. *Id.* at 774. *See also* RESTATEMENT (SECOND) OF TORTS § 577 (1976). Important to note is the definition of publication:

(1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.

(2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.

*Id.* Arguably, paragraph (2) is entirely relevant to the discussion before us. Although allowing the speaker to use the employer’s Internet system or e-mail system may be akin to paragraph (1), the employer, once it becomes aware of the posting, would be under an obligation to remove such defamatory matter pursuant to paragraph (2), as construed in the modern day world of the Internet.

41. PROSSER, *supra* note 34, at 768-69.

42. *Id.* at 768; *see also* SMOLLA, *supra* note 4, at § 4:87.

comment made by the speaker, that person is liable for publication as well. The common law does distinguish between transmitters, or secondary publishers, and repeaters, or primary publishers.<sup>43</sup> When a person or organization broadcasts the defamatory material through newspaper, radio or television, that person is considered a primary publisher and is as much liable as the original publisher.<sup>44</sup> However, if the person or organization merely serves to transmit or distribute the defamatory material, sometimes referred to as secondary publishers, that person is subject to a reduced standard of liability.<sup>45</sup> A transmitter (such as a message carrier delivering a letter or the telephone company transmitting a phone call) or a distributor (such as a bookstore selling a newspaper) will not be considered liable absent a showing of knowledge on the part of the secondary publisher that the message was defamatory.<sup>46</sup> Nevertheless, a primary publisher (such as a caller on the phone or a newspaper) is charged with liability for negligent acts of defamation.<sup>47</sup>

Applying these theories to today's technology, it would seem that an ISP, which provides e-mail service, merely transmits or distributes another's defamatory material.<sup>48</sup> Only the ISP transmitting an e-mail which it knows to be defamatory would subject itself to liability for publication. Yet, when the ISP allows a member to post the material on an ISP-maintained electronic bulletin board or other forum, it becomes a primary publisher, much like a newspaper.<sup>49</sup> This analysis presents a legal dilemma for ISPs because courts weigh the level of control an ISP maintains over the medium when attempting to discern whether an ISP should be considered a transmitter or a publisher for purposes of defamation law.<sup>50</sup> Therefore, the dilemma for ISPs concerned with both offensive material and potential liability for that material, is that greater control over the services in essence subjects the ISP to a lesser standard of culpability.<sup>51</sup>

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43. SMOLLA, *supra* note 4, at § 4:87.

44. *Id.* at § 4:92.

45. *Id.*

46. RESTATEMENT (SECOND) OF TORTS § 581 (1976); SMOLLA, *supra* note 4, at § 4:92; PROSSER, *supra* note 34, at 775.

47. PROSSER, *supra* note 34, at 774.

48. *See, e.g.*, Lunney v. Prodigy Servs. Co., 683 N.Y.S.2d 557 (N.Y. App. Div. 1998) (holding ISP to be common law transmitter of e-mail and therefore not subject to liability for defamation).

49. *See, e.g.*, Patentwizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069, 1070-71 (D.S.D. 2001).

50. *See infra* Part I.B.4.

51. 141 CONG. REC. H22045 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).



### 3. The Doctrine of *Respondeat Superior* as Applied to Defamation

Under tort common law, employers are vicariously liable for the actions of their employees which are performed within the scope of employment.<sup>52</sup> The employer's "vicarious liability, for conduct which is in no way his own, extends to any and all tortious conduct of the servant which is within the 'scope of the employment.'"<sup>53</sup> If an employee, while acting within the scope of his employment, defames another, the employer will likely be the target of the defamation suit.<sup>54</sup> The reasoning behind vicarious liability of the employer is disputed.<sup>55</sup> It is difficult to determine whether the theory of *respondeat superior* simply imputes the act of publishing from the agent to the principal, or whether the employer is liable as a matter of policy for the tortious acts of the servant irregardless.<sup>56</sup> Nonetheless, *respondeat superior* charges the employer with the tortious acts of the employee within the scope of employment.

### 4. Judicial Decisions on Internet Defamation Before the CDA

In one of the first court decisions to consider defamation and the Internet, *Cubby, Inc. v. CompuServe, Inc.*,<sup>57</sup> a New York federal district court considered the liability of an ISP for an online newsletter published through its system.<sup>58</sup> The case involved the defendant CompuServe, a national ISP which provided access for subscribers to an "on-line general information service" including an "electronic library."<sup>59</sup> The electronic library included bulletin boards, online conferencing, and topical databases.<sup>60</sup> One of the publications available in the electronic library was a daily newsletter called "Rumorville" which provided reports on journalists.<sup>61</sup> Rumorville was operated entirely by an independent

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52. Conduct of a servant is within the scope of employment if, but only if:

- (a) it is of the kind he is employed to perform;
- (b) it occurs substantially within the authorized time and space limits;
- (c) it is actuated, at least in part, by a purpose to serve the master, and
- (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

RESTATEMENT (SECOND) OF AGENCY § 228 (1957).

53. PROSSER, *supra* note 34, at 460.

54. SMOLLA, *supra* note 4, at § 15:23.

55. PROSSER, *supra* note 34, at 459.

56. *Id.*

57. 776 F.Supp. 135 (S.D.N.Y. 1991).

58. *Id.* at 137-38.

59. *Id.* at 137.

60. *Id.*

61. *Id.*

contractor with complete control over the publication process who then uploaded the publication to CompuServe for access.<sup>62</sup> The plaintiff, a corporation which itself published an electronic newspaper on the television news and radio industries, was allegedly defamed by Rumorville on several occasions.<sup>63</sup> Plaintiff alleged claims against CompuServe as a publisher of the defamation.<sup>64</sup> The court, based on the lack of control CompuServe held over Rumorville, granted summary judgment to CompuServe.<sup>65</sup> The court declared CompuServe to be a mere electronic distributor,<sup>66</sup> therefore subject to the lower standard traditionally “applied to a public library, book store, or newsstand . . . .”<sup>67</sup> Holding an ISP to be a publisher “would impose an undue burden on the free flow of information.”<sup>68</sup> The court determined that distributor liability could only be imposed on CompuServe if “it knew or had reason to know of the allegedly defamatory Rumorville statements.”<sup>69</sup> Due to its lack of control over Rumorville, CompuServe would not be subject to publisher liability, but could potentially be held liable as a distributor of defamation.<sup>70</sup> The unfortunate result of such a case is to encourage an ISP like CompuServe to exercise no control over its content and to avoid any attempt to investigate possible defamatory statements.<sup>71</sup>

A case with more negative ramifications for ISPs emerged out of a New York trial court. In *Stratton Oakmont, Inc. v. Prodigy Serv. Co.*,<sup>72</sup> the state court determined that an ISP could be held liable as a publisher as long as it exercised sufficient control over the allegedly defamatory content.<sup>73</sup> Prodigy hired leaders to participate in electronic “[bulletin] board discussions” and “undertake promotional efforts to encourage usage . . . .”<sup>74</sup> One of Prodigy’s bulletin boards was “Money Talk,” which was led by Charles Epstein.<sup>75</sup> The plaintiff established that Prodigy advertised itself as a family-oriented ISP, claiming it “exercised editorial control over the content of messages posted on . . . bulletin boards,” and maintained content

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62. *Id.*

63. *Id.* at 138.

64. *Id.*

65. 776 F.Supp. 135, 140-41 (S.D.N.Y. 1991).

66. *Id.* at 140.

67. *Id.*

68. *Id.*

69. *Id.* at 141.

70. *Id.*

71. 141 CONG. REC. H22045 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

72. 1995 WL 323710 (N.Y.Supp. 1995).

73. *Id.* at \*4.

74. *Id.* at \*1.

75. *Id.*

Guidelines which empowered leaders to edit statements before they became public on the boards.<sup>76</sup> On summary judgment, the court determined that Prodigy served as a publisher, distinguishing *Cubby* because Prodigy advertised its editorial control over content, “implemented this control through its automatic software screening program,” and required board leaders to enforce content Guidelines.<sup>77</sup> “By actively utilizing technology and manpower . . . PRODIGY is clearly making decisions as to content, and such decisions constitute editorial control.”<sup>78</sup> Thus, the court held Prodigy to be a publisher for the purposes of plaintiff’s defamation action based on the extent of control Prodigy maintained over the bulletin board.<sup>79</sup>

### C. Congress Responds to Protect Expansion of the Internet

While *Stratton Oakmont* was pending in the trial court, Congress started considering legislation to alter the application of defamation law to the Internet.<sup>80</sup> The CDA was a small part of a major legislative effort to overhaul telecommunications legislation. The omnibus act, entitled the Telecommunications Act of 1996, targeted various areas of the telecommunications and cable industries.<sup>81</sup> Congress was concerned with the proliferation of obscene material on the Internet and codified Title V of the Act, the CDA, in an attempt to curb such proliferation.<sup>82</sup>

As part of the CDA, Congress sought to amend Title II of the Communications Act of 1934<sup>83</sup> to include a new § 230 entitled “Protection for Private Blocking and Screening of Offensive Material.”<sup>84</sup> The underlying purpose of this section, dubbed the Cox-Wyden Amendment, was to encourage private ISPs to screen out offensive material.<sup>85</sup> To accomplish this task, Congress immunized ISPs from liability for removing that which the ISP deemed “to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”<sup>86</sup> In part, because of the decision in *Stratton Oakmont*, Congress felt it necessary to

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76. *Id.* at \*2.

77. *Id.* at \*4.

78. *Id.* (internal citations omitted).

79. *Id.*

80. *Id.* at \*5.

81. 141 CONG. REC. H21999 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

82. *Reno v. ACLU*, 521 U.S. 844, 858 (1997).

83. 47 U.S.C. § 151 (1994).

84. 141 CONG. REC. H22044 (daily ed. Aug. 4, 1995) (statement of Rep. Cox); 47 U.S.C. § 230 (Supp. V 2000).

85. 141 CONG. REC. H22045 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

86. 47 U.S.C. § 230(c)(2)(A).

immunize ISPs from potential liability as a publisher.<sup>87</sup> The New York court in *Stratton Oakmont* based its decision on the control Prodigy maintained over its system.<sup>88</sup> Since the ISP maintained a sufficient level of control, it could be held liable for the material published through the system.<sup>89</sup> Congress realized the potential impact of such a decision: discouraging ISPs from controlling and screening the system because of the potential liability a court might impose.<sup>90</sup> Therefore, paragraph (c) of § 230 protects ISPs by declaring that no ISP “shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>91</sup> Essentially, § 230 would entrust screening of the Internet to private industry.

The House regarded the Senate’s version of Internet protections, known as the Exon Amendment, as constitutionally questionable.<sup>92</sup> Instead of the Senate’s effort toward government regulation under the Exon Amendment, the House’s Cox-Wyden Amendment would “encourage people like Prodigy, like CompuServe, . . . to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see.”<sup>93</sup> “[T]he Internet is the shining star of the information age, and Government censors must not be allowed to spoil its promise.”<sup>94</sup> As Congressman Cox stated, when advocating for the passage of § 230, “[t]he message today should be from this Congress we embrace this new technology, we welcome the opportunity for education and political discourse that it offers for all of us.”<sup>95</sup>

Congressman Cox criticized the Exon Amendment for having “content regulation by the Federal Government of what is on the Internet . . . .”<sup>96</sup> As he explained, the new § 230 would reverse the legal system’s “massive disincentive for the people who might best help us control the Internet to do so” by overruling the *Stratton Oakmont*

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87. 47 U.S.C. § 230(c); 141 CONG. REC. H22045 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

88. See *supra* text accompanying note 70.

89. *Id.*

90. See 141 CONG. REC. H22045 (daily ed. Aug. 4, 1995) (statement of Rep. Cox); H.R. CONF. REP. NO. 104-458, at 194 (1996).

91. 47 U.S.C. § 230(c)(1).

92. 141 CONG. REC. H1160 (daily ed. Feb. 1, 1996) (statement of Rep. Eshoo). The Supreme Court ultimately agreed with the House’s assessment of the Exon Amendment, finding it an unconstitutional infringement on the First Amendment. *Reno*, 521 U.S. at 849.

93. 141 CONG. REC. H22045 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

94. *Id.*

95. *Id.*

96. *Id.*

decision.<sup>97</sup> The Cox-Wyden Amendment, by allowing ISPs to regulate and control the material disseminated over the computer system, would be the most effective tool for screening minors from indecent material.

The CDA went to a conference committee to hammer out the differences between the two congressional Houses. At the completion of the conference, both the Exon Amendment and the Cox-Wyden Amendment remained as separate sections of the CDA.<sup>98</sup> The conference report provided the definitive legislative history on the CDA. The primary purpose of § 230 was “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 . . . unfettered by Federal or State regulation.”<sup>99</sup> As a result, the deregulation was intended “to remove disincentives for the development and utilization of blocking and filtering technologies.”<sup>100</sup> While the larger concern of Congress during debate seemed to be balancing the interest of protecting children from offensive material against maintaining a deregulated Internet, it is apparent from the legislative history that Congress found decisions such as *Stratton Oakmont* to be highly destructive to Internet growth.<sup>101</sup> As a result, Congress sought to immunize most of those who encourage the development of a responsible Internet—the service providers. The report clearly expressed that under § 230, “[t]hese protections apply to all interactive computer services . . . including non-subscriber systems such as those operated by many businesses for employee use.”<sup>102</sup> Congress hoped that by providing broad immunity to all forms of ISPs, the Internet would engage in self-regulation, thus screening minors from offensive material.

At least one court has interpreted § 230 to preempt both *Stratton Oakmont* and *Cubby*. In *Zeran v. America Online, Inc.*,<sup>103</sup> an unidentified subscriber of America Online (“AOL”) placed advertisements for tasteless products on AOL bulletin boards shortly after the Oklahoma City bombing for “Naughty Oklahoma T-Shirts.”<sup>104</sup> The advertisements informed readers to contact “Ken” at the phone number listed.<sup>105</sup> The phone number listed on the ad was Zeran’s, who then received a flood of phone calls, some of

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97. *Id.*

98. Compare 47 U.S.C. § 223 with 47 U.S.C. § 230. See also H.R. CONF. REP. NO. 140-458, at 194 (1996).

99. 47 U.S.C. § 230(b)(1)-(2).

100. *Id.* § 230(b)(4).

101. H.R. CONF. REP. NO. 104-458, at 194 (1996).

102. *Id.*

103. 129 F.3d 327, 332-33 (4th Cir. 1997).

104. *Id.* at 329.

105. *Id.*

which threatened his life.<sup>106</sup> Zeran contacted AOL and requested it remove the advertisements, which AOL failed to do.<sup>107</sup> When Zeran sued, AOL asserted § 230 as a defense to the action.<sup>108</sup> The Fourth Circuit, reviewing a judgment on the pleadings in favor of AOL, rejected plaintiff's argument that AOL acted as a distributor and therefore did not fall within § 230's immunity.<sup>109</sup> The court held that "[e]ven distributors are considered to be publishers for purposes of defamation law."<sup>110</sup> "Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium . . . . Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."<sup>111</sup> Although *Zeran* relied on *Stratton Oakmont* and *Cubby* to show a legal distinction, the court found those cases created different standards of liability for "the specific type of publisher concerned."<sup>112</sup> According to the Fourth Circuit, even if the entity at issue was merely acting as a distributor, the protections of § 230 applied with equal force.<sup>113</sup>

Another federal court determined that limitations to § 230 immunity do exist. In *Blumenthal v. Drudge*,<sup>114</sup> the plaintiffs, two White House employees, brought suit against Matt Drudge, the writer of an electronic gossip column entitled the "Drudge Report" and AOL, the report's online publisher.<sup>115</sup> Drudge published allegedly defamatory statements regarding plaintiffs' history of spousal abuse.<sup>116</sup> Drudge posted these statements on his Web site and sent them via e-mail to thousands of Drudge subscribers.<sup>117</sup> The statements were also made available to approximately nine million AOL subscribers, by a contract between Drudge and AOL.<sup>118</sup> Although Drudge and AOL later retracted the story, the plaintiffs followed through with their suit.<sup>119</sup> AOL moved for summary judgment in part claiming the protections of § 230.<sup>120</sup> The court, while agreeing with AOL

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106. *Id.*

107. *Id.*

108. *Id.*

109. 129 F.3d 332 (4th Cir. 1997).

110. *Id.*

111. *Id.* at 330.

112. *Id.* at 332.

113. *Id.* at 334.

114. 992 F. Supp. 44 (D.D.C. 1998).

115. *Id.* at 46-48.

116. *Id.* at 46.

117. *Id.* at 47.

118. *Id.*

119. *Id.* at 48.

120. *Id.* at 48-49.

and granting summary judgment, noted that “no person, other than Drudge himself, edited, checked, verified, or supervised the information [published].”<sup>121</sup> The court recognized that “wisely or not, [Congress] made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others.”<sup>122</sup> However, the court agreed with AOL that “there is no evidence to support the view . . . that Drudge is or was an employee or agent of AOL.”<sup>123</sup> Moreover, AOL acknowledged “that Section 230(c)(1) would not immunize AOL with respect to any information AOL developed or created.”<sup>124</sup> Both the parties and the court seemed to realize that § 230 did not immunize AOL from liability if the defamation action was based on statements made by AOL’s employees.

### III. JUSTIFYING EMPLOYER IMMUNITY

Failing to provide employer immunity under § 230 for an employee’s act outside the scope of his or her employment is directly contrary to the express language and legislative history of the CDA. Employers will not receive limitless immunity under § 230, but rather the same level of immunity available in the offline world. Finally, absent statutory immunity, employers will be trapped in a quagmire of conflicting federal policies and interests and forced to invade both employee privacy and the freedom of the Internet marketplace.

#### A. *Congressional Intent to Include Employers*

The legislative history surrounding § 230 indicates Congress’s intent to protect all ISPs, including commercial providers, employers, and public facilities like libraries. According to Representative Cox, § 230 “will protect computer Good Samaritans, online service providers, *anyone* who provides a front end to the Internet.”<sup>125</sup> The conference report, published concurrently with the conference agreeing to a version of the CDA, specifically comments that employer-operated ISPs are to be covered by § 230. “[Section 230’s] protections apply to all interactive computer services, as defined in [§ 230], including non-subscriber systems such as those operated by many businesses for employee use.”<sup>126</sup> In addition, the Senate

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121. 992 F. Supp. 44, 50 (D.D.C. 1998).

122. *Id.* at 49.

123. *Id.* at 50.

124. *Id.*

125. 141 CONG. REC. H22045 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (emphasis added).

126. H.R. CONF. REP. NO. 104-458, at 194 (1996).

counterpart to § 230, the Exon Amendment which ultimately became § 223 of the CDA, provides specific defenses for employers who maintain ISPs.<sup>127</sup>

The definitions for § 230 indicate Congress's intent to include any possible service provider. In pertinent part, § 230 protects "interactive computer service[s]" from publisher liability.<sup>128</sup> Such service is defined 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 and such systems operated or services offered by libraries or educational institutions."<sup>129</sup> The definition clearly does not limit itself to commercial providers who charge a fee for users to gain access. The statute makes no mention that the service be for-profit or for customers as a requirement of coverage.<sup>130</sup> The definition seems to further include intranet systems, that is, systems which are for internal use by the users only.<sup>131</sup> The most popular of such systems are intranets used by large employers to allow for internal communication between employees.<sup>132</sup> The broad definitions under § 230 leave little question that Congress intended to protect employers.<sup>133</sup>

In addition, Congress specifically conditioned immunity under § 230 on a requirement that the defamatory material be provided by another information content provider. Congress intended to encourage ISPs to provide access to the Internet and self-regulate the medium, but in no way intended to immunize those ISPs for their own defamatory information.<sup>134</sup>

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127. 47 U.S.C. § 223.

128. 47 U.S.C. § 230(f)(2).

129. *Id.* (emphasis added).

130. Although § 230(d) regarding obligations of an ISP under the statute mentions customers, this section was added after the conference and it was not likely the intent of the amendment to eliminate employers from coverage under § 230(c). While all other regulations under § 230 mention "users," paragraph (d), added later in the process, is the sole section which uses the term "customers." Courts may sever paragraph (d) to only apply to for-profit ISP operations or interpret paragraph (d) to cover employers. If paragraph (d) does not apply, then employees would be again without notice of monitoring. *But see infra* note 144 (discussing proposed Notice of Electronic Monitoring Act).

131. Interview with Gavin Day, *supra* note 12 (stating that because the statute specifically covers "computer access by multiple users to a computer server," it indicates coverage of internal computer networks).

132. *Id.*

133. Caitlin Garvey, Note, *The New Corporate Dilemma: Avoiding Liability in the Age of Internet Technology*, 25 U. DAYTON L. REV. 133, 135 (1999) (finding ambiguity as to coverage but ultimately concluding functional definition of ISP must cover employers providing Internet access).

134. *Blumenthal*, 992 F. Supp. at 50.



ISPs would only be immune from liability as publisher for defamatory content created or developed by third parties and would be encouraged to self-govern the material transmitted through their services.<sup>135</sup> By definition, the creator or developer of the defamatory material is liable as a publisher under § 230.<sup>136</sup> Prior to § 230 and the Internet, employers were not liable for defamation of third parties. Only when the employer created or developed the defamatory material, through the actions of its employees, was it liable for the defamation. Congress intended to carry that same standard into the electronic realm. Construing § 230 to provide blanket immunity to employers for the actions of their employees does violence to the language of the statute and the intent of Congress. Protecting employers from liability for employee defamation outside the scope of employment is consistent with defamation law and the CDA.

*B. Liability Under Respondeat Superior Despite Section 230*

Liability as a publisher is intended to discourage third parties from distributing the defaming comment of another. For this reason alone, it is entirely inconsistent to impose liability on the employer as publisher when a defaming statement is made utilizing the employer's system. If the comment is made in the scope of the speaker's employment, for example a supervisor who writes an e-mail recommendation regarding a former employee in which he defames the former employee, then the employer would be vicariously liable for the actions of the employee under common law.<sup>137</sup> As the statute's explicit language makes clear, an employer-provider is immune as a publisher for "information provided by another information content provider."<sup>138</sup> Employers, traditionally corporations which are fictional entities of the state, may only act through their employees. Therefore, the employer is already subject to liability for the defamation—not as a publisher—but through vicarious liability as a principal under the doctrine of *respondeat superior*.<sup>139</sup> Material published through the

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135. H.R. CONF. REP. NO. 140-458, at 194 (1996).

136. *Blumenthal*, 992 F. Supp. at 50.

137. PROSSER, *supra* note 34, at 460 (an employer's "vicarious liability, for conduct which is in no way his own, extends to any and all tortious conduct of the [employee] which is within the 'scope of employment.'"). The most likely and common fodder for defamation suits is a supervisor's post-termination comment regarding the reason for the plaintiff's termination. *See, e.g., Meloff v. N.Y. Life Ins. Co.*, 240 F.3d 138 (2d Cir. 2001) (defamation suit based on supervisor's e-mail to fellow supervisors discussing plaintiff's termination for credit card fraud).

138. 47 U.S.C. § 230(c)(1).

139. Although it may be suggested, it seems without merit that Congress intended to preempt any and all common law defamation theories when enacting § 230. *See, e.g., Lunney v. Prodigy Servs. Co.*, 683 N.Y.S.2d 557 (N.Y. App. Div. 1998) (holding that ISP

employer's system by an employee acting within the scope of his employment is not information provided by another, but is information provided by the employer and thus not immune from liability. A finding that an agent of the ISP, within his authority, defamed another is a finding that the ISP itself defamed the person. This conduct is not entitled to immunity under § 230.<sup>140</sup> Imposing *respondeat superior* liability for defamation on an employer's system is entirely consistent with the statute because it does not discourage employer control over the system.<sup>141</sup> Vicarious liability has always existed for employers in the offline world, and employers are held responsible under tort law for the actions of their employees within the scope of employment. Without *respondeat superior* liability, an employer must still maintain control over the actions of the employees, not only to advance his or her interests, but also because of other potential liabilities. This impetus does not exist in the context of a company and a customer, which is the situation of other ISPs when facing potential liability for the actions of their users.

On the other hand, if the speaker's defaming comment is not made within the scope of employment,<sup>142</sup> imposing liability for such a comment made without the employer's control or acquiescence seems entirely inconsistent with the principles of the CDA. Moreover, employers should not have free reign to prohibit certain e-mails despite their defamatory nature. In this case, employers are just as blameless for defamatory comments unrelated to work made by employees as commercial service providers are for comments made by customers. While employers will be held liable for defamation under traditional notions of tort law should the employee's comment take place in the course of employment, employers will be immune from utterly unrelated comments that happen to be made on the employee's business account as opposed to his personal account at home.

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not liable for defamatory e-mail because ISP served only as common law transmitter and therefore was immune without proceeding to second issue of immunity under § 230).

140. Where the line is drawn between another information content provider and the employee as agent of the employer may be difficult at times. It will basically boil down to whether an employee provided content as opposed to merely editing what others provided. *See, e.g., Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980, 985 n.4 (10th Cir. 2000) (immunizing defendant for exercising editorial control but noting "that § 230 would not immunize defendant with respect to information defendant developed or created by itself").

141. Section 230 preempts state law only if state law is inconsistent with the Section. 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.").

142. PROSSER, *supra* note 34, at 461 ("If the [employee] steps outside of his employment to do some act for himself, not connected with the [employer]'s business, there is no more responsibility for what he does than for the acts of any stranger.").

### C. *Imposing Liability Contrary to Federal Policy*

Numerous federal laws govern the workplace, and each federal law imposes new policies and requirements on the employer. In certain situations, denying employers immunity under § 230 of the CDA will compound potential liability or will create inconsistent federal policies leading to conflicting legal requirements. Maintaining immunity as envisioned by Congress, however, will prevent these problems and further the goals of the statute. Even though some suggest that, by imposing liability, Congress will encourage employers to closely monitor the actions of their employees, this goal will be largely illusory given the numerous competing and conflicting employer obligations. While in some situations the law encourages employers to monitor e-mails sent in the workplace, other limitations restrict the power of employers over their own system.

In some instances, federal policy favors employer monitoring of employee e-mail. Employers frequently monitor employees to maintain productivity and to ensure information security.<sup>143</sup> Employers may also need to monitor and investigate employee use of e-mail and Internet access in order to take corrective action if made aware of e-mails which may be considered harassing. Employers are subject to liability under Title VII for failing to reign in harassing e-mails sent to a female co-worker or off-color remarks sent to an ethnic minority.<sup>144</sup> In either situation, the employer will be held liable for acquiescing to the hostile work environment created by e-mails.<sup>145</sup> Under Title VII, an employer is obligated to eradicate the hostile environment upon becoming aware of the activity.<sup>146</sup> In this case, § 230 would immunize the employer from removing the offensive e-mails which Title VII already encourages an employer to monitor in the first place.

In other circumstances, encouraging employers to continuously monitor employee e-mail limits employees' expectations of privacy in the workplace.<sup>147</sup> Federal and state law has, in many ways, failed to protect private-sector employees' privacy in regard to intra-office electronic communication.<sup>148</sup> Although the federal Electronic Communications

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143. Hall Adams III et al., *E-Mail Monitoring in the Workplace: The Good, the Bad and the Ugly*, 67 DEF. COUNS. J. 32, 33 (2000).

144. Garvey, *supra* note 133, at 134.

145. See, e.g., *Knox v. Indiana*, 93 F.3d 1327, 1330 (7th Cir. 1996) (Title VII sexual harassment claim based upon supervisor's e-mails requesting sexual favors).

146. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

147. J.M. Balkin, *Essay: Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2298 (1999) ("Because employers have no general interest in preserving employee speech rights unrelated to efficiency, they will impose regulations as broad as they think necessary to insulate themselves from liability.").

148. *But see* Notice of Electronic Monitoring Act, H.R. 4908, 106th Cong. (1999) (bill

Privacy Act (ECPA)<sup>149</sup> curbed unauthorized monitoring of electronic communications, it had minimal impact on private sector offices.<sup>150</sup> This is largely due to the statutory definitions limiting the coverage to more public communications systems, not privately-maintained networks.<sup>151</sup> In addition, broad and ambiguous exceptions to coverage likely leave employers with many options in shielding themselves from potential liability under the ECPA.<sup>152</sup> As a result, many fear that the new danger of the technological workplace is the “electronic sweatshop” where employees are subject to constant electronic monitoring.<sup>153</sup> Advocates of excluding employers from § 230 immunity suggest that increased employee monitoring should be encouraged,<sup>154</sup> but this seems to call for limitless intrusion on individual employees’ privacy because few state or federal protections exist. Most scholars agree that there are relatively little to no restraints set on employers regarding electronic monitoring.<sup>155</sup> Encouraging an increase in such monitoring serves only to increase the detriment to employees’ privacy.

A rule which imposes liability on employers as publishers contradicts federal labor policy and causes conflicting liabilities for employers. The National Labor Relations Act (NLRA)<sup>156</sup> encourages employees to engage in collective concerted activity for the purpose of improving terms and conditions of employment.<sup>157</sup> Concerted activity includes collective discussion and communication by employees of various work-related matters.<sup>158</sup> E-mail now serves a critical role in the ability of an employee to discuss matters with fellow employees.<sup>159</sup> Unfortunately, defamatory comments targeting fellow employees or members of management may often occur in e-mails discussing working conditions.<sup>160</sup> Without § 230, the

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advocating setting notice requirements involving private employer monitoring of e-mail and Internet use).

149. 18 U.S.C. §§ 2510-2710 (1994).

150. F. LAWRENCE STREET, *LAW OF THE INTERNET* 100 (1998); FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* 84 (1997). *See generally* PAUL M. SCHWARTZ & JOEL R. REIDENBERG, *DATA PRIVACY LAW* ch. 13 (1996).

151. STREET, *supra* note 150, at 100.

152. CATE, *supra* note 150, at 84.

153. Adams et al., *supra* note 143, at 34.

154. Spencer, *supra* note 19, at \*23.

155. CATE, *supra* note 150, at 86.

156. National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994).

157. *Id.* § 157.

158. *NRLB v. City Disposal Sys., Inc.*, 465 U.S. 822, 825 (1984).

159. Office of General Counsel, Advice Memorandum (Feb. 23, 1998) (on file with Pratt & Whitney).

160. For the most part, defamatory comments made in the course of concerted activity are protected under the NLRA. *Old Dominion Branch 496, Nat’l Ass’n of Letter Carriers*,

employer may be liable to both the defamed person in tort, and subject to an unfair labor practice under the NLRA for attempting to remove, erase or limit such e-mails, or discipline the sender.<sup>161</sup> Liability under the NLRA is not dependent on the employer being a unionized workplace, rather it exists even in the absence of a union so long as the activity falls within the definition of concerted activity.<sup>162</sup> Potential tort liability forces employers to restrict the use of electronic media to limited business purposes. Yet, such a trend is contrary to the rising jurisprudence suggesting that denying an employee the right to e-mail fellow employees regarding working conditions is a violation of the employee's Section 7 rights,<sup>163</sup> and therefore an unfair labor practice under Section 8(a)(1).<sup>164</sup> Employers are between a "rock and a hard place" without some form of immunity under § 230. Congress, by immunizing employers under § 230, requires the victim of defamation to seek redress in court against the speaker and allows the employer to avoid restriction on protected concerted activity.

Moreover, new trends in labor law suggest that unions will continue to increase their use of the Internet to communicate with members and to provide resources. Scholars and members of the labor movement suggest that unions will begin using the Internet and its various resources including bulletin boards to create reference systems and training programs for members.<sup>165</sup> Employees will be able to obtain information regarding potential job opportunities, aside from the possibility of communicating globally with other employees regarding working conditions and rights under labor law. If employers are forced to set restrictive rules regarding usage of Internet and e-mail, this valuable new tool of the labor movement would be eliminated. Shielding employers from liability under § 230 therefore encourages employers to provide unfettered access to the electronic media and, in turn, spawns the use of the electronic media for concerted activity.

Even if the defamatory comment made by the employee is not work-related, and thus not covered by the NLRA, the employer may open the

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AFL-CIO v. Austin, 418 U.S. 264, 277-78 (1974) ("Vigorous exercise of this right 'to persuade other employees to join' must not be stifled by the threat of liability for the overenthusiastic use of rhetoric or the innocent mistake of fact. Thus, the Board has concluded that statements . . . are protected by § 7, even if they are defamatory and prove to be erroneous, unless made with knowledge of their falsity.").

161. Timekeeping Sys., Inc., 323 N.L.R.B. 30 (1997).

162. *Id.*

163. 29 U.S.C. § 157 (1994).

164. 29 U.S.C. § 158(a)(1) (1994).

165. Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 24 (2001).

door to additional tort liability by attempting to discipline the employee. Although employees are generally considered “at-will” and thus may be discharged for any reason or no reason at all, the law has recognized exceptions to the power of employers over the employment contract.<sup>166</sup> In particular, the law may readily restrict the ability of employers to discharge employees for private non-work-related misconduct.<sup>167</sup> As a result, a court may be inclined to reinstate with back pay or award damages to an employee discharged by an employer for making defamatory statements unrelated to work. Essentially, the employer in many situations is limited in its capacity to regulate the speech of its employees. While some cause for concern regarding employer immunity under § 230 is based on the power of the employer to allow employees to defame with impunity, in many instances the employer may be powerless to stop such activities, while in other situations, the employer would still be liable despite § 230.

#### D. Responding to the Objections

Critics of covering employers under § 230 point to the obvious concern that employers are the root of defamatory evil. That is to say, employers are notorious for being the defendants in defamation actions.<sup>168</sup> Whether this is because employers are a “deep pocket” or the true perpetrator of the defamation is irrelevant. As one scholar argues, providing immunity for employers in the context of a digital defamation action will lead to a parade of horrors.<sup>169</sup> “[E]mployers will allow employees to say and post anything, since employers will be immune from liability.”<sup>170</sup> As Professor Michael H. Spencer properly notes, “[t]he only restriction on this absolutism would be in situations in which [ISPs] themselves are the information content provider.”<sup>171</sup> Therefore, there is some limitation on the extent of immunity under § 230.

This begs the question: When may an ISP, such as Prodigy, be itself the information content provider as Professor Spencer suggests? The answer is simple under the law of agency and in light of *Blumenthal*.<sup>172</sup> An ISP is incapable of acting as an entity and therefore it must act through its agents. Drawing from *Blumenthal* and common law principles previously

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166. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 947-53 (1984).

167. N.Y. LAB. LAW § 201-d (McKinney Supp. 2001-2002) (prohibiting discrimination in employment based upon employee conduct outside workplace).

168. See *supra* text accompanying note 9.

169. Spencer, *supra* note 19, at \*17.

170. *Id.*

171. *Id.*

172. See *Blumenthal*, 992 F. Supp. at 49-50.

discussed, the ISP would only be liable if an employee of the company “developed or created” the information content, and thus the defamatory statement. In absence of this liability, there would be no situation in which any ISP could be held liable for defamation despite the language of § 230. To construe § 230 otherwise would make “another” entirely superfluous in the statutory language. Certainly, the court in *Blumenthal* did not presume that the entity known as AOL could actually develop or create defamation without the assistance of an agent, namely one of its employees.

Professor Spencer poses an important hypothetical: “Assume that an employee who is part of the employer’s hiring committee sends an e-mail to others in the company making disparaging remarks about a potential candidate for employment. The remarks, though untrue, keep the candidate from finding employment.”<sup>173</sup> The candidate discovers the statement and brings suit against the employee and employer.<sup>174</sup> In this situation, despite the existence of § 230, the employer is liable for the defamatory statement of the employee based upon *respondeat superior*. The definition of scope of employment is so broad that it includes any act of the employee within “the ‘same general nature as that authorized, or incidental to the conduct authorized.’”<sup>175</sup> Indeed, vicarious liability may be imposed “[e]ven when the conduct is *forbidden* by the employer.”<sup>176</sup> As an internal memorandum stating untrue reasons for an employee’s discharge is imputed to the employer,<sup>177</sup> false comments made by a hiring committee member regarding a candidate are just as equally charged against the employer. Such a comment subjects the employer to liability regardless of whether it is sent via internal memorandum or by e-mail. That is because § 230 and the court decisions make clear that an entity, and not one of its employees acting within the scope of his employment, is protected by the statute for the defamation of a third party.

#### IV. CONCLUSION

The CDA, through § 230, demonstrates congressional intent to protect employers who provide Internet service as a benefit of employment from potential liability and to encourage employers to responsibly monitor their services. Denying employers coverage under § 230 increases the likelihood of intensified electronic workplace monitoring and requires an invasion of employee rights and privacy. At the same time, employers are discouraged

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173. Spencer, *supra* note 19, at \*19.

174. *Id.*

175. SMOLLA, *supra* note 4, at § 15:23.

176. *Id.*

177. *See supra* text accompanying notes 10-11.

from providing access for their employees because of the potential liability, and thus possibly deny persons who might not otherwise be able to afford such access. Employers will not escape blame where it is due, because § 230 does not permit an ISP to escape its own defamatory actions.

With § 230, Congress struck with a broad stroke the possibility of defamation liability for ISPs when the defamatory comment originates with a third party. As the history and language make clear, the intent of Congress in drafting such broad language was to cover all potential providers in order to foster continued unregulated growth of the Internet while encouraging all providers to limit the amount of offensive material distributed. Protecting employers will further Congress's goal of protecting the e-marketplace of ideas.