

**THE WEB DIFFERENCE: A LEGAL AND NORMATIVE  
RATIONALE AGAINST LIABILITY FOR ONLINE  
REPRODUCTION OF THIRD-PARTY DEFAMATORY CONTENT**

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## I. INTRODUCTION

Under traditional defamation law, one who reproduces<sup>1</sup> a defamatory statement faces the same liability as the statement's originator.<sup>2</sup> In recent years the Internet has upended the simple concept of reproduction liability. Specifically, a single piece of legislation — section 230 of the Communications Decency Act (“CDA 230”)<sup>3</sup> — provides near-absolute immunity for online reproduction of third-party defamatory content.<sup>4</sup> CDA 230 has elicited concern from courts and commentators who argue that immunizing online reproduction while punishing identical offline reproduction<sup>5</sup> makes little sense.<sup>6</sup> Fueling this concern is the fact that CDA 230's language and history include little explicit justification as to why the law should hold online reproduction to a different standard than offline reproduction.<sup>7</sup>

This Note explains why CDA 230's grant of near-absolute immunity is both consistent with the general principles of defamation law and desirable as a matter of policy. In brief, it argues that online reproduction is so different from offline reproduction that it requires a different standard of liability. Part II of this Note establishes that

1. This Note uses the term “reproduce” to encompass any way in which a speaker can repeat the speech of another in tangible form, such as by quoting another speaker in a magazine article or by reprinting an entire news article on a blog. This Note avoids using words such as “publish,” “distribute,” and “transmit,” which are terms of art in the context of defamation law. Rather, it uses those terms only when referring to the legal concepts they typically represent.

2. RESTATEMENT (SECOND) OF TORTS § 578 (1977) (“[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.”).

3. 47 U.S.C. § 230 (2000).

4. *See* Barrett v. Rosenthal, 146 P.3d 510, 525 (Cal. 2006) (“[In enacting CDA 230] Congress intended to create a blanket immunity from tort liability for online republication of third party content.”). *But see* Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008) (denying CDA 230 immunity to website that participated in creation of third-party speech by allowing users to select drop-down menu items that violated Fair Housing Act); Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 693–97 (N.D. Ill. 2006) (“[CDA 230] is something less than an absolute grant of immunity . . .”), *aff'd* 519 F.3d 666 (7th Cir. 2008).

5. For simplicity's sake, this Note will use terms such as “offline reproduction” and “traditional speech” to refer to non-Internet equivalents of online speech — that is, print speech, broadcast speech, and any other offline speech that is subject to libel law. The spoken word, which would constitute slander if defamatory, is outside the scope of this discussion.

6. *See, e.g.,* Barrett, 146 P.3d at 529 (citing concerns about immunizing online reproduction of defamatory speech under CDA 230, while nonetheless applying CDA 230 immunity to an Internet user who reproduced defamatory e-mails); Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1468–69 (2006) (“[Immunity would allow] information that could not be published in a newspaper to be purposefully placed on a blog with no repercussions.”).

7. There is little rationale on this specific point. CDA 230 states a general goal of protecting the development of the Internet as “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” 47 U.S.C. § 230(a)(3).

courts historically have carved out exceptions to liability for distinct forms of reproduction that otherwise would be defamatory on the ground that they have particular value. Part III argues that online reproduction is sufficiently distinct from other forms of speech such that an exception is appropriate, focusing on online reproduction's benefits to the public dialogue and its increased susceptibility to suppression. Part IV argues that absolute or near-absolute immunity is the only standard that would ensure that online reproduction's benefits are not unduly restricted by the chilling effect of litigation. Part V concludes.

## II. EXISTING LAW GOVERNING REPRODUCTION OF THIRD-PARTY SPEECH

The traditional standard of reproduction liability is that one who repeats a defamatory statement<sup>8</sup> is liable as if she were the original speaker or publisher.<sup>9</sup> The rationale behind reproduction liability is that reproductions can harm the defamed individual to the same extent as the original defamatory message.<sup>10</sup> Following the common law principle that defamatory messages have little speech value, the law seems to assume that reproductions of defamatory content offer little value to the public and thus finds no First Amendment conflict in their suppression.<sup>11</sup>

CDA 230 draws a distinction between publishers of defamatory speech and individuals or entities that merely serve as conduits of third-party defamatory speech.<sup>12</sup> Typically, "publishers" of third-party

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8. "Defamation" and "libel" have become synonymous in the online context. Case law has established that libel laws, to the limited extent that they differ from slander laws, dictate defamation disputes online. *See, e.g., Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991). This Note will primarily rely upon the general term "defamation."

9. *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1122 (N.D. Cal. 1984); RESTATEMENT (SECOND) OF TORTS § 578 (1977).

10. *Condit v. Dunne*, 317 F. Supp. 2d 344, 363 (S.D.N.Y. 2004) ("The reason for this rule is that republication of false facts threatens the target's reputation as much as does the original publication.").

11. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact."); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) ("[Defamatory statements] are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."). *But see* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964) ("Even a false statement may be deemed to make a valuable contribution to public debate . . ."); Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 WM. & MARY BILL RTS. J. 1203, 1203 (2008) (arguing that the Sullivan view on the value of false statements accords with the First Amendment and that prevailing views from Gertz and later Supreme Court cases do not).

12. 47 U.S.C. § 230(c)(1) (2000) ("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.").

defamatory speech — such as newspapers, broadcast organizations, and individual speakers — face reproduction liability.<sup>13</sup> The rationale behind this is that they adopt a defamatory message as their own when making the affirmative choice to repeat it.<sup>14</sup> In contrast, individuals or entities who serve as conduits of speech, sometimes called “distributors” and “transmitters” — such as booksellers and telephone companies — typically do not face liability.<sup>15</sup> This distinction is the basis of CDA 230 immunity.

CDA 230 grants immunity to online reproducers by precluding courts from treating any reproducer as the publisher or speaker of content provided by a third party.<sup>16</sup> Opponents of CDA 230’s protections argue that such an exemption is nonsensical given that online reproducers’ actions often mirror those of traditional publishers.<sup>17</sup> However, online reproduction differs sufficiently from offline reproduction to require different treatment. Section A discusses three exceptions to traditional reproduction liability. These exceptions mark occasions where courts determined that particular forms of reproduced speech hold such value that allowing liability would unduly restrict free speech even where the speech otherwise would be considered defamatory. Section B argues that the rationales behind these exceptions are also applicable to online speech.

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13. See 1 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 4:87 (2d ed. 2007); see also *Barry*, 584 F. Supp. at 1122; RESTATEMENT (SECOND) OF TORTS § 578 (1977) (“[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.”).

14. See *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002) (“The law deems the repeater to ‘adopt as his own’ the defamatory statement.”).

15. See SMOLLA, *supra* note 13, § 4:92. However, individuals and entities sometimes may face liability if they had knowledge or notice that the reproduced material was defamatory. *Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006) (“Under the common law, ‘distributors’ like newspaper vendors and booksellers are liable only if they had notice of a defamatory statement in their merchandise.”); RESTATEMENT (SECOND) OF TORTS § 581 (“[O]ne who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.”).

16. 47 U.S.C. § 230(c)(1).

17. See generally Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. (forthcoming 2009) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1271900](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1271900) (arguing that online speech and online reproduction are not so distinct or so uniquely valuable that they deserve immunity); Troiano, *supra* note 6, at 1465 (“[D]efamatory speech should not be protected in some instances just because the defamer disseminated the message through one medium, but then not protected when the same speech is transmitted through a different medium.”).

*A. Privileges*

## 1. Fair Report Privilege

The fair report privilege is a common law and, in some jurisdictions, statutory privilege<sup>18</sup> that precludes defamation liability for speakers who give a fair and accurate report of certain types of governmental or official action.<sup>19</sup> This privilege immunizes speakers who reproduce the defamatory statements of legislators, parties to judicial proceedings, and other actors involved in official or government activities.<sup>20</sup> The fair report privilege was developed in order to ensure that information regarding official activities is made available to the public; for example, nearly all public knowledge about the workings of government is derived from the efforts of news organizations and others who reproduce and describe official statements.<sup>21</sup>

In order to qualify for the fair report privilege, the reproducer must report merely the fact of the assertion.<sup>22</sup> The reproducer cannot state that the assertion is true or add additional assertions on its own authority and still enjoy absolute privilege. Stated differently, the reproducer may not “adopt[] the defamatory statement as its own.”<sup>23</sup>

## 2. Neutral Reportage Privilege

The neutral reportage privilege, which can largely be traced to the common law, operates much like the fair report privilege. However, while fair report deals with statements made by public figures, neutral reportage precludes defamation liability for reproductions of certain statements made about public figures.<sup>24</sup> In order to qualify under the

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18. *See, e.g.*, N.Y. CIV. RIGHTS LAW § 74 (McKinney 1992) (“A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding . . . .”); N.D. CENT. CODE § 14-02-05 (2007); OHIO REV. CODE ANN. § 2317.05 (West 2008).

19. RESTATEMENT (SECOND) OF TORTS § 611 (1977) (“The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.”); *Karedes v. Acklerley Group, Inc.*, 423 F.3d 107 (2d Cir. 2005); *Riemers v. Grand Forks Herald*, 688 N.W.2d 167 (N.D. 2004).

20. *See* RESTATEMENT (SECOND) OF TORTS § 611.

21. Michael M. Conway et al., *The Illinois Supreme Court and the “Fair Report” Privilege: A Free-Press Victory*, 94 ILL. B.J. 414, 414 (2006).

22. *AirTran Airlines, Inc. v. Plain Dealer Pub. Co.*, 66 F. Supp. 2d 1355, 1360 (N.D. Ga. 1999).

23. *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1098 (4th Cir. 1993).

24. *See* *Edwards v. Nat’l Audubon Soc’y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977) (“[W]hen a responsible, prominent organization . . . makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges . . . .”).

common formulation<sup>25</sup> of the privilege, a reproduction must be an “accurate and disinterested” repetition of speech from a “responsible organization”<sup>26</sup> that targets a public figure, concerns “a raging and newsworthy controversy,” and constitutes a “serious charge” against the public figure.<sup>27</sup>

The rationale behind the neutral reportage privilege is that it is newsworthy when reputable speakers make accusations against public speakers, regardless of the truth of the accusation.<sup>28</sup> To borrow a hypothetical situation, imagine that the President of the United States holds a news conference in which he accuses the Vice President of accepting bribes from a large and influential corporation.<sup>29</sup> After the conference, the President informs those in attendance that the accusations were false and that he made them in order to rouse public sentiment against the Vice President. Traditional defamation reproduction law would hold the attendees liable for defamation if they printed only the phrase, “The President accused the Vice President of accepting bribes,”<sup>30</sup> regardless of the fact the attendees attributed the statement to the President. Thus, absent the neutral reportage privilege, the President’s attempt to discredit the Vice President — a significant news story — would likely go unreported, because there would be no way to reproduce the accusation without assuming liability for it.

### 3. Wire Service Defense

The wire service defense, another primarily common-law privilege, shields publications from liability for defamation arising from

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25. The neutral reportage privilege, like other elements of defamation law, varies by jurisdiction.

26. Courts have offered little guidance as to what constitutes a “responsible organization,” but have recognized organizations in specific cases. See *Edwards*, 556 F.2d 113 (National Audubon Society); *Coliniatis v. Dimas*, 965 F. Supp. 511 (S.D.N.Y. 1997) (law firm); *April v. Reflector-Herald, Inc.*, 546 N.E.2d 466 (Ohio Ct. App. 1988) (sheriff).

27. 50 AM. JUR. 2D *Libel and Slander* § 295 (2007) (citing *Lasky v. Am. Broad. Cos.*, 631 F. Supp. 962 (S.D.N.Y. 1986)) (listing the requirements to claim the neutral reportage privilege).

28. See *Edwards*, 556 F.2d at 120 (“What is newsworthy about such accusations is that they were made.”).

29. See Michael Huber, *Edwards v. Audubon Society Twenty-Five Years Later: What ever Happened to Neutral Reportage?*, COMM. LAW, Spring 2002, at 15, 15 (attributing the hypothetical to Alan H. Fein, Remarks at the Seventh Annual Conference of the American Bar Association’s Forum on Communications Law (Feb. 14–16, 2002)).

30. Because the Vice President is a public figure, he typically could not prevail on a defamation claim unless he proved that a defendant acted with “actual malice” — that is, that the defendant either knew the disputed statement was false or acted with reckless disregard as to its truth or falsity. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). Since the President stated that the statements were false in this hypothetical, the Vice President would have little difficulty proving actual malice.

news they reproduce from certain reputable sources.<sup>31</sup> The defense has primarily been applied to content that other speakers reproduce from wire services such as the Associated Press.<sup>32</sup> The privilege applies so long as the news is apparently authentic, meaning it is not facially inconsistent and the speaker does not have actual knowledge that it is false.<sup>33</sup>

The rationale of the wire service defense is that, absent such a protection, publications would be deterred from republishing news stories except where they could afford to have their own reporters investigate the facts.<sup>34</sup> It would be difficult, if not impossible, for wire services to operate or for small publications to offer coverage of news occurring outside their community if publications were required to independently verify all facts included in wire service content.<sup>35</sup>

### *B. Application of the Established Privileges to Online Reproduction*

As is apparent from the above discussion, the established privileges mark occasions where courts determined that the value in particular forms of reproduced speech exceeds the possible harm caused by reproducing possible defamatory statements. The rationales for adopting the above privileges resonate with online reproduction. Owning to its unique characteristics as a speech medium, online reproduction offers great value to society in that it allows a robust, immediate, and open public dialogue to arise around noteworthy events and statements. While online reproduction as a whole does not fit neatly into any of the three privileges, the rationales behind the privileges justify exempting online reproduction from liability.

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31. See *Winn v. Associated Press*, 903 F. Supp. 575, 579 (S.D.N.Y. 1995); *Layne v. Tribune Co.*, 146 So. 234, 238–39 (Fla. 1933).

32. The wire service defense is not limited to wire services in theory. The defense was originally formulated to encompass all “generally recognized reliable source[s]” of news. *Layne*, 146 So. at 238; see James E. Boasberg, *With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage*, 13 HASTINGS COMM. & ENT. L.J. 455, 458–66 (1991) (tracing history, application, and interpretation of the wire service defense).

33. The speaker need take no steps to independently verify the truth or falsity of the content. *Brown v. Courier Herald Pub. Co.*, 700 F. Supp. 534, 537 (S.D. Ga. 1988).

34. Boasberg, *supra* note 32, at 458–59. See *Layne*, 146 So. at 239 (“No newspaper could afford to warrant the absolute authenticity of every item of its news, nor assume in advance the burden of specially verifying every item of news reported to it by established news gathering agencies, and continue to [publish promptly, if at all].”).

35. Boasberg, *supra* note 32, at 458–59 (“It is arguable that a contrary ruling would have crippled both wire services and small papers of a national bent, leaving the field of national news reporting exclusively to the largest papers and thereby narrowing the spectrum of comment and criticism.”); *Appleby v. Daily Hampshire Gazette*, 478 N.E.2d 721, 725 (Mass. 1985) (“Because verification would be time-consuming and expensive, imposing such a burden would probably force smaller publishers to confine themselves to stories about purely local events.”).

In developing the fair report and neutral reportage privileges, courts and legislators recognized that important controversies arise around statements and that the public dialogue benefits from these statements: the fact that a statement or accusation has been made can be as noteworthy as the accusation itself.<sup>36</sup> These privileges protect discussion of statements and accusations by allowing speakers to spread word without fearing liability. Online reproduction allows even greater opportunity for such discussion than does traditional reproduction because the online environment makes it easy for nearly anyone to reproduce statements and comment on them.<sup>37</sup> Online reproduction also gives nearly anyone the ability to speak on any topic to a wide audience and gives interested parties a larger, more connected forum for their discussions.<sup>38</sup> However, online reproducers as a whole — the majority of whom are individual citizens<sup>39</sup> — are more likely to refrain from speaking due to fear of liability than are traditional reproducers such as newspapers and TV stations.<sup>40</sup>

Similarly, online reproducers typically are even smaller than the small publications discussed in the context of the wire service defense.<sup>41</sup> Online reproducers, like those small publications, tend to lack the resources of traditional media entities and thus would find it nearly impossible to operate if forced to independently verify the truth or falsity of any information they planned to reproduce.<sup>42</sup> With that in mind, the following Part discusses the unique characteristics of online reproduction that make it sufficiently different from offline reproduction to require its own exemption from liability.

### III. THE WEB DIFFERENCE

The prevailing theme among those who question liability exemptions is that online reproduction is not substantially (if at all) different from offline reproduction.<sup>43</sup> This position is incorrect for two reasons.

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36. See *Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977) (“What is newsworthy about such accusations is that they were made.”).

37. See *infra* Part III.B.

38. *Id.*

39. See *infra* Part III.A.

40. *Id.*

41. See *supra* Part II.A and *infra* Part III.A.

42. See *infra* Part III.A.

43. See Citron, *supra* note 17 (rejecting the idea that online speech and online reproduction are sufficiently different from their offline counterparts to merit immunity); Brittan Heller, Note, *Of Legal Rights and Moral Wrongs: A Case Study of Internet Defamation*, 19 YALE J.L. & FEMINISM 279, 286 (2007) (“[W]hat is impermissible in the real world should not be permitted in the virtual world . . . .”); Jae Hong Lee, Note, *Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 488 (2004) (“The Internet . . . is probably not so unique as to require the formulation of a truly novel approach to defamation liability.”).



First, the average online reproducer and the average offline reproducer are fundamentally different entities. Because online reproducers typically have fewer resources and experience with defamation doctrine, they face a greater burden when asked to ascertain the defamatory nature of speech and are more likely to refrain from reproducing due to the chilling effects of litigation. Second, online reproduction is primarily composed of different speech activities than offline reproduction. These activities offer unique benefits to the public dialogue such that they warrant protection from liability even where the protection exempts some speech that otherwise would be defamatory.

#### *A. Fundamental Differences Between Online and Offline Speakers*

Offline reproduction is dominated by a small number of particularly powerful speakers.<sup>44</sup> Aside from the occasional activist pamphlet or other form of citizen publication, offline speech comes from newspapers, magazines, broadcast organizations, and other traditional media entities. The average offline speaker can be imagined as an average-sized traditional media entity.

In contrast, traditional media entities are the minority of online speakers. Blogs alone vastly outnumber traditional media entities: blog tracking and rating website Technorati monitors 112.8 million blogs,<sup>45</sup> and it is doubtful that that number encompasses all blogs. Most bloggers are not traditional media entities. Instead, the average blogger — like the average Internet user — is essentially the average citizen.<sup>46</sup> Added to the number of bloggers are users who post to discussion boards, individuals who speak on their personal home pages, small groups of unpaid individuals who run online-only publications, and a host of other online reproducers. In comparison, there were approximately 110,000 magazines<sup>47</sup> and 10,000 daily newspapers<sup>48</sup> in print worldwide as of 2005. To put those numbers in further perspective, the country of Iran alone is home to 60,000 routinely updated blogs.<sup>49</sup>

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44. See Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 894 & n.204 (2000).

45. See About | Technorati Media, <http://www.technorati.com/about/> (last visited Dec. 19, 2008).

46. See Sean P. Trende, *Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem*, 44 DUQ. L. REV. 607, 608 (2006) (“[Blogs] are typically run by small, unincorporated individuals, sometimes as a mere pastime.”).

47. Press Release, International Federation of the Periodical Press, Speakers Confirmed for FIPP World Magazine Congress [sic] in New York (Feb. 29, 2005), <http://www.fipp.com/Default.aspx?PageIndex=2002&ItemId=12768>.

48. WORLD ASS'N OF NEWSPAPERS, WORLD PRESS TRENDS 2006 (2007), <http://www.wan-press.org/IMG/doc/UPDATE-WPT2006-2-Final.doc>.

49. JOHN KELLY & BRUCE ETLING, MAPPING IRAN'S ONLINE PUBLIC: POLITICS AND CULTURE IN THE PERSIAN BLOGOSPHERE 2 (The Berkman Ctr. for Internet & Soc'y at Har-

If we accept that the totality of online speakers and reproducers is composed differently from the totality of traditional media speakers and reproducers, we must also accept that liability might affect them differently. The following Sections show that, compared to the average traditional media entity, the average Internet reproducer is more likely to be dissuaded from speaking because of the threat of suit and less likely to be capable of satisfying traditional defamation reproduction law's requirements without suffering undue burden.

### 1. Burden of Ascertaining the Defamatory Nature of Speech

Under traditional defamation law, reproducers are treated essentially the same as original speakers under the rationale that reproducers "adopt" third-party statements as their own when they reproduce them.<sup>50</sup> This concept reflects the editorial practices of the traditional media, wherein reproduced speech is typically reviewed by media professionals prior to publication. Before traditional media entities reproduce a statement, they usually make a concerted effort to ascertain the statement's truth — or, alternatively, the trustworthiness of the statement's source — similar to the effort they make when producing their own original content. Opponents of reproduction immunity argue that online speakers are equally capable of making such determinations.<sup>51</sup> However, because of several differences between online reproducers and offline reproducers, it would be an undue burden on online reproducers to require that they undertake such determinations.

In general, traditional media outlets produce material well in advance of publication. Few news articles are completed without a buffer of at least a number of hours before printing, while magazine articles and books may be completed months before they are published. This grants traditional media entities ample time for editing, research, and contemplation, each of which allows for greater possible investigation into the truth and defamatory character of a statement before publication. Traditional speakers typically also have the benefit

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vard Law Sch., Research Publication No. 2008-01, 2008), available at [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Kelly&Etling\\_Mapping\\_Irans\\_Online\\_Public\\_2008.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Kelly&Etling_Mapping_Irans_Online_Public_2008.pdf).

50. See KENT D. STUCKEY, INTERNET AND ONLINE LAW § 2.03[3][a][i] (2008) ("Having reproduced and disseminated the defamatory statements with knowledge of what they say, print publishers are characterized by the courts as 'republishers' who have 'adopted' the statements as their own . . . ." (citing *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1298 (D.C. Cir. 1988))).

51. See, e.g., Troiano, *supra* note 6, at 1479–80 ("[D]etermining what is and what is not a defamatory statement is mainly a matter of common sense. Because bloggers individually choose what information to publish on their blogs, bloggers could easily control what information to omit based on a message's defamatory nature.").

of editors and other “second and third set[s] of eyes,” which lowers the risk of publishing defamatory information.<sup>52</sup>

The average online speaker, in contrast, typically operates on an abbreviated timeline. The lack of editorial bureaucracy allows citizens to respond to events in a uniquely timely manner, but it also leaves them with less time and fewer tools to investigate the facts surrounding statements they reproduce.<sup>53</sup> Requiring online reproducers to engage in an editorial process comparable to that of traditional media would significantly curtail the immediate dialogue that arises because of online speech.<sup>54</sup>

Aside from the differences in timeline and access to editorial guidance, online speakers as a class do not have the experience or resources to manage the “Herculean assignment” of verifying the facts contained in every piece of information they reproduce.<sup>55</sup> The assertions at issue in defamation claims are only problematic if false. However, even in those cases, it will rarely be practical for a citizen speaker to independently verify facts contained in third party statements. Whether a statement is defamatory is difficult enough to ascertain for professional media organizations, which have significantly more resources, legal knowledge, training, and experience in investigating information than online speakers. Even sophisticated litigators, who have the benefit of legal training and experience in defamation cases, have difficulty ascertaining and proving whether an allegedly defamatory statement is true.<sup>56</sup> Thus, online reproducers are extreme examples of small publications that would have difficulty operating if expected to independently verify all statements they reproduce. Online reproducers face a greater burden when required to investigate to the same extent as traditional media entities.

One can consider this issue in the context of negligence, which is the minimum permissible standard of fault for defamation liability.<sup>57</sup> A traditional media entity could be found negligent if it failed to contact the original source of a statement, seek out additional sources, judge the trustworthiness of these sources, conduct further investigation into the events surrounding the statement, or otherwise attempt to ascertain the truth of the statement. Few online reproducers have the

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52. See DAN GILLMOR, *WE THE MEDIA* 193–94 (paperback ed. 2006) (quoting David L. Marburger).

53. See *infra* Part III.B.

54. See *Barrett v. Rosenthal*, 146 P.3d 510, 525 (Cal. 2006).

55. See *id.*

56. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (“[C]ourts . . . have recognized the difficulties of adducing legal proofs that [an] alleged libel was true in all its factual particulars.”).

57. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (holding “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for . . . defamatory falsehood injurious to a private individual”).

resources to undertake such activities before reproducing a statement. Worse, the average online speaker likely does not know the intricacies of defamation law, so she may not know what precautions to take regardless of her resources.<sup>58</sup>

## 2. Defamation Liability's Enhanced Suppressive Effect on Online Speech

Given the complexities of defamation law, any defamation lawsuit is "a daunting and expensive challenge."<sup>59</sup> Defamation plaintiffs face the prospect of large judgments even when the plaintiff cannot prove any specific harm.<sup>60</sup> Due to the high costs of legal proceedings,<sup>61</sup> the cost of defending a lawsuit may have as much of a deterrent effect on speech as the fear of large jury awards.<sup>62</sup> The deterrent effect of these costs often is the primary motivation for plaintiffs to file suit; a favored tactic of defamation plaintiffs is to burden defendants with an "unnecessarily protracted and tangential" discovery process intended more to punish than to produce information.<sup>63</sup> Fear of such burdens produces a "cloud of self-censorship" that causes speakers to avoid controversial topics.<sup>64</sup>

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58. Jennifer L. Peterson, *The Shifting Legal Landscape of Blogging*, WIS. LAW., Mar. 2006, at 8, 10 ("[B]loggers . . . almost universally are not . . . familiar with basic legal issues.").

59. *Barrett*, 146 P.3d at 525.

60. *Gertz*, 418 U.S. at 349 ("Juries [in defamation cases] may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred.").

61. Even twenty years ago researchers estimated that the average attorneys' fees for media defamation suits were as high as \$90,000 to \$150,000, though fees charged to smaller publishers tended to be lower than those charged to larger publishers. See Roselle L. Wissler, *Media Libel Litigation: A Search for More Effective Dispute Resolution*, 14 LAW & HUM. BEHAV. 469, 472 (1990) ("Attorneys' fees to defend a media libel suit are estimated to average \$96,000."); Seth Goodchild, Note, *Media Counteractions: Restoring the Balance to Modern Libel Law*, 75 GEO. L.J. 315, 322 (1986) ("[L]egal fees are estimated to average \$150,000 per defamation case.").

62. *Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) ("The threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself . . ."); *Barrett*, 146 P.3d at 525 ("We reject the argument that the difficulty of prevailing on a defamation claim mitigates the deterrent effect of potential liability."); Sharlene A. McEvoy, "The Big Chill": *Business Use of the Tort of Defamation to Discourage the Exercise of First Amendment Rights*, 17 HASTINGS CONST. L.Q. 503, 505 (1989) ("Although . . . 'the probability of an adverse judgment is small,' the price of [defamation lawsuits] can be very high . . . discouraging even the hardiest souls from exercising their first amendment rights."); Goodchild, *supra* note 61, at 315–16.

63. See *Herbert v. Lando*, 441 U.S. 153, 205–06 (1978).

64. M. Linda Dragas, *Curing a Bad Reputation: Reforming Defamation Law*, 17 U. HAW. L. REV. 113, 121–22 (1995) ("[A]n increase in lawsuits seeking damages . . . could hobble the media and have a chilling effect on freedom of expression. The cloud of self-censorship might hover ominously over newsrooms, potentially resulting in less aggressive reporting and in the avoidance of controversial topics." (internal citations omitted)).

Though the threat of suit has a deterrent effect on the traditional media,<sup>65</sup> litigation is less of a burden on traditional media speech than speech by online reproducers. Professional media speakers are better positioned to avoid the risk of litigation and to deal with it when it comes.<sup>66</sup> Large media entities can mitigate the danger of suit by maintaining defamation insurance, employing in-house counsel, and including litigation expenses in their budget. Online reproducers are more susceptible to the chilling effects because they lack these protections.<sup>67</sup>

One can conceptualize the preclusive effect of defamation liability as a continuum. At one extreme are the largest media entities, whose cost/benefit ratio tends to tip in favor of reproduction because they are less affected by defamation judgments than are smaller entities. These reproducers might tend to shelve speech only when it seems blatantly defamatory, resulting in the dissemination of a wide scope of controversial reproduction. Smaller media entities, which occupy the middle of the continuum, can be expected to set the bar somewhat lower. For instance, they might tend to reproduce most contentious allegations aimed at public figures but few aimed at private figures, taking into account the lower pleading standards private figures must meet to prevail on a defamation claim. A key variable for these reproducers might be the amount of corroborating evidence available, the reputation of the original source, or the number of sources who confirm the statement. At some point along the continuum, the fear of suit combined with a lack of resources begins to prevent the reproduction of speech that probably would not support defamation claims.<sup>68</sup>

Because the average online reproducer — that is, the average citizen — will tend to occupy the continuum's latter extreme, even obvi-

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65. The Supreme Court has discussed the chilling effects of defamation suits on media defendants in at least twenty cases. Lidsky, *supra* note 44, at 889 n.173; *see, e.g.*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

66. *See Sarah Trombley, Visions and Revisions: Fanvids and Fair Use*, 25 CARDOZO ARTS & ENT. L.J. 647 (2007) (“[A large corporation] may be able to withstand a lawsuit by a major media conglomerate — the ordinary citizen cannot.”).

67. Lidsky, *supra* note 44, at 890–91 (“Media defendants identify litigation costs as a primary source of the chilling effect, and these costs will fall even more heavily on the nonmedia defendants . . . [N]onmedia defendants are unlikely to have enough money even to defend against a libel action . . .”).

68. For background on legal threats and actions against online speakers, see Legal Threats Database | Citizen Media Law Project, <http://www.citmedialaw.org/database> (last visited Dec. 19, 2008). In many cases the threatened citizen chose to remove the speech rather than face suit, even when the claims were obviously non-meritorious. The author of this Note has been at various times a volunteer, clinical student, and part-time employee of the Citizen Media Law Project.

ously meritless defamation claims can chill online reproduction.<sup>69</sup> Allegedly wronged individuals take advantage of this fact by using lawsuits to threaten online speakers.<sup>70</sup> A particularly troubling example is plaintiffs' increasing use of Strategic Lawsuits Against Public Participation ("SLAPPs"), which are meritless lawsuits that use the threat of burdensome litigation to suppress speech with which the plaintiffs disagree.<sup>71</sup> SLAPPs have had much success in suppressing speech even though they often do not continue past the early stages of suit.<sup>72</sup> This provides evidence that online reproduction faces a significant chilling effect from litigation.

### *B. The Unique Benefits of Online Speech and Online Reproduction*

The chilling effect of defamation litigation is particularly troublesome given the unique benefits of online reproduction. Online speech and reproduction have fundamentally expanded and enriched the realm of human communications. This fact is so well-recognized that Congress included it in the findings of CDA 230.<sup>73</sup> The Internet has produced unique forms of speech with unprecedented depth, breadth, diversity, timeliness, connectivity, community-building, and access.<sup>74</sup> Though the ubiquity of online speech makes it easy to forget, it was not long ago that there was little opportunity for individual citizens' speech to reach the public at large in any meaningful way.<sup>75</sup> Citizens could do little else other than "stand on the corner and rant, or post a

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69. See *Barrett v. Rosenthal*, 146 P.3d 510, 525 (Cal. 2006).

70. See *supra* note 68; see also GILLMOR, *supra* note 52, at 95 ("[T]hreats against bloggers abound. Commenters on Internet forums have had more trouble.").

71. *Batzel v. Smith*, 333 F.3d 1018, 1023–24 (9th Cir. 2003) ("[SLAPPs] 'masquerade as ordinary lawsuits' but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so.") (quoting *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d, 446, 449–50 (Ct. App. 1994)).

72. See *McEvoy*, *supra* note 62 ("While many of these actions fail at the earliest stages of the civil process, they have the effect of chilling public participation."). Indeed, SLAPPs have been so successful that some states have enacted so-called "anti-SLAPP" statutes to combat them. See, e.g., Cal. Civ. Proc. Code § 425.16 (West 2008); Mass. Gen. Laws Ann. ch. 231, § 59H (2008). However, existing anti-SLAPP statutes generally apply only to a narrow range of speech and are plagued by exceptions and qualifications that render them less useful. See LAWRENCE SOLEY, *CENSORSHIP, INC.* 95–102 (2002) (comparing various anti-SLAPP statutes and noting their faults).

73. 47 U.S.C. § 230(a) (2000) ("The Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.").

74. See generally GILLMOR, *supra* note 52 (discussing the Internet's effects on communications).

75. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 250–51 (1974) ("[T]he public has lost any ability to respond or to contribute in a meaningful way to the debate on issues . . . . [E]ntry into the marketplace of ideas served by the print media [is] almost impossible.").

sign, or write a newsletter, or pen a letter to the editor.”<sup>76</sup> Now, any citizen with access to the Internet can disseminate their views almost instantaneously in a format that allows for global access.<sup>77</sup>

Online reproduction is the source of many of these benefits. The Internet community is a linking and quoting culture, as online communications are based in large part on the process of spreading information from other sources.<sup>78</sup> In particular, commentary on third-party speech and action is the lifeblood of the online public dialogue.<sup>79</sup> Online commentary builds an immediate and robust public discussion around events.<sup>80</sup> Once a single actor introduces a piece of information into the online realm, online speakers begin to discuss and disseminate it.<sup>81</sup> They post links to the information on forums along with their opinions on the matter. They cut and paste portions of the information directly into their blog posts, allowing them to comment on each portion while providing the original alongside for reference.<sup>82</sup> Through reproduction, online speakers can undertake an in-depth critique of information confident that any reader unfamiliar with the topic can familiarize themselves with the information in a matter of moments.<sup>83</sup>

Despite the online medium’s premium on speed and directness, online speech and reproduction also offer the opportunity for greater

76. GILLMOR, *supra* note 52, at 46.

77. *ACLU v. Reno*, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999) (“In the medium of cyberspace . . . anyone can build a soap box out of web pages and speak her mind . . . to an audience larger and more diverse than any the Framers could have imagined.”).

78. YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 293–94 (2006) (describing the linking and quoting nature of the Internet in the context of discussions of cultural issues).

79. *See* GILLMOR, *supra* note 52, at 194 (“Most blogs involve linking to someone else’s work and then commenting on it.” (quoting Professor Glenn Reynolds) (internal quotation marks omitted)).

80. This Note uses the term “online commentary” to encompass a varied series of online speech activities that utilize reproduced content as a tool to inform public discourse. Online commentary occurs when citizens use the Internet to create a discussion around the statements of others. Countless variations of online commentary exist, with new forms of technology and new types of online speech activities creating new variations continuously.

81. Examples of these discussions are numerous. Websites such as Slashdot, <http://slashdot.org> (last visited Dec. 19, 2008); The Volokh Conspiracy, <http://volokh.com> (last visited Dec. 19, 2008); and Daily Kos, <http://www.dailykos.com/> (last visited Dec. 19, 2008) feature constantly updated, in-depth commentary on news stories, political statements, and other third-party sources of information.

82. A striking example is online reproduction’s tremendous effect on Malaysian elections in early 2008. Internet speakers, bypassing the government-controlled mainstream media, took it upon themselves to inform the public of corruption in the country’s highest offices. Once initial accounts of abuses had reached the Internet, bloggers and other speakers engaged in an extensive dialogue over the issues that culminated in the dominant Barisan National coalition losing its long-held majority in parliament and in several states. *See* Luis Ramirez, *Malaysian PM Says He Underestimated Power of Blogs Before Suffering Big Election Losses*, VOICE OF AM., Mar. 25, 2008, <http://www.voanews.com/english/archive/2008-03/2008-03-25-voa17.cfm>.

83. BENKLER, *supra* note 78, at 294 (“The basic tools enabled by the Internet — cutting, pasting, rendering, annotating, and commenting — make . . . discussion . . . easier to create, sustain, and read . . .”).

depth of commentary and discussion than the traditional media. Online speakers can take advantage of the ease of Internet communication to collaborate with other speakers in order to produce detailed content. Further, it is easy for online speakers to cut and paste, link, or otherwise reproduce statements in order to more effectively evaluate or criticize those statements. This is true of topics conventionally considered newsworthy as well as those ignored by the traditional media.<sup>84</sup>

These cut-and-paste and linking styles of commentary are unlike anything that has existed before. The closest offline analogues, such as op-ed columns and letters to the editor, are woefully inadequate because they allow only a trickle of public sentiment to infiltrate the media world. Further, these analogues offer little capacity for back-and-forth discussion, whereas online speakers have a limitless venue to debate matters.

The immense public dialogue opened by online reproduction, which allows discussion of great speed and depth on the issues of the day, is where online reproduction most distinguishes itself. Such a dialogue allows the public to gain a better understanding of an issue and to better ascertain the truth than if discussion were suppressed, even if the discussion involves otherwise defamatory elements.<sup>85</sup> As Justice Holmes famously said, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>86</sup> Online speech allows the public to achieve a middle ground of healthy competition of ideas previously unavailable in the spectrum between person-to-person contact and traditional media broadcasts.<sup>87</sup> Due to the chilling effects’ enhanced suppression of online speech, imposing

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84. Lidsky, *supra* note 44, at 897 (“The Internet allows people to transcend the limits of geography in order to find those with similar interests, and no topic is too obscure to generate Internet discussion.”).

85. See Spottswood, *supra* note 11, at 1203 (“When false statements are spoken sincerely, they are a useful and necessary part of argumentation, which is a powerful means of increasing human knowledge . . . [P]roponents of competing beliefs have a natural impulse to contest [errors]; in so doing, they . . . deepen the understanding of both speakers and listeners.”).

86. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (“‘The First Amendment,’ said Judge Learned Hand, ‘presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.’” (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))); *ACLU v. Reno*, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999) (“[M]ost courts and commentators theorize that the importance of protecting freedom of speech is to foster the marketplace of ideas. If speech, even unconventional speech that some find . . . offensive, is allowed to compete unrestricted in the marketplace of ideas, truth will be discovered.”).

87. *ACLU v. Reno*, 929 F. Supp. 824, 882 (E.D. Pa. 1996) (“The Internet is a far more speech-enhancing medium than print . . . [Reduction of] the speech available for adults on the medium . . . is a constitutionally intolerable result.”), *aff’d*, 521 U.S. 844 (1997).



liability for reproductions of defamatory speech would reduce citizen participation and thus restrict this valuable dialogue.<sup>88</sup> Thus, online reproduction's value requires protection, even if such protection would also shield some speech that otherwise would be considered defamatory under traditional defamation law.<sup>89</sup>

#### IV. THE NECESSITY OF ABSOLUTE OR NEAR-ABSOLUTE IMMUNITY

The preceding Parts argued that online reproduction warrants special protection from the chilling effects of litigation. In order to prevent chilling effects, it is appropriate to exempt speakers from liability for otherwise actionable content if doing so is necessary to protect valuable speech.<sup>90</sup> A standard as close as possible to absolute immunity is warranted because exceptions to an online reproduction exemption would allow the chilling effects to frustrate the exemption's protection. Additionally, online reproduction holds such value that it warrants protection even in discussions that contain otherwise defamatory content.

Allowing qualifications or exceptions to online reproduction immunity would negate the immunity's protections. Exceptions provide loopholes under which plaintiffs can bring even the most meritless claims and maintain them to at least the early stages of suit. Plaintiffs do this because the purpose of many suits against online reproducers is to suppress their speech, rather than to recover for a genuine harm.<sup>91</sup> Fault and other possible qualifications to online reproduction immunity would require difficult, case-by-case determinations of whether the disputed reproduction constituted protected speech.<sup>92</sup> For example, if the law allowed liability when online speakers reproduce

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88. *See id.* at 879 ("Since much of the communication on the Internet is participatory, *i.e.*, is a form of dialogue, a decrease in the number of speakers, speech fora, and permissible topics will diminish the worldwide dialogue that is the strength and signal achievement of the medium.")

89. *See* Spottswood, *supra* note 11, at 1203 ("False speech, therefore, is valuable because it is an essential part of a larger system that works to increase society's knowledge.")

90. *See* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 340 (S.D.N.Y. 2000) ("[The] standard of culpability [should be] sufficiently high to immunize the activity . . . except in cases in which the conduct in question has little or no redeeming constitutional value."), *aff'd sub nom.* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001); Spottswood, *supra* note 11, at 1206 ("[T]he Supreme Court has largely espoused the principle that false speech should . . . be protected . . . only to the extent that restricting false speech will chill truthful speech.")

91. *See supra* Part III.A.2 (discussing SLAPPs).

92. *See supra* Part III.A.2 (discussing the difficulty in determining whether speech qualifies as defamatory).

statements with actual malice,<sup>93</sup> plaintiffs could allege actual malice in a given case even if they had no reason to suspect the defendant acted with malice.<sup>94</sup> Regardless of the malice claim's merit, the case could continue at least until the defendant could convince the court that the plaintiff could not prove malice.

In addition, the various components of traditional defamation law that could serve as qualifications on online reproduction immunity are prohibitively difficult for online reproducers to evaluate.<sup>95</sup> Since it is not easy for reproducers to determine the likelihood of suit against them — much less the likelihood that a suit would survive past a given stage — some will choose not to reproduce speech at all.<sup>96</sup> Requiring reproducers to take these issues into account in order to qualify for immunity would lead to the same chilling effect that immunity seeks to protect.

A standard as close as possible to absolute immunity would check the chilling effect by putting prospective plaintiffs on notice that their suits would have no chance of success. Few plaintiffs or plaintiffs' lawyers would undertake the burden of suit with this knowledge, particularly given the possibility that they would face sanctions or be forced to pay defendants' attorneys' fees and costs for filing obviously meritless claims.<sup>97</sup> With firm precedent in place, it is unlikely that plaintiffs would be able to find counsel willing to take their cases.

It is important to note here that even a standard of absolute reproduction immunity would not entirely remove defamed individuals' ability to seek redress for their injuries. Defamed individuals would retain the right to take action against the originator of the defamatory speech. This allows individuals to clear their name in court and seek damages without encroaching upon online reproduction's benefits to the public dialogue.

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93. Actual malice, a higher standard of fault than negligence, applies in certain defamation action — most notably when the plaintiff is considered a “public figure” or “public official.” *N.Y. Times v. Sullivan*, 376 U.S. 254, 269–70 (1964). Such a standard is more favorable to defendants than to plaintiffs and thus could reduce the chilling effect if applied to all online reproduction actions. However, as explained in the accompanying text, allowing liability under the actual malice standard still would lead to an inappropriate chilling effect.

94. Plaintiffs currently can take advantage of this tactic in situations involving online reproduction, due to the unsettled nature of CDA 230 litigation, as well as situations involving other forms of online speech as a whole. *See supra* Part III.A.2 (discussing plaintiffs' use of SLAPPs and other meritless lawsuits).

95. *See supra* Part III.A.1.

96. *See supra* Part III.A.2.

97. This could include sanctions under a state anti-SLAPP statute or Rule 11(c) of the Federal Rules of Civil Procedure, as well as regular awards of attorneys' fees and costs to prevailing defendants. *See* Lance P. McMillian, *The Nuisance Settlement “Problem”: The Elusive Truth and a Clarifying Proposal*, 31 AM. J. TRIAL ADVOC. 221, 241 (2007) (“Nuisance plaintiffs . . . knowing from the outset that their cases had no chance of success on the merits, would almost certainly . . . be dissuaded from filing suit.”).

That being said, it is conceivable that a strictly defined standard of near-absolute immunity, rather than absolute immunity, could frustrate the chilling effect while still affording an opportunity to bring the most egregious examples of abuse of online reproduction to court.<sup>98</sup> While delineating the parameters of an acceptable near-absolute standard is beyond the scope of this Note, near-absolute immunity could include strictly defined categories of punishable reproduction,<sup>99</sup> dramatically increased pleading standards, and provisions for sanctions in the case of abusive suits. Such a standard would need to closely approximate an absolute standard's ability to preclude the chilling effect — a necessarily high bar — in order to adequately protect online reproduction's benefits.

Although this position may sound extreme, online reproduction immunity is not a far stretch from the reproduction privileges discussed in Part II.A, and indeed has been the prevailing law since the enactment of CDA 230. Those privileges demonstrate instances in which a class of reproduction has particular value that outweighs any interest of the plaintiff in recovering for alleged harm arising from the reproduction.<sup>100</sup> Online reproduction holds similar value. Equally important, online reproduction is more likely to be chilled than the speech covered by those privileges. The combination of these factors renders it appropriate and necessary to have a standard as close as possible to absolute immunity, such as that offered by CDA 230.

## V. CONCLUSION

Online reproduction is fundamentally different from the speech upon which courts and legislatures built traditional defamation reproduction law. It holds benefits to the public dialogue beyond those of traditional reproduction. Those benefits are so compelling that they warrant protection from liability even when such protection precludes liability for otherwise defamatory speech. Such strong protection is only more necessary given the greater chilling effect on online reproduction from the mere threat of suit. For these reasons, a standard of

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98. This Note admittedly declines to dwell on the less virtuous examples of online reproduction because the benefits of online reproduction as a whole exist regardless of individual abuses. Online reproduction warrants protection even if that would let certain abuses go unpunished. Abuses do exist, however, and this Note does not intend to espouse the idea that every conceivable reproduction is beyond reproach.

99. For instance, a near-absolute standard might punish reproduction only when the reproducer contributed in some way to the development of the third-party speech. *See Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (denying CDA 230 immunity to website that participated in creation of third-party speech by allowing users to select drop-down menu items that violated Fair Housing Act).

100. Of course, the plaintiff still may seek to recover against the originator of the allegedly defamatory statement.

absolute or near-absolute immunity for online reproducers of defamatory speech is both understandable under defamation law principles and necessary to protect free speech.