

# SEARCH ENGINE LIABILITY FOR AUTOCOMPLETE DEFAMATION: COMBATING THE POWER OF SUGGESTION

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## I. INTRODUCTION

In September 2012, Bettina Wulff, a former first lady of Germany, sued Google for defamation.<sup>1</sup> Mrs. Wulff's complaint arose from Google's autocomplete function: when Mrs. Wulff's name was entered into the search engine, the search engine automatically suggested terms such as "prostitute" and "red light district."<sup>2</sup> Rumors that Mrs. Wulff was a former prostitute dated back to 2006 when she first met Christian Wulff, her eventual husband and president of Germany from 2010 until his resignation in February 2012.<sup>3</sup> Mrs. Wulff denied the truth of these rumors.<sup>4</sup>

Mrs. Wulff contended that these autocomplete results were defamatory and that they caused her great emotional distress.<sup>5</sup> Google maintained that it was not to blame, noting that its autocomplete function merely reflected popular search queries that had been previously entered by other Google users.<sup>6</sup> Some commentators noted that Wulff's lawsuit may backfire, with the lawsuit's publicity prompting more searches of "Bettina Wulff escort," which would "further buoy the term in Google's autocomplete."<sup>7</sup>

Mrs. Wulff is not the only figure whose good name has been besmirched by Google autocomplete.<sup>8</sup> Political,<sup>9</sup> pop culture,<sup>10</sup> and even legal figures<sup>11</sup> are all vulnerable to the statements contained in autocomplete search query suggestions. Even Google has fallen prey to its own devices.<sup>12</sup>

Mrs. Wulff's case illustrates the evolving nature of defamation in the Internet age. While rumors about political figures may have once "remained as whispers among the political elite," the Internet has amplified the potential for rumors to be widely broadcasted and perpetuated.<sup>13</sup> Where newspapers and magazines once selected and edited contributions from sources and provided this information to an easily defined audience of readers, algorithms that rank search popularity now result in the automatic broadcasting of potentially

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1. *Google Sued over Bettina Wulff Search Results*, BBC NEWS (Sept. 10, 2012, 1:03 PM), <http://www.bbc.com/news/technology-19542938> [hereinafter *Google Sued*].

2. *Id.*

3. Nicholas Kulish, *As Google Fills in Blank, a German Cries Foul*, N.Y. TIMES (Sept. 18, 2012), [http://www.nytimes.com/2012/09/19/world/europe/keystrokes-in-google-bare-shocking-rumors-about-bettina-wulff.html?\\_r=0](http://www.nytimes.com/2012/09/19/world/europe/keystrokes-in-google-bare-shocking-rumors-about-bettina-wulff.html?_r=0).

4. *Google Sued*, *supra* note 1.

5. *Id.*

6. *Id.*

7. Chris Gaylord, *Bettina Wulff and the Trouble with Fighting Google's Autocomplete*, CHRISTIAN SCI. MONITOR (Oct. 3, 2012), <http://www.csmonitor.com/Innovation/Tech/2012/1003/Bettina-Wulff-and-the-trouble-with-fighting-Google-s-autocomplete>.

8. To be fair to Google, statements about Mrs. Wulff's rumored past occupation appeared on Bing.com as well. *Google Sued*, *supra* note 1.

9. An October 25, 2012, Google search query "Paul Ryan is" prompted the suggested queries "paul ryan is evil," "paul ryan is a liar," and other negative results.

10. An October 25, 2012, Google search query "Angelina Jolie is a" prompted the suggested queries "angelina jolie is a skank," "angelina jolie is a sociopath," and other negative results.

11. An October 25, 2012, Google search query "Antonin Scalia is" prompted the suggested queries "antonin scalia is evil," "antonin scalia is a homophobe," and other negative results.

12. See Gaylord, *supra* note 7 (displaying suggested queries "google is evil," "google is skynet," and "google is watching you," for the search query "google is").

13. *Id.*

defamatory statements to anybody using Google's search engine.<sup>14</sup> This feature is known as "autocomplete" or "autosuggest."<sup>15</sup> The Internet has changed the landscape of society, and legislatures and courts have struggled to keep pace.<sup>16</sup>

This Essay evaluates whether lawsuits like Mrs. Wulff's are feasible in the United States. While § 230 of the Communications Decency Act (CDA) of 1996<sup>17</sup> poses a significant challenge to defamation lawsuits against websites that display third-party content, recent developments in technology and law create potential avenues around this obstacle.<sup>18</sup> This Essay explores these legal and technological developments and concludes that search engines are not immune from defamation lawsuits arising from autocomplete statements.

This Essay's primary focus is whether plaintiffs like Mrs. Wulff can overcome CDA immunity. This Essay will briefly address questions about the merits of the defamation claims, including whether websites intend to publish autocomplete suggestions and whether algorithms that give rise to autocomplete suggestions constitute "acts" of publishing. Courts can only engage in an accurate treatment of this question once plaintiffs overcome the immunity obstacle, however.<sup>19</sup> For this reason, this Essay's primary purpose is to show how plaintiffs may survive the initial defense of immunity so that plaintiffs may focus on litigating their core defamation claims. Only when this obstacle is overcome can courts develop a jurisprudence of autocomplete defamation.

Part I of this Essay describes search engines and autocomplete features and how these features may give rise to defamation claims. Part II of this Essay summarizes the CDA, its history, and its development in subsequent case law. Courts initially construed the CDA and the immunity it grants to websites in an extremely broad manner. Developments in case law, however, give prospective plaintiffs the potential means to overcome CDA immunity defenses. Part III addresses a potential challenge to search engine immunity that plaintiffs may raise under the Ninth Circuit's decision in *Fair Housing Council v. Roommates.com, LLC*.<sup>20</sup> While this case contains promising language, courts would likely shy away from applying it due to its potentially far-reaching implications. Part IV discusses the earlier Ninth Circuit case of *Batzel v. Smith*<sup>21</sup> and how this case may also support a narrower, more direct

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14. See *Autocomplete*, GOOGLE, <http://support.google.com/websearch/bin/answer.py?hl=en&answer=106230> (last visited Sept. 4, 2013) (explaining how autocomplete operates).

15. *Id.*; see also Kindra Mason & Robert Williams, *Bing Autosuggest—Keeping You Current*, BING BLOGS: SEARCH BLOG (Jan. 19, 2010), [http://www.bing.com/blogs/site\\_blogs/b/search/archive/2010/01/19/bing-autosuggest-keeping-you-current.aspx](http://www.bing.com/blogs/site_blogs/b/search/archive/2010/01/19/bing-autosuggest-keeping-you-current.aspx) (describing Bing's feature as "Autosuggest"). For ease of discussion, I will refer to the search-completion features as "autocomplete features."

16. Michael L. Rustad & Diane D'Angelo, *The Path of Internet Law: An Annotated Guide to Legal Landmarks*, 2011 DUKE L. & TECH. REV., no. 12, ¶ 16.

17. 47 U.S.C. § 230 (2006).

18. Amanda Groover Hyland, *The Taming of the Internet: A New Approach to Third-Party Internet Defamation*, 31 HASTINGS COMM. & ENT. L.J. 79, 96–97 (2008).

19. *Id.* at 82.

20. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

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

challenge to search engine immunity. This Essay concludes that these cases give plaintiffs two strong, independent arguments against search engine immunity. With the question of immunity resolved, defamation claims may move forward and courts will be able to address substantive questions, including whether algorithm creation constitutes publication and how to gauge search engines' levels of intent.

## I. SEARCH ENGINE AUTOCOMPLETE AND THE POTENTIAL FOR DEFAMATION CLAIMS

### A. *Background: Search Engines and Autocomplete Technology*

Search engines such as Google and Bing provide Internet users with the means of locating websites based on search queries that users type into the engines. The user enters text and then hits the "Enter" key on the computer keyboard or uses the mouse to click on the search engine's "search" button, which generates a list of results.<sup>22</sup> Search engines like Google aid users' searches by employing algorithms that provide links to websites that are relevant to the terms entered by the user.<sup>23</sup>

As the Internet has evolved, so, too, have search engines. Search engines have diversified, offering services in numerous languages and launching services for users to read online books and magazines.<sup>24</sup> An additional development in the evolution of search engines was the creation of the autocomplete feature.

Autocomplete features offer suggestions for search queries as users enter text into search engines.<sup>25</sup> These suggestions appear before the user completes the search by hitting the "Enter" key or clicking the "search" button. These suggestions typically appear below the text box on search engine homepages.<sup>26</sup> Suggested queries appear automatically as users type letters into the search engine text box. These queries change as additional letters are entered.

Autocomplete search suggestions are based on algorithms that search engines employ.<sup>27</sup> These algorithms suggest and display search queries based on other users' aggregated search activities and the contents of web pages the search engine reaches.<sup>28</sup>

Google implemented its autocomplete feature on its homepage for U.S.-centered searches in August 2008.<sup>29</sup> Google notes that its autocomplete feature

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22. See generally Gaylord, *supra* note 7 (noting the logistics of Google's search bar).

23. See Rustad & D'Angelo, *supra* note 16, ¶ 11 (outlining the method Google's search engine uses to perform its searches).

24. *Id.* ¶ 12.

25. See *Autocomplete*, *supra* note 14 (describing autocomplete features for search queries).

26. See Gaylord, *supra* note 7 (providing a visual example of a set of autocomplete suggestions).

27. See, e.g., *Autocomplete*, *supra* note 14 (describing Google's autocomplete function and how it operates based on Google's algorithm).

28. *Id.*

29. Sean Carlos, *Google Autocomplete, Née Google Suggest, the Precursor of Google Instant*, ANTEZETA (Sept. 10, 2010), <http://antezeta.com/news/google-suggest-history>.

is based on “purely algorithmic factors” and operates “without human intervention.”<sup>30</sup> Google also notes that users can report problems with autocomplete by reporting questions or feedback in an online forum.<sup>31</sup> Google has “blacklisted” certain words by blocking autocomplete queries related to “pornography, violence, hate speech, and illegal file sharing.”<sup>32</sup> Google has also implemented autocomplete suggestion restrictions in a country-specific manner, such as blocking terms related to Holocaust denial from several of Google’s “country-specific listings.”<sup>33</sup>

Google has also limited autocomplete suggestions in response to specific complaints. In March 2012, Google was ordered to disable a portion of its autocomplete feature relating to a Japanese man who complained that his name was being “associated with crimes he had not committed.”<sup>34</sup>

### B. *Defamation Claims Arising from Search Engine Autocomplete*

Defamation claims, like the lawsuit filed by Mrs. Wulff, may arise from the statements that automatically appear as users type search queries into online search engines. Plaintiffs may argue that false statements that tend to injure their reputation appear in the form of these suggested queries and that the search engine publishes these statements to third parties—the users of the search engine.<sup>35</sup> While the central focus of this Essay is whether search engines are immune from suit due to CDA immunity, there are several obstacles to defamation suits that are worth noting in the search engine context.

#### 1. *Distributor or Publisher Liability*

Search engines have already pointed out the indirect nature of the autocomplete process, noting that statements are generated solely through algorithms, without human intervention.<sup>36</sup> Search engines may argue that the statements’ origination in third parties and the indirect relationship that the search engine has with the statements and their eventual publication raises questions about whether the search engine is actively publishing the autocomplete statements and whether the search engine intends to publish these statements. A search engine may argue that it is a distributor rather than a publisher. This would require plaintiffs to prove that the search engine knew or had reason to know that it was distributing defamatory material.<sup>37</sup>

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30. *Autocomplete*, *supra* note 14.

31. *Id.*

32. Gaylord, *supra* note 7; *see also* Jacqui Cheng, *Google Flips the Switch on Autocomplete Censorship*, ARS TECHNICA (Jan. 27, 2011, 10:02 AM), <http://arstechnica.com/tech-policy/2011/01/google-flips-the-switch-on-autocomplete-censorship/> (discussing Google’s removal of autocomplete suggestions that are related to illegal media downloading).

33. Gaylord, *supra* note 7.

34. *Google Sued*, *supra* note 1.

35. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

36. *See Autocomplete*, *supra* note 14; *Google Sued*, *supra* note 1 (detailing how autocomplete suggestions are generated).

37. RESTATEMENT (SECOND) OF TORTS § 581(1) (1977) (“[O]ne who only delivers or transmits

Plaintiffs may respond by arguing that websites should be held liable as publishers for the interactive systems these websites create and with which users interact.<sup>38</sup> While search engine programmers may not personally interact with individual users, the algorithm these programmers create has the effect of broadcasting users' aggregated search queries to other users.<sup>39</sup> Google's statement explaining how its autocomplete feature works indicates that search engines may be aware that the autocomplete feature broadcasts users' statements in this manner.<sup>40</sup> This argument is especially plausible when combined with the argument that CDA immunity should not apply because search engines are independent content providers.<sup>41</sup>

Furthermore, self-regulation of autocomplete features is not beyond the capabilities of Google, a search engine that has prevented its autocomplete function from displaying certain content on multiple occasions.<sup>42</sup> This ability to control the statements the search engine broadcasts supports the conclusion that the search engine is a "primary publisher" of the statements and can be held liable under the same standards as the initial publisher of the statements.<sup>43</sup>

Search engines can respond to these arguments by focusing on the sheer scale of the searches and results that search engines reach. Search engines are used by millions of users who input billions of search queries.<sup>44</sup> While search engine algorithms may shape the results, search engines can argue that they should not be expected to track the intricacies of their extensive operations.

In light of this argument, plaintiffs will need to show that the search engine had knowledge or should have known of the offending content.<sup>45</sup> If the search engine is notified by users that false statements are being published through autocomplete, plaintiffs will likely have a strong claim that the search engine knows the statements being published are false or that the search engine is publishing the statements with reckless disregard of the statements' possible falsity.<sup>46</sup>

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defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character."); *see also* *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135, 139–40 (S.D.N.Y. 1991) (examining the protections afforded distributors).

38. *See, e.g.*, *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1172 (9th Cir. 2008) (noting that Defendant website is structured in a manner that requires violation of the Fair Housing Act (FHA)).

39. *See* Gaylord, *supra* note 7 ("All of the queries shown in Autocomplete have been typed previously by other Google users.").

40. *Autocomplete*, *supra* note 14.

41. This argument is explained in detail *infra* Part II.

42. *See* Gaylord, *supra* note 7 (discussing Google's removal of certain blacklisted words); *see also* Cheng, *supra* note 32 (discussing Google's removal of autocomplete suggestions that are related to illegal music downloading).

43. Hyland, *supra* note 18, at 96–97 (explaining the distinction between primary and secondary publishers).

44. *See, e.g.*, *Google Annual Search Statistics*, STATISTIC BRAIN (July 14, 2012), <http://www.statisticbrain.com/google-searches/> (calculating the number of Google searches in 2011 at over 1.7 trillion).

45. RESTATEMENT (SECOND) OF TORTS §§ 580B(a)–(b) (1977).

46. *Id.*

## 2. *Statements “Of and Concerning” the Plaintiff*

Another challenge that will arise in defamation suits against search engines will be whether search engine autocomplete statements concern the plaintiff. The tort of defamation typically requires a defamatory statement that is “of and concerning” the plaintiff.<sup>47</sup> A plaintiff needs to show that a defamatory statement can be reasonably understood to refer to the plaintiff, and statements that could not be reasonably inferred to refer to the plaintiff are not actionable.<sup>48</sup>

A plaintiff alleging defamation based on a statement displayed by an autocomplete feature may have a difficult time establishing that the statement refers to the plaintiff. Autocomplete suggestions are typically short and are not displayed in the context of a larger website or article. Often, the only context of an autocomplete suggestion will be a list of several additional suggestions.<sup>49</sup> In this setting, plaintiffs may have a severely limited basis of arguing that the autocomplete suggestions refer to them.<sup>50</sup>

Plaintiffs may argue that, despite the limited environment of the search engine, there is still sufficient context to imply that an autocomplete statement refers to the plaintiff. Plaintiffs may note that multiple search suggestions may be aggregated to identify a specific individual. For example, a search for “Angelina Jolie” may result in search suggestions of “actress” and “famous” in addition to search suggestions that are potentially defamatory.<sup>51</sup> These suggestions, taken together, may be sufficient to convince a reasonable observer that the defamatory statements refer to Angelina Jolie the actress rather than a different person of the same name.

Before any of these questions can be decided by courts, however, search engines will likely claim that they are immune from these defamation claims due to protections granted by the CDA. Overcoming this argument is a crucial requirement for plaintiffs to succeed and is a necessary first step towards the development of a coherent approach to autocomplete defamation.

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47. See, e.g., *State v. Crawley*, 819 N.W.2d 94, 104–05 (Minn. 2012) (noting that a defamation statute that does not require the statement to be “of and concerning” a specific individual is a facially unconstitutional infringement on speech); see also RESTATEMENT (SECOND) OF TORTS § 580B cmt. b, illus. 5 (noting that questions of the defendant’s fault may arise depending on whether the statement is “reasonably understood” as referring to the plaintiff).

48. See, e.g., *Dontigney v. Paramount Pictures Corp.*, 411 F. Supp. 2d 89, 92–93 (D. Conn. 2006) (stating an allegedly defamatory statement was reasonably understood to refer to plaintiff).

49. See, e.g., Gaylord, *supra* note 7 (displaying how autocomplete suggestions take the form of a list of search queries).

50. See *Dontigney*, 411 F. Supp. 2d at 92–93 (quoting *Bowen v. Poli-New England Theaters, Inc.*, 12 Conn. Supp. 28, 28 (Super. Ct. 1943)) (emphasizing that plaintiff’s failure to allege circumstances that infer a film refers to him fatally undermines his defamation suit).

51. See *supra* note 10 (describing a search query for Angelina Jolie).

### III. THE HISTORY AND DEVELOPMENT OF CDA IMMUNITY

#### A. *Internet Defamation Before the CDA: Cubby and Stratton Oakmont*

In 1991, the Southern District of New York decided *Cubby, Inc. v. CompuServe, Inc.*<sup>52</sup> In *Cubby*, the plaintiffs sued CompuServe, an early Internet service provider, for libel arising out of various comments posted in a forum that CompuServe hosted.<sup>53</sup> CompuServe did not review any comments that were posted in the forum and received no payment from those hosting and using the forum.<sup>54</sup>

The court held that CompuServe was not liable for any libelous content that was posted in the forum.<sup>55</sup> The court noted that CompuServe was a distributor of the content and was analogous to a library or bookstore.<sup>56</sup> Because of its status as a distributor, the court held that CompuServe would only be liable for libelous content it distributed if it knew or had reason to know of the nature of the content.<sup>57</sup>

In 1995, a New York state trial court decided *Stratton Oakmont, Inc. v. Prodigy Services Co.*<sup>58</sup> In *Stratton Oakmont*, the plaintiffs, a securities investment banking firm and the firm's president, sued Prodigy, the owner and operator of a computer network, for libel arising out of statements written on Prodigy's online bulletin board.<sup>59</sup> An unidentified user had posted a number of negative statements, including statements deeming Stratton Oakmont, Inc. to be a company filled with liars and claiming that the president of the company was a criminal.<sup>60</sup>

The court noted that Prodigy had promulgated a set of guidelines asking individuals posting on its message boards to refrain from posting insulting or harassing notes.<sup>61</sup> Prodigy also stated in its guidelines that Prodigy would remove any offensive messages that were brought to Prodigy's attention and that it had a system that would prescreen offensive language in messages.<sup>62</sup> The court held that Prodigy was the publisher of the libelous statements that were posted in its message board due to Prodigy's "conscious choice to gain the benefits of editorial control."<sup>63</sup> This opened up Prodigy to greater liability than other networks that did not exercise editorial control, which the court deemed to be mere distributors rather than publishers.<sup>64</sup> In defamation cases

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52. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

53. *Id.* at 137–38.

54. *Id.* at 137.

55. *Id.* at 142.

56. *Id.* at 139–40.

57. *Id.* at 140–41.

58. *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

59. *Id.* at \*1.

60. *Id.*

61. *Id.* at \*2.

62. *Id.*

63. *Id.* at \*3, \*5.

64. *Id.* at \*5.

against distributors, the plaintiff is required to prove that the defendant “knows or has reason to know” of the statement’s defamatory character.<sup>65</sup> Publishers like Prodigy, on the other hand, are subject to the same liability as the original party making the defamatory statement,<sup>66</sup> meaning that plaintiffs only need to prove that the publisher acted with reckless disregard of the potential falsity of the material it distributes.<sup>67</sup>

### B. Development of the CDA

The CDA was passed in 1996 with the primary goal of preventing minors from being exposed to indecent online material.<sup>68</sup> While parts of this statute were struck down as unconstitutional, § 230 of the act remained.<sup>69</sup>

Congress enacted § 230 of the CDA in response to *Stratton Oakmont*.<sup>70</sup> Section 230 notes that it is the policy of the United States to “remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.”<sup>71</sup> Section 230(c)(2)(A) states that Internet content providers cannot be held liable on account of “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . . .”<sup>72</sup>

Section 230 seems to go further than addressing specific scenarios of self-regulation by content-providers. In addition to the provisions quoted above, § 230(c)(1) states that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>73</sup> Section 230 also states that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”<sup>74</sup>

Read in conjunction with the definitions provided in the statute, § 230(c)(1) seems to provide broad immunity for websites. Section 230 defines an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by

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65. RESTATEMENT (SECOND) OF TORTS § 581(1) (1977).

66. RESTATEMENT (SECOND) OF TORTS § 578 (1977).

67. RESTATEMENT (SECOND) OF TORTS § 580B(b) (1977).

68. *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003).

69. *Id.*

70. S. REP. NO. 104-230, at 194 (1996) (Conf. Rep.) (“One of the specific purposes of this section is to overrule *Stratton-Oakmont* [sic] *v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”); see also *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (“In passing Section 230, Congress sought to [allow interactive computer services] to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn’t edit or delete.”).

71. 47 U.S.C. § 230(b)(4) (2006).

72. *Id.* § 230(c)(2)(A).

73. *Id.* § 230(c)(1).

74. *Id.* § 230(e)(3).

multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.<sup>75</sup> This definition has generally been applied to Internet service providers and websites.<sup>76</sup> An “information content provider” is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>77</sup>

It is important to note that the text of § 230(c)(1) seems to provide protection beyond situations like *Stratton Oakmont* where websites screen content. Section 230(c)(2)(A) seems to specifically overrule the *Stratton Oakmont* approach of basing liability on editorial control, but § 230(c)(1) and its broad language is an additional level of protection that the statute provides.<sup>78</sup>

### C. Interpretation of the CDA: *Zeran* and the Broad Immunity Approach

The Fourth Circuit was the first circuit to interpret § 230 in *Zeran v. America Online, Inc.*<sup>79</sup> In *Zeran*, the plaintiff, Kenneth Zeran, sued America Online (AOL) for defamation arising out of messages posted on AOL’s online bulletin board by unidentified third parties.<sup>80</sup> The messages advertised T-shirts with offensive slogans related to the Oklahoma City bombing, instructed those interested in buying the shirts to call “Ken,” and provided Zeran’s home phone number.<sup>81</sup> Zeran received numerous harassing phone calls and complained to AOL, who removed the offending messages.<sup>82</sup> In the following days, additional messages were posted—advertising offensive shirts, bumper stickers, and key chains—all referring interested buyers to Zeran’s number, which prompted numerous death threats and violent calls to Zeran.<sup>83</sup> Zeran sued AOL for defamation arising out of AOL’s failure to remove the offensive messages.<sup>84</sup>

The Fourth Circuit held that § 230 of the CDA immunized AOL from Zeran’s lawsuit.<sup>85</sup> Zeran argued that AOL was not the publisher of the

75. *Id.* § 230(f)(2).

76. *See, e.g., Zeran v. America Online, Inc.*, 129 F.3d 327, 329, 331 (4th Cir. 1997) (noting that a website with an electronic bulletin board constitutes an interactive computer service); Jeff Kosseff, *Defending Section 230: The Value of Intermediary Immunity*, 15 J. TECH. L. & POL’Y 123, 133 (2010) (“Courts generally have held that distributors such as ISPs and websites are among the ‘publishers’ covered by the text of Section 230.”).

77. 47 U.S.C. § 230(f)(3).

78. *See Kosseff, supra* note 76, at 131–32 (noting that the broad language gave websites “immunity for content that they have edited”).

79. *Zeran*, 129 F.3d 327, 331–34; *see also* Ryan French, Comment, *Picking Up the Pieces: Finding Unity After the Communications Decency Act Section 230 Jurisprudential Clash*, 72 LA. L. REV. 443, 451–52 (2012) (noting that § 230 was first interpreted in the Fourth Circuit).

80. *Zeran*, 129 F.3d. at 328–29.

81. *Id.* at 329.

82. *Id.*

83. *Id.*

84. *Id.* at 328.

85. *Id.* at 332.

offensive material but the distributor and therefore was not being treated as a “publisher” normally entitled to § 230 protection.<sup>86</sup> Zeran argued that, under his theory of distributor liability, AOL, once notified, had a legal duty to remove the offending messages.<sup>87</sup> The court rejected this argument, holding that Zeran’s theory of distributor liability was a subset of the “larger publisher category”—meaning that § 230 specifically protected AOL from liability due to its “publisher” status, making AOL immune from Zeran’s claim.<sup>88</sup>

Noting the danger of imposing liability under a “distributor” theory, the court stated that computer service providers “would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message.”<sup>89</sup> Fear of liability would likely prompt computer service providers “simply to remove messages upon notification, whether the contents were defamatory or not.”<sup>90</sup> The court concluded that § 230 immunity for AOL was consistent with the text and policy goals of the statute.<sup>91</sup>

*Zeran* is the foundational case for § 230 interpretation, and most cases following it have applied its broad protection.<sup>92</sup> Other circuit courts that have applied the *Zeran* approach include the First Circuit,<sup>93</sup> Fifth Circuit,<sup>94</sup> Seventh Circuit,<sup>95</sup> Eighth Circuit,<sup>96</sup> and, initially, the Tenth Circuit.<sup>97</sup> While agreement on *Zeran* was initially widespread, some circuits are beginning to place limits on its application.<sup>98</sup>

#### D. CDA Immunity in the Search Engine Context

In autocomplete defamation cases, defendant search engines will likely argue that they are immune from liability under § 230 of the CDA because the suggested search queries that appear are largely based on information inputted

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86. *Id.* at 331–32.

87. *Id.* at 331.

88. *Id.* at 332–33.

89. *Id.* at 333.

90. *Id.*

91. *Id.* at 334.

92. See Cecilia Ziniti, Note, *The Optimal Liability System for Online Service Providers: How Zeran v. America Online Got It Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 585 (2008) (noting that “[a]lmost uniformly, courts have interpreted § 230’s safe harbor broadly” and that *Zeran* “established the foundation for broad interpretation of § 230”) (citations omitted).

93. *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418–20 (1st Cir. 2007).

94. *Doe v. MySpace, Inc.*, 528 F.3d 413, 419–20 (5th Cir. 2008).

95. *Doe v. GTE Corp.*, 347 F.3d 655, 659–60 (7th Cir. 2003).

96. *Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010).

97. *Ben Ezra, Weinstein, and Co. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000). This Circuit may have changed its approach to CDA immunity with a broader test in *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1198–99 (10th Cir. 2009) (“We therefore conclude that a service provider is ‘responsible’ for the development of offensive content only if it in some way specifically encourages development of what is offensive about the content.”).

98. See *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1167–68 (9th Cir. 2008) (“[A] website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.”); see also *Accusearch*, 570 F.3d at 1198–99 (applying a version of the test adopted by the Ninth Circuit in *Roommates.com*).

by third parties.<sup>99</sup> Because the defamatory statements are not generated by the search engines but are rather the product of user input, the search engines may argue that § 230 immunity applies because the search engines are not the content providers.<sup>100</sup>

Search engines can argue that their situation is analogous to the defendant in *Zeran* because the defamatory statements displayed through autocomplete suggestions are the result of third-party actions and are simply being displayed to other users in a manner similar to online bulletin boards. Third-party search queries are inputted into algorithms, and these algorithms effectively redisplay the queries *provided* by the third parties.<sup>101</sup> For example, Google may argue that the people typing “Bettina Wulff is a prostitute” into Google searches are analogous to posters on an online bulletin board whose entries are displayed to other viewers of the bulletin board.

#### IV. ROOMMATES.COM: A POTENTIAL BUT DANGEROUS BASIS FOR AUTOCOMPLETE LIABILITY

While § 230 was initially interpreted broadly, the Ninth Circuit in *Fair Housing Council v. Roommates.com, LLC*<sup>102</sup> applied a narrower interpretation of the statute.<sup>103</sup> The test enunciated in *Roommates.com* limits the typically broad scope of § 230 immunity and gives courts broader discretion in adjudicating suits against Internet service providers (ISPs) and websites.<sup>104</sup>

##### A. Roommates.com: The “Material Contribution” Test

In *Roommates.com*, the Fair Housing Councils of San Fernando Valley and San Diego sued the defendant, Roommates.com, based on Roommates.com’s website, alleging that it violated the FHA.<sup>105</sup> The website was designed to match people searching for places to live with those who were renting out rooms.<sup>106</sup> In order for subscribers to this site to post advertisements or notifications about available rooms or search for available rooms, each subscriber was required to create a profile, which required disclosure of the subscriber’s “sex, sexual orientation, and whether they would bring children to a household.”<sup>107</sup> The website also provided an “Additional Comments” section where subscribers could describe “themselves and their desired roommate in

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99. See *Autocomplete*, *supra* note 14 (using the term “you” to reference the user, who would be a third-party in the litigation).

100. 47 U.S.C. § 230(c)(1) (2006).

101. See *Autocomplete*, *supra* note 14; Danny Sullivan, *How Google Instant’s Autocomplete Suggestions Work*, SEARCH ENGINE LAND (April 6, 2011, 6:27 PM), <http://searchengineland.com/how-google-instant-autocomplete-suggestions-work-62592> (“The suggestions that Google offers all come from how people actually search.”).

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

103. *Id.*

104. Varty Defterderian, Note, *Fair Housing Council v. Roommates.com: A New Path for Section 230 Immunity*, 24 BERKELEY TECH. L.J. 563, 583 (2009).

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

106. *Id.* at 1161.

107. *Id.*

an open-ended essay.”<sup>108</sup> The plaintiffs argued that these practices violated the FHA because Roommates.com was engaged in practices that discriminated based on sex, sexual orientation, and parental status, as all users were required to fill out these profiles, allowing other users to choose roommates in a discriminatory manner based on these unlawful characteristics.<sup>109</sup>

The district court held that Roommates.com was immune from liability under § 230.<sup>110</sup> The Ninth Circuit reversed in part, holding that Roommates.com was itself an “information content provider” and could not avail itself of § 230 immunity.<sup>111</sup> The court first noted that immunity only applies if a computer service provider is not an information content provider who is “responsible, in whole or in part, for the creation or development of” the offending content.<sup>112</sup> Websites may be immune if they are service providers who “passively” display content “created entirely by third parties.”<sup>113</sup> This immunity is lost, however, when the lawsuit concerns content that the website creates or is responsible for creating or developing.<sup>114</sup>

The court held that a website develops content and loses immunity when the website materially contributes to the content’s alleged unlawfulness.<sup>115</sup> The court held that in requiring subscribers to provide information on their sex, sexual orientation, and parental status, Roommates.com elicited content that may have been the basis for illegal discrimination, made use of this information in conducting its business, and, in doing so, materially contributed to the content being used in an illegal, discriminatory manner.<sup>116</sup> The court distinguished this practice from the open-ended comments sections of the pages, noting that Roommates.com did not encourage or require any illegal statements in these sections of the website.<sup>117</sup>

The court also distinguished the actionable activity of Roommates.com from search functions provided by “generic search engines such as Google, Yahoo!, and MSN Live Search.”<sup>118</sup> The court argued that these search engines “do not use unlawful criteria to limit the scope of searches conducted on them” and that the engines therefore play no role in developing any illegal searches.<sup>119</sup> The court noted that websites that provide “neutral tools” do not lose the immunity that § 230 provides.<sup>120</sup> The court warned that CDA immunity is only lost when “it is very clear that the website directly participates in developing the alleged illegality,” lest the courts fatally

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108. *Id.*

109. *See id.* at 1162 n.4. (“The Fair Housing Act prohibits certain forms of discrimination on the basis of ‘race, color, religion, sex, familial status, or national origin.’ 42 U.S.C. § 3604(c).”).

110. *Id.*

111. *Id.* at 1164, 1176.

112. *Id.* at 1162 (quoting 47 U.S.C. §230(f)(3) (2006)).

113. *Id.*

114. *Id.*

115. *Id.* at 1167–68.

116. *Id.* at 1172.

117. *Id.* at 1173–74.

118. *Id.* at 1167.

119. *Id.*

120. *Id.* at 1169.

undermine the immunity the CDA provides.<sup>121</sup>

### B. Applying Roommates.com to Autocomplete Defamation

*Roommates.com* offers a potential avenue for plaintiffs to overcome broad § 230 immunity. Plaintiffs may argue that under the *Roommates.com* approach, websites lose § 230 immunity if they “materially contribute” to the unlawfulness of the content that third parties provide.<sup>122</sup> A statement is not defamatory unless it is published or delivered in some way to a third party.<sup>123</sup>

Plaintiffs may point out that individuals who enter search queries into search engines are not publishing the search to third parties. In a typical search, the contents of a user’s search are submitted to the search engine, which in turn displays relevant links and websites to that user based on the search algorithm.<sup>124</sup> Third parties typically do not read the statements;<sup>125</sup> the search engine is a non-human program and, at least in Google’s case, operates without any human intervention.<sup>126</sup>

The statements entered by search engine users are not published to third parties until the search engine’s autocomplete algorithm compiles and displays the statements to other users based on popularity.<sup>127</sup> Plaintiffs may argue that the statements entered by search engine users do not meet all of the elements of a defamation claim until the autocomplete algorithm intervenes, as the statements are not published to a third party until the statements are redisplayed through autocomplete.<sup>128</sup> Plaintiffs can argue that the jump from non-defamatory to defamatory conduct is made possible only by the search engine’s autocomplete algorithm and subsequent broadcasting and displaying of statements. This function of the search engine, which transforms statements from unread entries into suggestions that are broadcasted to other users, transforms the search engine into a content provider outside the scope of § 230 immunity.

121. *Id.* at 1174.

122. *Id.* at 1167–68.

123. See RESTATEMENT (SECOND) OF TORTS § 580B cmt. b (1977) (noting that publication to a third party is a distinct context in which the question of fault may arise).

124. See Rustad & D’Angelo, *supra* note 16, ¶ 11 (“Google’s search engine provides links to websites in the order of “descending relevance to the user’s search terms based on its proprietary algorithms.[sic]”).

125. See *Facts About Google and Competition*, GOOGLE, <http://www.google.com/competition/howgooglesearchworks.html> (last visited Sept. 7, 2013) (describing the search engine as an automated process that relies on computer algorithms to process search queries). Text entered into search engines may occasionally be accessed by law enforcement officers who obtain subpoenas for this content. See generally Matthew Werner, Note, *Google and Ye Shall Be Found: Privacy, Search Queries, and the Recognition of a Qualified Privilege*, 34 RUTGERS COMPUTER & TECH. L.J. 273 (2007). However, this should be of no consequence to a potential plaintiff’s argument, because law enforcement access requires search engines to release the information—meaning the information is not viewed by third parties until the search engine administrators intervene.

126. *Autocomplete*, *supra* note 14 (“As people type words into the search engine, [Google’s autocomplete] suggests additional terms that have been popular in previous searches.”).

127. See Gaylord, *supra* note 7 (“The search engine relies on algorithms to rank the popularity of previous searches. The most common phrases become the top suggestions.”).

128. See RESTATEMENT (SECOND) OF TORTS § 558(b) (1977) (stating that publication to a third party is a required element for a defamation claim).

Search engines can respond by arguing that this “material contribution” to the illegality of the content is no different from a model case of § 230 immunity. *Zeran* illustrates: In *Zeran*, a third party posted defamatory statements on AOL’s website, and the statements were then viewed by other individuals.<sup>129</sup> In *Zeran*, the statements would not have been actionable had it not been for the website’s function of displaying a post online where third parties may view the page and see the statements.<sup>130</sup> Despite this function, the court found that AOL was immune from suit.<sup>131</sup> Even under the language of *Roommates.com*, search engines may argue that they are “passively” displaying content “created entirely by third parties” and are therefore service providers deserving of § 230 immunity.<sup>132</sup>

Plaintiffs may respond by arguing that autocomplete is distinguishable from the display of third-party content in *Zeran* because search engines actively promote the user-entered content to unsuspecting parties by means of the autocomplete algorithm. This amplifies the illegality of the content beyond the simple display of third-party content because the autocomplete algorithm proactively displays this information to unsuspecting search engine users. For example, a student working on a paper about Bettina Wulff may enter her name into Google and be confronted with the statement, “Bettina Wulff prostitute.”<sup>133</sup> This student did not visit a gossip site containing this information. This student did not seek out a message board on Mrs. Wulff that contained third-party comments about Mrs. Wulff’s rumored occupation. As this scenario illustrates, third-party statements entered into search engines may be broadcast to anybody who enters text similar to a portion of these statements into that search engine. This is an audience far broader than a typical case of a third-party post on an online bulletin board.

Search engines may also argue that *Roommates.com* specifically deems search engines immune under § 230. The *Roommates.com* court noted that while websites that materially develop unlawful searches are not immune, “generic search engines” do not use “unlawful criteria to limit the scope of searches conducted on them.”<sup>134</sup> The court further noted that a reading of “develop” that removes § 230 liability from these search engines would swallow up “every bit of the immunity that the section otherwise provides.”<sup>135</sup>

Plaintiffs may respond by noting that the “immunity swallowing” impact of this argument assumes that searches are not narrowed through “unlawful criteria.”<sup>136</sup> The argument therefore does not apply to autocomplete cases where plaintiffs are alleging that the searches are in fact narrowed through unlawful criteria with search engines actively suggesting defamatory search

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129. *Zeran v. America Online, Inc.*, 129 F.3d 327, 328–29 (4th Cir. 1997).

130. See RESTATEMENT (SECOND) OF TORTS § 580B cmt. b (1977) (noting that defamatory statements must be published to a third party).

131. *Zeran*, 129 F.3d at 332.

132. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008).

133. See Kulish, *supra* note 3 (discussing the various implications of Google’s autocomplete).

134. *Roommates.com*, 521 F.3d at 1167.

135. *Id.*

136. *Id.*

queries to unsuspecting users.<sup>137</sup> Plaintiffs would agree that a neutral search engine that does not employ this active suggestion would still be entitled to § 230 immunity.

Additionally, plaintiffs could argue that the discussion of search engines in *Roommates.com* cannot be taken to apply to Google and other search engines as they exist today. *Roommates.com* was decided in April 2008.<sup>138</sup> Google's autocomplete function was not introduced on its U.S. homepage until August 2008.<sup>139</sup> The court, in labeling Google as an example of an immune website, could not have taken into account autocomplete results since this feature had not yet been introduced.

### C. *Roommates.com as an Impractical Model for Liability*

Plaintiffs who rely on *Roommates.com* to argue that search engines are liable for their autocomplete features will probably fail because of courts' fact-specific application of the *Roommates.com* test. While some courts have relied on *Roommates.com* to rule that websites are not deserving of CDA immunity,<sup>140</sup> courts have distinguished other websites from the "material contribution" of *Roommates.com*.<sup>141</sup> Furthermore, other courts have cited different provisions of *Roommates.com* to support holdings that other websites are immune under the CDA.<sup>142</sup>

Courts may have trouble determining a bright line that distinguishes "neutrally" displayed search results from autocomplete results. It may be difficult for courts to identify when search engines cross the line and materially contribute to the illegality of content that is entered into them.<sup>143</sup> *Roommates.com* indicates that search engines do not materially contribute to illegality by displaying search results based on the terms entered and the relevance of the results to the search terms.<sup>144</sup> The question becomes more

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137. *Id.* at 1167.

138. *Id.* at 1157.

139. Carlos, *supra* note 29.

140. *See, e.g.*, *FTC v. Accusearch, Ltd.*, 570 F.3d 1187, 1198 (10th Cir. 2009) (stating that CDA immunity is unavailable because the creator of the source of information should be liable). Other courts applied a similar approach before *Roommates.com*. *See* *MCW, Inc. v. Badbusinessbureau.com*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at \*9-10 (N.D. Tex. April 19, 2004) (holding that consumer complaint website's use of headings labeling companies as "Con Artists" and "Corrupt Companies" constituted website contribution and shaping of content); *Carafano v. Metrosplash.com*, 207 F. Supp. 2d 1055, 1066-67 (C.D. Cal. 2002) (stating that a website that provided multiple-choice and essay questions that shaped online content was responsible "in part" for development of content).

141. *See, e.g.*, *Nemet Chevrolet Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009) (holding that defendant website's setup did not require users to input illegal content and that the case was distinguishable from *Roommates.com*).

142. *See, e.g.*, *Asia Econ. Inst. v. Xcentric Ventures, LLC*, No. CV 10-01360 SVW (PJWx), 2011 WL 2469822, at \*6 (C.D. Cal. May 4, 2011) (holding that if a website increases the visibility of content, the website has not independently developed the content for purposes of CDA immunity).

143. *See, e.g.*, *Goddard v. Google*, 640 F. Supp. 2d 1193, 1197-98 (2009) (holding that Google is not liable for false keywords displayed by advertisers to which it links since the tool to display the keywords could be used for proper or improper purposes).

144. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008) (stating that ordinary search engines do not use unlawful criteria to limit the scope of searches conducted and do not achieve illegal ends).

complicated when other features of search engines are considered, such as spelling corrections that search engines may suggest when a user undertakes a search. For example, does a search engine's suggestion, "Bettina Wulff was a prostitute," when displayed in response to the completed, misspelled search, "Bettina Wulff was a prostitute," constitute material contribution to the unlawfulness of third-party searches?<sup>145</sup> If so, it seems that imposing liability based on algorithmic assistance to users of the search engine may have unpleasantly broad implications.

Plaintiffs may try to distinguish search terms suggested upon the completion of a search from suggested autocomplete results. Algorithms in place to correct spelling are more likely to display suggested results to users who are attempting to seek out the information that is displayed in the suggestion.<sup>146</sup>

Although it is impossible to state a user's intent with complete certainty, a user who types "Bettina Wulff was a prostitutet" is probably more likely to be searching for websites and links to content related to the suggested statement, "Bettina Wulff was a prostitute," than a user who simply types in, "Bettina Wulff." Users actively seeking out negative information about a plaintiff likely already hold a negative opinion or have suspicions about the plaintiff, and the search engine displaying the negative search results will not cause any new harm to the plaintiff. Contrast this to the situation of a user simply typing in "Bettina Wulff" who may end up being surprised to see statements about Mrs. Wulff being a prostitute.<sup>147</sup> The user may develop new, negative opinions of Mrs. Wulff, resulting in damage to Mrs. Wulff's reputation.

Another difference between autocomplete suggestions and search results and spelling suggestions for completed searches is that the spelling suggestions require a search to be completed.<sup>148</sup> A user must enter in search terms and hit "Enter" or click on the "search" button in the search engine in order for relevant links and spelling suggestions to be displayed.<sup>149</sup> At this point, the user has entered the search query and expects to receive information relevant to that query. The user who has completed a search is distinct from a user who is simply entering text into a search bar and has not yet hit "Enter" or "search"—the latter user does not yet expect to receive information, making the autocomplete suggestions uniquely surprising to the user. The fact that autocomplete results are displayed to unsuspecting users means that these

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145. An October 30, 2012, Google search of the misspelled text yields results for the suggested search query, "Bettina Wulff was a prostitute." See also *Autocomplete*, *supra* note 14 (explaining how Google's algorithms assist in search spelling through Google autocomplete). This alternate spelling is not automatically suggested, but is instead displayed after a user clicks the "search" button to undertake a search for the terms entered.

146. *Autocomplete*, *supra* note 14; see also David Ward et al., *Autocomplete as Research Tool: A Study on Providing Search Suggestions*, 31 INFO. TECH. & LIBRARIES 6, 10 (2012) (discussing how algorithms that also correct misspelled words by users by presenting correctly spelled results speed up the search process).

147. See Kulish, *supra* note 3 (noting that many Germans were unaware of the Wulff prostitution rumors, at least before Mrs. Wulff's lawsuit).

148. *Autocomplete*, *supra* note 14.

149. For example, as of October 30, 2012, a completed Google search of "Leanred Hand" prompts a list of results for the suggested alternate search query: "Learned Hand."

results are displayed to a wider and less-suspecting audience than results in completed searches. Thus, autocomplete is likely to cause more harm due to the wider audience that is less likely to be negatively inclined towards the defamed individual. The search-in-progress versus completed search distinction may be a bright line that courts can emphasize to prevent the creation of an overly broad rule.

While plaintiffs may argue that this factual distinction creates a bright line, the argument lacks persuasive value because of the arbitrary nature of this distinction. While it may be easier for search engine users to stumble upon defamatory statements in autocomplete situations, defendants will likely argue that this is a difference in degree, not kind, from the algorithms typically employed by search engines. Search engines make it easier to find websites and the statements these websites contain—be it through search algorithms or autocomplete functions.<sup>150</sup> Accordingly, courts may conclude that *Roommates.com*'s “material contribution” approach is dangerously broad.

#### D. *Roommates.com as a Dangerous Model for Liability*

Not only is the “material contribution” test from *Roommates.com* an impractical strategy for defamation plaintiffs, this model would also risk chilling speech if courts adopt it. The majority in *Roommates.com* rejected this contention, arguing that the decision “extensively clarif[ie]d” the scope of CDA immunity.<sup>151</sup> The majority also dismissed the dissent's concern that the decision would chill online speech, arguing that the Internet “has outgrown its swaddling clothes and no longer needs to be so gently coddled.”<sup>152</sup>

*Roommates.com* may be interpreted narrowly by limiting the “material contribution” test to situations where websites require users to enter the unlawful content. This approach is consistent with the majority's claim that it clarifies the standards of CDA immunity.<sup>153</sup> If courts adopt plaintiffs' arguments in autocomplete lawsuits, however, the courts will be required to expand the application of the *Roommates.com* test to a situation where the algorithms of a search engine lead to the dissemination of defamatory information. In contrast to the dropdown format of the *Roommates.com* website that required users to enter information in violation of the FHA,<sup>154</sup> there is an intervening algorithm and the further requirement that users engaged in searches see the defamatory content through the autocomplete feature.<sup>155</sup> This argument might not be hopeless, since some courts have taken a similar, expansive view of the *Roommates.com* test.<sup>156</sup> Expansive

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150. *Autocomplete*, *supra* note 14.

151. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1175 n.39 (9th Cir. 2008).

152. *Id.*

153. *Id.*

154. *Id.* at 1172.

155. *Autocomplete*, *supra* note 14.

156. See *Fraleigh v. Facebook, Inc.*, 830 F. Supp. 2d 785, 802–03 (N.D. Cal. 2011) (holding that rearrangement of text provided by users combined with grouping of the content with third-party logos could make Facebook a “content provider” and therefore not subject to CDA immunity).

manipulation of the “material contribution” terminology can lead courts to expand the test beyond the established limits, thereby reducing the scope of CDA immunity.

Once this reduction of immunity occurs, there is a danger that search engines may be chilled from including potentially controversial content in autocomplete results. This result could have a detrimental impact on the speech interests of search engines.<sup>157</sup> Additionally, users who rely on the search engines could be inconvenienced: users who search may be unable to locate relevant websites and users with websites may not be located by search engines if the search engine determines that their websites are controversial.<sup>158</sup> Burdens on users that result from heightened restrictions exercised by search engines are especially problematic because search engines are private actors and therefore not restricted by the First Amendment. Because of these concerns, it is important that courts adopt an approach to autocomplete liability that is unlikely to significantly reduce the scope of CDA immunity.

#### V. BATZEL’S “PROVIDED” ANALYSIS APPLIED TO SEARCH ENGINE USERS

Plaintiffs seeking to file defamation claims against search engines based on searches suggested by autocomplete features may find an independent avenue around § 230 that does not rely on the *Roommates.com* “material contribution” language. This avenue originates in *Batzel v. Smith*,<sup>159</sup> a case that some commentators view as espousing a broad approach to § 230 immunity.<sup>160</sup> In fact, *Batzel* represents “one of the first deviations from the strict immunization usually provided under section 230.”<sup>161</sup> *Batzel* is especially relevant in the modern context of autocomplete searches.

##### A. *Batzel*: The “Provided” Requirement for § 230 Immunity

In *Batzel*, one of the defendants, Robert Smith, was working as a handyman in the home of the plaintiff, Ellen Batzel.<sup>162</sup> Based on several conversations Smith overheard and based on artwork Smith observed in Batzel’s home, Smith came to believe that Batzel was descended from Heinrich Himmler and that she was in the possession of artwork that had been

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157. Regarding the speech interests of search engines, see generally EUGENE VOLOKH & DONALD M. FALK, FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE SEARCH RESULTS (2012), available at <http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf>, for a discussion of how search engines’ search results are protected by the First Amendment.

158. See Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 273–74 (2005) (discussing heightened costs to others when online intermediaries are burdened).

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

160. See Michael Burke, Note, *Cracks in the Armor?: The Future of the Communications Decency Act and Potential Challenges to the Protections of Section 230 to Gossip Web Sites*, 17 B. U. J. SCI. & TECH. L. 232, 245–46 (2011).

161. Colby Ferris, Comment, *Communication Indecency: Why the Communications Decency Act, and the Judicial Interpretation of It, Has Led to a Lawless Internet in the Area of Defamation*, 14 BARRY L. REV. 123, 133 (2010).

162. *Batzel*, 333 F.3d at 1020.

looted by the Nazis.<sup>163</sup> Smith communicated this concern to the Museum Security Network by sending an email to the Network.<sup>164</sup> Ton Cremers, the operator of the Network, received Smith's email and published the message to the Network's listserv and website with some minor changes.<sup>165</sup> The listserv was sent to "hundreds of museum security officials, insurance investigators, and law enforcement personnel."<sup>166</sup>

Smith later emailed a subscriber to the listserv voicing his confusion about his email's distribution and writing that he had "no idea that his email would be posted to the listserv or put on the web."<sup>167</sup> Cremers learned of Smith's confusion and apologized.<sup>168</sup> As these interactions were taking place, Batzel discovered Smith's posted message and filed a defamation lawsuit against Smith and Cremers.<sup>169</sup> Cremers responded with a motion to strike under the California anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, which the lower court denied and which Cremers appealed.<sup>170</sup>

In evaluating Batzel's probability of success pursuant to her resistance of the anti-SLAPP motion, the Ninth Circuit applied the *Zeran* analysis in determining whether Cremers was immunized from liability under § 230.<sup>171</sup> The court noted that § 230 limits the immunity of interactive computer services to information "provided" by another information content provider.<sup>172</sup> The court concluded that Cremers's website and listserv fell under § 230's definition of "interactive computer service" as Cremers was a user of such a service.<sup>173</sup> The court also concluded that Cremers did not independently develop Smith's email, despite Cremers's minor revisions and act of sending the email out on a listserv.<sup>174</sup>

While these conclusions would typically result in the conclusion that Cremers had § 230 immunity, this case presented the "twist" of whether Smith "provided" his email to Cremers.<sup>175</sup> The court noted that § 230 immunity "applies only with regard to third-party information provided *for use on the Internet* or another interactive computer service."<sup>176</sup> The court ultimately held that:

[A] service provider or user is immune from liability under § 230(c)(1) when a third person or entity that created or developed the information in question furnished it to the provider or user under

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163. *Id.* at 1021.

164. *Id.*

165. *Id.* at 1021–22.

166. *Id.*

167. *Id.* at 1022.

168. *Id.*

169. *Id.*

170. *Id.* at 1023.

171. *Id.* at 1026–29, 1031.

172. *Id.* at 1031 (quoting 47 U.S.C. §230(c) (2006)).

173. *Id.* at 1030 (quoting 47 U.S.C. §230(c)(1) (2006)).

174. *Id.* at 1031.

175. *Id.* at 1032.

176. *Id.* at 1033.

circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other “interactive computer service.”<sup>177</sup>

The court vacated the district court’s order denying the anti-SLAPP motion and remanded the case to determine whether Cremers’s situation called for § 230 immunity under this standard.<sup>178</sup> The court noted that if Cremers should have reasonably concluded that Smith’s email was not provided for possible posting on the listserv, Cremers would not be able to take advantage of § 230 immunity.<sup>179</sup>

### B. Applying *Batzel* to Autocomplete Defamation

Plaintiffs filing defamation claims based on statements in search engine autocomplete suggestions can argue that *Batzel*’s analysis of the “provided” requirement for § 230 immunity prevents search engines from claiming immunity.<sup>180</sup> Plaintiffs may argue that a reasonable person in the place of the search engine cannot reasonably conclude that the information entered by users of that search engine is provided for publication on the Internet.<sup>181</sup> Search engine users do not enter information to express themselves or to communicate with others; the statements users enter in search engines are entered for the users’ purpose of locating relevant links. Google’s statements about its autocomplete illustrate this reality; rather than promoting autocomplete as a mode of expression, Google promotes its autocomplete function by stating that it makes searches faster, more accurate, repeatable, and useful for users.<sup>182</sup>

Plaintiffs can argue that because Google cannot reasonably conclude that users expect their search terms to be posted online, Google cannot avail itself of § 230 immunity by arguing that autocomplete results are based on third-party searches.<sup>183</sup> While autocomplete results may originate in what third parties type into the search engine, the content of searches is not “provided” by users of the engines for publication on the Internet and therefore is not “provided” under the meaning of § 230.<sup>184</sup>

Search engines may respond by arguing that it is reasonable for search engines to conclude that users of search engines are providing information to the search engine for publication on the Internet.<sup>185</sup> Search engines may argue that users have access to information on how autocomplete results are

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177. *Id.* at 1034.

178. *Id.* at 1035.

179. *Id.*

180. *See id.* at 1033 (distinguishing between information provided by the author with the intent that it be made viewable on the Internet and information that the author did not intend to be made viewable).

181. *See id.* at 1034 (explaining that service provider or user must reasonably perceive that information provided was intended to be published to have immunity).

182. *Autocomplete*, *supra* note 14.

183. *See, e.g., Batzel*, 333 F.3d at 1034 (stating that § 230 immunity requires a reasonable conclusion that information was meant for posting).

184. *See id.* at 1032–33 (defining “provided” information under § 230).

185. *See id.* at 1034–35 (discussing difficulties in determining reasonable perceptions).

generated and are therefore aware that users' searches may be compiled to form suggested results.<sup>186</sup> Information on the algorithmic basis of autocomplete results is available both on search engines' websites<sup>187</sup> and in news articles about search engines.<sup>188</sup>

Plaintiffs may initially respond by noting that the search engine's argument assumes a level of technological understanding that many users of the search engine may not have. Users may not take the time to research how the search engine functions, and users may not be exposed to news containing information about autocomplete algorithms. However, this argument is weak without further empirical support, because it relies on broad assumptions about the demographics and knowledge level of search engine users.

Plaintiffs' stronger reply to the search engines' argument is that there is an extremely low probability that a user's search query will have any impact on the results prompted by the search engine's autocomplete function. Search engine algorithms rank the most commonly searched phrases more highly in their autocomplete results.<sup>189</sup> Since millions of people are online and since search engines like Google reach billions of websites, individual users of search engines have a miniscule impact on the information ultimately displayed on autocomplete search results.<sup>190</sup> Individuals who know how search engine algorithms function should be aware that there is a very low probability that their searches will be published to other users. It is therefore reasonable for search engines to conclude that users do not expect their search queries to be published online.<sup>191</sup>

### C. *The Argument from Batzel is Relevant Beyond the Ninth Circuit*

A broader objection to the *Batzel* approach is that this approach is limited to the Ninth Circuit and therefore is not of wide significance to litigants across the nation. While *Batzel* may be controlling authority in the Ninth Circuit, it is only persuasive authority for courts in other circuits. Moreover, the Ninth Circuit is the most reversed circuit in the country, which may diminish the persuasive value of its cases.<sup>192</sup>

While it is correct that the Ninth Circuit, through *Batzel*, is the only circuit court that has advanced the expectation of publication "provides"

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186. *Autocomplete*, *supra* note 14.

187. *Id.*

188. *E.g.*, Kulish, *supra* note 3; Gaylord, *supra* note 7.

189. Gaylord, *supra* note 7.

190. *See* Rustad & D'Angelo, *supra* note 16, ¶¶ 11–12. (discussing Google's popularity worldwide).

191. This argument would also apply to claims that users should expect their queries to be read by law enforcement officers. *See* Werner, *supra* note 125. The likelihood that officers will access any given search query is low given the sheer number of search queries. *See* *Google Annual Search Statistics*, *supra* note 44. Moreover, because officers access search query information by subpoenaing search engines rather than viewing the information online, it would strain *Batzel's* requirement that information be provided "for publication on the internet." *Batzel v. Smith*, 333 F.3d 1018, 1034 (9th Cir. 2003).

192. *See* Kevin M. Scott, *Supreme Court Reversals of the Ninth Circuit*, 48 ARIZ. L. REV. 341, 341–43 (2006) (noting the high reversal rate of the Ninth Circuit and that this reversal rate is significant despite the Ninth Circuit's size and caseload).

analysis, this treatment of “provides” has not been challenged by courts in any other circuit.<sup>193</sup> Furthermore, other provisions of *Batzel* have been cited favorably by multiple circuits, including the First,<sup>194</sup> Fifth,<sup>195</sup> and Eighth<sup>196</sup> Circuits.

Additionally, *Batzel*’s “provides” analysis remains unchallenged in the Ninth Circuit. *Global Royalties, Ltd. v. Xcentric Ventures, LLC*<sup>197</sup> and *Perfect 10, Inc. v. CCBill, LLC*<sup>198</sup> appear to be the only other federal opinions that mention *Batzel*’s “provides” analysis. While both cases conclude that CDA immunity applies, both cases reach this conclusion, in part, by determining that the published information was provided with an intention that the information be published on the Internet.<sup>199</sup> Even though the results in these cases differ from *Batzel*’s procedural posture, the courts reached their decisions by applying *Batzel*’s test. It appears that no other federal court has dealt with a similar scenario of a website publishing material that the provider of the material did not expect to be published online.

The only other case outside of the Ninth Circuit that appears to deal with a similar situation is *Brandewyne v. Arthur Solutions Inc.*<sup>200</sup> In this case, a Kansas state trial court applied *Batzel* to conclude that the authors of an allegedly defamatory book were not Internet content providers simply because their book could be bought over the Internet.<sup>201</sup> Applying *Batzel*’s “provides” analysis, the court denied the defendants’ motion for summary judgment and held that § 230 immunity required the intention by the defendants that the allegedly defamatory statements would be published on the Internet.<sup>202</sup>

While *Brandewyne* is a state court trial order, it remains the only situation outside of the Ninth Circuit that involves any apparent dispute over whether the party making the statement intended for the statement to be published online. In resolving the dispute, the court concluded that for § 230 immunity to apply the intention to publish online needed to be present, and the failure to show this intention precluded the § 230 immunity defense.

While the precedent this Essay draws upon originates primarily in the Ninth Circuit, the reason for this approach is not because of disagreement

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193. While *Batzel* has been cited and disputed by other circuit opinions, the disputes are limited to aspects of *Batzel* other than the “provides” analysis. See, e.g., Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669–70 (7th Cir. 2008) (challenging *Batzel*’s treatment of the CDA as granting immunity to online content hosts).

194. See *Godin v. Schencks*, 629 F.3d 79, 85 (1st Cir. 2010) (noting *Batzel*’s importance in articulating that lawmakers wanted to protect speakers from the trial itself rather than merely from liability).

195. See *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 175 (5th Cir. 2009) (noting that a state statute, similar to that addressed in *Batzel*, is distinct from the underlying suit).

196. See *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (citing *Batzel* in support of its decision to determine that defendant is not a “publisher or speaker” and, thus, cannot be held liable).

197. *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 931–32 (D. Ariz. 2008).

198. *Perfect 10, Inc. v. CCBill, LLC*, 340 F. Supp. 2d 1077, 1110–11 (C.D. Cal. 2004), *rev’d in part on unrelated grounds*, 488 F.3d 1102 (9th Cir. 2007).

199. *Global Royalties*, 544 F. Supp. 2d at 931; *Perfect 10*, 340 F. Supp. 2d at 1110–11.

200. *Brandewyne v. Arthur Solutions Inc.*, No. 2004-CV-4363-TT, 2006 WL 4005011, at \*1 (Kan. Dist. Ct. Jan. 31, 2006).

201. *Id.* at \*11.

202. *Id.*

elsewhere but because of a lack of cases that raise similar issues. While Ninth Circuit precedent may not be controlling in other circuits, *Batzel*'s analysis of "provided" appears to be the only existing case authority on how to interpret this term in situations where a statement is made without intent for publication on the Internet. This may not remain the case for long, as one of the goals of this Essay has been to show that the potential for additional cases on this issue may be far greater than the existing case law suggests.

## VI. CONCLUSION

Liability for autocomplete search results is a realm of defamation that has gone unexplored in the courts and commentary on § 230 immunity.<sup>203</sup> While Mrs. Wulff's lawsuit may be novel, it seems that her claim would overcome a defense of § 230 immunity in the United States.

While cases have not yet dealt with the autocomplete phenomenon in the defamation context, cases dealing with other online content have created a legal environment where § 230 immunity is notably limited for autocomplete scenarios. While courts often warn against the danger of litigation chilling speech by creating overly-cautious websites and ISPs,<sup>204</sup> the remedy of simply removing the autocomplete display function in response to a narrow argument from *Batzel* may avoid the flood of litigation and chilling effect that typically worry the courts.

Bettina Wulff's litigation has gained international attention due to its scandalous subject matter and her high profile in German politics and society.<sup>205</sup> Individuals in the United States may be prompted to bring similar litigation in light of this news, and American courts may soon face the prospect of applying the CDA and cases that interpret it to this novel scenario. If litigants in the United States choose to sue search engines for defamation claims arising out of autocomplete suggestions, these claims may be stronger than search engines anticipate.

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203. As of September 12, 2013, a Westlaw Citing References search of court cases and law review articles citing *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) and *Fair Housing Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) with the text limit "autocomplete" yields zero results.

204. See, e.g., *Zeran*, 129 F.3d at 333 (expressing discomfort at the prospect of websites automatically removing content upon receiving a complaint).

205. See Kulish, *supra* note 3.