

Undiplomatic Immunity

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Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, **87 Notre Dame L. Rev. 101** (2011), available at [SSRN](#).

“[Section 230](#)” contains the single most important provision in all of Internet law:

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.

Felix Wu’s [Collateral Censorship and the Limits of Intermediary Immunity](#) — his first article as a law professor — offers a perceptive new interpretation of this enigmatic sentence. It has always been clear that Section 230 protects intermediaries — the Googles, Facebooks, Comcasts, and bloggers of the world — from being held liable for user-generated content. But consensus in the core gives way to controversy in the penumbra: just how far does or should the immunity reach?

In [Zeran v. America Online](#), the Fourth Circuit gave an answer stunning in its absoluteness and its simplicity: the immunity applies no matter whether the intermediary is on notice of the content and of its wrongfulness. The courts have uniformly agreed: even if an offending post is transparently false and hurtful, and even if this fact is pointed out to the intermediary, and even if the intermediary cackles with glee, still it will be immune. This protection is the legal bedrock on which Internet empires have been built; it has also left countless victims of online thuggery without any effective legal recourse. The limited academic debates on Section 230 have largely focused on whether the *Zeran* rule is fine as it is, whether it should be rolled back to some form of notice-based liability, or whether it needs other exceptions for particularly egregious situations. There are good articles here, but one does not need a very long string cite to run through them.

Wu’s move, so elegant that it is obvious in hindsight, is to recognize that there are really two questions about Section 230, not one. The first is how strong its protection should be: this was the issue in *Zeran* and it is the one on which scholars have mostly divided. The second is when that protection should apply at all: this part has received less attention. If we have two sliders to play with, perhaps we should set them differently. Section 230 could be broad and shallow: shielding intermediaries in a variety of factual settings but offering only a thin immunity that can be overcome with a sufficient showing of malice or unconcern on the intermediary’s part. Or it could be narrow and deep: protecting intermediaries only from defamation and closely related torts, but offering absolute protection when it does.

Having distinguished these sliders, Wu offers guidance on how to set them. He does so by reconstructing a theory of what Section 230 is supposed to do: prevent “collateral censorship.” It’s a commonplace that an online intermediary can’t be counted to stick up for its users when its own ass is on the line. (Exhibit A: PayPal and Amazon disgracefully [dropped WikiLeaks](#) based on little more than Joe Lieberman’s disgraceful jawboning.) Faced with even the vague and distant threat of liability for user speech, the rational intermediary will yank the challenged content. It has nothing to gain and everything to lose by doing anything else. This gives opponents of speech an easy-to-use heckler’s veto: just threaten the intermediary. A robust, deep immunity recognizes that the intermediary has much weaker incentives than the original poster does.

As Wu demonstrates, however, this rationale only works some of the time. It fails when the intermediary has a

speaker's own incentives because it has adopted the user's speech as its own. Wu's example is [Barrett v. Rosenthal](#), where the defendant reposted an email message to two USENET newsgroups: she was not just acting as a gateway, she was "speaking in her own right." This distinction helps understand why some of the other problematic cases in the section 230 canon, such as [Blumenthal v. Drudge](#) and [Doe v. Ciolli](#), are so problematic. These are cases in which the intermediary at least plausibly "obtains the social benefits of speech" and so may not deserve Section 230's full protection.

Wu also argues that the collateral censorship rationale fails when the law in question is actually designed to target intermediaries rather than users. He gives an illuminating exegesis of the statutory phrase "be treated as the publisher or speaker," which he claims should not apply when the intermediary is the *recipient* of the information in question. His example here is [MySpace v. Doe](#), in which the fourteen-year-old plaintiff had been sexually assaulted by a man she met on MySpace. Among her causes of action against MySpace was a claim for negligence based on its failure to implement effective age verification that would have kept her from meeting her attacker. The Fifth Circuit held this theory of liability preempted by Section 230, but Wu disagrees. Doe's negligence claim wasn't really about treating MySpace as the "speaker" of her assertion that she was older than she was, and liability here would not raise the incentive-mismatch problem Section 230 was designed to address.

These are just a few of the analytical gems in this treasure chest of an article. His explanation of when intermediaries are and are not really acting *as intermediaries* alone is worth the price of admission, and will be of use to scholars working on a range of Internet problems. Even where its arguments are less persuasive — I'm not convinced that it really engages with the best arguments for immunity in the [Roommates.com](#) housing discrimination case — it has fresh and important insights. Wu's recommendations don't fit cleanly into a "pro-" or "anti-" Section 230 camp; anyone who teaches, writes, or cares about Internet law will be challenged and energized by his reinterpretation of the caselaw.

This what good doctrinal scholarship looks like. Wu starts with a real problem, one that is [frequently before the courts](#). He brings to bear the scholar's comparative advantages: abstraction, time, and theoretical rigor. Having achieved a synoptic view, he returns to the specific, making well-argued recommendations that courts can put to work in actual cases. "Collateral Censorship and the Limits of Intermediary Immunity" is an outstanding debut.

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