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## Wide Right: How ISP Immunity and Current Laws Are Off the Mark in Protecting the Modern Athlete on Social Media

Dominick J. Mingione

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## Wide Right: How ISP Immunity and Current Laws Are Off the Mark in Protecting the Modern Athlete on Social Media

### Abstract

"[Y]our tranny looking dad is a disgrace to American football," "I would rape the shit out of her," and "[The] [B]ears are easier than you on prom night," are just a sampling of some of the alarmingly harassing tweets received by Chloe Trestman between the night of November 9, 2014 and November 10, 2014. Who is Chloe Trestman, and what could she have possibly done to warrant such abuse? Chloe's father is Marc Trestman, the head coach of the Chicago Bears. And the twitter vitriol, or "twitriol," directed toward Chloe was in response to the Bears' blowout loss to their longtime rivals, the Green Bay Packers, 55-14 on Sunday Night Football. So the question remains, what did Chloe do to garner such an abusive reaction from the disgruntled Chicago fan-base?

The answer, of course, is she did nothing to deserve this hate-inspired tweeter tirade, other than being the daughter of an NFL head coach and having a twitter account. In this generation of Facebook, Twitter and other social media outlets, it is commonplace for athletes, and unfortunately sometimes their family members, to become targets of harassing online misconduct and abuse. Arguably more alarming than the harassing component of social media websites, is the fact that the current laws governing Internet Service Providers lack the necessary teeth to provide any recourse to athletes victimized by online misconduct, which only perpetuates this type of behavior and leaves no recourse for the injured party. So Coach Trestman, Chloe Trestman and mostly any other internet targeted athlete are left with no legal remedy until the vast safeguards protecting ISPs are curtailed.

### Keywords

ISP, internet service providers, harassment, internet, social media, football, twitter

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*Essay*

**Wide Right:  
How ISP Immunity and Current Laws Are Off the Mark  
in  
Protecting the Modern Athlete on Social Media**

***Dominick J. Mingione, Esq.\****

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\* Dominick graduated from Pace University School of Law in January 2014, as he was a member of the final night class in school history. During his tenure at Pace, he also worked in the New York County Clerk's Office. Upon graduation, Dom passed the February 2014 Bar Exam and was admitted to the New York Bar in July 2014. Prior to his time at Pace, he received his bachelor's degree from Marist College in Poughkeepsie, NY, Magna Cum Laude, after attending Xavier High School in Manhattan. He has been working at Subin Associates, LLP, located at 150 Broadway, New York, NY 10038, a personal injury law firm, since August 2014. Dom would like to thank Professor Garfield at Pace Law School, for without her belief in his idea, her encouragement and all of her help along the way, this article would never have been written. Dom would also like to thank his girlfriend, Allison, for all of her love and support, his parents, Nancy and Ernest, for their unwavering support and for always believing in him even when he did not believe in himself. Finally, Dom dedicates this article in loving memory of his grandparents.

### Abstract

“[Y]our tranny looking dad is a disgrace to American football,” “I would rape the shit out of her,” and “[The] [B]ears are easier than you on prom night,”<sup>1</sup> are just a sampling of some of the alarmingly harassing tweets received by Chloe Trestman between the night of November 9, 2014 and November 10, 2014. Who is Chloe Trestman, and what could she have possibly done to warrant such abuse? Chloe’s father is Marc Trestman, the head coach of the Chicago Bears. And the twitter vitriol, or “twitriol,” directed toward Chloe was in response to the Bears’ blowout loss to their longtime rivals, the Green Bay Packers, 55-14 on Sunday Night Football. So the question remains, what did Chloe do to garner such an abusive reaction from the disgruntled Chicago fan-base?

The answer, of course, is she did nothing to deserve this hate-inspired tweeter tirade, other than being the daughter of an NFL head coach and having a twitter account. In this generation of Facebook, Twitter and other social media outlets, it is commonplace for athletes, and unfortunately sometimes their family members, to become targets of harassing online misconduct and abuse. Arguably more alarming than the harassing component of social media websites, is the fact that the current laws governing Internet Service Providers lack the necessary teeth to provide any recourse to athletes victimized by online misconduct, which only perpetuates this type of behavior and leaves no recourse for the injured party. So Coach Trestman, Chloe Trestman and mostly any other internet targeted athlete are left with no legal remedy until the vast safeguards protecting ISPs are curtailed.

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<sup>1</sup> Samer Kalaf, *Twitter Users Harass Marc Trestman's Daughters After Bears Loss*, Deadspin (Nov. 10, 2014), <http://deadspin.com/twitter-users-harass-marc-trestmans-daughters-after-bea-1657009542>.

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“The fact that broadcasters, media people and athletes are allowed to tweet, which should be against the law, is a big change, okay. It should be against the law, all right, because nobody needs to hear from any one of them.”<sup>2</sup>

– Mike Francesa

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<sup>2</sup> Tom Weir, *WFAN's Mike Francesa Wants to Make Twitter Illegal*, USA TODAY (May 15, 2012), <http://content.usatoday.com/communities/gameon/post/2012/05/wfans-mike-francesa-wants-to-make-twitter-illegal/1#.UXhmTrVJOVV>.

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Legendary New York sports radio talk show host Mike Francesa is right in that athletic tweets can be problematic. Due to their celebrity status, athletes are easy targets for social media “trolls,” or people who regularly and anonymously post offensive insults on social media sites.<sup>3</sup> While some of the negative content constitutes free speech, there are many instances when the third party’s conduct exceeds the First Amendment’s scope of protection, and quite often constitutes cyber harassment.<sup>4</sup>

Few, if any, laws provide athletes with meaningful recourse. Under the current law, individual social media sites and other Internet Service Providers (ISPs) are immune from liability for their users’ behavior by the legislative safeguards granted to ISPs through the Communications Decency Act (CDA) and the Digital Millennium Copyright Act (DMCA).<sup>5</sup> As recent incidents illustrate, the consequences of athletic cyber harassment yield great damages.<sup>6</sup>

The consequence of damages is complicated by the anonymous nature of social media and the strong business presence of the sports industry in the United States and throughout the world. This makes athletes some of the most popular and influential people in the country, which renders them vulnerable targets for Internet misconduct by way of social media sites. Society’s iconography of athletes increases the potential for damages resulting from public humiliation via social media. According to a recent article by Lee Gordon, the Barna Group reports that, “Americans believe that professional athletes have a bigger influence on their lives than pastors by more than a three-to-one margin.”<sup>7</sup> Just consider the 20.5 million Twitter followers of LeBron James to the 5.9 million followers of Pope Francis.<sup>8</sup>

The combination of America’s infatuation with athletes and ease of fan-athlete communication on social media can be volatile. Despite every effort that is made to limit athletes’ use of social media to avoid precarious situations that will reflect poorly on the athlete and the team, league or university, athletes still find themselves frequently in trouble due to their availability to the public on such sites

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<sup>3</sup> Erik Brady & Jorge L. Ortiz, *For Athletes, Social Media Not All Fun and Games*, USA TODAY (July 31, 2013), <http://www.usatoday.com/story/sports/2013/07/31/for-athletes-social-media-not-all-fun-and-games/2606829/>.

<sup>4</sup> *Id.* (example of how tennis professional and “U.S. Fed Cup team member Varvara Lepchenko found a message on her Facebook page at Wimbledon telling her that if she didn’t lose her first-round match in London she wouldn’t live”).

<sup>5</sup> Communications Decency Act 47 U.S.C. § 230 (2012); Digital Millennium Copyright Act 17 U.S.C. § 512 (2012).

<sup>6</sup> See *infra* Part I (the Manti Te’o and Randall Goforth situations discussed within this article).

<sup>7</sup> Lee Gordon, *Think Before You Tweet: Social Media Lessons for Athletes*, STACK (Feb. 22, 2013), <http://www.stack.com/2013/02/22/twitter-for-athletes>.

<sup>8</sup> @KingJames, TWITTER, <https://twitter.com/KingJames> (last visited April 19, 2015); @Pontifex, TWITTER, <https://twitter.com/Pontifex/followers> (last visited April 19, 2015).

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as Facebook and Twitter. Under the current set of laws, there is no remedy for athletes victimized through social media misconduct.

This article will highlight the vulnerability of national athletes through their use of social media and will discuss the lack of remedies available due to the legislative and judicial confines of Free Speech and the current applicable laws. The article proceeds in four parts. Part I provides a narrative of two recent social media debacles: the Manti Te'o catfishing controversy and the Randall Goforth fake Twitter account prank. This section uses the Te'o and Goforth situations to illustrate how high profile athletes can become victims of Internet misconduct through the use of social media.

Part II outlines the current safeguards that prevent Te'o, Goforth and other similarly situated athletes from recovering damages suffered through social media sites or other ISPs. Specifically, this section will address the immunities granted to ISPs through the CDA, the DMCA, and explain how the Supreme Court and other federal courts have expanded Congressional immunity granted to ISPs.

Part III analyzes the cyber harassment aspect of these two incidents, while Part IV describes the collective limitations of the CDA, the DMCA, and the current harassment laws as means to provide relief for online harassment. This last section illustrates the reason Te'o and Goforth are likely to fail should they proceed with their actions against Facebook and Twitter, respectively. This article concludes by arguing that the current laws do not offer adequate relief for Te'o, Goforth and other similarly situated athletes. In fact, these laws actually contribute to social media misconduct by immunizing social media sites from repercussions from this type of conduct.

## **I. OPENING DRIVE: SOCIAL MEDIA'S NEGATIVE IMPACT ON ATHLETES**

Both the Manti Te'o fake girlfriend hoax, which broke in early January 2013, and the Randall Goforth fake Twitter account incident, which occurred at the end of the 2012 NCAA football season, illustrate how social media sites can make athletes, through little or no fault of their own, easy targets for harmful online activity. Although the specific details differ, both cases share the important similarities of garnering an incredible amount of media coverage and displaying the dangerous side of social media for athletes. Both instances serve as examples that support the need for accountability of ISPs when social media leads to emotional injury, loss of anticipated business, and other possible damages.

### ***A. (Cat)fishing for Manti***

Manti Te'o at 6'5" and 250lbs, was Notre Dame's All-American inside linebacker who played in all 38 games during his four-year career and started in 36

of them, including 35 consecutive contests for the Fighting Irish.<sup>9</sup> Te'o was one of the most highly regarded and most decorated defensive players, not only to come out of Notre Dame in recent years, but in college football history.<sup>10</sup> Prior to January 2013, his name was synonymous with winning, strong character, leadership, and potential.

Te'o's journey was one of the feel-good college stories emerging out of the 2012 season. His exceptional play anchored the revitalized Notre Dame defense that paced the Fighting Irish to a 12-0 record, which earned the storied university a spot in the 2013 Bowl Championship Series title game to compete for its first National Championship since 1988.<sup>11</sup> He was heralded for how well he was able to perform on the field after losing both his grandmother and his girlfriend, Lennay Kekua, who lost a battle to leukemia, within hours of each other during the season in September 2012.<sup>12</sup> Te'o's stellar play, coupled with his tragic personal loss, propelled him into the running for the Heisman Trophy, which is awarded by a vote to the most outstanding college player of the season. Although Te'o would finish second in the Heisman Trophy balloting, his professional career appeared to be bright as he was considered a highly touted prospect coming out of college and believed to be a high first round draft selection in the upcoming 2013 NFL Draft.<sup>13</sup> Te'o's personal and professional life were both compromised, however, when the website Deadspin published an article stating that his late girlfriend never existed.<sup>14</sup>

Notre Dame claimed in a statement that Te'o was a victim of an elaborate "hoax," known as catfishing,<sup>15</sup> in which someone used the fictitious name Lennay Kekua in order to establish a relationship with him and later conspired with others to convince Te'o that she had tragically died of leukemia.<sup>16</sup> Te'o released a

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<sup>9</sup> *Manti Te'o*, THE OFFICIAL SITE OF NOTRE DAME'S ATHLETICS: FOOTBALL, [http://www.und.com/sports/m-footbl/mtt/teo\\_manti00.html](http://www.und.com/sports/m-footbl/mtt/teo_manti00.html) (last visited May 2, 2013).

<sup>10</sup> *Id.*

<sup>11</sup> *Manti Te'o-Biography*, THE BIOGRAPHY.COM, <http://www.biography.com/people/manti-teo-21105315?page=1> (last visited May 2, 2012) (hereinafter "Manti Te'o-Biography").

<sup>12</sup> Steve Eder, *Hoax Is Revealed as Irish Star Says He Was Duped*, N.Y. TIMES (Jan. 16, 2013), [http://www.nytimes.com/2013/01/17/sports/ncaafootball/story-of-manti-teos-girlfriend-is-said-to-be-a-hoax.html?\\_r=0&adxnnl=1&adxnnlx=1367524036-s7Qzmj65fhVnlshsZd8BNA](http://www.nytimes.com/2013/01/17/sports/ncaafootball/story-of-manti-teos-girlfriend-is-said-to-be-a-hoax.html?_r=0&adxnnl=1&adxnnlx=1367524036-s7Qzmj65fhVnlshsZd8BNA).

<sup>13</sup> Manti Te'o-Biography, *supra* note 11; see Matt Hayes, *BCS National Championship Game: Alabama vs. Notre Dame Analysis*, SPORTING NEWS (Dec. 14, 2012), <http://www.sportingnews.com/ncaa-football/story/2012-12-14/bcs-national-championship-game-2013-alabama-vs-notre-dame-nick-saban>.

<sup>14</sup> Eder, *Hoax*, *supra* note 12.

<sup>15</sup> See generally Mary Pilon, *In Te'o Story, Deception Ripped from the Screen*, N.Y. TIMES (Jan. 17, 2013), [http://www.nytimes.com/2013/01/18/sports/ncaafootball/deception-ripped-from-the-screen-in-hoax-story-of-manti-teo.html?\\_r=0](http://www.nytimes.com/2013/01/18/sports/ncaafootball/deception-ripped-from-the-screen-in-hoax-story-of-manti-teo.html?_r=0) (explaining the origins of the "catfishing" phenomenon).

<sup>16</sup> Eder, *Hoax*, *supra* note 12.



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statement of his own, admitting that he was the target of “what was apparently someone’s sick joke and constant lies.”<sup>17</sup> But as more facts became public, the more twisted the story became, lending credence to what many media outlets’ labeled as, “one of the most bizarre stories to surface in the sports world in a long time.”<sup>18</sup>

Despite the claims from Te’o and Notre Dame that depicted him as nothing more than a sympathetic victim in this peculiar story, some of the facts have left many questioning if he was a willing participant in this fraud, hoping that the tragic story would garner sympathy from the public and voters alike, in an effort to bolster his resume for the Heisman Trophy.<sup>19</sup> On December 8, 2012 (two days after receiving the chilling call from Kekua’s phone, which left him questioning her death and identity), at the Heisman Trophy ceremony, Te’o stated that the most unforgettable moment of the 2012 season was the moment he found out his girlfriend had died.<sup>20</sup> Although he has maintained his innocence in the hoax, Te’o did admit during his interview with ESPN that he tailored the story to lead people to believe that he had actually met Kekua in person before her death, out of embarrassment of people knowing it was strictly an online relationship.<sup>21</sup>

From the time the rumblings surrounding the hoax began to surface at the end of December 2012, a downward spiral was set in motion for Te’o’s professional career.<sup>22</sup> He had a poor performance in the BCS National Championship Game in early January 2013<sup>23</sup> and was later underwhelming at the 2013 NFL combine in Indianapolis.<sup>24</sup> His misfortune continued in April 2013 when he was selected with

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<sup>17</sup> Eder, *Hoax*, *supra* note 12.

<sup>18</sup> Manti Te’o-Biography, *supra* note 11.

<sup>19</sup> Steve Eder, *Image Becomes a Puzzle as Theories on Te’o Swirl*, N.Y. TIMES (Jan. 17, 2013), <http://www.nytimes.com/2013/01/18/sports/ncaafotball/image-of-manti-teo-becomes-puzzle-as-theories-swirl.html?pagewanted=all&module=Search&mabReward=relbias%3As>.

<sup>20</sup> Eder, *Te’o Answers Questions but Doesn’t Settle Riddle*, N.Y. TIMES (Jan. 20, 2013), [http://www.nytimes.com/2013/01/21/sports/ncaafotball/teos-espn-interview-has-answers-but-doesnt-settle-riddle.html?module=Search&mabReward=relbias%3As&\\_r=0](http://www.nytimes.com/2013/01/21/sports/ncaafotball/teos-espn-interview-has-answers-but-doesnt-settle-riddle.html?module=Search&mabReward=relbias%3As&_r=0).

<sup>21</sup> *Id.*

<sup>22</sup> Eder, *Te’o Answers*, *supra* note 20.

<sup>23</sup> Tim Rohan, *Te’o’s Draft Stock Tumbled When Irish Did*, N.Y. TIMES (Jan. 9, 2013), <http://www.nytimes.com/2013/01/09/sports/ncaafotball/manti-teos-draft-stock-tumbled-when-irish-did.html>.

<sup>24</sup> Mike Florio, *Te’o Blames Slow 40 Time on Combine Stress*, PRO FOOTBALL TALK (Feb. 25, 2013, 9:21 PM), <http://profootballtalk.nbcsports.com/2013/02/25/teo-blames-slow-40-time-on-combine-stress> (Te’o ran a 4.82-second 40-yard dash at the NFL scouting, which is considered slow for an NFL linebacker).

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the thirty-eighth pick, the sixth pick of the second round and the third linebacker taken overall, in the 2013 NFL Draft.<sup>25</sup>

Te'o, who entered the 2013 championship game as a highly regarded first round draft pick talent, dropped to the second round after his poor performance in the championship game and his sub-par forty time. Two team officials from different NFL clubs expressed to ESPN after the draft that their respective teams passed up on Te'o due to his "off the field issues" as well.<sup>26</sup> It appears as though the fake girlfriend hoax not only embarrassed Te'o on a national level and tarnished his reputation, but it may have cost him the prestige and money that accompany a first round draft pick. Even Te'o was quoted as saying that he expected himself to be a first round draft pick, but he realized that "things happened" and vowed that his misfortunes would only give him more motivation going forward.<sup>27</sup> The damage to Te'o's reputation and professional career has already been done.

***B. Will @TheRealRandallGoforth Please Tweet Back?***

Although far less convoluted than the Manti Te'o saga, Randall Goforth's situation was no less serious. Sometime in late October 2012, it appeared as though, innocently enough, Randall Goforth, University of California, Los Angeles' (UCLA) then Freshmen punt returner and defensive back, set up a Twitter account under the handle @RandallG3000.<sup>28</sup> The problem was that it was not Goforth at all, but an unknown perpetrator.<sup>29</sup> And it did not take long for this undercover prankster to heat up the already deep seeded football rivalry between UCLA and University of Southern California (USC) sending both fan bases and players alike into a twitter frenzy.

While the Twitter war raged on between the two college football powerhouses, the actual Randall Goforth was left completely in the dark because, according to Coach Jim Mora, Goforth was in a tutoring session when the "idiot" was out there tweeting.<sup>30</sup> At the time of the incident, Goforth himself did not even have a Twitter account and he later informed the Los Angeles Times that he would

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<sup>25</sup> *Chargers Draft LB Manti Te'o*, ESPN.COM NEWS (April 27, 2013), [http://espn.go.com/nfl/draft2013/story/\\_/id/9215985/2013-nfl-draft-san-diego-chargers-select-manti-teo-sixth-pick-second-round](http://espn.go.com/nfl/draft2013/story/_/id/9215985/2013-nfl-draft-san-diego-chargers-select-manti-teo-sixth-pick-second-round).

<sup>26</sup> *Id.*

<sup>27</sup> *Chargers Draft*, *supra* note 25.

<sup>28</sup> Paul Myerberg, *Fake Twitter Account has UCLA's Jim Mora Steaming Mad*, USA TODAY (Nov. 6, 2012), <http://www.usatoday.com/story/gameon/2012/11/06/jim-mora-ucla-fake-twitter/1687763/>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

not dare talk like that as a freshmen.<sup>31</sup> Whatever Goforth would not say, however, @RandallG3000 had no problem tweeting. On November 5, 2012, the imposter infuriated the Trojan fan base, including some members of the USC football squad, when he boisterously tweeted, “[W]e will beat you guys on Nov. 17. Believe the hype.”<sup>32</sup> After a series of exchanges between USC fans and @RandallG3000, the fake Goforth further enraged the USC faithful by claiming, “USC SUCKS!! WE WILL GET IT IN NOVEMBER 17. ALL ABOUT ACTION NO NEED TO BRAG JUST BE TUNED IN ON THE 17TH!!!!”<sup>33</sup>

Quickly, the real Goforth’s UCLA teammates came to his defense alerting the Twitter community that this was someone impersonating Goforth and nothing more.<sup>34</sup> The backlash even prompted Mora to contact then USC head coach Lane Kiffin to explain that this was just a hoax.<sup>35</sup> Mora was visibly livid when he spoke to the media about the whole situation, noting that the “[p]ower of social media is amazing and when it's used in a negative way like that, it's sickening.”<sup>36</sup> He labeled the imposter a “coward” and challenged whomever it was to reveal his true identity, but Mora noted this would never happen because “[t]hat’s what cowards do. Cowards hide behind print...”<sup>37</sup>

Mora, however, continued in his criticism of the Goforth impersonator claiming that this individual was “the lowest form of life form if you would portray yourself as an 18-year-old young man who's out here trying to do his best...I think he ought to go to jail. That's how I feel. I think you're a scumbag.”<sup>38</sup> Although Mora’s comments were rife with emotion, he does unearth a serious problem associated with the type of social media behavior experienced by Goforth, which is the near impossible task of discovering who should be held accountable for Goforth’s harm when the actual attacker remains anonymous. Unfortunately for Goforth, due to the current structure of our laws, Twitter would remain free from liability despite the fact that it was the vehicle chosen to perpetrate the unauthorized online impersonation - essentially offering no remedy to Goforth.

The circumstances surrounding Te’o and Goforth are uniquely different, but the natures of the indiscretions are the same. Both men were targeted because of their high profile statuses as NCAA college football players for major programs at

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<sup>31</sup> Ron Dicker, *Randall Goforth Impersonator Starts Twitter War Between USC, UCLA*, THE HUFFINGTON POST (Nov. 7, 2012), [http://www.huffingtonpost.com/2012/11/07/randall-goforth-impersonator-twitter-usc-ucla-mora\\_n\\_2088357.html](http://www.huffingtonpost.com/2012/11/07/randall-goforth-impersonator-twitter-usc-ucla-mora_n_2088357.html).

<sup>32</sup> Myerberg, *supra* note 28.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Dicker, *supra* note 31.

<sup>36</sup> Myerberg, *supra* note 28.

<sup>37</sup> *Id.*

<sup>38</sup> Myerberg, *supra* note 28.

Notre Dame and UCLA, and social media provided the platform allowing these athletes to be easily perpetrated. Only compounding the problem for Te'o and Goforth (and other similarly situated athletes) is the fact that any attempt at legal recourse against the ISPs in question, will likely be a futile exercise under today's Internet regulations and laws to online activity. This is alarming because not only are ISPs protected from liability for their users' tortious conduct, but also there is no deterrent for similar misconduct in the future under the current governing laws.

## **II. PROTECTING THE QUARTERBACK: ISP SAFEGUARDS AND THEIR IMMUNITY FROM TORTIOUS INTERNET ACTIVITY**

Congress has protected ISPs by providing immunity from defamatory or tortious material published by their users through the CDA and the DMCA. Congress determined that holding ISPs liable for legal issues created by their subscribers was not in the public's best interest<sup>39</sup> and passed the CDA and the DMCA in an effort to protect the ISPs from liability.<sup>40</sup> These acts render ISPs immune from tort-based claims stemming from a third party's activity.<sup>41</sup> ISP immunity from tortious conduct has only been expanded through the case law governing the CDA and DMCA.

### ***A. The Two Blocks of Granite: Legislative Safeguards***

This section will discuss both the CDA and the DMCA in depth. It will then explain how the higher courts, through precedent, have expanded the already broad ISP safeguards. The combined ramifications of the Acts, along with the case law, renders ISPs nearly invincible to litigation arising from the conduct of their users.

#### ***i. The Communications Decency Act***

Congress enacted the CDA in 1996, which paved the way for the preferential treatment afforded to ISPs in regards to user liability.<sup>42</sup> At the heart of the Act is Section 230, which offers ISPs immunity from third party liability.<sup>43</sup> Section 230(c)(1) of the CDA establishes a general standard in regard to all ISPs providing 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>44</sup> The Act defines an "information content provider" as a "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

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<sup>39</sup> Cyrus Sarosh Jan Manekshaw, *Liability of Isps: Immunity from Liability Under the Digital Millennium Copyright Act and the Communications Decency Act*, 10 COMPUTER L. REV. & TECH. J. 101, 102 (2005).

<sup>40</sup> *Id.* at 102.

<sup>41</sup> *Id.* at 109.

<sup>42</sup> *Id.* at 106.

<sup>43</sup> 47 U.S.C. § 230.

<sup>44</sup> *Id.*

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service.”<sup>45</sup> Whereas Section 230(f)(2) defines an “interactive computer service” as any interactive service system or provider that “enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”<sup>46</sup>

The distinction between an “interactive computer service” and an “information content provider” is a crucial one under Section 230(c)(1), as any ISP labeled an “interactive computer service” is free from liability for another’s content.<sup>47</sup> Courts have referred to Section 230(c)(2), specifically, as the “Good Samaritan” provision of the CDA, despite the whole (c) subsection being entitled “Protection for ‘Good Samaritan’ blocking and screening of offensive material.”<sup>48</sup> The “Good Samaritan” provision, Section 230(c)(2)(A), specifically limits civil liability for any provider or user of interactive computer service on account of “[a]ny 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>49</sup>

Congress made sure to address the issue of preemption in Section 230(e)(3) of the CDA in an effort to curtail the challenge-ability of the Act. This Section declares 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>50</sup> Despite the wide-ranging immunity bestowed upon ISPs through Section 230, it is important to note that the CDA is not absolute.<sup>51</sup>

Section 230(e), which discusses the effect the Act has on other laws, highlights the act’s weakness.<sup>52</sup> According to Section 230(e)(1): “Nothing in this section shall be construed to impair the enforcement of” specific laws pertaining to obscenity or relating to the sexual exploitation of children or “any other Federal criminal statute.”<sup>53</sup> Through its language this Section also appears to exempt intellectual

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<sup>45</sup> 47 U.S.C. § 230.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See Claudia G. Catalano, Annotation, *Validity, Construction, and Application of Immunity Provisions of Communications Decency Act*, 52 A.L.R. Fed. 2d 37 (2011).

<sup>49</sup> 47 U.S.C. § 230

<sup>50</sup> 47 U.S.C. § 230

<sup>51</sup> Manekshaw, *supra* note 39, at 108.

<sup>52</sup> 47 U.S.C. § 230.

<sup>53</sup> *Id.*

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property from the CDA since “[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property.”<sup>54</sup>

The courts seem to struggle with interpreting the application of the limitation involving intellectual property law.<sup>55</sup> Depending on the circumstances of the case, courts have been split when deciding if the limitation did or did not apply to claims arising under state and federal law.<sup>56</sup> Despite the intellectual property limitation to the Act, it is evident that Congress’ intent, which has been expounded by the case law, was to restrict government interference and to extend immunity from liability to ISPs for third party activity.<sup>57</sup>

Another peculiarity of the CDA is located in Section 230(b), which discusses the policy concerns of the Act. Section 230(b)(5) proclaims that it is the United States’ policy to “ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”<sup>58</sup> If this was truly a priority for Congress, then it seems almost counterproductive to grant such indiscriminate and extensive immunity to all ISPs who can meet the requirements to be labeled as an interactive computer service. However, instead of limiting Section 230’s safeguard protections, Congress only further broadened the immunity enjoyed by ISPs by virtue of the DMCA.

**ii. The Digital Millennium Copyright Act**

The DMCA improved the shortcomings of the CDA while making the immunity power enjoyed by ISPs even more expansive. Congress passed the Digital Millennium Copyright Act in 1998, amid much controversy, with the purpose of adapting copyright law to the digital age.<sup>59</sup> The Act consists of two crucial, and sometimes conflicting, goals: “promoting the continued growth and development of electronic commerce and protecting intellectual property rights.”<sup>60</sup>

Section 512 of the DMCA offers ISPs a “safe harbor” or immunity from liability stemming from claims of copyright infringement,<sup>61</sup> an area that was left vulnerable under Section 230 of the CDA.<sup>62</sup> Section 512(b)(1) limits service providers’ liability for copyright infringement “by reason of the intermediate and temporary storage of

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<sup>54</sup> 47 U.S.C. § 230.

<sup>55</sup> Catalano, *supra* note 48.

<sup>56</sup> *Id.*

<sup>57</sup> Manekshaw, *supra* note 39, at 114.

<sup>58</sup> 47 U.S.C. § 230.

<sup>59</sup> Amy P. Bunk, Annotation, *Validity, Construction, and Application of Digital Millennium Copyright Act*, 179 A.L.R. Fed. 319 (2002).

<sup>60</sup> H.R. REP. NO. 105-551, pt. 2, at 23 (1998).

<sup>61</sup> Digital Millennium Copyright Act (DMCA) of 1998, 17 U.S.C. § 512 (2012).

<sup>62</sup> Jillian Bluestone, *La Russa's Loophole: Trademark Infringement Lawsuits and Social Networks*, 17 VILL. SPORTS & ENT. L.J. 573, 581 (2010).

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material on a system or network controlled or operated by or for the service provider.”<sup>63</sup> The infringing material must: 1) be made available online by someone other than the service provider; 2) be transmitted by that person to a third person via the service provider’s network; and 3) be stored and transmitted through “an automatic technical process for the purpose of making the material available to users of the system or network” who can request to access the material from the person who made it available online.<sup>64</sup>

The DMCA does not provide blanket immunity to all ISPs for infringing material posted on their networks, but rather qualifies only certain providers when specific conditions are met.<sup>65</sup> In order for a provider to qualify for a Section 512 safe harbor, the provider must:

(a)[Adopt] and reasonably [implement], and [inform] subscribers and account holders of the service provider's system or network of, a policy that provides for termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and (b)[accommodate] and does not interfere with standard technical measures.<sup>66</sup>

Even though the DMCA allows for the service providers to follow these guidelines reasonably, as opposed to strictly, there are limitations for the safe harbor provision of the Act.<sup>67</sup> An ISP can lose its safe harbor protection when it has actual knowledge or should have had constructive knowledge of the infringement.<sup>68</sup> The safe harbor can also be limited when a service provider, upon obtaining an infringing activity, does not “[act] expeditiously to remove, or disable access to, the material.”<sup>69</sup> Therefore, in order for an ISP to enjoy the safe harbor provided by the DMCA, the service provider must advertise a policy against copyright infringements and make a realistic threat of shutting down account access to those who go against the policy.<sup>70</sup>

***B. The Expansion of the CDA and the DMCA Through the Courts***

Through their interpretations of the CDA and the DMCA, the federal courts have broadened the Act’s already far-reaching authority to the point where it appears as though there is no remedy available for a victim of social media

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<sup>63</sup> 17 U.S.C. § 512.

<sup>64</sup> *Id.*

<sup>65</sup> 17 U.S.C. § 512.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> 17 U.S.C. § 512.

<sup>70</sup> Bluestone, *supra* note 62, at 582.

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misconduct. It is evident that at the time, the federal courts chose to protect ISPs from user misconduct as opposed to holding them accountable for such actions on their Internet platforms. The cases that followed resulted in the pivotal precedent that has shaped the landscape of ISP immunity as it is today.

The landmark case of *Zeran v. America Online* tested the immunity power of Section 230 of the CDA.<sup>71</sup> In *Zeran*, the Fourth Circuit held that the CDA barred the plaintiff's liability claims against AOL alleging that the company "unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter."<sup>72</sup> The court emphasized that Congress' intent for Section 230 was to restrict governmental interference and allow the Internet to police itself.<sup>73</sup>

The Fourth Circuit continued to interpret Congressional intent in *Zeran* by finding that the purpose behind statutory immunity was "not difficult to discern," and that Congress made a "policy choice" not to "deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages."<sup>74</sup> This case was decided in 1997 and the court then acknowledged that an ISP such as AOL was dealing with users in the millions and the amount of information communicated via interactive computer services was staggering.<sup>75</sup> According to the Fourth Circuit, Congress believed that if ISPs were faced with liability claims for each message republished by their services, the service providers would be forced to restrict the number of users and messages posted, which would have a "chilling effect" on the freedom of internet speech.<sup>76</sup> As a result, Congress chose to immunize ISPs to avoid such a restrictive result.<sup>77</sup>

In the 1998 case of *Blumenthal v. Drudge*, the D.C. Circuit expanded on the immunities provided to ISPs via the CDA and the *Zeran* decision.<sup>78</sup> The Blumenthals, a husband and wife, were White House Employees who brought a defamation action against defendant, Matt Drudge, an online columnist, and AOL for disseminating the defamatory content.<sup>79</sup> AOL had entered into a one year licensing agreement with Drudge making the Drudge Report available to all AOL members in exchange for a \$3,000 monthly "royalty payment" to Drudge.<sup>80</sup> Under

<sup>71</sup> Bluestone, *supra* note 62, at 582.

<sup>72</sup> *Zeran v. Am. Online, Inc.* 129 F.3d 327, 327 (4th Cir. 1997).

<sup>73</sup> *Id.*, at 327, 330.

<sup>74</sup> *Id.* at 330-31.

<sup>75</sup> *Id.* at 331.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Bluestone, *supra* note 62, at 582.

<sup>79</sup> *Blumenthal v. Drudge*, 992 F. Supp. 44, 47 (D.D.C. 1998).

<sup>80</sup> *Id.* at 47.



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the agreement, Drudge was able to “create, edit, update and ‘otherwise manage’ the content of the Drudge Report” while AOL maintained the right to remove content that it “reasonably determined” was in violation of AOL's then standard terms of service.<sup>81</sup>

In formulating its decision, the D.C. Circuit used the principals outlined in *Zeran* to begrudgingly conclude that AOL was immune from suit in this case despite the fact that Drudge was an AOL employee and was operating in his employment capacity.<sup>82</sup> This ruling was a display of great deference to the *Zeran* decision since the D.C. Circuit ruled in this manner even though the court believed that AOL had taken “advantage of all the benefits conferred by Congress in the Communications Decency Act, and then some, without accepting any of the burdens that Congress intended.”<sup>83</sup> *Blumenthal* would be only one of several cases to cite *Zeran* as authority, which reaffirmed the findings of the *Zeran* court.<sup>84</sup>

In 2001, the Southern District of New York decided *Gucci Am., Inc. v. Hall & Assoc.*, in which Gucci brought a trademark infringement claim against a website operator and the ISP which was hosting the operator's website.<sup>85</sup> Here, the court affirmed that the CDA does not provide immunity for trademark infringement claims against ISPs.<sup>86</sup> The impact of this decision gave rise to several claims that triggered DMCA safe harbor protection.<sup>87</sup>

The first notable case in this category was *Hendrickson v. eBay*, which was decided in 2001.<sup>88</sup> The plaintiff was the owner of a copyright in a motion picture and brought this infringement action against eBay, the online auction service, which had listed offers to sell the alleged infringing copies of the film.<sup>89</sup> The court applied a narrow interpretation of the DMCA in determining whether an ISP qualified for safe harbor protection and found that a service provider cannot lose its immunity when it engages in conduct specifically required by the DMCA.<sup>90</sup>

The conduct specifically required by the DMCA at issue in *Hendrickson* is the requirement for an ISP to remove or block access to materials posted on its system once it has been notified of a claimed infringement.<sup>91</sup> Upon receiving notice of the

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<sup>81</sup> *Blumenthal*, 992 F. Supp. at 47.

<sup>82</sup> *Id.* at 51-52.

<sup>83</sup> *Id.* at 52-53.

<sup>84</sup> Bluestone, *supra* note 62, at 582-83.

<sup>85</sup> *Gucci Am., Inc. v. Hall & Assoc.*, 135 F. Supp. 2d 409 (S.D.N.Y. 2001).

<sup>86</sup> *Id.* at 417.

<sup>87</sup> Bluestone, *supra* note 62, at 583.

<sup>88</sup> *Hendrickson v. eBay*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001).

<sup>89</sup> *Id.* at 1084-85.

<sup>90</sup> *Id.* at 1093.

<sup>91</sup> *Id.*

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infringement claim by the plaintiff, eBay removed the infringing listings of the movie pursuant to the DMCA.<sup>92</sup> Thus, it was meritless to argue that by removing the infringed material that eBay had established the right and ability to control the infringing activity on its website.<sup>93</sup> Furthermore, the court found that a notice of infringement to a service provider such as eBay must “comply substantially” with the elements of notification of the DMCA in order to remove safe harbor protection, which was not achieved in *Hendrickson*.<sup>94</sup>

In *Costar Group v. Loopnet*, the court further expanded the DMCA interpretations of safe harbor immunity for service providers claiming that the DMCA created a floor, but not a ceiling, for ISP protection.<sup>95</sup> The District Court of Maryland held that an ISP’s “policy must warn users who repeatedly infringe copyrights that there is a ‘realistic threat’ of losing account access.”<sup>96</sup> Then in 2008, the Fifth Circuit continued the trend of extending CDA and DMCA immunities to include social networking sites such as Facebook and Twitter in *Doe v. MySpace*.<sup>97</sup>

Based on the immunity from liability provided to ISPs through the CDA and the DMCA and the broadening effect of these Acts via court interpretation, it seems unlikely that any service provider could be found liable for a tort committed by one of their users’ acts.<sup>98</sup> However, many times the damaging online behavior necessitates some type of remedy. In these situations, it is common for these victims to turn to harassment statutes to find justice for their Internet grievances.

### III. INCOMPLETE PASS: HARASSMENT LAWS ILLUSTRATE HOW TRADITIONAL LAWS DO NOT ADEQUATELY ADDRESS ISP MISCONDUCT

Harassment laws have progressed through the years in effort to adapt to our ever-evolving society, except when it comes to cyber harassment. Harassment, in its traditional offline form, is defined as “words, conduct, or action ... that ... annoys, alarms, or causes substantial emotional stress in [the] person and serves no legitimate purpose.”<sup>99</sup> The Internet has muddled the traditional notions of harassment by providing increased opportunities for harassers who can anonymously perpetrate their victims with ease through email, blogs, or social media sites while at home or at work.<sup>100</sup> As a result, there is no universal definition

<sup>92</sup> *Hendrickson*, 165 F. Supp. 2d at 1093.

<sup>93</sup> *Id.*

<sup>94</sup> *Hendrickson*, 165 F. Supp. 2d at 1089.

<sup>95</sup> *Costar Group v. Loopnet*, 373 F.3d 544, 555 (4th Cir. 2004).

<sup>96</sup> *Bluestone*, *supra* note 62, at 584.

<sup>97</sup> *Id.*; *see, e.g., Doe v. MySpace*, 528 F.3d 413 (5th Cir. 2008).

<sup>98</sup> *See Zeran*, 129 F.3d at 328; *Hendrickson*, 165 F. Supp. 2d at 1082; *Blumenthal*, 992 F. Supp. at 47; *Gucci Am., Inc.*, 135 F. Supp. 2d at 409.

<sup>99</sup> Sarah Jameson, *Cyberharassment: Striking a Balance Between Free Speech and Privacy*, 17 COMM-LAW CONSPECTUS, 231, 235 (2008).

<sup>100</sup> Jameson, *supra* note 99, at 235.

for cyber harassment, but it typically occurs “when an individual or group with no legitimate purpose uses a form of electronic communication as a means to cause great emotional distress to a person.”<sup>101</sup> A cyberharasser’s motive is to frighten or embarrass the victim.<sup>102</sup>

Unfortunately, Congress has not made protecting victims of cyberharassment a priority.<sup>103</sup> As a result, there is currently no federal statute that directly addresses the various forms of cyberharassment, which means victims must rely on the traditional federal harassment laws and possibly state laws.<sup>104</sup> Harassment is usually classified as a misdemeanor in most states, but these statutes have no applicable law or punishment for violators on the Internet.<sup>105</sup>

Initially, Section 223 of the CDA made it a federal crime to use a telecommunications device to make harassing or obscene calls, but the Internet was intentionally excluded from the statute for years.<sup>106</sup> Then, in 2006, Section 223(a)(1)(C) was amended to incorporate into its definition of “telecommunications device,” “any device or software that can be used to originate telecommunications or other types of communications that are transmitted, in whole or in part, by the Internet.”<sup>107</sup> After the 2006 amendment, Section 223(a)(1)(C) made it a federal crime for anyone using the Internet “without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person...who receives the communications.”<sup>108</sup> Thus, Internet harassment was finally criminalized pursuant to the 2006 amendment.

Based on their most recent amendments, the traditional federal statutes addressing harassment are trying to incorporate the online nature of the crime as

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<sup>101</sup> Jameson, *supra* note 99, at 237 (“Until Congress adopts a federal statute, the need for clearly stated definitions remains.”).

<sup>102</sup> Jameson, *supra* note 99, at 236.

<sup>103</sup> Jameson, *supra* note 99, at 245-46 (“Traditional, federal harassment statutes focus on physical contact between the harasser and the victim and therefore inappropriately address the virtual nature of cyberharassment. Although Congress has enacted legislation to protect children on the Internet, mainly from harmful content, enacting legislation to protect victims from harassers on the Internet has not been a congressional priority. Victims of cyberharassment are limited to civil litigation as a remedy: victims can sue for defamation, invasion of privacy, or intentional infliction of emotional distress. Victims might also find recourse by reporting a cyberharasser to an ISP and then attempting to sue the ISP itself under section 509 of the CDA. However, when utilized in suits for unlawful conduct over the Internet, these options are increasingly restricted and leave victims of cyberharassment ineffectively protected. Fortunately, Congress has started to recognize the increasing problems caused by cyberharassment.”).

<sup>104</sup> 2 RONALD N. WEIKERS ET AL., , DATA SECURITY AND PRIVACY LAW § 15:18 (2d ed. 2014).

<sup>105</sup> Jameson, *supra* note 99, at 246.

<sup>106</sup> WEIKERS, *supra* note 104.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

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evidenced by Section 223(a)(1)(C). However, issues with applying them to cyberharassment still remain. The fundamental problem in applying such laws to cyberharassment is due to the traditional statute's strong focus on the physical and direct contact between the harasser and the victim, which makes the statute ineffective when dealing with the cyber aspect of harassment.<sup>109</sup> For instance, applying Section 223(a)(1)(C) to a catfishing hoax or to a false Twitter account prank would be difficult because the specific nature of those activities do not fit into the statutory definition of harassment. It is important to note that the statute itself inherently carries with it issues of vagueness, as well as First Amendment free speech challenges.<sup>110</sup>

Since there is no federal statute regulating cyberharassment and there is no current federal harassment law that adequately addresses the cyber aspect of harassment, victims of the crime are forced to find a remedy through civil litigation.<sup>111</sup> The Megan Meier's "MySpace Suicide Hoax" illustrates the consequences of not having a specific statute penalizing cyberharassment.<sup>112</sup> Megan was a thirteen-year-old girl who hanged herself due to a MySpace prank that was played on her by her forty-seven year old neighbor, Lori Drew.<sup>113</sup> Drew created a MySpace account under the fictitious name Josh Evans with the intent to discover whether or not Megan spread rumors about Drew's daughter.<sup>114</sup>

During a two-hour time frame on the night she committed suicide, Megan became a target of intense cyberharassment, analogous to a "teenage mob on the Web."<sup>115</sup> The "mob" tormented Megan by calling her fat and a slut, as well as spreading other rumors about her, and said that no one should befriend her.<sup>116</sup> Tragically, Megan ended her life that night, and without a federal statute specifically criminalizing the cyberharassment she suffered. Thus, holding Drew criminally responsible for her role in the suicide will likely be unsuccessful, leaving civil litigation as Megan's family's sole remedy.<sup>117</sup>

Victims of cyberharassment can attempt to sue for defamation, invasion of privacy, and/or intentional infliction of emotional distress, along with other torts.<sup>118</sup> The voluntary nature of the Internet combined with the high burden the plaintiff carries in presenting clear evidence proving the defendant's state of mind to

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<sup>109</sup> Jameson, *supra* note 99, at 246.

<sup>110</sup> WEIKERS, *supra* note 104.

<sup>111</sup> Jameson, *supra* note 99, at 246.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Jameson, *supra* note 99, at 232.

<sup>118</sup> *Id.* at 246.

intentionally cause harm, makes it very difficult for a plaintiff to win on these claims.<sup>119</sup>

Another major problem associated with cyberharassment is the anonymous nature of the Internet, because too often the victim does not know the harasser's identity or is mistaken as to the true identity of the harasser.<sup>120</sup> These victims may try to find recourse through suing the ISP after reporting the cyberharassment to the ISP under the CDA.<sup>121</sup> ISP immunity, however, as previously discussed, is incredibly broad and the standard of proof required to find one liable for a user's message is very high. This limits the options for cyberharassment victims and leaves them ineffectively protected by the law.<sup>122</sup> Failure to allow relief from ISPs renders these plaintiffs without a remedy.

#### IV. THE 4<sup>TH</sup> QUARTER

The CDA, the DMCA, and the corresponding case law, appear to leave Te'o and Goforth without a remedy against the social media conglomerates, Facebook and Twitter. It seems evident that Congress chose to legislate away any claim to damages that would have been available to the two athletes. The harms that Te'o and Goforth suffered are so pervasive and rapidly becoming commonplace in our cyber-world that Congress must do something to address this inequity. This is the type of conduct the CDA promised to protect against in its policy section, but instead, Congress has only allowed this kind of cyber misconduct to flourish without recourse.

Te'o and Goforth will have an incredibly difficult time establishing a successful tort claim against Facebook and Twitter, respectively. Section 230 of the CDA specifically states that ISPs will not be treated as the "publisher or speaker" for the content of a third party.<sup>123</sup> The act also prohibits civil liability in instances where the service provider acted in good faith to remove or restrict access to materials considered by the provider to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."<sup>124</sup> The immunity afforded to Facebook and Twitter by Section 230 of the CDA would appear to thwart a tort claim brought forth by Te'o or Goforth on its face.

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<sup>119</sup> Jameson, *supra* note 99, at 248.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 246.

<sup>122</sup> *Id.*

<sup>123</sup> 47 U.S.C. § 230.

<sup>124</sup> 47 U.S.C. § 230.

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Then, the *Zeran* decision expanded Section 230 ISP immunity so far as to make recovery virtually impossible for Te'o and Goforth.<sup>125</sup> The court held that instead of having ISPs actively limit and restrict online speech in fear of being liable for its content, "Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect."<sup>126</sup> In other words, an ISP is not required to screen each of its millions of postings for possible problems and is free from liability from such postings pursuant to the CDA.<sup>127</sup> Even if Te'o or Goforth could establish that there was "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" material that caused them injury on either site, Facebook and Twitter are not obligated to screen for that content and, therefore, cannot be held liable for its appearance on their networks. .

The DMCA, by way of Section 512, strengthens the weakness of Section 230 of the CDA by offering ISPs "safe harbor" protection from monetary damages for claims of copyright infringement.<sup>128</sup> Finally, the court in *Doe v. MySpace*, extended CDA and DCMA immunities to include social media sites, thus rendering Facebook and Twitter seemingly impervious to tort liability for their users' conduct.<sup>129</sup>

Although it is likely that Te'o and Goforth would be precluded from successfully suing the appropriate social media sites for tort liability, they could attempt to bring a possible cyberharassment claim due to the nature and extent of their victimization. While filing a cyberharassment claim is an option, it is likely that both players would fail on that ground as well.

Te'o appears to have a stronger cyberharassment claim than does Goforth, because Te'o can readily identify his alleged "harasser" as Ronaiah Tuiaosopo who has accepted responsibility for the catfishing hoax.<sup>130</sup> Pursuant to Section 223(a)(1)(C) of the federal cybercrime statute, it is a federal crime for anyone to use the Internet "without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person...who receives the communications."<sup>131</sup> Applying this statute to Tuiaosopo's online activity, however, will be difficult to accomplish for a few reasons. First, Tuiaosopo clearly did not reveal his true identity to Te'o, but he did go to great lengths to assume a fictitious identity instead of remaining anonymous. This is an important difference, because it lends insight into

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<sup>125</sup> Bluestone, *supra* note 62, at 580.

<sup>126</sup> *Zeran*, 129 F.3d at 331.

<sup>127</sup> Bluestone, *supra* note 62, at 582.

<sup>128</sup> *Id.* at 580.

<sup>129</sup> *Id.*

<sup>130</sup> Eder, *Te'o Answers*, *supra* note 20 (since Ronaiah Tuiaosopo came forward and accepted responsibility for the hoax).

<sup>131</sup> WEIKERS, *supra* note 104.

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Tuiasosopo's mindset during the catfishing hoax, which is pivotal when trying to interrupt his intent.

Second, it is unclear and nearly impossible to prove that Tuiasosopo's intent was to "annoy, abuse, threaten, or harass" Te'o given the bizarre nature of this case.<sup>132</sup> People have speculated a variety of possible motives for Tuiasosopo, ranging from him seeking the thrill of a successful publicized catfishing hoax, to a potential financial payout from Te'o down the line.<sup>133</sup> By all accounts, however, it is still unclear as to what motivated Tuiasosopo's behavior, assuming he was definitely the architect behind the hoax.<sup>134</sup> Tuiasosopo, in his interview with Dr. Phil, claimed that pretending to be Lennay Kekua gave him an "escape" from his life and that he developed "feelings" and "emotions" for Te'o that eventually Tuiasosopo "couldn't control anymore."<sup>135</sup>

Based on Tuiasosopo's account, which is difficult to rely on since he is an admitted liar and hoaxer,<sup>136</sup> his actions do not appear to meet the intent requirement of Section 223(a)(1)(C) and proving otherwise will be challenging. Te'o's voluntary participation in the matter will not aid in establishing the intent requirement of Section 223(a)(1)(C) either. Tuiasosopo clearly duped Te'o into believing Kekua was an actual person, but the fact remains, Te'o was a willing party in the relationship, which leads to the question, "how harassing was Tuiasosopo's behavior?"

Despite Te'o's participation in the catfishing hoax, he was still injured by the actions of Tuiasosopo. It seems likely, however, that Tuiasosopo's actions will fall outside the scope of Section 223(a)(1)(C) because the intent requirement cannot be established. Thus, the current harassment laws do not seem equipped to incriminate complex catfishing hoaxes.

The circumstances surrounding Goforth's online impersonation seemingly disqualify any potential cyberharassment claim he may have under Section 223(a)(1)(C). Even if Goforth could establish the intent burden of Section 223(a)(1)(C), he was not the person who "receive[d] the communications," and was therefore not the subject of any harassment himself, as the statute requires.<sup>137</sup>

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<sup>132</sup> Eder, *Te'o Answers*, *supra* note 20.

<sup>133</sup> *Id.*

<sup>134</sup> Eder, *Te'o Answers*, *supra* note 20.

<sup>135</sup> Timothy Burke & Jack Dickey, *Here's Everything Ronaiah Tuiasosopo Told Dr. Phil in Day One Of His Exclusive Interview*, DEADSPIN (Jan. 31, 2013, 2:07 PM), <http://deadspin.com/5980594/heres-everything-ronaiah-tuiasosopo-told-dr-phil-in-day-one-of-his-exclusive-interview>.

<sup>136</sup> Eder, *Te'o Answers*, *supra* note 20.

<sup>137</sup> WEIKERS, *supra* note 104.

Wide Right:

How ISP Immunity and Current Laws Are Off the Mark in  
Protecting the Modern Athlete on Social Media

Furthermore, an anonymous individual committed the online impersonation. As a result, Goforth's cyberharassment claim would have to be brought against Twitter, which is clearly immune from third party actions, under the immunities provided to ISPs through the CDA and the DMCA. The extensive safeguarding power afforded to the ISPs, coupled with the nonexistent federal statute that directly addresses the specific nature of all the various new forms of cyberharassment, leaves no available recourse for either Te'o or Goforth.

**V. THE "HAIL MARY"**

The evolving nature of the Internet creates new challenges in its regulation almost on a daily basis. As a result of these challenges, the Legislature needs to create new laws or amend the current ones so that ISPs can no longer hide behind blanket immunity for all of their users' behavior. However, given the legislative safeguard protections enjoyed by the CDA and the DMCA, coupled with the courts' apparent stance that this type of Internet misconduct is not something that needs to be protected, it is likely that nothing will change unless the CDA and the DMCA are amended. Amending the CDA and the DMCA, however, is almost as unlikely as completing a successful "Hail Mary" as time expires to win the Super Bowl; meaning Te'o and Goforth will be left on the sidelines without a remedy.