ONLINE DEFAMATION: BRINGING THE COMMUNICATIONS DECENCY ACT OF 1996 IN LINE WITH SOUND PUBLIC POLICY

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According to the Communications Decency Act of 1996, a provider of an interactive computer service cannot be held liable for publishing a defamatory statement made by another party. In addition, the service provider cannot be held liable for refusing to remove the statement from its service. This article postulates that such immunity from producer and distributor liability is a suspect public policy, and argues that the statute should be amended to include a broad definition of "development" and a "take-down and put-back" provision.

INTRODUCTION

¶1 The Communications Decency Act of 1996 ("CDA") should be amended to include a broad definition of "development" and a "take-down and put-back" provision. In the twenty-first century, sixteen percent of Americans have broadband Internet access in their homes,[2] ninety-five percent of libraries provide Internet access to their patrons,[3] and seventy-seven percent of elementary and secondary schools provide Internet access to their students.[4] In addition, it is estimated that the percentage of American adults who use the Internet more than tripled from 1996 to 2002.[5] Despite these developments, Congress has yet to amend the CDA, which endows a provider of an interactive computer service with immunity from publisher and distributor tort liability. Under the statute, the service provider may select and publish a defamatory statement made by another party and may refuse to remove the statement from its service even after it knows that the statement is false. Conversely, under the common law, a provider of a traditional information service is liable if it publishes or distributes defamatory material. This distinction between e-providers and traditional providers is suspect because it is inherently based on an outdated policy decision.

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[2] PEW INTERNET & AMERICAN LIFE PROJECT, ADOPTION OF BROADBAND TO THE HOME: A PEW INTERNET PROJECT DATA MEMO, 1 (May 2003), *available at* http://www.pewinternet.org/reports/toc.asp?Report=90.

[3] THE NATIONAL CENTER FOR EDUCATION STATISTICS, E.D. TABS: PUBLIC LIBRARIES IN THE UNITED STATES, FISCAL YEAR 2000, tbl. 6 (July 2002), *available at* http://www.nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2002344.

[4] THE NATIONAL CENTER FOR EDUCATION STATISTICS, INTERNET ACCESS IN U.S. PUBLIC SCHOOLS AND CLASSROOMS: 1994-2000, tbl. 2 (May 2001), *available at* http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2001071.

[5] Harris Interactive, *The Harris Poll #8: Those with Internet Access to Continue to Grow but at a Slower Rate*, tbl. 1 (Feb. 5, 2003), *at* http://www.harrisinteractive.com/harris_poll/index.asp?PID=356.

THE COMMON LAW TORT OF DEFAMATION

¶2 The common law tort of defamation provides a legal remedy to those injured by gossip. Specifically, an individual is subject to liability if he or she damages another person's reputation by speaking or publishing false statements about that person to a third party.[6] Defamatory statements have the potential to tarnish a person's morality or integrity, or even to discredit a person's financial standing in the community.[7] A person found guilty of making a defamatory statement is assessed the monetary value of the harm caused by his or her statement.[8] In addition, the plaintiff in a defamation action has the burden of proving the elements of the tort.[9]

¶3 An entity that publishes or distributes a defamatory statement made by another person is also liable.[10] An entity, such as a newspaper, that repeats or otherwise republishes a defamatory statement is subject to publisher liability because the injured party is harmed every time the statement is repeated.[11] However, an entity, such as a bookstore, that only distributes or transmits a defamatory statement, is subject to distributor liability only if the entity knew or should have known that the statement was defamatory.[12] A distributor "should know" that a statement is defamatory if "a person of reasonable prudence and intelligence or of the superior intelligence of the [distributor] would ascertain [the nature of the statement]."[13]

THE COMMUNICATIONS DECENCY ACT OF 1996

¶4 The CDA was created in large part to protect children from objectionable online material.[14] In *Stratton Oakmont, Inc. v. Prodigy Services Co.,*[15] Prodigy was held liable for publishing defamatory statements on one of its online bulletin boards;[16] the statements were placed on the board by one of Prodigy's customers.[17] The court reasoned that Prodigy was the publisher of all statements made on the bulletin board because Prodigy frequently monitored the information on the service and removed offensive material.[18] This holding concerned Congress. They worried that such a rule would deter a provider of an interactive computer service from removing objectionable material from its services that are frequented by minors because

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[6] RESTATEMENT (SECOND) OF TORTS § 558 (1977).
[7] *Id.* at § 559 cmt. b.
[8] *Id.* at § 621.
[9] *Id.* at § 613.
[10] *Id.* at §§ 578, 581.
[11] *Id.* at § 578 & cmt. b, illus. 1.
[12] *Id.* at § 581 & cmt. e.
[13] *Id.* at §§ 12 (2), 581 cmt. c.
[14] Batzel v. Smith, 333 F.3d 1018, 1027-29 (9th Cir. 2003).
[15] 1995 WL 323710 (N.Y. Sup. May 24, 1995).
[16] *Id.* at *4. A bulletin board system is "a computer system that provides its users files for downloading and areas for electronic discussions." *Glossary of Internet Terms*, E-BIZ-U.COM, *at* http://www.ebiz-u.com/glossary.htm.
[17] *Stratton Oakmont*, 1995 WL 323710, at *1.
[18] *Id.* at *4.

removing the material would subject the service provider to publisher liability.[19] In response, Congress enacted 47 U.S.C. § 230[20] as part of the CDA.[21]

¶5 Under § 230, a provider of an interactive computer service cannot be held liable for publishing or distributing a defamatory statement made by another party[22] as long as the service provider did not assist in the creation or development of the statement.[23] Specifically, § 230 states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The statute 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."[24] Interactive computer services include online bookstores,[25] online auctions,[26] and online bulletin boards.[27] In addition, an "information content provider" is "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."[28]

¶6 Congress also enacted § 230 to promote the development of the Internet and to preserve its unique nature.[29] The Internet is unique from other communication services because it enables individuals from around the world to place, or post, information onto interactive computer services and to quickly receive responses to that information from previously unknown persons. Information posting services include, but are not limited to, email listservs[30] and online bulletin boards. Traditional media are unable to facilitate this same degree of collaboration and development of ideas.

¶7 In *Batzel v. Smith*, the Court of Appeals for the Ninth Circuit held that a provider of a website or listserv can be immune from publisher liability.[31] In *Batzel*, a Mr. Cremers operated a website and listserv

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[19] *Batzel*, 333 F.3d at 1029.
[20] Protection for Private Blocking and Screening of Offensive Material, 47 U.S.C. § 230 (2003).
[21] H.R. Conf. Rep. No. 104-458, at 194 (1996) ("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."); *see also Batzel*, 333 F.3d at 1027-29.
[22] § 230 only explicitly provides immunity for publisher liability. However, all courts to rule on the subject have concluded that § 230 inherently includes immunity for distributor liability. *Batzel*, 333 F.3d at 1027 n.10 (citing Zeran v. America Online, Inc., 129 F.3d 327, 331-34 (4th Cir. 1997)); Ben Ezra, Weistein, and Co. v. America Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000); Doe v. America Online, Inc., 783 So. 2d 1010, 1013-17 (Fla. 2001)).
[23] *Batzel*, 333 F.3d at 1030-31.
[24] § 230 (f)(2).
[25] Schneider v. Amazon.com, 31 P.3d 37, 41 (Wash. App. Div. 2001).
[26] Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 831 n.7 (2002).
[27] *Zeran*, 129 F.3d at 330 n.2.
[28] § 230 (f)(3).
[29] *See* § 230 (b).
[30] A listserv is "a family of programs that manages mailing lists by distributing messages posted to the list, adding and deleting members automatically." *Glossary of Internet Terms*, *supra* note 16.
[31] 333 F.3d at 1034.

that distributed information about museum security and stolen art.[32] One day Cremers received an email from a Mr. Smith stating that Smith suspected that paintings located in the house of a Ms. Batzel were stolen.[33] The email requested guidance on how to report the stolen art.[34] Cremers selected Smith's email, made minor edits, placed the email in an electronic newsletter, and distributed the newsletter via the listserv.[35] Soon thereafter, Batzel sued Cremers and Smith claiming that Smith's statements were false and harmful to her reputation.[36]

¶8 The court of appeal's analysis of Cremer's actions turned on whether Cremer's act of selecting and editing the email made him a co-developer of the statements.[37] The statements could not be considered to be "information provided by another information content provider" if Cremers was a co-developer.[38] The court reasoned that Cremers was not a co-developer because editing and selecting content is part of the normal duties of a publisher, and, if the CDA frees publishers from liability, then Cremers' actions as a publisher could not also make him ineligible for immunity.[39] In addition, the court stated that Cremers is only immune from liability if Smith intended Cremers to publish the email.[40] Lastly, the court acknowledged that the CDA does not require a provider of an interactive computer service to remove a statement from its service even after the injured party informs the service provider that the statement is defamatory.[41]

¶9 Judge Gould dissented from the majority's opinion and argued that Congress did not intend the statute to protect rumors and falsehoods.[42] Gould postulated that the CDA should be interpreted to endow a provider on an interactive computer service with immunity from liability only if the service provider does not take an active role in selecting the statement for publication.[43] However, Gould continued, if the service provider takes an active role in selecting the statement, the statement is no longer information provided by another party, and the service provider is liable.[44] The majority implied that Gould's rule had merit, but stated that the

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[32] *Id*. at 1021.
[33] *Id.*
[34] *See id.*
[35] *Id*. at 1022.
[36] *Id.*
[37] *Id*. at 1031.
[38] *Id.*
[39] *Id*. at 1031-32.
[40] *Id*. at 1033-34.
[41] See *id*. at 1031 n.19.
[42] *Id*. at 1040 (Gould, J., dissenting).
[43] *Id*. at 1038-40 (Gould, J., dissenting).
[44] *Id*. at 1038-39 (Gould, J., dissenting).

dissent did not have any statutory backing for its opinion.[45] The majority's holding in *Batzel* is consistent with the opinions of other courts.[46]

BRINGING THE COMMUNICATIONS DECENCY ACT IN LINE WITH SOUND PUBLIC POLICY

¶10 The common law tort of defamation and the CDA are inherently based on policy decisions. The tort of defamation signifies that avenging and reducing the harm caused to individuals by defamatory statements is worth some limitations on free speech.[47] The CDA implies that avenging and reducing the harm from electronic defamatory statements is not worth the risk of limiting the unique nature of the Internet and the risk of deterring providers of interactive computer services from voluntarily regulating objectionable material.[48] However, the CDA policy decision is based on the state of the Internet in 1996. Today, the Internet is used by 140 million American adults[49] and is a valuable research and educational tool. In fact, a defamatory statement made on the Internet will likely cause the same, if not more, harm as a similar statement made in a traditional information service because of the number of people who could potentially read the statement.[50] Therefore, in 2003, the 1996 balance between the harm caused by electronic defamatory statements and the goals of the CDA is at best suspect.

¶11 The CDA would be a sound policy if it protected individuals from electronic defamatory statements, protected the unique nature of the Internet, and protected a service provider's ability to voluntarily edit objectionable material. It is imperative that an amended statute does not protect individuals at the expense of the original objectives of the CDA because such a statute would create the very situation feared by the 1996 lawmakers. All three policy objectives would be accomplished if the CDA included a broad definition of "development" and a "take-down and put-back" provision.

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[45] *See id.* at 1032. *Compare with* Blumenthal v. Drudge, where the court made a policy argument similar to the dissent's argument in *Batzel*. However, the court did apply the argument because the argument did not comply with the language of the CDA. 992 F. Supp. 44, 51-52 (D.D.C. 1998).

[46] Ben Ezra, Weistein, and Co. v. America Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000) ("By deleting the symbols, however, Defendant simply made the data unavailable and did not develop or create the stock quotation information displayed.); *Blumenthal*, 992 F. Supp. at 52 ("But 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."); Zeran v. America Online, Inc., 129 F.3d 327, 332-33 (4th Cir. 1997) ("Once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit or withdraw the posting. In this respect, [the defendant] is assuming the role for which § 230 specifically proscribes liability—the publisher's role.").

[47] *See generally* RESTATEMENT (SECOND) OF TORTS § 558.

[48] *See generally* 47 U.S.C. § 230 (b), (c)(1).

[49] Harris Interactive, *supra* note 5, at tbl. 4.

[50] *See* Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 587-88 (2001) ("This means that for victims of those statements that are found to be defamatory, or would be adjudicated, the injury can be extremely large in terms of how many people viewed the defamation and likely responded to it by reducing their opinion of the victim.").

1. Publisher Liability and a Definition of Development

¶12 Under the current CDA, a provider of an interactive computer service is immune from liability for publishing a defamatory statement made by another party if the service provider was not a co-developer of the statement. The CDA does not define what actions constitute development, but the courts have held that actively selecting a statement for publication is not enough to qualify the service provider as a co-developer of the statement.[51] This discrepancy between e-providers and traditional providers would not exist if the CDA included a broad definition of "development," such as:

> A provider of an interactive computer service is considered to have participated in the development of "information provided by another information content provider" if the service provider actively selected the information for publication. The interactive service provider is not considered to have actively selected the information if the service provider only took actions consistent with § 230 (c)(2)(A).[52]

Under this definition, a provider of an interactive computer service is subject to publisher liability if it posts information that it specifically selected for publication, but is not subject to liability if it posts all the non objectionable material it receives. For example, a provider of a listserv that reviews all emails sent to the listserv and posts all the non objectionable messages, or all the messages minus the objectionable text, is immune from publisher liability. However, the same service provider is not immune from liability if it only posts the messages it believes to be relevant.

¶13 Inserting this definition of development into the CDA preserves the original objectives of the statute and is a first step to protecting individuals from electronic defamatory statements. First, the definition preserves a service provider's ability to voluntarily remove objectionable material from its service. The service provider is not considered to be a co-developer of "information provided by another information content provider" if the service provider's only selection criteria is that the information does not contain objectionable material.

¶14 Second, the definition does not stifle the unique nature of the Internet because it does not create an incentive for the service provider to discontinue its information posting service. The service provider only incurs liability if it limits the non objectionable material available on its service, or, in other words, the service provider only incurs liability if it turns its posting service into an online newsletter or quasi-newspaper. There

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[51] *See* Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003).

[52] Section 230 (c)(2) states:

> No provider or user of an interactive computer service shall be held liable on account of--
> (A) 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, whether or not such material is constitutionally protected.

is nothing inherently unique about a high-speed newspaper that would justify the high-speed newspaper being protected from publisher liability when a traditional newspaper would not be protected.[53]

¶15 Third, the definition of development subjects the service provider to the common law tort of defamation if the service provider selects and publishes a defamatory statement made by another party. However, the definition does not require the service provider to retract the statement once the service provider knows the statement is false. Therefore, inserting the definition of development into the CDA is only the first step in bringing the statute completely in line with sound public policy.

¶16 There are two arguments against inserting the definition of development into the CDA. The first argument is that the CDA should not be altered because the Internet allows an individual harmed by an electronic defamatory statement to rebut the statement in the same forum. This argument is misguided for three reasons. First, the current CDA does not require a provider of an interactive computer service to post a rebuttal or retraction to a defamatory statement. Second, not all interactive computer services allow the injured individual to rebut the defamatory statement in the same forum. For example, in *Batzel*, Batzel could not directly place a rebuttal in Cremer's electronic newsletter because the content of the newsletter was controlled solely by Cremers.[54] Third, assuming the injured individual is able to post a rebuttal, the current CDA does not provide the injured party with any means of obtaining monetary damages.

¶17 The second argument against inserting the definition is that the Internet provides an inexpensive opportunity for a lay person to electronically publish information and that any amendment to the CDA might stifle this ability. This argument is also misguided because the definition of development does not change the cost of online publishing, such as, the price of web space or the price of creating a web page. The definition only requires any provider of an interactive computer services to meet minimal common law standards.

2. Distributor Liability and a Take-Down and Put-Back Provision

¶18 By itself, the definition of development does not adequately protect individuals from electronic defamatory statements because the definition does not hold a provider of an interactive computer service liable for refusing to remove a statement from its service that it knows to be defamatory.[55] In 2000, Congress faced a similar problem with copyrights and solved it by enacting a "take-down and put-back" provision[56] as part of the Digital Millennium Copyright Act ("DMCA").[57] The DCMA take-down and put-back provision subjects an online service provider to distributor liability for failing to remove defamatory material posted by another party from its service if the service provider knows, or has been sufficiently notified, that the material

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[53] *See generally Batzel*, 333 F.3d at 1020.
[54] *See id.* at 1021.
[55] *See id.* at 1031 n.19.
[56] Limitations on Liability Relating to Material Online, 17 U.S.C. § 512 (2003).
[57] *Batzel*, 333 F.3d at 1031 n.19.

infringes a third party's copyright.[58] In addition, the provision places the burden of investigating the validity of a copyright infringement claim on the injured party and the party that posted the material.[59]

¶19 If the DCMA take-down and put-back provision was adapted to the CDA, a provider of an interactive computer service would be subjected to distributor liability if it had actual knowledge that a statement is defamatory, had knowledge of facts which make the defamatory nature of a statement apparent, received financial benefit directly from a defamatory statement, or was notified that a statement is defamatory, and did not remove the statement from its service.[60] The service provider is considered to know that a statement is defamatory if a reasonable person in the service provider's position would conclude that it is apparent that the statement is defamatory.[61] In addition, the service provider is only considered to be notified of the existence of a defamatory statement if the injured party submits a formal written notification[62] to the service provider.[63] The service provider may file a lawsuit to recoup any expenses incurred as the result of a fraudulent statement made within the notification.[64]

¶20 Upon receiving a valid notification, the service provider retains its immunity if it adheres to a set of formal procedures. The service provider must first inform the party that provided the statement that the statement will be removed from the service.[65] The service provider is only required to take reasonable steps to contact the content provider, such as, sending an email to the address that was connected to the original posting.[66] The content provider may submit a counter notice declaring that the statement is not defamatory.[67] If he or she submits a counter notice, the service provider must put the disputed statement back onto the interactive computer service within ten to fourteen business days.[68] The injured party may then seek an

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[58] H.R. Rep. No. 105-551(II), at 53-54 (1998).
[59] *See id.* at 59-60.
[60] *Batzel*, 333 F.3d at 1031 n.19; § 512 (c)(1); H.R. Rep. No. 105-551(II), at 53-54.
[61] *See* H.R. Rep. No. 105-551(II), at 53; *see generally* RESTATEMENT (SECOND) TORTS §§ 12, 581.
[62] The notification is only valid if it substantially includes:

> (1) A physical or electronic signature of the injured party.
> (2) Identification of the statement claimed to be defamatory, or, if multiple defamatory statements at a single online site are covered by a single notification, a representative list of such statements at that site.
> (3) Identification of the statement that is claimed to be defamatory or to be the subject of defamatory activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the statements.
> (4) Information reasonably sufficient to permit the service provider to contact the injured party, such as an address, telephone number, and, if available, an electronic mail address at which the injured party may be contacted.
> (5) A statement that the injured party has a good faith belief that the statements are defamatory.
> (6) A statement that the information in the notification is accurate.

See § 512 (c)(3).
[63] § 512 (c)(3)(A), (B)(i); H.R. Rep. No. 105-551(II), at 54.
[64] § 512 (f); H.R. Rep. No. 105-551(II), at 59.
[65] § 512(g)(2); H.R. Rep. No. 105-551(II), at 59.
[66] § 512(g)(2)(A); H.R. Rep. No. 105-551(II), at 59.
[67] § 512(g)(2)(B); H.R Rep. No. 105-551(II), at 60.
[68] § 512(g)(2)(C); H.R. Rep. No. 105-551(II), at 60.

injunction declaring that the statement is defamatory and that it must be removed.[69] The service provider is not involved in the court proceedings, but must comply with the order.[70]

¶21 The proposed CDA take-down and put-back provision preserves the original objectives of the CDA and is the second step to protecting individuals from electronic defamatory statements. First, the take-down and put-back provision imposes liability only if a provider of an interactive computer service purposefully leaves a defamatory statement on its service, without first following the prescribed protocol. The service provider's ability to voluntarily remove objectionable material from its service is not affected.

¶22 Second, the provision does not stifle the unique nature of the Internet because the provision does not make it more economically efficient for a service provider to alter its service. A generic distributor liability provision could stifle the unique nature of the Internet.[71] If the service provider is forced to incur significant expenses in order to adequately investigate whether a statement is defamatory, the service provider may find it more efficient to automatically discard every disputed statement,[72] or to stop providing the service all together.[73] However, the take-down and put back provision places the majority of the investigation costs on the injured party and the content provider. The service provider does not incur investigation costs if it knows that the statement is defamatory because there is nothing to investigate. In addition, if the service provider is notified that a statement might be defamatory, the service provider's only responsibility is to take-down and put-back the statement according to the formal procedure. Also, the service provider can recover any costs associated with a fraudulent notification. Lastly, in the case of an injunction, the service provider's only responsibility is to remove the statement if so ordered. The service provider will likely find it economically advantageous to internalize these minimal transaction costs because it will be driven by market forces to provide a competitive information posting service.

¶23 Third, the take-down and put back-provision protects individuals from electronic defamatory statements. The provision imposes liability on a service provider if it refuses to remove a statement from its service that it knows to be defamatory or that it has been notified could be defamatory.

CONCLUSION

¶24 The CDA should be amended to include a broad definition of "development" and a "take-down and put-back" provision. Under the current CDA, a provider of an interactive computer service may select and publish a defamatory statement made by another party and may refuse to remove the statement from its

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[69] *See generally* § 512 (g); H.R. Rep. No. 105-551(II), at 60-61.
[70] *See generally* § 512 (g); H.R. Rep. No. 105-551(II), at 61.
[71] Paul Ehrlich, *Cyberlaw: Regulating Conduct on the Internet*, 17 BERKELEY TECH. L.J. 401, 415 (2002).
[72] *Id.* at 415-16; *see also* Freiwald, *supra* note 50, at 590 ("Common law courts have been hesitant to impose upon these entities a liability rule that would force them to review publications as a matter of course, reflecting concern that distributors would unduly limit their publications out of fear of liability and to avoid the burden of reviewing them.").

service even if the service provider knows that the statement is false. Conversely, a provider of a traditional information service is liable if it publishes or distributes defamatory material. This distinction between e-providers and traditional providers is suspect because a defamatory statement published over the Internet has as much, if not more, potential for harm as a statement published over a traditional media.

¶25 The CDA would be in line with sound public policy if it included the proposed definition of development and the take-down and put-back provision. The definition of development would subject a provider of an interactive computer service to publisher liability if the service provider actively selected the information posted on its service. The take-down and put-back provision would subject the service provider to distributor liability if it refused to remove a statement from its service which it knew to be defamatory or for which an injured party had submitted a formal notification. In addition, the amended CDA would preserve the unique nature of the Internet and would not deter service providers from voluntarily regulating objectionable material.

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[73] Ehrlich, *supra* note 71, at 415-16.