INTERNET LAW — COMMUNICATIONS DECENCY ACT — TEXAS DISTRICT COURT EXTENDS § 230 IMMUNITY TO SOCIAL NETWORKING SITES. — *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843 (W.D. Tex. 2007).

With well over ten million users under the age of eighteen,[1] social networking powerhouse MySpace.com (MySpace) has been facing pressure to implement additional safety measures to protect its underage users from sexual predators.[2] Recently, in *Doe v. MySpace, Inc.*,[3] the United States District Court for the Western District of Texas held that the interactive website was not liable for failing to prevent an adult MySpace member from contacting and sexually assaulting a minor user. While the court's holding rightly absolved MySpace of legal responsibilities, its conferral of immunity under § 230 of the Communications Decency Act[4] (CDA) effectively grants social-networking websites blanket immunity against all negligence claims. Though § 230 is essential to the continued growth and development of the Internet, such a broad application of its immunity provisions goes significantly beyond the legislative intent and frustrates congressional attempts to bring this area of the law up to speed with the modern World Wide Web.

Julie Doe signed up for a MySpace account at the age of thirteen.[5] Shortly after she joined the site, Pete Solis, a nineteen-year-old MySpace user, initiated contact with Julie.[6] The two eventually agreed to meet in person, whereupon Solis sexually assaulted Julie.[7] Julie's mother, Jane Doe, then filed a complaint against MySpace alleging that the company was negligent in failing to implement reasonable security measures to prevent dangerous adult users from using its website to communicate with underage minors.[8] After removing the

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[1] *See* Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 851 n.8 (W.D. Tex. 2007) (crediting MySpace.com as the most visited website in the United States, with over 100 million users worldwide). On a monthly basis, nineteen percent of MySpace.com users are minors under the age of seventeen. Julia Angwin & Brian Steinberg, *News Corp. Goal: Make MySpace Safer for Teens*, WALL ST. J., Feb. 17, 2006, at B1.

[2] *See, e.g.*, Elizabeth P. Stedman, Comment, *MySpace, but Whose Responsibility? Liability of Social-Networking Websites When Offline Sexual Assault of Minors Follows Online Interaction*, 14 VILL. SPORTS & ENT. L.J. 363 (2007); Rebecca Porter, *Lawyers, Advocates Look to Protect Kids from Web Networking Dangers*, TRIAL, Oct. 2006, at 16, 16.

[3] 474 F. Supp. 2d 843 (W.D. Tex. 2007).

[4] 47 U.S.C. § 230 (2000).

[5] *MySpace*, 474 F. Supp. 2d at 846.

[6] *Id.*

[7] *Id.*

[8] *Id.*

case to federal court, MySpace moved to dismiss for failure to state a claim, asserting immunity under the CDA.[9]

The court began its analysis by examining the immunity provisions of the CDA. Section 230 offers two types of immunity: § 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,"[10] and § 230(c)(2) immunizes websites from liability stemming from good-faith attempts to screen objectionable material.[11] Congress hoped that § 230 would protect websites from unfair liabilities and simultaneously encourage them to adopt broader filtering and blocking technologies, thereby promoting the continued expansion and development of the Internet.[12]

Relying heavily on the Fourth Circuit's opinion in *Zeran v. America Online, Inc.*,[13] the *MySpace* court concluded that § 230(c)(1) of the CDA applied to the case at hand. *Zeran* involved the anonymous posting of crude and offensive advertisements on an online bulletin board along with the plaintiff's contact information, which caused the plaintiff to suffer death threats and severe emotional distress.[14] The plaintiff sued America Online (AOL) for negligence in failing to remove the ads after being notified of their fraudulent nature.[15] Affirming the district court's dismissal of the case, the Fourth Circuit noted that the imposition of liability in such a context would create an impossible burden, forcing website operators to thoroughly investigate every (potentially bogus) claim of defamation.[16] The court in *MySpace* analogized MySpace's allegedly negligent failure to act given the known threat of sexual predators to Zeran's claim that AOL negligently failed to remove the offensive ads after realizing the ads were fraudulent and damaging,[17] and concluded that the immunity protections granted to AOL should similarly apply to MySpace.

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[9] *Id.*

[10] 47 U.S.C. § 230(c)(1) (2000). There are thus three requirements for this type of § 230 immunity: first, the defendant must be a provider or user of an interactive computer service; second, the claim must treat the defendant as the publisher or speaker of the offensive information; and third, the offensive information must be provided by another information content provider. An "information content provider" is defined by the statute as "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" — generally speaking, a third-party user. *Id.* § 230(f)(3).

[11] *See id.* § 230(c)(2).

[12] *See id.* §§ 230(b)(1)-(4). By tying this "get out of liability free" card to good-faith attempts to filter and block offensive content, Congress hoped to encourage more websites to develop and adopt such self-regulatory technologies.

[13] 129 F.3d 327 (4th Cir. 1997).

[14] *Id.* at 329.

[15] *Id.*

[16] *Id.* at 333.

[17] *MySpace*, 474 F. Supp. 2d at 848.

Since the plaintiffs' complaint alleged negligence in failing to implement greater safety precautions,[18] a claim that in and of itself does not involve MySpace as an information content provider or distributor,[19] the court further justified its application of § 230(c)(1) by maintaining that "[n]o matter how artfully Plaintiffs seek to plead their claims, the Court views Plaintiffs' claims as directed toward MySpace in its publishing, editorial, and/or screening capacities," arguing that the heart of the claim was the sexual assault made possible by postings and communication through MySpace.[20]

In addition, the court held that any negligence claims for ineffective security or age verification measures would alternatively be barred under the self-regulation provisions of § 230(c)(2)(A), which immunizes "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be . . . objectionable."[21]

Having already decided that the negligence claims were barred under § 230's immunity provisions, the court nonetheless proceeded to analyze the claims from a common law perspective. The court found that no special relationship existed creating an affirmative duty on MySpace's part[22] and concluded that premises liability was inappropriate because the imposition of such a duty on virtual premises would "stop MySpace's business in its tracks and close this avenue of communication, which Congress in its wisdom has decided to protect."[23] The court further reasoned that virtual information carriers, like traditional carriers such as the postal service or telephone companies, are not obligated to refuse their services to unscrupulous operations or

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[18] These would most likely take the form of background checks, age or identity verification systems, or similar measures. *See* Plaintiffs' Original Petition at 9–10, *MySpace*, 474 F. Supp. 2d 843 (No. D-1-GN-06-002209).

[19] Traditional publisher or distributor cases usually involve a defamation victim suing the online bulletin board or chat room for allowing another user to post the defamatory comments. *See, e.g.*, Stratton Oakmont, Inc. v. Prodigy Services Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). In this case, however, the plaintiffs sued MySpace for failing to implement adequate safety measures, and not for the publication or distribution of any third-party-created content. *See MySpace,* 474 F. Supp. 2d at 848 ("Plaintiffs assert Section 230(c)(1) is inapplicable here because Plaintiffs have not sued MySpace for the publication of third-party content but rather for failing to implement basic safety measures to prevent sexual predators from communicating with minors on MySpace.").

[20] *MySpace,* 474 F. Supp. 2d at 849.

[21] *Id.* at 850 (quoting 47 U.S.C. § 230(c)(2)(A) (2000)).

[22] *See id.* ("Here the alleged sexual assault happened offline, after telephone conversations offline, and there is no allegation MySpace was in control of the premises where the crime occurred.").

[23] *Id.* at 851. In this way, the court linked its common law analysis back to the § 230 immunity provisions.

businesses.[24] It concluded by stating that "[i]f anyone had a duty to protect Julie Doe, it was her parents, not MySpace."[25]

Though the court correctly found that no duty had been breached, its treatment of the case as a traditional publisher case in disguise — and its consequential conferral of § 230 immunity — was erroneous. The decision in *MySpace* wrongly encourages future courts to grant broad immunity to *all* negligence claims against interactive websites. With the explosive growth of interactive websites into areas such as social networking, such broad immunity goes beyond what Congress intended in creating the CDA, and complicates attempts at much-needed legislative updates.

Unlike past defendants granted § 230 immunities,[26] MySpace was not accused of negligence in publishing or failing to remove third-party offensive speech, but rather for negligence in encouraging underage children to sign up for accounts without implementing security precautions to protect them from dangerous adult users. This is not a traditional § 230 case of online defamation; it is a case of insufficient website security. Common law negligence doctrine clearly dictates that all individuals have a duty not to act in any way that would unreasonably and foreseeably increase the risk of harm to another; a knowing creation of risk thus implies an affirmative duty to protect. MySpace was charged with failing to implement security measures given the foreseeability[27] that minors using MySpace would be targeted by sexual predators.[28] It may seem illogical to expect websites to take affirmative actions to prevent crimes if they are not required to respond after crimes have been committed. Nonetheless, that result is consistent with the legislative intent behind § 230's enactment.

Congress intended the immunity provisions to protect internet *publishers*, not interactive website operators in general.[29] Congress was attempting to protect primary publishers, such as online bulletin

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[24] *Id.*

[25] *Id.* at 852.

[26] *See, e.g.*, Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003) (granting Matchmaker.com full immunity for publishing a false personal ad provided voluntarily by a third-party user); Doe v. Bates, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006) (finding that § 230 protected service provider from liability for hosting child pornography posted by users); Chicago Lawyers' Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. 2006) (holding that the CDA protected defendant's website from liability under the Fair Housing Act for discriminatory rental advertisements posted by users).

[27] For a list of previous incidents where adult MySpace users have used the site to contact and sexually assault underage MySpace users, see Plaintiffs' Original Petition at 6–9, *MySpace*, 474 F. Supp. 2d 843 (No. D-1-GN-06–002209).

[28] *Id.* at 13–14.

[29] *See Craigslist*, 461 F. Supp. 2d at 695–97 (stressing that congressional intent and the statute's plain language imply that immunity should apply only to suits that target interactive websites in their capacity as publishers of third-party content).

boards, classifieds, and personal ads, from liability stemming from their role as publishers of information;[30] it was not attempting to safeguard companies like MySpace from attacks on its website management. Furthermore, Congress clearly stressed the importance of websites' self-regulation through the "development and utilization of blocking and filtering technologies . . . to restrict . . . children's access to objectionable or inappropriate online material."[31] In fact, as some have noted, Congress created the CDA primarily to encourage self-regulation and only secondarily to promote free speech.[32] If the CDA is interpreted as granting blanket immunity for all negligence suits against interactive websites, websites will lose their legal incentives to undertake *any* self-regulation and will have little motivation to invest heavily in research and development towards better security technologies.[33]

Although the *MySpace* court tried to justify its application of § 230 by stressing the broad applicability of the CDA,[34] it cited only to cases that dealt with the "*publication* of third-party content."[35] By subsuming the plaintiffs' negligence claims within the established § 230 publisher immunity, the court's opinion encourages future courts to automatically grant § 230 immunity to *all* negligence claims against interactive websites without reviewing the actual content of the plaintiffs' claims.[36] For example, in *Doe v. SexSearch.com*,[37] a recent district court case involving the applicability of CDA immunity to an online interactive dating service, the plaintiff explained that his claim

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[30] Legislative history suggests that § 230 was in part a congressional response to the New York Supreme Court's ruling in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), that an Internet service provider that regulated the content of interactive bulletin boards would be liable for the effects of a third-party user's defamatory posting. *See* Keith N. Hylton, *Property Rules, Liability Rules, and Immunity*, 87 B.U. L. REV. 1, 37 n.160 (2007) ("The House Conference Report on the CDA stated that one of the 'specific purposes' of Section 230 was 'to overrule *Stratton-Oakmont v. Prodigy*.'" (quoting H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 124, 208)).

[31] 47 U.S.C. § 230(b)(4) (2000).

[32] *See* Cara J. Ottenweller, Note, *Cyberbullying: The Interactive Playground Cries for a Clarification of the Communications Decency Act*, 41 VAL. U. L. REV. 1285, 1318–25 (2007).

[33] *Cf. Craigslist*, 461 F. Supp. 2d at 697 (pointing out that even within publishing, immunity cannot be limitless as "it seems rather unlikely that, in enacting the CDA and in trying to protect Good Samaritans from filtering offensive conduct, Congress would have intended a broad grant of immunity for [interactive websites] that do *not* screen any third party content whatsoever").

[34] *See MySpace*, 474 F. Supp. 2d at 849 ("Nothing on the face of the statute supports Plaintiffs' narrow interpretation that the CDA's immunity applies only to cases involving defamation and defamation-related claims.").

[35] *Id.* (emphasis added).

[36] In the case of *MySpace*, an actual review of the plaintiffs' negligence claims might have included a feasibility assessment of alternative age verification systems, a cost-benefit analysis of the additional measures compared to the likelihood of assault, and analogies to the First Amendment protections in adult pornographic website access.

[37] 502 F. Supp. 2d 719 (N.D. Ohio 2007).

was not based on the website's role as a publisher of information, stressing that "[i]t [was] the fact that a minor was on the SexSearch website, and not the content of the minor's profile that [was] at issue."[38] Instead of evaluating the claim as pled, the *SexSearch* court followed the example of *MySpace* and concluded that the plaintiffs were simply attempting to plead around the CDA.[39] Even if *SexSearch* and, arguably, the majority of interactive website negligence cases *are* actually publishing cases in disguise, it is imperative that courts continue to review the claims as pled, because even if many claims are merely exercises in evasive pleading, some will contain viable alternative claims.[40]

This point is especially important given the heart of the *MySpace* plaintiffs' claims: the protection of underage minors. As social networking websites target increasingly younger audiences, the need for security will continue to increase. Last year, Disney paid over $350 million to acquire ClubPenguin.com (Club Penguin), a social networking site specifically designed for pre-teens.[41] Attracting members as young as six years old, the site has prompted Illinois Attorney General Lisa Madigan to introduce an Internet education safety bill to the state legislature,[42] warning that "[t]hese Web sites provide a false sense of security because they look and feel non-threatening. But we know that predators can hide behind fake identities and even fuzzy penguins if they want to gain access to our children."[43] Concerned parents could bring attractive nuisance or affirmative creation of risk claims against sites like Club Penguin for knowingly operating a website that encourages toddlers to interact with strangers, even before an explicit crime or predator emerges.

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[38] *Id.* at 727. The plaintiff alleged that he had mistakenly had sex with a minor he had met through the online dating service because the minor portrayed herself as an adult.

[39] *See id.* ("In the present action, Plaintiff attempts to do the same thing as the plaintiffs in *Doe v. MySpace*. . . . At the end of the day, . . . Plaintiff is seeking to hold SexSearch liable for its publication of third-party content and harms flowing from the dissemination of that content.").

[40] For example, future plaintiffs could charge MySpace with an attractive nuisance claim or negligent failure to warn. *See* Stedman, *supra* note 2, at 392–94 (discussing how plaintiffs in *MySpace* could have built common law claims based on MySpace's creation of a minor-friendly and child-predator-friendly site and its failure to warn parents of the history of child predator crimes associated with the website).

[41] Josh Friedman, *Disney Adds Networking Site to Stable*, L.A. TIMES, Aug. 2, 2007, at C2. As advertised on its website, Club Penguin is "an online world for kids where they [can] safely play games, have fun and interact." About Club Penguin, http://www.clubpenguin.com/company/about.html (last visited Dec. 8, 2007).

[42] Press Release, Ill. Att'y Gen., Attorney General Madigan Introduces New Internet Safety Training for Law Enforcement on Websites Targeting Children (July 31, 2007), *available at* http://www.illinoisattorneygeneral.gov/pressroom/2007_07/20070731.html.

[43] *Id.*

Although courts have done well in interpreting § 230 immunity as it applies to traditional publishers,[44] websites like MySpace and Club Penguin have evolved dramatically from the online bulletin boards and chat rooms of the past.[45] Some argue that the most efficient and effective means of dealing with these new areas of cyberspace is through legislative regulation.[46] Yet, by extending federal CDA protection to all negligence claims, the *MySpace* court precluded legislative responses from state and local officials.[47] Though federal legislators can still step in and amend the CDA to account for the changing nature of interactive websites, the speed of the Internet's development outpaces that of congressional legislation.

In fact, with their legal and legislative options limited by cases like *MySpace*, state[48] and federal[49] officials have been forced to pursue creative alternatives in dealing with the threat of online sexual preda-

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[44] While *Zeran* expanded the reach of § 230, granting "federal immunity to *any* cause of action that would make service providers liable for information originating with a third-party user of the service," Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (emphasis added), many courts have reined in such seemingly limitless immunity. *See, e.g.*, Fair Housing Council v. Roommates.com, LLC, 489 F.3d 921, 925 (9th Cir. 2007) (holding that a website cannot claim immunity if it is "responsible, *in whole or in part*, for the creation or development of information provided through the Internet") (quoting 47 U.S.C. § 230(f)(3) (2000)); Anthony v. Yahoo! Inc., 421 F. Supp. 2d 1257, 1262 (N.D. Cal. 2006). *See generally* Karen Alexander Horowitz, *When is § 230 Immunity Lost?*, 3 SHIDLER J.L. COM. & TECH. 14 (2007) (discussing recent cases concerning limits of § 230 immunity). In fact, the Eleventh Circuit has gone so far as to suggest that the insertion or alteration of a single word that adds emphasis to an online text without altering its meaning could be enough to remove the publisher's § 230 immunity. *See* Whitney Information Network, Inc. v. Xcentric Ventures, LLC, 199 F. App'x 738, 743–44 (11th Cir. 2006).

[45] *Cf.* Jonathan Zittrain, *The Rise and Fall of Sysopdom*, 10 HARV. J.L. & TECH. 495, 498–501 (1997) (describing the evolution of online chatrooms and newsgroups from orderly, close-knit communities to chaotic mob scenes due to massive internet growth).

[46] *See, e.g.,* Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1311 (2002) (explaining the various ways in which rules are helpful and necessary given the development of cyberspace and arguing that "the courts' deferral of important Internet issues to Congress can help to foster greater debate and accountability on how the Internet is regulated").

[47] Under § 230(e)(3), "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). *See* Jack M. Balkin, *Virtual Liberty: Freedom To Design and Freedom To Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2097–98 (2004) (lamenting that § 230(e)(3) preempts state laws concerning rights within virtual worlds).

[48] Attorneys general from eight states formed a campaign calling upon MySpace to cross-reference the names of its users with sex-offender registries. Press Release, N.C. Att'y Gen., AG Cooper Seeks Info About Possible Thousands of Sex Offenders on MySpace (May 14, 2007), *available at* http://www.ncdoj.com/DocumentStreamerClient?directory=PressReleases/&file=MySpace%20letter%202.pdf.

[49] Constituent fears about child predators led to the introduction of the Keeping the Internet Devoid of Sexual Predators (KIDS) Act of 2007, S. 431, 110th Cong. (2007), which would match the membership of social networking sites such as MySpace against the National Sex Offender Registry, and to the proposed creation of an Office of Internet Safety and Public Awareness within the Federal Trade Commission to protect against threats to juveniles, particularly by cyber-predators. *See* Bennet Kelley, *Spyware and Data Security Bills Advance*, 11 J. INTERNET L., Aug. 2007, at 25, 26.

tors. Facing subpoenas and social pressure, MySpace eventually agreed to hand over information from the user accounts of registered sex offenders[50] and to implement additional security mechanisms to prevent minors under the age of fourteen from opening a MySpace account.[51] However, these measures are strictly voluntary and nonbinding; other social networking websites will not be held accountable for failing to adopt similar protections.[52] To clarify the landscape for future courts, website operators, and concerned parents, legislative action is still needed.

When the CDA was enacted over ten years ago, the chat room was the most interactive of Internet websites. Today, social networking websites essentially offer a secondary online life. The Internet now provides virtual worlds in which children as young as thirteen[53] can meet complete strangers online and quickly proceed to become friends, get "married," and even raise virtual children — the possibilities seem endless.[54] Such sites may have been created with idyllic intentions, but they have since spawned virtual terrorist attacks and mob riots, as well as defamation campaigns that have cost real-life individuals profits, reputations, and, in extreme cases, their lives.[55] Congress could not have intended to give interactive websites the freedom to act negligently, and perhaps even recklessly, without any restraints. Although the *MySpace* decision rightly emphasized the importance of publisher immunity as valuable and essential to the growth and development of the Internet, such immunity cannot be extended indefinitely. Section 230 of the CDA was created specifically to protect websites in their publishing capacity; broadly applying it to cover all negligence claims misinterprets congressional intentions and delays crucial regulations.

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[50] Ken Dixon, *MySpace Gives Offender Info to States*, CONN. POST, May 22, 2007, at A1.

[51] MySpace now offers a tool for parents to monitor a minor's profile, thus allowing parents to catch younger children who are lying about their ages. Julia Angwin, *MySpace Moves To Give Parents More Information*, WALL ST. J., Jan. 17, 2007, at B1.

[52] In fact, the *MySpace* decision did not involve an analysis of the level of "good faith" necessary to trigger the self-regulation provisions. As a result, even a knowingly ineffective security provision would seem to be sufficient for § 230 immunity and bar claims from future plaintiffs.

[53] *See* Terms of Service, Second Life, http://secondlife.com/corporate/tos.php (last visited Dec. 8, 2007) (prohibiting Second Life users younger than thirteen years old).

[54] *See* Seth Kugel, *A House That's Just Unreal*, N.Y. TIMES, Aug. 9, 2007, at F1 (explaining the world of Second Life, a virtual universe with its own money, property, and commonplace conduction of whirlwind marriages and divorces).

[55] *See* Erin Anderssen, *Frontier Justice: Can Virtual Worlds Be Civilized?*, GLOBE & MAIL (Toronto), Sept. 8, 2007, at F4 (surveying virtual crimes in online universes, including a case in which a disgruntled user was charged with murder for stomping a fellow player to death in real life). Recently, a thirteen-year-old female MySpace user committed suicide after an online relationship with a user claiming to be a sixteen-year-old boy turned sour. After her death, it was revealed that a the boy was actually a former friend's mother. *See* David Hunn & Joel Currier, *Law Lags as Taunts Ruin Lives*, ST. LOUIS POST-DISPATCH, Nov. 19, 2007, at B1.