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Raymond Shih Ray Ku

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IRRECONCILABLE

CONGRESSIONAL TREATMENT OF
INTERNET SERVICE PROVIDERS
AS SPEAKERS

by

Raymond Shih Ray Ku

Raymond Shih Ray Ku: Associate Professor of Law and Director, Institute of Law, Science & Technology, Seton Hall University School of Law; A.B., Brown University; J.D., New York University School of Law. This Article is the second in a three part series examining whether Internet service providers should be considered speakers under the First Amendment. The author can be reached by email at kuraymon@shu.edu. I would like to specially thank Michelle Adams, Daniel Solove, and Charlie Sullivan for their comments and suggestions on earlier drafts of this article as well as my wife Melissa whose constant support and encouragement makes these projects possible.

Not only is the Internet the “most participatory form of mass speech yet developed,”¹ cyberspace also introduces forms of communication and speech intermediaries with no precise real space corollaries.² In particular, Internet service providers (ISPs), the primary entities responsible for providing individuals with access to cyberspace, do not fit neatly into the existing conceptual boxes for speech intermediaries under First Amendment law. Like traditional publishers, ISPs create and disseminate content. But they also provide other services, including Internet access and e-mail and data transmission, similar to those provided by telephone companies and the postal service. All of these different functions

publishers, and broadcasters.⁶

I have argued elsewhere that proponents of open access are trapped in a First Amendment catch-22.⁷ Either the ISPs seeking access to cable systems and the cable ISPs opposing them are both speakers under the First Amendment and the rights of cable ISPs prevail,⁸ or neither side may claim First Amendment protection because providing Internet access is not an expressive activity.⁹ The latter conclusion depends upon the existence of First Amendment principles that would permit the conceptual severance of the various services and functions provided by ISPs into expressive and non-expressive components. Traditionally, this conceptual

DIFFERENCES?

appear as part of an integrated seamless package. Moreover, unlike traditional media, ISPs are capable of exercising absolute control over the information that appears on their networks and who may access that information.

The control ISPs are capable of exercising over who may access their networks and the content that may be accessed clearly raises constitutional concerns with respect to efforts to regulate the “most participatory form of mass speech.” How the First Amendment and the principles of freedom of speech that it represents will be applied to the Internet has been the subject of much debate.³ While the Supreme Court’s decision in Reno v. American Civil Liberties Union⁴ resolved the general question of whether the First Amendment would apply to the Internet at all, the current controversy over open access to cable Internet networks raises a more fundamental question.⁵ Given the variety of different functions and services provided by ISPs, how do we determine when ISPs should be considered speakers entitled to protection under the First Amendment? The answer to this question is critical as traditional media prepare themselves for cyberspace, and as Congress and local governments attempt to regulate these speech intermediaries. To answer it, we must address the latent ambiguities in First Amendment jurisprudence brought about by the Supreme Court’s divergent treatment of existing mediums for communication, including common carriers,

severance was unnecessary because of the physical differences and separa-

tion between media. Publishing, broadcasting, and telecommunications were provided by different entities and separated by different modes of communication. Each mode of communication had its own unique characteristics and limitations. Given the convergence of these forms in the new medium of the Internet, it remains to be seen whether constitutional principles exist that would permit the conceptual severance of corresponding activities when they occur in chorus on the Internet.

In an effort to determine whether coherent constitutional principles exist that would allow the treatment of ISPs as speakers under some circumstances but not others, this Article examines congressional treatment of ISPs under the Communications Decency Act (CDA)¹⁰ and the Online Copyright Infringement Liability Limitation Act (OCILLA).¹¹ Because these statutes address the circumstances in which ISPs should be subject to liability for injuries traditionally related to expression, defamation, and copyright infringement, they implicitly provide us with insight into the circumstances in which Congress considers ISPs speakers. While the statutes do not directly address what acts of ISPs should be considered expressive activity protected by the First Amendment, we may draw certain inferences from their treatment of ISPs and the assumptions underlying both statutes.

This Article argues that under the CDA and OCILLA, Congress adopted facially inconsistent approaches

towards ISP liability for expression. Nonetheless, despite the overt differences, it is possible to discern an underlying principle for determining when ISPs should be considered speakers that reconciles this inconsistency. Put simply, the CDA and OCILLA support an approach toward determining when ISPs are speakers that focuses on whether an ISP exercises editorial control over its network. This approach is evidenced by the fact that both statutes recognize that ISPs are able to exercise editorial control over any and all content on their networks, and both encourage the exercise of that control in one form or another.

Part I summarizes the open access controversy and explains why the search for a principled means of analyzing the free speech claims of ISPs is necessary.

Parts II & III examine the CDA and OCILLA and their respective treatments of ISPs in light of First Amendment concerns. Lastly, part IV argues that the congressional treatment of ISPs under those statutes are facially at odds with one another and cannot be reconciled by coherent legal principles. Part IV concludes, however, that despite the obvious differences between the CDA and OCILLA, it is possible to discern an underlying principle based on editorial control for recognizing when, according to Congress, ISPs can and should be treated as speakers.

I. Open Internet Access & Free Speech

A. The Open Access Controversy

One of the current battles in the war for Internet dominance is being fought over the right to control the market for residential broadband access. Broadband refers to the ability to deliver information at speeds in excess of 200 kilobits per second (Kbps).¹² In general, Internet users access their e-mail or surf the web by connecting with ISPs such as AOL, Prodigy, or Netzero through the copper twisted wire of the local telephone company.¹³ Due to technical limitations, the speed at which information is transmitted through these wires limits the rate at which data can be transferred to a maximum speed of fifty-six Kbps.¹⁴ This means that downloading large files can take hours rather than seconds, changing webpages

may be painfully slow, and receiving full-motion video is virtually impossible.¹⁵ In contrast, other technologies, including cable and digital subscriber lines (DSL), are capable of transmitting data up to one hundred times faster than traditional telephone lines.¹⁶ At that speed, users can change webpages as quickly as they change channels on a television, and receiving streaming music and full-motion video becomes painless.¹⁷

Proponents of open access are trapped in a First Amendment catch-22. Either the ISPs seeking access to cable systems and the cable ISPs opposing them are both speakers under the First Amendment and the rights of cable ISPs prevail, or neither side may claim First Amendment protection because providing Internet access is not an expressive activity.

The functional differences between these technologies are the heart of the open access controversy. While just about all ISPs use broadband connections within their networks and to connect to other networks, most depend upon copper twisted telephone lines to provide the actual link between the residential user and the ISP.¹⁸ Since

the Internet is only as fast as

its slowest link, the connection from the home to the curb—commonly referred to as the “last mile”—generally dictates the rate at which information is sent and received by the residential user. Traditionally this “last mile” has been the most bandwidth-constrained portion of the Internet.¹⁹ However, this is beginning to change as cable companies upgrade their networks to accommodate the two-way transmission of information, and telephone companies upgrade their networks to provide DSL service.²⁰

While the upgrading of cable networks continues to be universally applauded as a necessary improvement of our communications infrastructure, these changes are also perceived as threats to the economic survival of existing non-cable ISPs.²¹ In particular, such ISPs are concerned because after investing billions of dollars to upgrade their networks, cable companies have begun to compete with traditional ISPs, providing Internet services themselves or (more commonly) through an exclusive ISP partner.²² Given the tremendous bandwidth and resulting functional differences between cable and regular telephone lines, AOL and other traditional ISPs worried that they would not be able to compete with cable ISPs in this billion-dollar industry.²³ As a result, AOL and others have lobbied government officials at the local, state, and federal levels to force cable companies to open

their networks so that all ISPs can compete to provide customers with Internet services over the local cable company's high-speed network.²⁴ The technological and resulting competitive advantages of cable over regular telephone lines also prompted AOL to purchase Time Warner, thereby acquiring high-speed cable networks of its own.²⁵

In response, cable ISPs argue that open access requirements are preempted by federal law and would otherwise violate their freedom of speech.²⁶ According to the cable ISPs, by forcing them to carry competing ISPs against their editorial decision, open access represents an unconstitutional effort to compel speech.²⁷ While the current open access cases should be resolved solely on the basis of preemptive federal law,²⁸ the distinct possibility that the law might change and that future legislation will restrict the free speech rights of ISPs in general²⁹ necessitates an answer to a deceptively simple question: are ISPs speakers under the First Amendment?

B. The Search for First Amendment Principles

As I have written elsewhere, there are three possible approaches for evaluating the free speech claims of ISPs: categorical, functional, and editorial.³⁰ The categorical approach would treat ISPs as speakers for all purposes because of their ownership and ultimate ability to control the information that flows through their networks.³¹ In contrast, both the functional and editorial approaches would treat ISPs as speakers under some circumstances but not others. The functional approach would assign fixed First Amendment rights and duties to each distinct service offered by ISPs (e-mail, World Wide Web access, bulletin boards, chat rooms, etc.) by drawing analogies to corresponding real world activities or by legislative fiat.³² Under the editorial approach, the First Amendment would protect ISPs as speakers when they exercise editorial control over the particular service in question.³³ In other words, with this approach, an ISP would be considered a speaker only when it actively controls the content available through its network.³⁴

How we determine whether ISPs should be entitled to First Amendment protection will depend upon which of the three approaches we adopt. Consider the following hypothetical:

Following a public outcry over the privacy of e-mail communications after the unveiling of the government's carnivore program,³⁵ Congress passes the Electronic Mail Privacy Act. The

Act would make it a crime for anyone to monitor, intercept, edit, disclose, or otherwise tamper with electronic mail or messages except pursuant to a court order. The Act does not exempt ISPs.

Under the categorical approach, the Act would be subject to strict scrutiny. By tying First Amendment protection to ownership of the communication medium, any interference with the ISP's control over its network would represent an interference with its First Amendment rights. In contrast, the Act would most likely be upheld under rational basis review by the functional approach because e-mail would be considered the functional equivalent of snail mail, and mail carriers have traditionally not been afforded First Amendment protection with respect to their carrying of messages.³⁶ Lastly, the editorial approach would require a case-by-case analysis. Strict scrutiny would only apply if the particular ISP objecting to the Act actually exercises editorial control over e-mail content.

II. Section 230 of the Communications Decency Act

Passed as part of Congress' first attempt to restrict content on the Internet, the CDA addresses the liability of ISPs with respect to obscene, indecent, and otherwise offensive material. Section 230 provides in part that: "No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."³⁷ The CDA defines 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 . . ."³⁸ "Information content providers" are 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."³⁹ The CDA further provides that no ISP shall be held liable on account of "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . ."⁴⁰

By its terms, section 230 concludes that ISPs should not be treated as speakers with respect to any information provided by others and cannot be held liable for

actions taken to restrict access to that content. But while on its face the CDA appears to provide a definitive answer to when ISPs should not be treated as speakers, the statute is both inconsistent with existing law and internally inconsistent with respect to what acts represent speech. On one hand, it states in clear and unequivocal terms that ISPs should not be considered speakers for content that they did not originate. In so doing, Congress rejects the role that editorial control plays in determining whether one has spoken and therefore should be held responsible for one's speech. On the other hand, the CDA then encourages those very same ISPs to exercise editorial control to censor even constitutionally protected speech to make the content on the Internet more "palatable."⁴¹ The emperor's new clothes are fine indeed.

Left intact by the Supreme Court's decision in Reno, section 230 has become critical in Internet defamation cases. Notably, two early decisions examining the liability of ISPs for defamation equated an ISP's level of editorial control to that exercised by newspaper publishers and bookstores.⁴² In Stratton Oakmont, Inc. v. Prodigy Services Co., a state court concluded that Prodigy's decision to exercise editorial control over its computer bulletin boards made it appropriate to treat Prodigy as a publisher of the alleged defamation.⁴³ From its inception, Prodigy attempted to distinguish itself from other ISPs by describing itself as the family-oriented network.⁴⁴ The ISP claimed that it maintained such an environment by controlling the content of messages placed on its bulletin boards.⁴⁵ By screening messages before and after their posting, Prodigy made it clear that open discussion on its network did not mean "anything goes." As the ISP, Prodigy acted as the final arbiter of what could and could not be said on its network.⁴⁶ According to the court, by consciously choosing "the benefits of editorial control," the ISP, like a newspaper, became a speaker and publisher of the alleged defamation. Therefore, Prodigy opened itself up to potentially greater liability for defamation than networks that choose not to exercise editorial control.⁴⁷ In other words, with the privilege of determining what expression would be made available on its network came the responsibility of bearing the adverse consequences resulting from that expression.

In a similar case, the court in Cubby, Inc. v. CompuServe Inc. examined an ISP's liability for allegedly defamatory statements contained in an electronic pub-

lication available through one of its online databases.⁴⁸ Here, it concluded that CompuServe could only be held responsible as a distributor of the alleged defamation if it knew or should have known about the defamatory content.⁴⁹ But the critical divergence from the Prodigy case was factual, not philosophical. Unlike Prodigy where people and software filtered the bulletin boards, CompuServe only decided whether the publication would be included in its electronic library without exercising any control over the publication's content.⁵⁰ As such, the court concluded, "CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand . . ." ⁵¹ The differences in the degree and nature of editorial control exercised by Prodigy and CompuServe, therefore, resulted in different applications of the same general liability rules.

Prodigy and CompuServe were consistent with traditional defamation law. In general, defamation law subjects publishers of defamatory statements to the same liability as the original speaker.⁵² In contrast, distributors such as bookstores and libraries are liable only if they knew or had reason to know of the defamation.⁵³ The different liability rules for distributors and publishers reflect the different kinds of editorial control exercised by the two groups, and therefore, the differing degrees of culpability involved.⁵⁴

For example, when an individual repeats what someone else has said or written, she clearly communicates ideas. More importantly, by speaking, she exercises her judgment as to the content of that communication. If her statements include defamatory falsehoods, then her judgment did not rise to the legally required standard of care, and she can be considered at fault for what was said.⁵⁵ It is assumed that publishers of print media exercise similar judgment when they determine not only what news is fit to print, but also what words will be used to convey the news.⁵⁶ Accordingly, we require publishers to exercise the same degree of care as our street corner speaker.

In contrast, it is not always reasonable to hold distributors of speech responsible for what they distribute.⁵⁷ Bookstores and libraries are not familiar with all of the content they distribute. As recognized by the Supreme Court, the First Amendment thus prevents the imposition of no-fault liability for distributors because: "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near

an approach to omniscience.”⁵⁸ Moreover, strict liability for distributors would “become the public’s burden, for by restricting [the bookseller] the public’s access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed.”⁵⁹ Unless the newsstand operator knows or has reason to know of the defamation, therefore, we do not consider her responsible for the speech she distributes.

Despite the different liability rules for distributors and publishers, both are protected speakers under the First Amendment.⁶⁰ Publishers are considered speakers because they select what statements and materials will go into their publication;⁶¹ distributors because they select which publications to distribute.⁶² The protected status of both publishers and distributors remains the same regardless of whether the form of communication is tangible or electronic. Thus, the Supreme Court has protected the free speech rights of broadcasters to determine what to broadcast on their networks,⁶³ and cable operators to determine what programming to carry over their cable systems.⁶⁴ In contrast, common carriers such as telephone companies, which do not exercise any editorial control over the content that travels over their networks, do not have First Amendment rights and are immune from defamation liability.⁶⁵ Consequently, prior to the CDA, an ISP’s free speech rights and responsibilities, like those of other media, would depend upon the type of editorial control it exercised.

However, by concluding that no ISP “shall be treated as the publisher or speaker of any information provided by another information content provider,” section 230 of the CDA appears to reject the common law scheme of liability with respect to ISPs.⁶⁶ Thus, in Zeran v. America Online, Inc., the Fourth Circuit agreed with America Online that through section 230, “lawsuits seeking to hold a service provider liable for its exercise of publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”⁶⁷ In that case, an unidentified indi-

vidual posted a message on an AOL bulletin board describing the sale of tasteless shirts relating to the Oklahoma City bombing, listing Zeran’s telephone number as the number to call to purchase the shirts. Following the posting, Zeran received numerous angry calls and even death threats.⁶⁸ He complained to AOL, which removed the original message but failed to prevent the anonymous poster from posting several similar messages.⁶⁹ Zeran argued that AOL should be considered a distributor of allegedly defamatory material posted on its bulletin boards, and that the CDA left distributor liability intact.⁷⁰ In rejecting this argument, the court concluded that distributor liability “is merely a subset, or subspecies, of publisher liability”⁷¹

While the Zeran court is clearly right that in the parlance of defamation distributors “publish” statements, it is unclear whether Congress intended to employ the broad definition of “publisher” used in defamation law when it crafted §230.⁷² Nonetheless, the court’s conclusion appears consistent with the CDA. Regardless of

whether distributors are publishers in the lexicon of defamation or in the ordinary meaning of the word, both distributors and publishers are speakers, and the CDA specifically states that ISPs should not be treated as speakers.⁷³

While the current open access cases should be resolved solely on the basis of preemptive federal law, the distinct possibility that the law might change and that future legislation will restrict the free speech rights of ISPs in general necessitates an answer to a deceptively simple question: are ISPs speakers under the First Amendment?

In Blumenthal v. Drudge, a federal district court agreed with the Zeran decision when it concluded that the CDA barred another action against AOL for allegedly defamatory statements contained in a gossip column entitled the “Drudge Report.”⁷⁴ While Zeran involved messages posted by an anonymous third party, AOL’s relationship with Drudge was much more involved. At the time, Drudge had entered into a licensing agreement with AOL to make his report available to all AOL members.⁷⁵ Pursuant to the agreement, AOL paid Drudge \$3,000 per month, promoted his report to current and potential subscribers, and retained the right to exercise editorial control over the content of the Drudge Report.⁷⁶ Despite AOL’s relationship with Drudge and the fact that it was much more than a ‘passive conduit like the telephone company,’ the court concluded that liability was

precluded by the CDA.⁷⁷

In granting AOL immunity from liability, the court appeared to distinguish between actual and potential editorial control. Critical to the court's decision was the fact that even though AOL had the contractual right to control the content of the Drudge Report, there was no evidence that it actually had any role in writing or editing the report.⁷⁸ In fact, the plaintiffs ultimately represented that Drudge was the only person who investigated, wrote, edited, and otherwise supervised the content of the report.⁷⁹ This distinction is critical because presumably if AOL had actually edited the contents of Drudge's report, it would have been

considered an information content provider as an entity "responsible, in whole or in part, for the creation or development of information provided through the Internet," and thus its immunity would be lost.⁸⁰ While the Drudge

court's conclusion that AOL was not responsible in any degree for the content of the Drudge Report does not appear to be compelled by the CDA (which does not distinguish between actual versus potential editorial control over a publication's contents), it highlights an important distinction made by Congress. Under the CDA, an individual or entity is treated as a speaker only when it creates or develops the content in question.⁸¹ In contrast, content transmission, post-publication editing, or post-publication blocking in whole or in part by an ISP does not make the ISP responsible for that content.⁸²

Why Congress made this decision can be explained by the CDA's purpose and history. In general, the conclusions reached in Zeran and Drudge are supported by the CDA's purpose and history. As the Drudge court recognized, section 230 of the CDA represents Congress' effort to enlist the aid of ISPs in eliminating offensive material from the Internet.⁸³ Cubby and Stratton Oakmont clearly stood in the way of that purpose. If an ISP could be held responsible for the content available through its networks whenever it exercised editorial control over that network by removing or blocking access to certain content, Congress believed that ISPs would choose not to eliminate offensive material for fear of being subject to liabilities traditionally associated with editorial control. Furthermore, if ISPs faced tort liability for information

distributed by others, the growth of the Internet might be threatened.⁸⁴ Accordingly, the legislative history of section 230 specifically states:

One of the specific purposes of this section is to overrule Stratton Oakmont v. Prodigy and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.⁸⁵

To that end, Congress concluded that ISPs should not be treated as speakers with respect to content that they did not create. Speakers

under the CDA, therefore, are limited to the original creators of content; subsequent decisions to transmit, edit, or block content are not treated as components of speech. To use a non-Internet example, under this approach, the

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producers and creators of the television show "Survivor" would be considered the speakers while CBS and its affiliates would not—even though they decided to broadcast the program and censor portions of the program during the broadcast. Additionally, under the Drudge court's interpretation of the CDA, "Survivor" would not be considered CBS's speech even if the network had the right to control the production of the series but chose not to do so.⁸⁶

Even though the framework established by the CDA may make sense in instrumental terms—Congress clearly wanted to eliminate indecent material on the Internet, and if it could not do so directly, it would enlist the aid of ISPs⁸⁷—it is difficult to discern any principled distinctions between ISPs and other speakers under these circumstances. Assuming that it is inappropriate to hold ISPs to the standard of liability for publishers unless they are directly involved in creating the content, why is distributor liability not appropriate?

Consider two variations on the facts of Zeran. One, after receiving notice that the posting was potentially defamatory and injurious to Zeran, AOL decides not to remove the initial posting or block the subsequent postings because it thinks the messages are funny and should be accessible to the public. Or two, after receiving notice, instead of blocking the posting outright, AOL deletes the

portions of the messages it considers to be offensive, leaving the rest intact, including Zeran's telephone number, because it determines that the unedited material should be seen by the public. Under the Zeran and Drudge decisions, the CDA would immunize AOL in both hypotheticals because AOL did not create the messages, irrespective of the fact that it now has actual knowledge that the messages are causing harm to Zeran. If a magazine publisher can be held responsible for knowingly publishing harmful classified advertisements,⁸⁸ why should ISPs be held to a different standard of accountability?

Zeran suggests a possible answer. According to the court, this immunity is necessary in order to preserve freedom of speech on the Internet. The court stated that unlike traditional print publishers, ISPs will face "an impossible burden" even if required to investigate claims of defamation given "the sheer number of postings" available through their network.⁸⁹ This in turn would create a "natural incentive simply to remove messages upon notification, whether the contents were defamatory or not."⁹⁰ Additionally, the court noted that distributor liability would naturally deter ISPs from censoring material because those efforts would lead to notice of potentially defamatory material.⁹¹ If true, the first explanation would certainly be a cause for concern and sufficient justification for immunity. However, as part III later demonstrates, given the fact that Congress imposed distributor-type liability upon ISPs in the context of copyright infringement, the Zeran court's "censor first and ask questions later" argument is simply a post-hoc justification that rings hollow.

Furthermore, not only is the court's argument that ISPs would be deterred from censoring speech on the Internet unsupportable by the First Amendment, it is also antithetical to the promotion of a vibrant and responsible free market place of ideas. While Congress may have paid lip service to the values of free expression in the CDA, the statute itself threatens rather than promotes freedom of speech. The CDA does not simply recognize the private editorial rights of ISPs, it encourages private censorship of speech by immunizing ISPs from all liability with respect to their editorial decisions, creating an environment for unrestrained and irresponsible censorship.⁹²

III. The Online Copyright Infringement Liability Limitation Act

Congress' next effort to regulate ISPs responded to the

problems that the Internet presents for copyright law. The Internet not only brings with it the potential to facilitate copyright infringement, but it also raises fundamental conceptual difficulties for copyright law. What constitutes a copy? Is data stored in an ISP's server "fixed" for the purposes of copyright law? What duties and liabilities should ISPs be subject to as speech intermediaries when allegedly infringing information is transmitted over their networks?

The Online Copyright Infringement Liability Limitation Act (OCILLA) was Congress' answer to these questions.⁹³ Following the White House proposal that all electronic storage of information should be treated as a fixed copy under copyright law,⁹⁴ OCILLA immunizes ISPs from copyright liability when the allegedly infringing content is: 1) transmitted through digital communications;⁹⁵ 2) cached on the ISP's system;⁹⁶ 3) residing on the network at the direction of users;⁹⁷ or 4) made accessible through information location tools.⁹⁸ As with the CDA, Congress predicates immunity upon a finding that the ISP did not originate the content.⁹⁹ Further, as in the CDA, if the ISP is directly responsible for the infringing content, it cannot escape liability under OCILLA.

At this point, however, the similarities between the acts end. After distinguishing between the original content provider and those that merely act as conduits for that content, OCILLA imposes four additional requirements upon ISPs before they qualify for immunity under the statute. First, the ISP cannot exercise any editorial control over the material. Even if it originates from someone other than the ISP, if the ISP exercises any discretion in selecting the material¹⁰⁰ or the recipients,¹⁰¹ or if the ISP modifies the content of the materials,¹⁰² it will not be immune from copyright liability. Second, the ISP cannot have actual knowledge that "the material or an activity using the material on the system or network is infringing"¹⁰³ or knowledge "of any facts or circumstances from which infringing activity is apparent."¹⁰⁴ Third, if an ISP obtains knowledge or awareness of allegedly infringing material either on its own or after receiving notice from a third party, the ISP must act "expeditiously to remove, or disable access to, the material."¹⁰⁵ Lastly, the ISP cannot receive any financial benefit directly from the allegedly infringing material or activity.¹⁰⁶

Unlike the CDA, OCILLA recognizes that an ISP's post-creation exercise of editorial control over content on its network renders the ISP responsible for that content.

Whether the ISP is altering the content of the message, selecting which materials to make accessible in a database, or independently directing materials to particular recipients, the ISP is exercising control over its network similar to the editorial control exercised by newspaper publishers, broadcasters, and cable operators. Liability under these circumstances is akin to publisher liability under defamation law.

OCILLA, however, does not stop there. In addition to publisher liability, the Act recognizes liability for ISPs similar to distributor liability. Even when an ISP does not exercise editorial control over content residing on or transmitted through its network, OCILLA recognizes potential liability for an ISP's subsequent failure to exercise that control. By conditioning immunity upon an ISP's lack of actual knowledge or awareness of copyright violations and requiring that an ISP act expeditiously to remove or disable access to the allegedly infringing material once it has such knowledge or awareness, subsections 512(c) and (d) mirror distributor liability under defamation law.

The liability scheme under OCILLA, therefore, is directly at odds with the one established by the CDA. By imposing both publisher and distributor liability upon ISPs, OCILLA undermines the *Zeran* court's explanation for why distributor liability for ISPs should not be recognized under the CDA.¹⁰⁷ Clearly, ISPs would be under the same burden to examine and evaluate the volume of claims for copyright infringement as they would defamation claims. ISPs would also have the same incentive to censor first and ask questions later. In fact, given the potential for significant damage awards with respect to copyright infringement,¹⁰⁸ ISPs arguably have a greater incentive to censor in cases involving alleged copyright infringement. Moreover, OCILLA not only recognizes the potential for ISPs simply to restrict access to challenged content, but also encourages ISPs to take such action by immunizing them for censoring first and asking questions later.¹⁰⁹ The First Amendment threat of private and perhaps public censorship, therefore, is just as

strong under OCILLA as it would be under the CDA. Nonetheless, Congress chose to impose distributor liability upon ISPs under OCILLA, and, whatever the legislative intent, courts have chosen not to find the same in the CDA.

IV. Irreconcilable Differences?

At face value, the approaches taken by Congress in section 230 of the CDA and OCILLA clearly conflict with one another. The CDA immunizes ISPs from liability under all circumstances except when the ISP itself is the original source of the content. This approach treats ISPs as common carriers, like telephone companies or postal carriers, which do not exercise editorial control over the messages they carry, and correspondingly do not have recognized speech rights or responsibilities.¹¹⁰ The CDA

does so despite the fact that ISPs can and do exercise editorial control over their networks similar to publishers of print publications. In contrast, OCILLA not only leaves ISPs open to liability when they are the source of the infringing content, but also subjects them to liability when they simply exercise editorial control—or, under certain circumstances, fail to exercise such control. This divergent treatment of ISP liability exists despite compa-

While Congress may have paid lip service to the values of free expression in the CDA, the statute itself threatens rather than promotes freedom of speech. The CDA does not simply recognize the private editorial rights of ISPs, it encourages private censorship of speech by immunizing ISPs from all liability with respect to their editorial decisions, creating an environment for unrestrained and irresponsible censorship.

parable degrees of culpability and burden. As a result, this section addresses whether there is a way to reconcile these divergent approaches, and suggests that despite the overt differences between the statutes, both statutes recognize the editorial control of ISPs.

A. Explanations

Can the apparent differences between the CDA and the OCILLA be reconciled? One answer is suggested by legal realism and public choice theory. Perhaps the copyright and entertainment industries simply have more political power than victims of defamation and plaintiffs' attorneys, or they have been more successful at capturing the legislative process. One could argue that Congress is more concerned with protecting the information industry from potential harm than protecting indi-

viduals. Simply put, the differences between the CDA and OCILLA are not the result of principled decision-making. Although public choice theory may explain these differences, it does little to guide us in a search for unified First Amendment principles except to tell us that focusing on Congress may render our project in vain. However, unless one requires a slavish reliance upon actual intent (if such a thing is ever discernable), the fact that the differences between the CDA and OCILLA may not reflect reasoned and/or consistent policy choices does not undermine their value as examples that shed some light on the question of when ISPs should be considered speakers.

Another possible explanation for the different treatment is that copyright and defamation have different relationships to speech. While defamation is absolutely tied to speech because by definition it involves the communication of a defamatory statement, copyright infringement includes acts unrelated to expression. For example, the individual who photocopies a new Stephen King novel from cover to cover without permission from the copyright holder is clearly making an unauthorized copy. But is she speaking? While many may consider the act of photocopying copyright infringement, few would consider it speech, as it often lacks any expressive component.

There are, however, two major objections to this explanation. First, copyright law clearly implicates speech and First Amendment concerns.¹¹¹ Copyright infringement includes not only the act of copying itself, but also the act of communicating copyrighted material.¹¹² By limiting the circumstances in which individuals and entities may express themselves, copyright law clearly implicates speech. In other words, when I give you an MP3 of a Metallica song, it may seem as though I am not communicating anything more than that I think you might enjoy the song. However, when I give you an unauthorized copy of Tracy Chapman's "Talking About a Revolution" to awaken your political consciousness or I copy text from your webpage and post that text on mine for others to see, expression is undeniable. Under the current copyright regime, unless the particular use of the copyrighted material is privileged by statute,¹¹³ falls under the statutory exceptions for fair use,¹¹⁴ or is otherwise protected by the First Amendment,¹¹⁵ expression can violate copyright law.

Second, the requirements established by OCILLA themselves undermine any argument that OCILLA con-

siders copyright infringement unrelated to speech. If the Act only permitted an ISP to be subject to liability when that ISP is the original source of the allegedly infringing content or has actual knowledge or awareness of facts of the infringement,¹¹⁶ it might be plausible to interpret it as recognizing liability for acts unrelated to speech. Under those circumstances, OCILLA would permit liability because the ISP is committing a direct act of infringement by "copying" protected materials or aiding others in making those copies. Nonetheless, as discussed above, OCILLA imposes copyright liability under additional circumstances.¹¹⁷ For example, an ISP loses immunity under the OCILLA simply by selecting what material will be transmitted over its network, selecting the recipients of that material, or by modifying the contents of the contents of the material.¹¹⁸ Moreover, knowledge or awareness that the material may be infringing is not required under those circumstances. Congress simply concluded that by exercising editorial control over the material on their networks, ISPs, like print publishers, should have knowledge of the allegedly infringing material. OCILLA, therefore, recognizes liability specifically under circumstances when the alleged copyright infringement results from what may be considered an ISP's speech.

B. Reconciling the Irreconcilable

Despite the overt conflict between the CDA and OCILLA with respect to liability, congressional treatment of ISPs under these statutes may still yield a coherent approach for determining when ISPs are speakers. Because the statutes only address ISP liability for speech, it is quite possible to assume that Congress recognized a uniform approach for determining when ISPs speak, and simply chose to immunize ISPs for some types of speech but not for others. As such, the CDA's statement that ISPs should not be treated as publishers or speakers does not necessarily represent Congress' conclusion that they are not publishers or speakers even with respect to content originated by others. It may only represent a congressional conclusion that ISPs should not be held responsible for objectionable material as a matter of public policy even when that material should be considered their speech. Whether Congress could limit an ISP's ability to speak by modifying content originated by others, selecting the materials to make accessible to users, or selecting which users will receive the material, therefore, would present an entirely different

question. In other words, the CDA and OCILLA do not necessarily directly address whether ISPs are speakers or whether they have a right to exercise editorial control over their networks.

Moreover, despite the different approaches towards ISP responsibility for speech, both statutes recognize that ISPs have the capacity to exercise editorial control over content on their networks. In fact, an ISP's editorial control over its network plays a prominent role in both the CDA and OCILLA. As discussed earlier, the CDA insulates ISPs from liability for any action taken "to restrict access to or availability of material" that may be considered objectionable.¹¹⁹ Congress provided this immunity to harness an ISP's independent editorial control for its own ends—namely, the elimination of obscene and indecent material on the Internet.¹²⁰ Similarly, OCILLA recognized an ISP's editorial control over content when it limited immunity to circumstances in which the ISP does not exercise that editorial control.¹²¹ Thus, while the statutes differ with respect to the consequences of exercising editorial control, their recognition of an ISP's editorial control is undeniable.

CONCLUSION

The purpose of this Article was to examine congres-

sional treatment of ISPs in an effort to determine when they should be considered speakers for First Amendment purposes. The prominence of editorial control in the provisions and history of the CDA and OCILLA suggest that congressional treatment of ISPs as speakers is consistent with the editorial approach. Neither statute takes the categorical approach, imposing liability based upon ownership of the communications medium alone. Similarly, both statutes recognize an ISP's editorial control with respect to its network as a whole rather than limiting that control to discrete and particular services under the functional approach. These are, however, only two statutes, and legislation introduced in Congress specifically on the issue of open access appears to reject an editorial approach towards speech by proposing common carrier obligations for ISPs.¹²² Moreover, because the CDA and OCILLA only address ISP liability for expression and not whether they have a right to speak, they present us with only half the picture. While it remains to be seen how Congress, let alone the Supreme Court, will treat ISPs in the context of open access or in other cases that implicate the freedom of speech of ISPs directly, the CDA and OCILLA suggest a presumption in favor of the editorial approach.

¹ *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (Dalzell, J. supporting opinion), *aff'd* 521 U.S. 844 (1997).

² See Kathleen M. Sullivan, *First Amendment Speech Intermediaries In the Age of Cyberspace*, 45 U.C.L.A. L. REV. 1653 (1998) (discussing the concept of speech intermediaries in the context of the Internet).

³ See, e.g., Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L. J. 1757 (1995), Thomas G. Krattenmaker & L. A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L. J. 1719 (1995); Ira Glasser, *The Struggle for a New Paradigm: Protecting Free Speech and Privacy in the Virtual World of Cyberspace*, 23 NOVA L. REV. 627 (1999).

⁴ 521 U.S. 844 (1997)

⁵ See *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146 (D. Or. 1999) (upholding forced access requirements for cable Internet service providers), *rev'd* 216 F.3d 871 (9th Cir. 2000) (holding that open access requirements are pre-empted by the Telecommunications Act of 1996). See also Raymond Ku, *Open Internet Access & Freedom of Speech: A First Amendment Catch-22*, 75 TULANE L. REV. 87 (2000) & STANFORD TECHNOLOGY LAW REVIEW (Working Paper Series 2000); Marcus Maher, *Cable Internet Unbundling: Local Leadership in Deployment [sic] High Speed Access*, 52 FED. COMM. L. J. 211, 225 (1999).

⁶ See Ku, *supra* note 5, at 134; Krattenmaker & Powe, *supra*

note 3, at 1721-22. See generally, ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* (1983); LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999).

⁷ See Ku, *supra* note 5, at 93.

⁸ See *id.* at 110-124.

⁹ See *id.* at 124-134.

¹⁰ See 47 U.S.C. § 230.

¹¹ See 17 U.S.C. § 512. I do not mean to imply that Congressional interpretation of the First Amendment is by any means conclusive. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (rejecting the argument that Congress has the power to substantively define constitutional rights under the §5 of the Fourteenth Amendment).

¹² The Federal Communications Commission defines "broadband" as "having the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed (in technical terms, "bandwidth") in excess of 200 kilobits per second (kbps) . . ." In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 14 F.C.C.R. 2398, ¶ 20 (1999) [hereinafter *Advanced Services Report*].

¹³ See Ku *supra* note 5, at 116. For a more detailed discussion of how the Internet is connected and about the technologies

used to connect users to the Internet see id.

¹⁴ See id. at 98.

¹⁵ See id. at 99-100.

¹⁶ See id. at 98. See also *AT&T Corp. v. Portland*, 216 F.3d 871, 873-74 (9th Cir. 2000).

¹⁷ See *AT&T*, 216 F.3d at 874. See also *Advanced Services Report*, *supra* note 12, at 3; *Ku*, *supra* note 5, at 100.

¹⁸ See *Ku*, *supra* note 5, at 100-101, 116; *Advanced Services Report*, *supra* note 12, at 13, 34

¹⁹ See *Ku*, *supra* note 5, at 100; *Advanced Services Report*, *supra* note 12, at 13.

²⁰ See *Ku*, *supra* note 5, at 100-101.

²¹ See *Maher*, *supra* note 5, at 225.

²² See *Ku*, *supra* note 5, at 88.

²³ In 1998, the market revenue for ISPs was projected to grow from \$4 billion to \$18 billion in the year 2000. In the Matter of Federal-State Joint Board on Universal Service, 13 F.C.C.R. 11501 [20-21] (1998).

²⁴ See Application for Consent to Transfer of Licenses and Section 214 Authorization from TCI to AT&T, 14 F.C.C.R. 2160 (1999); *AT&T*, 215 F.3d at 874-75.

²⁵ See Seth Schiesel, *Media Megadeal: THE IMPACT; A Rush to Provide High-Speed Internet Access*, THE NEW YORK TIMES, Jan. 12, 2000.

²⁶ See *AT&T*, 43 F. Supp. 2d at 1154.

²⁷ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994).

²⁸ See *AT&T*, 216 F.3d at 880; *Ku*, *supra* note 5, at 109.

²⁹ See H.R. 1685, 106th Cong. (1999) (prohibiting anti-competitive contracts by broadband access providers); H.R. 1686, 106th Cong. (1999) (same); H.R. 2637, 106th Cong. (1999) (authorizing the FCC to require cable operators to open their networks "on terms and conditions that are fair, reasonable, and non-discriminatory"). See also H.R. 2420, 106th Cong. (1999) (requiring local exchange carriers to provide Internet users with the ability to subscribe to the high speed ISP of their choice; S. 877, 106th Cong. (1999) (same). See also Kaplan Srinivasan, *FCC Mulls Regulating Cable Internet*, THE WASHINGTON POST (Sep. 28, 2000) (noting that the FCC and FTC are both considering whether to require cable companies to open their networks).

³⁰ See *Ku*, *supra* note 5, at 127.

³¹ Id. at 127-128. This approach is suggested by Justice Thomas in *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 816 (1996) (Thomas, J., concurring in part & dissenting in part). According to Justice Thomas, as the owner of the property, a cable operator is in the same position as the owner of a bookstore, and entitled to the same First Amendment protection. Id.

³² Id. at 128-129. The functional approach is by far the most common approach advanced in the literature. See, e.g., Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" within the New Media*, 71 NOTRE DAME L. REV. 79 (1995) (suggesting that it is possible to distin-

guish speakers from distributors on the Internet); Allen S. Hammond, *Regulating Broadband Communications Networks*, 9 YALE J. ON REG. 181, 212-13, 216-17 (1992) (discussing channel functionalism which allows government to regulate the use of the channels or transmission paths depending on the type of information transmitted and operational functionalism which separates the transmission medium and the message transmitted regulating the former and not the latter); Harold Feld, *Whose Line is it Anyway? The First Amendment and Cable Open Access*, 8 COMM.LAW CONSPICUOUS 23 (2000) (arguing that Internet access should be treated as a common carriers service). In part this is due to the appeal of regulating the Internet by analogy to existing forms of communications. It is also, however, due to an ends driven analysis by many commentators who would prefer to treat ISPs as commons.

³³ Id. at 129-130. In the third installment of this three part series, I argue that an editorial approach for evaluating the speech rights of ISPs is the most consistent with our constitutional tradition and the values we seek to protect under the First Amendment.

³⁴ Without the requirement that ISPs actually exercise editorial control over their networks as opposed to potentially being able to exercise that control, distinguishes it from the categorical approach.

³⁵ Carnivore is a proposed computer system developed by the FBI to monitor e-mail communications. See generally, Oscar S. Cisneros, *FCC Could Adopt Carnivore*, WIRED NEWS (Sep. 29, 2000) <<http://www.wired.com/news/politics/0,1283,39129,00.html>>.

³⁶ *Lamont v. Postmaster General of U.S.*, 381 U.S. 301, 305 (1965) (recognizing the limited rights of the post-office).

³⁷ 47 U.S.C. § 230(c)(1).

³⁸ 47 U.S.C. § 230(f)(2).

³⁹ 47 U.S.C. § 230(f)(3).

⁴⁰ 47 U.S.C. § 230(c)(2)(A).

⁴¹ 47 U.S.C. § 230 (c)(2)(A) (providing immunity for the censoring content "whether or not such material is constitutionally protected").

⁴² See *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991); *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995). The CDA was enacted in part to overrule the Stratton Oakmont decision. See infra text accompanying notes 83-86.

⁴³ See *Stratton Oakmont*, 1995 WL 323710 at *5.

⁴⁴ See id. at *2.

⁴⁵ See id.

⁴⁶ See id. at *2-*3.

⁴⁷ See id. at *5.

⁴⁸ See *Cubby*, 776 F. Supp. at 137-38.

⁴⁹ See id. at 140.

⁵⁰ See id.

⁵¹ Id.

⁵² See RESTATEMENT (SECOND) OF TORTS § 578 (1977); W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 113, at 799 (5th ed.

1984) [hereinafter PROSSER AND KEETON].

53 PROSSER AND KEETON, *supra* note 52, § 113 at 803-04, 810-12.

54 *Id.*

55 The degree of responsibility can and does vary depending upon the circumstances and the subject matter of the communication. See New York Times, Co. v. Sullivan, 376 U.S. 254 (1964) (recognizing a constitutional malice standard for defamation regarding public officials).

56 PROSSER AND KEETON, *supra* note 52, § 113 at 803.

57 See Smith v. California, 361 U.S. 147, 153 (1959).

58 *Id.* at 153 (citations and footnote omitted).

59 *Id.*

60 See, e.g., Smith, 361 U.S. 147, New York Times, 376 U.S. 254.

61 See Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (protecting the right to editorial control and judgment); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 653 (1994) (“The First Amendment protects the editorial independence of the press.”).

62 See, e.g., Lerman v. Flynt Distrib. Co., 745 F.2d 123, 139 (2d Cir. 1984) (“First Amendment guarantees have long been recognized as protecting distributors of publications . . .”), *cert. denied*, 471 U.S. 1054 (1985). Cf. PROSSER AND KEETON, *supra* note 52, § 113 at 803:

Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such extent in making the books, newspapers, magazines, and information available to others as to be regarded as publishers. They are intentionally making the contents available to others, sometimes without knowing all of the contents - including the defamatory content - and sometimes without any opportunity to ascertain, in advance, that any defamatory matters was to be included in the matter published.

63 See CBS v. Democratic Nat'l Comm., 412 U.S. 94, 124 (1973) (“For better or worse, editing is what editors are for; and editing is selection and choice of material.”).

64 See Turner Broadcasting, 512 U.S. at 636.

65 See HARVEY L. ZUCKERMAN, ROBERT L. CORN-REVERE, ROBERT M. FRIEDEN & CHARLES H. KENNEDY, MODERN COMMUNICATIONS LAW 187(West 1999) (common carriers “receive the lowest level of First Amendment protection by definition, for they do not have a recognized right to speak on their own and are denied editorial control over their communication traffic.”).

66 47 U.S.C. § 230(c)(1). I use the word “appear” because the purpose of the CDA was to enlist the aid of ISPs to censor pornography on the Internet. It is by no means certain that Congress intended to insulate ISPs from liability with respect to defamation. See *infra* note 85.

67 Zeran v. America Online, Inc., 129 F.3d 327, 329 (4th Cir.

1997).

68 *Id.* at 329.

69 *Id.*

70 *Id.* at 331.

71 *Id.* at 332.

72 The broad definition of publisher stems from the requirement in defamation that a statement be published. Publishing in this context is simply the communication of the statement to others. See PROSSER AND KEETON, *supra* note 52, § 113 at 797.

73 See 47 U.S.C. § 230(c)(1).

74 Blumenthal v. Drudge, 992 F. Supp. 44 (D.C. Cir. 1998).

75 See *id.* at 47.

76 See *id.* at 51.

77 *Id.* at 51 (“ . . . Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.”).

78 See Drudge, 992 F. Supp. at 50. Given their contractual arrangement, it is unclear why the court did not consider Drudge an employee or agent of AOL similar to a freelance journalist or syndicated columnist employed by a newspaper.

79 See *id.*

80 47 U.S.C. § 230(f)(3).

81 Compare 47 U.S.C. § 230(f)(2) with § 230(f)(3).

82 See 47 U.S.C. § 230(c).

83 Drudge, 992 F. Supp. at 41 (“In some sort of tacit quid pro quo arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material . . .”).

84 See 47 U.S.C. § 230 (b)(stating that the purpose of the CDA is “to promote the continued development of the Internet” and “to preserve the vibrant and competitive free market that presently exists”).

85 H.R. Conf. Rep. No. 104-459, at 194 (1996). Given the Conference report’s focus on immunizing ISPs when they restrict access to objectionable material, one could argue that immunity should be limited to circumstances in which ISPs act to block objectionable material or when it is argued that a failure to block obscene and/or indecent material subjects ISPs to liability for that particular content. Aside from the argument that CDA use of “otherwise objectionable” is sufficiently vague to include defamation, neither the statute nor the legislative history directly addresses whether immunity should be granted for defamation. While Congress was clearly concerned that the principle underlying the Stratton Oakmont defamation decision might deter ISPs from blocking obscene and indecent speech, that concern does not necessarily reflect a judgment that Stratton Oakmont should be overruled with respect to liability for defamatory expression.

86 This conclusion is generally consistent with the laws gov-

erning broadcasters. See Prosser and Keeton, *supra* note 52, § 113 at 812 (noting that for broadcasting defendants to be held liable for defamation, a plaintiff must generally demonstrate “some kind of fault in permitting a false and defamatory statement to be published”).

⁸⁷ Cf. James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177 (1997) (recognizing the policy of enrolling private actors to act as enforcement agents for government policy).

⁸⁸ Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110 (11th Cir. 1992) (concluding that magazine publisher could be held responsible for an advertisement that created an unreasonable risk of soliciting violent criminal activity).

⁸⁹ Zeran, 129 F.3d at 333.

⁹⁰ Id. at 333. While it may be that ISPs will have an incentive to remove “challenged” content, the CDA itself undermines the argument that Congress found that reality troubling when it insulates ISPs from liability for removing content “whether or not such material is constitutionally protected.” See 47 U.S.C. § 230(c)(2)(A).

⁹¹ Zeran, 129 F.3d at 333.

⁹² By immunizing ISPs for any effort to censor material on their networks “whether or not such material is constitutionally protected,” see 47 U.S.C. § 230 (c)(2)(A), the CDA potentially elevates private censorship to state sponsored censorship of speech inconsistent with the First Amendment. Cf. Reitman v. Mulkey, 387 U.S. 369, 376 (1967) (holding that a constitutional amendment which prohibited the enactment of anti-discrimination laws “would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment.”). Whether the granting of immunity from tort liability under these circumstances is sufficient to represent state action is beyond the scope of this article and is the subject of a future article.

⁹³ See 17 U.S.C. § 512

⁹⁴ See INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, 114-24 (1995) (proposing a strict liability standard for ISPs for copyright violations under an broad definition of fixation); Boyle, *supra* note 87, at 198 (“On-line service providers were to be made strictly liable for copyright violations committed by their subscribers; in part, this was done by an expansive definition of fixation so that even holding a document in RAM as it was browsed would constitute the creation of a copy.”).

⁹⁵ See 17 U.S.C. § 512(a).

⁹⁶ See 17 U.S.C. § 512(b).

⁹⁷ See 17 U.S.C. § 512(c).

⁹⁸ See 17 U.S.C. § 512(d).

⁹⁹ For example, the sections that address transitory information and information cached on the network require that for an ISP to qualify for immunity under the OCI, the allegedly infringing information must originate from “a person other than the service provider.” See 17 U.S.C. §§ 512(a)(1); 512(b)(1)(A). Likewise, sections 512(c) and 512(d) of the Act which address information residing on the network at the direction of users, such as third party web pages or newsgroup posts,

and directory and hypertext links, only apply when the infringing content originates from a party other than the ISP. See 17 U.S.C. §§ 512(c); 512(d).

¹⁰⁰ See 47 U.S.C. § 512(a)(2).

¹⁰¹ See 47 U.S.C. § 512(a)(3).

¹⁰² See 47 U.S.C. §§ 512(a)(5) & 512(b)(2)(A).

¹⁰³ 47 U.S.C. §§ 512(c)(1)(A)(i) & 512(d)(1)(A).

¹⁰⁴ 47 U.S.C. §§ 512(c)(1)(A)(ii) & 512(d)(1)(B).

¹⁰⁵ 47 U.S.C. §§ 512(c)(1)(A)(iii) & 512(c)(1)(C); 47 U.S.C. §§ 512(d)(1)(C) & 512(d)(3).

¹⁰⁶ See 47 U.S.C. §§ 512(c)(1)(B) & 512 (d)(2).

¹⁰⁷ See supra text accompanying notes 89–90.

¹⁰⁸ See Amy Harmon, *Copyright and Copying Wrongs: A Web Rebalancing Act*, THE NEW YORK TIMES (Sep. 10, 2000) <<http://www.nytimes.com/2000/09/10/weekinreview/10HARM.html>> (noting that MP3.com was ordered to pay \$250 million for copyright infringement).

¹⁰⁹ See 17 U.S.C. § 512(g)(1) (“[A] service provider shall not be liable to any person for any claim based on the service provider’s good faith disabling of access to, removal of, material or activity claimed to be infringing . . . regardless of whether the material or activity is ultimately determined to be infringing.”).

¹¹⁰ See supra notes 36, 60-65 and accompanying text.

¹¹¹ See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press*, 17 U.C.L.A. L. REV. 1180 (1970); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L. J. 2431 (1998).

¹¹² See Denicola, *supra* note 111, at 289-93.

¹¹³ See 17 U.S.C. §§ 107-120 (setting forth exemptions and limitations upon copyright).

¹¹⁴ See 17 U.S.C. § 107 (setting for the elements of fair use).

¹¹⁵ Cf. Cambell v. Acuff Rose Music, Inc., 114 S. Ct. 1164 (1994) (concluding that a parody of “Oh, Pretty Woman” may be protected expression).

¹¹⁶ See supra Part III.

¹¹⁷ See supra text accompanying notes 100–106.

¹¹⁸ Id.

¹¹⁹ See 47 U.S.C. § 230(c)(2).

¹²⁰ See supra text accompanying notes 83-92.

¹²¹ See supra text accompanying notes 100-108.

¹²² See supra note 29.