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Chris Williams

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# THE COMMUNICATIONS DECENCY ACT AND *NEW YORK TIMES V. SULLIVAN*: PROVIDING PUBLIC FIGURE DEFAMATION A HOME ON THE INTERNET

CHRIS WILLIAMS\*

## I. INTRODUCTION

Chances are, if you logged onto the Internet<sup>1</sup> during the homestretch of the 2008 presidential campaign season, you likely came across some false information. This misinformation ranged from stories published and emailed throughout cyberspace, implying that then Senator Barack Obama could potentially be Al Qaeda's version of the Manchurian Candidate,<sup>2</sup> to the posting of altered pictures objectifying Alaskan Governor Sarah Palin.<sup>3</sup> Accessible at home, at the office, and virtually everywhere else through technological advances like cellular telephones, the Internet has proven its ability to educate, entertain, and enrich the lives of Americans on a truly grand scale. With direct access to

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1. See *United States of America: Internet Usage and Broadband Usage Report*, INTERNET WORLD STATS, <http://www.internetworldstats.com/am/us.htm> (last visited Mar. 17, 2010) (stating that 227,719,000, of the 307,212,123 people living in the United States, or roughly 74% of the total population, are currently using the Internet).

2. See *Who Is Barack Obama?* SNOPE.COM, <http://www.snopes.com/politics/obama/muslim.asp> (containing a reproduction of the email forward implying that then Senator Barack Obama was raised learning the tenants of Radical Islam and may have affiliations with those terrorist groups poised to attack the United States).

3. See *Call to Arms* SNOPE.COM, <http://www.snopes.com/photos/politics/palin.asp> (containing a reproduction of altered photos with Governor Palin's head superimposed on the bodies of other women appearing as if Governor Palin is posing on the cover of Playboy Magazine). The website further contains the email forward containing an altered picture of the Governor's head posted on the body of a woman in a U.S. flag bikini holding a rifle. *Id.* This email surfaced within a week of the Governor's nomination as the Vice Presidential Candidate of the Republican Party. *Id.*

the lives of so many Americans, however, comes influence and control.

Thus, the online publisher possesses the unique ability to convey his message to a mass audience while simultaneously maintaining a self-determined level of control over both the content and the identity of the content provider. But what happens when the content, anonymously published and riddled with falsities, influences the way populous perceives a public figure?<sup>4</sup> Do these online falsities rise to the level of defamation?

This Comment will explore the current state of defamation law as applied to the Internet through the lens of a public figure. Specifically, it will demonstrate that the conservative application of the public figure standard in defamation law, coupled with the blanket immunity granted to publishers and distributors of online content, grants no effective cause of action to a political figure defamed on the Internet. Part II of this Comment examines the background of the case law, giving rise to the modern standard for proving defamation of a public figure and the interplay between defamation and free speech. Part II also explores the history of The Communications Decency Act<sup>5</sup> and how issues of free speech have already limited its application. Part III analyzes how the application of public figure defamation law and the CDA together leave a public figure remediless for damage to his reputation. Part IV of this Comment proposes that the standard for public figure defamation be slightly adjusted and actually enforced by the judiciary as set out by the United States Supreme Court in *New York Times v. Sullivan*.<sup>6</sup> Lastly, this Comment proposes abolishing the automatic immunity granted to online publishers and distributors of defamatory material through the CDA in lieu of a standard more closely related to that of their print media relatives.

## II. BACKGROUND

### A. Defamation Law and Public Figures

*Black's Law Dictionary* defines 'defamation' as "the act of harming the reputation of another by making a false statement to

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4. See Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 798 (1986) (noting that elections are won and lost by implications of adultery, corruption, and criminal misconduct). Reputation is the lifelong culmination of economic, political, and social capital, which, when attacked, usually cannot be simply rehabilitated by rebuttal from the victim. *Id.*

5. The Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

6. 376 U.S. 254 (1964).

a third person.”<sup>7</sup> The Supreme Court of the United States, however, has modified the application of this common law tort as applied to public figures. To understand how this interpretation of defamation law has developed into an impossible standard for public figures, one need only look to *New York Times v. Sullivan*.

### 1. *New York Times v. Sullivan*: Background

This landmark case was born out of turbulent times in American history. On March 29, 1960, a full-page advertisement appearing in *The New York Times* entitled “Heed Their Rising Voices” called for financial support for the legal aid of Rev. Dr. Martin Luther King, Jr. and other members arrested for their part in the civil rights movement taking place in the southern United States during the late 1950s and early 1960s.<sup>8</sup> Contained within the advertisement was a recitation of the numerous arrests of Dr. King and the arrests of University of Alabama students protesting the state’s treatment of African Americans on the steps of the state capital.<sup>9</sup> It is from this advertisement’s language upon which the forthcoming litigation was grounded.<sup>10</sup>

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7. BLACK’S LAW DICTIONARY 449 (8th ed. 2004); see also RESTATEMENT (SECOND) OF TORTS § 558 (1977) (listing the model elements for proving defamation proposed by the American Law Institute as a false, defamatory statement about another, published by a third party without privilege, amounting to at least negligence on the part of the publisher, constituting an injury in the publishing itself or causing special injury through publication).

8. See *New York Times*, 376 U.S. at 305 (Appendix Containing the Advertisement) (recounting multiple atrocities perpetrated against African Americans throughout the south and calling upon “[d]ejected minded Americans” to lend their verbal and financial support to the civil rights movement).

9. *Id.* at 257-58.

10. See generally Kermit L. Hall, “Lies, Lies, Lies”: *The Origins of New York Times Co. v. Sullivan*, 9 COMM. L. POL’Y. 391, 405-20 (2004) (discussing at length the historical background of the parties to the litigation, an overview of the political climate of Montgomery, Alabama, during the early 1960s, and the events leading up to Sullivan’s discovery of the article in question and subsequent filing of suit against *The New York Times*); see also *New York Times*, 376 U.S. at 257 (listing the two paragraphs of the advertisement that would become the focus of litigation). They read as follows:

In Montgomery, Alabama, after students sang ‘My Country, ‘Tis of Thee’ on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

....

Again and again the Southern violators have answered Dr. King’s peaceful protests with intimidation and violence. They have bombed his

The sitting Montgomery Commissioner of Public Affairs Lester Bruce Sullivan<sup>11</sup> was charged with overseeing the Montgomery Police Department, Fire Department, Cemetery Department, and The Department of Scales.<sup>12</sup> Upon having this advertisement brought to his attention, Sullivan's attorney noted that by impugning the behavior of the Montgomery Police Department, the ad was in fact discrediting his administration.<sup>13</sup> A libel suit against the named civil rights leaders contained<sup>14</sup> within the advertisement, and *The New York Times*, ensued.<sup>15</sup> A jury hearing the case in the Circuit Court of Montgomery County awarded Sullivan \$500,000 in damages, finding the published article libelous.<sup>16</sup> The Alabama Supreme Court affirmed.<sup>17</sup>

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home almost killing his wife and child. They have assaulted his person. They have arrested him seven times-for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'-a felony under which they could imprison him for ten years.).

*Id.*

11. See Hall, *supra* note 10, at 399-401 (providing a detailed personal and political history of L.B. Sullivan and noting that Sullivan was a one-time member of the Ku Klux Klan).

12. *New York Times*, 376 U.S. at 256.

13. See Hall, *supra* note 10, at 409-15 (recounting the advertisement's path to Sullivan). Three of the major participants in the events leading up to this historic litigation make simultaneous and well-documented discoveries of the controversial advertisement: (1) William H. McDonald, assistant editor of *The Montgomery Advertiser*, (2) Ray Jenkins, editor of *The Alabama Journal*, a sister paper of *The Advertiser*, and 3) Merton Nachman, Sullivan's attorney who would later argue the case in front of the United States Supreme Court. *Id.* at 409-12. It was Nachman who physically brought this advertisement to Sullivan and encouraged him to file suit for libel. *Id.* at 415

14. See *New York Times v. Sullivan*, 144 So.2d 25, 29 (Ala. 1962) (noting that along with *The New York Times*, Alabama Clergymen Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery, were also named as defendants in the complaint); see also Hall, *supra* note 10, at 408 (noting that the advertisement contained endorsements from popular cultural and political figures of the day, including: Eleanor Roosevelt, Norman Thomas, Marlon Brando, Harry Belafonte, Sidney Portier, Shelly Winters, Van Heflin, Nat Hentoff, Ertha Kitt, Nat King Cole, and Frank Sinatra).

15. See Hall, *supra* note 10, at 393 (noting that scholars and legal commentators have done little in analyzing *New York Times* in the face of the social and political norms of the 1960s South). Hall remarks that the southern courts, considerably more so than northern courts, were used as a vehicle to preserve civility and manners in the political dialogue. *Id.* Common law libel actions were the road used to force the courts into maintaining the status quo. *Id.*

16. *New York Times*, 376 U.S. at 256.

17. See *New York Times*, 144 So.2d at 37 (applying Alabama precedent "[w]here the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt are libelous per se."). Once the defamatory statement is classified as libelous per se, damages are presumed by law. *Id.* at 41. See also *Iron Age Publ'g Co. v. Crudup*, 5 So. 332, 332-33 (Ala. 1889) (holding that special damages need not be pled when

## 2. *The Standard*

Upon granting Certiorari by the United States Supreme Court, Justice Brennan framed the issue as “whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.”<sup>18</sup> Sullivan, citing the Supreme Court’s previous language, argued that “the Constitution does not protect libelous publication.”<sup>19</sup> The Court, however, reviewing under the pretext that public discourse leads to social change, rejected Sullivan’s contention and sought to examine the case “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>20</sup> Through this lens, the Court held the advertisement

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defamation is shown to be libelous per se). Cited by the Alabama Supreme Court in *New York Times* as controlling authority. *New York Times*, 144 So.2d at 39.

18. *New York Times*, 376 U.S. at 268.

19. *Id.* at 264; see *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961) (rejecting “the view that freedom of speech and association . . . are ‘absolutes’ not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.”). Although plaintiff passed the California bar examinations, the California State Bar refused to grant him admission to the bar on account of plaintiff’s refusal to answer questions about his past involvement with the Communist Party. *Id.* at 38. Plaintiff unsuccessfully appealed to the United States Supreme Court twice, having the ruling of the California Supreme Court affirmed both times. *Id.* at 37-40, 56. See also *Chaplinski v. State of New Hampshire*, 315 U.S. 568, 571 (1942) (stating that certain classes of speech, when punished, do not rise to First Amendment protection, including libelous speech). The speech at issue in this case was the plaintiff’s shouting, in close proximity to City Hall, that the local officials were fascists. *Id.* at 569. See also *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (stating that libelous utterances, like obscene speech, are not within the realm of constitutionally protected speech).

20. *New York Times*, 376 U.S. at 270. There are many other examples of the Supreme Court’s protection of freedom of speech and freedom of press in criticizing public officials. See *Roth v. United States*, 354 U.S. 476, 484 (1957) (noting that First Amendment protection was created to ensure the exchange of ideas leading to political and cultural change); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (advancing the principle that the First Amendment is predicated upon the notion that the larger and more diverse the pool from where the information flows the more enriched is the welfare of the American populous becomes. Freedom of the press is requirement to a truly free society); *Bridges v. California*, 314 U.S. 252, 270 (1941) (observing that it is an inherently American benefit for one to speak his mind, even if the content is in poor taste); *NAACP v. Button*, 371 U.S. 415, 433, (1963) (declaring that First Amendment protections needs room to grow, and thus the government may only regulate these rights with limited focus).

was protected speech under the First Amendment, thus overturning the decision of the Alabama Supreme Court.<sup>21</sup> The resulting decision set the standard for a public figure proving defamation in the shadow of the First Amendment. Justice Brennan announced the standard that remains in place today:

the constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not.<sup>22</sup>

### B. The Communications Decency Act

Congress passed The Communications Decency Act of 1996 ("CDA" or "Act")<sup>23</sup> into law as part of the larger Telecommunications Act of 1996<sup>24</sup> without much attention or debate.<sup>25</sup> Along with regulating the mainstream

21. *New York Times*, 376 U.S. at 271, 292. See generally John M. Huggins, *Constitutional Law—Freedom of the Press—Libel—State Allowing Libel Suit by Public Official Without Proof of Malice Held Unconstitutional* *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), 42 TEX. L. REV. 1080, 1084 (1964) (suggesting that it follows naturally from the holding in *New York Times* that the criticism of a candidate's qualifications for public office is equally as essential to the criticism of a public official's conduct once in office).

22. *New York Times*, 376 U.S. at 279-80; see *Westmoreland v. CBS Inc.*, 596 F. Supp. 1170, 1172 (S.D.N.Y. 1984) (explaining that the "malice" standard, as used in public figure defamation actions, is a term of art, meaning to publish a statement about a public figure believing it to be false or with reckless disregard as to whether the statement is true).

23. The Communications Decency Act of 1996, 47 U.S.C. §§ 230, 560, 561 (2006).

24. Telecommunications Act of 1996, 47 U.S.C. §§ 201-276 (2006).

25. See Mary Kay Finn, Karen Lahey & David Redle, *Policies Underlying Congressional Approval of Criminal and Civil Immunity for Interactive Computer Service Providers Under Provisions of the Communications Decency Act of 1996 — Should E-Buyers Beware?*, 31 U. TOL. L. REV. 347, 353 (2000) (noting that major portions of what would become The Communications Decency Act of 1996 were added after the conclusion of committee hearings and were thus offered on the floor without the benefit of extensive review); see also *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 858 n.24 (1997) (citing *Cyberporn and Children: The Scope of the Problem, The State of the Technology, and the Need for Congressional Action*, 104th Cong. 7-8 (1995) (Statement of Sen. Patrick Leahy)).

It really struck me in your opening statement when you mentioned, Mr. Chairman, that it is the first ever hearing, and you are absolutely right. And yet we had a major debate on the floor, passed legislation overwhelmingly on a subject involving the Internet, legislation that could dramatically change-some would say even wreak havoc-on the Internet. The Senate went in willy-nilly, passed legislation, and never once had a hearing, never once had a discussion other than an hour or so on the floor.

*Id.*

telecommunications industry,<sup>26</sup> portions of this Act were directed at regulating the spread of obscenity to minors via the Internet. These early attempts at online regulation were codified into two prevailing sections: Section 223 (Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications)<sup>27</sup> and Section 230 (Protection for private blocking and screening of offensive material).<sup>28</sup>

Section 223 of this Act sought to criminalize the transmission of any obscene, indecent, or other communication describing any patently offensive material, measured by contemporary community standards, to a person eighteen years of age or younger.<sup>29</sup> Upon signature into law by President Clinton, the constitutionality of Section 223 was immediately challenged by The American Civil Liberties Union on the grounds the section was an abridgement upon Free Speech.<sup>30</sup> This paved the way for the United States Supreme Court to overrule Section 223 in *Reno v. American Civil Liberties Union*,<sup>31</sup> thus leaving only Section 230<sup>32</sup> as the controlling law on offensive Internet content.

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26. 47 U.S.C. § 201 (2006); *see also Reno*, 521 U.S. at 857-58 (stating that “the major components of the statute have nothing to do with the Internet; they were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting.”). The Act included seven Titles, the first six of which were byproduct of lengthy committee hearings, debates, and Senate and House Committee Reports. *Id.* at 858. The Communications Decency Act, Title V, consisted of provisions that were either added in executive committee mostly after the hearings were over. Finn, Lahey & Redle, *supra* note 25, at 353.

27. 47 U.S.C. § 223 (1996), *invalidated by Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

28. 47 U.S.C. § 230 (2006).

29. 47 U.S.C. § 223 (1996) (current version available at 47 U.S.C. § 223 (2006)).

30. *See Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 827 (E.D. Pa. 1996) (noting that the ACLU filed this action the day the bill was signed into law, on February 8, 1996, alleged that aforementioned portions of Section 223 are unconstitutional on their face, and sought and obtained a temporary restraining order).

31. *See Reno*, 521 U.S. at 878-79 (holding that section 223 of the CDA was not narrowly tailored to the government interest). The United States Supreme Court affirmed the district court’s finding that section 223 placed an overbearing restriction on free speech. *Id.* at 882. The Court, analogizing to the old adage of not burning down the house to roast the pig, noted that section 223 threatened to “torch a large segment of Internet community” in an effort to protect a small portion of the users. *Id.*; *see also Reno*, 929 F. Supp. at 857 (noting that while the CDA was undergoing its Genesis in Congress, the United States Justice Department relayed the view that cyber-based child obscenity, solicitation, and pornography cases were already being effectively prosecuted under existing laws and will successfully remain to do so). *See also* 47 U.S.C. § 223(a)-(d) (2006) (amending prior unconstitutional language to now read “obscene or child pornography”).

32. 47 U.S.C. § 230 (2006).



Section 230,<sup>33</sup> “the good Samaritan” section,<sup>34</sup> centers on immunizing providers of “interactive computer service[s]”<sup>35</sup> for their attempts to restrict access to constitutionally protected material. This section is further significant for noting that the content provider cannot be “treated as the publisher or speaker”<sup>36</sup> of any distributed material. The practical application of Section 230 is best examined by looking to the subsequent judicial interpretations.

*Zeran v. America Online, Inc.*<sup>37</sup> involved the posting on an America Online (“AOL”) message board of advertisements for offensive material relating to the terrorist attack on the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma.<sup>38</sup> These advertisements, posted anonymously, listed plaintiff Zeran’s telephone number as the point of contact for purchasing the offensive material.<sup>39</sup> Shortly thereafter, plaintiff began receiving abusive phone calls, angry messages, and even death threats.<sup>40</sup> Although AOL was notified almost immediately of the error, they refused to post a retraction.<sup>41</sup> Members of the Oklahoma City media soon discovered the advertisement and broadcasted Zeran’s telephone number over local radio while the radio host urged the listeners to call.<sup>42</sup>

Zeran initiated suit against AOL,<sup>43</sup> on April 23, 1996,<sup>44</sup> seeking to hold AOL liable for the defamatory speech initiated by a third party. Specifically, Zeran argued “that once he notified AOL

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33. *Id.*

34. *See id.* § 230(c) (noting the title of the section as: “protection for ‘good Samaritan’ blocking and screening of offensive material.”).

35. *See id.* § 230(f)(2) (defining “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.”).

36. *Id.* § 230(c)(1).

37. 129 F.3d 327 (4th Cir. 1997).

38. *Id.* at 329.

39. *See id.* (noting that the bombing occurred on April 19, 1995). The subsequent offensive postings appeared on AOL as soon as April 25, 1995, and instructed solicitors to ask for plaintiff Zeran by his first name, Ken. *Id.*

40. *Id.*

41. *Id.*

42. *See id.* (providing that after Zeran’s telephone number was broadcasted by Oklahoma City radio station KRXXO, his home was placed under police surveillance out of concern for his safety). At its worst, Zeran was receiving threatening phone calls approximately every two minutes in response to the advertisement and subsequent news coverage. *Id.*

43. *See id.* at 330 n.1 (stating that Zeran was not able to discover the identity of the originator of the defamatory advertisement and thus not eligible to file a suit against them directly).

44. *See id.* (noting the suit was transferred from the United States Court for the Western District of Oklahoma to the Eastern District of Virginia).

of the unidentified third party's hoax, AOL had a duty to remove the defamatory posting promptly, to notify its subscribers of the message's false nature, and to effectively screen future defamatory material."<sup>45</sup> The Court of Appeals for the Fourth Circuit disagreed, reasoning that Section 230 creates "federal immunity" to any cause of action" that creates liability for an online service provider.<sup>46</sup>

The word "provider" has been defined by Congress and the judiciary as including website operators under the term "interactive computer services."<sup>47</sup> In *Schneider v. Amazon.com, Inc.*,<sup>48</sup> Division 1 of the Washington Court of Appeals interpreted Section 230 as applicable to web site operators, noting that web postings on Amazon.com are "indistinguishable" from the posting in question in *Zeran*.<sup>49</sup> Further, in *Carafano v. Metrosplash.com, Inc.*,<sup>50</sup> the United States Court of Appeals for the Ninth Circuit echoed the above ruling, holding that an online dating website, which submitted questions to visitors who in turn provided answers, was not liable for the defamatory content posted about the plaintiff by a third party.<sup>51</sup>

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45. *Id.* at 330.

46. *See id.* (stating that Section 230 "precludes courts from entertaining claims that would place a computer service provider in a publisher's role."). This preclusion further applies to service providers who chose to exercise control over the defamatory material published. *Id.* Thus, even in performing editorial decisions such as changing the content or deciding to publish, service providers are granted blanket immunity. *Id.*

47. 47 U.S.C. § 230(f)(2) (2006).

48. *See Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 38-39 (Wash. Ct. App. 2001) (arising out of false and negative comments posted on customer feedback section of the website). After bringing the negative postings containing material in violation of Amazon.com's stated posting criteria to the website's attention, Schneider was told posts would be removed within two business days. *Id.* When they were not, Schneider filed suit. *Id.* at 39.

49. *See, e.g., Schneider*, 31 P.3d at 40 (stating "Amazon's web site enables visitors to the site to comment about authors and their work, thus providing an information service that necessarily enables access by multiple users to a server," bringing Amazon within the definition of an interactive computer system).

50. *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121 (9th Cir. 2003) (arising from a fabricated personal profile on an online dating website). It was claimed that this personal posting was originated by the plaintiff, actress Christine Carafano (a famous television actress acting under the screen name Chase Masterson). *Id.* The posting included pictures of the actress found online, sexually suggestive responses to the website's questionnaire, and the plaintiff's home address and telephone number. *Id.* Upon the defendant's delay in removing the post, which the actress alleged contributed to several stalking incidents in the United States, plaintiff filed suit. *Id.* at 1122.

51. *See id.* at 1124 (holding that Matchmaker was not even partly responsible for posting content which the dating service helped create). Matchmaker provided the multiple choice questions that the user would

As interpreted by the courts, Section 230 immunizes any website operator not responsible for the creation of the defamatory content it publishes. Thus, a plaintiff's only chance of success in proving a cause of action for online defamation is to uncover the source of the post. Given the guarded nature of Internet postings, the creator of defamatory material is easily able to remain anonymous.<sup>52</sup>

### III. ANALYSIS

One running for an elected position is virtually outflanked by the combination of the two areas of the law discussed above when defamed on the Internet.<sup>53</sup> On one side, a political figure is held to a much higher standard when proving defamation than the average citizen due to a court characterizing them as a "public figure."<sup>54</sup> On the other side, unless the identity of the creator of the defamatory Internet post is discovered, the politician is barred from bringing a defamation action against the website operator by the immunity granted through The Communications Decency Act.<sup>55</sup> This section analyzes the application of the "actual malice"<sup>56</sup> standard and how politicians fit under the public figure requirement. This section also analyzes the burden of proof a plaintiff in a public figure defamation action must meet in order to succeed. Further, this section explores the expansion of the blanket immunity provided to all online publishers of defamatory statements in Section 230 of the Communications Decency Act and compares this Act to another federal law regulating content on the Internet. Lastly, this section briefly examines the defamation liability of traditional print media publishers.

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answer in accordance with his physical characteristics, examples of potential essay answers, and a section for the user to upload a photograph. *Id.* The court reasoned that Matchmaker could not be considered an 'information content provider' under the Communications Decency Act because no personal "profile has any content until a user actively creates it." *Id.*

52. See *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774 (S.D. Tex. 1999) (noting that courts continue to cautiously view the Internet as one large home for insinuation, rumor, and lies). The court further states that there is no reliable way to authenticate material posted on the Internet noting, "Anyone can put anything on the Internet." *Id.* at 775.

53. See *supra* notes 22, 35 and accompanying text (examining both the heightened standard required by a public figure in proving defamation and the blanket immunity granted online publishers through the Communications Decency Act).

54. See *generally* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (discussing the different standard for public figures).

55. The Communications Decency Act of 1996, 47 U.S.C. §§ 230, 560, 561 (2006).

56. *New York Times*, 376 U.S. at 280.

A. *New York Times v. Sullivan: Tailor-Made to Bar Politicians from Recovery*

1. *Politicians as Public Figures?*

The Supreme Court's decision in *Gertz v. Robert Welch, Inc.*<sup>57</sup> established that a public figure may come from one of two categories. The first category is a "public figures for all purposes."<sup>58</sup> This category encompasses politicians and celebrities and is defined as those who hold great influence over society and possess unfettered access to the media.<sup>59</sup> The second category is a "limited purpose public figures."<sup>60</sup> This category is defined as those who have "thrust themselves into the forefront of particular public controversies in order to influence the resolution of the issues involved."<sup>61</sup>

Since the Court's ruling in *Gertz*, the Court has done little to expand further on the definition of public figures.<sup>62</sup> Lower courts,

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57. 418 U.S. 323.

58. *Id.* at 345.

59. *See id.* (explaining that public figures for all purposes are those which hold positions of vast power and influence in society). Those that have "assumed roles of especial prominence in the affairs of society." *Id.*

60. *See id.* (stating that some public figures push themselves to the forefront of a particular issue or controversy).

61. *Id.* It is remarkably rare for one to attain the recognition of a public figure through no action of one's own. *Id.* For a history of the Supreme Court's holdings on limited purpose public figures prior to *Gertz*, see *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967); it held that a public figure who is not a public official may recover damages in a defamation action by showing conduct which is so unreasonable that it greatly deviates from the investigative and reporting standards of a reasonable publisher). *See also* *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43-44 (1971) (holding that the distinguishing factor of whether to apply the public figure standard is whether the statement involved issues of public concern). The Court effectively overruled both of these cases through the holding in *Gertz*. *Gertz*, 418 U.S. at 352.

62. *See* Erik Walker, Comment, *Defamation Law: Public Figures-Who Are They?*, 45 BAYLOR L. REV 955, 962 (1993) (noting that the three cases involving the issue of a private v. public figure decided by the Supreme Court since *Gertz* were each case specific, thus providing no further guidance for interpretation of the standard); *see, e.g.*, *Time, Inc. v. Firestone*, 424 U.S. 448, 454-55 (1976) (holding that the recently divorced third wife of American industrial heir Russell Firestone, Jr., was not a public figure for constitutional purposes, regardless of the publicity that the dissolution of marriage proceeding garnered in the public, as much of the publicity was created by Florida divorce court's glib characterization of the parties accusations); *Hutchinson v. Proxmire*, 443 U.S. 111, 114 (1979) (holding that a research scientist who published writings and actively sought federal grant money for his research projects was not a public figure for purposes of a defamation action brought when a sitting United States senator referred to federal funding of the scientist's work as "wasteful government spending"); *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 166-67 (1979) (holding petitioner not a public figure for purposes of the *New York Times* standard when his failure

however, have readily applied the public figure standard to politicians bringing defamation actions.<sup>63</sup> For example, the Supreme Court of Delaware recently held that a town council member qualified as a public figure for purposes of a defamation action.<sup>64</sup> Thus, one running for any civic office is likely to be classified as a public figure for all purposes and thus subject to the “public figure” classification under *New York Times*.<sup>65</sup>

## 2. A Public Figure’s Burden of Proving “Actual Malice”

The standard for a public figure’s proving defamation requires that he prove “that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>66</sup> One commentator has expanded on this standard stating that “the Court further held that a plaintiff must prove actual malice by clear and convincing evidence, which is a stricter standard than the civil preponderance of the evidence, but less rigorous than the criminal standard of beyond a reasonable doubt.”<sup>67</sup> This standard proves a difficult

to respond to a grand jury subpoena connected with allegations of Russian espionage gathered the attention of a multitude of newspapers).

63. See *Freedom Newspapers of Texas v. Cantu*, 168 S.W.3d 847, 849, 853 (Tex. 2005) (holding that a candidate for county sheriff was a public figure under the *New York Times* standard). Plaintiff, Cantu, a candidate for county sheriff did not present the argument that he did not fall under the public figure grouping. *Id.*

64. See generally *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) (involving statements posted online alleging elected town council member suffered from “mental deterioration” and implying the councilman was a homosexual). The issue of the councilman’s status as a public figure was not an issue raised before the court. *Id.*

65. *New York Times*, 376 U.S. at 279-80. For other examples of courts qualifying people as public figures for all purposes, see *Hustler Magazine v. Falwell*, 485 U.S. 46, 47, 49 (1988) (finding Rev. Jerry Falwell, “a nationally known minister who has been active as a commentator on politics and public affairs,” a public figure for general purposes under the *New York Times* standard of defamation); see also *Burnett v. Nat’l Enquirer, Inc.*, 193 Cal. Rptr 206, 216 (Cal. Ct. App 1983) (finding famous actress, comedian, and television star Carol Burnett a public figure for all purposes).

66. *New York Times*, 376 U.S. at 279-80; see also *St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968) (noting that “reckless disregard” cannot be readily defined). In attempting to expand further, Justice White states:

That reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

*Id.* at 731; *Garrison v. State of La.*, 379 U.S. 64, 67-68 (1964) (stating that only defamatory statements made with a heightened level of suspicion as to the untruthfulness of the content warrant criminal or civil punishment).

67. Meiring de Villiers, *Opinionated Software*, 10 VAND. J. ENT. L. & PRAC.

hurdle for public figure plaintiffs to clear,<sup>68</sup> thus making the likelihood of success in a public figure defamation action minimal. Randall Bezanson, Professor of Law at the University of Iowa, has stated that less than ten percent of media libel cases actually succeed.<sup>69</sup> Further estimations show that around seventy percent of all media defamation cases end with the defendant obtaining summary judgment.<sup>70</sup> The practical application of these statistics to political candidates is evidenced in defamation action of *Howell v. Hecht*.<sup>71</sup>

Howell and Hecht were both Republican primary candidates competing for a seat on the Texas Supreme Court in 1986.<sup>72</sup> Throughout the course of the campaign, it was brought to Howell's attention that Hecht had allegedly made several defamatory statements regarding Howell's character and fitness for the

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269, 280 (2008).

68. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 768 (1985) (White, J., concurring) (noting that defamation plaintiffs often lose on summary judgment because proof of malice is lacking). Justice White further discussed the lack of remedy provided through this standard:

If the plaintiff succeeds in proving a jury case of malice, it may be that the jury will be asked to bring in separate verdicts on falsity and malice. In that event, there could be a verdict in favor of the plaintiff on falsity, but against him on malice. There would be no judgment in his favor, but the verdict on falsity would be a public one and would tend to set the record right and clear the plaintiff's name. It might be suggested that courts, as organs of the government, cannot be trusted to discern what the truth is. But the logical consequence of that view is that the First Amendment forbids all libel and slander suits, for in each such suit, there will be no recovery unless the court finds the publication at issue to be factually false. Of course, no forum is perfect, but that is not a justification for leaving whole classes of defamed individuals without redress or a realistic opportunity to clear their names. We entrust to juries and the courts the responsibility of decisions affecting the life and liberty of persons. It is perverse indeed to say that these bodies are incompetent to inquire into the truth of a statement of fact in a defamation case. I can therefore discern nothing in the Constitution which forbids a plaintiff to obtain a judicial decree that a statement is false—a decree he can then use in the community to clear his name and to prevent further damage from a defamation already published.

*Id.* at 768 n.2.

69. See Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 228 (1985) (noting further that an additional 15% of all media libel cases settle, usually without a monetary award). This statistic was promulgated twenty-three years prior to the current date and thus does not reflect the impact that Internet defamation cases may have upon this percentage.

70. Jonathan Garret Erwin, Note, *Can Deterrence Play a Positive Role in Defamation Law?*, 19 REV. LITIG. 675, 693 (2000) (citing Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455, 492 (1980)).

71. 821 S.W.2d 627 (Tex. App. 1991).

72. *Id.* at 628.

bench.<sup>73</sup> Howell petitioned Hecht for a retraction of these statements claiming them to be false, and upon Hecht's refusal, filed a Complaint alleging defamation.<sup>74</sup> In bringing a motion for summary judgment Hecht argued, "I had no knowledge indicating to me that the complained of statements that I made were false at the time those statements were allegedly made. Further, at no time did I ever entertain any doubts as to the truth of those complained of statements that I made."<sup>75</sup> In response, Howell submitted to the court the letter he had written to Hecht stating the falsity of the statements and providing documentation from the Supreme Court as to such.<sup>76</sup> Howell provided additional evidence showing Hecht continued to repeat these statements even after receipt of the letter.<sup>77</sup> The Court of Appeals of Texas, Dallas Division, affirmed Hecht's motion for summary judgment stating, "We conclude that Howell failed to submit any specific affirmative proof to show that Hecht entertained serious doubts as to the truth of Hecht's publication."<sup>78</sup>

Politicians of all governmental levels are likely to be deemed public figures by the court for purposes of defamation law. This status in turn requires courts to apply the "actual malice" standard set forth in *New York Times*. This standard, however, acts almost as an affirmative defense for one accused of defaming a public figure, making a plaintiff's survival of summary judgment unlikely.

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73. See *id.* (noting Hecht is reported to have said that Howell is an embarrassment to the Republican Party and the bench, lost numerous campaigns for office, and was reprimanded by the Texas State Bar Association for misrepresentation). Hecht further implied that Howell served a total of thirteen weekends in jail for repeatedly being held in contempt of court. *Id.*

74. *Id.* at 628.

75. *Id.* at 630.

76. *Id.* at 631.

77. *Id.* at 628.

78. *Id.* at 631; see also *Miller v. Nestande*, 237 Cal. Rptr. 359, 365-66 (Cal. Ct. App. 1987) (finding negative comments made about plaintiff candidate's activities and statements as a POW were not made with actual malice; award of summary judgment for defendant affirmed); *Carr v. Brasher*, 776 S.W.2d 567, 568 (Tex. 1989) (holding the newly elected mayor's campaign brochures accusing the defeated incumbent of issuing payoffs to friends did not constitute actual malice; summary judgment for defendant affirmed); *Mohan v. Fetterolf*, 667 N.E.2d 1278, 1281 (Ohio. Ct. App. 1995) (stating that unless plaintiff can provide evidence that defendants "knew or deliberately disregarded the truth in publishing the defamatory information," plaintiff cannot defeat motion for summary judgment).

## B. The Communications Decency Act: All Are Safe

### 1. Comparing the Communications Decency Act with the Digital Millennium Copyright Act

The Digital Millennium Copyright Act<sup>79</sup> (the “DMCA”) was enacted to protect copyright holders from the growing problem of digital pirating online.<sup>80</sup> It has been noted that as the Internet expanded in reach and availability through the 1990s, the availability of copyrighted material online grew exponentially, leading to a marked increase in piracy online.<sup>81</sup> Aside from adding new chapters to the United States Code,<sup>82</sup> the DMCA added numerous new sections to the Copyright Act of 1976.<sup>83</sup> It is one of these new sections, the “Safe Harbor” provision,<sup>84</sup> upon which this analysis will focus.

Section 512<sup>85</sup> of the DMCA (known as the Online Copyright Infringement Liability Limitation Act (the “OCILLA”), provides the setting for the copyright infringement liability of both Internet Service Providers and website operators. Sections (a) and (b),<sup>86</sup> not at discussion in this Comment, deal directly with the immunization of Internet Service Providers (the providers of access to the Internet such as Comcast, AT&T, and Mediacom) for the pirating of copyrighted material by their subscribers.<sup>87</sup>

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79. The Digital Millennium Copyright Act, Pub. L. No. 105-352, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 & 28 U.S.C.).

80. See Diane Barker, Note, *Defining the Contours of the Digital Millennium Copyright Act: The Growing Body of Case Law Surrounding the DMCA*, 20 BERKELEY TECH. L.J. 47, 49 (2005) (noting the several failed attempts by both the 104th Congress and the Clinton Administration to pass legislation addressing the problem of digital piracy); see also BLACK'S LAW DICTIONARY 1186 (8th ed. 2004) (defining piracy as “the unauthorized and illegal reproduction or distribution of materials protected by copyright, patent, or trademark law.”).

81. Barker, *supra* note 80, at 47-48.

82. See *id.* at 49 n.13 (noting the DMCA added chapters 12 and 13 to the United States Code).

83. Copyright Act of 1976, 17 U.S.C. §§ 101-810 (2006).

84. 17 U.S.C. § 512 (2006); see Jonathon J. Darrow & Gerald R. Ferrera, *Social Networking Web Sites and the DMCA: A Safe Harbor from Copyright Infringement Liability or the Perfect Storm*, 6 NW. J. TECH. & INTELL. PROP. 1, 4 (2007) (explaining that section 512 is referred to as the safe harbor provision).

85. 17 U.S.C. § 512.

86. *Id.* § 512(a), (b).

87. See Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 624 (2006) (noting that Section (a) of OCILLA provides safe harbor for providers which merely supply access to the Internet, e.g., “broadband, DSL, dial-up, and high-speed Internet access providers.”). Authors label these providers as “mere conduit[s]” through which information flows . . . .” *Id.*



OCILLA Sections (c) and (d)<sup>88</sup> provide the provisions by which hosting services and search engines can gain safe harbor.<sup>89</sup>

Sections (c) and (d) of OCILLA<sup>90</sup> provide website operators and search engines the ability to limit their liability to copyright holders for the pirating of copyrighted material by users through abiding by what has become known as the “notice-and-takedown” requirements.<sup>91</sup> Section (c) requires the service provider (here, the website operator), upon receipt of statutorily approved notice from the copyright holder, to: “1) take down the material ‘expeditiously’; 2) notify the alleged infringer that material has been removed; and 3) forward any counter notices from alleged infringers back to the original complainant.”<sup>92</sup> Serving this same purpose, section (d) requires search engines to “expeditiously” remove links to the objectionable copyrighted material from their search catalog.<sup>93</sup> Further, OCILLA section (g) provides guidance for website operators and search engines on when material may be reinstated while also limiting liability for the erroneous takedown of said material.<sup>94</sup> In essence, as long as the website operator complies with the provisions of the statute, no liability attaches. As discussed in Part II of this Comment, no such provision exists in section 230 of the CDA.<sup>95</sup> This absence leaves one defamed online

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88. 17 U.S.C. § 512(c), (d).

89. See Urban & Quilter, *supra* note 87, at 624-25 (explaining the aim of OCILLA § 512(c) is directed at hosted content, defined as “websites, forums, social networking profiles, and the like”). Further, the aim of OCILLA § 512 (d) is targeted at search engines like Google or Yahoo. *Id.* at 626.

90. 17 U.S.C. § 512(c), (d).

91. See Urban & Quilter, *supra* note 87, at 626 (referring to portions of § 512 as “notice-and-takedown” requirements).

92. See *id.* 625-26 (noting that compliance with the notice-and-takedown provisions is mandatory and requires no independent determination or adjudication that the content in question is in fact infringing). Safe harbor is thus conditioned upon compliance. *Id.*

93. *Id.*

94. See 17 U.S.C. § 512(g)(1)-(4) (stating in part that no liability will attach to the party in question if no suit is filed by the infringed party, against the infringing party, within ten to fourteen business days following the receipt of counternotice from the infringing party). The statute states further that no liability will attach to the service provided if the provisions and procedures of the statute are adhered to as required. *Id.*

95. See 47 U.S.C. § 230 (providing Internet Service Providers blanket immunity for any material, including material which is deemed defamatory, contained within or posted on their website). The statute provides no legal incentive for website operators to remove defamatory material upon notice from the defamed as inducement to remain within the safe harbor of the statute. *Id.* See also *Zeran*, 129 F.3d at 329 (observing that plaintiff notified defendant website operator of defamatory material posted on website on more than one occasion to no avail). The United States Court of Appeals for the Fourth Circuit, in applying section 230 of the CDA (here, pleaded as an affirmative defense), declared that attaching liability to publishers with notice of defamatory material would defeat the stated objectives advanced by

no legal recourse to petition the website operator for removal.

## 2. *Publisher Liability for Defamation: Gone Paperless (and Remediless?)*

Traditional defamation law has always treated the publisher of the defamatory statement as the author.<sup>96</sup> Section 578, illustration 1 of the *Restatement (Second) of Torts*, has demonstrated this principle simply, explaining that “a newspaper feature syndicate supplies a defamatory article to each of its subscribing newspapers. Each paper that prints the article has published a libel for which it is separately subject to liability.”<sup>97</sup> This principle has been thoroughly echoed in case law.

*Wright v. Bachmurski*<sup>98</sup> involved a newspaper publication concerning a previous malpractice litigation between an accountant, plaintiff, and his former client, defendant.<sup>99</sup> The defendant’s exaggerations about the details of the litigation and judgment made during an interview were subsequently published in the local paper.<sup>100</sup> Upon plaintiff accountant’s bringing of a libel suit against this local newspaper for the republication, the parties reached a settlement agreement of \$120,000.<sup>101</sup>

In *Cianci v. New Times Publishing Co.*,<sup>102</sup> plaintiff, former mayor of Providence, R.I., brought libel suit against defendant, magazine publisher, for a defamatory story published about an alleged rape and settlement agreement entered into by the mayor while in law school.<sup>103</sup> In reversing the grant of summary judgment for defendants, and remanding for further proceedings, the court noted that rule of liability for republication of

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section 230 of the CDA. *Id.* at 330, 333. The Fourth Circuit, rather, estimated that strict liability for publishers who do not respond to notice would further restrict speech and stifle self-regulation. *Id.* at 333.

96. See RESTATEMENT (SECOND) OF TORTS § 578 (1977) (“Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.”); see also Jae Hong Lee, Note, *Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 471 (2004) (stating at common law, newspaper publishers were subject to strict liability as they maintained final control over the matter to be published).

97. RESTATEMENT (SECOND) OF TORTS § 578 cmt. b, illus. 1 (1977).

98. 29 P.3d 979 (Kan. Ct. App. 2001).

99. *Id.* at 983.

100. *Id.*

101. *Id.*

102. 639 F.2d 54 (2d Cir. 1980).

103. See *id.* at 56 (recounting in detail portions of the article accusing the mayor of drugging the victim, threatening her with a gun, and raping her). Cianci, on record, denied drugging, raping, or sleeping with the accuser. *Id.* at 58 n.7.

defamatory material has been “widely recognized.”<sup>104</sup> The court expounded on this rule stating, “Any different rule would permit the expansion of a defamatory private statement, actionable but without serious consequences, into an article reaching thousands of readers, without liability on the part of the publisher.”<sup>105</sup>

In contrast, section 230 of the Communications Decency Act immunizes all Internet service providers for the republication of defamatory material.<sup>106</sup> Thus, a newspaper’s republication of a defamatory statement is actionable whereas a website’s republication of that same statement is not. The disconnect between these nearly identical entities is obvious. Conceivably, a company could publish the same defamatory statement both online and through its print newspaper and be held liable only for the print version.

#### IV. PROPOSAL

The “actual malice”<sup>107</sup> standard applied to public figures in defamation actions must be lowered to an objective reasonable person standard. Further, Congress must amend the Communications Decency Act to remove the blanket immunity provided to all online “publishers” of defamatory material. Alternatively, notice and takedown requirements should be implemented as a prerequisite to receiving immunization. Without the removal of both these barriers to litigation, a public figure defamed on the Internet is left powerless to defend his reputation.

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104. *Id.* at 60-61.

105. *Id.* at 61; *see also* *Hoover v. Peerless Publ'ns, Inc.*, 461 F. Supp 1206, 1209 (E.D. Pa. 1978) (citing RESTATEMENT (SECOND) OF TORTS § 578 and noting that one who republishes is subject to the same liabilities as the original publisher); *Olinger v. Am. Sav. & Loan Ass'n*, 409 F.2d 142, 144 (D.C. Cir. 1969) (stating that regardless of whether the republisher names the source, the act of republishing is publishing itself). “The law affords no protection to those who couch their libel in the form of reports or repetition.” *Id.*

106. *See* *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998) (noting that legislators decided not to treat website operators and Internet Service Providers like newspapers and magazines, both of which are liable for republishing defamatory content, but rather to grant them blanket immunity for essentially the same action).

107. *See supra* note 22 and accompanying text (examining the background and caselaw which led to the United States Supreme Court’s creation of the ‘actual malice’ standard).

A. *Leveling the Playing Field: Lowering the ‘Actual Malice’ Standard to an Attainable Objective Level*

The current standard<sup>108</sup> applied in public figure defamation cases not only acts as a gatekeeper, ostensibly preventing public figure plaintiffs from passing through the summary judgment<sup>109</sup> entryway of the pretrial motion phase, but also effectively encourages authors and publishers to refrain from seeking out the truth. The standard calls on public figures to convince the finder of fact of the subjective intentions of the defaming party.<sup>110</sup> In interpreting the “reckless disregard for the truth”<sup>111</sup> prong of the “actual malice” standard, the Supreme Court has stated, “There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.”<sup>112</sup> In applying reasoning to this holding, one unable to provide sufficient evidence of the defamer’s doubts as to the truth of the statement is thus unable to prove actual malice.<sup>113</sup>

Justice White addressed this concern writing for the majority in *St. Amant v. Thompson*.<sup>114</sup> Advocating for the position that the

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108. See *New York Times*, 376 U.S. at 279-80 (prohibiting a public figure from recovering damages for defamation pertaining to one’s official behavior unless it is proven that the statement was made with actual malice). Actual malice is defined as “with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 280.

109. See *supra* note 70 and accompanying text (noting it has been that estimated seven out of ten defamation cases brought against media defendants do not survive motions for summary judgment).

110. See *St. Amant*, 390 U.S. at 731 (holding that the reckless disregard section of the actual malice standard rendered in *New York Times* is not to be discerned by whether a reasonable person would have published the defamatory material if similarly situated). The Court stated that there must be actual proof that the defendant doubted the truth of the material but published it anyway. *Id.*

111. *New York Times*, 376 U.S. at 280.

112. *St. Amant*, 390 U.S. at 731.

113. See *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971) (holding that a newspaper’s publishing of a column, stating that a candidate in an upcoming Senatorial race was a “small-time bootlegger” during prohibition, can never be irrelevant to the candidate’s fitness for office). The Court, requiring evidence of reckless disregard for the truth or actual knowledge of the statement’s falsity, reversed the libel judgment in favor of the plaintiff and remanded. *Id.*; see also *St. Amant*, 390 U.S. at 730-31 (stating that a public official falsely accused of criminal conduct by a political opponent failed to prove the statements were made with actual malice even though the speaker relied completely on the information provided to him by his source, had no firsthand knowledge of public official’s misdeeds, and failed to corroborate the information with those who might have had knowledge of the criminal conduct); *New York Times*, 376 U.S. at 263 (noting that those responsible for publishing the allegedly defamatory advertisement in question did not first corroborate the stories contained within the advertisement with the newspaper’s own stories published on the topic and available on file).

114. 390 U.S. at 728.

people's interest in the conduct and character of public officials substantially outweighs the harm to a public figure's reputation through an erroneous publication, Justice White prophetically anticipated the unintended consequences of this subjective standard.<sup>115</sup> "It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendants testimony that he published the statement in good faith and unaware of its probable falsity."<sup>116</sup> It is, however, ultimately these same tactics which cause this standard to be unattainable.<sup>117</sup>

Thus, a more appropriate standard for determining culpability in a public figure defamation action is whether a reasonable person<sup>118</sup> knew or would have known the statement published was false or that the statement was published with reckless disregard for the truth. Inserting the reasonable person standard transforms the analysis from an avoidable subjective analysis to an objective one. In many ways, this objective standard is nothing more than a recitation of the old standard with the addition of a few words. With the introduction of reasonableness into the analysis, the finder of fact is no longer bound by the necessity that sufficient evidence of the speaker's doubts as to the truthfulness of the statement be shown, but instead is free to find culpability with a showing of the speaker's recklessness.<sup>119</sup>

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115. *Id.* at 731-32

116. *See id.* at 731 (explaining that the "reckless disregard" standard may in fact lead to fewer recoveries by public figure's defamed than if the standard were lowered to that of a "reasonable man" or "prudent publisher"); *see also* Arlen W. Langvardt, *Section 43(A), Commercial Falsehood, and the First Amendment: A Proposed Framework*, 78 MINN. L. REV. 309, 345 (1993) (noting that the 'actual malice' requirement acts to considerably increase the burden of proof on the plaintiff while concurrently protecting speakers lacking knowledge or doubt as to the falsity of their statements).

117. Justice White is not the only Supreme Court Justice to raise concerns about the "actual malice" standard. *See* John W. Dean, *Justice Scalia Thoughts, and a Few of My Own, on New York Times v. Sullivan*, FINDLAW, Dec. 2, 2005, <http://writ.news.findlaw.com/dean/20051202.html> (recounting the author's attendance of a speech by Justice Scalia's where he addressed the state of the "actual malice" standard). It is reported that Justice Scalia exposed his sentiment that *New York Times* was wrongly decided stating, "The press is the only business that is not held responsible for its negligence." *Id.* Justice Scalia further stated, "I don't think that's what the founding fathers intended." *Id.*

118. *See also* BLACK'S LAW DICTIONARY 1294 (8th ed. 2004) (defining the "reasonable person" as "[a] hypothetical person" who acts with the level of judgment, intelligence, and knowledge that society requires of its members for the security of the interests of others and oneself). This standard is frequently used to determine negligence in tort cases. *Id.*

119. *See supra* note 113 and accompanying text (providing examples of United States Supreme Court holding that the actual malice standard not satisfied in high profile public figure defamation actions).

Further, the standard of proof for the “knowingly false”<sup>120</sup> prong essentially remains the same. The finder of fact will be required to look at the totality of the evidence and decide: (1) would a reasonable person in the speaker or publisher’s position know or should have known that the statement disseminated was false; or (2) would a reasonable person, looking at the totality of the circumstances, maintain serious doubts as to the truthfulness of the allegedly defamatory material.

*B. Copying the OCILLA: Notice and Takedown Requirements as a Prerequisite to Immunity Under the Communications Decency Act*

The “Good Samaritan” section<sup>121</sup> of the Communications Decency Act,<sup>122</sup> interpreted by federal and state courts<sup>123</sup> as providing absolute immunity from liability to any online service provider for content published on its website, is overbroad and antiquated. The permutations of the blanket immunity provided by this section not only present a barrier to those defamed on the Internet, but also negatively impede additional individual rights falling under other unrelated areas of the law.<sup>124</sup>

In *Zeran*, the Court of Appeals for the Fourth Circuit noted

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120. See, e.g., *New York Times*, 376 U.S. at 280 (noting that it must be proven that a speaker made a statement “with knowledge that it was false.”).

121. 47 U.S.C. § 230(c) (2006).

122. The Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

123. See *supra* note 46 and accompanying text (providing a discussion of the case law interpreting section 230 and interpreting the immunity provision to cover publishers of online content).

124. See Stephen Collins, Comment, *Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act*, 102 NW. U. L. REV. 1471, 1490-91 (2008) (attributing the recent decline in newspaper circulation nationwide to an increase in the popularity and functionality of the Internet as a source of both news and advertising). Collins continues by noting that the blanket immunity provided to online service providers through the CDA has opened the door for discriminatory housing advertising that would be held actionable under the Fair Housing Act (§ 3604(c)) if published via print media. *Id.* at 149; see also 42 U.S.C. § 3604(c) (2006) (making it unlawful to make, print, or publish any discriminatory housing advertisement indicating preference for or against any “race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination”); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC.*, 521 F.3d 1157, 1174 (9th Cir. 2008) (holding defendant, Roommates.com, immune under section 230 of CDA for any information published on the website’s “Additional Comments” section). Although the Ninth Circuit held Roommates.com liable for other violations of the Fair Housing Act, the court was quick to defend the immunity provided by the section 230 by stating that even where a close call exists as to a website’s culpability for encouraging illegality, the close call must be resolved in favor of immunity. *Id.*

that requiring online service providers to abide by notice and takedown provisions would create an impossible burden for the website operator due to the sheer number of postings foreseeable and thus, although common practice for print media, would be infeasible in the realm of the Internet.<sup>125</sup> This case was decided in 1997,<sup>126</sup> two years prior to the effective date of the Digital Millennium Copyright Act,<sup>127</sup> which successfully implemented such provisions for online service providers. Accordingly, the premise of this decision is factually false as this infeasible procedure is now federal law.<sup>128</sup> In light of the OCILLA's<sup>129</sup> successful implementation of notice and takedown requirements as a prerequisite to immunizing online service providers for copyright infringement, Congress should amend the "Good Samaritan"<sup>130</sup> section of the Communications Decency Act<sup>131</sup> to follow suit. By requiring this same conduct of website operators as a prerequisite to the receiving immunity for the publishing of defamatory content, the website operator is now simply being held to the same level of accountability for both defamation and

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125. See *Zeran*, 129 F.3d at 333 (continuing this reasoning by analogizing website operators to television network affiliates). In citing *Auvil v. CBS 60 Minutes*, 800 F. Supp. 928, 931 (E.D. Wash. 1992), the Fourth Circuit attempts to draw a parallel between a television network affiliate's broadcasting of a potentially defamatory news segment produced by the parent company and a website operator's publishing of a potentially defamatory statement produced by an online user. *Zeran*, 129 F.3d at 333. This analogy fails to consider the feasibility of notice and takedown requirements applicable to television media versus the Internet. *Id.* Where a television news story airs briefly, encompassing a fifteen-minute window in this situation, notice and takedown becomes virtually ineffective: once the news story is complete, no evidence of the story remains available to the viewer. Although the story may be defamatory and thus potentially actionable, the need for takedown is moot upon completion of the broadcast. An Internet post, however, can remain available for view by the Internet audience for days, months, or even years; thus, precipitating the need for a notice to be provided to the website operator of the existence of the defamatory content, and thus the need for the subsequent taking down of the defamatory material.

126. *Zeran*, 129 F.3d 327.

127. The Digital Millennium Copyright Act, Pub. L. No. 105-352, 112 Stat. 2860 (codified as amended in scattered sections of 17 & 28 U.S.C.).

128. 17 U.S.C. § 512; see, e.g., Complaint for Declaratory and Injunctive Relief and Damages at 3, Viacom International, Inc., v. Youtube Inc., (S.D.N.Y. March 13, 2007) (Civil Action No. 1:2007cv02103) (alleging that more than 150,000 unauthorized clips of Viacom copyrighted material has been found on defendant's website having been viewed approximately 1.5 billion times); see also *Media Companies Blast YouTube for Anti-Piracy Policy*, FOXNEWS.COM, Feb. 19, 2007, <http://www.foxnews.com/story/0,2933,252798,00.html> (noting that Viacom sent over 100,000 notices of copyright infringement to YouTube in the month prior to bringing this litigation).

129. 17 U.S.C. § 512.

130. 47 U.S.C. § 230.

131. The Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

copyright infringement matters.

The notice-and-takedown amendment to the “Good Samaritan” section of the CDA should mirror the applicable sections of OCILLA<sup>132</sup> with the addition of a few caveats tailoring this provision to the publishing of any defamatory material. The practical application of this amendment will look as follows: a victim of online defamation contacts the website publishing the statement and provides the statutorily required notice; the website, upon finding the notice to be provided in good faith, expeditiously takes down the defamatory post.<sup>133</sup> Upon the taking down of this statement, the website operator notifies the originator of the post as to the complaint and action of the website. If the originator believes the website erroneously removed the post, he/she provides a statement asserting a good faith belief that the post is not defamatory under penalty of perjury. If, after removal, the statutorily determined period of time passes without the defamed filing a claim for defamation, the website operator is free to repost the statement. Only in following this procedure is the publisher able to gain immunity.

## V. CONCLUSION

A public figure’s character and reputation are the bill of goods that the politician sells to the electorate in an attempt to win his vote. If defamation law exists to protect reputation, curing the overbroad standard that obstructs the public figure from recovering for a damage to this reputation only acts to ensure that the free exchange of ideas surrounding a campaign are not clouded with lies and half-truths. Further, by allowing an avenue for the politician to (1) remove the half-truths and lies from the ever growing world of online media; or (2) hold those responsible for purveying this damaging material to the same standard applied to their print media brethren, society can attempt to focus political campaigns on the issues as opposed to the deception.

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132. 17 U.S.C. § 512(c),(d) & (g).

133. *See* 17 U.S.C. § 512(c)(1)(c) (noting OCILLA provides no definition of the term “expeditiously”).



