

# Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites

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*Revenge porn is a term for the posting of nude images of an unconsenting individual online, frequently by an ex-boyfriend. These photos are often linked to social media profiles, the victim's home address, and employer. Revenge porn victims have "lost jobs, been forced to change schools, change their names, and have been subjected to real-life stalking and harassment."<sup>1</sup> Legal commentary seems to almost unanimously conclude that the operators of revenge porn websites are immune to most civil liability arising from the humiliating content these website operators post on their websites. This conclusion derives from the perceived applicability of Section 230 of the Communications Decency Act of 1996, which often provides immunity to website operators for the content they host. However, no court has yet ruled on the Section 230 immunity of revenge porn website operators. This Comment proposes and evaluates two possible arguments that revenge porn victim-plaintiffs might mount to avoid having their claim barred by Section 230. Both arguments involve convincing courts that revenge porn websites are information content providers under Section 230 even though the humiliating images were submitted by third parties.*

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1. Mary Anne Franks, *Adventures in Victim Blaming: Revenge Porn Edition*, CONCURRING OPINIONS (Feb. 1, 2013), <http://www.concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html>.

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#### INTRODUCTION

In recent years, a new form of sexual predation has been invented. Relying on the proliferation of camera phones, Internet access, and online anonymity, some individuals have begun publicly displaying nude images of unconsenting (and usually female) victims.<sup>2</sup> This activity has been labeled “cyber-rape,” “non-consensual pornography,” and “revenge porn.”<sup>3</sup> The harm visited upon victims of revenge porn is often vast, and “[m]any victims report that this practice has had detrimental effects on their lives.”<sup>4</sup> Victims of

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2. *Revenge Porn: Societal Costs and Legislative Solutions*, LEGAL TALK NETWORK (Mar. 25, 2014), <http://legaltalknetwork.com/podcasts/lawyer-2-lawyer/2014/03/revenge-porn-societal-costs-legislative-solutions> (“Many victims report that this practice has had detrimental effects on their lives. Of those surveyed, 90 percent are women . . .”).

3. END REVENGE PORN, <http://www.endrevengeporn.org> (last visited June 25, 2014).

4. *Revenge Porn*, *supra* note 2.

revenge porn have reportedly “lost jobs, been forced to change schools, change their names, and have been subjected to real-life stalking and harassment because of the actions of those who posted and distributed their images. Some victims have committed suicide.”<sup>5</sup> While many legislators and advocates are working to criminalize revenge porn,<sup>6</sup> the current legal landscape often does not protect victims of revenge porn.<sup>7</sup> Indeed, revenge porn victims report that law enforcement agencies are often unwilling or unable to pursue operators whose websites host revenge porn.<sup>8</sup> Meanwhile, a significant portion of legal commentators believe that Section 230 of the Communications Decency Act of 1996 (CDA) protects these operators from civil liability.<sup>9</sup> Danielle Citron, Mary Anne Franks, and Eric Goldman, the three most prominent legal scholars to publish about Section 230 in the revenge porn context, all conclude that operators of these websites are likely to qualify for Section 230 immunity.<sup>10</sup>

This Comment rejects that conclusion and articulates two theories that might enable a plaintiff to persuade courts that many website operators are responsible for the harmful content on their sites, and therefore are liable as information content providers under Section 230. First, where an operator has added original material, a victim-plaintiff can argue that the revenge porn website operator contributed to the illegality of the post. Second, a plaintiff can argue that the operator is responsible for the content because the operator solicited it. Under both theories, plaintiffs would argue that by fostering the creation or development of the harmful content, the operator of the site is “responsible, in whole or in part, for the creation or development”<sup>11</sup> of illegal information and thus is an information content provider ineligible for Section 230 immunity. Successfully convincing courts that proprietors of such websites are information content providers will not guarantee that victims will be able to

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5. Franks, *supra* note 1; *see also* *Revenge Porn*, *supra* note 2 (“Of those surveyed . . . 49 percent say they’ve been stalked or harassed.”).

6. *See* Emily Shire, *Could Revenge Porn Bans Sweep the Nation?*, *THE WEEK* (Oct. 10, 2013), <http://theweek.com/article/index/250742/could-revenge-porn-bans-sweep-the-nation>; *see also* Michelle Dean, *The Case for Making Revenge Porn a Federal Crime*, *GAWKER* (Mar. 27, 2014, 2:45 PM), <http://gawker.com/the-case-for-making-revenge-porn-a-federal-crime-1552861507>.

7. *See* Mary Anne Franks, *Criminalizing “Revenge Porn”: Quick Guide & Model Statutes* (Oct. 9, 2013) (unpublished manuscript), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2337998](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337998).

8. *See id.*

9. 47 U.S.C. § 230 (2012).

10. *See, e.g.*, Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 *WAKE FOREST L. REV.* 345, 359 (2014) (“Generally speaking, site operators are immunized from tort liability related to a third party’s content.”); Franks, *supra* note 7, at 2 (“[Section 230] grants online entities a special defense against civil liability”); Eric Goldman, *What Should We Do About Revenge Porn Sites Like Texxxan?*, *FORBES* (Jan. 28, 2013, 1:13 PM), <http://www.forbes.com/sites/ericgoldman/2013/01/28/what-should-we-do-about-revenge-porn-sites-like-texxxan> (“No matter how much the [revenge porn victim’s] lawyers hype their lawsuit in the media, it’s mostly dead on arrival. All of the defendants—other than the users actually submitting the revenge porn—are protected by [Section 230].”).

11. 47 U.S.C. § 230(f)(3).

hold these victimizers liable, but it would take plaintiffs one step closer to trying the merits of their claims, including, for example, intentional infliction of emotional distress, defamation, and other state law claims.

Part I.A explains what revenge porn is and what motivates individuals to host and patronize revenge porn sites. It also discusses why and how revenge porn is harmful. After providing this overview, Part I.B will discuss Section 230, a statute that many legal commentators believe protects the hosts of these sites from civil suits other than those based on intellectual property claims.<sup>12</sup> Part II will discuss the two aforementioned arguments that revenge porn victims might advance to avoid seeing their claims barred by Section 230 immunity.

## I. BACKGROUND

### *A. Revenge Porn*

Revenge porn is the term for the distribution of images of nude or semi-nude individuals—usually women—without the consent of the person(s) present in the photo.<sup>13</sup> The images sometimes appear to be captured with the consent of the person pictured, but many of them appear to lack consent.<sup>14</sup>

Although private sharing of nude images without the subject's consent via text message or in hard copy would likely qualify as revenge porn, the genre's most common domain is the Internet. Indeed, cyber distribution is likely the cheapest and most accessible way for proprietors of revenge porn websites to receive submissions from, and share images with, a large audience. Meanwhile, widespread ownership and prevalence of camera phones makes it easier to capture pornographic images without significant investment of time or money.

#### *1. Possible Motivations for Submitting, Patronizing, and Hosting Revenge Porn*

For individuals who visit revenge porn websites, there might be three possible attractions: (1) nude photos; (2) the viewer's belief that the subjects of the images do not want those images shared publically, if at all; and (3) the belief that the subjects of the images did something wrong and deserve to be humiliated. The first possible attraction to this genre—nudity—is likely the least potent. There are many nude photos and videos on the Internet and nothing other than the supposed context of revenge seems to distinguish these images from the many other sources available.

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12. *Supra* note 5.

13. *Supra* note 3.

14. Franks, *supra* note 1 (noting that some revenge porn victims “are photographed or filmed without their knowledge or consent . . . includ[ing] women engaged in consensual sex acts, or mere acts of undressing, who are filmed or photographed surreptitiously, as well as victims of rapists who capture and broadcast footage of their acts.”).

Given the availability of other forms of pornography and the context of revenge porn sites, the primary motivation for submitting revenge porn is likely the humiliation of former romantic partners. The distinguishing feature is the implication that the humiliation of the individuals featured in the images is fair retribution for wrongs committed against their exes. Former romantic partners are presumably the primary sources for the images that appear on revenge porn sites. However, there is no discernible guarantee that any particular image actually came from an ex-partner, or that the individual appearing in the image performed the act or acts a site's hosts and patrons propose deserve such exposure. Other possible sources for the images include individuals sharing images of themselves, or hackers and other individuals who come into possession of nude photos and submit them to the site.<sup>15</sup>

Many revenge porn websites feature a link on their homepages that requests or allows visitors to submit images for publication.<sup>16</sup> Similarly, each site provides its own guidelines for submissions. Example guidelines include the requirement that everyone appearing in images be over the age of eighteen when the image was captured, and a guarantee that the images belong to the person submitting them.<sup>17</sup> One site featured a page claiming its conduct was legal, citing to statutes the website's operator believed would protect the site from liability.<sup>18</sup> The site even expressed amusement regarding potential harms it caused, dedicating a page to sharing critical responses, including cease and desist letters.<sup>19</sup> The site's operator boasted that "the more embarrassing and destructive the material, the more money he made."<sup>20</sup> However, it is nearly impossible to determine whether a victim is over the age of eighteen or if the individual submitting the image is the true owner. Thus, there is little evidence that users follow these guidelines.

While one motivation for starting and operating a revenge porn website may be potential profits, other costs of running such a site may cut against this potential profitability, and suggest that proprietors have other motivations. The

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15. *Id.* (noting that "many revenge porn victims never shared their photos with anyone"); see also Danielle Citron, *Some Thoughts on Section 230 and Recent Criminal Arrests*, CONCURRING OPINIONS (Feb. 17, 2014), <http://www.concurringopinions.com/archives/2014/02/some-thoughts-on-section-230-and-recent-criminal-arrests.html> (revenge porn proprietor Hunter Moore "paid a computer hacker to access women's password-protected computers and e-mail accounts to steal nude photos").

16. See, e.g., *Submit Your Ex-GF Pics*, EX-GF PICS.COM, <http://www.exgfpics.com/submit.html> (last visited June 25, 2014).

17. See, e.g., *id.*

18. 18 U.S.C. § 2257 (2012); IS ANYBODY DOWN?, <http://isanybodydown.com> (last visited Apr. 8, 2013). At the time of writing, this website had been removed. To respect the privacy of the revenge porn victims identified on the website, a link to the archived version of the website has not been provided. A redacted copy of the archived website is on file with the author.

19. IS ANYBODY DOWN?, *supra* note 18.

20. Danielle Citron, *Could Revenge Porn Victims Seek Civil Liability Against Hunter Moore?*, CONCURRING OPINIONS (Feb. 17, 2014), <http://www.concurringopinions.com/archives/2014/02/could-revenge-porn-victims-seek-civil-liability-against-hunter-moore.html>.

original revenge porn website, “Is Anyone Up?,” is estimated to have grossed up to \$20,000 a month.<sup>21</sup> However, given the low barriers to entry, the notable ease in finding nude pictures that are believably revenge-oriented, and few fixed costs, there is little preventing other people from creating competing sites. Similarly, the increased notoriety and attention that can accompany the operation of a popular site makes running a revenge porn site financially and personally burdensome. For example, as “Is Anyone Up?” gained notoriety, it became a target for lawyers and “hacktivists” who wanted to see the site taken down.<sup>22</sup> In a more extreme example, the founder of “Is Anyone Up?” was attacked by a victim.<sup>23</sup>

Given the low likelihood of sustained profitability, the diminishing profits of those who initially succeed, and potential other costs, many website operators are likely to have alternative motivations. Two potential motivations are (1) sexual interest in revenge porn and (2) the belief that exposing these victims is a just moral purpose. The former is relatively straightforward, but the moral motivation is not as intuitive.

These motivations are rooted in the humiliation of individuals—particularly women—for engaging in what users deem lascivious behavior, whether on or off camera.<sup>24</sup> This motivation is problematic. First, as discussed above, there is no guarantee that the individuals pictured actually engaged in the allegedly wrongful behavior. Website hosts do not make any attempt to verify that the individuals featured engaged in conduct the hosts deem worthy of humiliation.<sup>25</sup>

Additionally, the moral standard these sites often apply is antiquated, hypocritical, and misogynist. While some sites feature pictures of men, the vast majority of images feature women,<sup>26</sup> and harm from having one’s image shared on a revenge porn site is likely to disproportionately affect women.<sup>27</sup> Like “rape, domestic violence, and sexual harassment,” revenge porn “punishes

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21. Helen A.S. Popkin, ‘Revenge Porn’ Site Shut Down by ‘Anti-Bullying’ Site, NBC NEWS (Apr. 20, 2012, 12:37 PM), <http://www.nbcnews.com/tech/internet/revenge-porn-site-shut-down-anti-bullying-site-f726532>.

22. Danny Gold, *The Man Who Makes Money Publishing Your Nude Pics*, THE AWL (Nov. 10, 2011), <http://www.theawl.com/2011/11/the-man-who-makes-money-publishing-your-nude-pics>.

23. Amanda Hess, *Hunter Moore’s Biggest Fan*, SLATE (Dec. 5, 2012, 4:25 PM), [http://www.slate.com/blogs/xx\\_factor/2012/12/05/hunter\\_moore\\_s\\_revenge\\_porn\\_cheerleader\\_is\\_any\\_one\\_up\\_s\\_biggest\\_fan\\_is\\_not.html](http://www.slate.com/blogs/xx_factor/2012/12/05/hunter_moore_s_revenge_porn_cheerleader_is_any_one_up_s_biggest_fan_is_not.html).

24. Jessica Roy, *Anonymous Hunts Hunter Moore to Hold Him ‘Accountable’ for His Revenge Porn Empire*, BETABEAT (Dec. 2, 2012, 4:50 PM), <http://betabeat.com/2012/12/anonymous-launches-ophunthunter-to-destroy-hunter-moore-and-his-revenge-porn-empire>; see also Hess, *supra* note 23; *Exposed Women Confront Website Owner: ‘What is Your Motive?’*, ANDERSON LIVE (Nov. 21, 2011), <http://www.youtube.com/watch?v=GAcXjjD3nYg>.

25. See, e.g., IS ANYBODY DOWN?, *supra* note 18 (not employing any means to determine whether submitted images or narratives are factual or accurate).

26. *Revenge Porn*, *supra* note 2 (finding that 90 percent of revenge porn victims are female).

27. See Franks, *supra* note 1; see also Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009).

women and girls for engaging in activities that their male counterparts regularly undertake with minimal negative (and often positive) consequences.”<sup>28</sup> The moral standard is perhaps most hypocritical because revenge porn hosts and patrons are themselves often engaging in lascivious behavior—deriving pleasure from images whose very existence is immoral by those hosts’ and patrons’ standards. However, ascribing this “moral” purpose to revenge porn hosts and patrons might be giving them more credit than they deserve. This semblance of moral purpose might very well be a post hoc rationalization for hosting and supporting this material merely because perpetrators enjoy doing so.

## 2. Harms Visited Upon Revenge Porn Victims

Although some revenge porn sites limit themselves to posting nude or semi-nude images, others divulge the identity of the individuals featured.<sup>29</sup> Sharing of a victim’s identity is typically performed by posting screenshots from the individual’s social media profiles or providing links to those profiles.<sup>30</sup> Some sites also disclose a victim’s home state, city, or address.<sup>31</sup> Most revenge porn sites allow visitors to sort and search for individuals by specific geographic regions.<sup>32</sup>

There are two plausible purposes for linking the images and the individual’s identity. First, the linkage might heighten the “revenge thrill” for visitors and proprietors by transforming the images from the abstract to a more individualized context. With easy access to identifying details, visitors may more easily construct whatever imaginary scenario they desire. Second, identification further humiliates the victims and advances the aforementioned moral purpose that might motivate site hosts and users. Hypocritically, while hosts and patrons of revenge porn sites often claim to believe in accountability, revenge porn sites do not disclose the home address, or link to the personal social media pages, of the users who submit the images or the individuals who host the website.<sup>33</sup>

Revenge porn victims are susceptible to a number of harms.<sup>34</sup> They have reportedly “lost jobs, been forced to change schools, change their names, and have been subjected to real-life stalking and harassment because of the actions of those who posted and distributed their images. Some victims have committed suicide.”<sup>35</sup> Victims may also suffer loss of personal dignity, a lost sense of security, lowered respect from family and friends, and greater

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28. Franks, *supra* note 1.

29. *See, e.g.*, IS ANYBODY DOWN?, *supra* note 18.

30. *Id.*

31. *See, e.g.*, Citron, *supra* note 20.

32. IS ANYBODY DOWN?, *supra* note 18.

33. *See, e.g.*, EX-GF PICS.COM, <http://www.exgfpics.com> (last visited June 25, 2014).

34. Franks, *supra* note 1; *see* END REVENGE PORN, *supra* note 3.

35. Franks, *supra* note 1.

difficulty in maintaining or securing future romantic relationships.<sup>36</sup> This victimization also limits women's freedom by punishing females "for engaging in activities that their male counterparts regularly undertake with minimal negative (and often positive) consequences."<sup>37</sup> While revenge porn sites that do not identify victims can certainly still cause harm, those sites that do identify victims are far more harmful.

Once these images appear, there might be no existing legal mechanism to ensure that they are taken down. Victims who have contacted law enforcement agencies report that "[s]tate police argue that the crime is occurring on the internet, which therefore crosses state lines and is out of their jurisdiction. The FBI claims that these cases are civil and/or do not threaten national security and should therefore . . . be handled solely by lawyers."<sup>38</sup> And even if legal pressure could successfully have the images taken down, the initial posting can be quite harmful. It is easy to download and save most images that appear on the Internet, making removal irrelevant for those viewers who already have possession of the image on their computer. Furthermore, the site traffic is high; while operational, "Is Anyone Up?" had an estimated three hundred thousand visitors per day.<sup>39</sup>

### 3. *The Scope of Revenge Porn*

Evidence suggests that the number of revenge porn victims is high. One study found that one in ten people have had an ex threaten to share nude or embarrassing images of them online.<sup>40</sup> That same study also claims that 60 percent of people who threaten to post those images online actually follow through.<sup>41</sup> If younger Americans are more likely to capture and share nude images ("sexting"), the number of individuals harmed by revenge porn is likely to increase.<sup>42</sup> It is also very difficult for individuals to protect themselves from victimization.<sup>43</sup> Individuals who wish to capture these images can do so without the consent or knowledge of the victim.<sup>44</sup> Furthermore, individuals'

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36. *Id.*

37. *Id.*

38. Danielle Citron, *Revenge Porn Site Operators and Federal Criminal Liability*, CONCURRING OPINIONS (Jan. 30, 2013), <http://www.concurringopinions.com/archives/2013/01/revenge-porn-site-operators-and-federal-criminal-liability.html> (quoting END REVENGE PORN, *supra* note 3).

39. Popkin, *supra* note 21.

40. Helen A.S. Popkin, *Ex-Sweeties Threatening to Post Your Naked Pics? Odds Are, They'll Do It, Survey Suggests*, TODAY (Feb. 4, 2013, 3:51 PM), [http://digitallife.today.com/\\_news/2013/02/04/16840835-ex-sweeties-threatening-to-post-your-naked-pics-odds-are-theyll-do-it-survey-suggests](http://digitallife.today.com/_news/2013/02/04/16840835-ex-sweeties-threatening-to-post-your-naked-pics-odds-are-theyll-do-it-survey-suggests); Robert Siciliano, *Do You Share Passwords with Your Partner?*, MCAFEE BLOG CENTRAL (Feb. 4, 2013), <https://blogs.mcafee.com/consumer/love-relationships-technology-survey>.

41. Popkin, *supra* note 40.

42. See Goldman, *supra* note 10 (arguing that "between sexting and sex tapes, far more private pornography is being generated than at any point in human history").

43. *Id.*

44. *Id.*



private photos might be stolen from devices or private cloud databases and then submitted.

### *B. Section 230 of the Communications Decency Act*

The Communications Decency Act of 1996<sup>45</sup> was Congress's attempt to regulate Internet pornography. Although part of the CDA has been struck down, Section 230 remains.<sup>46</sup> Section 230 was designed "to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material."<sup>47</sup>

#### *1. Section 230's Dual Purpose*

Section 230 was a reaction to *Stratton Oakmont, Inc. v. Prodigy Services Co.*,<sup>48</sup> "in which Prodigy, an Internet access provider that ran online bulletin boards, was held liable for the libelous statements of others."<sup>49</sup> The New York Superior Court held Prodigy liable largely because it monitored its bulletin boards but had not removed the offending content.<sup>50</sup> Had Prodigy not regulated the material, the website's operators likely would not have been held liable.<sup>51</sup> According to the court, Prodigy's decision to take some editorial control of the message boards was akin to Prodigy acting as the publisher of all content on their site, thus making them liable for the site's contents.<sup>52</sup>

"Congress was concerned with the impact such a holding would have on the control of material inappropriate for minors,"<sup>53</sup> providing website operators with incentive to avoid regulation of the material posted to their sites by third parties. Instead, Congress wanted to encourage, or at least protect, website operators who chose to regulate the material that appeared on their sites.<sup>54</sup>

Congress thus had two primary reasons for passing Section 230: to promote free exchange over the Internet, and to encourage hosts to voluntarily monitor their sites for offensive or obscene content.<sup>55</sup> As seen in *Oakmont*, without Section 230, computer service providers had to choose whether to regulate content posted on their sites, and thus be potentially liable for how they monitor content. If the provider declined to monitor and regulate its site, it

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45. 47 U.S.C. § 230 (2012).

46. See *Reno v. ACLU*, 521 U.S. 844 (1997).

47. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).

48. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

49. *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1271–72 (W.D. Wash. 2012).

50. *Id.*

51. *Oakmont*, 1995 WL 323710, at \*4.

52. *Id.*

53. *Batzel v. Smith*, 333 F.3d 1018, 1029 (9th Cir. 2003).

54. *Id.* ("If efforts to review and omit third-party . . . inappropriate material make a computer service provider or user liable for posted speech, then website operators and Internet service providers [would be] likely to abandon efforts to eliminate such material from their site.")

55. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997).

could avoid liability for the content, but that content might contain information that Congress deemed harmful to the public. On the other hand, if providers chose to monitor their sites, individuals could notify the provider of objectionable content and providers might then be liable if they declined to remove the material.<sup>56</sup> This decision required providers to inquire into the merits of each objection and make a legal judgment as to whether they should remove the material.<sup>57</sup>

The volume of information on the Internet, combined with Congress's desire to balance regulation of offensive content and promotion of free expression, made case-by-case inquiries into objectionable content unfeasible.<sup>58</sup> Providers who might have chosen to regulate and protect against harmful material would face an overwhelming volume of requests, and would be burdened by follow-up inquiries and potential tort liability.<sup>59</sup> Congress thus enacted Section 230 so that website operators and service providers would not shield themselves from liability by removing material that, though subjectively objectionable, might be expression Congress wished to protect.<sup>60</sup>

## 2. Section 230 of the CDA: The Statute

Section 230(c) protects users and providers of interactive computer services from civil immunity resulting from content provided by third parties.<sup>61</sup> Titled "Protection for 'Good Samaritan' Blocking and Screening of Offensive Material," it reads:

(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.<sup>62</sup>

Section 230(f)(2) 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."<sup>63</sup> Section 230(f)(3) defines "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."<sup>64</sup> Section 230 lists four areas of law to which the immunity provision

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56. See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162–63 (9th Cir. 2008).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Zeran*, 129 F.3d at 331.

61. 47 U.S.C. § 230(c) (2012).

62. 47 U.S.C. § 230(c)(1).

63. 47 U.S.C. § 230(f)(2).

64. 47 U.S.C. § 230(f)(3).

does not apply: federal criminal law, intellectual property law, state laws consistent with Section 230, and application of the Electronic Communications Privacy Act of 1986.<sup>65</sup> Immunity based on Section 230 is grounds for a Rule 12 motion to dismiss under the Federal Rules of Civil Procedure.<sup>66</sup>

Courts have largely interpreted Section 230 to grant broad immunity to interactive computer service providers from liability for content provided by third parties.<sup>67</sup> “Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others.”<sup>68</sup>

Courts consider three elements when determining whether a defendant should receive Section 230 immunity: “(1) whether Defendant is a provider of an interactive computer service; (2) if the postings at issue are information provided by another information content provider; and (3) whether Plaintiffs [sic] claims seek to treat Defendant as a publisher or speaker of third party content.”<sup>69</sup> A defendant must satisfy each element in order to receive immunity.<sup>70</sup>

### C. Section 230 Immunity in Revenge Porn Suits

Revenge porn plaintiffs have sued many different types of defendants under several different theories, including defamation, false information, sexually explicit content including minors, discriminatory housing ads, and threats.<sup>71</sup> However, because these causes of action are often based on state law, defendants are eligible for Section 230 immunity if they can satisfy all three elements.<sup>72</sup> Potential defendants might include the individual or individuals who captured or submitted the offending image, the site operator, or the company that hosts the domain registry. Claims against each type of defendant pose their own complications.

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65. 47 U.S.C. § 230(e).

66. FED. R. CIV. P. 12(b)(6); *cf.* *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997).

67. *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010).

68. *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998).

69. *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 564 F. Supp. 2d 544, 548 (E.D. Va. 2008).

70. 47 U.S.C. § 230(c)(1).

71. Paul Samakow, *Civil Suit Against GoDaddy: Revenge Porn Should be Criminal*, THE WASHINGTON TIMES: COMMUNITIES (Jan. 26, 2013), <http://communities.washingtontimes.com/neighborhood/leading-edge-legal-advice-everyday-matters/2013/jan/26/revenge-porn-should-be-criminal/#ixzz2JJPTAt8x>; *see also Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009).

72. 47 U.S.C. § 230; *see also Barnes*, 570 F.3d at 1102 (“[W]hat matters is whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another. To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant’s status or conduct as a ‘publisher or speaker.’ If it does, section 230(c)(1) precludes liability.”).

While the individuals who submit images to revenge porn sites are not immune under Section 230, suing them is unlikely to provide a satisfactory remedy. They are unlikely to receive Section 230 immunity because submission to a revenge porn site likely qualifies one as “an information content provider” as required by the statute, making them ineligible for Section 230 immunity.<sup>73</sup> However, suing the individual who submitted an offending image will often be an unsatisfactory remedy for revenge porn victims for two reasons. First, the plaintiff may encounter difficulty identifying who submitted the image, because the image might have been taken without the victim’s knowledge, stolen from the plaintiff or another party, or shared with the submitter by someone with whom the plaintiff shared the image.<sup>74</sup> Seeking to protect their supporters and profits, providers are unlikely to volunteer the information plaintiffs might need in order to identify and serve the proper defendant. Courts typically have discretion to make an exception to the general rule requiring that plaintiffs identify a defendant prior to discovery and can compel computer service providers to disclose the identifying information,<sup>75</sup> but such exceptions are rare.<sup>76</sup>

Second, suits against those who submit images are also unattractive for revenge porn plaintiffs because the submitters might be judgment-proof.<sup>77</sup> There is a dearth of data on the wealth of individuals who submit images to revenge porn sites, but because they are typically private individuals like former romantic partners, they do not necessarily have deep pockets.<sup>78</sup> Nonetheless, if a plaintiff is able to identify the submitter and wishes to bring suit, there will be no Section 230 defense available to that individual because that individual is likely to be viewed as an information content provider and thus would not satisfy the second element required for Section 230 immunity.<sup>79</sup>

Although easier to identify and more likely to have deep pockets, Internet service providers (e.g., Comcast) are immune under Section 230.<sup>80</sup> Because these defendants are typically sued for activities that occur on their online message boards, domains, and similar services, they easily satisfy the first prong of Section 230 immunity, which only requires that the defendant be a

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73. See 47 U.S.C. § 230(f)(3).

74. See *supra* Part I.A.

75. See *Gillespie v. Civiletti*, 629 F.2d 637, 642–43 (9th Cir. 1980).

76. *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 577 (N.D. Cal. 1999).

77. *Citron & Franks*, *supra* note 10, at 359 (arguing that criminalizing revenge porn is necessary in part because many of the individuals who submit victims’ images are likely to be judgment-proof).

78. See *id.*

79. See *supra* Part I.B.2.

80. See *Goldman*, *supra* note 10; Helen A.S. Popkin, *Former ‘Revenge Porn’ Czar Under FBI Investigation: Report*, POLITICS GLOBAL WARMING (May 19, 2012), <http://politicsglobalwarming.chicagoexclusivecorts.net/397/former-revenge-porn-czar-under-fbi-investigation-report>.

“provider or user” of an interactive computer service.<sup>81</sup> Second, because content on revenge porn sites is not created or specifically encouraged by Internet service providers, they are not information content providers and thus easily pass the second prong.<sup>82</sup> Finally, the third prong of Section 230 immunity, which requires that a plaintiff’s theory of liability “be based on the defendant’s having acted as a ‘publisher or speaker’”<sup>83</sup> similarly weighs heavily in favor of granting these defendants immunity. Nearly any claim seeking to hold one of these defendants liable for revenge porn website content inherently requires the plaintiff to argue that the defendant is responsible for that content as either a “publisher” or “speaker”; without any such responsibility, there would be no basis for liability.<sup>84</sup> Having satisfied each of the three prongs, service providers who do not operate the website the offending content appears on are immune under Section 230.

Furthermore, this immunity satisfies the policy purposes of Section 230.<sup>85</sup> If these defendants did engage in some regulation of the content on their servers, like Prodigy in *Oakmont*,<sup>86</sup> then the defendants are engaging in precisely the behavior that Congress wished to encourage—“voluntary monitoring for offensive or obscene material.”<sup>87</sup> On the other hand, if the defendants do not engage in any regulation, they would not even be liable under *Oakmont*.<sup>88</sup>

Individual liability for revenge porn site operators falls somewhere between the liability of individual submitters and the limited liability of service providers. Revenge porn hosts do not capture the content, but they do solicit images and accompanying material. Many sites’ operators also add their own content to the images, such as comments and identifying information.<sup>89</sup> There is widespread consensus that revenge porn website operators qualify for immunity.<sup>90</sup> This Comment, however, argues that although some operators

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81. 47 U.S.C. § 230(c)(1) (2012); *see also* F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1196 (10th Cir. 2009).

82. *See Accusearch Inc.*, 570 F.3d at 1196.

83. *Id.*

84. *See, e.g.*, Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).

85. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“[Section] 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”).

86. *Oakmont*, 1995 WL 323710, at \*5.

87. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).

88. *Cf. Oakmont*, 1995 WL 323710, at \*5 (holding Prodigy liable for content in part because Prodigy did engage in content regulation).

89. *See, e.g.*, eRock, *Ex Girlfriend Posing Nude in Bathroom*, EX-GF PICS (Mar. 26, 2014), <http://www.exgfpics.com/blog/index.php/2014/03/26/ex-girlfriend-posing-nude-in-bathroom-2/> (adding editorial content apparently separate from the information received in the submission).

90. *See, e.g.*, Franks, *supra* note 7, at 2 (“[A] federal law known as the [CDA] §230 grants online entities a special defense against civil liability . . . .”); Goldman, *supra* note 10 (“No matter how

likely qualify for Section 230 immunity, many would not qualify. The remainder of this paper will focus on suggesting and evaluating different legal strategies for victims to sue site operators independent of Section 230 immunity.

## II.

### MANY REVENGE PORN WEBSITE OPERATORS ARE INFORMATION CONTENT PROVIDERS AND THUS INELIGIBLE FOR SECTION 230 IMMUNITY

Section 230 immunity only applies to material “provided by another information content provider.”<sup>91</sup> Therefore, if a defendant is the information content provider, Section 230 immunity would not apply.<sup>92</sup> A computer service provider can simultaneously be a “publisher and speaker” of material “provided by another information content provider,” and an “information content provider” itself.<sup>93</sup> If the defendant merely provides a forum or “neutral conduit” for the material to be communicated, then courts are unlikely to treat the defendant as an information content provider under Section 230.<sup>94</sup> However, if the defendant was “responsible” for the “creation or development” of the information, courts should deem the defendant an information content provider<sup>95</sup> and decline to extend Section 230 immunity for claims regarding that particular information.<sup>96</sup>

Section 230, however, does not define “responsible” or “development.”<sup>97</sup> Imagine a spectrum of acts in which computer service providers might engage that might make them “responsible” for the “development” of the harmful content. At the passive end, a provider might merely host a forum for users to post their own content, such as a message board. A provider is unlikely to be

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much the lawyers hype their lawsuit in the media, it’s mostly dead on arrival. All of the defendants—other than the users actually submitting the revenge porn—are protected by 47 USC 30 . . .”).

91. 47 U.S.C. § 230(c)(1) (2012).

92. See Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008); MCW, Inc. v. Badbusinessbureau.com, LLC, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at \*7 (N.D. Tex. Apr. 19, 2004); see also Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 695–96 (2012); KrisAnn Norby-Jahner, “Minor” Online Sexual Harassment and the CDA § 230 Defense: New Directions for Internet Service Provider Liability, 32 HAMLINE L. REV. 207, 247 n.323 (2009) (“[Section 230] shifts liability away from ISPs to [information content providers]”).

93. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008).

94. F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1199 (10th Cir. 2009); see also Collins v. Purdue Univ., 703 F. Supp. 2d 862, 880 (N.D. Ind. 2010).

95. See 47 U.S.C. § 230(f)(3).

96. See, e.g., *Accusearch Inc.*, 570 F.3d at 1197; see also M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC, 809 F. Supp. 2d 1041, 1051 (E.D. Mo. 2011).

97. See 47 U.S.C. § 230(f) (defining other terms, but not “responsible” or “development”); see also *Accusearch Inc.*, 570 F.3d at 1197–99.

held liable for this limited action under even the *Oakmont* standard.<sup>98</sup> Likewise, under Section 230, this passive action would be sufficient to find immunity.<sup>99</sup>

On the other end of the spectrum, content authored by the same provider who posts the information, such as a blogger posting content he authored himself, would be more active conduct. This activity would be enough to label a defendant as an information content provider and disqualify the defendant from Section 230 immunity.<sup>100</sup> “If [the defendant] 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 [the defendant] creates itself, or is ‘responsible, in whole or in part’ for creating or developing, the website is also a content provider.”<sup>101</sup>

However, there is no clear line indicating when a defendant qualifies as an information content provider.<sup>102</sup> The inquiry rests primarily on the degree to which the defendant influences the information.<sup>103</sup> Courts are more inclined to find that a defendant is not an information content provider and choose to err on the side of immunity. For example, in *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, the Ninth Circuit stated: “The message to website operators is clear: If you don’t encourage illegal content, or design your website to require users to input illegal content, you will be immune.”<sup>104</sup> The Ninth Circuit continued:

[T]here will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. [But] [s]uch close cases . . . must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties.<sup>105</sup>

Courts’ inclination to protect computer service providers in “close cases” aligns with Congress’s motivations for enacting Section 230.<sup>106</sup> Providers’

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98. See *Roommates.com*, 521 F.3d at 1163.

99. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997); see also *Accusearch Inc.*, 570 F.3d at 1198–99 (holding that a defendant’s being neutral with respect to the “offensiveness of the content” would not be enough to void Section 230 immunity).

100. 47 U.S.C. § 230 (offering immunity only if the content was provided by another information content provider).

101. *Roommates.com*, 521 F.3d at 1162.

102. See *Accusearch Inc.*, 570 F.3d at 1197–99 (noting that while Congress defined “information content provider,” they did not define “development” or “responsible”).

103. See, e.g., *id.* at 1198–99 (noting that while neutrality as to what makes the content offensive qualifies a defendant for Section 230 immunity, responsibility for the development of what makes the content offensive places the defendant outside the scope of Section 230 protection).

104. 521 F.3d at 1175.

105. *Id.* at 1174.

106. See 47 U.S.C. § 230(b) (2012) (listing five policy rationales for Congress’s enactment of the CDA, largely aimed at promoting development of the Internet); see also *Roommates.com*, 521 F.3d

confidence that they will not be liable for close calls is likely to incentivize editorial control over the content they host.<sup>107</sup> However, because Congress also wished to protect the public from harmful and offensive content, withholding absolute immunity from providers is justified.<sup>108</sup>

There are two arguments revenge porn plaintiffs might advance in order to classify a site operator as information content provider and render them unable to invoke Section 230 immunity. First, a plaintiff might argue that the defendant is an information content provider because the defendant authored the content. Second, a plaintiff could argue that the defendant is an information content provider because the defendant “specifically encourage[d]” the creation of the illegal content.<sup>109</sup> Thus, the most vulnerable defendant would be one that “developed” the content by acting in a way that both “specifically encourage[d]” and authored the harmful content. However, because some revenge porn sites might only engage in one of the two actions, and because evidence of each would presumably only support a plaintiff’s argument, this Part separately discusses the two arguments.

*A. A Revenge Porn Site Becomes an Information Content Provider by Adding Content*

This argument for treating site operators as information content providers is premised on their adding their own content in addition to the content provided by the original posters. The more the additional content contributes to the alleged illegality of the victimization, the stronger the argument that an operator is responsible for the “development” of the content and is therefore an information content provider ineligible for Section 230 immunity.

Courts interpret “development” as “referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness.”<sup>110</sup> Discussing what development means in this context, the Ninth Circuit in *Roommates.com* reasoned that “a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.”<sup>111</sup> In determining whether a defendant’s behavior “contributes materially” to the alleged illegality, courts emphasize the distinction between “merely publishing” content from a third party and actually creating the content.<sup>112</sup> “That distinction determines whether the CDA provides immunity to a

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at 1174 (“[Section 230] is an immunity statute . . . , a provision enacted to protect websites against the evil of liability for failure to remove offensive content.”).

107. See *supra* Part I.B.1.

108. See *id.*

109. See, e.g., *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009).

110. See *Roommates.com*, 521 F.3d at 1167–68.

111. *Roommates.com*, 521 F.3d at 1168.

112. See *MCW, Inc. v. Badbusinessbureau.com, LLC.*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at \*8 (N.D. Tex. Apr. 19, 2004).



provider . . . of an interactive computer service.”<sup>113</sup> Neither the right to edit a posting nor the act of editing prohibits an interactive computer service from falling under the CDA’s protective umbrella.<sup>114</sup> However, “[Section] 230 immunity is not so broad as to extend to an interactive computer service that goes beyond the traditional publisher’s role and takes an active part in creating or developing the content at issue.”<sup>115</sup> Furthermore, a defendant need not be responsible for all of a post’s disputed content.<sup>116</sup>

A plaintiff is most likely to persuade a court that an operator is an information content provider if the defendant actually authored original harmful content.<sup>117</sup> Given the large amount of the images on such websites, most images appearing on these sites are likely to originate elsewhere,<sup>118</sup> but content added to those images will often come from the site operator. This content added by a proprietor (e.g., photo alterations, accompanying text, or screenshots of social media profiles captured by the website’s operator) provides a basis for plaintiffs to argue that the defendant is an information content provider if that added content contributes to what the plaintiff alleges is illegal about their appearance on the site. In other words, a plaintiff relying upon this theory would argue that the defendant added content that increased the harm of the victim’s appearance on the site.

### 1. Legal Background

Although no decisions have applied this framework in the revenge porn context, courts have examined this issue in analogous cases. In order to adequately evaluate the likelihood of a court determining that a revenge porn website operator is an information content provider, it is helpful to compare how courts have treated analogous defendants when considering whether they were information content providers. These cases can be viewed on a spectrum of liability, ranging from cases where a defendant’s additions to third-party content were minor and Section 230 immunity was granted, to cases in which a defendant’s additions were more substantial and Section 230 immunity was rejected. This discussion will begin with the former—those cases where defendants made only minor alterations to third-party content before publishing them on their websites.

In *Ben Ezra, Weinstein, and Co. v. America Online, Inc.*,<sup>119</sup> the Tenth Circuit held AOL was not an information content provider with respect to content on a website where AOL had collaborated with third parties to post

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113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at \*9 (“[T]he critical issue is whether they are ‘responsible, in whole or in part, for the creation or development of [any disputed] information.’” (alteration in original) (emphasis added)).

117. *See, e.g., F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1197–99 (10th Cir. 2009).

118. *Supra* Part I.A.

119. 206 F.3d 980 (10th Cir. 2000).

stock market information that was sometimes inaccurate.<sup>120</sup> AOL ran a service that published information about stocks that was provided by two third parties.<sup>121</sup> The plaintiff argued that AOL's computer services allowed others to access allegedly inaccurate information.<sup>122</sup> According to the plaintiff, AOL was an information content provider because AOL worked closely with other parties and removed content when it discovered inaccuracies.<sup>123</sup> The Tenth Circuit rejected this argument, holding that AOL was engaging in standard editorial functions that Congress sought to protect in passing Section 230.<sup>124</sup> According to the court, AOL was not an information content provider with respect to the inaccurate stock information because AOL's involvement was limited to requesting that the third parties correct the inaccuracies each time an error came to AOL's attention.<sup>125</sup>

Similarly, in *Schneider v. Amazon.com, Inc.*, a Washington appellate court determined Amazon was not an information content provider with respect to allegedly illegal book reviews posted on its site.<sup>126</sup> The plaintiff argued that because Amazon "had the right to edit the posting," Amazon was the information content provider of those reviews.<sup>127</sup> Amazon had not actually edited the objected-to content.<sup>128</sup> Analogizing to *Ben Ezra*, where AOL's actual editing was not enough to render AOL an information content provider, the court in *Schneider* reasoned that "if actual editing does not create liability, [Amazon's] mere right to edit can hardly do so."<sup>129</sup>

In *Batzel v. Smith*, the Ninth Circuit held a defendant's publishing of allegedly defamatory information provided by a third party, along with some additional information, did not make the defendant an information content provider.<sup>130</sup> The defendant received an email from a third party claiming that another party, Batzel, had inherited artwork stolen by a Nazi ancestor.<sup>131</sup> The defendant made some minor editorial changes to the email and then published it to a listserv and website, along with a declaration that the FBI had been informed of the message's contents.<sup>132</sup> Although the defendant added the additional content, the court concluded that this was insufficient to make him an information content provider.<sup>133</sup> The court reasoned that "development of

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120. *Id.*

121. *Ben Ezra*, 206 F.3d at 983.

122. *Id.*

123. *Id.* at 985.

124. *Id.* at 985–86.

125. *Id.*

126. *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 38–40 (Wash. Ct. App. 2001).

127. *Id.* at 42.

128. *Id.* at 43.

129. *Id.*

130. 333 F.3d 1018, 1020–22 (9th Cir. 2003).

131. *Id.* at 1020–21.

132. *Id.* at 1022.

133. *Id.* at 1031.

information’ . . . means something more substantial than merely editing portions of an e-mail and selecting material for publication.”<sup>134</sup>

In each of the cases discussed above, each defendant’s role was more akin to editor than content originator or author. Each court granted Section 230 immunity where the defendant’s role in the appearance of the allegedly illegal material was limited to deciding whether or not to publish the material and making some minor editorial changes. These cases indicate that a defendant could qualify for Section 230 immunity if he or she merely behaves as an editor or other neutral medium for the expression of harmful content by other parties.

So long as operators of revenge porn websites remain similarly neutral, there is little reason to believe that courts would withhold Section 230 immunity by deeming them information content providers because of the scant content they might add. However, as the following cases show, when defendants move beyond serving as editors and instead add allegedly illegal original content of their own, courts are more likely to deem defendants information content providers and withhold Section 230 immunity.

In *Fair Housing Council of San Fernando Valley v. Roommates.com*, the Ninth Circuit addressed various actions that might qualify the defendant as an information content provider.<sup>135</sup> Roommates.com operated a website that enabled users to find roommates after answering several different questions, including the users’ sex, sexual orientation, and whether or not they have children.<sup>136</sup> Roommates.com also required users to express their preferences with respect to roommates on each of these issues.<sup>137</sup> The plaintiff argued that these questions violated the federal Fair Housing Act and analogous California law.<sup>138</sup> The Ninth Circuit determined these actions made Roommates.com an information content provider and declined to grant it Section 230 immunity.<sup>139</sup> The court held that because Roommates.com provided “a limited set of pre-populated answers” and required users to answer, Roommates.com was an information content provider with respect to illegal questions expressed on the site.<sup>140</sup> The Ninth Circuit reasoned that this conduct made Roommates.com a developer rather than merely a “passive transmitter” of information.<sup>141</sup>

In *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, the court held the defendant was an information content provider because the defendant’s website added allegedly disparaging titles, headings, and editorial messages about the

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134. *Id.*

135. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1161–62 (9th Cir. 2008).

136. *Id.* at 1161.

137. *Id.*

138. *Id.* at 1162.

139. *Id.* at 1175–76.

140. *Id.* at 1166.

141. *Id.*

plaintiff.<sup>142</sup> The website, Badbusinessbureau.com, posted user complaints about companies with whom users had negative experiences.<sup>143</sup> After receiving those uploads, the defendant added titles like “Con Artists,” “Ripoff,” and “Corrupt Companies.”<sup>144</sup> The plaintiff argued that this additional content went beyond the editorial changes protected by Section 230.<sup>145</sup> The court agreed, determining that since the disputed content was written by the defendant, Section 230 immunity was not available.<sup>146</sup>

The District Court for the District of Arizona employed a similar analysis in *Hy Cite Corp. v. Badbusinessbureau.com L.L.C.*, finding Badbusinessbureau.com to be an information content provider ineligible for Section 230 immunity.<sup>147</sup> While the defendant in these Badbusinessbureau.com cases operated a computer service that allowed users to submit their own content like in *Ben Ezra* and *Schneider*, the defendant’s conduct in the Badbusinessbureau.com cases also involved the addition of allegedly illegal content alongside the information submitted by other parties, making Badbusinessbureau.com an information content provider.<sup>148</sup>

Employing a similar analysis in *Jones v. Dirty World Entertainment Recordings, LLC*, the District Court for the Eastern District of Kentucky determined the defendant was an information content provider based on his encouragement of allegedly illegal content.<sup>149</sup> The defendant operated a website called thedirty.com, which received and published information provided by third parties.<sup>150</sup> The website’s operator would occasionally add his own comments.<sup>151</sup> The court held that the operator was an information content provider with respect to the allegedly illegal content because the name of the site encouraged only the posting of “dirt,” he acted as editor and posted a small number of submissions without verifying their accuracy, and added his own commentary to many posts.<sup>152</sup> Though the opinion mentioned some of the defendant’s comments, the court did not elaborate on its reasoning.<sup>153</sup>

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142. *MCW, Inc. v. Badbusinessbureau.com, LLC*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at \*8 (N.D. Tex. Apr. 19, 2004).

143. *Id.* at \*1.

144. *Id.* at \*9 n.10.

145. *Id.* at \*10.

146. *Id.*

147. *Hy Cite Corp. v. Badbusinessbureau.com, LLC*, 418 F. Supp. 2d 1142, 1149–50 (D. Ariz. 2005).

148. *Id.*; *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 985 (10th Cir. 2000); *MCW, Inc.*, 2004 WL 833595, at \*7; *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 38–40 (Wash. Ct. App. 2001).

149. *Jones v. Dirty World Entm't Recordings, LLC*, 840 F. Supp. 2d 1008, 1012 (E.D. Ky. 2012).

150. *Id.* at 1009.

151. *Id.* at 1012.

152. *Id.*

153. *See id.* at 1012–13.

Although the facts of *Jones* are analogous to the content of, and actions taken by, revenge porn websites, there is reason to believe that *Jones* is not good law. The case is currently on appeal and the opinion's limited reasoning, and partial reliance on the editing decisions of thedirty.com, suggest the court misunderstood and misapplied Section 230.<sup>154</sup> For a defendant to qualify as an information content provider because he "specifically solicited" the allegedly illegal content, courts look to the specific content at issue in that suit, not whether the defendant generally encourages illegal content.<sup>155</sup> For these reasons, *Jones* has been criticized by at least one other district court,<sup>156</sup> and Santa Clara Law Professor Eric Goldman called the opinion "a terrible piece of judicial analysis."<sup>157</sup>

## 2. Revenge Porn Websites Add Additional Content

Like the above cases, many revenge porn site operators add content to the material they receive from third parties. When this additional content contributes to what is allegedly illegal about the content, proprietors of revenge porn are unlikely to qualify for Section 230 immunity. The malicious and harmful nature of revenge porn sites varies with the type of information they publish. Some sites present images with little or no additional comment, or present images and social media profile links or screen captures without adding much more.<sup>158</sup> Other sites present images with edited content, added titles, or other features.<sup>159</sup> Finally, on the most malicious end of the spectrum are sites that not only post pictures and links to social media profiles, but also include phone numbers or addresses of the individuals pictured and provide tags or labels like "disgusting" or "nasty."<sup>160</sup> However, even this extreme content is unlikely to make an operator an information content provider within the meaning of Section 230 if all of the content was created entirely by someone

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154. *See id.* (holding that the defendant was an information content provider, in part, because he "reviews the postings but does not verify their accuracy" and "refused to remove the postings . . . alleged to be defamatory or an invasion of privacy").

155. *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008) (holding that a website encouraging defamatory content does not make it an information content provider with respect to every post on the site).

156. *S.C. v. Dirty World, LLC*, No. 11-CV-00392-DW, 2012 WL 3335284, at \*5 (W.D. Mo. Mar. 12, 2012) ("This Court also distances itself from certain legal implications set forth in *Jones*. In particular, *Jones* appears to adopt a relatively narrow interpretation of CDA immunity. This is in conflict with the 'broad' interpretation recognized in this circuit.") (citation omitted).

157. Eric Goldman, *Should The Dirty Website Be Liable for Encouraging Users to Gossip?*, FORBES (Nov. 25, 2013, 2:07 PM), <http://www.forbes.com/sites/ericgoldman/2013/11/25/should-the-dirty-website-be-liable-for-encouraging-users-to-gossip/>.

158. *See, e.g.*, GIRLFRIEND GALLERIES, <http://www.girlfriendgalleries.net> (posting pictures submitted by third parties without adding descriptions, commentary, or other related content apparently attributable to the website) (last visited June 25, 2014).

159. *See, e.g.*, EX-GF PICS, <http://www.exgfpics.com/blog> (last visited June 25, 2014).

160. *See, e.g.*, IS ANYBODY DOWN?, *supra* note 18.

other than the operator.<sup>161</sup> The information content provider analysis must determine who is “responsible, in whole or in part, for the creation or development of information” at issue.<sup>162</sup> The following Part begins by discussing the added content that courts are most likely to conclude “contributes materially to the alleged illegality of the conduct.”<sup>163</sup>

*a. Addition of Malicious Titles, Hashtags, or Commentary*

In addition to posting images, some operators add comments. For example, “Is Anybody Down” added tags to posted images and categorized those images, presumably to make it easier for users to search for what type of humiliation they wished to view.<sup>164</sup> Tags include relatively benign words addressing the victim’s age, gender, and race as well as more malicious labels like “disgusting” and “[s]lut.”<sup>165</sup> Categories include gender, age, and “Herps Confirmed,” a term asserting that the individuals pictured within this category have a sexually transmitted disease.<sup>166</sup> Additionally, some revenge porn website operators post their own comments alongside the images. For example, the website “Ex-Girlfriend Pics” posts one or two paragraphs of commentary alongside posted images.<sup>167</sup> This commentary is usually divided between the operator’s opinions of the victim—notably their physical appearance and what sex acts the operator would like to perform on them—and a summary of the story told by the submitter.<sup>168</sup>

In requesting Section 230 immunity, an operator might argue that he is not an information content provider because he merely edits and reproduces information that was provided by a third party.<sup>169</sup> If the operator’s actions are truly limited to reproducing material submitted by a third party, this argument is likely to succeed. However, if the site adds its own commentary or requires users to share allegedly illegal content, the operator is likely to be treated as an information content provider.<sup>170</sup>

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161. See 47 U.S.C. § 230 (2012).

162. 47 U.S.C. § 230(f)(3).

163. See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1167–68 (9th Cir. 2008).

164. IS ANYBODY DOWN?, *supra* note 18.

165. *Id.*

166. *Id.*

167. See, e.g., *Ex Girlfriend Pictures*, *supra* note 159.

168. *Id.*

169. See, e.g., Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 985 (10th Cir. 2000) (holding that AOL was not an information content provider because they only engaged in “standard” editorial functions).

170. See, e.g., Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1165–66 (9th Cir. 2008) (holding Roommates.com was an information content provider because Roommates.com required subscribers to provide illegal information in order to use the website and providing a limited set of answers including illegal content).

If the operator added its own commentary, plaintiffs would find favorable case law in both the *Badbusinessaffairs.com* cases and *Roommates.com*. In *Badbusinessaffairs.com*, the defendant's addition of titles like "Ripoff" and "Con Artists" to posts uploaded by other parties persuaded two different courts to classify the defendant as an information content provider and withhold Section 230 immunity.<sup>171</sup> Indeed, *Badbusinessaffairs.com*'s use of these terms is analogous to a revenge porn website's use of "Slut" or "Herps Confirmed."<sup>172</sup> The addition of original "titles, headings, and editorial messages" was sufficient for the court in *Badbusinessaffairs.com* to deny that defendant's request for Section 230 immunity.<sup>173</sup> Both examples materially contribute to the alleged illegality of the content by adding a significant new element attributable to the operators. If those tags are written by the site operator and are, as such, original content, the website should be viewed as an information content provider and ineligible for Section 230 immunity.

If a revenge porn website requires submitters to include defamatory or otherwise illegal content, plaintiffs might also argue that these tags and categories are similar to the actions of the defendant in *Roommates.com*.<sup>174</sup> Just as *Roommates.com* induced users to express illegal preferences and thus materially contributed to that content's alleged illegality,<sup>175</sup> a revenge porn victim might argue that the allegedly defamatory tags and categories are induced by the defendant. In *Roommates.com*, the Ninth Circuit held that *Roommates.com* was an information content provider in part because the site required users who posted on the site to answer questions that expressed discriminatory housing preferences.<sup>176</sup> If a revenge porn website requires users to include allegedly illegal content in order to post, plaintiffs have a strong argument that the website is analogous to *Roommates.com*, and thus an information content provider with respect to the allegedly illegal content the website requires users to express.

*b. Posting Additional Content Retrieved by the Defendant Website Operator*

Revenge porn websites commonly link images to victims' social media profiles either by providing a URL link to the victim's social media profile or by posting a screenshot of the profile, which typically includes the person's name, profile picture, and website URL.<sup>177</sup> Tying the images to a specific

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171. *MCW, Inc. v. Badbusinessbureau.com, LLC*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at \*10–11 (N.D. Tex. Apr. 19, 2004).

172. *See supra* note 10; *IS ANYBODY DOWN?*, *supra* note 18.

173. *MCW, Inc.*, 2004 WL 833595, at \*10 (holding defendant *Badbusinessbureau.com* was an information content provider where they created "disparaging titles, headings, and editorial messages" created by MCW).

174. *See generally Roommates.com*, 521 F.3d at 1157.

175. *Id.* at 167–68.

176. *Roommates.com*, 521 F.3d at 1175–76.

177. *See, e.g., YOU GOT POSTED*, <http://archive.is/YPuzd> (last visited June 26, 2014).

identity increases the humiliation and other harms the victim is likely to suffer as a result of having her likeness posted on a revenge porn website.<sup>178</sup> For example, enabling users to reach a victim's Facebook page would allow that user to send harassing messages directly to the victim and the victim's acquaintances, and to learn more information about the victim.

If the operator retrieves the URL link or screen capture himself or herself, and that additional content contributes to the alleged illegality of the post, courts are likely to hold that operator as an information content provider ineligible for Section 230 immunity with respect to that content. Importantly, the inquiry is not whether a defendant posted the materials, but whether that defendant is "responsible, in whole or in part, for the creation" of the disputed content.<sup>179</sup> In this context, the inquiry would not be limited to whether the website posts the link or screen capture, but rather whether the operator provided the link or capture and whether that material is part of the allegedly illegal content.<sup>180</sup> Most revenge porn websites that do link photos to social media profiles request or require that submissions include a link or screenshot.<sup>181</sup> If the operator retrieves an image from a link provided by a submitter, courts have good reason to find the operator is an information content provider of the allegedly illegal content and withhold Section 230 immunity because the operator added the image.

Defendants might argue that the originators of these social media profiles are the plaintiffs and social media websites. Therefore, the plaintiff and the social media website operator are the information content providers, leaving the defendant a mere publisher. However, content can have multiple information content providers. That the plaintiff and social media operators may be information content providers does not exclude the defendant from also being an information content provider.<sup>182</sup> In other words, even though the social media profile and the nude images are provided by other parties, the creation of the link between the nude images and the victim's identity might be sufficient additions to convince a court that the defendant is an information content provider with regard to the entire post, or at least liable for harms resulting from the link itself.

*MCW, Inc. v. Badbusinessbureau.com*<sup>183</sup> provides strong support for this argument. In *Badbusinessbureau.com*, the defendant argued it was not an

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178. *Supra* Part I.A.

179. *See* *MCW, Inc. v. Badbusinessbureau.com, LLC*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at \*9–11 (N.D. Tex. Apr. 19, 2004) (quoting 47 U.S.C. § 230(f)(3) (2012)).

180. *See id.* at \*10 (holding that disputed titles and headings were "clearly part of the web page content" on which the plaintiff based his claim).

181. *See, e.g.*, MY EX, <http://www.myex.com/add-your-ex> (last visited June 25, 2014).

182. *See* *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1165 (9th Cir. 2008) (explaining that "the fact that users are information content providers does not preclude Roommate from *also* being an information content provider").

183. *MCW, Inc.*, 2004 WL 833595.



information content provider because the plaintiff's claims were based on the content of user-generated reports rather than the content added by the defendant.<sup>184</sup> The court rejected this argument because the plaintiff's claim was based on the "disparaging titles, headings, and editorial messages" allegedly created by the defendant.<sup>185</sup> The court reasoned, "the CDA does not distinguish between acts of creating or developing the contents of reports, on the one hand, and acts of creating or developing the titles or headings of those reports, on the other."<sup>186</sup>

Just as *Badbusinessbureau.com* did not qualify for Section 230 immunity because it added original content, so too should revenge porn operators fail to qualify for Section 230 immunity when they add allegedly illegal content like links or screenshots to victims' social media pages. In order to succeed on this theory, a plaintiff would need to persuade a court that the link between the revenge porn images and the victim's online presence specifically encourages development of what is offensive about the content.<sup>187</sup> Although the revenge porn images and the social media content may come from third parties, placing them together makes the defendant "responsible, in whole or in part, for the creation or development" of the information.<sup>188</sup> Because linking revenge porn with a victim's social media or other online presence is likely to contribute to the alleged illegality of a revenge porn post, plaintiffs have a strong argument that operators who retrieve those URLs or screenshots in order to make that link between the image and the victim's identity are information content providers and thus should not qualify for Section 230 immunity.

### *c. Posting Only the Uploaded Images*

Some revenge porn websites display revenge porn images without significant additional content.<sup>189</sup> A site that engages in this practice might have titles or categories that do not appear to contribute to the alleged illegality of the postings.<sup>190</sup> Because all allegedly illegal content on these websites comes from the images and accompanying content submitted by users, the operators are unlikely to be considered information content providers under this theory. Thus, victims who sue these operators are unlikely to overcome Section 230 immunity by arguing that the defendant added original content.

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184. *Id.* at \*9–10.

185. *Id.* at \*10.

186. *Id.*

187. *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009) (finding the defendant was an information content provider because it "specifically encourage[d] development of what [was] offensive about the content").

188. 47 U.S.C. § 230(f)(3) (2012).

189. *See, e.g., GIRLFRIEND GALLERIES*, *supra* note 158.

190. *See, e.g., EX-GF PICS*, *supra* note 159 (labeling posts with more benign titles like "Slender Ex Girlfriend Posing Naked").

The actions of these potential defendants seem most analogous to those of Amazon.com in *Schneider*, since these sites make minimal, if any, alterations or additions to the content.<sup>191</sup> As the court held in *Schneider*, a computer service provider is not an information content provider simply because it has the right to edit posts.<sup>192</sup> Just as Amazon.com was posting allegedly illegal book reviews, these potential defendants are posting only the photos they receive from third parties. Therefore, individuals whose images are posted will need a different theory to overcome a motion to dismiss on Section 230 grounds. One theory potentially available to these plaintiffs is to argue that the website operators are information content providers because they requested submission of the harmful images. This theory is advanced and discussed below.

*B. Revenge Porn Operators Are Information Content Providers Because They Solicit the Harmful Content*

The primary method through which revenge porn websites acquire images is through soliciting user submissions. These requests are an additional way for revenge porn victims to argue that a website operator is an information content provider and therefore should not receive Section 230 immunity. There is no case law directly on point, but there is a body of case law discussing this argument for other types of websites.<sup>193</sup> Courts attempt to distinguish whether a defendant specifically encouraged what is allegedly illegal about the content.<sup>194</sup> As in the cases discussed above, if a defendant is merely a passive conduit for the illegal activity, courts are unlikely to deem the defendant an information content provider under Section 230.<sup>195</sup> However, if a defendant did specifically encourage what is allegedly illegal about the content, Section 230 immunity is unlikely.<sup>196</sup>

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191. *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 38–40 (Wash. Ct. App. 2001).

192. *Id.* at 42–43.

193. *See, e.g.*, *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009) (“[T]he offending content was the disclosed confidential information. . . . Accusearch solicited requests for such confidential information.”); *see also* *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1165–68 (9th Cir. 2008) (the allegedly illegal content is “provided by subscribers in response to Roommate’s questions, which [users] cannot refuse to answer if they want to use defendant’s services”); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 968–69 (N.D. Ill. 2009) (rejecting plaintiff’s argument that Craigslist induces users to post unlawful ads).

194. *See, e.g.*, *Accusearch Inc.*, 570 F.3d at 1199; *see also* *Roommates.com*, 521 F.3d at 1167–68; *Dart*, 665 F. Supp. 2d at 968–69.

195. *Cf. Dart*, 665 F. Supp. 2d at 961 (rejecting claim that by allowing users to post adult services, Craigslist induced illegal prostitution); *see also* *Roommates.com*, 521 F.3d at 1167–68 (“We believe that both the immunity for passive conduits and the exception for co-developers must be given their proper scope . . .”).

196. *See, e.g.*, *Accusearch Inc.*, 570 F.3d at 1199.

### 1. Legal Background: Solicitation of Harmful Conduct

Courts used nearly identical reasoning to determine that Craigslist.com was not an information content provider in two cases involving Craigslist.com.<sup>197</sup> In *Dart v. Craigslist*, a sheriff sued Craigslist on the grounds that “the ‘erotic’ (now ‘adult’) services section of Craigslist’s popular Internet classifieds service facilitates prostitution and constitutes a public nuisance.”<sup>198</sup> Craigslist users create and post “‘over thirty million new classified advertisements each month’ for, among other things, ‘jobs, housing, dating, used items, and community information.’”<sup>199</sup> “Craigslist create[s] the categories, but its users create the content of the ads and select which categories their ads will appear in.”<sup>200</sup> In determining that Craigslist was not an information content provider, the court noted “[n]othing in the service [C]raigslist offers induces anyone to post any particular listing.”<sup>201</sup> “The phrase ‘adult,’ even in conjunction with ‘services,’ is not unlawful in itself nor does it necessarily call for unlawful content.”<sup>202</sup> Moreover, in order to post something to Craigslist, users must agree to abide by Craigslist’s “Terms of Use,” which prohibit posting unlawful content.<sup>203</sup> The court noted that “users routinely flout Craigslist’s guidelines,” but not because Craigslist has caused them to do so.<sup>204</sup>

Similarly, in *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.* (“*Chicago Lawyers*”), the court held Craigslist was not an information content provider with respect to allegedly illegal housing preferences that appeared in users’ posts.<sup>205</sup> In addressing whether Craigslist was a cause of the content at issue and whether that made it an information content provider, the court reasoned:

Doubtless craigslist plays a causal role in the sense that no one could post a discriminatory ad if craigslist did not offer a forum. That is not, however, a useful definition of cause. One might as well say that people who save money “cause” bank robbery, because if there were no banks there could be no bank robberies. An interactive computer service “causes” postings only in the sense of providing a place where people can post. . . . Nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination.<sup>206</sup>

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197. See, e.g., *Dart*, 665 F. Supp. 2d at 968–69.

198. *Id.* at 961.

199. *Id.*

200. *Id.* at 962.

201. *Id.* at 968 (quoting *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008)).

202. *Id.*

203. *Id.* at 962.

204. *Id.* at 969.

205. *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008).

206. *Id.*

The court determined Craigslist was not the information content provider of the allegedly illegal content and noted that a plaintiff “cannot sue the messenger just because the message reveals a third party’s plan to engage in [illegal conduct].”<sup>207</sup>

Finally, in *S.C. v Dirty World, LLC*, the court addressed whether a website that encourages the posting of “dirt” was an information content provider entitled to Section 230 immunity when some of the “dirt” involved allegedly illegal content.<sup>208</sup> The court held that because the defendant did not encourage the posting of allegedly illegal content about *that particular plaintiff*, and because the website also encouraged posting content that was not allegedly illegal, the defendant qualified for Section 230 immunity.<sup>209</sup>

Because revenge porn websites typically do not encourage submissions about *specific* individuals, the *S.C. v Dirty World* opinion is likely favorable to revenge porn operators. However, if the court determines revenge porn websites exist to share allegedly illegal content (e.g., material that constitutes an action for intentional infliction of emotional distress), the court might not interpret the information content provider prong so narrowly.<sup>210</sup>

In *F.T.C. v. Accusearch Inc.*, the Tenth Circuit determined that a defendant’s solicitation of confidential information and payment to researchers to obtain it made the defendant an information content provider under Section 230.<sup>211</sup> The defendant knew the researchers were likely to use improper methods and “sought to transform virtually unknown information into a publicly available commodity.”<sup>212</sup> The court held that the defendant was an information content provider because the defendant’s actions specifically encouraged what was offensive about the website and were actually intended to generate illegal content.<sup>213</sup> The court noted that Accusearch “sought to transform virtually unknown information into a publicly available commodity.”<sup>214</sup>

The Tenth Circuit compared the facts of *Accusearch* to those in *Ben Ezra* and *Roommates.com*.<sup>215</sup> The *Accusearch* court noted the “offending content” at issue in *Ben Ezra* was erroneous stock quotations and, unsurprisingly, that AOL did not solicit the errors. Indeed, it sent the vendor emails requesting that

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207. *Id.* at 672.

208. *S.C. v Dirty World, LLC*, No. 11-CV-00392-DW, 2012 WL 3335284, at \*2–6 (W.D. Mo. Mar. 12, 2012).

209. *Id.* at \*4–5.

210. *See, e.g., F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009) (finding that the defendant was an information content provider in part because its website’s reason for existence was solicitation and revelation of illegal content).

211. *Id.*

212. *Id.* at 1199.

213. *Id.*

214. *Id.*

215. *Id.* at 1199–1201.

it “correct the allegedly inaccurate information.”<sup>216</sup> The court noted that “if the information solicited by America Online had been inherently unlawful—for example, if it were protected by contract or was child pornography—our reasoning would necessarily have been different.”<sup>217</sup> In *Ben Ezra*, however, AOL had done nothing to encourage what made the content offensive (its alleged inaccuracy). AOL’s conduct was neutral with respect to possible errors in the stock quotations. “It was therefore not *responsible* for the offensive content.”<sup>218</sup>

In that case, the court found that Accusearch actually encouraged users to post offending content, making the site even more of an information content provider than Roommates.com. “Roommates.com may have encouraged users to post offending content; but the offensive postings were Accusearch’s *raison d’etre* and it affirmatively solicited them.”<sup>219</sup>

## 2. Revenge Porn Websites Solicit Illegal Content

As discussed above, revenge porn websites typically ask users to submit images.<sup>220</sup> These requests may include a statement requesting and outlining guidelines for submissions. The guidelines generally state that photos must include nude or semi-nude images, and that the individual pictured must be over the age of eighteen.<sup>221</sup> Some websites require users to provide the victim’s name and a link to their social media profile. Similarly, some websites require users to check a box stating that they agree to these terms.<sup>222</sup> Some revenge porn websites also declare that by clicking to submit, users are claiming they own the copyright to the images.<sup>223</sup>

Whether courts will deem revenge porn sites information content providers for soliciting photos will depend heavily on what courts think revenge porn sites are actually requesting. If they believe the websites are analogous to AOL in *Ben Ezra* or thedirty.com in *S.C. v. Dirty World*, soliciting harmful but legal content, revenge porn sites might not be seen as materially encouraging illegality, even if the images may be illegal. If, however, courts see revenge porn websites as soliciting illegal content like the websites in *Accusearch* and *Roommates.com*, Section 230 immunity will likely be unavailable. Because the essential appeal of revenge porn—indeed, its distinguishing feature—is the humiliation of victims,<sup>224</sup> plaintiffs have a strong

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216. *Id.*

217. *Id.*

218. *Id.* at 1200.

219. *Id.*

220. *Supra* Part I.A.

221. *See, e.g., Submit Your Ex-GF Pics, supra* note 16.

222. *Id.*

223. *Id.* (instructing users “[d]o NOT submit copyrighted photos. This usually means any photo that you did not take yourself”).

224. *Supra* Part I.A.

argument that revenge porn defendant-operators are information content providers and unqualified for Section 230 immunity.

Although the operators of revenge porn websites might argue that their sites are analogous to Craigslist, because they merely allow for illegal content, this argument is unlikely to succeed.<sup>225</sup> Revenge porn websites do not resemble Craigslist.<sup>226</sup> Most sites are not merely message boards or open forums. Craigslist allows users to post virtually any content; revenge porn sites request a very specific type of content and appear to require posts to conform to that type of content in order to get posted.<sup>227</sup> Revenge porn websites do request a particular type of post—nude images of individuals and links to social media profiles that identify the individuals in the images.<sup>228</sup> The solicited content is much more likely to be illegal (e.g., a basis for intentional infliction of emotional distress or defamation claims) than Craigslist’s “adult” section. As the *Dart* court noted, “Nothing in the service craigslist offers induces anyone to post any particular listing. . . . The phrase ‘adult,’ even in conjunction with ‘services,’ is not unlawful in itself nor does it necessarily call for unlawful content.”<sup>229</sup>

Assuming the Craigslist analogy does not succeed, revenge porn operators have two credible arguments based on existing case law: (1) they do not solicit posts about any particular victim, and (2) they have submission requirements or guidelines that instruct users to only submit legal images. The remainder of this section will discuss the merits of these two defenses.

First, revenge porn websites might claim that, like the defendant in *S.C. v. Dirty World*, they do not solicit posts about specific individuals.<sup>230</sup> Additionally, operators also do not induce users to capture images; rather, these images exist independently of the sites’ willingness to post them.<sup>231</sup> Unfortunately for operators, however, *S.C. v. Dirty World* appears to be the only case interpreting “specifically encourage” this narrowly. While Accusearch did seek out particular illegal information, it did so only after soliciting and receiving that information from users.<sup>232</sup> Moreover, like

225. *Cf. Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 968–69 (N.D. Ill. 2009) (explaining there is Section 230 immunity when a set of solicited content contains many legal elements and some illegal elements).

226. *See, e.g., EX-GF PICS*, *supra* note 159.

227. *Compare Submit Your Ex-GF Pics*, *supra* note 16 (“You may submit your ex-girlfriend, ex-wife, current girlfriend or wife, or any female showing her stuff . . . Please only submit softcore/nude photos”) with *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (“[n]othing in the service craigslist offers induces anyone to post any particular listing”).

228. *Supra* Part I.A.; *Submit Your Ex-GF Pics*, *supra* note 16.

229. *Dart*, 665 F. Supp. 2d at 968 (quoting *Chicago Lawyers’ Comm.*, 519 F.3d at 671).

230. *See, e.g., S.C. v. Dirty World, LLC*, No. 11-CV-00392-DW, 2012 WL 3335284, at \*2–6 (W.D. Mo. Mar. 12, 2012).

231. *See, e.g., id.*

232. *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1200 (10th Cir. 2009) (finding that Accusearch’s soliciting the requests and paying researchers to obtain the material—often through fraud

Accusearch, revenge porn website operators do not merely allow for humiliating images, but “affirmatively solicit[]” users to post them.<sup>233</sup> Revenge porn defendants would likely respond that while they solicit the images, they do not solicit or “materially encourage” what makes the content allegedly illegal. To the contrary, they only ask for submissions that are legal. This contention raises the issue likely to be at the heart of this inquiry—what exactly these revenge porn sites are soliciting. To support their contention that they only solicit legal content, defendants would point to the basis for the second argument introduced above—the submission requirements they often post on their websites.

Operators would likely argue that their “terms of use” or “submission guidelines” indicate that they do not solicit allegedly illegal material, just like Craigslist did in *Dart* and *Chicago Lawyers*.<sup>234</sup> Rather, whatever is allegedly illegal about the images they post is attributable solely to the individual who submitted each image. However, although it might be better for a revenge porn site to have submission requirements stating they do not want illegal content, stating that submissions must be legal does not ensure that they are. There is no reliable mechanism employed by revenge porn website operators to ensure that submissions do not violate their submission requirements.<sup>235</sup>

The purpose of a website is crucial to a court’s analysis of whether the site operators are information content providers where the operators solicit content. The very purpose of revenge porn websites is sharing humiliating nude images and related content.<sup>236</sup> Part of what made Accusearch an information content provider was that “the offensive postings were Accusearch’s *raison d’etre*.”<sup>237</sup> And just as Accusearch knew its researchers were obtaining the information through fraud or illegality,<sup>238</sup> so too must revenge porn website operators know that the images they receive are often obtained through illegal means like hacking electronic devices or without the victim’s consent.<sup>239</sup> And, as in Accusearch, revenge porn websites’ *raison d’etre* is—as plaintiffs would argue—the sharing of harmful and illegal content.

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or other illegal conduct—made Accusearch an information content provider, but neglecting to indicate or discuss whether their holding relied on both actions or would have been the same with only the solicitation of requests).

233. *Id.*

234. *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670–72 (7th Cir. 2008); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 962 (N.D. Ill. 2009).

235. *See, e.g., Submit Your Ex-GF Pics*, *supra* note 16 (stating a requirement that all submitted pictures be of people who are at least eighteen years old, but not requiring any documentation or proof that victims actually are eighteen years of age or older).

236. *Supra* Part I.A.

237. *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1200 (10th Cir. 2009).

238. *Id.* at 1199.

239. *Supra* Part I.A.

*Roommates.com* is also helpful to plaintiffs.<sup>240</sup> *Roommates.com* was illegal because it featured housing discrimination in violation of the Fair Housing Act.<sup>241</sup> If revenge porn websites are illegal, plaintiffs would argue, it is because placing victims' images and information together on those sites is illegal, even if the images or information by themselves are not illegal. As the Ninth Circuit noted, *Roommates.com* was not a passive conduit for the illegal content and that content was not incidental to *Roommates.com*'s existence.<sup>242</sup> Revenge porn victims should argue that, like *Roommates.com*, which required users to answer questions that contained discriminatory content, revenge porn websites require illegal content be submitted in order for it to be posted.<sup>243</sup> Indeed, without these allegedly illegal submissions, most revenge porn websites would not exist. Therefore, just as *Roommates.com* was an information content provider with respect to the illegal discrimination required for postings, so too are revenge porn operators information content providers with respect to the information they demand in order for submissions to appear on their sites.

#### CONCLUSION

There is potential for the number of revenge porn victims to grow significantly in coming years if these sites remain unchecked. In the meantime, the photos of numerous current victims populate revenge porn websites. Litigation against the operators of revenge porn websites offers one avenue for victims to shut down individual sites and potentially collect damages to compensate them for harm suffered. But it is unclear how courts will apply Section 230 to these cases. Most legal commentators argue that courts would interpret Section 230 to grant these websites immunity. Revenge porn websites would likely satisfy the first and third elements required for Section 230 immunity: they provide interactive computer services and are treated as publishers or speakers.<sup>244</sup> Plaintiffs might succeed in convincing courts that the operators of these sites are information content providers and therefore do not qualify for Section 230 immunity.

While legal precedent supports denying revenge porn websites Section 230 immunity, the purpose of the statute and the policy preferences of many judges might further aid revenge porn plaintiffs. Congress intended for Section 230 to incentivize websites to remove offensive content without chilling free expression.<sup>245</sup> And although courts are likely to err on the side of rejecting

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240. Fair Hous. Council of San Fernando Valley v. *Roommates.com*, LLC, 521 F.3d 1157, 1167–68 (9th Cir. 2008).

241. *Id.*

242. *Id.*

243. *Id.*

244. 47 U.S.C. § 230(c)(1) (2012).

245. 47 U.S.C. § 230(b).



content-based speech restrictions, they are unlikely to see any redeeming value in revenge porn websites, which exist simply to share and enjoy humiliating images of non-consenting victims. The protection that these websites seek is not for close calls resulting from monitoring offensive content, but rather to immunize themselves. Therefore, if given a legal hook, courts might be particularly hostile to defendants requesting Section 230 immunity.

