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IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

BILLY CULLEN, CLAUDETTE CULLEN, TRACY CULLEN, JERRY FROELICH, DANA BARRETT, KAREN SAWYER, and MIKE GREEN,	)	
Plaintiff,	)	
v.	)	Case No. 04 C 197
PHILLIP YBARROLAZA and JOHN DOES 1-10,	)	
Defendants.	)	

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT PHILLIP YBARROLAZA'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

COMES NOW, Defendant, Phillip Ybarrolaza ("Defendant Ybarrolaza"), and respectfully submits this Supplemental Memorandum on the issue of the legislative history for 47 U.S.C. § 230. In further support of his Motion to Dismiss, Defendant Ybarrolaza states as follows:

At the hearing on Defendant Phillip Ybarrolaza's Motion to Dismiss ("Motion to Dismiss"), the Court inquired as to whether any legislative history existed with respect to 47 U.S.C. § 230. Counsel for Defendant Ybarrolaza acknowledged that the record before the Court did not include any documented legislative history. Counsel for Plaintiffs stated that their efforts to find legislative history had failed. At the conclusion of the hearing, the Court further directed the parties to submit any legislative history within ten (10) days.[1] Defendant Ybarrolaza now complies with this directive.

The Beginning

In 1995, both the United States House of Representatives ("House") and the United States Senate ("Senate") introduced legislation seeking to overhaul laws affecting communications. The origin of these legislative efforts began in the 103rd Congress in 1994. See S. REP. NO. 23, 104th Cong., 1st Sess. 12 (1995) (included in the CD-ROM compendium attached as Exhibit A with the filename "S_Rep_104-23.pdf").[2] However, the full 103rd Congress did not consider any such legislative proposal prior to the conclusion of its term. See id.

In the beginning of the 104th Congress, Senator Pressler circulated a Republican draft of the telecommunications legislation entitled "The Telecommunications Competition and Deregulation Act of 1995" ("Telecommunications Bill").[3] See id. Both the Senate and House versions of the Telecommunications Bill were introduced later in the First Session of the 104th Congress. The Senate version of the Telecommunications Bill eventually included the original draft of the limited immunity provisions of the Communications Decency Act ("CDA"). The House version of the bill eventually included the broader § 230 language (along with other provisions) as an alternative to the CDA. Congress enacted both the CDA and § 230. While the Supreme Court held certain provisions of the CDA to be unconstitutional, § 230 survives as 47 U.S.C. § 230.

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[1] Defendant Ybarrolaza has computed these ten (10) days pursuant to Rule 6.01 of the Tennessee Rules of Civil Procedure.

[2] Although the Senate Report indicates that the 104th Congress included 1994, it did not. The Report no doubt meant to state the 103rd Congress.

[3] Senator Hollings (D-SC) circulated a Democratic alternative entitled the "Universal Service Telecommunications Act of 1995" on February 14, 1995.

The Senate Version

In January 1995, Senator Pressler began circulating a version of the Telecommunications Bill.[4] In addition, the Senate Committee on Commerce, Science, and Transportation began to hold hearings on the bill's subject matter.[5] See generally S. REP. NO. 23, 104th Cong., 1st Sess. (1995).

On January 30, 1995 (legislative day February 1, 1995), Senator Exon introduced S. 314 known as the "Communications Decency Act" to the Senate.[6] See S. 314, 104th Cong., 1st Sess. (1995) (attached as Exhibit B and included in the CD-ROM compendium attached as Exhibit A with the filename "S_314.pdf"). S. 314 was referred to the Senate Committee on Commerce, Science, and Transportation. As introduced, the CDA did not include any immunity language, much less immunity language similar to § 230.[7] See id.

While in the Senate Committee on Commerce, Science, and Transportation, the Telecommunications Bill was amended to include Senator Exon's CDA language as well as an immunity section. See S. 652 (Reported), 104th Cong., 1st Sess. 137-145 (1995) (attached as Exhibit C) (the entire S. 652 as reported has been included in the CD-ROM compendium attached as Exhibit A with the filename "S_652_Reported.pdf"). Specifically, as Senator Exon stated, "the decency provisions were refined to clarify and to focus on wrongdoers and to avoid imposing vicarious liability on innocent *information service* ***and*** *Internet access providers* who

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[4] Attempts to find a copy of the Pressler draft from January 1995 were not successful.

[5] These hearings occurred on January 9, March 2, and March 21, 1995.

[6] The House counterpart to the CDA was H.R. 1004. See H.R. 1004, 104th Cong., 1st Sess. (1995) (included in the CD-ROM compendium attached as Exhibit A with the filename "HR_1004.pdf").

[7] For a legislative history specific to the Communications Decency Act (and not so much § 230) through November 1996, see Cannon, Robert, "The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway," 49 FEDERAL COMMUNICATIONS LAW JOURNAL 51 (November 1996).

simply act as the mailmen, if you will, for computer messages." 141 CONG. REC. S8330 (1995) (statement of Senator Exon) (emphasis added) (attached as Exhibit D and included in the CD-ROM compendium attached as Exhibit A with the filename "141_Cong_Rec_S8327-8347.pdf").

On March 30, 1995, Senator Pressler introduced the Telecommunications Bill into the Senate accompanied by the "Telecommunications Competition and Deregulation Act of 1995 Report of the Committee on Commerce, Science, and Transportation." See generally S. 652 (Reported), 104th Cong., 1st Sess. (1995); see also S. REP. NO. 23, 104th Cong., 1st Sess. (1995). As introduced, the CDA immunity provision read:

> (d) ADDITIONAL DEFENSES; RESTRICTIONS ON ACCESS; JUDICIAL REMEDIES RESPECTING RESTRICTIONS
>
> (1) No person shall be held to have violated this section with respect to any action by that person or a system under his control that is limited solely to the provision of access, including transmission, downloading, intermediate storage, navigational tools, and related capabilities not involving the creation or alteration of the content of the communications, for another person's communications to or from a service, facility, system, or network not under that person's control.
>
> (2) It is a defense to prosecution under subsections (a)(2), (b)(1)(B), and (b)(2)(B) that a defendant lacked editorial control over the communication specified in this section.
>
> (3) It is a defense to prosecution under subsections (a)(2), (b)(1)(B), and (b)(2)(B) that a defendant has taken good faith, reasonable steps as appropriate:
>
> (A) to provide users with the means to restrict access to communications described in this section;
>
> (B) provide users with warnings concerning the potential for access to such communications;
>
> (C) to respond to complaints from those who are subjected to such communications;
>
> (D) to provide mechanisms to enforce a provider's terms of service government such communications; or

> (E) to implement such other measures as the Commission may prescribe to carry out the purposes of this paragraph. Nothing in this section in and of itself shall be construed to treat enhanced information services as common carriage.

S. 652 (Reported), 104th Cong., 1st Sess. 140-142 (1995) (attached as Exhibit C). As the accompanying Senate Report made clear, "[t]he measure specifically excludes from liability telecommunications and information service providers and system operators who are not themselves knowing participants in the making or otherwise responsible for the content of the prohibited communications." S. REP. NO. 23, 104th Cong., 1st Sess. 9 (1995) (attached as Exhibit E). Further, "[t]he Communications Decency Act applies to those who knowingly and intentionally created and send prohibited messages or use telecommunications devices to harass an individual . . . [and] . . . specifically exclude from liability telecommunications and information service providers and system operators who are not themselves knowing participants in the making of or otherwise responsible for the content of the prohibited communications." See id. at 59 (attached as Exhibit E).

The Senate did not hold any committee hearings specifically on the CDA. As the Supreme Court noted:

> The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, was an unusually important legislative enactment. As stated on the first of its 103 pages, its primary purpose was to reduce regulation and encourage "the rapid deployment of new telecommunications technologies." The major components of the statute have nothing to do with the Internet; they were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting. The Act includes seven Titles, six of which are the product of extensive committee hearings and the subject of discussion in Reports prepared by Committees of the Senate and the House of Representatives. By contrast, Title V--known as the "Communications Decency Act of 1996" (CDA)--contains provisions that were either added in executive committee after the hearings were concluded or as amendments offered during floor debate on the legislation. An amendment offered in the Senate was the source of the two statutory provisions challenged in this case. They are

informally described as the "indecent transmission" provision and the "patently offensive display" provision.

See Reno v. ACLU, 521 U.S. 844, 857-858 (1997).

The Senate debated the Telecommunications Bill on June 7, 8, 9, 12, 13, 14 and 15, 1995. On June 9, 1995, Senator Exon submitted Amendment 1268 to the Telecommunications Bill (S. 652) which was intended to be proposed but was "[o]rdered to lie on the table" and proceeded no further.[8] See 141 CONG. REC. S8120 (1995) (included in the CD-ROM compendium attached as Exhibit A with the filename "141_Cong_Rec_S8120.pdf"). On June 13, 1995, Senator Leahy introduced Amendment 1288 that intended to replace nearly all of the CDA language with provisions calling generally for a Congressional study of these issues.[9] See 141 Cong. Rec. S8270-8271 (1995) (attached as Exhibit F and included in the CD-ROM compendium attached as Exhibit A with the filename "141_Cong_Rec_S8270-8271.pdf").

The next day, Senators Exon and Coats introduced a second-degree Amendment 1362 to Senator Leahy's Amendment 1288. See 141 CONG. REC. S8327-8239, S8386 (1995) (attached as Exhibit G and included in the CD-ROM compendium attached as Exhibit A with the filename "141_Cong_Rec_S8327-8347.pdf"). This Amendment 1362 sought to further refine the CDA language originally proposed by Senator Exon.[10] See id. A debate ensued between supporters of

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[8] However, Senator Exon did submit remarks on Amendment 1268. See 141 CONG. REC. S8087-8092 (1995) (included in the CD-ROM compendium attached hereto as Exhibit A with the title "141_Cong_Rec_S8087-8092.pdf").

[9] Senator Leahy's amendment replaced pages 137 line 7 through 144 line 19. See 141 Cong. Rec. S8270 (1995). Senator Leahy had previously introduced S. 714 as an alternative to the proposed Communications Decency Act on April 7, 1995 (legislative day April 5, 1995). In relation to this topic, Senator Leahy requested the Center for Democracy & Technology's industry Interactive Working Group to study the issues and issue a report. See 141 CONG. REC. S8342 (1995). This Report has been included in the CD-ROM compendium attached as Exhibit A with the filename "IWG_Report_Leahy_Request.pdf".

[10] Speaking to the difference between the original CDA in the Telecommunications Bill and Amendment 1268, Senator Leahy acknowledged Senator Exon's correction of serious problems

the Exon-Coats Amendment and the Leahy Amendment. See id. at S8327-8347. During this debate, Senator Coats explained that the language of Amendment 1362 envisioned a meaning for Internet access provider much broader than the large ISPs. Specifically, Senator Coats stated that the act of providing Internet access included small businesses that merely have a computer that others can use to access the Internet. See id. at S8333. The Senate approved the Exon-Coats Amendment 1362 on June 14, 1995. See 141 CONG. REC. S8347 (1995). The final language read as follows:[11]

> (f) Defenses to the subsections (a), (d), and (e), restrictions on access, judicial remedies respecting restrictions for persons providing information services and access to information services--
>
> (1) No person shall be held to have violated subsections (a), (d), or (e) solely for providing access or connection to or from a facility, system, or network over which that person has no control, including related capabilities which are incidental to providing access or connection. This subsection shall not be applicable to a person who is owned or controlled by, or a conspirator with, an entity actively involved in the creation, editing or knowing distribution of communications which violate this section.
>
> (2) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his employment or agency and the employer has knowledge of, authorizes, or ratifies the employee's or agent's conduct.
>
> (3) It is a defense to prosecution under subsection (a), (d)(2), or (e) that a person has taken reasonable, effective and appropriate actions in good faith to restrict or prevent the transmission of, or access to a communication specified in such subsections, or complied with procedures as the Commission may prescribe in furtherance of this section. Until such regulations become effective, it is a defense to prosecution that the person has complied with the procedures prescribed by regulation pursuant to subsection (b)(3). Nothing in this subsection

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in the prior version of the CDA identified by the Department of Justice and others (though Senator Leahy found the corrections far short of those necessary). See 141 CONG. REC. S8340 (1995).

[11] The only difference between Senator Exon's Amendment 1362 and the final language incorporated into the Telecommunications Bill (S. 652) involved the word "person" in the second sentence of (f)(1) replacing the word "individual." Compare 141 Cong. Rec. S8327-8328, S8386 (1995).

shall be construed to treat enhanced information services as common carriage. June 14, 1995.

S. 652 (Engrossed), 104th Cong., 1st Sess. 173-175 (1995) (included in the CD-ROM compendium attached as Exhibit A with the filename "S_652_Engrossed.pdf"). Although the Senate passed defense and immunity language far more restrictive than §230, the Senate debates made clear that the immunity provided through the CDA defenses included a definition of Internet access provider much broader than that proposed by the Plaintiffs (e.g. including a business that provides a computer to its employee) and included both information service and Internet access providers). See 141 CONG. REC. S8330, S8333 (1995) (attached as Exhibit C). The Senate passed S. 652 on June 15, 1995. See generally S. 652 (Engrossed), 104th Cong., 1st Sess. (1995). This version did not include the language and immunity provisions enacted as § 230. See id. This language emanated from the House in response to the concerns over the restrictive language of the CDA.

The House Version

In the House, Representative Thomas Bliley introduced the House telecommunications bill as H.R. 1555, styled as the "Communications Act of 1995," on May 3, 1995. See H.R. 1555 (Introduced), 104th Cong., 1st Sess. (1995) (included in the CD-ROM compendium attached as Exhibit A with the filename "HR_1555_Introduced.pdf"). As introduced, H.R. 1555 did not include any language similar to that of § 230. See id. In fact, the version of H.R. 1555 reported in the House on July 24, 1995 also did not contain similar language.[12] See H.R. 1555

[12] On May 10-12, 1995, the House Subcommittee on Telecommunications and Finance of the House Committee on Commerce held hearings on H.R. 1555. On May 17, 1995, the Subcommittee on Telecommunications and Finance approved amended H.R. 1555 for review by the full committee. On May 24, 1995, the House Committee on Commerce began mark-up of H.R. 1555. On May 25, 1995, the House Committee on Commerce ordered amended H.R. 1555

(Reported), 104th Cong., 1st Sess. (1995) (included in the CD-ROM compendium attached as Exhibit A with the filename "HR_1555_Reported.pdf").

On June 30, 1995, Representatives Christopher Cox and Ron Wyden introduced House Resolution 1978 ("H.R.1978") as "The Internet Freedom and Family Empowerment Act." See H.R, 1978, 104th Cong., 1st Sess. (1995) (attached as Exhibit G and included in the CD-ROM compendium attached as Exhibit A with the filename "HR_1978.pdf"). The House referred H.R.1978 to the House Committee on Commerce. On July 10, 1995, H.R.1978 was referred to the Subcommittee on Telecommunications and Finance. See H.R.1978 Bill Summary and Status (attached as Exhibit H and included in the CD-ROM compendium attached as Exhibit A with the filename "HR_1978_History.pdf"). H.R.1978 contained the first introduction of the language that would eventually become § 230. Specifically, H.R.1978 provided:

> (c) PROTECTION FOR `GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL- No provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by an information content provider. No provider or user of interactive computer services shall be held liable on account of--
>
> (1) any action voluntarily taken in good faith to restrict access to 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; or
>
> (2) any action taken to make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

H.R. 1978, 104th Cong., 1st Sess. 3-4 (1995). The language of H.R. 1978 made clear that it protected both a provider *and* user of interactive computer services.[13] See id. Moreover, the

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to be reported. However, as H.R. 1555 did not at this juncture contain language similar § 223 or § 230 and the hearing transcripts could not be located, these hearings have not been reviewed.

[13] As will be noted below, the specific phrase "of any information provided by an information content provider" as introduced became amended to read "by another information content

language of H.R. 1978 also made clear that interactive computer services meant more than the provision of Internet access. See id. at 2. Indeed, the Internet "and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." See id.

H.R. 1978 failed to emerge from subcommittee. Rather, the language of H.R. 1978 next emerged as House Amendment 744 to H.R. 1555 ("Cox-Wyden Amendment") on August 4, 1995.[14] See 141 CONG. REC. H8468-8472 (1995) (attached as Exhibit I and included in the CD-ROM compendium attached as Exhibit A with the filename "141_Cong_Rec_H8468-8472.pdf"). As the Cox-Wyden Amendment made clear, the intended meaning of "interactive computer service" extended beyond just an Internet service provider ("ISP"). See id. at H8468-8469. The language explained that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" and "[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services." See id.

The language also included "access software providers" in the immunity provision of 230(c)(1). An "access software provider" is one who provides software or enabling tools that "filter, screen, allow, or disallow content" or "transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content." See id. It reflected a policy to "promote the continued development of the Internet and other interactive computer services and other interactive media;" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by State or Federal regulation;"

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provider." See *infra*. This further supports the position that Congress clearly intended that an information content provider could also be immune from liability for content published by *another* information content provider.

and to "encourage the development of technologies which maximize user control over the information received by individuals, families and schools who use the Internet and other interactive computer services." See id. at H8469.

The House agreed to the Cox-Wyden Amendment and later passed H.R. 1555 on that same day. See 141 CONG. REC. at H8472. The House version of the "Communications Act of 1995" then met the Senate's version in conference committee.

Conference Committee

The Conference Committee adopted the defenses provided in both the CDA and in the Cox-Wyden Amendment to H.R.1555.[15] See H. R. CONF. REP. NO. 458, 104th Cong., 1st Sess. 187-197 (1995) (attached as Exhibit J; the full report has been included in the CD-ROM compendium attached as Exhibit A with the filename "HR_Conf_Rep_104-458.pdf").

The Conference Report's discussion of the defenses in the CDA provide additional perspective on the scope of the Congressional intent to protect those not directly responsible for the publication of offensive material and further clarifies the distinction between § 230 and the "access provider" defense of § 223.[16] With respect to the CDA, the Conference Report affirmed that "[n]ew defenses are provided to assure that the mere provision of access to an interactive computer service does not create liability." See id. at 187. The Conference Report reads:

> New subsection 223(e) includes statutory defenses for violations of new sections 223 (a) and (d) that supplement other defenses available at law, such as common law defenses. ***New subsections 223 (e)(1), (e)(2) and (e)(3) set forth the***

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[14] The House Committee on rules held hearings on July 31, 1995 and August 1, 1995.

[15] The Conference Committee held hearings on October 25, 1995, December 5, 1995, March 12, 1995, and January 31, 1996. On January 31, 1995, the House Committee on Rules granted a rule that waived all points of order against the Telecommunications Act of 1996, its accompanying conference report, and the consideration of it. The rule treated the conference report as if read.

[16] Indeed, various portions of the CDA refer to the definition of "interactive computer service" under § 230.

"access provider" defense. The defense protects entities from liability for providing access or connection to or from a facility, network or system not under their control. ***The defense covers provision of related capabilities incidental to providing access, such as server and software functions, that do not involve the creation of content.*** The defense does not apply to entities that conspire with entities actively involved in the creation of content prohibited by this section, or who advertise that they offer access to prohibited content. Nor does it apply to provision of access or connection to a facility, system or network that engages in violations of this section and that is owned or controlled by the access provider. ***In the absence of these conditions, commercial and non-profit Internet operators who provide access to the Internet and other interactive computer services shall not be liable for indecent material accessed by means of their services. This provision is designed to target the criminal penalties of new sections 223(a) and (d) at content providers who violate this section and persons who conspire with such content providers, rather than entities that simply offer general access to the Internet and other online content. The conferees intend that this defense be construed broadly to avoid impairing the growth of online communications through a regime of vicarious liability.***

* * * * *

New subsection 223(f)(1) supplements, without in any way limiting, the "Good Samaritan" liability protections of new section 230.

New subsection 223(f)(2) preempts inconsistent State and local regulations of activities and actions described in new subsections 223(a)(2) and (d). This provision is intended to establish a uniform national standard of content regulation for a national, and indeed a global, medium, in which content is transmitted instantaneously in point-to-point, and point-to-multipoint communications. As originally passed by the Senate, this subsection excluded non-commercial content providers. The conferees have expanded this section to provide for consistent national and State and local content regulation of both commercial and non-commercial providers. The conferees recognize and wish to protect the important work of nonprofit libraries and higher educational institutions in providing the public with both access to electronic communications networks like the Internet, and valuable content which they are uniquely well-positioned to provide. Accordingly, nonprofit libraries and educational institutions, like commercial entities, are assured by this provision that they will not be subjected to liability at the State or local level in a manner inconsistent with the treatment of their activities or actions under this legislation.

The conferees also recognize the critical importance of access software in making the Internet and other interactive computer services accessible to Americans who are not computer experts. Accordingly, provisions of "access software" is included within the access provider defense. As defined in new subsection 223(h)(3), in term includes software that enables a user to do any of an

> enumerated list of functions that are set forth in technical language. It includes client and server software, such as proxy server software that downloads and caches popular web pages to reduce the load of traffic on the Internet and to permit faster retrieval. The definition distinguishes between software that actually creates or includes prohibited content and software that allows the user to access content provided by others.

H.R. CONF. REP. NO. 158, 104th Cong., 1st Sess. 190-191 (1995). Again, the comments with respect to §223 provide context to the interpretation of §230. The Conference Report makes clear that what has been known as the "access provider defense" refers to § 223 and not § 230.[17] See id. Although some have construed the limited § 223 "access provider defense" as applying to only providers of Internet access, the comments belie this limited interpretation. Indeed, the comments state explicitly that "[t]he defense covers provision of related capabilities incidental to providing access, such as server and software functions, that do not involve the creation of content."[18] See id. If the more limited "access provider defense" of § 223 included the provision of related capabilities incidental to providing access, clearly the broader protection under § 230 would include these in its definition of "interactive computer service." The comments also make clear that the provision of access to the Internet is but one of many possible interactive computer services. See id. ("commercial and non-profit Internet operators who provide access to the Internet and other interactive computer services shall not be liable for indecent material accessed by means of their service"). Indeed, the comments explicitly state that the defense included those who provide access to the Internet and "other online content." See H.R. CONF. REP. NO. 158, 104th Cong., 1st Sess. at 190-191. The comments also make clear that the defense should be construed broadly to avoid a regime of vicarious liability that could deter the growth of

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[17] To the extent then that the Plaintiffs have misconstrued § 230 as the "access provider" defense, the Plaintiffs have confused the two defenses.

[18] Arguably, this includes the very software functions the Plaintiffs have attributed to Defendant Ybarrolaza.

online communications. Finally, the comments discuss the addition of "access software" providers in the scope of the defense. See id. As § 230 also includes access software providers, this discussion remains relevant.[19]

As for § 230, the adopted version of § 230 read as follows:

SEC. 509. ONLINE FAMILY EMPOWERMENT.
Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

SEC. 230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.

(a) FINDINGS.—The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) POLICY.—It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

[19] Again, this includes the very software functions the Plaintiffs have attributed to Defendant Ybarrolaza.

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.

(1) TREATMENT OF PUBLISHER OR SPEAKER.—No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) CIVIL LIABILITY.—No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected;

or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) EFFECT ON OTHER LAWS.—

(1) NO EFFECT ON CRIMINAL LAW.—Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW.—Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) STATE LAW.—Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW.—Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(e) DEFINITIONS.—As used in this section:

(1) INTERNET.—The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) INTERACTIVE COMPUTER SERVICE.—The term 'interactive computer service' means 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.

(3) INFORMATION CONTENT PROVIDER.—The term 'information content provider' means 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.

(4) ACCESS SOFTWARE PROVIDER.—The term 'access software provider' means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 137-139 (attached as Exhibit K; the full text is included in the CD-ROM compendium attached as Exhibit A with the filename "PL_104-104.pdf"). In adopting the language for new § 230 as passed by the House, the Conference Report read:

> SECTION 509—ONLINE FAMILY EMPOWERMENT
>
> *Senate bill*
> No provision.
>
> *House amendment*
> Section 104 of the House amendment protects from civil liability those providers and users of interactive computer services for actions to restrict or to enable restriction of access to objectionable online material.
>
> *Conference agreement*
> The conference agreement adopts the House provision with minor modifications as a new section 230 of the Communications Act. This section provides ''Good Samaritan'' protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont* v. *Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.
>
> These protections apply to all interactive computer services, as defined in new subsection 230(e)(2), including non-subscriber systems such as those operated by many businesses for employee use. They also apply to all access software providers, as defined in new section 230(e)(5), including providers of proxy server software.
>
> The conferees do not intend, however, that these protections from civil liability apply to so-called ''cancelbotting,'' in which recipients of a message respond by deleting the message from the computer systems of others without the consent of the originator or without having the right to do so.

H.R. CONF. REP. NO. 158, 104th Cong., 1st Sess. 193-194 (1995).[20] In particular, the Conference Committee reflected that the provisions applied to both providers and/or users of interactive computer services. See id. In addition, the Conference Report expressed a broad interpretation to defining interactive computer services to include "all interactive computer services . . . including non-subscriber systems such as those operated by many businesses for employee use." See id.

It remains clear that should Congress have intended to limit § 230 to only providers of Internet access or providers of interactive computer services for that matter, it would have done so. However, it chose not to do so. The breadth of the "access provider" defense in § 223 coupled with the explicit language of "provider or user" under §230 clearly demonstrates that Congress intended § 230 to apply immunity to both providers and users of interactive computer services.

On February 8, 1996, Congress passed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (included in the CD-ROM compendium attached as Exhibit A with the filename "PL_104-104.pdf").

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[20] The defenses in § 230 relating to those who take affirmative steps for purposes of editing content arose from the decisions in Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995) and Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991). In Stratton, a court found Prodigy to be liable as a publisher because Prodigy advertised that it engaged in a practice of controlling content on its services as well as actively screened and edited messages posted on its bulletin boards. See Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 229 *13 (N.Y. Sup. Ct. May 24, 1995) ("It is PRODIGY's own policies, technology and staffing decisions which have altered the scenario and mandated the finding that it is a publisher.") In Cubby, the court held Compuserve not liable because Plaintiff had not demonstrated that Compuserve had knowledge of the communications at issue. Thus, the CDA and § 230 defenses equalized the approaches of the Stratton and Cubby decisions by overturning Stratton and affirming Cubby.

Subsequent Legislative History

In 1997, the Supreme Court held certain provisions of the CDA to be unconstitutional. See generally Reno v. ACLU, 521 U.S. 844, 857-858 (1997). This did not include § 230. In an attempt to enact constitutional provisions that would effectuate the objectives behind the CDA, Congress passed in 1998 the Child Online Protection Act ("COPA"), Pub. L. 105-277, 112 Stat. 2681 (1998).[21] See Child Online Protection Act ("COPA"), Pub. L. 105-277, 112 Stat. 2681 (1998) (included in the CD-ROM compendium attached as Exhibit A with the filename "PL_105-277.pdf"). In Section 1404 of COPA, Congress added a new sub-section and made minor modifications to 47 U.S.C. § 230. Congress did not modify § 230(c) or change the definitions of interactive computer service or information content provider under § 230. See id. Indeed, the House Report accompanying the legislation explicitly reaffirmed the intent of 230(c) as applying to providers *and* users of interactive computer services:

> E. Section 230 of the Communications Act
>
> In addition to Section 223, as part of the Telecommunications Act, Congress added Section 230 to the Communications Act. 47 U.S.C. §230. Section 230 states that providers and users of interactive computer services shall not be treated as publishers of any information provided by another information content provider. Section 230 also provides liability protections for providers and users of interactive computer services by permitting them to remove or restrict access to inappropriate materials.

H.R. REP. NO. 775, 105th Cong., 2d Sess. 9 (1998) (attached as Exhibit L; the full text of the report is included in the CD-ROM compendium attached as Exhibit A with the filename

[21] COPA was introduced in the House as H.R. 3783, but later became attached to H.R. 4328 "Making Appropriations for the Department of Transportation and Related Agencies for the Fiscal Year Ending September 30, 1999, and for other purposes." See H.R. 3783, 105th Cong., 2d Sess. (1998); H.R. 4328, 105th Cong., 2d Sess. (1998).

"HR_Rep_No_105-775.pdf").[22] Consequently, Congress both explicitly and implicitly reaffirmed the application of § 230's immunity to providers and users of interactive computer services. See id.

CONCLUSION

For the foregoing reasons, the legislative history of 47 U.S.C. § 230 demonstrates that the immunity defense under § 230(c) applies to Defendant Ybarrolaza whether as a provider or user of interactive computer services. For this reason, those raised at oral argument, and those in Defendant Ybarrolaza's prior memoranda on this motion, Defendant Ybarrolaza respectfully moves this Court to dismiss Plaintiffs' Amended Complaint in its entirety as to him.

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[22] In COPA, Congress defined the term "Internet access service" with a definition distinct from that of "interactive computer service." 47 U.S.C. § 231(e) (1998). Not only did COPA define "Internet access service," but referred to the § 230 definition of "interactive computer service" when amending 47 U.S.C. § 223(h)(2) by striking "230(e)(2)" and replacing it with "230(f)(2)". See 105 H.R. Rep. No. 825, 105th Cong., 2d Sess. 744, 766 (1998) (included in the CD-ROM compendium attached as Exhibit A with the filename "HR_Conf_Rep_105-825.pdf") and 47 U.S.C. § 223(h)(2).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished, via United States Mail, first-class postage prepaid, on this the 7th day of February, 2005, to:

James G. Stranch, III
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