Notes

Artificial Intelligence & Defamation Law: An Excuse to Do Away with the Infamously Controversial Section 230?

KATHRYN BINDER[†]

With the growing prevalence of artificial intelligence (AI) in various aspects of our lives, it is not surprising that it has become a subject of legal disputes and controversy. In 2023, an individual filed the first defamation lawsuit against AI company, OpenAI, for its ChatGPT service, leaving many to speculate how the court will proceed. This Note assesses the viability of defamation actions against generative AI platforms and their broader effect on defamation law. Particularly, this Note considers how courts may characterize these platforms and how specific characterizations could further the controversy over an already polarizing and hotly debated piece of legislation—Section 230 of the Communications Decency Act ("CDA"). Suppose courts remain consistent with prior broad interpretations of Section 230 and grant generative AI platforms "internet provider" status. This would protect AI platforms from liability for outputs that spread false, misleading, or dangerous information to users. Consequently, harmed plaintiffs would be left without any recourse or recovery options against the companies and programs behind the AI algorithms. The potential for a continuation of such expansive judicial interpretations should prompt Congress to revisit the legislation that has granted internet providers sweeping protection for decades. This Note argues that Congress should use the contentions associated with AI and defamation to clarify the contours of the current Section 230 legal framework and adjust it to fit the range of technological advancements that have developed since its enactment. Specifically, Congress should not simply leave it up to individual courts to decipher the statute's reach on their own. Instead, Congress should act now to eradicate or radically restructure this controversial and outdated legislation before it seeps into areas of technology beyond its purpose. Thus, generative artificial intelligence programs emphasize the

[†] J.D. Candidate 2025, University of California College of the Law, San Francisco; Senior Production Editor, UC Law Journal, Volume 76. The publication of this Note would not have been possible without the support of many people in my life. I am grateful to Professor John Diamond for his guidance, feedback, and assistance in developing this Note. Further, my sincere appreciation extends to my friends and family for their unwavering support throughout law school, with a special thank you to Hunter for being by my side through it all. Finally, I offer my deepest thanks to the UCLJ Volume 76 Articles and Production teams and all other members whose collaborative efforts and hard work contributed to this publication.

antiquity and inflexibility of Section 230 in today's technological society, giving AI the potential to ignite congressional removal or reform of one of the most influential internet laws today.

TABLE OF CONTENTS

INTRODUCTION

Imagine you begin researching potential candidates for an upcoming local election, and you turn to ChatGPT to ask about one of the people running. You type in their name and ask about their history. To your shock, you read that the candidate has been convicted and imprisoned for bribery and there is a pending legal complaint against him for embezzling for a gun rights organization. Turns out, none of that is true, but you don't learn that until after you actively voted against that candidate for these reasons. In a scenario like this, we must ask: does the political candidate have any recourse against OpenAI for the false output? Essentially, can AI defame? If so, who would a court hold liable? Will courts provide the same immunity from liability granted to internet providers like Google or AT&T that disseminate defamatory statements created by others?[1] These questions have come to the forefront of legal debate with the emergence of a defamation case against a generative AI platform, ChatGPT.[2] As AI-generated information and materials seemingly blur the line between independent creation of content and dissemination of information in a unique format, discussions emerge about the possible legal ramifications and potential need for clarification or change.[3]

Relevant to the AI defamation liability debate is a controversial area of defamation and internet law, which has prompted questions about how courts will classify AI platforms in the current legal framework.[4] Section 230 of the Communications Decency Act ("Section 230") currently provides an exception for internet providers, holding them immune from liability for disseminating defamatory statements created by others, typically users of their platforms.[5] Section 230 is highly controversial, with some advocating for its protection of online speech and others criticizing its power to spread defamation through untraceable users, leaving victims with limited recourse.[6] Particularly, harmed plaintiffs are unable to seek relief or financial recovery from the identifiable platforms distributing the defamatory information.[7] With this in mind, if courts characterize AI platforms as "internet providers," protecting them from liability

1. See *infra* Subpart.III.B for a discussion of what constitutes an internet provider.

2. *See* Isaiah Poritz, *First ChatGPT Defamation Lawsuit to Test AI's Legal Liability*, BLOOMBERG L. (June 12, 2023, 2:46 AM PDT), https://news.bloomberglaw.com/ip-law/first-chatgpt-defamation-lawsuit-to-test-ais-legal-liability; *infra* Subpart.III.C; *see also* Leslie Y. Garfield Tenzer, *Defamation in the Age of Artificial Intelligence*, 80 N.Y.U. ANN. SURV. AM. L. 135, 137 (2024); Matt Perault, *Section 230 Won't Protect ChatGPT*, 3 J. FREE SPEECH L. 363, 363–64 (2023).

3. *See* Perault, *supra* note 2, at 366–67.

4. *Id.*

5. 47 U.S.C. § 230(c)(1).

6. *See generally* David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373 (2010) (discussing the general arguments in support of and against Section 230).

7. *Id.* at 485–87 (discussing section 230's practical effects on plaintiffs).

under Section 230, it may prompt Congress to revisit the legislation that permits such broad protection. In doing so, Congress might be tempted to resurrect a version of the previously used common law framework that categorized different types of service providers based on their level of control over the information. This Note argues, however, that rather than leaving it to individual courts to decipher the reach of Section 230 or reverting back to the common law approach, Congress should use this opportunity, and the controversies associated with AI, to eradicate Section 230 and put an end to the blanket immunity from liability for all internet providers. Alternatively, if Congress does not wish to go that far, the Note argues that it should at least heavily adjust the legal framework and adapt it to fit the range of technological advancements that have developed since Section 230's enactment. Whether through complete eradication, or a less extreme reformation approach, Congress must work to prevent new types of unintended internet providers, platforms, or programs from weaseling their way into the current framework to avoid all liability. Congress must act to address this outdated legislation before it seeps into areas of technology beyond its purpose. Thus, generative AI programs like ChatGPT have the power to prompt congressional efforts to change one of the most influential internet laws today, Section 230 of the Communications Decency Act ("CDA").

Part I of this Note begins with introductory information and background on AI to familiarize the reader with the types of platforms available and the services and tasks they can complete.[8] Next, in Part II, this Note discusses controversies related to AI, both legal and social.[9] Then, Part III.A introduces defamation law and the general requirements to establish a claim for relief.[10] Part III.B briefly overviews Section 230 of the CDA and the controversies associated with it in various speech-related contexts.[11] Subparts IV.A and IV.B provide a more in-depth discussion of the history and downfall of the common law approach to intermediary liability and the emergence of Section 230, respectively.[12] In Part IV.C, this Note explores how artificial intelligence programs potentially fit within the two different approaches, considering how courts may address AI cases today.[13] Lastly, this Note explores how potential court interpretations of Section 230 or certain characterizations of AI must prompt Congress to finally eliminate the controversial Section 230 and create a new framework that reflects our societal and technological development, or at least strongly reform the law

8. *See infra* Subpart.I.A.
9. *See infra* Subpart.I.B.
10. *See infra* Subpart.III.A.
11. *See infra* Subpart.III.B.
12. *See infra* Subparts.IV.A–IV.B.
13. *See infra* Subpart.IV.C.

to allow courts to assess different programs and platforms on a case-by-case or scenario-based system.[14]

I. ARTIFICIAL INTELLIGENCE BACKGROUND

A. WHAT IS AI?

It is essential to understand what AI is to consider how to address its rapid growth and advancement. There are various definitions to consider. One way to define AI is technology capable of carrying out tasks that typically require human intelligence.[15] As the technology has developed, AI has been tasked with and successfully completed various activities such as playing chess, translating languages, and driving cars.[16] Certain programs have been able to carry out these exercises and skills because modern AI has cognitive capabilities as possessed by humans.[17] As such, the English Oxford Living Dictionary defines AI as "software used to perform tasks or produce output previously thought to require human intelligence, esp[ecially] by using machine learning to extrapolate from large collections of data."[18] In contrast, Merriam-Webster defines AI as "(1) the capability of computer systems or algorithms to imitate intelligent behavior" and "(2) a branch of computer science dealing with the simulation of intelligent behavior in computers."[19] The National Artificial Intelligence Act of 2020 defined the term artificial intelligence to mean "a machine-based system that can, for a given set of human defined objectives, make predictions, recommendations or decisions influencing real or virtual environments."[20]

These definitions encapsulate many common perceptions of AI as a rapidly developing technology with human-like capabilities. Nevertheless, defining it in a way that captures all its potential and underlying proficiencies remains challenging. For example, AI is often considered a sub-field of computer science, but in reality, it is an interdisciplinary enterprise combining techniques, ideas, and research from a variety of fields,[21] including statistics, linguistics, robotics, mathematics, economics, and more.[22] A complete definition of AI is a moving target as it evolves and its capabilities expand into unexpected areas,

14. *See infra* Part.V.

15. Harry Surden, *Artificial Intelligence and Law: An Overview*, 35 GA. ST. U. L. REV. 1305, 1307 (2019).

16. *Id.*

17. *Id.*

18. *Artificial Intelligence*, OXFORD ENG. DICTIONARY (2023), https://doi.org/10.1093/OED/7359280480.

19. *Artificial Intelligence*, MERRIAM-WEBSTER (Apr. 10, 2025), https://www.merriam-webster.com/dictionary/artificial%20intelligence.

20. *Artificial Intelligence (AI)*, U.S. DEP'T. OF STATE, https://2021-2025.state.gov/artificial-intelligence/ (last visited June 1, 2025).

21. Surden, *supra* note 15, at 1310.

22. *Id.*

such as the newly developing industry of fully autonomous self-driving cars.[23] Consider, how, 70 years ago, seeing a computer complete arithmetic would have been groundbreaking, but today we see that as a given.[24] Now, a car with no driver in the front seat is a modern-day version of a surprising and jarring sight. Thus, the definition of "human-like intelligence" narrows as tasks that were once considered untouchable by computers become routine.[25]

Under the current definitions or perceptions, AI has demonstrated supreme abilities to complete complex cognitive functions.[26] One example of this affecting the legal profession occurred when AI platform, ChatGPT-4, passed the Uniform Bar Exam,[27] in the 90th percentile, no less.[28] While some view these developments as outstanding technological advancements, others are concerned about the potential impact these capabilities will have on various industries.[29] Either way, AI's possession of human-like capacities is fascinating, as it goes beyond standard automated technological assistance.[30] AI performs tasks that require high-level cognitive capabilities from humans.[31] To pass the bar exam, for example, most takers study law for three years, study specifically for the exam for roughly ten weeks, and then sit through a two-day long exam requiring critical thinking capabilities.[32] AI's successful completion of tasks once considered only possible for intelligent and highly trained humans demonstrates the incredible, human-like power that these models possess.

One of the most popular AI platforms today is ChatGPT. This platform is a type of generative AI program owned by OpenAI, and it is the subject of both controversy and curiosity today.[33] Generative Pre-trained Transformer ("GPT")

---

23. Ricardo Cano, *Riding Waymo's Robotaxis in S.F. for the First Time? Here's What You Need to Know*, S.F. CHRON. (June 25, 2024), https://www.sfchronicle.com/sf/article/s-f-waymo-first-time-ride-19539040.php.

24. NOAH WAISBERG & ALEXANDER HUDEK, AI FOR LAWYERS: HOW ARTIFICIAL INTELLIGENCE IS ADDING VALUE, AMPLIFYING EXPERTISE, AND TRANSFORMING CAREERS 5 (2021).

25. *Id.* at 5–6.

26. Pablo Arredondo, *GPT-4 Passes the Bar Exam: What That Means for Artificial Intelligence Tools in the Legal Profession*, SLS BLOGS: LEGAL AGGREGATE (Apr. 19, 2023), https://law.stanford.edu/2023/04/19/gpt-4-passes-the-bar-exam-what-that-means-for-artificial-intelligence-tools-in-the-legal-industry.

27. *Id.*

28. *Id.*

29. *See generally* WAISBERG & HUDEK, *supra* note 24 (discussing the benefits of embracing AI in the legal profession).

30. *See* Surden, *supra* note 15, at 1307–08.

31. *Id.* at 1307.

32. *See* Karen Sloan, *Bar Exam Score Shows AI Can Keep Up with 'Human Lawyers,' Researchers Say*, REUTERS (Mar. 15, 2023, 11:17 AM PDT), https://www.reuters.com/technology/bar-exam-score-shows-ai-can-keep-up-with-human-lawyers-researchers-say-2023-03-15.

33. Akalbir Singh Chadha, *What Exactly Is Chat GPT & How Does It Work? For a 5-Year-Old!*, MEDIUM (Jan. 1, 2023), https://becominghuman.ai/what-exactly-is-chat-gpt-how-does-it-work-for-a-5-year-old-aeccabdfa990; *see also* Isobel O'Sullivan, *Who Owns ChatGPT and Its Creator, OpenAI? All You Need to Know*, TECH.CO (June 21, 2023), https://tech.co/news/who-owns-chatgpt-and-openai.

is a type of AI large language model ("LLM").[34] It works by using a transformer algorithm[35] that relies on a "neural network," which is a type of program designed to mimic the way the human brain works.[36] Transformer algorithms analyze and comprehend significant amounts of data and text and then use that knowledge to generate responses that are akin to human conversation.[37] Therefore, when given a prompt, ChatGPT works by receiving a large dataset of text made up of articles or conversations[38] to then learn language patterns and structures before generating its conversational text.[39] For example, when asked "Can you suggest an easy meal that will impress my friends?" ChatGPT responded with, "Certainly! How about trying a simple yet impressive dish like 'Caprese Salad Skewers'? They're easy to make, visually appealing, and always a hit with friends."[40] This conversational response resembles a human-to-human conversation, is generated based on the data fed to ChatGPT's transformer algorithm, and applies the language patterns it analyzed and understood.[41] ChatGPT's conversational nature makes it appear different than a traditional Google search engine result that outputs articles containing meal recipes.[42] However, one could argue that a Google search is essentially doing the same thing in creating its outputs, minus the pleasantries.[43] Thus, despite using different types of algorithms, one could argue that both Google and ChatGPT ultimately boil down to the same thing—an algorithm churning out responses to prompts based on the data it has been fed.[44]

---

34. *See* O'Sullivan, *supra* note 33. This Note will use the terms "AI" and "generative AI" interchangeably throughout. While the Note focuses primarily on generative AI platforms like ChatGPT, other types of artificial intelligence are likely to impact the legal framework, and thus, the Note does not explicitly limit the conversation to generative AI programs.

35. Chadha, *supra* note 33; *see also* O'Sullivan, *supra* note 33.

36. Chadha, *supra* note 33.

37. *Id.*

38. *Id.*

39. *Id.*

40. *See* Kathryn Binder, *Can You Suggest an Easy Recipe that Will Impress my Friends*, CHATGPT (May 7, 2024), https://chatgpt.com/.

41. *See* Chadha, *supra* note 33.

42. *Id.* Note that Google has also begun using its own AI program, called Gemini that mimics ChatGPT and other generative AI responses, particularly responding to searches in a conversational tone. However, here, the comparison between ChatGPT and Google is to illustrate the differences from previous Google searches that simply output a series of relevant articles.

43. *See id. See generally History of Google Algorithm Updates*, SEARCH ENGINE J. (Mar. 26, 2025) [hereinafter *History of Google*], https://www.searchenginejournal.com/google-algorithm-history (discussing Google's complex algorithm system used to retrieve data from its search index and instantly deliver the best possible results to a query).

44. *See* Chadha, *supra* note 33. *See generally History of Google Algorithm Updates*, *supra* note 43 (discussing Google's algorithm and result delivery system).

B. CURRENT CONTROVERSIES

While developments in AI have transformed multiple industries and sparked unprecedented technological innovation, AI has also found itself at the center of much controversy in recent years.[45] This is relatively unsurprising, as it takes time to develop software fully, and industries must adjust to the prevalence of AI in the workforce. Consider the lawyer facing sanctions in New York for citing "hallucinated" cases in a court of law.[46] This unfortunate situation brought to light an unexpected technical issue with the ChatGPT platform where the system can fabricate or "hallucinate" information.[47] The realization that the platform's method of compiling information to create outputs was not necessarily reliable or verifiable concerned many who relied on its information. Particularly affected are those like the lawyer who cited cases in a legal briefing, thinking he could rely on the information, but now faces consequences such as sanctions from the court.[48]

AI has also affected journalism, given the expectation of high journalistic standards that AI can compromise. Consider when Facebook fired the human team in charge of curating its "Trending Topics" and replaced it with an algorithm in 2016.[49] Two days later, the algorithm put out an erroneous article that "trended" for at least 8 hours, claiming that Fox News fired a conservative news anchor for endorsing Hillary Clinton for president.[50] This incident prompted legal questions, such as who was responsible for the algorithm's failure, and whether this constitutes defamation by the algorithm.[51]

Such controversies are at the heart of this Note: How does AI fit into the current legal framework for defamation? Can artificial intelligence, which by definition possesses human-like capabilities, actually "defame" someone? Moreover, if so, who is responsible? Is it the machine, the algorithm, the platform, or someone else? These considerations are relevant in assessing and analyzing how the legal system will interpret defamation laws and how to create the proper framework to address AI.

---

45. Krzysztof Wach, Cong Doanh Duong, Joanna Ejdys, Rūta Kazlauskaitė, Pawel Korzynski, Grzegorz Mazurek, Joanna Paliszkiewicz & Ewa Ziemba, *The Dark Side of Generative Artificial Intelligence: A Critical Analysis of Controversies and Risks of ChatGPT*, 11 ENTREPRENEURIAL BUS. & ECON. REV. 7, 8 (2023).

46. Benjamin Weiser & Nate Schweber, *The ChatGPT Lawyer Explains Himself*, N.Y. TIMES (June 8, 2023), https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html.

47. Karen Weise & Cade Metz, *When A.I. Chatbots Hallucinate*, N.Y. TIMES (May 9, 2023), https://www.nytimes.com/2023/05/01/business/ai-chatbots-hallucination.html.

48. Weiser & Schweber, *supra* note 46.

49. Seth C. Lewis, Amy Kristin Sanders & Casey Carmody, *Libel by Algorithm? Automated Journalism and the Threat of Legal Liability*, 96 JOURNALISM & MASS COMMC'N Q. 60, 60–61 (2019).

50. *Id.* at 61.

51. *Id.*

III. DEFAMATION LAW

A. DEFAMATION LAW GENERALLY

Defamation is a legal claim for injury to one's reputation as the result of false speech.[52] False speech can take the form of a written statement, known as libel, or spoken statements, known as slander.[53] State common law and statutory law govern defamation actions and the specific elements necessary for a defamation claim.[54] While exact requirements and treatment varies among states, many have adopted the general framework of the Restatement (Second) of Torts, Section 558.[55] Under this standard, a defamation claim requires four elements: (1) "a false and defamatory statement concerning another," (2) "an unprivileged publication to a third party," (3) "fault amounting at least to negligence on the part of the publisher," and (4) "either actionability of the statement irrespective of special harm, or the existence of special harm caused by the publication."[56] There are also constitutional requirements imposed by the Supreme Court to ensure First Amendment rights are protected.[57]

As an initial matter, the first element requires the statement be defamatory. The Restatement (Second) of Torts defines a defamatory statement as follows: "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him."[58] The statement must also be one of fact, rather than opinion, meaning it can be proven true or false.[59] However, the factual statement must also actually be false in order to be defamatory.[60] Thus, one cannot get around defamation liability by claiming it was an opinion if the opinion implies a false assertion of fact.[61] In the controlling Supreme Court case on the matter, *Milkovich v. Lorain Journal Co.*, the Court held that an assertion made in an opinion column stating that a high school coach had committed perjury constituted a provable assertion of fact, even though it was in an opinion column.[62]

52. RESTATEMENT (SECOND) OF TORTS § 568 (AM. L. INST. 1977).

53. *Id.*

54. Ellyn M. Angelotti, *Twibel Law: What Defamation and Its Remedies Look Like in the Age of Twitter*, 13 J. HIGH TECH. L. 430, 442 (2013).

55. RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

56. *Id.*

57. JOHN L. DIAMOND, LAWRENCE C. LEVINE & ANITA BERNSTEIN, UNDERSTANDING TORTS § 21.03 (7th ed. 2023).

58. RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1977).

59. *See id.* § 558(a).

60. *See id.* § 566.

61. *Id.*; Milkovich v. Lorain J. Co., 497 U.S. 1, 18–19 (1990).

62. *Milkovich*, 497 U.S. at 3; *see also* RESTATEMENT (SECOND) OF TORTS § 566 (AM. L. INST. 1977).

For the second element, "publication" has been interpreted to mean intentionally or negligently communicating to at least one person other than the defamed person.[63] Because a defamation action hinges on reputational harm as perceived by others, if the speaker does not communicate the statement to anyone whose opinion is subject to change about the person, then there is no viable claim for defamation.[64]

The third element is more complicated, as the standard for fault depends on who the subject of the defamatory statement is. In this regard, the law treats public officials and public figures differently than private citizens.[65] "One who publishes a false and defamatory communication concerning a public official or public figure [regarding] his conduct, fitness or role in that capacity is subject to liability if, but and only if, he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters."[66] This is known as the "actual malice" standard that the Supreme Court established in *New York Times v. Sullivan*.[67] In addition to (a) and (b), if the defamed individual is a private person, then one who publishes a false, defamatory statement may be liable even if he merely "(c) acts negligently in failing to ascertain them."[68] Thus, the target of the defamation makes a difference when determining whether a speaker is liable; when the victim alleging defamation is a public official, they will have to meet a higher burden than the ordinary citizen to prove their claim.

Lastly, for the fourth element, different types of defamation require different showings of proof of the damages suffered. For example, slander requires a showing of pecuniary damages, frequently referred to as "special damages" or "special harm."[69] Special harm is interpreted to mean the loss of something having economic or pecuniary value.[70] Modern court decisions have found pecuniary loss when the plaintiff has been deprived of a benefit that has an indirect financial value to him, such as the loss of the "society, companionship and association of friends."[71] An exception exists for certain types of slander, referred to as slander per se, where no showing of special harm is required.[72] This includes publication that assigns to the victim (a) "a criminal

63. RESTATEMENT (SECOND) OF TORTS § 577 cmt. a (AM. L. INST. 1977).

64. *Id.* § 577 cmt. b.

65. *See id.* § 580A; *see also id.* § 580B.

66. *Id.* § 580A; *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283–84 (1964) (affording greater First Amendment protections to those who speak potentially defamatory statements about public figures and officials).

67. *Sullivan*, 376 U.S. at 279–80.

68. RESTATEMENT (SECOND) OF TORTS § 580B (AM. L. INST. 1977).

69. *See id.* § 575.

70. *Id.* § 575 cmt. b.

71. *Id.*

72. *Id.* § 570.

offense," (b) "a loathsome disease," (c) a "matter incompatible with his business, trade, profession, or office," or (d) "serious sexual misconduct."[73] On the other hand, generally no showing of special damages is required for libel, except for in a minority of jurisdictions where a plaintiff must show damages unless it is libelous per se.[74]

However, even if all the discussed requirements are present, a victim's claim may be unsuccessful if a defendant can raise certain privileges that provide absolute immunity from defamation liability. Relevant here, if the defendant is an internet provider, it will receive absolute immunity.[75] The internet provider privilege under Section 230 arises when a victim wants to hold intermediaries civilly liable for their involvement or contribution to others' defamation malfeasance.[76] The current Section 230 legal framework provides absolute immunity from defamation liability for intermediaries like internet and computer service providers.[77] This limits a plaintiff's ability to seek relief or recover from the platforms on which defamatory statements were allegedly shared.[78] Practically speaking, this imposes financial implications, as it prevents a plaintiff from recovering from a more easily identifiable entity with potentially deep pockets.[79]

B. INTRODUCTION TO SECTION 230: WHAT IS THE EXCEPTION FOR INTERNET PROVIDERS?

In 1996, Congress enacted the Communications Decency Act (CDA) to address the rapidly developing internet.[80] In Section 230 of the CDA, comprised of only 26 words, Congress unwittingly created a very controversial piece of legislation.[81] While the provision did not receive much attention in 1996, it has since spiraled into a hotly contested area of law.[82] The provision itself states, "[n]o provider or user of an interactive computer service shall be treated as the

73. *Id.*

74. *Id.* § 569.

75. This Note focuses on internet provider immunity, however, note there are also other types of privileges. For example, spousal privilege protects communications made only between spouses, and substantial truth of a statement can also prevent a plaintiff's recovery. *See* Orrin B. Evans, *Legal Immunity for Defamation*, 24 MINN. L. REV. 607, 623 (1940); RESTATEMENT (SECOND) OF TORTS § 581A (AM. L. INST.1977).

76. Ardia, *supra* note 6, at 392–93.

77. *See id.*

78. *See id.* at 381–82 (discussing section 230's practical effects on plaintiffs).

79. Matthew G. Jeweler, Note, *The Communications Decency Act of 1996: Why Sec. 230 is Outdated and Published Liability for Defamation Should be Reinstated against Internet Service Providers*, 8 PITT. J. TECH. L. & POL'Y 1, 21 (2008).

80. Joe Cosgrove Jr., *Section 230: Twenty-Six Words that Created Controversy*, 61 INFRASTRUCTURE 1, 3 (2022); *see* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 138 (codified as amended at 47 U.S.C. § 230).

81. *See* Cosgrove, *supra* note 80, at 3.

82. *Id.*

publisher or speaker of any information provided by another information content provider."[83] While brief, this twenty-six-word law packs a mighty punch in its practical application.[84] Essentially, Section 230 protects internet providers from liability when publishing third parties' defamatory statements.[85] In other words, an internet provider cannot be held liable for the posts, comments, or other forms of statements made on its platform, that were created by its users or other third parties.[86] For the purpose of Section 230, internet providers means providers of any "interactive computer service."[87] This refers to providers of 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."[88] At the time this law was enacted, it applied to servers like American Online, CompuServe and Prodigy, but as courts have considered Section 230 over the years, it has been interpreted to include modern day internet servers and social media platforms.[89] This approach diverts from the common law framework applied prior to the CDA's enactment, which looked to the extent of control an intermediary had over the statements to determine liability.[90] In contrast, the language of Section 230 grants much greater immunity, essentially protecting internet providers regardless of their editorial control over their users' posts.[91] Since its enactment, state and lower federal courts have interpreted the Section 230 provision broadly and expanded it to many areas of the internet.[92] While some value Section 230's encouragement of internet speech, others criticize its contribution to the spread of defamatory, false, or otherwise harmful information.[93]

Despite this Note's focus on defamation, it is worth pointing out that the controversy extends to several other contexts, such as when internet providers

83. 47 U.S.C. § 230(c)(1).

84. *See* Cosgrove, *supra* note 80, at 2.

85. *See* Lewis et al., *supra* note 49, at 12.

86. *Id.*

87. 47 U.S.C. § 230(f)(2).

88. *Id.*

89. Jeweler, *supra* note 79, at 5, 19.

90. *See infra* Subpart.IV.A.

91. Ardia, *supra* note 6, at 479.

92. Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 458 (2018).

93. *See id.* at 465–67 (contrasting the First Amendment rationale underlying Section 230 with the practical implications).

spread fake news,[94] misinformation, and deepfake content,[95] publish obscene or dangerous materials,[96] or fail to censor otherwise harmful information without consequence.[97] Consider how, in a physical context, a business that helped a sex trafficking organization sell its illegal services would likely be liable for aiding and abetting illegal sex trafficking.[98] This is precisely what a classified website called Backpage did.[99] However, under Section 230, Backpage got off scot-free.[100] Similarly, the founder of "Dirty.com," a site devoted to spreading gossip about college students, admitted to "ruin[ing] people sometimes out of fun" by posting images and descriptions of people "scantily clad, inebriated, and unfaithful."[101] Such an admission highlights that internet providers and the people behind them are well aware that they are untouchable under Section 230, and this often prevents them from making the effort to implement policies that remove a variety of harmful content.[102] Needless to say, Section 230 remains controversial in various speech-related contexts. Now, with the rapid advancement of AI and other technology, Section 230 is out of its depth. The statute is outdated and ill-equipped to handle the range of technology we have today, and it could allow harmful defamatory content to be spread online by platforms Congress never intended to protect with Section 230.

C. *WALTERS V. OPENAI*: A DEFAMATION LAWSUIT AGAINST AN OUTPUT

A lawsuit filed against the AI company, OpenAI, is a developing case that may highlight the complexities associated with fitting AI programs into this current defamation framework.[103] In 2023, a radio host named Mark Walters sued the generative AI platform for defamation.[104] The suit arose after the

94. *See* Emma M. Savino, Comment, *Fake News: No One Is Liable, and That Is a Problem*, 65 BUFF. L. REV. 1101, 1103 (2017).

95. *See* Nicholas O'Donnell, *Have We No Decency? Section 230 and the Liability of Social Media Companies for Deepfake Videos*, 2021 U. ILL. L. REV. 701, 703.

96. *See generally* Citron & Wittes, *supra* note 92 (discussing Backpage, an online host for illegal commercial sex advertisements, in connection with Section 230).

97. *See* Patricia Spiccia, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VAL. U. L. REV. 369, 369–70 (2013).

98. *See* Citron & Wittes, *supra* note 92, at 454–55.

99. *Id.* at 453–54. A classified website is an online platform where users can post advertisements to sell, buy, or exchange goods. *See Classified Website*, CARTUM, https://cartum.io/glossary/classified (last visited Apr. 30, 2025).

100. *See* Citron & Wittes*, supra* note 92, at 454–55.

101. *Id.* at 453–54; *see* Kate Knibbs, *Cleaning up the Dirty*, THE RINGER (Apr. 19, 2017, 9:21 AM PT), https://www.theringer.com/2017/4/19/16041942/the-dirty-nik-richie-gossip-site-relaunch-4a086aa24536; *see also* Kashmir Hill, *The Dirty Business: How Gossipmonger Nik Richie Stays Afloat,* FORBES (Nov. 11, 2010, 8:37 PM EST), https://www.forbes.com/sites/kashmirhill/2010/11/11/the-dirty-business-how-gossipmonger-nik-richie-of-thedirty-com-stays-afloat.

102. *See* Citron & Wittes, *supra* note 92, at 453–54.

103. Poritz, *supra* note 2.

104. *Id.*

platform output to users a hallucinated legal complaint implicating him in a crime. The entirely erroneous and made-up complaint accused him of embezzling money from a gun rights group.[105] Now that Walters has officially filed a lawsuit, the legal community is left to speculate how the court will approach these types of situations. Since 2023, the case has progressed slowly. In July 2023, OpenAI attempted to remove the case to federal court, which the court denied, and the case was remanded back to state court. In January 2024, the state court judge denied OpenAI's motion to dismiss.[106] As of February 2025, the case is approaching a hearing on OpenAI's summary judgment motion, scheduled for February 12, 2025.[107] It is unclear how this case will proceed, and whether Section 230 will be the primary focus, or if other defamation aspects will take priority. However, the mere filing of this case created significant stir in legal circles and public discourse. Many scholars began to wonder if the court will hold generative artificial intelligence platforms liable for defamatory statements, or if AI, like its predecessor, "internet providers," will be home-free under Section 230 of the CDA. The latter of which is bound to have severe consequences.[108]

Considering the case under traditional defamation law, Walters may be able to prove the statement was defamatory. Working in Walters's favor, the statement was (1) false and (2) published to a third-party user.[109] However, the third element of a defamation claim revolving around fault may be harder to meet since Walters could be deemed a public figure as a talk show host, and thus he would need to prove actual malice.[110] This standard requires the plaintiff prove more than mere negligence, and that OpenAI acted with knowledge that the statement was false or with reckless disregard for the truth.[111] This may be difficult for Walters to prove, unless he can show the hallucination was output recklessly. Additionally, he may need to prove damages or harm, which also may be difficult to do, and more facts are needed to determine this. While certain aspects of Walters's case may pose challenges or be ultimately unsuccessful, the

105. *Id.* While Walters is one of the first to officially file suit against a generative AI platform, similar incidents have happened in recent years as these types of programs have developed. For example, an Australian mayor made news when he said he planned to sue OpenAI for a false ChatGPT output claiming that he was convicted and imprisoned for bribery. *See* Tom Gerken, *ChatGPT: Mayor Starts Legal Bid Over False Bribery Claim*, BBC (Apr. 6, 2023), https://www.bbc.com/news/technology-65202597.

106. Poritz, *supra* note 2.

107. *Summary Judgment Hearing Scheduled in* Walters v. OpenAI, WORDS BY WES (Jan. 8, 2025), https://www.wordsbywes.ink/casetracker/updates/summary-judgment-hearing-scheduled-in-walters-v-openai.

108. *Id.*; *see* Tenzer, *supra* note 2; Perault, *supra* note 2, at 363–64.

109. *See* RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

110. *See* Poritz, *supra* note 2; RESTATEMENT (SECOND) OF TORTS § 580A (AM. L. INST. 1977); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

111. RESTATEMENT (SECOND) OF TORTS § 580A (AM. L. INST. 1977); *see also Sullivan*, 376 U.S. at 279–80.

court's decision to deny the motion to dismiss highlights that the case is likely not without potential merit.[112]

Another legal possibility to consider is whether the Walters will argue that the output amounts to libel per se, a special type of defamation claim. Walters is suing ChatGPT for outputting an erroneous legal complaint accusing him of embezzling money from a gun rights group.[113] Since embezzlement is a criminal offense, under traditional defamation law, Walters could have a libel per se claim.[114] This means that even if filed in a minority jurisdiction requiring a showing of damages, he would not have to show special damages to succeed in suing someone who falsely accused him of embezzlement.[115]

Finally, even if the elements of defamation are met, OpenAI could raise a defense: Section 230 internet provider immunity. OpenAI could assert that they are simply a third-party intermediary outputting others' content and argue that the court should extend Section 230 to generative AI platforms. This is not out of the question because Section 230 has been broadly interpreted by courts since its enactment, and it has extended to contexts beyond what Congress intended at the time.[116] Even further, it is likely courts will interpret Section 230 in this way, even if the internet has outgrown it, because courts are boxed in by the language of the statute and the interpreting precedent.

This case presents an unprecedent legal issue, and there are several ways in which the case could unfold. While this case may not be the one that offers analysis of Section 230 in the AI context, it should still get courts, Congress, and scholars thinking about how this will develop and how defamatory statements made by AI do not fit cleanly within the defamation framework. If Walters cannot meet the actual malice standard or prove the necessary harm, that that does not mean another, private citizen plaintiff in the future could not do so based on different facts and with a lower standard to prove fault.

Additionally, if Section 230 does not become the central argument here, that does not mean it is left out for good. If AI continues to output defamatory statements, plaintiffs will likely continue to sue, and courts will be forced to consider what type of program AI platforms constitute. Generative AI is like other internet providers in some ways, as it is an intermediary between content

112. *See* Poritz, *supra* note 2.

113. *Id.*

114. RESTATEMENT (SECOND) OF TORTS § 569 (AM. L. INST. 1977).

115. *See id.* The same reasoning applies to the legal course of action proposed by the Australian mayor when ChatGPT falsely stated that he was convicted and imprisoned for bribery. Like embezzlement, bribery is also a criminal offense establishing a libel per se claim. It could also be considered a matter incompatible with his office, another libel per se protected category, given that a bribery conviction and imprisonment may not be something constituents approve of in a mayor or political leader. *See* Gerken, *supra* note 105; RESTATEMENT (SECOND) OF TORTS § 570 (AM. L. INST. 1977).

116. *See* Citron & Wittes, *supra* note 92, at 458–60.

(articles published elsewhere) and users (those asking the platform questions). On the other hand, it is different in that it compiles information in a unique way by summarizing and combining sources together and outputting it coherently in a conversational manner, resembling creation. It also differs in that it can hallucinate information during this process. Whether it occurs in *Walters* or not, courts will likely face arguments asserting the similarities between AI and other internet providers in hopes of avoiding liability. Therefore, Congress needs to replace, or at least clarify, Section 230 to address the differences before that happens.

IV. THE HISTORY OF PROTECTION FOR INTERNET SERVICE PROVIDERS: THE ROAD FROM THE COMMON LAW TO SECTION 230

Before the enactment of Section 230, courts applied a common law approach to determine whether various internet services and intermediary mediums could be liable for defamation.[117] Given Section 230's controversial nature, many scholars suggest a return to the old framework to address new technological developments and the availability of different types of platforms and internet services today.[118] However, Congress enacted Section 230 as a direct, disproving response to courts' interpretations of the common law approach, so Congress may be reluctant to return to that standard.[119] This Note discusses the common law framework to understand why Congress enacted Section 230, as well as how Section 230 exists and operates today. Next, this Note assesses how AI could fit within the current framework of Section 230. Finally, this section discusses how courts could treat AI if they revert back to the common law approach, which categorizes different types of internet providers based on their involvement over the content.

A. COMMON LAW FRAMEWORK

Third-party intermediaries have not always received the blanket protection now granted Section 230. Under the common law, the applicable framework assessed defamation liability for intermediaries based on the level of control retained over the material or statement.[120] With this, the common law applied a spectrum approach to liability that divided intermediaries into three categories: common carriers, distributors, and publishers.[121] Further, an entity's

117. *See* Jeweler, *supra* note 79, at 3.

118. *Id.* at 20.

119. Joshua A. Geltzer, *The President and Congress Are Thinking of Changing This Important Internet Law*, SLATE (Feb. 25, 2019, 3:40 PM), https://slate.com/technology/2019/02/cda-section-230-trump-congress.html.

120. *See* Jeweler, *supra* note 79, at 3.

121. *Id.* at 3–4.

characterization as one of these categories depended on the amount of control it retained over the defamatory material.[122]

Under this approach, common carriers are the least likely to be subject to liability because they possess no authorial or editorial control.[123] Telephone companies are the quintessential example of a common carrier, and practically, they have no control over what users say over their phone lines.[124] Next, distributor entities are those that have a choice as to what information they carry, but they do not retain editorial control over the underlying materials.[125] For this, one can think about public libraries and bookstores that have a say over what books are in the store or library, but do not have editorial control over the books themselves.[126] Distributors are only subject to liability if the plaintiff shows that the statement is defamatory and that the distributor knew or should have known of the defamatory statement.[127] Lastly, publishers are entities that retain substantial editorial control over the information that it sends out, like a newspaper.[128] Given the level of control, it is presumed that publishers can prevent defamatory statements from being published and thus, can be liable to a victim of defamation.[129]

With the development of the internet, courts began to fit early internet providers like CompuServe and Prodigy into this framework.[130] The publisher versus distributor theory assessed an internet provider's functional control over content on a case-by-case basis, and courts began to hold internet providers liable in some instances.[131]

In a consequential case, *Cubby, Inc. v. CompuServe, Inc.*, Cubby developed a computer database called "Skuttlebut" to publish news and gossip about the television and radio industries.[132] Cubby then sued CompuServe over its similar gossip publication called "Rumorville" (provided to CompuServe subscribers through CompuServe's forums), for publishing false and defamatory statements about the Cubby database.[133] CompuServe, the carrier of the statements, argued that it acted as a distributor, and not a publisher of the statements, thus exempting

122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 4.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *See* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 141 (S.D.N.Y. 1991); *see also* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063, 1995 WL 323710, at *4–5 (N.Y. Sup. Ct. May 24, 1995).
131. Jeweler, *supra* note 79, at 5.
132. *Id.*
133. *Id.*

it from liability unless it knew or had reason to know of the statements.[134] The District Court for the Southern District of New York found that the plaintiffs did not show that CompuServe knew or had reason to know of the statements, and that it was a distributor because it was essentially an electronic, for-profit library.[135] Thus, CompuServe could not be held liable for the defamatory statements.[136]

In contrast, in the landmark case *Stratton Oakmont, Inc. v. Prodigy Services Co.*, a New York State court held an early internet provider, Prodigy, liable for allegedly defamatory posts on its message boards, finding that Prodigy had controlled the content on the bulletin boards by actively deleting virtual post it notes based on their content.[137] Thus, since they exerted some control, they were liable for not exerting the same control all the time.[138] Additionally, not only were they liable as an intermediary, but the court also held Prodigy just as liable as if it had authored the content itself.[139]

In near-direct response, Congress enacted Section 230 to address concerns with the effect of these two court decisions.[140] Namely, legislators were concerned that internet providers would attempt to adhere to the *Cubby* reasoning and avoid implementing any content moderation efforts to remain "distributors" rather than "publishers" like in *Stratton Oakmont*.[141] Thus, with Section 230, Congress intended to ensure that platforms could delete some user content, and not face liability for other material they leave up.[142] On the flip side, Congress wanted to prevent these platforms from trying to evade liability by blocking anything that may be likely to generate controversy or legal liability, thus having a "chilling effect" on free speech on the internet.[143]

B. THE SECTION 230 APPROACH AND COURTS' INTERPRETATION SINCE ITS ENACTMENT

As mentioned throughout, Section 230 offers internet providers broad blanket protection from liability with its provision holding that "[n]o provider or user of an interactive computer service shall be treated as the publisher or

134. *Id.* at 5–6.
135. *Id.* at 6.
136. *Id.* at 6–7.
137. *Id.* at 7–8.
138. *See id.*
139. Jeff Kosseff, *Have Trouble Understanding Section 230? Don't Worry. So Does the Supreme Court.*, LAWFARE (Mar. 7, 2024, 12:31 PM), https://www.lawfaremedia.org/article/have-trouble-understanding-section-230-don-t-worry.-so-does-the-supreme-court.
140. *See* Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 46.
141. Kosseff, *supra* note 139.
142. *Id.*
143. *See id.*; *see also* Citron & Franks, *supra* note 140, at 20–21.

speaker of any information provided by another information content provider."[144] With this, some have credited Section 230 with "creating the internet."[145] Particularly, by allowing internet and computer service providers to flourish with limited legal liability, Section 230 has encouraged the free flow of information on the internet that we have today.[146] In the decades since its enactment, both state and federal courts have construed the provision broadly.[147] Many courts have also expressed a desire to remain faithful to the intention of Section 230,[148] namely, not to put excessive burdens on internet providers or "chill" free speech in the internet age.[149]

But some scholars argue that many courts have misconstrued or overstated Congress's intentions.[150] While this broad interpretation has likely reached beyond what Congress initially expected to protect, lower federal and state courts have *attempted* to adhere to Section 230 despite having been left without guidance from the U.S. Supreme Court.[151] In two 2023 cases, the Supreme Court explicitly declined to resolve a Section 230 issue, with Justice Kagan stating during oral argument, "We really don't know about these things. . . . You know, these are not like the nine greatest experts on the internet."[152] This signaled the Supreme Court's desire to defer the resolution of the Section 230 controversy to the legislative branch, leaving lower federal and state courts to interpret it until Congress acts to clarify, adjust, or get rid of Section 230 altogether.[153]

Consider the following early federal court cases to see how broadly courts have applied Section 230. In *Zeran v. America Online* ("AOL"), the court adhered to Section 230 when Zeran sued AOL for an unidentified person posting a message on an AOL bulletin board.[154] The message listed Zeran's phone number for t-shirts relaying insensitive slogans about the 1995 Oklahoma City bombing.[155] Similar posts stayed up on the bulletin board despite Zeran's requests for AOL to remove it after he received angry calls and death threats.[156] The court expressed concerns that if it found in Zeran's favor, internet providers

144. 47 U.S.C. § 230(c)(1).

145. *See* Jeff Kosseff, *Op-Ed: Section 230 Created the Internet as We Know It. Don't Mess With It*, L.A. TIMES (Mar. 29, 2019, 3:05 AM PT), https://www.latimes.com/opinion/op-ed/la-oe-kosseff-section-230-internet-20190329-story.html.

146. *Id.*

147. *See* Citron & Wittes, *supra* note 92, at 459–60.

148. *See generally* Zeran v. Am. Online, 129 F.3d 327 (4th Cir. 1997) (holding that Congress enacted Section 230 to remove the disincentives to self-regulation content in response to prior court cases).

149. *Id.* at 333.

150. *See* Citron & Wittes, *supra* note 92, at 458–60.

151. *Id.* at 458.

152. Kosseff, *supra* note 139.

153. *See generally id.* (discussing the Supreme Court's decision to defer to Congress about Section 230).

154. *See Zeran*, 129 F.3d at 329.

155. *Id.*

156. *Id.*

would have to quickly investigate all messages users notified them of and make a legal judgment about whether a statement was defamatory; thus, the court decided for AOL.[157]

Similarly, in *Blumenthal v. Drudge*, the court also sided with the internet provider.[158] In *Blumenthal*, AOL was in contract with Matt Drudge, who wrote a gossip column called the Drudge Report.[159] Drudge wrote an article about Sidney Blumenthal, assistant to the President of the United States, accusing him of having a history of spousal abuse.[160] The court held that even though it believed there *should* be a difference when the user is not an anonymous poster, but rather someone in contract with the internet provider, Section 230 required it to immunize AOL.[161] However, the court recognized that AOL was taking advantage of the benefits of the law without accepting any of its burdens.[162] Both *Zeran* and *Blumenthal* highlight the courts' immediate adherence to Section 230, despite some reluctancy to do so. However, some have criticized these decisions as immediate misinterpretations of Section 230 and Congress's intent, construing it far too broadly.[163]

In other early cases, courts have applied Section 230 to a range of internet contexts such as a matchmaking website providing questionnaires for users to fill out,[164] AOL publishing incorrect stock quotes provided to AOL by contracted third-party companies,[165] and negative book reviews left on Amazon.com.[166] Courts have also had to consider how to fit the use of varying types of algorithms by internet providers into the framework, which is relevant to the AI inquiry.[167] For example, in *Parker v. Google, Inc.*, Google successfully raised a Section 230 defense and received immunity from defamation liability stemming from algorithm-generated content.[168] The Third Circuit found that Google was an interactive computer service and should not be responsible for its algorithm that produced search results to websites linking to false information about individuals.[169]

Fast forward two decades, in 2023, *Gonzalez v. Google, LLC.* and *Twitter, Inc. v. Taamneh* presented the Supreme Court with its first-ever Section 230

157. *Id.* at 333.
158. Blumenthal v. Drudge, 992 F. Supp. 44, 51 (D.D.C. 1998).
159. *See id.*
160. *Id.* at 46–47.
161. *Id.* at 52–53.
162. *Id.*
163. Jeweler, *supra* note 79, at 35.
164. *See* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003).
165. *See* Ben Ezra, Weinstein, & Co. v. Am. Online, Inc., 206 F.3d 980, 983 (10th Cir. 2000).
166. *See* Schneider v. Amazon.com, Inc., 31 P.3d 37, 39 (Wash Ct. App. 2001).
167. *See* Lewis et al., *supra* note 49, at 70–71.
168. *Id.* at 71; *see* Parker v. Google, Inc., 242 F. App'x 833, 840 (2007).
169. *See Parker*, 242 F. App'x at 840; *see also* Lewis et al., *supra* note 49, at 71.

case, but the Court ultimately declined to answer the question altogether.[170] In these consolidated cases, the plaintiffs appealed a Ninth Circuit decision holding that Section 230 shielded Google, the owner of YouTube, and Twitter, from liability to victims of a 2017 ISIS attack.[171] The plaintiffs sued the social media companies for aiding and abetting and conspiring with ISIS because the algorithms allegedly recommended ISIS's posts and content to users.[172] The Court ultimately held that the plaintiffs' allegations were insufficient to establish a claim for aiding and abetting ISIS and thus avoided the Section 230 issue with respect to algorithms.[173]

The discussed case law highlights that lower courts generally err on broadly interpreting Section 230 when determining which platforms receive internet provider status. Additionally, the Supreme Court likely has no plans to guide lower federal and state courts' application of Section 230 in the context of new technologies or developments, seemingly deferring to legislators. The previous interpretations leave open the potential for a court to expand Section 230 to the context of generative AI. This would be consequential, because potential plaintiffs would be left with limited recourse for defamatory statements made against them by AI programs. This is cause for concern because society is becoming increasingly AI-dependent, and limiting AI's legal liability could lead to accountability gaps and potential harm to individuals or businesses. Thus, Congress holds the ultimate authority to revise or abolish Section 230, and courts are left upholding the law, whether they like it or not.

C. AI: HOW DOES IT FIT WITHIN THE LEGAL FRAMEWORKS?

As technology and society advance, the legal system must adapt its legal framework to provide appropriate lenses to approach new developments. Section 230 was born out of that exact scenario—Congress adapted the legal system to allow the early days of the internet to develop without interruption.[174] Now, our laws must be similarly flexible and reflect the extent of the internet today. As briefly mentioned, it will be difficult to adequately fit AI into the Section 230 framework because "internet providers" and internet services have drastically changed since the 1990s. Does this mean Congress should return to the common law approach? While that approach allowed for more case-by-case assessment of different programs, it too is likely outdated. While the common law approach and Section 230 each have their pros and cons, truthfully, neither

170. Gonzalez v. Google LLC, 598 U.S. 617, 621 (2023).

171. *See* Kosseff, *supra* note 139; *see also Gonzalez*, 598 U.S. at 620. *See generally* Twitter, Inc. v. Taamneh, 598 U.S. 471 (reversing a Ninth Circuit judgment based on plaintiff's failure to state a claim rather than Section 230 grounds).

172. *See Taamneh*, 598 U.S. at 478.

173. *See id.*; *Gonzalez*, 598 U.S. at 621; *see also* Kosseff, *supra* note 139.

174. *See* Kosseff, *supra* note 139.

could address all potential scenarios involving the internet and technological advancement. That is why scholars have proposed various alternative frameworks.[175] For example, Danielle Keats Citron and Benjamin Wittes suggest adding language to the CDA to make its protections less sweeping.[176] Additionally, Mark Zuckerberg, the creator and CEO of Facebook, encouraged Congress to consider making platforms' intermediary liability conditional on companies' ability to meet best practices to combat the spread of unlawful content.[177] However, this Note limits its comparison to the common law and Section 230 since these are the only frameworks courts have applied in the relatively recent case law. Thus, it provides a helpful guide to consider how our judicial and legislative branches may address or regard developments like AI, and whether aspects of either approach should remain in effect today.

1. AI Under Section 230: Internet Provider?

Unlike the common law approach, Section 230 has been around since the early days of the internet and allowed advancements to flourish, causing some to even credit it with creating the internet as we know it today.[178] Thus, courts have had the opportunity to interpret technological developments and new speech-related contexts on the internet. While the first AI defamation case is still developing,[179] other similar scenarios can guide the assessment of how courts may treat this new context.

First, since courts have reached a "near-universal agreement" to construe Section 230 broadly, it is not out of the question for courts to afford AI programs protection.[180] Courts have justified such a broad approach by inferring congressional intent to promote First Amendment values and the growth of the internet within its reading of the CDA and Section 230.[181] Whether Congress indeed possessed such intent, is up for debate.[182] Nonetheless, courts have interpreted Section 230 this way for nearly three decades.[183] Until Congress says

175. *See* Cosgrove Jr., *supra* note 80, at 10; *see also* Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 403, 419 (2017).

176. *See* Cosgrove Jr., *supra* note 80, at 10–11; *see also Hearing Before the Subcomms. on Consumer Prot. & Com. & Commc'ns & Tech. of the H. Comm. on Energy & Com.*, 117th Cong. (2021) (testimony of Mark Zuckerberg, Facebook CEO).

177. *See* Cosgrove, *supra* note 80, at 10–11; *see also Hearing*, *supra* note 176.

178. *See generally* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019) (crediting Section 230 with creating the internet as we know it).

179. *See* Poritz, *supra* note 2.

180. *See* Doe v. Backpage.com, LLC, 817 F.3d 12, 18 (1st Cir. 2016) (citing cases from the 1st, 5th, 9th, and 11th Circuits); *see also* Citron & Wittes, *supra* note 92, at 458.

181. Citron & Wittes, *supra* note 92, at 458.

182. *Id.* at 458–60.

183. *Id.*

otherwise, broad readings are likely to continue. Thus, there is real potential for courts to extend Section 230 to AI platforms, at least in some circumstances.

Second, since generative AI programs are algorithm-based and resemble search engines, the reasoning from court decisions that previously extended Section 230 to algorithm-generated content by search engines may apply.[184] As seen in *Parker v. Google, Inc.*, the court construed Section 230 to include platforms like Google, even when algorithms produce search results of articles containing false information about individuals.[185] One could argue that similar reasoning applies to search results generated by AI algorithms, despite the conversational presentation of the information, since both ChatGPT and Google retrieve data and deliver the best results to a query.[186]

Third, the original reason for enacting Section 230 may shed light on how courts could approach it in new contexts today. Section 230 was enacted to allow the internet to flourish and develop without hinderance from lawsuits.[187] With this in mind, courts could view Section 230 as a potential way to allow AI developments to grow and advance without similar interference. Additionally, this original reasoning may be why courts have construed Section 230 so broadly for decades, as it has been believed to be Congress's intent.[188]

Fourth, it is useful to consider one of the court's orders in the *Walters v. OpenAI* case. In January of 2024, Judge Tracie Cason of the Superior Court of Georgia denied OpenAI's motion to dismiss Walter's defamation complaint.[189] The judge provided a one-page order but did not supply a reason for the denial.[190] While not dispositive, this could indicate the court's intention to reject Section 230 protection since courts often determine Section 230's application based solely on the allegations in the complaint.[191] Thus, a denial of the motion to dismiss could signal the judge's reluctance to expand Section 230 to the context of generative AI. This may also more broadly suggest that the court is unsure how to concretely fit AI into the Section 230 defamation law framework.

Drawing on past court interpretations, it appears courts will be especially conflicted with how to treat AI and defamation in the context of Section 230. While there are several reasons why clarification of Section 230 is necessary,

184. *See* Parker v. Google, Inc., 242 F. App'x. 833, 840 (3d Cir. 2007).

185. *Id.*

186. *See* Chadha, *supra* note 33. *See generally History of Google*, *supra* note 43 (discussing Google's complex algorithm system Google used to retrieve data from its search index and instantly deliver the best possible results to a query).

187. *See* Cosgrove Jr., *supra* note 80, at 2.

188. *See* Doe v. Backpage.com, LLC, 817 F.3d 12, 18 (1st Cir. 2016) (citing cases from the 1st, 5th, 9th, and 11th Circuits); *see also* Citron & Wittes, *supra* note 92, at 458.

189. Poritz, *supra* note 2.

190. *Id.*

191. *See* Parker v. Google, Inc., 242 F. App'x. 833, 838 (3d Cir. 2007) (affirming the trial court's decision that Section 230 bars some of the claims asserted in Parker's first amended complaint).

AI's unique complications make it a suitable route for successfully re-examining and updating the current Section 230 legal framework to effectively monitor and account for modern technology.

The first complication is its hallucinations. AI hallucination is a phenomenon that occurs when a large language model, including generative AI programs, perceives patterns that are nonexistent or imperceptible to human observers, resulting in outputs that are nonsensical or inaccurate.[192] As discussed above, this is a relatively frequent occurrence with ChatGPT.[193] Consider, again, how in the *Walters v. OpenAI* defamation case, the defamatory material at issue arose from a ChatGPT hallucination that created a fake complaint.[194] In this situation, it appears AI is no longer merely drawing on information it learned from other sources and outputting it, like a search engine. Instead, AI itself ultimately created the false content. This scenario almost certainly should fall outside the scope of Section 230, which only applies to content that a third party created.[195] In this case, the company behind the program may be held liable for the creation, or potentially others associated with developing the algorithm. These hallucinations present a unique issue with AI programs and may limit their ability to receive Section 230 protection in situations where the output was hallucinated, and thus, created by the platform. These hallucinations are harmful and should not warrant protection under Section 230. AI is not the same as a social media site acting as a third party where users can post content, which may be defamatory. Instead, AI when hallucinating, is creating that content and its potential can be harmful.

There is another potential complication with fitting AI into the existing framework that affords liability to internet providers like social media sites. Once ChatGPT outputs an erroneous and defamatory statement, it cannot be taken down by the site in the same way through content moderation procedures.[196] Once generative AI outputs something, it cannot retract it or take it back.[197] Thus, it will be extremely difficult to resolve the situation after defamatory information output by an AI program. This presents another unique issue that warrants consideration.

These differences between traditional internet providers and generative AI, as well as the potential for chaotic and haphazard court interpretations, emphasize why Congress should act to ensure AI does not receive blanket

192. *What are AI Hallucinations?*, IBM (Sept. 2, 2023), https://www.ibm.com/topics/ai-hallucinations.

193. *See* Weise & Metz, *supra* note 47; *see also* Weiser & Schweber, *supra* note 46.

194. *See* Poritz, *supra* note 2.

195. *See* Kosseff, *supra* note 139.

196. *See How Social Media Firms Moderate Their Content*, KNOWLEDGE AT WHARTON (Jan. 24, 2022), https://knowledge.wharton.upenn.edu/article/social-media-firms-moderate-content.

197. *See* Aatish Bhatia, *When A.I.'s Output Is a Threat to A.I. Itself*, N.Y. TIMES: THE UPSHOT (Aug. 25, 2024), https://www.nytimes.com/interactive/2024/08/26/upshot/ai-synthetic-data.html.

immunity. Ultimately, addressing AI in the context of Section 230 will likely be a fact-intensive inquiry and the court could approach these cases in a variety of different ways.[198] In some situations, courts may find that if ChatGPT puts out defamatory answers based on data created by others on the internet, it deserves protection as an internet provider or search engine like Google.[199] On the other hand, when AI "hallucinates" or makes up information to create its answers on its own, it may fall outside of Section 230 protections.[200] But this uncertainty and room for potential different treatment or interpretations is exactly why Congress needs to step in. Ultimately, generative AI is different in many ways, making it unfit to receive blanket immunity in all scenarios. That is not to say, however, that there is *never* an occasion where generative AI platforms should be absolved. But Section 230 as it currently stands lacks the flexibility to account for these different circumstances. As clarified in the consideration of AI and defamation, Section 230's outdated nature can no longer be ignored.

2. AI Under the Common Law: Common Carrier, Distributor, or Publisher?

If Congress returned to a variation of the common law approach, within which category would AI fall? Drawing on the reasoning from *Cubby* and *Stratton Oakmont*, are generative AI platforms more like CompuServe, a distributor; Prodigy, a publisher; or a telephone company, a common carrier?[201] While the complex and advanced algorithms in operation today did not exist at the time the courts followed the common law approach,[202] an argument could be made that AI fits within each category drawing on the general framework.

In many respects, while generative AI utilizes transformer algorithms to mimic conversations, it also resembles a search engine providing answers to

198. *See* Perault, *supra* note 2, at 366.

199. *See* Lewis et al., *supra* note 49, at 71.

200. *See* Kosseff, *supra* note 139.

201. *See* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 138 (S.D.N.Y. 1991); Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063, 1995 WL 323710, at *5–6 (N.Y. Sup. Ct. May 24, 1995).

202. *See* Matt White, *A Brief History of Generative AI*, MEDIUM (Jan. 7, 2023), https://matthewdwhite.medium.com/a-brief-history-of-generative-ai-cb1837e67106 ("Generative AI research can trace its history back to the 1960s. However generative AI began to develop into something similar to its current form in 2006 . . . ."); *see also* Jonathan Gilbert, *Computer Bulletin Board Operator Liability for User Misuse,* 54 FORDHAM L. REV. 439, 449–50 n.52 (1985) ("A computer program must go through several complex steps before it can 'understand' a sentence. It must ascertain the meaning of each word, even when the word is part of an idiom. It must then determine the structure and meaning of the sentence, and having done so, it must remember the meaning and process other sentences. Determining the meaning of any one sentence may require the application of knowledge gained from a prior sentence or a pool of general knowledge. This type of artificial intelligence is only in its developmental stages and is by no means common in the computer industry."); Loftus E. Becker Jr., *Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 U. CONN. L. REV. 203, 223 n.95 (1990) ("[F]uture developments in artificial intelligence may make it possible to write bulletin board programs with a reasonable degree of common sense.").

user's questions drawing on the data it has analyzed.[203] Scholars have considered how search engines and other algorithms may fare under variations of the common law framework when assessing legal liability and reform potential.[204] Some scholars have argued that, concerning the First Amendment, general-purpose search engines that use algorithms to generate results, by design, merely facilitate the protected speech of others, making search engines more akin to a common carrier carrying phone calls than a media outlet.[205] While not identical to a search engine nor a telephone company, AI possesses similar qualities to a search engine that provides results to user queries, and one can argue that when turning over speech it acquired from other sources, it is acting as a conduit.[206]

However, many would disagree and insist that, at the very least, AI and other algorithms are "distributors" choosing what information to share, but without editorial control,[207] such as a newsstand or library.[208] However, this argument may be unsuccessful given generative AI's method of sharing information conversationally. In effect, the algorithm takes information from other sources, edits it into different language, and shares it with the user. Theoretically, a court could give weight to an argument along the lines of claiming AI merely reorganizes the presentation of information, rather than edits the content. If so, then the issue of whether the algorithm knew the matter was defamatory would arise.[209]

The most likely assessment by courts would be that AI and other algorithmic models are publishers, exerting control over the information it outputs. Drawing on *Stratton Oakmont*, the court held Prodigy liable for exercising any editorial control over posts on its bulletin board.[210] Thus, an AI program, generating answers by editing together data and information and then outputting an answer in its own words would likely amount to the editorial control necessary for publisher status.[211]

---

203. *See* Chadha, *supra* note 33; O'Sullivan, *supra* note 33.

204. *See generally* Lewis et al., *supra* note 49 (discussing how algorithms fit within libel law).

205. *See* Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search,* 93 CORNELL L. REV. 1149, 1206 (2008); *see also* Lewis et al., *supra* note 49, at 63–64.

206. *See* Bracha & Pasquale, *supra* note 205. *See generally* Jeweler, *supra* note 79 (discussing the common carrier category of the common law).

207. *See* Jeweler, *supra* note 79, at 3–4; *see also* Lewis et al., *supra* note 49, at 71.

208. *See* Jeweler, *supra* note 79, at 3–4; *see also* Lewis et al., *supra* note 49, at 71.

209. *See* Jeweler, *supra* note 79, at 4; *see also* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991).

210. *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063, 1995 WL 323710, at *7 (N.Y. Sup. Ct. May 24, 1995); *see also* Jeweler, *supra* note 79, at 7.

211. Lewis et al., *supra* note 49, at 70–71.

The common law approach, while allowing more flexibility than Section 230, has its faults. Particularly, the common law approach would not allow the internet as we know it to survive. Platforms maintaining any control over their content would be subject to liability constantly, and many of the concerns from the 1990s would reemerge. If Congress ever did opt for a return to the common law approach, however, the framework would almost certainly need to be an updated version that accounts for new technologies, including algorithms and AI. Such an approach would require the consideration of differences in technologies today that did not exist at the time of the common law approach. Further, the new approach needs to strike the necessary balance between accountability and freedom of the internet. Thus, the common law approach that would hold liable any platform provider who exerts editorial control over content would likely be too extreme. It would likely again either result in too much content moderation harming free speech, or result in no content moderation at all, resulting in extremely harmful information on the internet—ranging from defamation or deep fakes to fake news.[212]

While analyzing these programs under an outdated model is complicated, one can draw analogies and find that AI will not fit within the common law framework. This analysis further highlights that the new approach Congress should adopt would benefit from the common law's relative flexibility and model of different categories, but it must also do more. It should prioritize balancing between scenarios where immunity is necessary to allow a company or program to function and develop, but other circumstances where we need to hold internet providers and programs liable (i.e. when they are producing defamatory content).

V. WHAT'S NEXT: HOW CONGRESS COULD USE THE UNCERTAINTY PRESENTED BY AI & DEFAMATION LIABILITY TO CHANGE THE SECTION 230 LEGAL FRAMEWORK TO BETTER REFLECT TECHNOLOGICAL ADVANCEMENTS AND SOCIETY TODAY

As this Note initially points out, Section 230 is a highly controversial piece of legislation. While many scholars argue for its reform, others tout its contribution to the growth of the internet.[213] In recent years, there has been much debate about the viability of Section 230 with respect to new and developing contexts, such as the rise of the spread of misinformation online, the use of

212. *See* Savino, *supra* note 94, at 1104; *see* O'Donnell, *supra* note 95, at 720.

213. *See* Citron & Wittes, supra note 92, at 467; KOSSEFF, *supra* note 178, at 4; Jeweler, *supra* note 79, at 1; Jason Kelley, *Section 230 is Good, Actually*, ELEC. FRONTIER FOUND. (Dec. 3, 2020), https://www.eff.org/deeplinks/2020/12/section-230-good-actually; Michael D. Smith & Marshall Van Alstyne, *It's Time to Update Section 230*, HARV. BUS. REV. (Aug. 12, 2021), https://hbr.org/2021/08/its-time-to-update-section-230.

platforms for illegal activities, and new services and programs available on the internet, like generative AI.[214]

In addition to scholars, people from both political parties within all branches of the government have weighed in on the debate.[215] From the executive branch, President Joe Biden advocated for the repeal of Section 230 during his 2020 election campaign by telling the *New York Times* Editorial Board that "Section 230 should be revoked, immediately should be revoked, number one."[216] Additionally, during President Donald Trump's first term, he vocally criticized Section 230 after Twitter and Facebook deleted his posts containing COVID-19 misinformation.[217] This highlights the bipartisan nature of the Section 230 controversy.

Within the legislature, senators like Amy Klobuchar (D-MN), Lindsey Graham (R-SC), Richard Blumenthal (D-CT), and Josh Hawley (R-MO) have proposed changes to Section 230.[218] On the other hand, others, like Senator Ted Cruz (R-TX), have recognized Section 230's positive aspects such as its protection of the internet and innovation.[219] In 2021, Senator Klobuchar proposed legislation to limit Section 230 protections that allowed the spread of misinformation about COVID-19 online.[220] Further, Senators Graham and Blumenthal proposed a bill called the EARN IT Act, which hoped to remove Section 230 immunity from platforms that did not follow a set of best practices to detect and remove child sexual abuse material.[221] While neither of these efforts became law, they signal some legislators' willingness to reform Section 230, and possibly soon.

Particularly relevant is Senator Hawley's 2023 proposed bill creating a carve-out for generative AI, preventing these types of programs from receiving

---

214. *See generally* Citron & Wittes, *supra* note 92 (discussing Backpage, an online host for illegal commercial sex advertisements in connection with Section 230). *See* O'Donnell, *supra* note 95, at 701 (discussing the emergence of deep fake content); *see also* Perault, *supra* note 2 (arguing against Section 230 protections for generative AI).

215. Sara Morrison, *Section 230, The Internet Law That's Under Threat, Explained*, VOX (Feb. 23, 2023, 12:07 PM PST), https://www.vox.com/recode/2020/5/28/21273241/section-230-explained-supreme-court-social-media.

216. Cosgrove Jr., *supra* note 80, at 8; The Editorial Bd., *Joe Biden: Former Vice President of the United States.*, N.Y. TIMES (Jan. 17, 2020), https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-*nytimes-interview.html?smid=nytcore-ios-share.*

217. *See* Morrison, *supra* note 215.

218. *See id.*; Anna Edgerton, *Klobuchar Takes Aim at Online COVID Lies with Section 230 Bill*, L.A. TIMES (July 22, 2021, 12:04 PM PT), https://www.latimes.com/business/technology/story/2021-07-22/klobuchar-takes-aim-at-online-covid-lies-with-section-230-bill (discussing a proposed bill to prevent the spread of misinformation about Covid-19).

219. Christopher Hutton, *Hawley's Attempt to Revoke Section 230 Protections for AI Blocked by Cruz*, WASH. EXAM'R (Dec. 13, 2023, 6:06 PM) https://www.washingtonexaminer.com/news/2606749/hawleys-attempt-to-revoke-section-230-protections-for-ai-blocked-by-cruz.

220. Edgerton, *supra* note 218.

221. *See* Morrison, *supra* note 215.

Section 230 protections.[222] However, Senator Cruz blocked the proposed bill by speaking up and arguing that "We need to make sure that America remains the leader in AI. However, even Senator Cruz acknowledged, that "we need to protect against abuses of power," and "that Section 230 is too broad."[223] While Hawley's proposal has also yet to become law, the very presence of such a discussion in the Senate indicates that the implications associated with AI receiving Section 230 protection are on Congress's radar.

This Note proposes that Congress should use the wide range of ways AI may fit within the Section 230 analysis as an opportunity to finally eradicate, or at least heavily reform, Section 230 to create a framework that recognizes the changes to technology, the internet, and society since the law's enactment.[224] While some speculate that courts will treat AI differently under Section 230, no court has issued a definitive answer either way. Further, the Supreme Court has very recently declined to offer guidance to lower federal and state courts on how to consider algorithms such as those used by X[225] and Google. Thus, courts will likely feel obligated to continue following Section 230 and construing it to fit generative AI, as it has done for other types of technological developments. While some courts may decline to interpret Section 230 in this way, others certainly might. For example, a court may see the benefit of extending Section 230 to preserve innovation and foster the growth of AI programs. Particularly, some courts may draw analogies to the early days of the internet and congressional intent at the time of Section 230's enactment to prevent interference with similar growth of the internet. Further, courts could view AI as akin to a traditional search engine algorithm like Google and find it appropriate to treat it the same. Given courts' reluctancy to change or narrow Section 230, as previously discussed, Congress must be the one to act. Complications arising from AI present the perfect opportunity for legislators to finally step in and make a new law that addresses technological developments on the internet. A new framework would free courts from the Section 230 box and ideally offer greater flexibility in determining when immunity from liability is warranted.

A primary issue with Section 230 in a constantly evolving technological world is its absoluteness.[226] It only has one category: internet provider or not. It also offers absolute blanket immunity to any program or service deemed an internet provider, leaving limited room to assess the different types of programs and considerations of how different features may affect the analysis. It also

222. Hutton, *supra* note 219.
223. *Id.*
224. *See* Citron & Wittes, *supra* note 92, at 463.
225. Formerly known as Twitter.
226. *See* 47 U.S.C. § 230(c)(1).

prevents courts from immunizing a platform in certain situations but not others. On the other hand, the common law approach permitted more discretion and assessment of the differences from platform to platform and situation to situation.[227] While the three common law categories may be too outdated given the range of technology and the scope of the internet today, its balancing approach may be a valuable aspect to bring into a new framework. Ideally, a new approach would allow for more flexibility and assessment based on the specific scenario or platform at issue because technological advancements are only going to continue to flourish. Thus, an outdated legal scheme that operates solely in black and white is going to continue to cause problems, either hindering the growth of technology, or leaving harmed plaintiffs without any recourse or cause of action against large companies.

Whether starting from scratch with a new framework or attempting to reform Section 230, it is useful to reflect on Congress's original intent in enacting the CDA. The CDA was a broad campaign to restrict access to sexually explicit material on the developing internet.[228] Congress added Section 230 in response to court cases like *Stratton Oakmont* that used an internet provider's attempts to moderate content against them to establish them as publishers—the category subject to the most liability under the current legal framework.[229] Thus, Congress was trying to create a safe harbor from liability for internet providers engaged in self-regulation of content on their platforms.[230] In addition to fostering sufficient self-regulation by internet companies, some scholars have interpreted congressional intent to encourage the growth of the internet by relieving intermediaries from liability for the content of third parties.[231]

Courts have interpreted this safe harbor broadly, potentially beyond what Congress intended.[232] At this point Congress will need to step in and offer guidance to the courts on how to address the profound changes of the internet. When revisiting the intermediary liability framework, Congress will likely need to create a new legal framework that recognizes the complexities of the internet today that previously did not exist.[233] While recommending the exact approach Congress should adopt is beyond the scope of this Note, a version of the common law or minor tweaks to Section 230 likely will not be enough. Since courts have consistently expanded Section 230 and provided broad protection to different

227. *See* Jeweler, *supra* note 79, at 3–4.

228. S. REP. NO. 104-23, at 59 (1995).

229. *See* Citron & Wittes, *supra* note 92, at 455; *see also* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991); *see also* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

230. Citron & Wittes, *supra* note 92, at 455.

231. Kosseff, *supra* note 139.

232. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 116 (2009).

233. Citron & Wittes, *supra* note 92, at 463.

internet companies, enacting a new law will likely require a new approach entirely. For example, even if Congress adopted a version of the previously used common law approach focusing on the amount of editorial control exercised, as discussed, it would need to be drastically adjusted to allow the internet to operate as it does now.[234] Since the common law has never addressed the modern-day internet, it could be interpreted improperly based on precedent from the 20th century and result in further confusion and either over- or under-breadth.[235] This Note does not suggest that generative AI programs should receive no protection from liability but instead encourages Congress to create a more comprehensive and specific law that accounts for the variety of internet programs and services available to users today, including generative AI programs like ChatGPT.

An ideal new framework would encapsulate various factors. Primarily, it should strike a balance between preserving internet freedom and ensuring platform accountability where necessary. To achieve this balance, Congress must enact a law with relative flexibility to address the growing changes in technology and advancements. The common law allowed for flexibility through its different categorizations based on context and the nature of the platform.[236] However, this approach hindered internet companies from growing, developing, and flourishing. But then Section 230 swung too far in the other direction and has allowed internet providers to absolve themselves from all liability, resulting in no accountability. Thus, Congress must adopt an approach combining these two differing frameworks to strike the necessary balance to allow AI and other technological advancements to grow, but without sacrificing any remedial measures for those who the platforms harm.

Congress should also consider the longevity of this approach. Either Congress needs to find an approach that offers enough flexibility to account for the range of technical advancements that are likely to come, or it needs to adopt a limited and amenable approach. If Congress is unable to be prepared for exponential technological progression, then it must adopt a limited framework that applies current, explicitly stated platforms and programs. This is essential to ensure courts in thirty years are not constrained by a now-outdated new version of Section 230 and applying in inappropriate contexts.

Ultimately, AI signifies the changing technological landscape of our society and makes clear that the internet is different today than it was in 1996.[237] This should signal to legislators a need to adjust the framework to adapt to the

234. *See supra* Subpart.IV.C.2.

235. *See* Bracha & Pasquale, *supra* note 205, at 1206; Lewis et al., *supra* note 49, at 70–71. *See generally* Jeweler, *supra* note 79 (discussing the common carrier category of the common law).

236. *See* Jeweler, *supra* note 79, at 3.

237. Citron & Wittes, *supra* note 92, at 463.

evolving technology and reach of the internet.[238] As the judge in one Section 230 case put it, "the internet has outgrown its swaddling clothes and no longer needs to be so gently coddled."[239] Thus, while Congress has refrained from reforming or rescinding Section 230 for nearly three decades to allow the internet to grow, the need for clarity has become too pressing to wait any longer. Section 230 presents issues in various contexts as it stands today, but Congress can use the difficulties associated with defamation and AI as a route to finally address these issues and change the outdated legislation. The rapid advancement of AI and other technological and societal developments should prompt Congress to finally create a new framework that reflects the nature of the internet today.

CONCLUSION

After exploring how the judicial and legislative branches may treat AI under the current defamation law framework, it is evident that Congress holds the power of change. Without guidance from the country's highest Court, lower federal and state courts will likely continue to apply Section 230 of the CDA broadly and potentially haphazardly or conflictingly. Some courts may fit generative AI programs into the current Section 230 framework and deem these programs "internet providers," immunizing them from defamation liability. On the other hand, some courts may exclude them from such protection. Congress should use one of the most rapidly developing technological advancements, AI, and the varying interpretations courts could place on AI in the defamation context, as an opportunity to restructure, reform, or rescind the controversial and outdated piece of legislation.

238. *Id.*

239. *Id.* (citing Fair Hous. Council of San Fernando Valley v. Roomates.com, 521 F.3d 1157, 1175 n.39 (9th Cir. 2008)).

***