PRIOR RESTRAINT 2.0: A FRAMEWORK FOR APPLYING SECTION 230 TO ONLINE JOURNALISM

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INTRODUCTION

In many ways, *New York Times Co. v. United States*[1] represented the apogee of the protections afforded the press by the United States Supreme Court. The Court's decision, affirming the essential role that newspapers play as a check on the power of government and rejecting attempts by the government to block publication of the Pentagon Papers, was a breathtaking conclusion to a tense constitutional standoff.

Forty years later, newspapers share the stage with a host of new digital media platforms. And while it is true that the traditional print medium may be challenged in an economic sense, the opportunities for news journalism have never been more dynamic.

No longer limited by the confines of the printed page, digital technology allows news organizations to provide accounts of greater depth, allow real-time access to official source documents, and provide links related to stories or information—all on a single digital page. Readers, for their part, are no longer limited to mailing letters

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1. N.Y. Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713 (1971).

to the editor that may or may not be published. Rather, they can comment in real time and engage in dialogue with other readers or the reporters themselves. Sometimes readers can turn into reporters by offering tips or even their own material—audio, video, and text from various news events they happened to catch and "cover" on their cell phone camera.[2]

Section 230 of the Communications Decency Act[3] has helped spur the growth of such user-generated content on news websites. The law provides immunity to website operators for user-generated content that is "created" or "developed" by third parties over the Internet.[4] Given that digital news websites receive some of the highest volumes of user-generated content, Section 230 has been vital in assuring that public discussion of public issues remains "robust, and wide-open."[5]

However, just like the government's efforts to block publication of the Pentagon Papers forty years ago presented a grave threat to the ability of a free press to report on issues of public importance, newspapers today seeking to make full use of digital technologies face a chilling effect from possible civil liability for all kinds of news content posted on their Internet websites.

The contours of Section 230 have yet to be fully developed in one important respect for journalism. While news websites can—and do—serve as passive conduits for user-generated content, news websites also actively report and post information authored by third parties. For example, reporters may link to original source material or to related websites that provide additional information or statements about the subject of a news account. Reporters may also post or link to supporting audio or video or photo sources created by third parties. In this Essay, we label this category of content "secondary user-generated content," by which we mean information created or

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2. *See, e.g.*, *Protests in Middle East, North Africa*, CNN iREPORT, http://ireport.cnn.com/ir-topic-stories.jspa?topicId=555448 (last visited Mar. 31, 2011). CNN's iReport, for example, allows individuals to post videos related to current events to CNN's website. This page invites viewers to share their experiences stemming from political protests in the Middle East and North Africa during the winter and spring of 2011. *See also* THE LEDE, thelede.blogs.nytimes.com (last visited Mar. 31, 2011) (describing itself as a "blog that remixes national and international news stories," is designed to "draw readers in to the global conversation about the news," and encourages readers to take part in blogging by submitting video and photographs).

3. Communications Decency Act of 1996, 47 U.S.C. § 230 (2006).

4. *Id.* § 230(c)(2).

5. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

developed by third parties but linked to or posted by the reporter or news website.

There is scant case law testing the boundaries of Section 230 immunity to protect news media who may themselves link to, or post, secondary user-generated content. But the boundaries of Section 230 should protect the use of such secondary user-generated content. The public benefits from journalists who use the wealth of content available online to provide more in-depth reporting to arm readers with more information and context. And so long as the information posted by journalists was authored by third parties for use over the Internet, there is no reason to muzzle and cripple the promise of more in-depth and expansive journalism by failing to extend the immunity to such newsgathering activities.

The text of Section 230, its stated policy of preserving "the vibrant and competitive free market that presently exists for the Internet,"[6] and the broad interpretation of the statute by federal and state courts, all support assuring that newsgathering activities receive the full panoply of protection when they include information that is authored by a third party for use over the Internet.

I. UNDERSTANDING SECTION 230

In 1995, with the Internet in its infancy, the decision of a New York state trial court spurred Congress into action, resulting in 47 U.S.C. § 230. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[7] a securities firm and its president brought defamation claims against Prodigy, an interactive computer services company, and two anonymous defendants who had posted comments on one of Prodigy's web-based "bulletin boards."[8]

The plaintiffs alleged that Prodigy should be considered the original publishers of the allegedly defamatory comments, even though they had been written and posted by third parties, because Prodigy had a widely promoted policy of reviewing and, if necessary, editing messages posted on its bulletin boards.[9] The court agreed, holding that Prodigy's policy of controlling content on its

6. Communications Decency Act § 230(b)(2).

7. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063-94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act § 230.

8. *Id.* at *1.

9. *Id.* at *2.

website, even when that content was produced by a third party, opened the company up to direct liability for defamation.[10]

Thus, Internet companies found themselves in a seemingly untenable position—*either* take some role in controlling the content on their website and risk significant legal liability for content they did not write *or* take a wholly hands-off approach and lose all control over the content on their website. The New York state judge expressed little concern for this conundrum, opining: "For the record, the fear that this Court's finding of publisher status for Prodigy will compel all computer networks to abdicate control of their bulletin boards incorrectly presumes that the market will refuse to compensate a network for its increased control and the resulting increased exposure."[11]

Congress was less sanguine. By February of 1996, it had passed Section 230 in direct response to *Stratton Oakmont*.[12] Recognizing the deleterious effects of exposing Internet services companies to direct liability for content "provided by" third parties, and wanting to encourage those companies to continue to exercise editorial control over their websites,[13] Congress enacted Section 230 to provide broad immunity from liability[14] to companies like Prodigy and America Online that published content provided by third parties, even when the companies reviewed or otherwise edited that content. As the first federal appeals court to review Section 230 in depth said,

> Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications

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10. *Id.* at *5.

11. *Id.* (citations omitted).

12. *See* H.R. Rep. No. 104-458 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, at 128; *see also Developments in the Law: The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1600 (1999) (noting the CDA overruled *Stratton Oakmont* in order to grant Internet service providers broad immunity from liability for third-party content).

13. It should not be forgotten that Section 230 was passed as part of the Communications *Decency* Act (emphasis added). *See generally* MARCIA S. SMITH & AMANDA JACOBS, CONG. RESEARCH SERV., RS21328, INTERNET: STATUS REPORT ON LEGISLATIVE ATTEMPTS TO PROTECT CHILDREN FROM UNSUITABLE MATERIAL ON THE WEB 1 (2003) (identifying the Communications Decency Act as one of the three major laws passed by Congress primarily to protect children from unsuitable Internet content).

14. *See, e.g.*, Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 419 (1st Cir. 2007) (stating that "Section 230 immunity should be broadly construed.").

> of others represented [is], for Congress, simply another form of intrusive government regulation of speech. 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.[15]

In its key provision, Section 230 provides: "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."[16] The statute further defined an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[17] Finally, an "information content provider" is defined 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."[18]

For the purposes of this Essay, Section 230 contains two key provisions relevant to the analysis of secondary user-generated con-

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15. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997). Judge J. Harvie Wilkinson III, a former newspaper editor and strong First Amendment advocate, authored this landmark opinion. *See Biographical Information of Judge J. Harvie Wilkinson III*, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, http://www.ca4.uscourts.gov/JudgesBio/JHW_bio.htm (last visited Apr. 4, 2011). Judge Wilkinson's majority opinion in *Zeran* set the tone for all future Section 230 cases, interpreting the statute primarily as an effort to preserve a wide-open Internet and focusing less on what, ironically, may have been Congress's true intent—encouraging Internet companies to edit and control content on their websites. Zeran, 129 F.3d at 330 (indicating that Congress's main purpose for creating Section 230 immunity was to protect free speech on the Internet); *see also* Batzel v. Smith, 333 F.3d 1018, 1028 (9th Cir. 2003) (noting that "[a]s a result of this apparent tension, some commentators have suggested that the Fourth Circuit in *Zeran* imposed the First Amendment goals on legislation that was actually adopted for the speech-restrictive purpose of controlling the dissemination of content over the Internet.").

16. Communications Decency Act § 230(c)(1).

17. *See id.* § 230(f)(2). As the Section 230 case law has developed, courts have uniformly treated websites as a "provider or user of an interactive computer service," even when that website does not actually provide Internet access or service to users. *See also Batzel,* 333 F.3d at 1030 (stating that the website of a newspaper or television station would qualify as a provider or user of an "interactive computer service" for the purposes of Section 230).

18. Communications Decency Act § 230(f)(3).

tent. First, to be considered an information content provider under Section 230, the third party must have either created or developed the underlying *information* that is the subject of the legal claim.[19] Second, this information must have been provided by the information content provider to the news website that serves as a "provider or user of an interactive computer service."[20]

The vast majority of user-generated content (e.g., online comments to news stories written and posted by readers of the newspaper's website, or classified advertisements written and posted by readers in the newspaper's online classified section) will clearly satisfy these two provisions. This kind of user-generated content is, of course, created or developed by the user, and the user then provides it to the newspaper website by posting it or submitting it.

The harder question, and the focus of this Essay, is how Section 230 should treat secondary user-generated content. This Essay argues, and the statutory text and case authorities support, that Section 230 should not be applied any differently in this situation than it is in the pure user-generated context described above.

II. APPLYING SECTION 230 TO SECONDARY USER-GENERATED CONTENT

In today's hyper-connected world, a newspaper's website is increasingly the first (or only) stop for readers of that newspaper looking for either breaking news or just the general news of the day.[21] On a newspaper's website, a story that ran on the front page of the newspaper's print edition about a major local trial may be accompanied by video of the key testimony, or it may hyperlink to the entire police report, including crime scene photos, and perhaps

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19. *See generally* David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 434 (2010) (explaining that courts will determine who is responsible for the content by assessing the third party's relationship to and interaction with the content itself, presuming that the third party is the original source of the content).

20. Fair Hous. Council v. Roommates.com, 521 F.3d 1157, 1165 (9th Cir. 2008) (relying on the standard set forth in *Zeran*, and holding that even if certain online information originated with a user, if the information content provider helped "at least 'in part'" to develop the information on an interactive online profile, the provider will still be held liable under Section 230).

21. *See generally Americans Spend More Time Following the News*, PEW RESEARCH CTR., 5 (Sept. 12, 2010), http://people-press.org/reports/pdf/652.pdf.

include a podcast from the reporter giving color and context to the main story. Most newspaper websites now also provide links to websites created by third parties, and many post audio or video of interviews with sources, or post copies of documents provided by a reporter's sources.[22]

Though the question has not been squarely addressed by the courts, the text of Section 230, the policy behind the law, and the many opinions that have interpreted it all indicate that secondary user-generated content deserves the same protection as pure user-generated content.

As outlined previously in Section II, Section 230 contains two key requirements relating to the protection of secondary user-generated content: (a) whether a third party created or developed the underlying information that is the subject of the legal claim; and (b) whether the third party at issue provided that information to a provider or user of an interactive computer service.

A. "Creating" or "Developing" Secondary User-Generated Content

Secondary user-generated content will, by definition, almost always have been created or developed by a third party. Whether it is a blog to which the news website links, pictures taken by a witness at the scene of an accident with a cell phone camera, or other original source material, all such content is created or developed by someone other than the news website.

The key word in this part of Section 230 is "information." The statute protects "*information* provided by another information content provider," not simply "content."[23] Thus, when a news website links to or posts secondary user-generated content, the link or post is *not* the information that is covered by Section 230. Rather, the underlying statement or data contained in the link or post is the information.

The closer question, and the question courts have more frequently wrestled with, is whether a news website becomes the information content provider and loses Section 230 protection when it takes information from a third party and posts it on the website in a

22. *See, e.g.*, N.Y. TIMES VIDEO LIBRARY, http://video.nytimes.com (last visited Apr. 20, 2011); WSJ BLOGS, http://blogs.wsj.com (last visited Apr. 20, 2011).

23. Communications Decency Act § 230(c)(1) (emphasis added).

slightly altered or edited form. The answer, generally, has been no, as courts have chosen to adopt a narrow view of information content provider.[24]

In *Batzel v. Smith*, for example, the United States Court of Appeals for the Ninth Circuit held that Section 230 immunity extended to the operator of a website and an electronic newsletter who published an edited version of an e-mail he had received from a third party that contained allegedly defamatory material, if the operator had the reasonable belief that the e-mail was provided in order to be published.[25] The plaintiff had argued that by selecting the e-mail for publication (rather than having the third party simply post the content) and by editing the e-mail before publishing it, the defendant website operator should lose the protection of Section 230 because he had become a content provider.[26] The Ninth Circuit disagreed, holding that "[t]he 'development of information' therefore means something more substantial than merely editing portions of an e-mail and selecting material for publication."[27]

Perhaps the fullest explanation of when a website becomes a developer for the purposes of Section 230 came in a more recent Ninth Circuit case, *Fair Housing Council of San Fernando Valley v. Roommates.com*,[28] which involved a housing website that asked subscribers to fill out a questionnaire that asked, among other things, the subscriber's sex, sexual orientation, and whether the subscriber had a preference as to the sex or sexual orientation of his or her potential roommates. The Ninth Circuit, sitting en banc, held that the website became the content developer and lost Section 230 protection by soliciting—in fact, requiring—information from subscribers that

24. *See* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003) (adopting "a relatively restrictive definition of 'information content provider'" and holding that a dating website had not created or developed the content at issue even though the content was provided in response to the website's online questionnaire); *see also* Atlantic Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690, 699 (S.D.N.Y. 2009) (holding that Section 230 applied to a website that linked to downloadable copies of copyrighted music on third party websites); Parker v. Google, Inc., 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006) (holding that providing users with links to message boards did not make Google an "information content provider"), *aff'd*, 242 F. App'x 833 (3d Cir. 2007).

25. Batzel v. Smith, 333 F.3d 1018, 1034 (9th Cir. 2003).

26. *Id.* at 1031.

27. *Id.*

28. 521 F.3d 1157, 1161–62 (9th Cir. 2008).

violated federal and state laws governing housing discrimination.[29] In so doing, the Court held:

> It's true that the broadest sense of the term "develop" could include the functions of an ordinary search engine—indeed, just about any function performed by a website. But to read the term so broadly would defeat the purposes of section 230 by swallowing up every bit of the immunity that the section otherwise provides. At the same time, reading the exception for co-developers as applying only to content that originates entirely with the website . . . ignores the words "development . . . in part" in the statutory passage "creation *or development* in whole *or in part*." 47 U.S.C. § 230(f)(3) (emphasis added). We believe that both the immunity for passive conduits and the exception for co-developers must be given their proper scope and, to that end, we interpret the term "development" as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.[30]

Thus, only in those rare cases where the website "contributes materially" to the allegedly illegal portion of the content, the website becomes a "co-developer" and loses Section 230 protection.[31]

B. "Providing" Secondary User-Generated Content

The harder textual hurdle to overcome in applying Section 230 to news websites' linking to or posting secondary user-generated content is the requirement that the information at issue be provided

29. *Id.* at 1166 (citing Communications Decency Act § 230(f)(3)).

30. *Id.* at 1167–68.

31. *Cf.* Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 421 (1st Cir. 2007) (considering, though not adopting, a proposed "culpable assistance" exception to Section 230).

by another information content provider.[32] In the vast majority of early Section 230 cases, this provision was not at issue because the content provider actually posted or submitted the information at issue in the case to the interactive computer service.[33] In the case of secondary user-generated content, however, the news website is posting the link or content itself.

In *Batzel*, the Ninth Circuit closely examined this provision of Section 230 in deciding whether the third party who had sent an e-mail to the defendant website operator, but testified that he never expected it would be posted on the Internet, had provided the information to the defendant.[34] The court recognized that the term "provided," as used in Section 230, contained the implicit requirement that the information was provided "*for use on the Internet* or other interactive computer service."[35]

> One would not say, for example, that the author of a magazine article "provided" it to an interactive computer service provider or user by allowing the article to be published in hard copy off-line. Although such an article is available to anyone with access to a library or a newsstand, it is not "provided" for use on the Internet.
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> The result in the foregoing example should not change if the interactive computer service provider or user has a subscription to the magazine. In that instance, the material in question is "provided" to the "provider or user of an interactive computer service," but not in its role as a provider or user of a computer service.[36]

Thus, a website operator who receives a paper letter in the mail from a friend "cannot be said to have been 'provided' the information in his capacity as a website service," in the Ninth Cir-

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32. *See* Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1) (2006).

33. *See, e.g.*, Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 534 (E.D. Va. 2003) (discussing an instance where the content provider was a third party who posted harassing comments on the interactive service provider's website), *aff'd*, No. 03-1770, 2004 WL 602711 (4th Cir. Mar. 24, 2004) (per curiam).

34. Batzel v. Smith, 333 F.3d 1018, 1032–34 (9th Cir. 2003).

35. *Id.* at 1033 (emphasis in original).

36. *Id.* at 1032–33.

cuit's view.[37] Rather, the Ninth Circuit requires that the information in question must have been provided "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.'"[38]

The decision whether a particular piece of information was provided under circumstances that meet the *Batzel* test is, of course, a case-by-case analysis.[39] Thus, the nature of the secondary user-generated content becomes crucial to the Section 230 analysis.

III. ANALYZING PARTICULAR CATEGORIES OF SECONDARY USER-GENERATED CONTENT

To guide our analysis of news websites' use of particular kinds of secondary user-generated content, it might be helpful to imagine a typical news scenario: the local newspaper has published a wide-ranging story accusing a local politician of fundraising misdeeds. On the newspaper's website, not only is the story itself posted, but so too is a variety of related stories and links intended to provide context and color to the main story. The politician is furious with the story and quickly files a defamation suit against the newspaper based on some of the additional material the newspaper posted on the website.

A. Links to a Blog Written by a Local Gadfly

The story first came to light on the blog of a local "fair election" activist who had been claiming for months that he knew of election law violations committed by the politician. On the newspaper's website there is a link to one of those posts. The newspaper's reporter had talked to the activist (and quoted him in the story), but the activist never asked the reporter to link to his blog.

In this case, there is no question that the information at issue—the initial blog post—was created or developed by the activist, not the newspaper, and that the newspaper did not become a

37. *Id.* at 1033.

38. *Id.* at 1034 (quoting Communications Decency Act § 230(c)(1) (2006)).

39. In fact, the *Batzel* court remanded the case back to the district court for further factual findings as to whether the information was "provided" as defined by the appellate court's newly minted test. *See id.* at 1034–35.

"co-developer" simply by posting a link to it. In *Atlantic Recording Corp. v. Project Playlist, Inc.*, for example, a federal district court held that a website that simply provided links to songs available for downloading on other third party websites was immune under Section 230.[40] This scenario is little different.

The second question is: Did the activist "provide" the information to the newspaper website, or, to use the *Batzel* test, was the information provided "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'"?[41]

Neither *Atlantic Recording Corp.* nor *Parker v. Google, Inc.*, which dealt specifically with the issue of linking to a third party's information, analyzed the question of whether the information had been "provided," and *Batzel* is distinguishable because in that case the third party affirmatively sent the information to the website operator, albeit not expecting it to be published online. Nonetheless, this scenario fits neatly into the *Batzel* test.

Most importantly, the secondary user-generated content linked to by the news website was *already posted on the Internet*. In other words, the information—the blog post—had already been "provided for publication on the Internet," albeit on a different website. The decision by the newspaper to select that posting and link to it is, in fact, no different than the decision by the website operator in *Batzel* to select one particular e-mail for publication on his website, a decision which the Ninth Circuit said was exactly the kind of decision that is protected by Section 230.[42]

Now imagine that the newspaper, instead of linking to the blog, quotes the blog in the story on the website and clearly attributes it to the blog. Does this change the analysis?

Again, *Batzel* provides a useful framework. The website operator in *Batzel* did not simply copy in its entirety the e-mail he

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40. Atl. Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690, 701–02 (S.D.N.Y. 2009); *see also* Parker v. Google, Inc., 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006) (holding that providing users with links to message boards did not make Google an "information content provider"), *aff'd*, 242 F. App'x 833 (3d Cir. 2007).

41. *Batzel*, 333 F.3d at 1034.

42. *See id.* at 1032 (stating that "[t]he scope of the immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance.").

had received.[43] Rather, he edited the content of the e-mail and added a "moderator's message" further explaining the e-mail.[44] Nonetheless, the Ninth Circuit held that Section 230 applied.[45] So too should it apply in our scenario, assuming that the quotations attributed to the blog are substantially fair and accurate.[46]

Of course, the risk to the newspaper in quoting the blog rather than simply linking to it is that the newspaper itself may, in some way, add to or create tortious language where it did not exist before by, for example, misquoting the blog or quoting it so out of context that the meaning changes. In that case, the newspaper may lose Section 230 immunity under *Roommates.com* if a court were to find that the newspaper "materially contribute[ed] to [the post's] alleged unlawfulness."[47]

B. Links to Official Documents or Business Records Contained in an Online Database

In addition to posting links to the activist's blog, the news website also posted links to documents about the politician found in an online database maintained by the state election commission. The politician believes that some of the material in those documents constitutes a tortious invasion of privacy.[48]

For the same reasons outlined above, Section 230 should plainly provide immunity in this case. The election commission reports, and the information contained in them, were created or developed by third parties, not the newspaper, and, in fact, the

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43. *See id.* at 1022.

44. *Id.*

45. *Id.* at 1034.

46. In this scenario, Section 230 immunity becomes similar to the widely recognized "fair report privilege" outlined in the Restatement. RESTATEMENT (SECOND) OF TORTS § 611 (1977) (stating that "[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.").

47. *See* Fair Hous. Council v. Roommates.com, 521 F.3d 1157, 1167–68 (9th Cir. 2008).

48. *See, e.g.*, RESTATEMENT, *supra* note 46. As previously mentioned, a defamation claim arising from hyperlinks to the records of a public agency would almost certainly fail because of the fair report privilege.

newspaper did nothing more than link to them.[49] Moreover, this information is already posted online, and therefore has been provided for publication on the Internet.

C. Links to Hard Copies of Law Enforcement Reports

In the course of its reporting, the newspaper received from a source a hard copy of the investigative file of the state law enforcement agency, which had investigated the charges against the politician. The file was not available anywhere online until the newspaper uploaded it to the paper's website and linked to it in the online story.

Neither the policy behind Section 230 nor the case law interpreting it provides clear support to give the news website immunity under Section 230 for these links. First, the linked documents may run afoul of *Batzel*'s requirement that the secondary user-generated content must have been "provided" to the website; in other words, they were provided "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.'"[50] Unlike the previous scenarios—or the information in *Batzel* or *Parker*—the law enforcement agency completing the linked reports had no expectation that they would be posted on the Internet.

Moreover, Section 230 was not intended to provide a general immunity for information posted on Internet websites.[51] Even given its broadest reading, Section 230 was simply intended to foreclose "tort liability on service providers for the [Internet] communications of others."[52]

But change the scenario slightly. Now, the source who leaked the investigative reports—and who also wrote them—is told by the reporter that he is seeking information on a story to be posted on the newspaper's website. In response to that request, the source hands the reporter hard copies of the file.

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49. Even if the newspaper repackaged the data contained in the database and posted it on its website, this is still far short of the "co-developer" standard set out in *Roommates.com*, assuming, of course, that the repackaged data was accurate.

50. *Batzel*, 333 F.3d at 1034.

51. *See* Communications Decency Act of 1996 § 230(b) (2006); *cf.* S. REP. NO. 104-230, at 172 (1996) (Conf. Rep.) (indicating that Section 230 is narrower than general immunity for information posted online).

52. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

This is a much closer question because *Batzel* does not provide a clear answer for whether the source "provided" the information to the reporter. On the one hand, the court in *Batzel* seemed to make a distinction between sending the information via an e-mail or a letter.[53] The court said that a website operator who receives a "snail-mail" letter "cannot be said to have been 'provided' the information in his capacity as a website service."[54]

And yet, in our scenario, the newspaper is receiving the equivalent of the snail-mail letter in its capacity as a website operator, since it expressly told the source that the information was to be used on the website. In fact, in a footnote responding to the dissent, the *Batzel* majority said,

> Under the partial dissent's theory, for example, content that is sent to an interactive service provider or user labeled "for consideration for inclusion on your website" would not be "information provided by another," if the website operator makes selection decisions amongst the material submitted. Yet, almost any speaker of the English language would agree that the content *was* "provided" to the website by the third party.[55]

As a policy matter, this seems exactly right, and it should not matter what mechanism the source used to transmit the information that he *knows* is going to be posted on the Internet. The information (i.e., investigative reports) was provided to the newspaper so that it could be posted on the Internet, and, therefore, Section 230 should apply even if it was delivered via horse and buggy. Newspapers may well choose to take steps to obtain such acknowledgements from third-party sources to show that they reasonably believed the information was intended for publication on the Internet.

D. Video Clip of Interview with the Key Source

Finally, the newspaper posts a video clip of the reporter interviewing a key source for the story (a former aide who covered

53. *Batzel*, 333 F.3d at 1033.
54. *Id.*
55. *Id.* at 1033 n.20 (emphasis in original).

up the transactions in question). The source is told before the interview that he is being videotaped so the whole interview can be posted on the newspaper's website.

For the first time, we are faced with the question of whether the interview was created or developed by the newspaper or the source. In short, is this more like *Atlantic Recording Corp.*, where the website simply linked to content created by others, or *Roommates.com*, where the website actually forced the subscribers to provide information that violated housing discrimination laws?

The answer probably depends on what exactly was said by both the reporter and the source. One could imagine, for example, a bizarre scenario in which the reporter asked a question which forced the source to respond with a defamatory statement.[56] In a typical interview, however, the reporter will ask a series of open-ended questions seeking to elicit the story, and the source will answer those questions as he or she sees fit.

In this typical case, again assuming the source reasonably expects that the interview is to be posted on the Internet, Section 230 should apply. It is well settled that websites that provide "neutral tools" to carry out their purposes do not become developers simply because a third-party uses those tools in an unlawful way.[57] Similarly, where a reporter asks a source questions that do not require an unlawful answer, the reporter and his or her newspaper should not become a developer for the purposes of Section 230, even if the questions are answered in an unlawful way.

IV. CONCLUSION

Just as surely as the Supreme Court stepped forward in 1971 to affirm the time-honored rule of law that a prior restraint is pre-

56. The paradigmatic and timeworn example being: "When did Politician *X* stop beating his wife?"

57. Fair Hous. Council v. Roommates.com, 521 F.3d 1157, 1169 (9th Cir. 2008); *see also* Chi. Lawyers' Comm. v. Craigslist, Inc., 519 F.3d 666, 671–72 (7th Cir. 2008) (stating that "[n]othing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination; for example, craigslist does not offer a lower price to people who include discriminatory statements in their postings."); Carafano v. Metrosplash.com, 339 F.3d 1119, 1124 (9th Cir. 2003) (concluding that a website that creates and hosts interactive information, such as a questionnaire, is not subject to liability when third- party users are exclusively responsible for supplying content within that framework).

sumptively unconstitutional,[58] so too must Congress—and the courts, if necessary—step forward today to advance the protections of Section 230 to cover all aspects of online journalism.

The public benefits of online journalism—expanded, in-depth coverage with access to original source material—are the type of benefits that fall within Congress's original decision to promote the free flow of information over the Internet. Seeing that much of this expanded newsgathering comes from information authored by third parties, the fact that the news media actively obtain such information from third-party sources, as opposed to passively receiving it through user-generated content, should not restrict the scope of Section 230 immunity. Indeed, news journalism, by definition, involves an active, inquisitive, and often dogged reporter who personally tracks down facts and information from third parties to provide to the public. Section 230 can easily be applied to protect and promote this core mission of news journalism rather than to undermine it.

58. *Pentagon Papers*, 403 U.S. 713, 714 (1971) (per curiam) (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).