Would a “Right of Reply” Fix Section 230 of the Communications Decency Act?

Michael D. Scott*

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I. Introduction

In 1986 Congress enacted the Communications Decency Act. Section 230 of the Act provided Internet service providers (“ISPs”) and website operators immunity from liability for defamatory statements posted by third parties. Section 230(c)(1) states:

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.

Prior to enactment of Section 230, ISPs and website operators were concerned that they could be held liable for defamatory statements posted by third parties. The Act provided “federal immunity” from liability under Section 230 held that the Act provided “federal immunity” from lawsuits seeking to hold an ISP liable for information originating from a third party. Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997). See also Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003) (“§ 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law.”). But see Chicago Lawyers’ Committee for Civil Rights Under Law v. Craigslist, Inc., 519 F.3d 666, 669 (7th Cir. 2008) (“Subsection (c)(1) does not mention ‘immunity’ or any synonym. § 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts.

*The author is a Professor of Law at Southwestern Law School, Los Angeles, California. He is the author of several treatises in the information technology law field, including Scott on Information Technology Law, Scott on Multimedia Law and Scott on Outsourcing Law and Practice. He can be contacted at mdscott@swlaw.edu. ©2011 Michael D. Scott. All rights reserved.

3. Although the Act does not use the word “immunity,” the first federal appellate court to examine the breadth of Section 230 held that the Act provided “federal immunity” from lawsuits seeking to hold an ISP liable for information originating from a third party. Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997). See also Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003) (“§ 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law.”). But see Chicago Lawyers’ Committee for Civil Rights Under Law v. Craigslist, Inc., 519 F.3d 666, 669 (7th Cir. 2008) (“Subsection (c)(1) does not mention ‘immunity’ or any synonym. § 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts.

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posted by third parties over which they had no control. In *Stratton Oakmont, Inc. v. Prodigy Services, Inc.*, the court held that:

By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and “bad taste,” for example, PRODIGY is clearly making decisions as to content . . ., and such decisions constitute editorial control. That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimize or eviscerate the simple fact that PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards. Based on the foregoing, this Court is compelled to conclude that for the purposes of Plaintiffs’ claims in this action, PRODIGY is a publisher rather than a distributor.\(^4\)\(^1\)

Section 230 gave ISPs and website operators absolute immunity with no obligation to monitor postings,\(^5\) no obligation to remove them if notified by the defamed party,\(^6\) no obligation to keep records of who posted the defamatory statement,\(^6,1\) no liability if they know of the falsity of the post,\(^7\) and no requirement to provide the damaged party a right of reply.\(^8\) This has caused numerous commentators and some federal judges to


\(^4,1\) Id. at *34.


\(^6\) See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1031 n.19 (9th Cir. 2003) (citations omitted; emphasis added): One possible solution to this statutorily created problem is the approach taken by Congress in the Digital Millennium Copyright Act (“Digital Act”). The Digital Act includes immunity provisions, similar to those of the Communications Decency Act, that protect service providers from liability for content provided by third parties. The Digital Act, however, unlike the Communications Decency Act, provides specific notice, take-down, and put-back procedures that carefully balance the First Amendment rights of users with the rights of a potentially injured copyright holder. *To date, Congress has not amended § 230 to provide for similar take-down and put-back procedures.*


\(^7\) See, e.g., *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 835, 121 Cal. Rptr. 2d 703 (2002); *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001).

\(^8\) The right of reply is generally defined as a right to defend oneself against public criticism in the same venue in which the original statements were published.
point out the unfairness of Section 230 to the victims— with some suggesting repeal of or significant modifications to Section 230.

This article will explore the issue of “right of reply” on the Internet. It will discuss the efforts by the Council of Europe and European Parliament to achieve a unified Europe position on an online right of reply, and will look at the problems presented by the First Amendment in getting an online “right of reply” statute enacted in the United States.

II. Developments in Europe

A. Council of Europe

In 2002, the Council of Europe’s (CoE) Steering Committee on the Mass Media (CDMM) requested its Group of Specialists on online services and democracy (MM-S-OD) to review Resolution (74)...

9. See, e.g., Blockowicz v. Williams, 675 F. Supp. 2d 912, 915 (N.D. Ill. 2009) (“The court is sympathetic to the Blockowiczs’ plight; they find themselves the subject of defamatory attacks on the internet yet seemingly have no recourse to have those statements removed from the public view. Nevertheless, Congress has narrowly defined the boundaries for courts to enjoin third parties, and the court does not find that Xcentric falls within those limited conscriptions based on the facts presented here.”); Batzel v. Smith, 333 F.3d 1018, 1036 (9th Cir. 2003) (“Under the majority’s interpretation of § 230, many persons who intentionally spread vicious falsehoods on the Internet will be immune from suit.”) (Gould, C.J., concurring in part, dissenting in part); id. at 1037 (“The majority rule licenses professional rumor-mongers and gossip-hounds to spread false and hurtful information with impunity. So long as the defamatory information was written by a person who wanted the information to be spread on the Internet (in other words, a person with an axe to grind), the rumormonger’s injurious conduct is beyond legal redress.”).

26 “on the right of reply—position of the individual in relation to the press,”\textsuperscript{11} in light of technological developments in the media sector and to adjust its principles to reflect these technological developments. Various drafts of the Recommendation were made public on the CoE’s website and individuals and organizations sent in comments.

After several meetings, on June 25, 2003, the CoE issued a “Draft Recommendation . . . on the Right of Reply in the New Media Environment.”\textsuperscript{12} The “Minimum Principles” required that

\begin{quote}
[a]ny natural or legal person, irrespective of nationality or residence, should be given the possibility of reacting to inaccurate factual statement in the media which affect his/her personal rights.\textsuperscript{13}
\end{quote}

Such a “right of reply” should be published “free of charge”\textsuperscript{14} and “without undue delay”\textsuperscript{15} and “be given, as far as possible, the same prominence as was given to the contested information in order for it to reach the same public and with the same impact.”\textsuperscript{16} If the contested materials were retained in an electronic archive, a link should be retained between the original post and the reply “in order to draw the attention of the user to the fact that the original information has been subject to a response.”\textsuperscript{17} The right of reply would be enforced through “a tribunal or other body with the power to order the immediate publication of the reply.”\textsuperscript{18}

\begin{itemize}
  \item \textsuperscript{11} Eur. Consult. Ass., \textit{Reply of the Comm. of Ministers}, 233d Meeting, Resolution (74) 26 (adopted July 2, 1974), \textit{available at http://www.coe.int/t/dghl/standardsetting/media/doc/cm/res %281974%29026_EN.asp} (last visited Dec. 18, 2011). As adopted in 1974, the resolution focused on the traditional press (“written press, radio, television or any other mass media of a periodical nature”), and not on online services.
  \item \textsuperscript{13} Id. (“Minimum principles” P 1). The term “medium” was broadly defined to include “any means of communication for the dissemination to the public of information at regular intervals in the same format, such as newspapers, periodicals, radio and television, or to any other service available to the public containing frequently updated and edited information of public interest.” (emphasis added). This “right of reply” is subject to certain exceptions. Id. (“Minimum principles” P 5).
  \item \textsuperscript{14} Id. (“Minimum principles” P 4).
  \item \textsuperscript{15} Id. (“Minimum principles” P 2).
  \item \textsuperscript{16} Id. (“Minimum principles” P 3).
  \item \textsuperscript{17} Id. (“Minimum principles” P 7).
  \item \textsuperscript{18} Id. (“Minimum principles” P 8).
\end{itemize}
These recommendations were further modified and adopted by the CoE Committee of Ministers on December 15, 2004. The Recommendation starts from the premise that “the right of reply is a particularly appropriate remedy in the online environment due to the possibility of instant correction of contested information and the technical ease with which replies from concerned persons can be attached to it.”

The two most important changes made to the earlier draft recommendation were:

1. A modification to the definition of “medium” to cover
   
   [a]ny means of communication for the periodic dissemination to the public of edited information, whether on-line or off-line, such as newspapers, periodicals, radio, television and web-based news services.

2. A revision of the definition of “right of reply” to provide that:
   
   [a]ny natural or legal person, irrespective of nationality or residence, should be given a right of reply or an equivalent remedy offering a possibility to react to any information in the media presenting inaccurate facts about him or her and which affect his/her personal rights.

The CoE’s Recommendation was roundly condemned by a large cross-section of potentially-affected organizations. For example, Article 19, an international organization dedicated to freedom of expression, opposed the recommendations, stated:

Under the proposal, websites such as those run by human rights organizations, a national health service or political parties—which are frequently undated, edited and contain information on matters of public interest—would all be treated as mass media outlets and be obliged to grant a right of reply to those who allege that their rights have been infringed by incorrect factual statements. For example, the administrator of the website of a human rights organization would have to grant space to the spokesperson of a military dictatorship to respond to alleged factual inaccuracies that may be impossible to verify. Or a government representative would be able to post a mandatory reply on the site of a political opposition party, to refute allegations of corruption.

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20. Id. One critic has called this premise “audacious.” See Graham J.H. Smith, Internet Law and Regulation § 4.6 Online Right of Reply 345 (4th ed. 2007).
22. Id. (“Minimum Principles” P 1).
Likewise, the Silha Center for the Study of Media Ethics and Law at the School of Journalism and Mass Communication at the University of Minnesota argued that a right of reply would be an impermissible prior restraint on freedom of speech and of the press, noting:

A claim of inaccuracy does not mean that the original statement is untrue, nor does it necessarily guarantee that a reply to it is the truth. Furthermore, the perception of “truth” can be greatly influenced by a person’s point of view, and two seemingly opposing points of view can actually be reflections of the same facts from different perspectives. One need only look at the arguments utilized by holocaust deniers or either side of the abortion issue to see the problems that could arise.

Additionally, there are varying degrees of inaccuracy. There would need to be set protocols to determine at what point a statement constitutes an “inaccuracy” requiring the Right of Reply. Such protocols could stifle speech such as satire, parody, or hyperbole which, for generations, have been used to encourage discussion and debate about political issues. Who would determine what is truth, and who should be allowed to post a reply? To whom would such authority be given? 24.1

B. European Parliament

On December 12, 2005, the European Parliament adopted a recommendation on the right of reply online. 25 While more vague than the Council of Europe recommendation, the European Parliament recommendation was that Member States should consider

[the introduction of measures into their domestic law or practice regarding the right of reply or equivalent measures in relation to on-line media, with due regard for their domestic and constitutional legislative provisions, and without prejudice to the possibility of adapting the manner in which it is exercised to take into account the particularities of each type of medium.]

The recommendation did not define what constituted “on-line media” nor how the recommendation would be implemented.

III. A “Right of Reply” and Section 230

The right of reply 26 is a highly disputed area of media law. Some see it as a low-cost, low-threshold alternative to expensive lawsuits for defamation for individuals whose


26. The “right of reply” should not be confused with the “right of correction.” “Under a right of reply, a news media outlet is obliged to disseminate a statement that
rights have been harmed by the publication of incorrect factual statements about them; others regard it as an impermissible interference with editorial independence.27

In Miami Herald Publishing Co. v. Tornillo,28 the U.S. Supreme Court struck down a state statute29 that required a newspaper to afford a political candidate a right to reply to editorials attacking the candidate’s personal character. The Court held that:

[A mandatory right of reply] fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.30

Since then, U.S. courts have made clear that the Internet is entitled to the same level of First Amendment protection as any other form of expression. In Reno v. American Civil Liberties Union,31 for example, the U.S. Supreme Court called the Internet “the most participatory form of mass speech yet developed.”32 The Court noted that the World Wide Web is a “unique and wholly new medium of worldwide human communication.”


29. Fla. Stat. § 104.38 (1973) TI p. 237, F.S.A., was a “right of reply” statute which provided that “if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper’s charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdemeanor.” Miami Herald, 418 U.S. at 244.
30. Id. at 258.
32. Id. at 863 (quoting American Civil Liberties Union v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996)).
33. Id. at 850. See also Daniel v. Dow Jones & Co., 520 N.Y.S.2d 334, 339, 137 Misc.2d 94 (N.Y. Civ. Ct. 1987) (“News services, whether free to the public, as are television or radio, or more expensive, specialized media, such as [the Dow Jones] computerized data base, are instruments for the free flow of all forms of information, and
Hence, it is clear in the United States that a statute imposing a mandatory requirement that an Internet service provider or a website operator provide a right or reply to someone defamed online by a third party would not pass muster under the First Amendment.\textsuperscript{33.1} However, the question is not whether such a mandatory requirement would be constitutional, but whether conditioning immunity under Section 230 of the CDA on providing a right of reply would be constitutional.

What this article proposes is an amendment to Section 230 along the lines of the “safe harbor” provisions of the Digital Millennium Copyright Act (“DMCA”).\textsuperscript{34} Under the DMCA, a website or ISP owner cannot be held liable for copyright infringement for third party postings, if the website or ISP owner designates an agent to receive notifications of claimed infringement\textsuperscript{35} and follows the “notice and take down” provisions mandated by the DMCA.\textsuperscript{36} If the owner follows the notice and takedown provisions, it is immune from damages for copyright infringement.\textsuperscript{37} If it fails to follow these provisions, it loses immunity and can be sued for copyright infringement.\textsuperscript{38} The statute does not require that the entity follow the provisions, but provides immunity as an incentive to “voluntarily” do so. There is no limit when an aggrieved party can make a take-down demand.

Under this proposed amendment to Section 230, if a website owner (or other operator of an online service that permits third party post-
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ings) offers an aggrieved party a right of reply, that entity would be immune from liability for the defamatory statements made by a third party. If the entity chooses not to provide a right of reply, it would lose that immunity. The unanswered question is whether such an amendment would be unconstitutional under the reasoning of the Tornillo case noted above, or whether the fact that the entity has a choice as to whether to provide a right of reply would change the analysis.

While certainly not identical to a right of reply, the concept of “retraction” may be useful in judging the constitutionality of a right of reply provision. A retraction is “a public statement, by the author of an earlier statement, that withdraws, cancels, refutes, or diametrically reverses the original statement.” More than half of the states have a retraction statute, although they differ substantially. Under many of these statutes, a plaintiff must request a retraction within a certain period of time. The defendant must then make “frank and full” retraction within a reasonable period of time to take advantage of the statute. In many states, if the defendant issues a proper retraction it can substantially reduce the damages it might otherwise have to pay. Research has failed to uncover any cases in which the publisher has challenged a retraction statute on the ground that it violated the publisher’s First Amendment rights as identified in Tornillo.

Under the retraction statutes, the publisher has the right, at its option, to refuse to make a correction or publish a retraction, in which case it waives the statutory right to limit recoverable damages. Likewise, in the proposed amendment to Section 230, the website owner, blogger or other online service provider would have the right, at its option, to refuse to grant a right of reply to the victim of allegedly defamatory statements posted on the service. In such a case, it would waive its statutory immunity from liability for those statements.

39. Retraction, Wikipedia, available at http://en.wikipedia.org/wiki/Retraction (last visited Dec. 18, 2011). Retraction is not the same as correction. “An alteration that changes the main point of the original statement is generally referred to as a retraction while an alteration that leaves the main point of a statement intact is usually referred to simply as a correction.” Id. (emphasis added).

40. Many of the remaining states recognize some form of non-statutory or common law retraction defense to defamation claims.

41. See, e.g., Cal. Civ. Code § 48a(1) (if a correction is properly published, the plaintiff is limited to “special damages,” and cannot recover general or exemplary damages); Fla. Stat. § 770.02 (if a correction, apology or retraction is made timely, the plaintiff can recover only actual damages).
IV. Proposed Language for an Amendment to Section 230
to Provide a Right of Reply

Although CDA Section 230 has provided needed protection for ISPs and website owners against defamation claims for third party postings, courts and commentators have expressed concern that the victims of defamation often have no effective remedy for the reputational harm they have suffered. While Section 230 does not limit a victim’s right to sue the defamer directly, in many cases the person who posted the defamatory statement cannot be identified. As a result, the defamed party has no remedy.

One proposed solution is to amend Section 230 to provide for a “notice and take-down” regime analogous to that provided by the DMCA. However, a major problem is that the DMCA take-down provisions have been abused repeatedly by those who do not like what is being said about them online—even when it is true and non-infringing. The DMCA take-down provisions have been used as a means of censoring discussion on controversial issues, not just for removal of copyright infringing materials. While the DMCA does provide for damages for the misuse of the notice and take-down right, that remedy has not been effective in most cases.

While there have been numerous proposals made for a “right of reply” globally, they vary widely and are often based on legal regimes that are very different from those in the United States. Any right of reply added to Section 230 of the CDA must meet the requirements of the First Amendment.

The following is intended only as suggested language to amend Section 230(c) to provide conditional immunity to website owners and Internet Service Providers who provide a right of reply to allegedly defamed third parties. It does not compel those entities to provide a

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42. See, e.g., Blockowicz v. Williams, 675 F. Supp. 2d 912, 915 (N.D. Ill. 2009).
43. Id. See also Michael L. Rustad & Thomas Koenig, Rebooting Cybertort Law, 80 Wash. L. Rev. 335 (2005).
46. Under Section 512(f), “any person who sends a Notice of Claimed Infringement (“NOCI”) [to an online service provider] with knowledge that claims of infringement are false may be liable for damages.” Online Policy Group, 337 F. Supp. 2d at 1202.
47. See Rossi v. Motion Picture Ass’n of America, Inc., 391 F.3d 1000 (9th Cir. 2004).
right of reply, but removes immunity from liability for those who do not. Deletions from the original statute are indicated by strike-throughs, while added language is in italics.

(c) PROTECTION FOR ‘GOOD SAMARITAN’ BLOCKING AND SCREENING OF OFFENSIVE MATERIAL—

(1) TREATMENT OF PUBLISHER OR SPEAKER-If a provider or user of an interactive computer service complies with the requirements of paragraph (3), such provider or user shall not 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 means to restrict access to material described in paragraph (1).

(3) SAFE HARBOR—A provider or user of an interactive computer service shall be immune from liability for any information provided by another information content provider, if—

(A) the information was made available by or at the direction of another information content provider;

(B) the transmission, routing, storage or posting of the information is carried out without material modification of the information by the provider or user of an interactive computer service;

(C) upon receipt of notice from the subject of any information posted by the provider or user of an interactive computer service, which identify the posting and claims that the posting violated applicable defamation law, the provider or user of that interactive computer service shall provide the subject with a right of reply.

(D) For the purpose of paragraph (C), a “right of reply” shall mean (i) a fair opportunity to respond to the allegation(s), (ii) at no cost to the subject, (iii) posted in the same location as the original posting (or posted in a different location with a link from the location of the original posting), (iv) limited solely to responding to the allegedly defamatory allegation(s), and (v) limited in length to the original posting. A right of reply is limited to a response to an allegedly defamatory statement; it does not provide for the posting of an alternative or contrary opinion. The provider or user of an interactive computer service shall not be liable for any costs incurred by the subject of a right of reply in relation to such reply.

V. Conclusion

The benefit of a “right of reply” statute over a notice and take-down mechanism is that the original statement will remain accessible to Internet users. They then will have the ability to consider both the original,
allegedly defamatory statement, and the reply, and will be able to make up their own minds as to the truthfulness of the competing statements.

As noted by U.S. Supreme Court Justice Louis D. Brandeis in Whitney v. California:48

If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, *the remedy to be applied is more speech, not enforced silence.*49

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49. *Id.* at 377.