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Platform Immunity Redefined

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ABSTRACT

Section 230 of the Communications Decency Act (CDA) immunizes "interactive computer services" from most claims arising out of third-party content posted on the service. Passed in 1996, section 230 is a vital law for allowing free expression online, but it is ill-suited for addressing some of the harms that arise in the modern platform-based economy.

This Article proposes to redefine section 230 immunity for sharing economy platforms and online marketplaces by tying internet platform immunity to the economic relationship between the platform and the third party. It primarily focuses on one key flaw of section 230: its binary classification of online actors as either "interactive computer services" (who are immune under the statute) or "information content providers" (who are not immune). This binary classification, while perhaps adequate for the internet that existed in 1996, fails to account for the full range of economic activities in which modern platforms now engage.

This Article argues that courts applying section 230 should incorporate joint enterprise liability theory to better define the

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contours of platform immunity. A platform should lose immunity when there exists a common business purpose, specific pecuniary interest, and shared right of control in the underlying transaction giving rise to liability. Sharing economy platforms, such as Airbnb and Uber, and online marketplaces, such as Amazon, are primary examples of platforms that may function as joint enterprises. By using joint enterprise theory to redefine platform immunity, this Article seeks to promote greater fairness to tort victims while otherwise retaining section 230's core free expression purpose.

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INTRODUCTION

Internet platforms are largely immune from liability arising out of the content they allow third parties to create or share on their platforms. The source of this immunity is section 230 of the Communications Decency Act (CDA),[1] a 1996 law that is vitally important but at times too broad. To begin, consider this tale of two platforms.

In 1995, Craig Newmark set out to create an internet platform for listing events, jobs, apartments, and other information for local communities seeking to connect with each other.[2] His website, Craigslist.org, initially focused on listing events in the San Francisco Bay Area but eventually expanded its content to include housing, jobs, and even goods available for sale.[3] Although Craigslist started as a noncommercial, nonprofit site,[4] by 1999, it was operating as a private, for-profit business with full-time employees.[5] It expanded into other cities and, to make revenue, began charging for some job postings.[6] While successful and profitable, Craiglist has avoided banner ads, subscription fees, and other sources of online revenue.[7]

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1. 47 U.S.C. § 230(c).

2. *See Mission and History*, CRAIGSLIST, https://www.craigslist.org/about/mission_and_history [https://perma.cc/92LP-SZ6W].

3. *See id.*

4. *Id.*

5. Terynn Boulton, *Everything You Ever Wanted to Know About Craig from Craigslist*, GIZMODO (Sept. 6, 2013, 5:30 AM), https://gizmodo.com/everything-you-ever-wanted-to-know-about-craig-from-cra-1262446153 [https://perma.cc/4ES4-LXU9]. Newmark started Craigconnects in 2011 as an umbrella organization for Craigslist's philanthropic endeavors, including supporting organizations that help people through community engagement and pursuing causes that promote online trust, internet ethics, and accountability. Jon Fine, *How Craigslist's Founder Realized He Sucked as a Manager*, INC. (Sept. 2016), https://www.inc.com/magazine/201609/jon-fine/inc-interview-craigslist.html [https://perma.cc/LFG8-9U26]. Nonetheless, Craiglist also lobbies for legislative and other action. Notably, Craigslist lobbied against the Stop Enabling Sex Traffickers Act (SESTA) and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) amendments to section 230. *See* Theodoric Meyer with Aubree Eliza Weaver, *Craigslist Hires First Lobbyists*, POLITICO (Dec. 8, 2017, 2:50 PM), https://www.politico.com/newsletters/politico-influence/2017/12/08/craigslist-hires-first-lobbyists-046160 [https://perma.cc/NZ9H-GLP6].

6. Boulton, *supra* note 5.

7. Fine, *supra* note 5.

In 2009, Travis Kalanick co-founded UberCab in San Francisco.[8] The business concept was somewhat simple: users seeking a ride could click a button on their smartphones, and a car would appear.[9] The vision was for UberCab to be "everyone's private driver"[10]—a much-needed improvement to the highly regulated and entrenched transportation industry.[11] By 2010, Uber started a new genre of transportation services in a tech-enabled modern sharing economy.[12] Sometimes called "transportation network companies," platforms such as Uber rely on mobile technology to connect individuals to each other for the purpose of offering "ridesharing services" to the public.[13] But Uber is not merely a forum for connecting riders with drivers. It exerts considerable control over transactions that happen on its platform. For example, in most locations Uber is entirely cashless;[14] the company collects payment from riders directly and later pays its drivers a portion of the fares.[15] Uber sets and enforces

8. Brian O'Connell, *History of Uber: Timeline and Facts*, THESTREET (Jan. 2, 2020, 12:50 PM), https://www.thestreet.com/technology/history-of-uber-15028611 [https://perma.cc/7Y7M-BLGK].

9. *The History of Uber*, UBER NEWSROOM, https://www.uber.com/newsroom/history/ [https://perma.cc/46FL-EQ67].

10. *E.g.,* Felix Salmon, *The Economics of "Everyone's Private Driver,"* MEDIUM (June 1, 2014), https://medium.com/@felixsalmon/the-economics-of-everyones-private-driver-464bfd730b38 [https://perma.cc/M6CK-LQ6M].

11. *See* Kara Swisher, *Man and Uber Man*, VANITY FAIR (Nov. 5, 2014), http://www.vanityfair.com/news/2014/12/uber-travis-kalanick-controversy [https://perma.cc/QBC6-QXPU] (describing the development of Uber).

12. *See id.*; *see also* Agnieszka A. McPeak, *Sharing Tort Liability in the New Sharing Economy*, 49 CONN. L. REV. 171, 177-78 (2016) (explaining the evolution of the sharing economy from a nonmonetized barter system to a tech-enabled, sophisticated system of peer-to-peer transactions).

13. *See* CAL. PUB. UTIL. CODE § 5431(c) (West 2019) (""Transportation network company' means an organization ... that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle."); Ravi Mahesh, *From Jitneys to App-Based Ridesharing: California's "Third Way" Approach to Ride-for-Hire Regulation*, 88 S. CAL. L. REV. 965, 965, 1009 (2015) (discussing California's adoption of the transportation network company definition).

14. *See Paying with Cash*, UBER HELP, https://help.uber.com/riders/article/paying-with-cash-?nodeId=ba02bcb0-4bdc-417a-a236-8fe1582adffc [https://perma.cc/N8GA-EU8K] ("Uber is designed to be an entirely cashless experience in most cities.").

15. *See How Do I Receive My Earnings?*, UBER HELP, https://help.uber.com/driving-and-delivering/article/how-do-i-receive-my-earnings?nodeId=42973e65-45a8-4aaf-90d5-d3e97ab61267 [https://perma.cc/58CP-627C].

its own prices,[16] requires drivers to meet certain safety requirements,[17] and sets terms and conditions for riders.[18]

Both Craigslist and Uber are internet-based businesses relying on web-enabled connections among individual users.[19] And both attempt to shield themselves from liability for claims arising out of third-party activity on their platforms.[20] Section 230 states that

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16. *See How Are Fares Calculated?*, UBER HELP, https://help.uber.com/riders/article/how-are-fares-calculated?nodeId=d2d43bbc-f4bb-4882-b8bb-4bd8acf03a9d [https://perma.cc/N262-Z8PP]. Although Uber touts driver flexibility, it has come under fire for its assertions about how much a driver can really make. *See, e.g.*, Janine Berg & Hannah Johnston, *Too Good to Be True? A Comment on Hall and Krueger's Analysis of the Labor Market for Uber's Driver-Partners*, 72 ILR REV. 39, 40, 55, 63-64 (2019). Nonetheless, Uber experimented with allowing California drivers to set their own fares in response to California legislation that reclassified some gig workers as employees. *See* Carolyn Said, *Uber, Wary of AB5, Is Giving California Drivers More Freedom. Its Tactics May Not Work*, S.F. CHRON. (Feb. 10, 2020, 9:13 AM), https://www.sfchronicle.com/business/article/Will-Uber-s-ride- changes-thwart-AB5-gig-work-15041528.php [https://perma.cc/PTP3-8N39]. *But see* Shannon Bond, *California Voters Give Uber, Lyft a Win but Some Drivers Aren't So Sure*, NPR (Nov. 5, 2020, 6:01 AM), https://www.npr.org/2020/11/05/931561150/california-voters-give-uber-lyft-a-win-but-some-drivers-arent-so-sure [https://perma.cc/GH2E-4VXV] (describing Proposition 22, a successful California ballot measure that allows sharing economy platforms to maintain independent contractor status for their workers). Moreover, as a company, Uber is highly valued and has raised unprecedented amounts of venture capital. Ritika Shah, *New Investment Round Could Put Uber Valuation at $62.5 Billion*, CNBC (Dec. 3, 2015, 5:34 PM), http://www.cnbc.com/2015/12/03/uber-to-be-valued-at-more-than-62-billion.html [https://perma.cc/Z6LE-WCDR]; *see also* Douglas MacMillan & Telis Demos, *Uber Valued at More than $50 Billion*, WALL ST. J. (July 31, 2015, 8:50 PM), http://www.wsj.com/articles/uber-valued-at-more-than-50-billion-1438367457 [https://perma.cc/EGA6-GHSG] (noting that Uber surpassed Facebook's venture capital success as a startup).

17. *Safety*, UBER, https://www.uber.com/us/en/safety [https://perma.cc/6JGT-M6VJ].

18. *U.S. Terms of Use*, UBER, https://www.uber.com/legal/usa/terms [https://perma.cc/C2E4-5FQU].

19. Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 94 (2016) (defining the platform "as an online intermediary between buyers and sellers of goods and services—the ancient role of the middleman—enhanced with the modern power afforded by cloud computing, algorithmic matching, pervasive wireless Internet access, scaled user-networks, and near-universal customer ownership of smartphones and tablets" but noting that platforms are also "the new wave of digital companies ... based on the logic of multi-sided markets that disrupt traditional offline interactions by reshaping the ways individuals transact"); Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 144-45 (2017) ("Platforms exploit the affordances of network organization and supply infrastructures that facilitate particular types of interactions, but they also represent strategies for bounding networks and privatizing and controlling infrastructures.... Platforms [also] use technical protocols and centralized control to define networked spaces in which users can conduct a heterogeneous array of activities and to structure those spaces for ease of use.").

20. *See, e.g.*, HomeAway.com, Inc. v. City of Santa Monica, 918 F.3d 676, 684 (9th Cir. 2019) (affirming district court's ruling that Airbnb was not immune under section 230);

"[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[21] An "interactive computer service," essentially defined as the entity that provides or enables access to a computer network,[22] is immune from liability.[23] By contrast, no immunity attaches for the "information content provider,"[24] that is, the "entity that is responsible, in whole or in part, for the creation or development of [online] information."[25]

Under section 230's binary classification of "computer service" and "content provider," Craigslist and Uber may both appear to fit the "computer service" category. After all, Craiglist's forum enables access to a network of listings, and Uber connects drivers and riders via its own network. But the core economic activity and business model of each platform vary considerably. Uber purports to screen members of its network;[26] Craigslist does not. Moreover, Uber takes a cut of every transaction on its platform.[27] While Craigslist charges fees "for job postings,"[28] it does not set prices for the goods and services available on its platform the way that Uber does.[29] These two platforms fundamentally differ in (1) how they operate, (2) the degree of control they exert over transactions, and (3) the way they profit from their users. Quite simply, Craigslist provides a forum for user-enabled exchanges (and likely deserves broad immunity) while Uber operates more like a joint enterprise with its drivers (and should not get the same broad immunity).

These two platforms illustrate the need for a more nuanced analysis of a platform's underlying economic activity for the purposes of determining section 230 immunity. Uber and other sharing economy platforms—along with online marketplaces such

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Adeline A. Allen, *Uber and the Communications Decency Act: Why the Ride-Hailing App Would Not Fare Well Under § 230*, 18 N.C. J.L. & TECH. 290 (2017) (describing how Uber might fare under section 230).

21. 47 U.S.C. § 230(c)(1).
22. *Id.* § 230(f)(2).
23. *Id.* § 230(c)(1).
24. *See id.*
25. *Id.* § 230(f)(3).
26. *See Safety*, *supra* note 17.
27. *See How Do I Receive My Earnings?*, *supra* note 15.
28. *See Mission and History*, *supra* note 2.
29. *See id.*; *How Are Fares Calculated?*, *supra* note 16.

as Amazon—challenge the bounds of section 230. While it is important to protect intermediaries from most liability arising out of third-party speech and allow them to moderate content,[30] section 230 has gone too far in insulating platforms that actively engage in something resembling a joint enterprise with third parties. This Article thus proposes that one limit on section 230 immunity should be based on the nature of the economic relationship between the platform and third parties.

This reform is necessary because modern platforms have multiple functions and at times engage in hands-on, for-profit relationships with users that resemble joint enterprises.[31] As actors who control and profit from transactions, these platforms should bear some of the cost of harms that flow from their activities.[32] By looking at whether the platform is engaging in a joint enterprise with a user, the law can rein in overly expansive applications of platform immunity and permit some remedies to tort victims.[33] At the same time, this approach can promote stability and clarity at a time when platform immunity is being threatened by sweeping reforms.[34]

This Article proceeds as follows. Part I examines the development of platform immunity over time and the current section 230

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30. "Content moderation" refers to the platform's policies for allowing certain content and blocking other content from its websites. Facebook, for example, uses a series of guidelines that dictate when nudity, violence, harassment, or other objectionable content should be excluded from the platform. *See* Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1356 (2018); *see also* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1603 (2018).

31. A "joint enterprise" in tort law often includes a common pecuniary purpose and right of control. *See* RESTATEMENT (SECOND) OF TORTS § 491 cmt. c (AM. L. INST. 1965).

32. *See generally* Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1286-87 (2001) [hereinafter Keating, *Theory of Enterprise Liability*]; Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1235 (1984); Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1267 (1997) [hereinafter Keating, *Idea of Fairness*].

33. *See also* Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345, 1380 (1982) (noting that enterprise liability can promote a higher degree of care).

34. *See, e.g.*, Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (amending section 230 to limit immunity for websites knowingly hosting content facilitating sex trafficking); *see also* Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019) (proposing to amend federal law to require that large internet platforms certify to the Federal Trade Commission that their content moderation practices are politically neutral as a prerequisite for getting section 230 immunity).

framework. It explores how immunity for internet platforms emerged due to the practical and normative concerns of imposing traditional publisher liability on internet companies and how courts have interpreted section 230 over time. Further, it provides an overview of legislative reform proposals and academic literature supporting and critiquing section 230.

Part II proposes redefining platform immunity using joint enterprise liability theory in tort law. It begins by explaining joint enterprise theory generally. It then critiques section 230's binary classification of "interactive computer services" and "information content providers" as insufficient for capturing the range of activities in which modern platforms now engage. Part II then examines how sharing economy platforms and online marketplaces in particular do not fit neatly within section 230's current framework.

Part II acknowledges that platform immunity under section 230 is appropriate for insulating many online intermediaries from claims based on third-party content, but it suggests also examining the economic relationship between the platform and the third-party content creator to determine the parameters of immunity. Drawing on joint enterprise liability in tort law, Part II thus concludes by arguing that section 230 immunity is inappropriate for platforms that have a common business purpose with the third party, share a specific pecuniary interest with the third party, and possess an equal voice or right of control. This approach reconciles a key purpose behind section 230—insulating online intermediaries from liability as "speakers" or "publishers" of third-party content[35]—with the current reality of the modern platform-based economy. Quite simply, online intermediaries now take many forms, and platforms that engage in joint enterprises with third parties should not be entitled to broad immunity.

I. THE CURRENT SECTION 230 FRAMEWORK

In the 1990s, when the internet was emerging as a personal tool for communication and commerce, policymakers foresaw the threat of innovation-crushing civil liability.[36] Traditional tort law imposes

35. *See* 47 U.S.C. § 230(b)-(c).

36. *See generally* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET

liability on publishers for the content they choose to publish.[37] Thus, poor editorial choices that result in harm to others may give rise to civil liability.[38] Even distributors can face tort liability if they knowingly distribute defamatory content.[39] An internet computer service, on the other hand, is different in both nature and scope.[40] At the time section 230 was passed, burgeoning new internet companies were not intending to supplant newspaper publishers or function as distributors but, instead, were programming software and developing high-tech tools to allow the "Cyber Age" to explode.[41] The internet they were building had the potential to democratize communication by giving individual users more freedom to interact

57-77 (2019) (describing the origins of section 230).

37. For example, a cause of action for defamation may arise when an actor publishes a false or defamatory statement. *See* RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977) (explaining elements of a defamation claim). Privacy-based torts may also arise when an actor unreasonably intrudes upon the seclusion of another, misappropriates someone's name or likeness, unreasonably publicizes private facts, or unreasonably places another in a false light before the public. *See id.* § 652A (stating the general principles of privacy torts).

38. *See id.* §§ 558, 652A (defining the elements of claims for defamation and invasion of privacy, both of which give rise to civil damages).

39. *See* Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 38 (2019).

40. Scholars have often referred to "internet exceptionalism," the idea that cyberspace is fundamentally different than the real world, both in its location and its primary function or purpose. *See, e.g.*, Mark Tushnet, *Internet Exceptionalism: An Overview from General Constitutional Law*, 56 WM. & MARY L. REV. 1637, 1638 (2015); H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369, 377 (2008) (describing the rationale for self-regulation on the internet); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1395-1400 (1996) (noting the challenges posed by the seemingly boundaryless space that is the internet); Henry H. Perritt, Jr., *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECH. L.J. 413, 476-78 (1997); Lawrence Lessig & Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 MICH. L. REV. 395, 396 (1999) (because cyberspace lacks a single jurisdiction, regulation, particularly of speech, becomes more difficult). *But see* Meg Leta Jones, *Does Technology Drive Law? The Dilemma of Technological Exceptionalism in Cyberlaw*, 2018 U. ILL. J.L. TECH. & POL'Y 249, 284 (taking a critical look at the notion of technological exceptionalism); Abbey Stemler, *Platform Advocacy and the Threat to Deliberative Democracy*, 78 MD. L. REV. 105, 146 (2018) (noting how platform regulation may be necessary in light of advocacy roles by platforms).

41. Courts have recognized that the "Cyber Age" is a revolutionary point in time, with broad implications on free speech and expression. *See, e.g.*, Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) ("While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.").

with each other directly through online forums.[42] Some internet platforms established norms for online conduct while others did not.[43] Either way, platforms served primarily as intermediaries, not as traditional editors or even newsstands.[44] Thus, policymakers in the 1990s recognized the threat that liability posed to the growth and promise of the internet and enacted section 230 of the Communications Decency Act in 1996.[45]

By passing section 230, Congress sought to prevent state and federal laws from over-regulating the internet.[46] In 1996, as the "DotCom" industry flourished,[47] concerns arose about the stifling

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42. *See, e.g.*, Klonick, *supra* note 30, at 1603-04.

43. *See* Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency Act*, U. RICH. J.L. & TECH. BLOG ¶¶ 26-27 (Aug. 27, 2020), https://jolt.richmond.edu/2020/08/27/the-origins-and-original-intent-of-section-230-of-the-communications-decency-act/ [https://perma.cc/4UY2-SKF8] (discussing the content guidelines in *Stratton Oakmont v. Prodigy Servs. Co.*, No. 031063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), in comparison to the lack of guidelines in *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991)). *See generally* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914-15 (1996) ("If a definition is thought necessary, we might, very roughly, understand 'norms' to be social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done.... Social norms may or may not promote liberty and well-being; they may or may not be easily malleable or go very deep into people's understandings."). While some social norms are affirmatively codified in enacted law, social norms may also exist outside of the law and are instead enforced through social sanctions by other members of a social group. *Id.* at 915. On the internet, social norms may be set by users of a platform, but they may also be enforced by the very architecture of the platform being used. *See* Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1287 (1998).

44. *See* Cox, *supra* note 43, ¶ 14 ("Above all, the internet was unique in that communications were instantaneous: the content creators could interact with the entire planet without any intermediation or any lag time. In order for censors to intervene, they would have to destroy the real-time feature of the technology that made it so useful.").

45. *See* Holland, *supra* note 40, at 372-73. Section 230 immunity applies to tort, statutory, and other liability and preempts state law. *See* 47 U.S.C. § 230(c), (e)(3). Exceptions to section 230 include federal criminal law, federal intellectual property law, and, most recently, state criminal laws designed to combat sex trafficking. *See id.* § 230(e). Although a plaintiff may proceed against the third-party content creator directly, anonymity online complicates such claims. *See* Bryan H. Choi, *The Anonymous Internet*, 72 MD. L. REV. 501, 529-30 (2013) (noting how difficult it can be to sue third-party content providers).

46. *See* 47 U.S.C. § 230(b)(2); *see also id.* § 230(f)(1) (defining "Internet" as "the international computer network of both Federal and non-Federal interoperable packet switched data networks").

47. *See, e.g.*, Jason Murdock, *The Dotcom Bubble Crash Was 20 Years Ago Today—Could It Happen Again?*, NEWSWEEK (Mar. 10, 2020, 12:14 PM), https://www.newsweek.com/dotcom-bubble-crash-20-anniversary-technology-companies-ever-happen-again-1491385 [https://perma.cc/J5G4-XYXJ] ("In the mid-to-late 1990s, as access to the World Wide Web

effect of broad civil liability on the internet's growth.[48] Lawmakers worried that civil lawsuits could extinguish the internet as a forum for free expression, particularly in its infancy.[49] One of the primary functions of section 230 is to allow for content moderation by platforms by insulating them from tort liability when they voluntarily restrict objectionable content.[50] It is designed to let users share openly and maintain some control over free expression online.[51] But section 230's reach is much broader, potentially extending into real-world commercial relationships in the sharing economy and online marketplaces.[52]

One pair of cases from the 1990s illustrates the problem that Congress sought to fix with the passage of section 230: *Cubby, Inc. v. CompuServe Inc.*[53] and *Stratton Oakmont, Inc. v. Prodigy Services Co.*[54] In both cases, the plaintiffs sued internet platforms for allegedly defamatory postings by third parties on the platforms' message boards. In the *CompuServe* case, no liability attached to a message board operator because it did not moderate content or otherwise attempt to remove improper materials.[55] But in *Prodigy*,

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became more common around the world, all eyes turned to internet-based companies as the future of commerce, leading to excessive market speculation, reckless 'fad' investments and an intense focus on marketing over substance. Loose wallets and the desire to grow startups extremely fast helped to fuel the boom, pushing the Nasdaq to an all-time high of 5132.52 on March 10, 2000.").

48. *See* Cox, *supra* note 43, ¶¶ 20-28. Section 230(b) lays out the policies underlying the statute's immunity provisions, including the need to continue development of the internet as a free-speech center, to allow for competition in the marketplace, to facilitate user control over online activity, and to permit online services to moderate offensive content without fear of liability. *See* 47 U.S.C. § 230(b).

49. *See* Cox, *supra* note 43, ¶ 23 (discussing how the two main cosponsors of what became section 230 were crafting legislation "that would bar federal regulation of the internet and help parents find ways to block material they found objectionable" (quoting *Cyberporn—On a Screen Near You*, TIME, July 3, 1995, at 38)).

50. 47 U.S.C. § 230(c)(2). Section 230(c) is titled "Protection for 'Good Samaritan' blocking and screening of offensive material." *Id.* § 230(c).

51. *See id.* § 230(b) (describing policy rationales for section 230, including enabling more user control).

52. *See infra* Part II.B-C.

53. 776 F. Supp. 135 (S.D.N.Y. 1991).

54. No. 031063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

55. 776 F. Supp. at 140-41. The *CompuServe* case involved a message board called Rumorville on which allegedly defamatory content was posted about a competing gossip website, Skuttlebut, and its founders. *Id.* at 137-38. A third party uploaded the Rumorville content and CompuServe allowed its display almost instantaneously with no editorial discretion. *Id.* at 140 & n.1. The court held that CompuServe functioned more like a library

a similar computer service was liable because of its efforts to keep some offensive content off its message boards.[56] These cases thus illustrate the defamation law origins of section 230 and the perverse results that can flow without section 230's enactment.[57]

CompuServe and *Prodigy* supported the perverse result that interactive computer services faced greater liability if they made an effort to police offensive content because an imperfect attempt to filter offensive content would give rise to publisher-based defamation claims.[58] These cases serve as important examples of why traditional publisher liability on the internet is not desirable. What

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or bookseller, and thus was a distributor that could be liable only if it knew of the defamatory content. *See id.* at 140. Because plaintiffs set forth no allegations that CompuServe had the requisite knowledge for distributor liability to attach, the claims were dismissed on summary judgment. *Id.* at 141. The court held that CompuServe was not a publisher but a mere distributor that was not liable because it did not know, nor did it have reason to know, about the defamatory posts. *See id.*

56. 1995 WL 323710, at *5. *Prodigy* involved an online computer service facing liability as a publisher of defamatory content because it tried to curtail offensive speech on its forums. *Id.* A user of the defendant company's "Money Talk" forum posted disparaging comments about Stratton Oakmont, an investment firm. *Id.* at *1. The defamatory statements included an allegation that Stratton Oakmont's "president ... committed criminal and fraudulent acts in connection with the initial public offering of stock" that was a "major criminal fraud" and "100% criminal fraud." *Id.* The statements also alleged the president was "soon to be proven criminal" and that the firm was a "cult of brokers who either lie for a living or get fired." *Id.* The court held that Prodigy was liable as the publisher of the defamatory content on its bulletin board because Prodigy used "Board Leaders" to moderate content and selectively filtered out some offensive content through software tools, but it failed to remove the defamatory posts at issue. *Id.* at *4. Prodigy argued that, with over sixty thousand posts a day, it could not perform editorial functions for all messages posted and should not be held responsible for any third-party content. *Id.* at *3. The court rejected Prodigy's arguments, holding it liable for the defamatory posts it failed to filter. *Id.* at *5. Thus, Prodigy exposed itself to liability because it tried to do the right thing, that is, to keep its message boards family-friendly by removing offensive or illegal content—albeit not doing a perfect job at it. *See id.*

57. *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc) (explaining that the *Prodigy* case inspired section 230).

58. As the court noted in the *Prodigy* case, the defendant platform's "conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice." 1995 WL 323710, at *5. The court acknowledged that its opinion may disincentivize responsible content moderation but noted that Prodigy's choice to be a "family-oriented" place online would presumably expand its market and attract more users. *Id.* Thus, Prodigy needed to face the legal consequences that flowed from its decision. *Id.*

followed was passage of section 230 and subsequent expansion by judicial interpretations of its scope.[59]

A. Overview of Section 230

Section 230 begins by laying out the congressional findings that inspired broad immunity for computer services.[60] First, the statute notes that the internet provides an array of "services available to individual Americans," marking an "extraordinary advance" in citizens' access to information and resources.[61] Additionally, internet services give users control and provide a forum for discourse and "myriad avenues for intellectual activity."[62] And, although still new, the internet thus far had flourished with minimal government intervention as people increasingly relied on it.[63]

In addition to these stated findings, the statute articulates the key U.S. policies that underlie it.[64] These policies include promoting further development of online services and "preserv[ing] the vibrant and competitive free market that presently exists for the Internet" without constraint by state or federal law.[65]

Notably, section 230 expressly contemplates selective content moderation by platforms. In particular, one of its stated policies is "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services."[66] In this way, the statute recognizes that a free and open internet will necessarily include offensive or undesirable content,

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59. The Communications Decency Act itself was a broad statute intended to protect children from offensive or pornographic material online. *See* Communications Decency Act of 1996, Pub. L. 104-104, 110 Stat. 133. The statute was largely struck down as unconstitutional. *See* Reno v. ACLU, 521 U.S. 844, 874 (1997). Section 230, however, remains valid law. *See* 47 U.S.C. § 230.

60. *See* 47 U.S.C. § 230(a).

61. *Id.* § 230(a)(1).

62. *Id.* § 230(a)(2)-(3).

63. *Id.* § 230(a)(4)-(5).

64. *See id.* § 230(b).

65. *Id.* § 230(b)(1)-(2).

66. *Id.* § 230(b)(3).

and platforms should be free to selectively curate content and create user controls without fear of liability.[67]

Not all types of claims are immune under section 230. Rather, section 230 carves out federal criminal law and intellectual property claims.[68] And, most recently, Congress passed legislation amending section 230 to allow for the enforcement of state laws aimed at stopping sex trafficking.[69] But, aside from these limitations, section 230 applies to a broad range of claims and is not limited to cases involving speech-based torts, such as defamation.

Section 230's most cited immunity provision is titled "Protection for 'Good Samaritan' blocking and screening of offensive material."[70] It distinguishes between the *provider* of content and the computer *service* that hosts it. It also expressly allows for restricting offensive content. Specifically, it states:

> (1) Treatment of publisher or speaker
> 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.
> (2) Civil liability
> 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; or
> (B) any action taken to enable or make available to information content providers or others the technical

67. *See id.* § 230(b). The private sector's lead role in moderating online content, however, is not without its own controversy and free speech concern. *See* Langvardt, *supra* note 30, at 1358 (cautioning against entrusting free speech rights solely to private-sector self-regulation); Kristine L. Gallardo, Note, *Taming the Internet Pitchfork Mob: Online Public Shaming, the Viral Media Age, and the Communications Decency Act*, 19 VAND. J. ENT. & TECH. L. 721, 741 (2017) (suggesting that platforms use section 230 as a shield so that they may warn users of the dangers of online public shaming through their design and choice of architecture).

68. *See* 47 U.S.C. § 230(e)(1)-(2).

69. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (amending section 230 to limit immunity for websites knowingly hosting content that facilitates sex trafficking).

70. 47 U.S.C. § 230(c).

> means to restrict access to material described in paragraph (1).[71]

Stated otherwise, immunity hinges on whether a company is a computer service or a content provider, as only the "interactive computer service" is afforded immunity.[72]

The definitions of these terms thus become crucial. Interactive computer *services* enable computer access to a server.[73] Domain-name registrars,[74] search engines,[75] website hosting services,[76] some online marketplaces,[77] message board operators,[78] and internet service providers[79] have been classified as computer services. By contrast, an information content provider is responsible for creating and developing information.[80] Content providers generally are not immune under section 230.[81] To determine if a platform is a content provider, courts conduct a fact-specific inquiry into the nature of the

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71. *Id.*

72. *See id.*

73. The statute defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." *Id.* § 230(f)(2).

74. *See, e.g.*, Smith v. Intercosmos Media Grp., Inc., No. Civ.A. 02-1964, 2002 WL 31844907, at *1, *3 (E.D. La. Dec. 17, 2002).

75. Parker v. Google, Inc., 242 F. App'x 833, 836-38 (3d Cir. 2007) (holding that a search engine was not liable for including defamatory content or content protected by intellectual property rights).

76. *See, e.g.*, Ricci v. Teamsters Union Loc. 456, 781 F.3d 25, 26 (2015).

77. *See, e.g.*, Schneider v. Amazon.com, Inc., 31 P.3d 37, 38-39, 43 (Wash. Ct. App. 2001) (holding that an online book merchant was not liable for allowing negative author reviews despite a take-down request).

78. *See, e.g.*, Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 415 (1st Cir. 2007) (holding that a message board operator was not responsible for defamatory content posted by an anonymous third-party user).

79. *See, e.g.*, Noah v. AOL Time Warner Inc., 261 F. Supp. 2d 532, 538 (E.D. Va. 2003) (holding that an ISP that provides its subscribers with access to public chatrooms qualified as an information service that provided multiple people with internet access), *aff'd*, No. 03-1770, 2004 WL 602711 (4th Cir. 2004).

80. *See* 47 U.S.C. § 230(f)(3) (defining "information content provider" 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").

81. *See id.* § 230(c).

company's activity to assess whether the company created or developed the problematic content.[82]

In addition to section 230's classification of online actors into only two binary categories, a key feature of the statute is its reliance on defamation law concepts in its framework. Under tort law, a cause of action for defamation may arise when an actor publishes a false or defamatory statement.[83] "Publication" for the purposes of defamation simply means communication to someone else, whether done intentionally or negligently, verbally or in print.[84] "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[85] Thus, a claim for defamation requires a false and defamatory statement,[86] unprivileged publication of the statement, negligence or greater fault,[87] and sometimes a showing of special harm.[88] Not only is the person who publishes the defamatory statement potentially liable, distributors can also be liable if they intentionally fail to remove defamatory content in their possession or control.[89]

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82. *See, e.g.*, FTC v. LeadClick Media, LLC, 838 F.3d 158, 174 (2d Cir. 2016) ("A defendant ... will not be held responsible [as an information content provider] unless it assisted in the development of what made the content unlawful."); FTC v. Accusearch Inc., 570 F.3d 1187, 1199 (10th Cir. 2009) ("[T]o be 'responsible' for the development of offensive content, one must be more than a neutral conduit for that content. That is, one is not 'responsible' for the development of offensive content if one's conduct was neutral with respect to the offensiveness of the content (as would be the case with the typical Internet bulletin board). We would not ordinarily say that one who builds a highway is 'responsible' for the use of that highway by a fleeing bank robber, even though the culprit's escape was facilitated by the availability of the highway.").

83. *See* RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977) (explaining the elements of a defamation claim).

84. *See id.* § 577 & cmt. a.

85. *See id.* § 559.

86. Statements of fact that are true do not give rise to liability for defamation. *Id.* § 581A & cmt. a.

87. For private matters pertaining to private persons, only negligence must be shown to be liable for defamation. *See id.* § 580B. For public officials or figures, the publication of a false and defamatory communication must be done recklessly or intentionally to give rise to liability. *See id.* § 580A.

88. *See id.* § 558 (defamation elements); *see also, e.g.*, *id.* §§ 569-70, 575, 620-22 (various special harm provisions).

89. *See id.* § 577(2) ("One who intentionally or unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.").

Section 230 expressly states that a computer service is not to be treated as a "speaker" or "publisher" of third-party content.[90] In other words, section 230 narrowly homes in on the role of the speaker, publisher, or distributor in the traditional defamation law context and expressly carves out interactive computer services from liability for defamation. Given that section 230 was preceded by the defamation cases of *CompuServe* and *Prodigy*, it only makes sense that section 230 structures its immunity on these defamation law principles.

Even though section 230 originated from defamation law principles, cases applying it are notable for their expansive interpretation, with some limitations carved out over time.

1. Key Cases Interpreting Section 230

Section 230 has been broadly interpreted and applied since its inception. One of the earliest cases interpreting section 230 resulted in broad statutory construction of platform immunity. In *Zeran v. America Online, Inc.*, Ken Zeran brought defamation and related claims against AOL after an anonymous user posted a fake and offensive t-shirt ad on an AOL bulletin board.[91] The fake ad included Zeran's phone number and resulted in angry phone calls and major disruption to his business.[92] Zeran sued AOL for negligence based on AOL's alleged unreasonable delay in removing a third party's defamatory messages, failure to post retractions, and failure to prevent future, similar messages from being posted on AOL's message boards.[93] He argued that, at the very least, AOL should

90. 47 U.S.C. § 230(c)(1).

91. 129 F.3d 327, 329 (4th Cir. 1997). The court explained that, in addition to electronic mailboxes for private messages, AOL subscribers had access to a community electronic message board, or "bulletin board," on which other AOL subscribers could post and interact with each other. *Id.*

92. *Id.* The calls included death threats, and their frequency amounted to about one every two minutes. *Id.* The fake and offensive t-shirts related to the Oklahoma City bombing, and, at one point, an Oklahoma City radio station read an AOL message on air, urging listeners to call Zeran to complain. *Id.* On the same day as the first fake ad posted, Zeran contacted AOL and was told that the fake ad would be taken down but that no retraction would be posted per company policy. *Id.* The ads kept appearing, and, as the calls intensified, Zeran repeatedly asked AOL to stop the fake ads. *Id.*

93. *Id.* at 328. *See generally* Eric Goldman, *Who Cyber-Attacked Ken Zeran, and Why?* (Santa Clara Univ. Sch. of L. Legal Stud. Rsch. Papers Series, No. 2017-18), https://papers.

have been liable as a distributer of defamatory content, thereby responsible for taking down the posts once on notice.[94] The trial court held that section 230 barred Zeran's claims, and the Fourth Circuit affirmed.[95] First, the court easily classified AOL as an interactive computer service because it allowed subscribers to access the internet and stored a network of information created by subscribers.[96] Second, the court looked at the plain language of section 230 and concluded that it created federal immunity to any claim in which a computer service is to be liable for third-party content.[97] Third, the court cited the purpose of section 230, noting the goals of promoting discourse and facilitating industry growth with minimal interference.[98] Relatedly, the court also pointed out that the statute encourages computer services to self-regulate and remove offensive content without fear of liability.[99] The result is an early, broad interpretation of section 230 that helped shape the course of section 230 jurisprudence in the two decades that followed.[100]

Courts have continued to apply section 230 broadly. Early social networking website MySpace.com was immune from a lawsuit alleging that it failed to sufficiently protect a thirteen-year-old girl from being contacted on the website and later assaulted.[101] Section 230 immunized Craigslist.org for discriminatory housing posts made on its site.[102] The statute also immunized Backpage.com in sex

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ssrn.com/sol3/papers.cfm?abstract_id=3079234 [https://perma.cc/NRQ2-GDG3] (speculating on who may have been the culprit attacking Zeran online).

94. *Zeran,* 129 F.3d at 330, 332. Notably, the third party or parties who posted the defamatory messages themselves were never sued because Zeran could not figure out their identity. *Id.* at 329 & n.1.

95. *Id.* at 328.

96. *Id.* at 329.

97. *Id.* at 330.

98. *Id.* Lastly, the *Zeran* court noted that the anonymous third party who created the content was not immune from tort liability. *Id.* Although online harassment is a concern, the court stated that "Congress made a policy choice ... not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." *Id.* at 330-31.

99. *Id.* at 331.

100. *See* Eric Goldman, *The Ten Most Important Section 230 Rulings*, 20 TUL. J. TECH. & INTELL. PROP. 1, 3 (2017) ("Two decades later, *Zeran* remains the seminal Section 230 opinion, and it has been cited in hundreds of other cases.").

101. Doe v. MySpace, Inc., 528 F.3d 413, 420 (5th Cir. 2008).

102. Chi. Laws.' Comm. for C.R. Under L., Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008).

trafficking claims because the claims arose from the website's regulation of third-party content.[103]

In addition to immunizing platforms from direct liability, section 230 has also been used to block court orders for a platform to take down content. In *Hassell v. Bird*, the court held that Yelp.com, as a nonparty to a lawsuit, could not be forced to remove a defamatory review via an injunction.[104] In *Batzel v. Smith*, a website operator decided to edit and post to a listserv an email alleging that the plaintiff was related to an especially infamous Nazi and was in possession of stolen art.[105] After the plaintiff sued for reputational and other harm, the court held that the website operator remained an interactive computer service despite the alteration of the email and decision to post it.[106] Similarly, in *Kimzey v. Yelp Inc.*, a website's star rating system that collected specific user content did not transform an interactive computer service into a developer of false information.[107] In a more recent case, section 230 immunized a dating app that facilitated stalking and harassment through its intentional platform design decisions.[108] It has also immunized

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103. *See* Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 22 (1st Cir. 2016).

104. 420 P.3d 776, 778, 793 (Cal. 2018). Similarly, in *Barnes v. Yahoo!, Inc.*, the court held that section 230 barred negligence claims against a search engine for failing to remove nude photographs of the plaintiff that were posted by her ex-boyfriend. 570 F.3d 1096, 1102 (9th Cir. 2009). However, the *Barnes* court allowed a claim for promissory estoppel to proceed based on Yahoo's promise to the plaintiff to remove the content. *Id.* at 1106, 1109. The estoppel claim was not based on any editorial function by Yahoo and was thus not barred by section 230. *See id.* at 1107. *Barnes* ultimately articulated a three-part test to determine whether a platform is immune under section 230(c)(1). A platform is immune when it is "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." *Id.* at 1100-01 (footnote omitted).

105. 333 F.3d 1018, 1020-22 (9th Cir. 2003). The plaintiff's building contractor emailed the website operator after being in the plaintiff's home and becoming suspicious. *See id.*

106. *Id.* at 1022, 1031.

107. 21 F. Supp. 3d 1120, 1123 (W.D. Wash. 2014), *aff'd*, 836 F.3d 1263 (9th Cir. 2016) ("Indeed, Yelp's star rating program is similar to eBay's color-coded star rating system that the Ninth Circuit analogized in holding that classifying user characteristics into discrete categories and collecting responses to specific essay questions does not transform an interactive computer service into a developer of the underlying misinformation.").

108. *See* Herrick v. Grindr, LLC, 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018), *aff'd,* 765 F. App'x 586 (2d Cir. 2019). In *Herrick*, a federal trial court held that a dating app was immune under section 230 when a victim of severe harassment facilitated by the app sued the app and its parent companies. *Id.* The court focused on the notion that the claims sought to hold the app liable as "publisher" of third-party content and dismissed failure to warn and other claims. *See id.* at 588-601. But the plaintiff alleged a defective product design—Grindr's

social media platforms in cases involving new technology such as algorithmic matching.[109]

While *Zeran* and other cases illustrate the breadth of section 230 immunity, some limitations also exist. In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the court recognized that a platform can be held liable as a content provider when it creates or develops the purportedly illegal content.[110] *Roommates.com* involved an online forum for people seeking roommates and featured a web form that required users to disclose demographic information, such as sex, sexual orientation, and family status, before they could search the website or post a listing.[111] The web form also included an optional "[a]dditional [c]omments" field.[112] The plaintiff brought claims under the federal Fair Housing Act and related state laws, alleging that Roommates.com forced users to disclose protected characteristics that would be illegal if used for housing decisions in any other context.[113] The appellate court held that section 230 did not bar claims arising out of the forced disclosure of protected information in Roommates.com's web form because it helped "develop unlawful content, and thus f[ell] within the exception to section 230, if it contribute[d] materially to the alleged illegality of the conduct."[114]

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geolocation features, inability to block and prevent spoofing, and lack of safety features—as a basis for the claim. *Id.* at 585. Nonetheless, the court noted that the claims essentially arose out of third-party use of the app to stalk, harass, and cause other harms, and not something the platform did. *See id.* at 593-94.

109. Force v. Facebook, Inc., 934 F.3d 53, 65-66 (2d Cir. 2019) (rejecting claims arising out of Facebook's purported support of terrorism and making clear that algorithmic matching does not change the analysis for section 230 immunity); *see also, e.g.*, Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1095-96 (9th Cir. 2019) (holding that section 230 immunized a social networking platform from negligence and collusion claims arising out of death following a drug deal transacted among the platform's users, after an algorithm helped specifically connect the drug dealer and the decedent).

110. 521 F.3d 1157, 1166-67 (9th Cir. 2008) (en banc).

111. *See id.* at 1161.

112. *Id.*

113. *Id.* at 1162-63 ("A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is 'responsible, in whole or in part' for creating or developing, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content.").

114. *Id.* at 1167-68.

However, any claims arising out of the "[a]dditional [c]omments" field were barred under section 230 because the descriptions in this field were optional and did not encourage discriminatory practices.[115]

Other courts after *Roommates.com* have found section 230 did not bar certain claims against apps or websites. In *Federal Trade Commission v. Accusearch Inc.*, the court held that section 230 did not immunize Accusearch, which operated a website that sold personal data, from unfair-practice claims because its "researchers" violated confidentiality or privacy statutes in the methods they employed.[116] In *Doe v. Internet Brands, Inc.*, section 230 did not bar failure to warn claims under California law after an aspiring model was lured to a fake audition through the defendant's "Model Mayhem" social networking site and later assaulted.[117] In *Maynard v. Snapchat, Inc.*, Snapchat was not immune under section 230 after the plaintiff was injured in a car accident that occurred when a driver was using the app's "Speed Filter" feature because no third-party user content was published in the case.[118] In the online

115. *Id.* at 1174. Although the Ninth Circuit allowed the claims to proceed, it later determined that Roommates.com was not liable for violating the Fair Housing Act. *See* Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216, 1222 (9th Cir. 2012) ("Because we find that the FHA doesn't apply to the sharing of living units, it follows that it's not unlawful to discriminate in selecting a roommate. As the underlying conduct is not unlawful, Roommate's facilitation of discriminatory roommate searches does not violate the FHA.").

116. 570 F.3d 1187, 1201 (10th Cir. 2009). Accusearch would get a request from a customer, forward the request to the researcher, charge the customer, and pay the researcher a share after the work was completed. *Id.* at 1191. The customer's interaction occurred directly with Accusearch, although website boilerplate language disclosed the use of third-party researchers. *Id.* The court held that section 230 did not apply because Accusearch was responsible, at least in part, for developing the illegal content. *Id.* at 1201.

117. 824 F.3d 846, 849 (9th Cir. 2016). The plaintiff alleged that Internet Brands had actual knowledge that its Model Mayhem site was being used by perpetrators to lure victims using fake profiles. *Id.* The court noted that Internet Brands was an "interactive computer service," but it was not being treated as a "publisher" of third-party content for the purposes of determining liability for failure to warn. *Id.* at 852. The court seemed to accept the plaintiff's theory as one arising out of a special relationship in tort law, thus placing it outside of the scope of section 230 immunity. *Id.* ("Jane Doe's failure to warn claim has nothing to do with Internet Brands' efforts, or lack thereof, to edit, monitor, or remove user generated content. Plaintiff's theory is that Internet Brands should be held liable, based on its knowledge of the rape scheme and its 'special relationship' with users like Jane Doe, for failing to generate its own warning. Thus, liability would not discourage the core policy of section 230(c), 'Good Samaritan' filtering of third party content.").

118. 816 S.E.2d 77, 78-79 (Ga. Ct. App. 2018). According to the plaintiffs, Snapchat's

marketplace context, Amazon was not immune under section 230 because the provision "protects interactive computer service providers from liability *as a publisher of speech*, ... not ... from liability as the seller of a defective product."[119] These cases show that some limitations to section 230's broad reach exist.

2. Legislative Reform Proposals

Section 230's protections remain strong despite some erosion by courts. But its broad immunity is increasingly being criticized by politicians. Several reform proposals loom, largely arising out of a perceived political bias against conservatives by large platforms. For example, the Ending Support for Internet Censorship Act (ESICA) would end "automatic" immunity for large internet platforms and empower the Federal Trade Commission to audit a platform's content-removal practices, including its algorithms, to ensure that they are "politically neutral."[120]

"Speed Filter" encouraged and facilitated unsafe driving, and Snapchat knew its users would be distracted and disobey safety rules while using the feature. *Id.* at 79. The court below granted Snapchat's motion to dismiss on section 230 grounds, but the appellate court reversed. *Id.* at 81. The appellate court held that Snapchat was not entitled to section 230 immunity because the published content arose out of Snapchat's own content—the speed filter itself—and not content created or posted by third parties. *Id. But see* Lemmon v. Snap, Inc., 440 F. Supp. 3d 1103, 1113 (C.D. Cal. 2020) (holding that section 230 immunized Snapchat from claims arising out of the speed filter feature).

119. Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 140 (4th Cir. 2019). Nonetheless, the Fourth Circuit affirmed the district court's judgment that Amazon was not liable because the company did not fit the statutory definition of a "seller" under state law. *Id.* at 144.

120. Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019). Initial reaction to ESICA has prompted strong outcries against the amendment. *See Academics, Civil Society Caution Lawmakers Considering Amending Section 230*, TECHFREEDOM (July 11, 2019), https://techfreedom.org/academics-civil-society-caution-lawmakers-considering-amending-section-230/ [https://perma.cc/M7G7-AVFB] (compiling statements from experts criticizing the amendment). A consortium of academics, civil society organizations, and other legal experts have signed on to a set of principles that policymakers should abide by when considering section 230 reforms, noting the importance of maintaining strong platform immunity. *Liability for User-Generated Content Online, Principles for Lawmakers*, SANTA CLARA L. DIGIT. COMMONS (July 11, 2019), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2992&context=historical [https://perma.cc/9SEL-FAMG]. But at least two commentators have supported the amendment. *See* Adam Candeub & Jeremy Carl, *Why Hawley's Bill Is the Right Tool to Fight Big Tech's Censorship of Conservatives*, FEDERALIST (July 9, 2019), https://thefederalist.com/2019/07/09/hawleys-bill-right-tool-fight-big-techs-censorship-conservatives/ [https://perma.cc/27GM-74X6].

The Eliminating Abusive and Rampant Neglect of Interactive Technologies (EARN IT) Act of 2020 would have removed section 230 protections from platforms that host child pornography, with particular implications for a platform's use of encryption.[121] The Stop the Censorship Act sought to deter platforms from removing legal content by barring section 230 immunity if they removed merely "objectionable" content.[122] Finally, the Protecting Local Authority and Neighborhoods (PLAN) Act would have removed section 230 immunity for Airbnb and other homesharing platforms when they facilitate the violation of a lease or state law and fail to remove the listing within thirty days of receiving notice of the violation.[123]

The executive branch has also taken aim at social media platforms, with former President Donald Trump attempting to reform platform immunity via executive order,[124] or through political pressure and veto power.[125] Prominent Democrats have also spoken out about the need for section 230 reform to combat misinformation, hate speech, and illegal activity online.[126] The calls for reform by the

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121. Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020, S. 3398, 116th Cong.; *see also* Cristiano Lima, *Senate Judiciary Vote Adds Momentum to Attack on Tech's Legal Shield*, POLITICO (July 2, 2020, 12:49 PM), https://www.politico.com/news/2020/07/02/tech-liability-protections-child-porn-348142 [https://perma.cc/2TZM-VMLU].

122. Stop the Censorship Act, H.R. 4027, 116th Cong. (2019).

123. Protecting Local Authority and Neighborhoods Act, H.R. 4232, 116th Cong. (2019).

124. Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020); *see also* Remarks at a Presidential Social Media Summit, 2019 DAILY COMP. PRES. DOC. 468, at 13 (July 11, 2019) (announcing the Trump administration's exploration of "regulatory and legislative solutions to protect free speech and the free speech rights of all Americans"); Bobby Allyn, *Stung by Twitter, Trump Signs Executive Order to Weaken Social Media Companies*, NPR (May 28, 2020, 9:00 PM), https://www.npr.org/2020/05/28/863932758/stung-by-twitter-trump-signs-executive-order-to-weaken-social-media-companies [https://perma.cc/9QHF-UYL4] ("President Trump signed an executive order Thursday aimed at limiting the broad legal protections enjoyed by social media companies, two days after he tore into Twitter for fact-checking two of his tweets.").

125. For example, at the end of his term, President Trump vetoed the National Defense Authorization Act when Congress declined to include a provision repealing section 230. Catie Edmondson, *Senate Overrides Trump's Veto of Defense Bill, Dealing a Legislative Blow*, N.Y. TIMES (Jan. 1, 2021), https://www.nytimes.com/2021/01/01/us/politics/senate-override-trump-defense-bill.html [https://perma.cc/B7GN-3KC5]. Both Houses of Congress voted to override the veto, and the bill thus became law. *See id.*

126. Taylor Hatmaker, *Nancy Pelosi Warns Tech Companies that Section 230 Is 'in Jeopardy*,*'* TECHCRUNCH (Apr. 12, 2019, 3:35 PM), https://techcrunch.com/2019/04/12/nancy-pelosi-section-230/ [https://perma.cc/T9SU-PQ5F]; *E&C Announces Additional Details for Hearing on Online Content Moderation and Section 230*, HOUSE COMM. ON ENERGY & COM.

executive and legislative branches will no doubt continue, and section 230 may very well face major revision soon.

B. Scholarly Critiques of Section 230

Over its history, section 230 has been the subject of much academic inquiry and critique. The debate has often recognized the lack of remedies available to victims of online abuse and other torts, but it has focused on vastly different approaches to redefining the contours of platform immunity.

One approach to section 230 reform argues that it should be narrowed in order to allow some remedies for defamation and libel victims.[127] Another approach focuses on providing users with a right to order removal of content. A notice-and-takedown scheme, similar to that contained in the Digital Millennium Copyright Act, has been proposed as one such solution.[128] More generally, scholars have observed the need for clarity as to the scope of online safe harbors, including those available under section 230.[129] One obstacle to meaningful recovery for victims is the barriers to suing responsible parties, whether it be a web platform or its (often anonymous)

(Oct. 9, 2019), https://energycommerce.house.gov/newsroom/press-releases/ec-announces-additional-details-for-hearing-on-online-content-moderation-and [https://perma.cc/9BMZ-EMW4] (announcing a hearing called by three Democratic Members of Congress to "explor[e] online content moderation practices and whether consumers are adequately protected under current law, including the protections Congress granted in Section 230 of the Communications Decency Act").

127. Vanessa S. Browne-Barbour, *Losing Their License to Libel: Revisiting § 230 Immunity*, 30 BERKELEY TECH. L.J. 1505, 1505 (2015) (arguing for a more nuanced analysis of the distributor/publisher distinction or, alternatively, proposing a notice-and-takedown provision resembling that of the Digital Millennium Copyright Act); Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1448 (2006) (arguing that bloggers should not always be immune from defamation claims).

128. *See, e.g.*, Browne-Barbour, *supra* note 127, at 1505. One commentator suggests that section 230 reform should include notice-and-takedown procedures in cases of online impersonation and a requirement that websites honor court orders to remove third-party content. Andrew P. Bolson, *Section 230 of the Communications Decency Act: A Blueprint for Reform*, MEDIUM (June 19, 2019), https://medium.com/@andrewbolson/section-230-of-the-communications-decency-act-a-blueprint-for-reform-ee8aa50d4430 [https://perma.cc/DE6K-D9WM].

129. *See, e.g.*, Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. ON TELECOMM. & HIGH TECH. L. 101, 102 (2007).

users.[130] Thus, some reforms focus on making it easier to bring lawsuits against platforms or third-party posters when immunity does not apply under the circumstances.[131]

Danielle Citron and Benjamin Wittes have pointed out that section 230 expressly contemplates immunizing platforms that act as "Good Samaritans."[132] Cases that broadly interpret section 230 often insulate bad faith conduct by platforms that exist for the purpose of facilitating offensive, obscene, or even illegal content. This runs afoul of the "Good Samaritan" content moderation envisioned by section 230 itself. Thus, they have proposed standards that look at the good faith or bad faith actions of the platform and the nature of the content itself.[133]

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130. *See* Choi, *supra* note 45, at 539 & n.145.

131. *See id.* at 505-07 (arguing that online anonymity should be regulated to provide recourse against third-party content providers without imposing innovation-crushing regulation on platforms themselves); Bolson, *supra* note 128 (suggesting that websites should be required to have a U.S. address for service of process and that procedures for unmasking anonymous posters should be less onerous); Gus Hurwitz, *The Third Circuit's* Oberdorf v. Amazon *Opinion Offers a Good Approach to Reining in the Worst Abuses of Section 230*, TRUTH ON MKT. (July 15, 2019), https://truthonthemarket.com/2019/07/15/the-third-circuits-oberdorf-v-amazon-opinion-offers-a-good-approach-to-reining-in-the-worst-abuses-of-section-230/ [https://perma.cc/94BR-PSKL] (noting that courts should require online marketplaces to identify third parties to facilitate direct claims, rather than going after the online marketplace).

132. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 416 (2017). Citron and Wittes argue that

> courts should limit [section 230's] application to Good Samaritans. Section 230's title reflects this purpose: "[p]rotection for private blocking and screening of offensive material." So does subsection (c)'s subtitle: "[p]rotection for 'Good Samaritan' blocking and screening of offensive material." "[T]he title of a statute and the heading of a section are 'tools available for the resolution of a doubt' about the meaning of a statute."

Id. (second, third, and fourth alterations in original) (first citing Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 116 n.377 (2009); then quoting 47 U.S.C. § 230; then quoting *id.* § 230(c); and then quoting Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998)); *see also* Gregory M. Dickinson, Note, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POL'Y 863, 870 (2010) (discussing the ways in which section 230 jurisprudence has moved away from the "Good Samaritan" role envisioned by subsection (c) and noting the undesirable policy outcomes from broad immunity for bad faith conduct).

133. Citron & Wittes, *supra* note 132, at 416. Other approaches have focused on limiting section 230 to civil immunity or otherwise reforming it to allow for greater criminal liability. *See* Shruti Jaishankar, Note, *Earning Immunity Under 47 U.S.C. § 230*, 8 ALA. C.R. & C.L. L. REV. 295, 304 (2017) (explaining how section 230 interacts with criminal statutes and how

Other proposals for improving section 230 have focused on more nuanced definitions of computer services and content providers so that a clearer test emerges for what level of content development defeats immunity. Some have suggested that platforms may need to be liable when they personalize content through machine-learning algorithms.[134] And, most notably, Benjamin Edelman and Abbey Stemler have noted that the "online computer service" definition is ill-suited to address online marketplaces and other platforms that facilitate real-world transactions.[135] Additionally, some commentators have noted that vicarious liability principles from tort law may still apply despite section 230 in certain cases.[136]

Others warn that modifications to section 230 are not the solution for many of the wrongs that need remedies. For example, Daphne Keller argues that hate speech and privacy violations are not necessarily prevalent because of section 230 and that attempts to attribute all legal shortcomings in online spaces to section 230 are ill-advised.[137] Keller also argues that calls for platform neutrality,[138] on the one hand, and platform policing of user speech,[139] on the

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it hinders meaningful enforcement of harassment laws); Ashley Ingber, Note, *Cyber Crime Control: Will Websites Ever Be Held Accountable for the Legal Activities They Profit from?*, 18 CARDOZO J.L. & GENDER 423, 426 (2012) (urging for legislative reform and narrower judicial application of section 230 when a platform is used to facilitate criminal activity).

134. *See, e.g.*, Catherine Tremble, Note, *Wild Westworld: Section 230 of the CDA and Social Networks' Use of Machine-Learning Algorithms*, 86 FORDHAM L. REV. 825, 867 (2017) (suggesting liability is appropriate for a platform as publisher "where the technology in question may have a hand in development of information or where the conduct of that technology is the source of the alleged harm").

135. Benjamin Edelman & Abbey Stemler, *From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces*, 56 HARV. J. ON LEGIS. 141, 168 (2019) ("In extending far beyond computer service to real-world transactions with real-world implications, marketplaces may exceed the boundaries of § 230's safe harbor because they are not purely providers of interactive computer services. This is especially true when the majority of a marketplace's activities are outside the scope of immunity intended by Congress."); *see also* Gregory M. Dickinson, *Rebooting Internet Immunity*, 347, 351-52 GEO. WASH. L. REV. (2021) (noting how section 230's binary classification of platforms is poorly tailored to address the array of modern platforms now available).

136. *See, e.g.*, Dickinson, *supra* note 132, at 864.

137. Daphne Keller, *Toward a Clearer Conversation About Platform Liability*, KNIGHT FIRST AMEND. INST. (Apr. 6, 2018), https://knightcolumbia.org/content/toward-clearer-conversation-about-platform-liability [https://perma.cc/WW8E-3NSL].

138. *See id.*; *see also* Annemarie Bridy, *Remediating Social Media: A Layer-Conscious Approach*, 24 B.U. J. SCI. & TECH. L. 193, 198 (2018) (explaining why "must-carry" rules are not the solution to curtail online abuse).

139. *See* DAPHNE KELLER, INTERNET PLATFORMS: OBSERVATIONS ON SPEECH, DANGER, AND

other, are both flawed approaches. Finally, Eric Goldman argues that section 230 provides greater procedural and substantive benefits than the First Amendment of the U.S. Constitution and remains a crucial feature of the modern internet.[140]

Taken as a whole, section 230 scholarship recognizes the statute's importance while often noting its shortcomings. Similarly, this Article seeks to maintain the core function of section 230—to prevent traditional defamation-based tort liability from stifling free speech on the internet—while redefining its contours to better address modern platforms.

II. REDEFINING PLATFORM IMMUNITY USING JOINT ENTERPRISE THEORY

Section 230 enables platforms to moderate content and to let users engage in free expression online, and this core purpose should be preserved. But section 230's reach becomes too broad when it immunizes platforms that directly profit from and exert some control over transactions that cause harm. Therefore, courts applying section 230 should also consider the economic activity in which modern platforms engage. In this vein, the theory of joint enterprise liability can shed light on the economic relationship between the platform and its users. In particular, by looking at the pecuniary interest of the platform and its right of control in individual transactions, section 230 can carve out actors who should bear the cost of harm, while still preserving the statute's goals of promoting free expression and enabling content moderation.

This Section first provides an overview of joint enterprise liability and urges that section 230 move away from its reliance on the binary classification of "service" or "provider." It then explores the range of modern platforms that now exist, using sharing economy platforms and online marketplaces as examples. Finally, this

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MONEY 1 (Hoover Inst. Aegis Series Paper No. 1807, 2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3262936 [https://perma.cc/UU2U-82VW].

140. Goldman, *supra* note 39; *see also* Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1002 (2008) (noting that the First Amendment does not bar meaningful regulation of intermediaries).

Section explains how the joint enterprise framework can help redefine modern platform immunity.

A. Joint Enterprise Liability Generally

Joint enterprise liability is a species of vicarious liability in tort law.[141] At its core, joint enterprise liability stands for the proposition that two entities who are engaging in a common business purpose are jointly liable for any resulting harms.[142] A business purpose is generally required, and joint enterprises typically arise out of an express or implied contractual relationship between the entities.[143] For example, the Restatement (Second) of Torts defines a "joint enterprise" as broader and more inclusive than just a business partnership.[144] Instead, a joint enterprise not only includes permanent business arrangements such as business partnerships, but also contemplates "less formal arrangements for cooperation, for a more limited period of time and a more limited purpose."[145]

The key then is that both entities in the joint enterprise "have a voice in directing the conduct of the enterprise."[146] Additionally, some sort of pecuniary interest is also required.[147] Thus, the elements for a joint enterprise can be summed up as

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141. *See* RESTATEMENT (SECOND) OF TORTS § 491 cmt. b (AM. L. INST. 1965) ("A joint enterprise includes ... an undertaking to carry out a small number of activities or objectives, or even a single one, entered into by members of the group under such circumstances that all have a voice in directing the conduct of the enterprise. The law then considers that each is the agent or servant of the others, and that the act of any one within the scope of the enterprise is to be charged vicariously against the rest."). Vicarious liability is the principle that a person stands in the shoes of the tortfeasor by virtue of his relationship with the tortfeasor. *See* RESTATEMENT (THIRD) OF TORTS § 13 (AM. L. INST. 2000). The vicariously liable party need not have committed any tortious act in order to be held liable for the acts of the other; the liability exists by imputation. *See id.* § 13 cmt. a. Notable types of relationships giving rise to vicarious liability are that of the master and servant—also called respondeat superior liability—and that of the parent and child. *Id.*

142. *See* RESTATEMENT (THIRD) OF TORTS § 13; Stephens v. Jones, 710 S.W.2d 38, 41 (Tenn. Ct. App. 1984) (holding that a business purpose is required for a finding of joint enterprise).

143. *See* RESTATEMENT (SECOND) OF TORTS § 491 cmt. c; *see also* Blount v. Bordens, Inc., 910 S.W.2d 931, 933 (Tex. 1995).

144. *See* RESTATEMENT (SECOND) OF TORTS § 491 cmt. b.

145. *Id.*

146. *Id.*

147. *See id.*

> (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.[148]

Joint enterprise liability reflects the social utility and public policy roles tort law plays in society. Several tort rationales support joint enterprise liability, including cost allocation, adequate compensation, and fairness.[149]

First, under the rationale of cost allocation, the cost of a single actor's tort is best allocated to the master for which that actor is engaged, particularly given that the actor is furthering the business purpose of the master.[150] For joint enterprise liability in particular, the theory of cost allocation also supports making the non-tortfeasor entity of the joint venture fully responsible for the other's independent acts of negligence in light of their joint business purpose.[151]

Cost allocation is a rationale underlying other no-fault regimes within tort law. All forms of vicarious liability and imputed negligence essentially hold an entity liable for some other tortfeasor's fault by virtue of the relationship between the entity and the tortfeasor.[152] It often relies on the principal-agent relationship and

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148. *Id.* § 491 cmt. c. Joint enterprise liability often comes up in the automobile context but is not limited to that category of cases. *Id.* § 491 cmt. b.

149. *See, e.g.*, Mark A. Geistfeld, *The Coherence of Compensation-Deterrence Theory in Tort Law*, 61 DEPAUL L. REV. 383, 394-95 (2012); John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1127 (2007) (emphasizing the corrective justice purpose of tort law over "moral luck"); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 986 (2010) (arguing that tort law should be conceptualized as righting a legal wrong and not merely as a system for allocating costs for accidental losses); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 430 (1994); Benjamin Shmueli, *Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice*, 48 U. MICH. J.L. REFORM 745, 748-49 (2015) (arguing for a pluralistic approach that balances multiple goals of tort law).

150. *See* RESTATEMENT (THIRD) OF TORTS § 13 cmt. b. (AM. L. INST. 2000).

151. *See* Shell Oil Co. v. Prestidge, 249 F.2d 413, 414-16 (9th Cir. 1957). In *Shell Oil*, the Ninth Circuit affirmed the trial court's ruling that two oil companies were jointly liable to the plaintiff, who suffered a burn injury while awaiting a job interview at an oil drill site. *Id.* The site was owned by Shell Oil but assigned to Rocky Mountain Oil pursuant to an express agreement giving both companies joint control and a sharing of costs and profits. *Id.* at 415.

152. RESTATEMENT (THIRD) OF TORTS § 13 (stating that joint and several liability applies when liability is imputed on an entity based on the tortious conduct of some other actor).

recognizes the economic reality that agents may lack the means to pay for a victim's harm, while the principal may be a wealthier entity capable of paying the victim.[153] Because vicarious liability does not require negligence on the principal's part, it is akin to a theory of strict liability.[154] Notably, strict liability also looks to cost allocation as a rationale, recognizing that the actor engaged in an activity causing harm is most able to bear the cost of the victim's harm.[155]

Second, the theories of just compensation and fairness also underlie joint enterprise liability. While cost allocation can be seen as furthering a broader social good, just compensation and fairness instead focus on the individual rights of tort victims.[156] The core consideration is that plaintiffs who suffer harm deserve compensation from the tortfeasor.[157] And when two entities operate as a joint enterprise, fairness concerns often dictate that plaintiffs should be allowed to seek adequate compensation from any of the parties to the joint venture.[158]

Furthering these rationales, joint enterprise liability builds on the principle that joint venturers who stand to profit from an activity should both be on the hook for the liability that may arise from the activity as well.[159] In order to deem two entities a joint enterprise, there must be some agreement among the joint venturers, a common purpose among them, a pecuniary interest or motive, and a shared right of control in the joint enterprise.[160] The joint enterprise need not be a business-wide partnership but instead can exist

153. *See, e.g.*, Sykes, *supra* note 32, at 1235 (reviewing the economic implications of vicarious liability versus personal liability regimes and noting that agents are often individuals of limited means, while principals are often wealthier individuals). Although a principal held vicariously liable for the acts of the agent likely owes the whole cost of the harm to the victim, the principal can seek indemnity from the agent. *See* RESTATEMENT (THIRD) OF TORTS § 22 (stating that a person held liable only through vicarious liability is entitled to recover indemnity from the other liable person or persons).

154. *See* Keating, *Theory of Enterprise Liability*, *supra* note 32, at 1286.

155. *Id.* at 1286-87.

156. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS § 2.2 (2d ed. 2016).

157. *Id.*

158. *See id.*

159. *See* RESTATEMENT (THIRD) OF TORTS § 13 cmt. c (AM. L. INST. 2000).

160. RESTATEMENT (SECOND) OF TORTS § 491 cmt. c (AM. L. INST. 1965).

for an individual transaction or incident.[161] Joint enterprise theory in general has been characterized as economically justified,[162] as it assigns liability to the enterprise and likely promotes a greater level of care as a result.[163]

Courts have applied joint enterprise liability in numerous contexts, from oil drilling and construction projects to transportation and patent cases. For example, two oil companies were liable as a joint enterprise when a prospective employee was injured at an oil drill site.[164] The court held the companies were joint venturers because one company owned the lease for the drilling site and the other company was assigned the lease, with an agreement about joint control and profit sharing.[165] Similarly, another court determined that a city transit authority and a state department of transportation constituted a joint enterprise and thus found both liable for two deaths caused by a head-on collision in a carpool lane because both agencies were responsible for its construction and maintenance.[166] In the transportation context, joint enterprise liability has also been used to hold a passenger or car owner liable

161. *See id.* § 491 cmt. b.

162. *See, e.g.*, W. Keith Robinson, *Economic Theory, Divided Infringement, and Enforcing Interactive Patents*, 67 FLA. L. REV. 1961, 2029 (2015) (noting some of the ways use of a joint enterprise test for enforcing interactive patents would promote the economic function of the patent system); Dmitry Karshtedt, *Divided Infringement, Economics, and the Common Law*, 67 FLA. L. REV. F. 329, 340 (2018) ("[T]he Federal Circuit's acceptance of the joint enterprise form of attribution in patent law is reasonable because this doctrine seems to solve similar problems throughout various areas of law, and is one on which courts have converged because it makes economic sense.").

163. *See* Kornhauser, *supra* note 33, at 1380 ("This paper's model suggests that in the private sector, enterprise liability produces greater levels of care.").

164. Shell Oil Co. v. Prestidge, 249 F.2d 413, 414-16 (9th Cir. 1957).

165. *Id.* at 416.

166. Tex. Dep't of Transp. v. Able, 35 S.W.3d 608, 615, 618 (Tex. 2000). Under the "dangerous instrumentality" doctrine, strict vicarious liability for a driver's negligence has been imposed on those who have an identifiable property interest in the driver's vehicle. *See, e.g.*, Fojtik v. Hunter, 828 A.2d 589, 595 (Conn. 2003) (holding an entity renting or leasing a vehicle liable for damages to the same extent as the vehicle's operator); Christensen v. Bowen, 140 So. 3d 498, 506 (Fla. 2014) (holding that a vehicle owner had control and use over the vehicle and exercised control by granting custody to the operator, thereby accepting potential liability); Murdza v. Zimmerman, 786 N.E.2d 440, 442-44 (N.Y. 2003) (holding a vehicle owner liable for accidents in the vehicle in order to provide recourse against financially responsible defendants, promote care in who can operate a vehicle, and remove hardships for injured plaintiffs).

for the negligence of a driver in an automobile collision[167] and to bar claims by an injured passenger against the car's driver.[168]

In the patent context, joint enterprise liability is a recognized means for establishing method patent infringement against multiple defendants. In *Akamai Technologies, Inc. v. Limelight Networks, Inc.*, the Federal Circuit held that,

> [w]here more than one actor is involved in practicing the steps [for infringement], a court must determine whether the acts of one are attributable to the other such that a single entity is responsible for the infringement. We will hold an entity responsible for others' performance of method steps in two sets of circumstances: (1) where that entity directs or controls others' performance, and (2) where the actors form a joint enterprise.[169]

The court looked to the general principles of vicarious liability, including the four elements contained in the Restatement (Second) of Torts definition of joint enterprise.[170] Failure to establish the elements of a joint enterprise can defeat a joint infringement claim.[171]

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167. *See, e.g.*, Troutman v. Ollis, 417 N.W.2d 589, 594 (Mich. Ct. App. 1987) (holding that the plaintiffs could bring a claim under joint enterprise theory against the owner and passengers of the automobile that caused the accident); Straffus v. Barclay, 219 S.W.2d 65, 69 (Tex. 1949) (holding that the driver and passenger, who owned the automobile, had the shared objective of cleaning the church and buying groceries and were thus engaged in joint enterprise when they crashed into another car). *But see, e.g.*, Reed v. Hinderland, 660 P.2d 464, 470 (Ariz. 1983) ("We hold that the mere presence of the owner in an automobile driven by another does not create any presumption of a ... joint enterprise. The existence of such a relationship must be proved by the party asserting it in the same manner as any other issue in the case.").

168. *See, e.g.*, Yant v. Woods, 120 S.W.3d 574, 580 (Ark. 2003). But some courts do not allow the joint enterprise doctrine to bar a passenger's recovery from the car's driver. *See Reed*, 660 P.2d at 466 (holding that imputed contributory negligence of the passenger is not presumed when the passenger sues the driver for damages); Gilmer v. Carney, 608 N.E.2d 709, 711 (Ind. Ct. App. 1993) (holding that imputed negligence through joint enterprise applies only in actions against third persons); Kalechman v. Drew Auto Rental, Inc., 308 N.E.2d 886, 891 (N.Y. 1973) (holding that a passenger's wrongful death claim against a driver is not to be barred by joint enterprise doctrine).

169. 797 F.3d 1020, 1022 (Fed. Cir. 2015).

170. *Id.* at 1023.

171. *See, e.g.*, Midwest Energy Emissions Corp. v. Vistra Energy Corp., No. 19-1334-RGA-CJB, 2020 WL 3316056, at *10 (D. Del. June 18, 2020) (holding that the plaintiff failed to establish that the defendants had "an equal right to a voice in the direction of the enterprise").

At its core, joint enterprise liability recognizes that entities standing to profit from an activity, albeit jointly with another actor, should be allocated some of the costs of accidents that flow from their activities.[172] It allows for a flexible, transaction-by-transaction approach that hinges on the enterprise's business purpose.[173] These features suggest that joint enterprise liability may also be able to assist in redefining platform immunity under section 230.

B. Moving Away from the Binary Classification of "Service" or "Provider"

A joint enterprise approach allows for more nuance in the analysis of modern platforms when compared to section 230's current binary classification of internet actors as either an "interactive computer service" or "information content provider." While the current binary classification may have sufficed in the 1990s, it does not adequately capture the range of internet platforms that currently exist some thirty years later.

Thus, section 230's computer service/content provider distinction should be interpreted to incorporate a joint enterprise analysis to better distinguish among the wider range of modern platforms. In other words, a platform that functions as a joint enterprise with the content provider should lose immunity under section 230.

1. The Range of Modern Platforms

A joint enterprise framework for redefining platform immunity aligns with the evolution of the internet. In 1996, when section 230 was enacted, the internet was described as being in its "infancy."[174] References to different iterations of the internet ("Web 2.0" to "Web 3.0") hint at the perceived evolution of the internet.[175] Regardless of

172. *See* Keating, *Idea of Fairness*, *supra* note 32, at 1269.

173. *See* RESTATEMENT (SECOND) OF TORTS § 491 cmt. b (AM. L. INST. 1965).

174. *See, e.g.*, Darren Waters, *Web in Infancy, Says Berners-Lee*, BBC NEWS (Apr. 30, 2008, 4:30 AM), http://news.bbc.co.uk/2/hi/technology/7371660.stm [https://perma.cc/5UZE-JUSB] (quoting Sir Tim Berners-Lee, the inventor of the world wide web, as saying that the web was "still in its infancy" as of 2008).

175. "Web 2.0" refers to the second wave of technological improvements to change the internet, marked by the rise of user-generated content, such as blogs and social networking

what titles can be coined to describe different phases of the internet's development, the basic premise of its evolution remains the same: over time, the nature of internet-based businesses has changed. And some online actors have evolved into large enterprises that stand to profit from their involvement in individual transactions.[176] As such, section 230's computer service/content provider delineation must also evolve to capture the modern range of roles internet actors play and the economic realities of e-commerce.

For example, when section 230 came into existence in 1996, internet actors played a more limited role in peer-to-peer interactions online. Message boards allowed social interaction and the exchange of ideas,[177] and forums such as Craigslist permitted users to share housing or goods.[178] But message boards and forums such as Craigslist did not set prices, curate listings, or take a cut of profits from peer-to-peer ridesharing or homesharing transactions, in stark contrast to the role that Uber, Airbnb, and similar platforms now play.

The term "platform" itself has emerged to better describe the range of online activity emerging in a mobile-enabled, connected world. Definitions vary, but in the broadest sense, a platform is hardware or software that forms the base for other programs or activities.[179] Modern internet platforms generally connect individuals

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sites, and cloud computing, which allows more programs to run within the web browser itself. *See, e.g.*, *Definition of Web. 2.0*, PCMAG: ENCYC., https://www.pcmag.com/encyclopedia/term/56219/web-2-0 [https://perma.cc/4HUV-BW4U] (defining the key features of "Web 2.0" and explaining the origins of the term).

176. *See* Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 BERKELEY TECH. L.J. 1051, 1053 (2017) ("Looking at Uber also illuminates the important reality that platform companies can be very different from each other in terms of the markets they serve, the type and degree of the power that they exercise within respective markets, and the relative effects of their activities on competition. Newer platform companies such as Uber and Airbnb share characteristics with (relatively) older platforms such as Amazon, eBay, Facebook and Google, in that they use the power and networking capacity of online technology and data analytics to create multisided markets that can quickly scale and achieve market dominance.").

177. *See, e.g.*, *supra* notes 53-56 and accompanying text (discussing cases from the early to mid-1990s involving message boards).

178. *See, e.g.*, *Mission and History*, *supra* note 2.

179. *See, e.g.*, *Platform,* PCMAG: ENCYC., https://www.pcmag.com/encyclopedia/term/platform [https://perma.cc/HAU6-V39A] (defining "platform" as "hardware and/or software architecture that serves as a foundation or base" and explaining that "[t]he term originally dealt with hardware and often still refers to only a CPU model or computer family").

to each other, or to goods and services, using the internet.[180] Thus, a platform can include any application that uses the internet to provide a service, whether it be connecting individuals to each other for social purposes, offering a product for sale, or otherwise.[181] Several governmental bodies, other groups, and scholars have attempted to provide some nuance as to the nature of modern internet platforms.[182] These groups seem to recognize that, rather than lumping vastly different online activity under one singular definition, more detailed classifications are necessary.

Legal scholars have also attempted to define platforms. Definitions include "an online intermediary between buyers and sellers of

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180. *See, e.g.*, *Online Platform,* PCMAG: ENCYC., https://www.pcmag.com/encyclopedia/term/online-platform [https://perma.cc/2XMV-74R9] (defining "online platform" as "[a]n online marketplace that places one party in touch with another, such as buyers and sellers"; explaining that online platforms "may be entirely self-contained" or "may allow third-party apps to connect via the platform's programming interface (API)"; and listing "eBay, Craigslist, Amazon Marketplace, Airbnb and Uber" as examples of online platforms).

181. The European Commission (EC) has also examined the nature of online platforms as part of developing its "strategy for the digital single market." *See Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, COM (2016) 288 final, at 2 (May 25, 2016), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0288&from=EN [https://perma.cc/TV6Q-BSVG]. In its report, the EC acknowledged that online platforms (including sharing economy platforms and online intermediaries) take many different forms and encompass various economic activities. *Id.* Thus, the EC held workshops, conducted studies, and polled the public to help define some of the issues surrounding online platforms. *Id.* In its work, the EC noted that platforms "cover a wide-ranging set of activities including online advertising platforms, marketplaces, search engines, social media and creative content outlets, application distribution platforms, communications services, payment systems, and platforms for the collaborative economy." *Id.* (footnote omitted). Finally, the EC noted that online platforms

> process ... large amounts of data; ... operate in multisided markets but with varying degrees of control over direct interactions between groups of users; ... benefit from 'network effects', where ... the value of the service increases with the number of users; ... rely on information and communications technologies to reach their users, instantly and effortlessly; ... [and] play a key role in digital value creation.

Id. at 2-3.

182. *See, e.g.*, *eCommerce Defined*, INT'L TRADE ADMIN., https://www.trade.gov/ecommerce-definitions [https://perma.cc/PSP2-BWN2]; *FTC "Sharing Economy" Report Explores Evolving Internet and App-Based Services*, FTC (Nov. 17, 2016), https://www.ftc.gov/news-events/press-releases/2016/11/ftc-sharing-economy-report-explores-evolving-internet-app-based [https://perma.cc/2A73-UUD8]; Letter from The App Ass'n to the FTC (Aug. 20, 2018), https://actonline.org/wp-content/uploads/Q3-ACT-Comments-re-FTC-2018-Consumer-Protection-Hearings-082018-FINAL.pdf [https://perma.cc/EG8T-JVM9]; Request for Information from Platform Providers of Commercial e-Commerce Portals, 83 Fed. Reg. 27,986 (requested June 15, 2018).

goods and services—the ancient role of the middleman—enhanced with the modern power afforded by cloud computing, algorithmic matching, pervasive wireless Internet access, scaled user-networks, and near-universal customer ownership of smartphones and tablets."[183] While Facebook, eBay, and other apps and websites can fit this definition generally, platforms have evolved even further into "the new wave of digital companies ... based on the logic of multi-sided markets that disrupt traditional offline interactions by reshaping the ways individuals transact."[184] Airbnb, Uber, and Amazon may fit into the new wave of platforms that blur real-world and online transactions in new and challenging ways.[185]

Another definition points out that modern "[p]latforms exploit the affordances of network organization and supply infrastructures that facilitate particular types of interactions, but they also represent strategies for bounding networks and privatizing and controlling infrastructures."[186] To accomplish this, "[p]latforms use technical protocols and centralized control to define networked spaces in which users can conduct a heterogeneous array of activities and to structure those spaces for ease of use."[187]

Thus, modern platforms include a plethora of activity, from social media applications to sharing economy companies. Even more importantly, the underlying business of modern platforms also varies, with greater opportunities for direct involvement and control over transactions.[188] While some platforms may provide a forum for third-party speech—making money through ads and monetizing user data—others may play a more direct and active role in providing goods and services.[189] Further, the rise of mobile computing and platform-only business models marks a shift in the internet's evolution.[190]

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183. Lobel, *supra* note 19, at 94.

184. *Id.*

185. *See id.* at 89.

186. *E.g.*, Cohen, *supra* note 19, at 144.

187. *Id.* at 145.

188. *See The 9 Types of Software Platforms*, MEDIUM: PLATFORM HUNT (June 12, 2016), https://medium.com/platform-hunt/the-8-types-of-software-platforms-473c74f4536a [https://perma.cc/4C26-BXKU] (analyzing over 170 platforms of all sizes and classifying them into nine categories).

189. *See id.*

190. *See* Lobel, *supra* note 19, at 94-95.

Modern internet platforms have thus expanded their economic activities, and the lines between real-world and virtual-world transactions are becoming more blurred. Some internet platforms have moved beyond message boards and community forums into sophisticated for-profit enterprises that facilitate real-world commerce in ways unforeseen at the time section 230 was first enacted. Sharing economy platforms and online marketplaces, in particular, illustrate the need for a more nuanced analysis of the platform's role in individual transactions.

a. Sharing Economy Platforms

The "sharing economy" is a broad term referring to peer-to-peer exchanges of goods and services.[191] Many modern sharing economy platforms use their own assets and infrastructure to facilitate the underlying peer-to-peer transactions. Although they purport to function as intermediaries that simply connect individuals to each other,[192] sharing economy platforms often function as unique, for-profit enterprises.[193] And many sharing economy platforms make a point to shun traditional, direct relationships between company and employee, or company and customer.[194] By linking people to each other, sharing economy platforms claim that they merely act as a platform for informal economic activity.[195] But these platforms often have capital assets and their own profit models that distinguish them from a simple website that allows peer-to-peer exchanges.[196] They may control the transactions they facilitate by dictating the mode and manner of performance and taking a share of profits from each underlying transaction.[197] In this way, a sharing economy platform does not serve as a message board but rather as a centralized business that just happens to rely on small-scale providers.

191. *See* McPeak, *supra* note 12, at 177-78.

192. *See id.* at 179 nn.30-33; *see also* Miriam A. Cherry, *Corporate Social Responsibility and Crowdwashing in the Gig Economy*, 63 ST. LOUIS U. L.J. 1, 15 (2018) ("The refusal to use the terminology that the legal system typically uses to discuss labor and employment law issues is troubling and may also signal evasion.").

193. *See* Bamberger & Lobel, *supra* note 176, at 1053-54.

194. *See* McPeak, *supra* note 12, at 216.

195. *See id.*

196. *See* Cohen, *supra* note 19, at 142.

197. *See id.* at 142, 145-47.

Uber, for example, does not own a fleet of cars, but instead uses ad-hoc drivers in their own vehicles.[198] Nonetheless, Uber sets the prices, imposes specific performance and quality requirements on its drivers, and otherwise controls its business.[199] Uber exerts considerable control over transactions that happen on its platform by making transactions entirely cashless in many places,[200] requiring users to enter credit card information before they can request a ride, and collecting payment from riders directly, later passing on a portion of the money to drivers.[201] Uber also sets its prices, including experimentation with "surge pricing" and other pricing models enforced by the platform.[202] Drivers receive a set percentage of the fare, as determined by Uber.[203] Uber also requires drivers to meet certain safety requirements.[204] Notably, Uber characterizes its drivers as independent contractors and not employees, a classification that has been challenged by regulators and litigants.[205] To be

198. *See How Does Uber Work?*, UBER HELP, https://help.uber.com/riders/article/how-does-uber-work?nodeId=738d1ff7-5fe0-4383-b34c-4a2480efd71e [https://perma.cc/58UX-LPVD].

199. *See How Are Fares Calculated?*, *supra* note 16.

200. *See How Does Uber Work?*, *supra* note 198.

201. *See id.*; *How Much Can Drivers Make with Uber?*, UBER, https://www.uber.com/us/en/drive/how-much-drivers-make/ [https://perma.cc/BC2P-7WNW].

202. *See How Are Fares Calculated?*, *supra* note 16; *What's Happening When Prices Surge?*, UBER MARKETPLACE, https://marketplace.uber.com/pricing/surge-pricing [https://perma.cc/4JQ2-DZ8V].

203. *See How Much Can Drivers Make with Uber?*, *supra* note 201. Uber experimented with allowing California drivers to set their own fares in response to California legislation that reclassifies some gig workers as employees. *See* Said, *supra* note 16.

204. *Safety*, *supra* note 17.

205. *See, e.g.*, Doe v. Uber Techs., Inc., 184 F. Supp. 3d 774, 785 (N.D. Cal. 2016) (denying Uber's motion to dismiss plaintiffs' claims on the ground that "[t]he California Supreme Court has left [the] question open" of whether Uber drivers are employees or independent contractors); Berwick v. Uber Techs., Inc., No. 11-46739 EK, 2015 WL 4153765, at *6 (Cal. Dep't of Lab. June 3, 2015) ("Plaintiff's car and her labor were her only assets. Plaintiff's work did not entail any 'managerial' skills that could affect profit or loss. Aside from her car, Plaintiff had no investment in the business. Defendants provided the iPhone application, which was essential to the work. But for Defendant's intellectual property, Plaintiff would not have been able to perform the work. In light of the above, Plaintiff was Defendants' employee."). After extensive lobbying, sharing economy platforms helped pass a state ballot initiative in late 2020 that allows them to continue classifying their workers as independent contractors, despite the California Senate having recently enacted Assembly Bill 5 to reclassify on-demand workers as employees. Danielle Abril, *Uber, Lyft, and Gig Companies Win Big After Prop 22 Passes in California*, FORTUNE (Nov. 4, 2020, 12:42 AM), https://fortune.com/2020/11/04/prop-22-california-proposition-uber-lyft-gig-companies-workers-passes/ [https://perma.cc/G4KC-SP99].

an Uber passenger, an app user must agree to the terms and services of the app, including its arbitration clause.[206]

In recent years, Uber has expanded beyond ridesharing services. It sees itself as providing "a global logistics layer" for a plethora of transportation-related services.[207] Uber exists in more than sixty countries, has nearly four million drivers, and boasts tens of millions of "monthly active platform consumers."[208] It has branched into carpooling services with UberPool,[209] meal delivery with Uber Eats,[210] shipping services with Uber Freight,[211] and kitten-snuggling services with UberKittens.[212] Uber was also developing self-driving car technology.[213]

Companies like Uber represent a new, evolving form of online commerce, and their activities blur the line between online intermediaries and real-world commercial actors. Nonetheless, Uber has attempted to classify itself as a platform and not a transportation provider.[214] According to Uber, it is providing "mobile applications and related services" and makes a point to classify itself as an

206. *See U.S. Terms of Use*, *supra* note 18; Alison Frankel, *Forced into Arbitration, 12,500 Drivers Claim Uber Won't Pay Fees to Launch Cases*, REUTERS (Dec. 6, 2018, 2:55 PM), https://www.reuters.com/article/legal-us-otc-uber-idINKBN1O52C6 [https://perma.cc/D2TZ-E2H5].

207. *See Company Info*, UBER NEWSROOM, https://www.uber.com/newsroom/company-info/ [https://perma.cc/K3H9-9JH7].

208. *Id.*

209. O'Connell, *supra* note 8.

210. *Id.*

211. *E.g.*, Jennifer Smith, *Uber Freight Launches Ratings for Cargo Facilities*, WALL ST. J. (Jan. 31, 2019, 9:00 AM), https://www.wsj.com/articles/uber-freight-launches-ratings-for-cargo-facilities-11548943201 [https://perma.cc/LET5-894V].

212. *See I Can Has UberKITTENS*, UBER BLOG (Oct. 29, 2013), https://www.uber.com/blog/i-can-has-uberkittens/ [https://perma.cc/8FKS-LTZX]. UberKittens somehow involves cupcakes in addition to cuddling with kittens. *See id.*

213. *E.g.* Sameepa Shetty, *Uber's Self-Driving Cars Are a Key to Its Path to Profitability*, CNBC (Jan. 28, 2020, 7:01 AM), https://www.cnbc.com/2020/01/28/ubers-self-driving-cars-are-a-key-to-its-path-to-profitability.html [https://perma.cc/87NE-J4GS]. In December 2020, Uber sold its self-driving car unit to Aurora Innovation, a startup backed in part by Amazon. Kirsten Korosec, *Uber Sells Self-Driving Unit Uber ATG in Deal that Will Push Aurora's Valuation to $10B*, TECHCRUNCH (Dec. 7, 2020, 2:05 PM), https://techcrunch.com/2020/12/07/uber-sells-self-driving-unit-uber-atg-in-deal-that-will-push-auroras-valuation-to-10b/ [https://perma.cc/A6TG-MU9M].

214. *See* Allen, *supra* note 20, at 294.

application and not "a provider of transportation, logistics or delivery services or as a transportation carrier."[215]

Airbnb is another example of a sharing economy platform that plays an active role in for-profit transactions while attempting to use section 230 as a broad liability shield. Airbnb is a home-sharing platform that allows people to rent out rooms or entire dwellings to others.[216] It does not charge users to list or find rentals on its website.[217] But once a booking is made, Airbnb charges guests directly and then pays the host, typically "about 24 hours after the guest is scheduled to arrive."[218] While hosts set their own prices, Airbnb offers "[t]rusted pricing advice" that is designed to match prices to local demands.[219] Additionally, Airbnb allows users to charge additional fees for services or extra guests.[220] It offers free property damage protection and liability insurance to hosts, along with customer support and the ability to set house rules.[221] Finally, Airbnb charges a general service fee of 3-5 percent for booked reservations.[222]

Airbnb has attempted to use section 230 immunity as a shield against state and local attempts to regulate its operations. Local municipalities have struggled with regulating short-term rentals,

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215. *U.S. Terms of Use*, *supra* note 18 (emphasis omitted).

216. *About Us*, AIRBNB NEWSROOM, https://press.airbnb.com/about-us/ [https://perma.cc/NX56-2CF6]. Airbnb touts itself as "[a]n economic empowerment engine" that "has helped millions of hospitality entrepreneurs monetize their spaces and their passions while keeping the financial benefits of tourism in their own communities." *Id.* It claims seven million listings in over two hundred countries and one hundred thousand cities. *Id.*

217. *See How You Make Money on Airbnb*, AIRBNB, https://www.airbnb.com/b/financials [https://perma.cc/9XC2-HCG2].

218. *Id.*

219. *Id.*

220. *Id.*

221. *Earn Money as an Airbnb Host*, AIRBNB, https://www.airbnb.com/host/homes [https://perma.cc/A289-VHU4].

222. *See How You Make Money on Airbnb*, *supra* note 217; *see also How Does Occupancy Tax Collection and Remittance by Airbnb Work?*, AIRBNB HELP CTR., https://www.airbnb.com/help/article/1036/how-does-occupancy-tax-collection-and-remittance-by-airbnb-work [https://perma.cc/KCM9-7GBK] ("We automatically collect and pay occupancy taxes on behalf of hosts whenever a guest pays for a booking in specific jurisdictions. Hosts may need to manually collect occupancy taxes in other jurisdictions and in certain listed jurisdictions where Airbnb does not collect all applicable occupancy taxes."); *What Is VAT and How Does It Apply to Me?*, AIRBNB HELP CTR., https://www.airbnb.com/help/article/436/what-is-vat-and-how-does-it-apply-to-me [https://perma.cc/ARS5-UDUJ] (listing the areas where Airbnb charges a value added tax).

which have boomed ever since homesharing platforms came into existence.[223] San Francisco is a notable jurisdiction that has passed ordinances requiring licensure and registration for short-term rentals.[224] These conditions include registration with the city in advance, proof of liability insurance, payment of taxes, reporting of usage, and compliance with municipal codes.[225] The city also mandated that web platforms that host short-term rental listings must inform hosts of the applicable law.[226] Most notably, citing a lack of enforcement and compliance, the city took aim at "booking services," such as Airbnb, that facilitate illegal rentals. In a June 2016 ordinance,[227] the city attempted to force booking services to police listings and avoid publishing illegal short-term rental offers.[228] Airbnb sued, seeking a preliminary injunction blocking enforcement of the ordinance.[229] In response, the city obtained a stay and amended the ordinance to remove restrictions on platforms

223. *See, e.g.*, Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147, 158-59 (2016) (discussing the benefits of the sharing economy for urban development in cities and other economic benefits to local regions). Notably, the sharing economy largely operates outside of existing regulations by explicitly violating local regulations that govern hotels or other industries. *Id.* at 153. The hotel industry and other traditional economic actors may be complying with industry regulations that sharing economy actors, such as Airbnb, are circumventing. *See id.* at 160-62. Regulatory reactions are varied among governing bodies, from attempts at all-out bans to little or no regulation at all. *See id.* at 185-87. One approach is to require licenses or permits, usually at a fee, as a means for collecting information and for limiting the negative effects of short-term rentals. *Id.* at 187. Registries are another aspect of short-term rental regulation that allow for information gathering and monitoring. *See id.* at 188.

224. *Id.* at 188 (citing S.F., CAL., ADMIN. CODE § 41A.5(g)(3)(A) (2015)); *see also* Airbnb, Inc. v. City & County of San Francisco, 217 F. Supp. 3d 1066, 1069-70 (N.D. Cal. 2016) (citing S.F., Cal., Ordinance 218-14 (Oct. 27, 2014)).

225. *Airbnb*, 217 F. Supp. 3d at 1070.

226. Miller, *supra* note 223, at 189.

227. The ordinance defined "booking service" as "any reservation and/or payment service provided by a person or entity that facilitates a short-term rental transaction between an Owner ... and a prospective tourist or transient user ... for which the person or entity collects or receives ... a fee in connection with the reservation and/or payment services." *Airbnb*, 217 F. Supp. 3d at 1071 (alterations in original) (quoting S.F., Cal., Ordinance 178-16 (Aug. 11, 2016)). The court explained that, under the ordinance, booking services were not meant to be limited to internet platforms and could encompass any person or entity that participated in the short-term rental business by collecting booking service fees. *Id.* (defining the ordinance's term "[h]osting [p]latform"). The court noted that the "[b]ooking [s]ervice terms and provisions [were] at the heart of plaintiffs' lawsuit." *Id.*

228. *Id.* at 1070.

229. *Id.*

publishing illegal listings, but it made it a misdemeanor for platforms to collect a fee for rental of an unregistered unit.[230]

Despite the amendment, Airbnb and HomeAway.com, another homesharing platform, still sought to enjoin the ordinance's enforcement, alleging that it was preempted by section 230.[231] The court analyzed the scope of section 230 and held that the platforms were "interactive computer service[s]" that host third-party content.[232] But the court also analyzed whether the ordinance sought to treat the platforms as the publishers or speakers of another's content.[233] According to the platforms, the ordinance treated the platforms as publishers because it, in essence, threatened "criminal penalty for providing and receiving a fee for [b]ooking [s]ervices for an unregistered unit" which thus "require[d] that they actively monitor and police listings by third parties to verify registration."[234] The court rejected this concern, noting that the ordinance did "not regulate what can or cannot be said or posted in the listings. It creates no obligation on plaintiffs' part to monitor, edit, withdraw or block the content supplied by hosts."[235] Instead, the court noted that the ordinance placed no limits on what the platforms allowed or did not allow to be posted.[236] Further, the liability under the ordinance arose out of the platforms' collection of a booking fee for an unregistered listing, which was the platforms' own conduct and activity.[237] The court distinguished several cases in which section 230 was applied broadly, noting that all of those cases involved publishing activity by the platform.[238] Ultimately, the court held that the test for section 230 immunity "is not whether a challenged activity merely bears some connection to online

230. *Id.* at 1071.
231. *Id.*
232. *Id.* at 1072.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.* at 1072-73.
237. *Id.* at 1073.
238. *Id.* at 1073-74. For example, the opinion noted that another trial court in the Ninth Circuit held that a state law's criminalization of the publication of sex-trafficking advertisements by third parties did implicate section 230 immunity. *Id.* at 1073 (citing Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262, 1266-68, 1273 (W.D. Wash. 2012)).

content."[239] Instead, the test is whether the activity "turn[s] on holding an Internet service liable for posting or failing to remove content provided by a third party."[240]

The Ninth Circuit reached a similar result in *HomeAway.com, Inc. v. City of Santa Monica*.[241] The court affirmed a decision rejecting section 230 immunity for homesharing platforms challenging a local ordinance that sought to curtail unlawful rental listings.[242] The ordinance prohibited rental agreements for durations shorter than thirty days, except when the owner also lived on premises or when the unit was a city-licensed homeshare.[243] The statute additionally imposed obligations on homesharing platforms, such as collecting and remitting an occupancy tax, regularly disclosing booking and listing information to the city, refraining from booking unlicensed properties through the platform, and refraining from collecting other fees from unlicensed properties.[244] Platforms that complied with these obligations could benefit from a safe harbor that presumes compliance with the law or otherwise face fines or other punishment.[245]

The platforms in *City of Santa Monica* argued that they were publishers of third-party content and were thus immune under section 230 from the obligations imposed by the ordinance for two reasons. First, they argued that the ordinance implicated section 230 immunity because it mandated that platforms "monitor the content of a third-party listing and compare it against the [c]ity's short-term rental registry."[246] Second, they argued that the ordinance forced the platforms "to remove third-party content."[247]

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239. *Id.* at 1074.

240. *Id.* The court also rejected the platforms' arguments that section 230 analysis must look at the "practical effect" of the law and "how it operates in fact" rather than what the ordinance says on its face. *Id.* at 1074-75 (internal quotations omitted). The fact that platforms may voluntarily remove postings for unregistered units does not mean the ordinance runs afoul of section 230 immunity. *Id.* at 1075. The court held that section 230 immunity was improper because the ordinance neither treated the platforms as publishers or speakers, nor forced them to edit or remove third-party content. *Id.*

241. *See* 918 F.3d 676 (9th Cir. 2019).

242. *See id.* at 679-80.

243. *Id.* at 680.

244. *Id.*

245. *Id.*

246. *Id.* at 682.

247. *Id.* at 683 (emphasis omitted).

The Ninth Circuit rejected both arguments. First, the court acknowledged that section 230 provides broad immunity from state-law claims, even outside of the defamation context.[248] But the court noted that the basis for liability under the ordinance does not rely on the platform's role as "publisher or speaker" of third-party content.[249] Instead, the court stated that it must look at the duty imposed and whether it "would necessarily require an internet company to monitor third-party content."[250] The ordinance limited the platforms' ability to process transactions and required monitoring of listings, which the court noted resulted from the third-party listings but did not rise to the level of reaching publication activities.[251] The court stated that section 230 immunity cannot be so broadly construed as to apply to any situation in which "a website uses data initially obtained from third parties."[252]

Further, the court held that the ordinance did not require the platforms to remove third-party content.[253] Rather, the platforms could choose to keep "un-bookable listings" on the website, even though it would have been useless to do so.[254] Thus, the court held that "the [o]rdinance does not proscribe, mandate, or even discuss the content of the listings that the [p]latforms display on their websites."[255] The court noted that section 230 does not "magically" make otherwise illegal conduct lawful simply because it happens online.[256] Rather, platforms have to comply with myriad state and local regulations just like brick-and-mortar companies, even though compliance is a burden on businesses.[257] Because the ordinance did not impose liability for the content of bookings, the court held that section 230 immunity did not apply.[258]

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248. *Id.* at 684.

249. *See id.* at 681.

250. *Id.* at 682.

251. *Id.* The court noted that the ordinance's monitoring and reporting requirements simply required platforms to cross-reference posts and comply with a tax regulation, which did not implicate editorial or publication functions. *Id.*

252. *Id.* (quoting Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100 (9th Cir. 2009)).

253. *Id.* at 683.

254. *Id.*

255. *Id.*

256. *Id.* (quoting Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc)).

257. *Id.*

258. *Id.* at 684.

In both the *San Francisco* and *Santa Monica* cases, the courts denied section 230 immunity but never held that Airbnb was an "information content provider." Instead, they held that the conduct in question did not implicate publication activities, thereby making section 230 inapplicable.[259] But in *La Park La Brea A LLC v. Airbnb, Inc.*, the court expressly held section 230 applied to Airbnb as an "interactive computer service."[260] There, a landlord sued Airbnb for its role in brokering unlawful subleases on its properties.[261] The court dismissed the claim, noting that "Airbnb hosts—not Airbnb—are responsible for providing the actual listing information. Airbnb 'merely provide[s] a framework that could be utilized for proper or improper purposes.'"[262] The court further noted that Airbnb was not a content provider "because no [listing] has any content until a user actively creates it."[263] Therefore, sharing economy platforms such as Airbnb will likely continue to assert broad section 230 immunity to disclaim all liability for the transactions they facilitate.

But Uber, Airbnb, and other platforms have evolved beyond the role of interactive computer services that "access software provider[s] that provide[ ] or enable[ ] computer access by multiple users to a computer server."[264] While Uber and Airbnb both allow user reviews, ratings, and comments, they also provide the structure and profit from individual transactions. This functionality moves far beyond an intermediary role and crosses over into a joint enterprise

259. *Id.* at 686; Airbnb, Inc. v. City & County of San Francisco, 217 F. Supp. 3d 1066, 1079 (N.D. Cal. 2016).

260. 285 F. Supp. 3d 1097, 1108 (C.D. Cal. 2017).

261. *Id.* at 1102.

262. *Id.* at 1105 (alteration in original) (quoting Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1172 (9th Cir. 2008) (en banc)).

263. *Id.* (alteration in original) (quoting Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2013)). The PLAN Act sought to carve platforms such as Airbnb out of section 230 immunity. Protecting Local Authority and Neighborhoods Act, H.R. 4232, 116th Cong. (2019); *see also* Eric Goldman, *The PLAN Act Proposes to Amend Section 230 to "Protect" ... Landlords and Hotel Chains?*, TECH. & MKTG. L. BLOG (Oct. 16, 2019), https://blog.ericgoldman.org/archives/2019/10/the-plan-act-proposes-to-amend-section-230-to-protect-landlords-and-hotel-chains.htm [https://perma.cc/6KFJ-E2K5] (noting that the PLAN Act would reverse the outcome in future cases resembling *La Park La Brea*).

264. 47 U.S.C. § 230(f)(2) (defining "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions").

based on the platform's hands-on involvement in providing services to users. Thus, modern platforms, and particularly sharing-economy platforms, may not fit neatly into section 230's computer service/content provider definition. Instead, a joint enterprise liability approach may help identify instances when a platform crosses over into the realm of being an information content provider.[265] This joint enterprise framework is instructive for identifying the nature of the platform's relationship to its users and whether section 230 immunity is appropriate.

b. Online Marketplaces

An emerging area testing the limits of section 230 is products liability in online marketplaces. Historically, the case law has established that section 230 immunity can apply to online auction sites.[266] For example, in *Gentry v. eBay, Inc.*, an online marketplace did not fit the definition of a "dealer" under state laws regulating certain transactions and was immune under section 230.[267] The *Gentry* plaintiffs purchased counterfeit sports memorabilia through eBay.[268] They alleged that eBay violated a California statute that required sellers of autographed sports memorabilia to require or provide a valid certificate of authenticity to purchasers.[269] The plaintiff also asserted other claims including negligence, unfair business practices, and misrepresentation.[270]

eBay is an online marketplace that allows users to sell goods via auction or for a fixed price.[271] It charges fees to dealers for listing

265. *See id.* § 230(f)(3) (defining "information content provider" 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").

266. *See, e.g.*, Gentry v. eBay, Inc., 121 Cal. Rptr. 2d 703, 706 (Ct. App. 2002); Stoner v. eBay, Inc., No. 305666, 2000 WL 1705637, at *1 (Cal. Super. Ct. Nov. 1, 2000) (holding that section 230 precluded liability for bootleg items sold on the company's website); Hinton v. Amazon.com, LLC, 72 F. Supp. 3d 685, 687 (S.D. Miss. 2014) (defective hunting equipment); Inman v. Technicolor USA, Inc., No. 11-666, 2011 WL 5829024, at *6 (W.D. Pa. Nov. 18, 2011) (mercury-laden vacuum tubes).

267. 121 Cal. Rptr. 2d at 706.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 707.

auction items and charges percentage fees when items are sold.[272] Additionally, it provides a forum for customer feedback, which may include endorsements from eBay based on a dealer's performance on the website.[273] Further, eBay sets the categories and general section descriptions for its "sports memorabilia" listings.[274] The *Gentry* plaintiffs noted that eBay gave consumers a sense of trust in the authenticity of items listed in its "sports memorabilia" categories and that eBay ignored consumer complaints and warnings from governmental agencies about forged sports memorabilia being sold on the website.[275] eBay, on the other hand, argued that it was not a "dealer" under the California statute and that section 230 immunized it from liability.[276] The court agreed with eBay, holding that it was not a seller and that it merely provided an online venue for third-party dealers.[277] Additionally, the court held that section 230 immunity preempted the plaintiffs' claims.[278]

In applying section 230 immunity, the *Gentry* court noted that the statute applies beyond defamation claims and can bar other tort causes of action.[279] Relying on *Zeran*, the court reiterated that

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272. *Id.* at 708.
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.* at 709. Under the California statute,

> [w]henever a dealer, in selling or offering to sell to a consumer a collectible in or from this state, provides a description of that collectible as being autographed, the dealer shall furnish a certificate of authenticity to the consumer at the time of sale. The certificate of authenticity shall be in writing, shall be signed by the dealer or his or her authorized agent, and shall specify the date of sale.

Id. at 711 (quoting CAL. CIV. CODE § 1739.7(b)). The statute defined a "dealer" as

> a person who is in the business of selling or offering for sale collectibles in or from this state, exclusively or nonexclusively, or a person who by his or her occupation holds himself or herself out as having knowledge or skill peculiar to collectibles, or to whom that knowledge or skill may be attributed by his or her employment of an agent or other intermediary that by his or her occupation holds himself or herself out as having that knowledge or skill. "Dealer" includes an auctioneer who sells collectibles at a public auction, and also includes persons who are consignors or representatives or agents of auctioneers. "Dealer" includes a person engaged in a mail order, telephone order, or cable television business for the sale of collectibles.

Id. at 711 (quoting CAL. CIV. CODE § 1739.7(a)(4)).
277. *Id.* at 711.
278. *Id.* at 712.
279. *Id.* at 714.

interactive computer services shall not be treated as "publishers" of third-party content that appears on their websites.[280] The court rejected the plaintiffs' arguments that eBay had an independent duty to "furnish a warranty" as a provider of descriptions of goods, not as a publisher.[281] Rather, the court held that the claims "ultimately s[ought] to hold eBay responsible for ... eBay's dissemination of representations made by the individual defendants, or the posting of compilations of information generated by those defendants and other third parties."[282] This, the court held, fell squarely within section 230's prohibition on treating interactive computer services as "publishers."[283]

But even in offline examples, auctioneers are not subject to products liability claims as "sellers" because the auctioneer's role is clearly different than that of the third-party owner for which the auctioneer is merely an agent facilitating a sale.[284] Thus, applying section 230 immunity to online auction sites such as eBay follows a similar rationale.

Other online marketplaces, however, blur the lines between seller and intermediary. Amazon, for example, sells its own products interspersed with third-party products from an Amazon warehouse, with all correspondence and payment handled through Amazon.[285] This complicates the section 230 and products liability analysis.

For example, in *Oberdorf v. Amazon.com Inc.*, the Third Circuit scrutinized Amazon's role in third-party vendor transactions under state products liability laws and held that section 230 did not immunize the company as a "seller" of a defective dog leash.[286] First, the court examined Amazon's role in the transaction.[287] Amazon, as an online marketplace, sells its own products and those listed by

280. *Id.* at 713-14 (citing Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997)).

281. *Id.* at 715.

282. *Id.*

283. *Id.* (citing 47 U.S.C. § 230(c)(1)).

284. *See* AMERICAN LAW OF PRODUCTS LIABILITY § 5:27, Westlaw (database updated Aug. 2020) (noting how products liability laws do not apply to auctioneers because they are not "sellers").

285. Oberdorf v. Amazon.com Inc., 930 F.3d 136, 140-41 (3d Cir. 2019), *reh'g en banc granted*, *opinion vacated*, 936 F.3d 182 (3d Cir. 2019), *and certifying questions to* 818 F. App'x 138 (3d Cir. 2020).

286. *Id.* at 140, 153.

287. *Id.* at 140.

third-party vendors.[288] It lists third-party products, collects order information, and processes payments in exchange for a fee from the vendor.[289] Amazon also prohibits the sale of certain products, such as those that it deems illegal, obscene, or defamatory.[290] Vendors must agree to Amazon's service agreement, which gives Amazon the "sole discretion to determine the content, appearance, design, functionality, and all other aspects" of the product's listing on Amazon's website.[291] Notably, the company "also offers a 'Fulfillment by Amazon' service, in which it takes physical possession of third-party vendors' products and ships those products to consumers. Otherwise, the vendor itself is responsible for shipping products directly to consumers."[292] Amazon's service agreement also gives vendors the power to choose their own pricing, with the caveat that they may not list a product on Amazon at a higher price than on other sales channels.[293] In analyzing Amazon's business structure with its third-party vendors, the *Oberdorf* court noted that Amazon "exerts substantial market control over product sales by restricting product pricing, customer service, and communications with customers."[294]

The product at issue in *Oberdorf* was a retractable dog collar that the plaintiff purchased on Amazon's website from a third-party vendor.[295] The plaintiff used the collar on her own dog and, a few weeks after purchase, the collar's D-ring broke and the retractable leash hit the plaintiff in the face, causing permanent blindness in her left eye.[296] The plaintiff sued Amazon alleging products liability based on failure to warn and design defect under Pennsylvania law.[297] The lower court granted summary judgment for Amazon, holding that it was not a "seller" under Pennsylvania's strict products liability law and that it was immune under section 230

288. *Id.* at 140-41.
289. *Id.* Amazon's fees can take several forms. *Id.*
290. *Id.* at 141.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* at 149.
295. *Id.* at 142.
296. *Id.*
297. *Id.* at 142-43. Neither Amazon nor the plaintiff could locate the third-party vendor, which was no longer active on Amazon. *Id.* at 142.

because the plaintiff sought to hold Amazon liable for publishing third-party content.[298]

First, as to whether Amazon was a seller, the appellate court analyzed the factors for determining what constitutes a "seller" under Pennsylvania law and held that Amazon could fit the definition.[299] The court emphasized that Amazon only allowed third-party vendors to communicate to customers through its platform and that it did nothing to ensure its third-party vendors were in good standing or amenable to suit in the United States.[300] Further, the court explained that imposing liability on Amazon would incentivize greater safety given the degree of control that the company exerts on its third-party vendors.[301] Finally, Amazon was in a unique position to discourage the sale of defective products, to manage complaints about those products, and to bear the costs of compensating injury victims.[302] Thus, the court held that Amazon could be a "seller" under Pennsylvania products liability law.[303]

Second, the *Oberdorf* court held that section 230 did not immunize Amazon from all claims.[304] The plaintiff argued that she was seeking to hold Amazon liable for its role in selling and distributing a defective product, not for its role in publishing a third-party vendor's listing.[305] The plaintiff also asserted failure to warn claims because Amazon failed to revise the post to warn of the product's

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298. *Id.* at 143.

299. *Id.* at 143-44. The court articulated four factors:

> (1) Whether the actor is the "only member of the marketing chain available to the injured plaintiff for redress";
> (2) Whether "imposition of strict liability upon the [actor] serves as an incentive to safety";
> (3) Whether the actor is "in a better position than the consumer to prevent the circulation of defective products"; and
> (4) Whether "[t]he [actor] can distribute the cost of compensating for injuries resulting from defects by charging for it in his business, i.e., by adjustment of the rental terms."

Id. (alterations in original) (quoting Musser v. Vilsmeier Auction Co., Inc., 562 A.2d 279, 282 (Pa. 1989)).

300. *Id.* at 145.

301. *Id.* at 145-46.

302. *Id.* at 146-47.

303. *Id.* at 147-48.

304. *Id.* at 151.

305. *Id.* at 152.

danger.[306] The court held that section 230 immunized Amazon from the failure to warn claims, as these involve "the publisher's editorial function."[307] But the appellate court vacated the lower court's dismissal of the design defect claims on section 230 grounds.[308] The court held that the design defect "claims rely on allegations relating to selling, inspecting, marketing, distributing, failing to test, or designing" a product.[309] Thus, Amazon played a direct role as seller and distributor and could not rely on section 230 immunity.[310]

Notably, the Third Circuit, sitting en banc, vacated the panel's ruling in *Oberdorf* and the case was reargued.[311] In June 2020, the Third Circuit announced that it was unable to "discern if and how" section 402A of the Restatement (Second) of Torts "applies to Amazon" and thus certified the question to the Pennsylvania Supreme Court.[312] However, other courts have also concluded that Amazon is not immune under section 230 for defective products. In *Erie Insurance Co. v. Amazon.com Inc.*, the Fourth Circuit held that Amazon was not immune under section 230(c)(1) in a products liability case relating to an LED-headlamp that caused a fire.[313] The plaintiff purchased the headlamp from a third-party seller, and Amazon "fulfill[ed]" the order.[314] Reviewing a grant of Amazon's motion for summary judgment, the appellate court held that section 230 is triggered only when a platform's potential liability is based on the platform's publication of third-party speech.[315] For products liability claims, the basis of liability is a defendant's role as seller and not as publisher.[316] Thus, the appellate court reversed the trial court and held that section 230 did not provide immunity to Amazon.[317] However, the appellate court also held that Amazon did

306. *Id.*
307. *Id.* at 153.
308. *Id.*
309. *Id.*
310. *Id.*
311. Oberdorf v. Amazon.com Inc., 936 F.3d 182 (3d Cir. 2019) (en banc) (mem.).
312. *See* Oberdorf v. Amazon.com Inc., 818 F. App'x 138, 143 (3d Cir. 2020) (en banc).
313. 925 F.3d 135, 137 (4th Cir. 2019).
314. *Id.* "Fulfillment by Amazon" means that the third-party seller uses Amazon's warehouse for storage and relies on Amazon to receive orders, collect payments, and ship merchandise. *Id.* at 138.
315. *Id.* at 139.
316. *Id.*
317. *Id.* at 140.

not fit the state's definition of "seller" and ultimately was not liable.[318]

Notably, in *Bolger v. Amazon.com, LLC*, a California appellate court allowed products liability claims to go forward against Amazon after a defective laptop battery exploded, causing severe burns.[319] The battery was sold by third-party foreign seller Lenoge Technology on Amazon's platform, and the court held that Amazon could be liable under strict products liability because of its role in the transaction:

> Amazon placed itself between Lenoge [the third-party seller] and Bolger [the consumer] in the chain of distribution of the product at issue here. Amazon accepted possession of the product from Lenoge, stored it in an Amazon warehouse, attracted Bolger to the Amazon website, provided her with a product listing for Lenoge's product, received her payment for the product, and shipped the product in Amazon packaging to her. Amazon set the terms of its relationship with Lenoge, controlled the conditions of Lenoge's offer for sale on Amazon, limited Lenoge's access to Amazon's customer information, forced Lenoge to communicate with customers through Amazon, and demanded indemnification as well as substantial fees on each purchase. Whatever term we use to describe Amazon's role, be it "retailer," "distributor," or merely "facilitator," it was pivotal in bringing the product here to the consumer.[320]

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318. *Id.* at 144. Maryland requires that the product defect be attributable to the seller. *Id.* at 140. The defect must have existed at the time of sale when it left the seller. *Id.* The court looked to the dictionary and the commercial code to conclude that a seller is someone who transfers title to property or otherwise has ownership of the property it is selling. *Id.* at 141. Because Amazon never "transfer[red] title to purchasers of that property for a price" when it took on the "fulfillment services" role, it was not liable as the "seller" of the headlamp. *See id.*; *cf.* Fox v. Amazon.com, Inc., 930 F.3d 415, 425 (6th Cir. 2019) (reversing grant of summary judgment in part in a hoverboard fire case because Amazon had a duty to warn the plaintiff but ultimately affirming summary judgment on the grounds that Amazon was not a seller in this instance). *But see* Love v. Weecoo (TM), 774 F. App'x 519, 520-22 (11th Cir. 2019) (reversing dismissal of a products liability claim regarding a hoverboard that caused a house fire because plaintiff sufficiently alleged Amazon had actual or constructive knowledge of the defect).

319. 267 Cal. Rptr. 3d 601, 604 (Ct. App. 2020), *petition for review denied*, S264607, 2020 Cal. LEXIS 7993 (Cal. Nov. 18, 2020).

320. *Id.* at 604-05.

Relying on the policy rationales that support strict liability—including making products safer, protecting consumers, and allocating costs to defendants—the court noted that products liability applies to parties involved in the chain of distribution that are "an integral part of the overall producing and marketing enterprise."[321] Amazon acted as an intermediary that went so far as to possess the product and fill customer orders directly.[322]

The *Bolger* court also rejected Amazon's argument that section 230 immunized it from liability.[323] The product liability claims against Amazon did not arise from Amazon's publication of third-party speech, such as the content of the product listing, but from Amazon's role in the transaction itself.[324]

These cases demonstrate that section 230 immunity may cease when the platform's role extends beyond hosting third-party listings. As online marketplaces morph into hands-on partners of third-party vendors, they may face liability as "sellers" of products under state products liability laws. But rather than focusing on whether the claim arises out of publication of third-party content, a joint enterprise liability theory helps provide a consistent and principled approach to help inform this analysis.

C. Platform as Joint Enterprise

Under a joint enterprise liability framework, the appropriateness and scope of platform immunity can be determined by the specific relationship between the platform and third party as to the unique conduct giving rise to liability. In the section 230 context, joint enterprises are more akin to information content providers than interactive computer services and should be subject to liability. While this framework will result in broader liability for some internet platforms, it will preserve section 230's important role in

321. *Id.* at 613 (quoting Arriaga v. CitiCapital Com. Corp., 85 Cal. Rptr. 3d 143 (Ct. App. 2008)).

322. *Id.* at 614.

323. *Id.* at 626 (citing Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 139-40 (4th Cir. 2019)).

324. *Id.* at 626-27. The Court rejected Amazon's contention that it was akin to the online auction website in *Gentry v. eBay*, noting that the *Gentry* case sounded in negligence, not strict liability, and hinged on third-party statements posted in an online product listing. *Id.*

insulating online intermediaries from liability arising out of third-party speech while allowing some remedies for those harmed in the platform economy.

The joint enterprise liability framework should consider the platform's economic activity and involvement in transactions. Take, for example, a social media platform and its individual users. While the platform encourages users to post content, filters content with algorithmic tools, and removes content based on its own internal procedures, these facts alone likely do not amount to a joint enterprise. The user and platform likely lack a common purpose, as the platform is interested in maximizing user engagement or collecting user data while the user is interested in maintaining and building social relationships.[325]

By contrast, a sharing economy platform that goes beyond merely listing third-party services may be deemed a joint enterprise. For some transactions, sharing economy platforms act like a joint venture with the third party by exerting sufficient control over the transaction and sharing a common pecuniary interest, among other factors.[326] When a common pecuniary interest and right of control exist, section 230 should not insulate the platform from liability arising out of the transaction or venture.

Uber, for example, functions as a transportation service that relies on third parties to use their own resources (cars) to deliver the service (giving customers rides). Uber's structure and involvement in each underlying transaction may support joint enterprise liability. In this scenario, Uber is not a speaker or publisher of third-party content but instead is acting as a joint venturer. Thus, section 230 immunity should not apply. Airbnb and other homesharing platforms may also fit the role of joint enterprise for the purposes of section 230 immunity given their specific involvement in the services the platform offers.

At the same time, however, if Uber or Airbnb is sued because a user defamed someone in a review, the platforms refused to remove

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325. *See* TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS 6 (2016); Andrew Keen, *The 'Attention Economy' Created by Silicon Valley Is Bankrupting Us*, TECHCRUNCH (July 30, 2017, 6:30 PM), https://techcrunch.com/2017/07/30/the-attention-economy-created-by-silicon-valley-is-bankrupting-us/ [https://perma.cc/YZB4-QQ94].

326. A "joint enterprise" in tort law often includes a common pecuniary purpose and right of control. *See supra* note 160 and accompanying text.

a comment, or the platform chose to moderate comments made by platform users, section 230 would still apply. The key is the specific role of the platform in the post or transaction giving rise to liability. Even sharing economy platforms should retain immunity when the basis of liability arises out of third-party speech. It is only in the context of platform-as-joint-enterprise that section 230 immunity would no longer apply.

Similarly, in the online marketplace context, platforms that host third-party content and act as intermediaries for the sale of goods are not necessarily a joint enterprise so as to lose section 230 immunity. But the more "hands on" the role the platform takes in the underlying transaction—including a shared pecuniary interest and equal right of control—the less appropriate section 230 immunity becomes. Thus, Amazon's role in the sale of the dog leash in *Oberdorf* or the headlamp in *Erie* may be sufficient to find a joint enterprise. In such cases, Amazon should not be entitled to section 230 immunity from products liability claims.

Together, these examples show how joint enterprise liability can be a helpful lens through which to define the bounds of platform immunity under section 230. A joint enterprise framework provides a method of discerning between online intermediaries hosting third-party content and platforms that are engaging in a for-profit venture with a third party sufficient to defeat platform immunity. A joint enterprise approach does not foreclose other solutions for redefining section 230 immunity, but it can help define the bounds of immunity in cases that seek to extend its protections too far. In sum, the joint enterprise liability framework homes in on those platforms that engage in a specific for-profit relationship with the third party that then causes harm to a victim, in which liability may be justified, and broad immunity is not warranted.

CONCLUSION

Over the last two decades, scholars, judges, and legislatures have identified some bases for limiting the broad immunity afforded by section 230. The concerns and rationales underlying section 230 have also evolved. The internet is no longer in its infancy. Human and corporate activity are no longer divided neatly into online and

real-world conduct. Modern internet platforms bear little resemblance to the limited functionality of the 1990s internet. Cases that involve section 230 immunity in the sharing economy platform and online marketplace contexts demonstrate the need to redefine section 230's bounds. Platform immunity has become a source of unfairness with its high bar to recovery, and well-reasoned reforms can promote fairness to plaintiffs. The crucial question then is how we preserve the benefits of section 230 and its laudable free speech and free market objectives while reining in overbroad applications of platform immunity.

Given the ways in which modern platforms have evolved, a sounder approach to determining section 230 immunity is to look at the core economic relationship between platform and user. Joint enterprise theory in tort law already provides a framework for doing so, allowing for liability to attach only when pecuniary interests align and sufficient control exists. By moving section 230 into a joint enterprise framework, meaningful limits to immunity can be created without frustrating section 230's core functionality and purpose.