When Retweets Attack: Are Twitter users liable for republishing the defamatory tweets of others?

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WHEN RETWEETS ATTACK:

ARE TWITTER USERS LIABLE FOR REPUBLISHING

THE DEFAMATORY TWEETS OF OTHERS?

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ABSTRACT

Under the republication doctrine, repeating false and defamatory statements has traditionally triggered liability for the repeater. However, some confusion has emerged regarding retweeting the posts of others on Twitter, the popular microblog site. Does retweeting the defamatory statement of another open the retweeter to liability? This article examines exceptions to the republication doctrine such as the single publication rule, the wire service defense, and the Communications Decency Act (CDA) to answer this question. A review of court opinions leads to the conclusion that Section 230 of the CDA provides a powerful shield for users of interactive computer services such as Twitter.
INTRODUCTION

If Gil Gamesh, the baseball phenom of the 1930s who dominated the major leagues as a 19-year-old pitcher, were alive today, his story may have been different. He would have been scrutinized by scouts, reporters, fans, teammates, opponents, and even his friends on vastly different media than the newspapers and radio available during his fictional life.

So picture, if you will, a so-called friend of Gamesh’s posting the following on his Twitter account, @GilBuddy: “Talked to @Gil_95 today, he said steroids and meth are his best friends.” Gamesh, the owner of the @Gil_95 account, said no such thing, but his “friend” is out to cause some trouble. A few of their friends retweet @GilBuddy’s post – that is, they circulate it among their followers. But this is of little consequence; in the closed group of friends, only a few dozen followers read the tweet. Then, local sportswriter Word Smith, @CallMeSmitty, sees it and retweets it as well, this time to his 4,000 followers.

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1 With apologies to Philip Roth, who chronicled the rise and fall of Gil Gamesh in his satirical account. See PHILIP ROTH, THE GREAT AMERICAN NOVEL (1973). In the novel, Gamesh is banned for life from baseball after hitting an umpire in the neck with a pitch in response to a call that ruined Gamesh’s perfectly perfect game, in which he had struck out 26 batters on 78 pitches; Gamesh had thrown two strikes to the final batter of the game before the umpire called a ball on the 81st pitch.

2 According to Twitter, “A Retweet is a reposting of someone else’s Tweet. Twitter’s Retweet feature helps you and others quickly share that Tweet with all of your followers.” Twitter, FAQs about Retweets (RT), https://support.twitter.com/articles/77606 (last accessed March 29, 2012).
BaseballProspectus.com scouting writer Kevin Goldstein, @Kevin_Goldstein, quotes the tweet to his 20,000 followers this way: “Gamesh isn’t top pick now, teams afraid. RT @GilBuddy: Talked to @Gil_95 today, he said steroids and meth are his best friends.” By this point, the news is starting to go viral. Ultimately, ESPN, the sports news giant, retweets Goldstein’s tweet to its more than 3 million followers on @espn, then adds its own comment: Friend of prep star Gamesh says he’s juicing. RT @GilBuddy: Talked to @Gil_95 today, he said steroids and meth are his best friends.

In a matter of hours, the false rumor of Gamesh’s illegal drug use has become a national news story, viewed by millions of readers. His draft stock is plummeting, likely to cost him millions in his first contract. His reputation has been harmed, and the best legal recourse he has is a libel lawsuit against those who published the defamatory statements.

But who counts as a “publisher” that Gamesh could hold liable for this defamatory chain of events? The purpose of this article is to examine libel liability for those who share and forward information on interactive computer services such as Twitter. This study begins with a brief review of Twitter and libel lawsuits that have arisen in connection with its use. Next, the author examines the republication rule, which typically holds republishers responsible for repeating the libels of others, as well as modifications including the single
publication rule and the wire service defense. This is followed by an examination of immunity for republication on interactive computer services provided by Section 230 of the Communications Decency Act of 1996. The article concludes with a discussion of the policy consequences of such immunity, the culture of Twitter, and the practical application of this analysis for Twitter users.

“TWIBEL”

There can be no question that tweets can be the subject of libel lawsuits. While no “Twibel” cases have made it to trial to date, several have settled in advance. The first high-profile case in the United States involved musician and actress Courtney Love, who unleashed a tirade against a fashion designer on Twitter and MySpace containing phrases such as “nasty lying hosebag thief.” Love paid $430,000 to settle a libel action by the designer.3

More recently, Associated Press sportswriter Jon Krawczynski was covering a game between the Minnesota Timberwolves and the Houston Rockets on Jan. 24, 2011, he thought he overheard a comment between NBA referee Bill Spooner and Minnesota coach Kurt Rambis following a mildly controversial foul call.

3 Anthony McCartney, $430k Love settlement shows tweets can be costly. ASSOCIATED PRESS, March 5, 2011.
Krawczynski, writing from his Twitter account @APKrawczynski, posted the following: “Ref Bill Spooner told Rambis he’d “get it back” after a bad call. Then he made an even worse call on Rockets. That’s NBA officiating folks.”

The “tweet” – the term used for entries of up to 140 characters that are circulated via the immensely popular microblog site – led to problems for Krawczynski. It immediately went out to his more than 2,000 followers, and was “retweeted” at least 14 times. The referee denied making the statement and took umbrage at the suggestion that he had violated the league’s ethical standards. Spooner filed suit in the federal district court in Minnesota against Krawczynski and the Associated Press, seeking at least $75,000 in damages. The parties settled, with the AP paying $20,000 and Krawczynski agreeing to delete the offending tweet from his account.

While the retweeters of the Krawczynski statement were not included in the lawsuit, there is some debate among Twitter users, lawyers, and professional groups about whether they may be liable for retweeting defamatory statements.

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Lawyers blogging about the Spooner/Krawczynski case said “the 14 people that retweeted the defamatory statement may have also committed Libel due to their republication of the same information.” Other lawyers have found the terrain to be unsettled, awaiting a ruling that would clarify liability for retweets. One journalism organization commented that the Communications Decency Act “protects retweets” by news publishers but could trigger liability if tweets are altered or if more defamatory statements are added. Another suggested that retweets may enhance the liability of the original publisher but made no comment about whether the retweet itself could lead to liability.

This confusion over the status of retweets likely stems from the common law of libel, which, long before the creation of the Internet, stood for the proposition that a person that repeats a libel is a publisher who is just as responsible for the damage, if not moreso, than the original publisher.

THE REPUBLICATION DOCTRINE

One of the elements a plaintiff is required to prove in a libel lawsuit is publication – that is, that the defamatory statement was communicated to a third person who was not the defamed.\(^\text{11}\) Publication is typically easy to prove in a libel action; any form of publication, whether written in print or on the Internet qualifies as publication for libel purposes.\(^\text{12}\)

The British common law, however, extended liability to those who repeated the libelous publications of others through the republication doctrine, which rests on the proposition that “any person who takes part in making the defamatory matter known to another may also be liable.”\(^\text{13}\) This rule became standard in American defamation law, as noted in late-nineteenth-century treatise on libel by Newell, who noted that “Tale-barers are as bad as tale-makers”:

A man cannot say there is a story in circulation that A. poisoned his wife

or B. picked C.’s pocket in the omnibus, or that D. has committed

\(^{11}\) *See* 50 AM. JUR. 2D LIBEL AND SLANDER §220 (West 2012); Peter F. Carter-Ruck, Libel and Slander 76-77 (1973); Prosser on Torts §93 810-811 (1941).


adultery, and relate the story, and when called upon to answer, say:

“There was such a story in circulation; I but repeated what I heard, and had no design to circulate it or confirm it;” and for two very plain reasons: (1) The repetition of the story must in the nature of things give it currency; and (2) the repetition without the expression of disbelief will confirm it.

The danger – an obvious one – is that bad men may give currency to slanderous reports, and then find in that currency their own protection from the just consequences of a repetition. 14

As an example, Newell mentioned an 1855 Massachusetts Supreme Court decision on slander, *Kenney v. McLaughlin*, in which the court stated that repeat publishers do so at their own risk, because for a person who repeats a defamatory statement, “He who gives it circulation gives it power of mischief. It is the successive repetitions that do the work. A falsehood often repeated gets to be believed.” 15

The policy underlying this approach is clear: Repeating the defamatory statements of another should not shield the repeater from liability because of the

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14 **MARTIN L. NEWELL, THE LAW OF LIBEL AND SLANDER IN CIVIL AND CRIMINAL CASES** 350-351 (1898).

15 *Kenney v. McLaughlin*, 71 Mass. 3, 5 (1855). The case involved Ms. McLaughlin’s repeat of a rumor that Ms. Kenney was a mistress of a Mr. Moran; Ms. Kenney received $7.29 in damages at trial.
potential for additional harm caused by the circulation of the statement, which may itself enhance the believability of the statement merely by being repeated enough times. As Prosser noted in his treatise on torts in 1941, “the courts have said many times that the last utterance may do no less harm than the first, and that the wrong of another cannot serve as an excuse to the defendant,” noting that at the time, this liability extended to press owners, editors, printers, vendors and carriers of newspapers.\textsuperscript{16}

However, this extension of the republication doctrine – known as the “multiple publication rule” – threatened to become a huge burden on the American publishing industry in the mid-twentieth century.\textsuperscript{17} Those who played a “secondary part in disseminating defamation” such as libraries, news vendors, booksellers, and other distributors, were only able to claim immunity when they could prove that they had no reason to believe the publications were libelous.\textsuperscript{18}

In response, courts and legislatures in several states developed another exception to the multiple publication rule that prevented the original publishers and

\textsuperscript{16} WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 813 (1941).


\textsuperscript{18} Prosser, supra note 16 at 820.
distributors from facing a wave of litigation without end. For example, the Alabama Supreme Court struck down efforts by a libel plaintiff to sue a newspaper publisher in nine different Alabama counties based on circulation of the newspaper to each of these counties, holding that the only proper forum is the county in which the newspaper was originally published, “not in other places where it is secondarily published, that is merely circulated.” Similarly, a New York court of appeals held that a library distributing a newspaper containing a defamatory article was not acting as a republisher when it allowed visitors to browse the archived newspapers, thus tolling the statute of limitations. In 1952, the National Conference of Commissioners on Uniform State Laws followed these principles limiting distributor liability by drafting the Uniform Single Publication Act. This model law largely mirrors the Second Restatement of Torts Section 577A, which provides, “any one edition of a book or newspaper, or any one radio or television broadcast, exhibition or a motion picture or similar aggregate communication is a single publication,” and thus can be the subject of just one lawsuit, with the statute of limitations on such actions beginning at the

date of the original publication, regardless of when the plaintiff discovered the publication.\(^{23}\) Most states have adopted this or a similar version of the “single publication rule,” either through legislation or court ruling.\(^{24}\) The U.S. Supreme Court has noted that the rule provides “a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding” while also protecting publishers “from harassment resulting from multiple suits.”\(^{25}\)

The policy underlying the single publication rule is evident in the “wire service defense,” which news publishers in some jurisdictions may claim to avoid liability for defamatory statements included in news stories they republish from a service such as the Associated Press. In one famed example, noted Western sharpshooter and performer Annie Oakley brought more than 50 lawsuits over several years against newspapers in connection with a single Associated Press article accusing her of stealing a man’s trousers in Chicago to help her buy cocaine.\(^{26}\) She was wrongly identified; the actual defendant in the cases was a Chicago woman named Any O’Klay. Oakley won all but two of the lawsuits, with awards of tens of thousands of dollars in damages.\(^{27}\) Some courts,

\(^{23}\) Restatement (2d) of Torts, Single and Multiple Publications 577A (1977).

\(^{24}\) Kumar, \textit{supra} note 17 at 642-643.


pushed back at this string of lawsuits. In 1905, the Virginia Supreme Court found that this very clearly libelous story had been “frequently published in a series of reputable newspapers” in such a way that it negated any finding of actual malice, which the state required Oakley to prove to win her libel case. The idea that republication of the news story of another publisher without knowledge of falsity or any other careless, reckless, or wanton behavior by the repeater later became recognized as the basis of the wire service defense, which typically shields news publishers of stories from wire services from libel liability unless there are obvious inconsistencies in the story or if the news organization had reason to know the story was inaccurate.

The wire service defense was more formally recognized in 1933, and today, about half of U.S. states recognize it in libel cases. As such, the defense does not provide an absolute shield for republishers, nor would it neatly fit to Twitter users that repeat the tweets of other users, particularly those that are not publishing in a news capacity. The policy underlying this defense – that distributors of news articles should not be liable for the content provided by third parties unless they know it to be false or otherwise exercise editorial control.

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28 Butler, 51 S.E. at 215.


over the story – instead is representative of how the classic republication rules have been applied to Internet publications.

The single publication rule was being adapted by courts to the challenges of new publishing technologies before Congress enacted the Communications Decency Act of 1996, discussed infra, that rendered many of the rulings about the single publication rule moot. However, because the Communications Decency Act may not resolve all matters regarding the retweet-as-republication dilemma, a brief discussion of the single publication rule in context of Internet publication is warranted here.

In 1991, the federal court for the Southern District of New York ruled that CompuServe, an Internet database and library, was not responsible for defamatory statements made on the “Rumorville” forum by users of the service.31 The court reasoned that CompuServe was “the functional equivalent of a traditional news vendor” that should be held to the same standard as a “public library, bookstore, or newsstand,” and as a distributor that had no reason to know that the forum contained defamatory statements, CompuServe could not be liable for republishing defamatory statements.32 Contrarily, a New York state court found that Prodigy, another interactive computer service, acted as a

32 Id. at 140-141.
publisher rather than a distributor when it went beyond being a “passive conduit” for communication by making the “conscious choice” to engage in editorial control of content on its bulletin boards through software that screened the bulletin boards and board community leaders.\(^{33}\) For defendants that fall outside of the immunity protection of the Communications Decency Act, acting as a distributor rather than as a publisher may provide a shield against libel actions, as a federal district court in California noted in 2002.\(^{34}\) The distinction is, of course, the level of control – the passive conduit online is merely a distributor and not subject to liability as a republisher, while any exercise of editorial control would open up the online service provider to being held responsible as a publisher.

As such, the single publication rule applies to damages stemming from the original publication – the printing of a book or newspaper, the airing of a broadcast – while immunizing distributors from liability. In the Internet era, the primary focus of the single publication rule appears to be procedural, applying


\(^{34}\) Nevertheless, the district court held that the website, Matchmaker.com, acted as a publisher because it was more than a “passive conduit” by providing “tailored membership questionnaires” that prompted users to create potentially defamatory profiles. Carafano v. Metrosplash.com, 207 F. Supp. 2d 1055, 1073-1074 (C.D. Cal. 2002). This decision was affirmed on appeal, but the Ninth Circuit did not address this reasoning because it found that the Communications Decency Act disposed of the issue. See Carafano v. Metrosplash.com, 330 F.3d 1119 (9th Cir. 2003).
to statute of limitations issues arising for online publication. Courts have uniformly ruled against the proposition that online publication is continuous publication that indefinitely tolls the statute of limitations.\textsuperscript{35} For example, the New York Supreme Court ruled in 2002 that the publication of a defamatory statement by the state on a website in 1996 was no longer actionable when the plaintiff filed suit in 1998, after the one-year statute of limitations had passed.\textsuperscript{36} The state’s single publication rule barred the action against the original publisher. However, the court did not rule on whether the single publication rule would bar action of the same material by a repeat publisher. In fact, the court suggested that libel may still be actionable if there were “a separate aggregate publication from the original, on a different occasion,” which is not merely delayed but instead “is intended to and actually reaches a new audience.”\textsuperscript{37} One commentator, while suggesting that the single publication rule be applied to websites as it has been traditionally to print publication, agreed that courts would need to more clearly define republication, “limiting that definition to the reprinting of a modified version of the defamatory statement or article at issue.”\textsuperscript{38}

\textsuperscript{35} See Wood, supra note 17.

\textsuperscript{36} Firth v. New York, 775 N.E.2d 463, 466 (N.Y. 2002).

\textsuperscript{37} Id. at 466.

\textsuperscript{38} Wood, supra note 17 at 915.
In the Internet era, the coverage of the single publication rule clearly only protects original publishers and passive distributors, not those who make a conscious choice to spread potentially defamatory information. As such, when the libel of one publisher is republished – or retweeted – by another publisher, it is unlikely that the single publication rule would serve as an adequate shield for the republisher. Twitter itself would certainly be treated as a distributor, rather than a publisher, because it does not exercise editorial control over its users; as Twitter notes in its Terms of Service, content is the responsibility of its creator, and that Twitter “may not monitor or control the Content posted via the Services and, we cannot take responsibility for such Content.” But Twitter users who retweet the content of others are making a conscious choice to repeat this content, making them appear to be more classic republishers than distributors.

However, another level of immunity for Internet publishers and republishers is available, triggered in part by issues of distributor liability addressed in the aforementioned cases involving computer services such as CompuServe and Prodigy, which were growing concerned about their exposure

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to lawsuits.\textsuperscript{40} The Communications Decency Act of 1996 may provide a more robust shield for some, if not all, republication via Twitter.

**THE COMMUNICATIONS DECENCY ACT**

The Communications Decency Act (CDA) was an effort by Congress to address confusion about the responsibility of computer services for defamatory, pornographic, and other potentially harmful postings by Internet users. The law, which went into effect in 1996, rested on findings that the Internet offers “users a great degree of control over the information that they receive”\textsuperscript{41} and was intended “to promote the continued development of the Internet and other interactive computer services”\textsuperscript{42} while also preserving “the vibrant and competitive free market that presently exists for the Internet” without need for further government interference.\textsuperscript{43}

Of primary interest for this article is the CDA’s safe harbor for internet service providers and users, contained in one seemingly simple sentence in Section 230 of the act: “No provider or user of an interactive computer service


\textsuperscript{41} 47 U.S.C.S. § 230(a)(2) (LexisNexis 2012)

\textsuperscript{42} 47 U.S.C.S. § 230(b)(1)

\textsuperscript{43} 47 U.S.C.S. § 230(b)(2)
shall be treated as the publisher or speaker of any information provided by another information content provider.” 44

Ardia, in his comprehensive review of the history, intent and subsequent application of the Section 230 in 2010, commented that this one sentence “upended a set of principles enshrined in common law doctrines that had developed over decades, if not centuries,” in cases involving intermediaries such as publishers and distributors. 45 The CDA essentially removed the distinction between publishers and distributors, providing safe harbor for both from defamation and other claims. As long as defendants qualify as a “user or provider” of an “interactive computer service,” 46 they are not responsible for hosting or republishing third-party content created by an “information content provider.” 47

This has proven to provide almost blanket immunity for Internet service providers, search engines, social networking sites, discussion forum hosts, and

44 47 U.S.C.S. § 230(c)(1)
45 Ardia, supra note 40 at 411.
46 Defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” 47 U.S.C.S. § 230(f)(2)
47 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.” 47 U.S.C.S. § 230(f)(3)
others that allow users to post content online. Courts have applied CDA immunity from liability for defamatory republication, for example, to the carousing blogger Tucker Max for negative reviews of a party thrown by a blueberry heir that were posted in the comments section of his blog;\(^48\) to online service provider America Online for hosting a chat room that included comments suggesting that an attorney was homosexual;\(^49\) to online dating site Matchmaker.com for hosting an actress’ profile that included offensive, sexually explicit details posted by a harasser;\(^50\) to Craigslist, an online classified ad site, that hosted users’ offers of homes for rent that violated Fair Housing Act anti-discrimination standards.\(^51\) In each of these cases, the libel defendant was found to be a “provider” of an “interactive computer service” and thus immune from liability for the acts of users.

In his empirical review of cases in which Section 230 of the CDA was applied, Ardia found that judges “overwhelmingly found that the defendant qualified under this prong,” with just 3 instances in 96 cases suggesting that the defendant was not shielded by the CDA.\(^52\) In such cases, defendants exerted

\(^{48}\) Dimeo v. Max, 248 Fed. Appx. 280 (3rd Cir. 2007)
\(^{49}\) Green v. America Online, 318 F.3d 465 (3rd Cir. 2003)
\(^{50}\) Carafano v. MetroSplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003)
\(^{51}\) Chi. Lawyers Comm. for Civ. Rights Under the Law v. Craigslist, 519 F.3d 666 (7th Cir. 2008)
\(^{52}\) Ardia, supra note 40 at 448-449.
When Retweets Attack

additional controls over user posts that led courts to find them to be engaged in
“partial creation” or “development” of content, thus making them an
“information content provider” and outside the scope of Section 230 immunity.\(^5^3\)

For example, the U.S. Court of Appeals for the Ninth Circuit found that
Roommate.com “developed” content by eliciting comments from users that were
unlawfully discriminatory under the Fair Housing Act, meaning Section 230 did
not shield the site from liability.\(^5^4\) The court reasoned:

If such questions are unlawful when posed face-to-face or by telephone,
they don’t magically become lawful when asked electronically online. The
Communications Decency Act was not meant to create a lawless no-
man’s-land on the Internet.\(^5^5\)

This contrasted with the Seventh Circuit’s holding, discussed above, that
Craigslist was protected under Section 230 from hosting ads that violated FHA
anti-discrimination provisions; however, Craigslist only served as a host or

\(^5^3\) See Brian J. McBrearty, *Case Note and Comment: Who’s Responsible? Website Immunity Under the
Communications Decency Act and the Partial Creation or Development of Online Content*, 82 TEMP. L.
REV. 827 (2009).

\(^5^4\) *Fair Housing Council of San Fernando Valley v. Roommate.com*, 521 F.3d 1157 (9th Cir. 2007).
Ultimately, after remand and another appeal, the Ninth Circuit found that regardless of its status
under Section 230, Roommate.com had not, in fact, violated the Fair Housing Act. *Fair Housing
Council of San Fernando Valley v. Roommate.com*, 666 F.3d 1216 (9th Cir. 2012).

\(^5^5\) Id. at 1164.
forum and did not exert the same level of control through drop-down menus and other options that Roommate.com offered.\textsuperscript{56}

The aforementioned cases all involve defendants that were websites or services acting as “providers” of interactive computer services – America Online, Matchmaker.com, Craigslist, Tucker Max’s blog. But Section 230 also extends immunity to “users” of such services that report content created by others, even if caselaw on users is less developed. In almost all of cases triggering a claim of immunity under Section 230 of the CDA, the defendant was found to be a “provider” of an interactive computer service, rather than a “user.” In his empirical study, Ardia found 147 cases in which the defendant claimed to be a provider or user of an interactive computer service. In just 10 of those cases was the defendant found specifically to qualify as a “user.”\textsuperscript{57} In the question at the heart of this study, Twitter would be a provider of an interactive computer service and thus unquestionably shielded from defamation lawsuits stemming from content posted by users on the service. But how would Twitter users such as @CallMeSmitty (who retweeted the defamatory message of @GilBuddy), @Kevin_Goldstein (who added a comment to the retweet), and @ESPN (which

\textsuperscript{56} 519 F.3d at 668-669.

\textsuperscript{57} Ardia, \textit{supra} note 40 at 448.
retweeted @Kevin_Goldstein and then added its own comment to the original @GilBuddy tweet), fare if they sought immunity under Section 230?

Such retweeter liability depends on two issues: (1) whether courts would extend near blanket immunity for providers to users, and (2) the extent to which adding comments to the original tweet would make the user fall qualify as an “information content provider.”

Are users the same as providers?

Regarding the first issue, Congress left some room for interpretation here by not explicitly defining “user” in Section 230. Further, there are some policy reasons for treating them differently under the act, as the California Supreme Court noted in Barrett v. Rosenthal:

(I)ndividuals do not face the massive volume of third party postings that providers encounter. Self-regulation is a far less challenging enterprise for them. Furthermore, service providers, no matter how active or passive a role they take in screening the content posted by users of their services, typically bear less responsibility for that content than do the users. Users are more likely than service providers to actively engage in malicious propagation of defamatory or other offensive material.58

However, courts have yet to treat “users” and “providers” of interactive computer services differently, and there is no guidance in the language of the law itself or its legislative history that suggest that Congress intended Section 230 immunity to be stronger for providers than users.\textsuperscript{59} Quite the contrary, users necessarily come under the definition of “interactive computer service,” which requires “multiple users.”\textsuperscript{60} In spite of the differences between users and providers it mentioned above, in a case involving a defendant who distributed defamatory e-mail messages and Internet postings on an “Internet discussion group,” the Supreme Court of California found that the defendant was protected by Section 230, holding that “Congress employed the term ‘user’ to refer simply to anyone using an interactive computer service,” regardless of how active the users’ publishing acts are.\textsuperscript{61} Similarly, when the operator of the Museum Security Network listserv republished parts of a message suggesting that a woman was a descendant of Heinrich Himmler and had paintings wrongfully seized by Nazis, the Ninth Circuit found that the operator was a “user” and thus immune from liability under Section 230; the court suggested that liability rested


\textsuperscript{60} 47 U.S.C.S. § 230(f)(2)

\textsuperscript{61} Barrett, 146 P.3d at 515.
with the author of the email, not those who distributed it to a wider audience.\textsuperscript{52}

Just as hyperlinking to defamatory statements on another website does not trigger liability for the hyperlinker,\textsuperscript{63} Internet users who repeat the online defamatory statements of third parties are not responsible for them.

As such, it could not be more clear that the “naked retweet”\textsuperscript{64} – that is, pushing the “Retweet” button to circulate somebody else’s tweet to one’s own followers, as @CallMeSmitty did in the hypothetical situation in the introduction – would not trigger republisher liability for defamation. Section 230 of the Communications Decency Act protects Twitter users when they retweet others.

\textbf{Does adding or altering content make one a content provider?}

When content is added to the original tweet, as was done in the hypothetical by @Kevin_Goldstein and @ESPN, the application of Section 230 may be different. As mentioned in the discussion of the classic republication and single publication rules, courts typically distinguished between distributors and

\textsuperscript{52}Batzel v. Smith, 333 F.3d 1018, 1030 (2003).

\textsuperscript{63}See McVey v. Day, 2008 Cal. App. Unpub. LEXIS 10462 (Cal. Ct. App. 2nd Div. 4, 2008), in which the defendant’s email containing a hyperlink to a defamatory website did not render the defendant liable for defamation.

\textsuperscript{64}The Associated Press’ standards editor used this phrase to describe tweets made without more detail or context. See Caitlin Johnson, The Naked Retweet Dilemma, AM. JOURNALISM REV., December 6, 2011, http://ajr.org/Article.asp?id=5209 (last accessed March 29, 2012).
publishers by determining the amount of editorial control exercised. Distributors, as mere passive conduits, were exempt from liability, while those who took an active role were deemed to be publishers.

This policy is represented, to some extent, in the Ninth Circuit’s holding in the *Roommate.com* case, in which the website was found to be a content provider because its drop-down menus with discriminatory language “materially contributed” to the content posted by people advertising homes for rent.\(^{65}\) However, this reasoning has little support elsewhere. McBrearty said the “material contribution” standard established by the Ninth Circuit was a “startling about-face” from other courts’ decisions and demonstrated a “flawed understanding” of Section 230 immunity.\(^{66}\) Instead, McBrearty suggests that the “essential published content” standard followed by the Ninth Circuit previously, in the *Carafano v. Metrosplash.com* case, is more appropriate.

In *Carafano*, the court said Section 230 protected Matchmaker.com in connection with defamatory sexual statements made about an actress posted by a user who was harassing her, reasoning that as long as the “essential published content” was made by third parties, the website was immune under Section

\(^{65}\) *Roommate.com*, 521 F.3d at 1167-68.

\(^{66}\) McBrearty, *supra* note 53 at 852.
230.\textsuperscript{67} Because Matchmaker.com only provided an online questionnaire and exercised no editorial control over the profiles, the “essential published content” was in the hand of users alone.

Again, the guidance in these cases regards providers, rather than users, of interactive computer services. But a similar policy has been echoed in cases involving users. In \textit{Batzel}, a defendant that circulated defamatory emails was found to be immune under Section 230, even though the Ninth Circuit noted that the listserv operator “exercises some editorial discretion in choosing which of the e-mails he receives are included in the listserv mailing, omitting e-mails unrelated to stolen art and eliminating other material that he decides does not merit distribution to his subscribers.”\textsuperscript{68} In \textit{Barrett}, similarly, the California Supreme Court found that when defendant Rosenthal posted an article written by a third party accusing a physician plaintiffs of “stalking a Canadian radio producer,” Rosenthal was a “user” shielded by Section 230 because the article was written by another person, the “content provider.”\textsuperscript{69} The court found that Congress intended there to be no distinction between “passive” and “active” users, treating both as distributors that are immune from defamation liability.\textsuperscript{70}

\textsuperscript{67} \textit{Carafano}, 339 F.3d at 1124.

\textsuperscript{68} \textit{Batzel}, 333 F.3d at 1021.

\textsuperscript{69} \textit{Barrett}, 146 P.3d at 514.

\textsuperscript{70} \textit{Id.} at 527-528.
Because the “essential published content” was provided by a third party, Rosenthal was not liable for reposting on her web page, even if she had reason to believe that the statements were false and defamatory.\(^{71}\)

Under the “essential published content” standard, retweets with added content may very well be protected, as long as the republisher does not add new content that is independently defamatory. Under the reasoning in Batzel and Barrett, the “essential published content” in the introductory hypothetical situation would still be allegations of drug use by @GilBuddy. When baseball scouting writer @Kevin_Goldstein retweets it, adding that “Gamesh isn’t top pick now, teams afraid,” this seems to endorse the truth of the original tweet. However, endorsement of the “essential published content” is not enough to turn a user into a “content provider,” following the reasoning that both of the defendants in Batzel and Barrett clearly endorsed the truth of the third-party messages they forwarded or circulated. By merely adding a layer of analysis to the situation, @Kevin_Goldstein likely would be able successfully to claim immunity from liability under Section 230.

Similarly, when @ESPN reports that “Friend of prep star Gamesh says he’s juicing. RT @GilBuddy: Talked to @Gil_95 today, he said steroids and meth are his best friends,” the sports network is merely providing context for the

\(^{71}\) Id. at 514.
information quoted and attributed to the third-party user who provided the content. By including the rest of @GilBuddy’s tweet, @ESPN has preserved its role as a user of an interactive computer service, rather than as an “information content provider.”

The greatest challenge facing those who quote or otherwise modify tweets through editing to reduce their length is that courts will embrace the tortured reasoning of the Ninth Circuit in the *Roommate.com* case. The court used its ruling to clarify its holdings in *Carafano* and *Batzel*, both of which favor immunity for users republishing third-party content. The court noted that its ruling in *Carafano* was “unduly broad” but noted that, nevertheless, Matchmaker.com properly qualified for immunity because the libelous statements were “created and developed entirely by the malevolent user” while the website did “nothing to encourage the posting of defamatory content.”\(^{72}\) Similarly, the Ninth Circuit said its ruling was consistent with *Batzel* because in that case, the defendant’s “minor changes to the spelling, grammar and length of third-party content” did not cause him to lose his immunity under Section 230, but that further editorial conduct on the part of users – such as making a determination of whether to

\(^{72}\) *Roommate.com*, 521 F.3d at 1171-1172.
publish an item submitted by a “tipster” who did not believe it was being submitted for possible republication online – may remove such immunity.73

Regardless, applying this reasoning, Twitter users certainly would foresee the possibility that the tweets they post would be open to republication elsewhere on Twitter, as is noted in the discussion of the culture of Twitter infra; unless the user chooses to “protect” his or her account through privacy settings,74 the tweets can be viewed by anyone with a web connection and retweeted by anyone with a Twitter account.

CONCLUSION

Barring a fundamental shift in the way courts apply Section 230 of the Communications Decency Act, it would appear that the only defendant remaining for Gil Gamesh to sue for his lost millions of dollars is his classmate, @GilBuddy. Despite the republication and apparent endorsement of the defamatory tweet by members of the news media, including sports broadcasting behemoth ESPN, Section 230 makes it extremely difficult for Gamesh to reach the deep pockets in his lawsuit.

73 Id. at 1170-1171.

This is, of course, fundamentally unfair to Gamesh as a plaintiff. Under the classic republication doctrine, Gamesh would have been able to sue ESPN successfully if the network repeated his friend’s assertions on the air. The shift to digital media, and particularly to Twitter, however, immunizes republishers from any liability for spreading and giving weight to false and defamatory rumors that may have caused tangible harm to plaintiffs. Neither the single publication rule nor the wire service defense would apply to ESPN in such a case for broadcasting on cable, rather than through Internet services.

When a person publishes on Twitter, he or she publishes to the entire world; anyone with access to the Internet can read the tweet when it is made. If this were the only consideration, the policy of Section 230 would make more sense, because liability would always rest with the original speaker with the power to communicate to the massive digital audience. However, Twitter activity includes about 140 million tweets per day, a “volume that makes it increasingly impractical for users to identify the most relevant pieces of information.”75 A retweet is “the basic form of currency of Twitter,” telling followers that the “you found something of interest in the original tweet, and

you wanted to share it with them.”

Retweeting helps Twitter users communicate what they believe is important to their followers, to sort through the wave of tweets and to judge the credibility of them, which is important because, as one study found, Twitter users are “poor at determining whether a tweet was true or false, regardless of (their) experience with Twitter.”

The credibility of an organization such as ESPN greatly outweighs that of a teenage friend of a high school ballplayer with a dozen Twitter followers; thus, ESPN’s retweet likely grants additional credibility to the original tweet.

But the culture of Twitter makes defamation liability for retweets problematic. In the news context, some organizations give more weight to retweeting as a news activity. For example, the Associated Press, in its social media guidelines for employees, has suggested that a retweet can be construed as endorsement of the original material and thus should be handled cautiously, if not avoided altogether: “A retweet with no comment of your own can easily be seen as a sign of approval of what you’re relaying...These cautions apply even if


77 Morris et al., supra note 75 at 8.
you say on your Twitter profile that retweets do not constitute endorsements.”

But this policy has come under fire from several critics who saw it as overly restrictive and misunderstanding of what retweeting actually means. Scholars examining Twitter use, similarly, have found users’ motivations for retweeting to be complex; they may include amplifying tweets to a larger audience, acting as a curator for a specific audience, commenting on the tweets of others, publicly agreeing with another user, as an act of friendship or loyalty to the original tweeter, to gain followers or reciprocal retweets, and more.

With this in mind, the immunity granted by Section 230 to Twitter users who retweet, and even comment on the retweets of others by embedding the original tweets into their own posts, makes more sense. A retweet may be an endorsement, but it also may not, and the plain language of Section 230 reflects Congressional intent that web users should not take on defamation liability for statements originating from third-party content creators. Similarly, a “modified tweet,” designated by posting from one’s own account, typing MT before the

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79 Johnson, supra note 76.

original tweeter’s username and editing the tweet that follows, is merely a “tweet that you had to truncate to save space” but that “retains the meaning of the original tweet in full, but the wording has changed.”\(^{81}\) As such, it falls within the basic editorial functions envisioned by the Ninth Circuit in the \textit{Roommate.com} case – “minor changes to the spelling, grammar and length of third-party content” – that even this court in its attempt to limit Section 230 immunity found would not be subject to liability.\(^{82}\)

On the other hand, a “hat tip,” designated by HT followed by a username, gives credit for pointing you in the direction of something interesting, a “nod in acknowledgement that they provided you with the fodder (but not the content) for that tweet.”\(^{83}\) This use, which is preceded by the Twitter user’s own thoughts, comments or assertions, is less likely to be granted immunity under Section 230. If Fox Sports were to tweet, “Gamesh admits to illicit drug use, draft stock plummeting. HT @Kevin_Goldstein @GilBuddy,” then Fox would likely be deemed an information content provider. Fox would be holding itself out as stating this information as fact, with no clear guidance as to the source of the information – users would have to click on the profiles and examine the tweets by @Kevin_Goldstein and @GilBuddy to see what had been said.

\(^{81}\) Dugan, \textit{supra} note 76.

\(^{82}\) \textit{Roommate.com}, 521 F.3d at 1170-1171.

\(^{83}\) Dugan, \textit{supra} note 76.
If this is the only act that may render a repeater liable, tort recovery by Gamesh of the damages he has suffered will be extremely difficult unless his buddy is particularly well off. That said, as unfair as this may be to Gamesh, it is not unusual in the grand history of libel law. As Prosser noted more than half a century ago:

(T)here is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word, and it is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for a real and very serious harm. 84

The “perverse refusal” to grant Gamesh adequate recourse for harm to his reputation, however, comes with the benefits Congress likely intended when it provided immunity for online service providers and users. Internet users and technological innovators will not be discouraged from sharing information for fear of tort liability, removing any possible chilling effect for those would who distribute news or provide forums to facilitate such distribution. Gamesh’s loss would be our gain.

84 Prosser, supra note 16 at 777-778.