

# Gaining Cyberspace “Sea Legs”: A Proposal for a Judicial Cyber Education Program in District Courts

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## Introduction

AS THE INTERNET BECOMES increasingly integrated into everyday life, maintaining control over the portrayal of one’s image becomes exceptionally difficult. Speech over the Internet, or “cyberspeech,”<sup>1</sup> enhances the means by which people communicate with the masses.<sup>2</sup> Other advances in technology have created the permanence of online activity. For example, search engine sophistication makes cyberspeech permanent, “divorced from context,” and available to all.<sup>3</sup> The permanence of an online footprint poses devastating consequences for those “dogged by the digital scarlet letter.”<sup>4</sup> Courts have largely interpreted § 230 of the Communications Decency Act

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1. *Cyberspeech Definition*, WIKTIONARY, <http://en.wiktionary.org/wiki/cyberspeech> (last modified Feb. 17, 2012).

2. See Daniel J. Solove, *Speech, Privacy, and Reputation on the Internet*, in *THE OFFENSIVE INTERNET* 15, 16 (Saul Levmore & Martha C. Nussbaum eds., 2010).

3. Brian Leiter, *Cleaning Cyber-Cesspools: Google and Free Speech*, in *THE OFFENSIVE INTERNET*, *supra* note 2, at 155, 156.

4. Frank Pasquale, *Reputation Regulation: Disclosure and the Challenge of Clandestinely Commensurating Computing*, in *THE OFFENSIVE INTERNET*, *supra* note 2, at 107, 110. For example, in 2011, evidence suggested that seventy-five percent of human resource recruiters were required by their companies to research candidates online, and seventy percent of human resource recruiters reported they rejected candidates because of online information. Jennifer Preston, *Social Media History Becomes a New Job Hurdle*, N.Y. TIMES (July 20, 2011), <http://www.nytimes.com/2011/07/21/technology/social-media-history-becomes-a-new-job-hurdle.html>. Additionally, the Internet eases the ability to spread false rumors, which can result in damaging effects when there are limited, if any, ways to effectively erase the false information. See Cass R. Sunstein, *Believing False Rumors*, in *THE OFFENSIVE INTERNET*, *supra* note 2, at 91, 93.

(“CDA”)<sup>5</sup> to grant blanket immunity to online intermediaries from civil liability for content posted by third parties.<sup>6</sup> This broad immunity leaves defamation victims without recourse since third-party posters often hide under the veil of anonymity.<sup>7</sup> The First Amendment<sup>8</sup> undeniably gives publishers the freedom to speak through various Internet platforms,<sup>9</sup> but this freedom cannot exist in a vacuum. Eventually, the demand for accountability will increase when those freedoms are more frequently abused.<sup>10</sup> One way to reduce harmful online speech would be for online norms to shift, perhaps through education, towards discouragement of such speech. That would not likely be enough, however, because the public seems to have an insatiable appetite for scandal, drama, and gossip, particularly online.<sup>11</sup>

With the speed of technological progress, statutes regarding technology quickly become outdated.<sup>12</sup> At the same time, judges continually have to reevaluate precedent to account for new factual and technological contexts.<sup>13</sup> Yet, courts resist judicial reevaluation of CDA § 230 because the statute lies in the cyberspace domain where judges “feel most at sea.”<sup>14</sup> Cyberspace requires a new understanding of how law interacts with technology.<sup>15</sup> Courts need enhanced training to play the active role society demands in the contexts of cyberspace and technology. This Comment argues that judges’ lack of technological and sociological cyberspace knowhow inhibits them

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5. 47 U.S.C. § 230 (2012).

6. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

7. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 117 (2009).

8. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . .”).

9. See, e.g., *About, WORDPRESS*, <http://wordpress.org/about/> (last visited July 5, 2014) (“WordPress was born out of a desire for an elegant, well-architected personal publishing system . . .”); *About, TUMBLR*, <http://www.tumblr.com/about> (last visited July 5, 2014) (“Tumblr lets you effortlessly share anything.”).

10. Andrew Slitt, Note, *The Anonymous Publisher: Defamation on the Internet After Reno v. American Civil Liberties Union and Zeran v. America Online*, 31 CONN. L. REV. 389, 421 (1998).

11. See, e.g., *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998); Steven Levy, *New Media’s Dark Star*, NEWSWEEK, Feb. 16, 1998, at 78, available at <http://www.lehigh.edu/~jl0d/J366-99/DrudgeNWK.html> (providing additional details about the lawsuit and the rise of gossip journalism).

12. See, e.g., Bryan D. Hull, *Recommendation of the UCC Committee of the State Bar of California: Article 6 Should Be Repealed*, 41 ALA. L. REV. 701, 701 (1990).

13. Suzanna Sherry, *Haste Makes Waste: Congress and the Common Law in Cyberspace*, 55 VAND. L. REV. 309, 312 (2002).

14. Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 655 (2001).

15. LAWRENCE LESSIG, CODE VERSION 2.0, at 5 (2006).

from clawing back at CDA § 230 immunity and performing adequate analysis in other cases involving online intermediaries. As a remedy, this Comment proposes a Judicial Cyber Education Program to be implemented at the district court level.

Part I discusses the Fourth Circuit’s broad interpretation of CDA § 230 immunity in *Zeran v. America Online, Inc.*<sup>16</sup> and argues that other judges’ apprehension of analyzing cyber-technological issues has led them to unnecessarily defer to the Fourth Circuit’s decision in those cases. Part I also provides examples of additional contexts in which technological misunderstanding has affected court decisions.

Part II presents cases where judges’ enhanced comprehension of cyberspace and technology has led to decisions that did not simply defer to nonbinding precedent. These opinions represent the type of astute analysis that a judge participating in the proposed Judicial Cyber Education Program could produce when that judge is unafraid to resolve hard technological questions.

Part III proposes a Judicial Cyber Education Program designed to enhance judges’ technical and sociological knowledge regarding social media providers and online intermediary platforms. Part III also examines the current Patent Pilot Program<sup>17</sup> as a prototype for the Judicial Cyber Education Program. The Patent Pilot Program demonstrates the feasibility of introducing a judicial program specially designed to benefit a certain segment of complex litigation.

Part IV addresses potential caveats and criticisms of the proposed Judicial Cyber Education Program. The criticisms discussed are: (1) judges are capable of self-education and do not require such a program; (2) there is a heightened potential for special interest group manipulation; and (3) the program could increase the risk of a judge’s reliance on the Judicial Cyber Education Program’s advisory memoranda. This Comment, nevertheless, concludes that the proposed program is an effective way to ameliorate how district court judges decide cyberlaw cases.

## **I. Background**

### **A. Broad Interpretation of Communications Decency Act § 230**

Congress enacted CDA § 230 to foster the Internet’s free market and promote the growth of the Internet and other interactive online

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16. 129 F.3d 327 (4th Cir. 1997).

17. Pub. L. No. 111-349, 124 Stat. 3674 (2011) (codified at 28 U.S.C. § 137 note (2012)).

services.<sup>18</sup> Section 230 protects Internet Service Providers (“ISPs”) from liability based on content posted by third-party users and encourages them to make a good-faith effort to monitor and suppress offensive speech.<sup>19</sup>

Before passage of the CDA, courts initially grappled with intermediary liability in the context of online defamation.<sup>20</sup> The courts struggled with determining whether, under the common law, a particular online intermediary was a publisher or distributor.<sup>21</sup> Distributors could be held liable for defamatory statements made by third parties “only if they knew or had reason to know of the defamatory statement at issue.”<sup>22</sup> Whereas “one who repeats or otherwise republishes a libel is [considered a publisher and] subject to liability as if he had originally published it.”<sup>23</sup> The level of editorial control an online intermediary maintained over its website emerged as the key element in analyzing the common law publisher versus distributor distinction.<sup>24</sup>

### 1. *Zeran v. America Online*

In 1997, Kenneth Zeran sued America Online (“AOL”), claiming AOL was negligent for: (1) the unreasonable delay “in removing defamatory messages posted by an unidentified third party”; (2) “refus[ing] to post retractions of those messages”; and (3) “fail[ing] to screen for similar posts thereafter.”<sup>25</sup> On AOL’s bulletin board, an anonymous poster had impersonated Zeran, offered various merchandise for sale glorifying the devastating Oklahoma City bombing, and

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18. 47 U.S.C. § 230(b) (2012).

19. *Id.* § 230(c)(2)(A) (“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.”).

20. See *Cubby v. CompuServe, Inc.*, 776 F. Supp. 135, 142–43 (S.D.N.Y. 1991) (finding CompuServe not vicariously liable, in part because it maintained no editorial control over the content of publication); *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at \*4–5 (N.Y. Sup. Ct. May 24, 1995) (determining that Prodigy was a publisher because it differentiated itself from other ISPs by marketing that it exercised editorial control).

21. Karen Alexander Horowitz, *When Is § 230 Immunity Lost?: The Transformation from Website Owner to Information Content Provider*, 3 SHIDLER J.L. COM. & TECH. 14 (2007), available at [http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/398/vol3\\_no4\\_art14.pdf](http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/398/vol3_no4_art14.pdf).

22. *Stratton Oakmont*, 1995 WL 323710, at \*3.

23. *Id.*

24. *CompuServe*, 776 F. Supp. at 137.

25. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 327–28 (4th Cir. 1997).

listed Zeran’s name and home telephone number.<sup>26</sup> The posting caused a surge of threatening phone calls to Zeran’s home telephone, a number he was unable to change because he conducted his business from home.<sup>27</sup>

Zeran argued that CDA § 230 immunity did not apply because AOL had knowledge of the defamatory postings and should be held to a distributor liability standard not covered under the immunity provision.<sup>28</sup> The court, referring to one of the policy reasons behind § 230, rejected Zeran’s argument.<sup>29</sup> The opinion further discussed the potential harm ISPs could experience if they were held to even distributor liability.<sup>30</sup> Thus, the court concluded distributors must be considered publishers under defamation law, and protected both under § 230 immunity.<sup>31</sup>

## 2. *Zeran*: Policy Decision with Incorrect Predictions About the State of Technology

When Congress enacted the CDA, the Internet was a “medium of mass communication that [was] still in its infancy.”<sup>32</sup> Since § 230 does not define the word publisher, the only interpretive aid comes from one of the statute’s stated purposes, which was to overrule *Stratton Oakmont, Inc. v. Prodigy Services Co.*’s<sup>33</sup> imposition of publisher liability.<sup>34</sup> Justice Ain’s opinion in *Stratton Oakmont* relied on a broad definition of publisher liability derived from the Restatement (Second) of Torts, but it also distinguished between publisher and distributor liability.<sup>35</sup> In passing CDA § 230 Congress never resolved the argument of distributor liability. The *Zeran* court made a policy choice<sup>36</sup> based

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26. *Id.* at 329.

27. *Id.*

28. *Id.* at 331.

29. *Id.* at 330–31; *see also* 47 U.S.C. § 230(b) (2012).

30. *Zeran*, 129 F.3d at 333 (stating that if service providers were subject to distributor liability, they would face potential liability each time they received notice for any statement made by any party and be faced with “ceaseless choices of suppressing controversial speech or sustaining prohibitive liability”).

31. *Id.* at 332.

32. Slitt, *supra* note 10, at 399 (internal citation omitted).

33. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

34. H. R. REP. NO. 104-458, at 194 (1996); *Stratton Oakmont*, 1995 WL 323710, at \*3.

35. *Stratton Oakmont*, 1995 WL 323710, at \*3 (“[O]ne who repeats or otherwise republishes a libel is subject to liability as if he had originally published it.”).

36. *Zeran*, 129 F.3d at 331 (“It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted.”).

on its inaccurate predictions about the future state of technology. The court opined that “[t]he specter of tort liability in an area of such prolific speech would have an obvious chilling effect.”<sup>37</sup> In making this prediction, the court failed to appreciate the real threat to speech imposed by online mobs,<sup>38</sup> which chill the speech of those unwilling to subject themselves to potential defamation or harassment.<sup>39</sup> Typically, the risk-averse pressured into self-censorship are those holding jobs in industries in which reputation is crucial, such as doctors and lawyers.<sup>40</sup> In 1997, when “commercial online services had almost 12 million individual subscribers,”<sup>41</sup> not much was known about the aggregative power of the modern day Internet.<sup>42</sup> The *Zeran* court clearly did not foresee the chilling effect granting blanket immunity to intermediaries would have.

The *Zeran* court also heavily emphasized Congress’s policy decision to grant widespread immunity for intermediaries: to remove the disincentives for the development and utilization of blocking and filtering technologies.<sup>43</sup> The *Zeran* court incorrectly predicted that removing liability would promote self-regulation by intermediaries and speed the development of blocking and filtering technologies.<sup>44</sup> Though there exists a degree of self-blocking and filtering<sup>45</sup> from

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37. *Id.*

38. *See* Citron, *supra* note 7, at 63–64 (explaining that on the Internet, a person who is intolerantly devoted to his own ideals can aggregate his efforts to suppress dissenter speech by grouping with others to form a conventional hate group).

39. *Id.* at 66; *see also* Freiwald, *supra* note 14, at 598.

40. *See* Freiwald, *supra* note 14, at 598.

41. *Reno v. ACLU*, 521 U.S. 844, 850–51 (1997).

42. *See* Citron, *supra* note 7, at 66–67 (“The Internet’s aggregative character turns expressions into actions and allows geographically-disparate people to combine their actions into a powerful force. . . . For example, an online mob’s capacity to manipulate search engines in order to dominate what prospective employers learn about its victim, by aggregating hundreds or thousands of individual defamatory postings, may not be grasped by judges accustomed to a world in which defamers’ messages either reached a mass audience or were sent specifically to recipients known to the defamer.”).

43. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

44. *Id.* (citing 47 U.S.C. § 230(b)(4) (2012)); *see also* Peter Bozzo, *Tensions Within the Communications Decency Act: Reconciling Robust Speech with Intermediary Self-Regulation*, YALE J.L. & TECH. BLOG (Mar. 3, 2014), <http://web.archive.org/web/20140611124734/http://yjolt.org/blog/2014/03/03/tensions-within-communications-decency-act-reconciling-robust-speech-intermediary-se> (accessed by searching for Yale Journal of Law & Technology Blog in the Internet Archive index) (“The lesson of the CDA is that outsourcing regulatory authority to market actors (ISPs) rather than judges does not end the debates underlying online conduct; it simply allows different actors to resolve those debates.”).

45. *See, e.g.*, Kristen Schweizer, *Google Joins Microsoft in U.K. Efforts to Block Child Porn*, BLOOMBERG (Nov. 18, 2013), <http://www.bloomberg.com/news/2013-11-18/google-joins-microsoft-in-u-k-effort-to-block-child-porn-online.html>.

larger online companies such as Google<sup>46</sup> and Yahoo!,<sup>47</sup> post-*Zeran*, the steady rise of gossip sites, such as TheDirty.com,<sup>48</sup> CampusGossip.com,<sup>49</sup> and CollegiateACB.com,<sup>50</sup> highlight the lingering effects of the one-sided self-regulatory deal the Fourth Circuit viewed Congress as making with all intermediaries.<sup>51</sup> The *Zeran* court should have considered the potential abuses of a total liability exemption.

### 3. Judicial Apprehension of Performing Analysis on Cybertechnological Issues Has Led to the Unnecessary Deferral to Nonbinding Precedent

Despite its weaknesses, the *Zeran* decision still serves as the basis for intermediary liability in the defamation context.<sup>52</sup> Since *Zeran*, judges, largely due to their own apprehension of analyzing that same technology themselves, have failed to recognize and correct the decision's faulty predictions about technology.

In *Blumenthal v. Drudge*,<sup>53</sup> for example, plaintiff Blumenthal brought suit against Matt Drudge and AOL for defamation in Drudge's online publication, the *Drudge Report*.<sup>54</sup> AOL had contracted with Drudge to provide weekly the *Drudge Report* to its subscribers.<sup>55</sup> The terms of the contract between AOL and Drudge allowed AOL to remove any content it deemed to violate its standard terms of service, or alternatively, to direct Drudge to remove any such violating content.<sup>56</sup> On August 10, 1997, Drudge submitted a story that accused the White House of covering up plaintiff Blumenthal's past spousal

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46. *About*, GOOGLE, <http://www.google.com/intl/en/about/> (last visited July 5, 2014).

47. YAHOO!, <http://www.yahoo.com/> (last visited July 5, 2014).

48. THE DIRTY, <http://thedirty.com/> (last visited July 5, 2014).

49. CAMPUS GOSSIP, <http://campusgossip.tumblr.com/> (last visited July 5, 2014).

50. COLLEGIATE ACB, <http://collegiateacb.com/> (last visited July 5, 2014).

51. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (“Congress enacted § 230 to remove the disincentives to self regulation created by the *Stratton Oakmont* decision.”).

52. See *infra* notes 53-73 for specific examples of defamation cases using *Zeran* as the basis for determining liability.

53. 992 F. Supp. 44 (D.D.C. Dist. 1998).

54. *Id.* at 46.

55. *Id.* at 47.

56. *Id.* at 51.

abuse.<sup>57</sup> Drudge later retracted the story because there was little evidence that the spousal abuse had actually occurred.<sup>58</sup>

Determining whether AOL could be held liable under CDA § 230, the District Court for the District of Columbia quoted the Fourth Circuit's *Zeran* opinion stating, "[s]pecifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."<sup>59</sup> The court concluded that "[t]he court in *Zeran* has provided a complete answer to plaintiffs' primary argument."<sup>60</sup> The *Blumenthal* court failed to provide any independent analysis for rejecting plaintiff's argument, and instead, simply deferred to *Zeran*'s nonbinding authority.<sup>61</sup>

It almost seems as though the *Blumenthal* court did not understand that the Fourth Circuit's opinion in *Zeran* was not binding precedent. The court admitted "[i]f it were writing on a clean slate, this Court would agree with plaintiffs."<sup>62</sup> It expressed the desire to hold AOL liable because AOL contractually maintained editorial rights with respect to Drudge's content, "including the right to require changes in content and to remove it."<sup>63</sup> The court reasoned that "AOL is not a passive conduit like the telephone company . . . [and] it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least . . . to the liability standards applied to a distributor."<sup>64</sup>

The *Blumenthal* court seemed not to realize it was indeed writing on a clean slate and could have delved deeper into the analysis of the word *publisher*. By relying on Congress's intent to overrule only *Stratton Oakmont*, the court in *Blumenthal* could have concluded that Congress did not immunize providers from distributor liability and examined AOL's liability under this standard. Instead of reluctantly following *Zeran*, interpreting the statute to retain distributor liability would have

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57. *Id.* at 46.

58. *Id.* at 48; Michael Godwin, *Internet Libel*, 8 SETON HALL CONST. L.J. 757, 758 (1998) ("[There was] just one problem with [Drudge's] story. . . . Blumenthal apparently ha[d] no history of spousal abuse").

59. *Blumenthal*, 992 F. Supp. at 50 (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

60. *Id.* at 51.

61. *See id.*

62. *Id.*

63. *Id.*

64. *Id.*

been reasonable in light of the statute’s express terms and legislative history.<sup>65</sup>

In *Barnes v. Yahoo!, Inc.*,<sup>66</sup> the Ninth Circuit also referred to *Zeran* in deciding whether CDA § 230 protected an ISP from liability when the ISP undertook to remove material harmful to the plaintiff but then failed to do so.<sup>67</sup> The plaintiff had filed a negligence claim against Yahoo!, arguing the company had a duty to remove the harmful material once the company’s Director of Communications assured her the company would take care of the matter.<sup>68</sup> Although the cause of action was not defamation, the court stated “what matters is not the name of the cause of action—defamation versus negligence . . . — what matters is whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.”<sup>69</sup> The court held that if Yahoo! was found to be a publisher, CDA § 230(c)(1) unquestionably precluded liability.<sup>70</sup> The court referred to *Zeran* for the types of activities an intermediary could perform that would turn it into a publisher for purposes of § 230.<sup>71</sup> And, as in *Blumenthal*, the Ninth Circuit used *Zeran* as if it were binding without conducting its own reasoning to identify the functions of an online publisher.

Though undiscerning deferral to *Zeran* is common,<sup>72</sup> it is not binding outside the Fourth Circuit, and other courts should conduct independent analyses about § 230 issues. Instead, many such courts, without first conducting their own in depth analysis, have treated *Zeran* as though it were binding, thereby leaving the jurisprudence surrounding § 230 immunity stuck in the ‘90s.<sup>73</sup>

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65. See *supra* notes 34–35.

66. 570 F.3d 1096 (9th Cir. 2009).

67. *Id.* at 1098.

68. *Id.* at 1099.

69. *Id.* at 1101–02.

70. *Id.* at 1102.

71. *Id.* (“[A] publisher reviews material submitted for publication, perhaps edits it for style or technical fluency, and then decides whether to publish it.”).

72. See, e.g., *Blumenthal v. Drudge*, 992 F. Supp. 44, 52–53 (D.D.C. Dist. 1998); *Yahoo!*, 570 F.3d at 1101–05; *Ben Ezra, Weinstein, and Co., Inc. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1013–17 (Fla. 2001).

73. See, e.g., *Blumenthal*, 992 F. Supp. at 52–53; *Yahoo!*, 570 F.3d at 1101–05; *Ben Ezra, Weinstein, and Co.*, 206 F.3d at 986; *Am. Online, Inc.*, 783 So. 2d at 1013–17.

## B. Courts: Technological Misunderstanding Affects Areas of Law Outside the CDA § 230 Context

We can currently “build, or architect, or code cyberspace”<sup>74</sup> to protect the values society wishes to promote, and eliminate those it wishes to disappear.<sup>75</sup> Technology is relatively plastic.<sup>76</sup> It can be remodeled and reworked to do things differently if the law requires.<sup>77</sup> To many, it seems that because courts do not fully understand the technological intricacies of cyberspace, they have not fully realized the plasticity of technology and that code is not a constant.<sup>78</sup> Apart from defamation courts tend to shy away from conducting meaningful case analysis in cyberspace areas in which technological and societal backdrops are rapidly changing.<sup>79</sup>

### 1. First Amendment: Courts Fail to Recognize Facebook Likes as Speech

The First Amendment<sup>80</sup> presents difficult issues as technology and the Internet continuously develop. For example, in *Bland v. Roberts*,<sup>81</sup> the district court’s familiarity with the popular social media intermediary, Facebook,<sup>82</sup> was critical to properly adjudicating the case.<sup>83</sup> Plaintiffs, former employees of the Hampton’s Sheriff’s office, filed suit against the resident Sheriff alleging that his termination of their employment violated their First Amendment rights of freedom of speech and association.<sup>84</sup> Prior to the plaintiffs’ termination, the Sheriff had been running for reelection.<sup>85</sup> Upon noticing the plain-

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74. LESSIG, *supra* note 15, at 6 (italics omitted).

75. *Id.*

76. *Id.* at 32.

77. *Id.*

78. See Barry Dyson Jr., *Should Prosecutors and Judges Be Required to Understand Technology?*, BUYDIG BLOG (Feb. 14, 2013), <http://www.buydig.com/blog/should-prosecutors-and-judges-be-required-to-understand-technology/> (stating the effect of all the laws trying to regulate technology and the “absurdities” that have come about through their application have caused people “to turn against the laws and to have a greater mistrust for prosecutors, judges, and legislators”).

79. See *infra* Parts I.B.1-2 for a discussion on cases in which courts appeared hesitant to apply the First and Fourth Amendments to text messages and Facebook likes.

80. U.S. CONST. amend. I.

81. 857 F. Supp. 2d 599 (E.D. Va. 2012).

82. FACEBOOK, <http://www.facebook.com> (last visited July 5, 2014).

83. *Bland*, 857 F. Supp. 2d at 603.

84. *Id.* at 599.

85. *Id.* at 601.

tiffs *liked*<sup>86</sup> the other candidate’s Facebook page, the Sheriff learned of their opposition to his reelection and fired them.<sup>87</sup> The main issue before the court was whether liking a Facebook page amounted to constitutionally protected speech.<sup>88</sup> The court distinguished prior cases that recognized comments and posts on Facebook as speech and rejected treating a Facebook like as constitutionally protected speech.<sup>89</sup> A Facebook like, the court reasoned, is not the kind of “substantive statement that has previously warranted constitutional protection [and] [t]he Court will not attempt to infer the actual content of [the] posts from one click of a button.”<sup>90</sup>

To active Facebook users, the court’s reasoning should have seemed strange. Facebook users view liking as an affirmative statement that indicates: “I like this thing right here’, and nothing else.”<sup>91</sup> Though the word like on a button is not subject to change by any user, societal perceptions make clear that users attach substantive meaning to every like they use.<sup>92</sup>

*Bland* sheds light on the difficulty of categorizing popular social media and intermediary platforms in First Amendment terms because of the blurry lines among various categories of expression.<sup>93</sup> As digital platforms provide new ways to communicate, social dynamics inevitably change.<sup>94</sup> The Constitution is living and was designed to accommodate change.<sup>95</sup> Courts must keep up with culture at large to render good decisions.

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86. *Like*, FACEBOOK, <http://www.facebook.com/help/like> (last visited July 5, 2014) (describing *likes* as a way to “[g]ive positive feedback and connect with things you care about”).

87. *Bland*, 857 F. Supp. 2d at 603.

88. *Id.* at 603–04.

89. *Id.*

90. *Id.* at 604. Though *Bland* was reversed and remanded it was included in this Comment as an illustration of the difficulties that district courts are having making these decisions. *Infra* Part B II.

91. Megan Garber, *Is a Facebook Like Protected Under the First Amendment? A Court Says No*, THE ATLANTIC (Apr. 30, 2012), <http://www.theatlantic.com/technology/archive/2012/04/is-a-facebook-like-protected-under-the-first-amendment-a-court-says-no/256534/>.

92. *See id.*

93. *Id.* (quoting *Bland*, 857 F. Supp. 2d at 604).

94. *Id.*

95. *See* Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 362 (1992). *But see* Associated Press, *Scalia Slams ‘Living Constitution’ Theory*, FOX NEWS (Mar. 14, 2005), <http://www.foxnews.com/story/2005/03/14/scalia-slams-living-constitution-theory/>.

## 2. Courts Punt on Incorporating New Technology in Fourth Amendment Analysis

In *City of Ontario, California v. Quon*,<sup>96</sup> a police officer brought suit against his employer asserting a search through text messages on his employer-provided pager violated his Fourth Amendment rights.<sup>97</sup> The police department claimed it conducted the search for a legitimate employment-related purpose and did not violate plaintiff's Fourth Amendment rights.<sup>98</sup>

Due to ongoing and significant changes in the dynamics of electronic communications, the Court refused to issue “[a] broad holding concerning employees’ privacy expectations vis-à-vis employer-provided technological equipment.”<sup>99</sup> The Court decided the issue by simply assuming—without officially explaining—that the officer had a reasonable expectation of privacy in the text messages sent on his pager.<sup>100</sup>

It is not surprising that the Court avoided updating the Fourth Amendment for new technology. Several Justices made statements indicating that they had a hard time figuring out how text messaging works.<sup>101</sup> Justice Scalia seemed surprised by the idea of an intermediary service provider when he asked counsel for the respondents, “You mean [the text] doesn’t go right to the other thing?”<sup>102</sup> Justice Scalia was not the only one struggling to understand the intricacies of text messaging. At one point, Chief Justice Roberts also seemed to have trouble grasping how text messages work.<sup>103</sup> He asked what would happen if multiple text messages were sent to an officer at the same time, “does the one kind of trump the other, or do they get a busy signal?”<sup>104</sup>

The Court decided *Quon* in 2010, but the case arose out of events that occurred in 2001 and 2002.<sup>105</sup> The Fourth Amendment issues the Court declined to adjudicate applied, not to text messages of modern day smart phones, but rather to messages on pagers used almost a

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96. 130 S. Ct. 2619 (2010).

97. *Id.* at 2624–26.

98. *Id.* at 2624–27.

99. *Id.* at 2630.

100. *Id.*

101. *See* Transcript of Oral Argument at 43–48, *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619 (2010) (No. 08-1332).

102. *Id.* at 48.

103. *Id.* at 43.

104. *Id.*

105. *Quon*, 130 S. Ct. at 2624.

decade prior to the decision.<sup>106</sup> If *Quon’s* case file, starting at the District Court, included memoranda explaining the technical functions of text messages and the role of pagers within the operational realities of the workplace, judges at all court levels could have used the information for self-educational purposes. With access to such informative memoranda, the Justices could have avoided raising embarrassing questions at oral argument and could have instead had the confidence not to punt when deciding whether to modernize the Fourth Amendment’s effect on technology.

### 3. Judicial Code of Ethics Concerns Lead to Minimized Online Judicial Presence

Age and generational differences are simple ways to explain the judicial branch’s general lack of technological knowhow. Other less obvious factors, such as ethical concerns, also perpetuate judicial technological blindness. Ethical concerns surround social networking sites because social networking invites a culture of broad information dissemination.<sup>107</sup> Social networking sites by design are not private, but rather are intended to increase the public flow of information.<sup>108</sup> Privacy tools located in a site’s profile settings allow users to retain certain levels of control over the displayed information.<sup>109</sup> However, users are not able to completely control every privacy aspect of information once it is posted.<sup>110</sup>

There is no express rule against judges’ maintaining a presence on social media sites; yet, every judge must abide by a code of ethics set by either the State or Federal Government.<sup>111</sup> For example, Canon 4A of the California Code of Judicial Ethics states: “A judge shall conduct all of the judge’s extrajudicial activities so that they do not (1) cast reasonable doubt on the judge’s capacity to act impartially; (2) demean the judicial office; (3) interfere with the proper performance of judicial duties; or (4) lead to frequent disqualification of the judge.”<sup>112</sup> Use of technology poses unique issues for judges in comply-

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106. *Id.* at 2621-22.

107. See *Participatory Culture*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Participatory\\_culture](http://en.wikipedia.org/wiki/Participatory_culture) (last visited July 5, 2014).

108. Cal. Judges Ass’n, Judicial Ethics Comm., Advisory Op. 66, at 1, 3 (2010), available at <http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf>.

109. *Id.*

110. *Id.*

111. See *Code of Conduct for United States Judges*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct.aspx> (last visited July 5, 2014).

112. CALIFORNIA CODE OF JUDICIAL ETHICS CANON 4A (2013).

ing with these guidelines. For example, if a person posts comments on a judge's social media profile and the posts are left exposed, the judge could seem to sanction the contents of the comments. This risk creates a burden for participating judges to vigilantly check their social networking pages to ensure no offensive or controversial posts are submitted. Another ethical concern arises regarding whom judges may ethically include in their social media friend circles.<sup>113</sup> Friending former law school classmates or other attorneys could cast doubt on a judge's ability to act impartially in cases where a friend is a party.<sup>114</sup>

Based on these ethical concerns, many judges choose not to participate in or create profiles on social media sites. The Conference of Court Public Information Officers<sup>115</sup> provides evidence of judges' low participation rates in social media in a nationwide survey designed "to empirically measure the perceptions of judges and court officials toward new media and the ways that courts are responding to the new pervasive reality of Facebook, Twitter, YouTube and the hyper-connected culture they have brought."<sup>116</sup> The survey was administered to 15,000 individuals primarily employed in the state courts.<sup>117</sup> Six hundred twenty-three participants completed the survey, 45.6 percent of which were judges.<sup>118</sup> The survey indicated only 19 percent of the responding judges agreed that "judges can use social media profile sites . . . in their personal lives without compromising ethics."<sup>119</sup> Only 46.1 percent of the total pool of responding judges indicated they used a social media profile site, and the percentage decreased significantly when measuring how many used their social media site on a regular basis.<sup>120</sup>

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113. See Jacob Gershman, *Judge Disqualified over Facebook 'Friend' Request*, WALL ST. J. (Jan. 27, 2014), <http://blogs.wsj.com/law/2014/01/27/judge-disqualified-over-facebook-friend-request/> (describing the disqualification of a circuit court judge presiding over a divorce proceeding after the judge sent the wife a friend request).

114. See *id.*

115. *About*, CONFERENCE OF COURT PUBL. INFO. OFFICERS, <http://ccpio.org/about/> (last visited July 5, 2014).

116. CONFERENCE OF COURT PUB. INFO. OFFICERS, 2012 CCPIO NEW MEDIA SURVEY (2012), <http://ccpio.org/wp-content/uploads/2012/08/CCOIO-2012-New-Media-Report-FINAL.pdf>.

117. *Id.* at 4 (survey excludes federal judges).

118. *Id.*

119. *Id.* at 7.

120. *Id.* at 16–17 (explaining 25.2 percent of the judges who responded stated their use of their social media profile was ">Never – 1x/month").

**Table I: Individual Users (Judges) of Digital Media by Year and Percent. CCPIO New Media Survey, 2012**

INDIVIDUAL USERS OF DIGITAL MEDIA TECHNOLOGIES						
	General response			Judge response		
	USERS (general)	PERCENT of general	USERS (judicial)	PERCENT of general	PERCENT of judicial	
Social media profile sites	2012	381	61.2	131	21.0	46.1
	2011	443	62.1	104	14.6	43.7
	2010	464	57.4	102	12.6	40.2

**Table II: Response Comparison of Judges to General Public of Use of Social Media Profile Sites. CCPIO New Media Survey, 2012.****SOCIAL MEDIA PROFILE SITES**

2012: 381 users, 131 of whom are judicial officers

I use social media profile sites:						
	General response (percent of 381)			Judge response (percent of 131)		
	2012	2011	2010	2012	2011	2010
>Never – 1x/month	19.7	19.4	23.5	25.2	29.8	30.4
Monthly – Weekly	21.5	21.4	24.4	22.1	22.1	25.5
2x/week – Daily	33.6	36.6	35.5	34.4	25.0	30.4
2x/day – Hourly	20.5	20.1	14.9	16.0	22.1	12.7
≥Hourly	4.7	2.5	1.9	2.3	0.9	1.3

The numbers depicting the low judicial presence on social media sites affirm the ethical concerns. Recognizing the additional burdens social media participation causes,<sup>121</sup> judges cannot be faulted for opting out. However, due to the commonality between social media and intermediary-related cases,<sup>122</sup> society should expect that judges fully understand and fairly adjudicate each issue. It is hard to feel confident that judges understand social media-related concerns when they do not use the sites. To understand the importance of a site’s features it is best to use and interact with the site. The next best alternative to

121. *Supra* note 113.122. *See, e.g.*, *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013); *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012); *Fralely v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011); *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010 (N.D. Cal. 2012); *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008); *Doe II v. MySpace, Inc.*, 175 Cal. App. 4th 561 (2d Dist. 2009); *Goddard v. Google, Inc.*, No. C 08-2738 JF (PVT), 2008 WL 5245490 (N.D. Cal. Dec. 17, 2008).

personal interaction is education about the site's technical aspects and their interplay with society. Judges who attained a heightened level of technical understanding have used the knowledge to make informed decisions.<sup>123</sup>

## II. Increased Technical Knowledge Leads to Informed Decisions

### A. *Fair Housing Council of San Fernando Valley v. Roommates.com, L.L.C.*<sup>124</sup>

Defendant, Roommates.com L.L.C. ("Roommates"), operates a website that matches renters with those who are renting out their spare rooms.<sup>125</sup> In order to use the site's service, users must create a profile by answering questions about their gender, sexual preference, and whether they have children.<sup>126</sup> User profiles also contain a space to include any additional comments.<sup>127</sup> Plaintiffs brought suit claiming that by requiring answers to the listed questions during the registration process and permitting discriminatory statements in the comments portion of user profile pages, Roommates violated state discrimination laws and the Fair Housing Act ("FHA").<sup>128</sup> The court denied Roommates CDA § 230 immunity defense, not only for the questions asked during user registration but also for its email and search functions.<sup>129</sup> The court held that the discriminatory questions qualified as content developed by the site, thus Roommates was an information content provider.<sup>130</sup> Also, the court found Roommates's involvement in the search feature established that "Roommate's [sic] connection to the discriminatory filtering process [was] direct and palpable . . . [because] Roommates selected the criteria used to hide listings."<sup>131</sup> The court granted Roommates immunity under CDA § 230 only for the additional comments portion of the user profile pages.<sup>132</sup>

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123. See *infra* Parts II.A-B (providing examples of cases where increased technical understanding led judges to make informed decisions).

124. 521 F.3d 1157 (9th Cir. 2008) (en banc).

125. *Id.* at 1161.

126. *Id.*

127. *Id.*

128. *Id.* at 1161-64.

129. *Id.* at 1167.

130. *Id.* at 1169-70.

131. *Id.* at 1169.

132. *Id.* at 1172-74.

Judge Kozinski’s in-depth analysis in *Roommates* discussed and compared other websites’ ordinary search functions and reached an independent conclusion about what functions qualified as “developed content.”<sup>133</sup> Additionally, the *Roommates* opinion revisited two prior holdings by the Ninth Circuit clarifying the scope of § 230 immunity.<sup>134</sup> Judge Kozinski did not rely on any of *Zeran*’s language or treat *Zeran* as binding precedent.<sup>135</sup> The *Roommates* decision demonstrated it is possible to develop original interpretations of § 230 immunity.

### B. Case with Improved Analysis Due to Better Judicial Knowledge

Almost a year after the district court’s decision,<sup>136</sup> the Fourth Circuit revisited the First Amendment issue in *Bland v. Roberts*.<sup>137</sup> The court carefully examined the merits of the plaintiff’s First Amendment claim regarding whether a Facebook like is a substantive statement amounting to protected speech.<sup>138</sup> The court stated “[t]o consider whether this conduct amounted to speech, we must first understand, as a factual matter, what it means to ‘like’ a Facebook page.”<sup>139</sup> The court then examined what service Facebook provides and how users interact with the site when they build a profile.<sup>140</sup> The court further analyzed how Facebook operates and what types of information a user profile includes. This was done by reviewing statements from the official Facebook website regarding “What is a Facebook ‘Page,’” “What is a News Feed,” “What does it mean to ‘Like’ some-

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133. *Id.* at 1167 (“Roommate’s [sic] search function differs materially from generic search engines such as Google, Yahoo! and MSN Live Search.”).

134. *Id.* at 1170–71. The court clarified *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003), noting that if an editor publishes material that he does not believe was created for online posting, he has made an affirmative choice to publish, and this decision rises to the level of being a material contribution not entitled to § 230 immunity. *Id.* at 1170. Additionally, the court stated that *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003), correctly held that a dating website intermediary was immune under § 230, but incorrectly suggested that it could *never* be liable because the dating profile did not have any content until a user actively created it. *Id.* at 1171.

135. *Id.*

136. *Bland v. Roberts*, 857 F. Supp. 2d 599 (E.D. Va. 2012).

137. 730 F.3d 368, 368 (4th Cir. 2013); *see also* discussion *supra* Part I.B.1.

138. *Bland*, 730 F.3d at 384–85.

139. *Id.* at 385.

140. *Id.* (“Facebook is an online social network where members develop personalized web profiles to interact and share information with other members.” (quoting *Lane v. Facebook, Inc.*, 696 F.3d 811, 816 (9th Cir. 2012))). The court explained that every Facebook user has a profile that consists of items such as the user’s name, photos, brief biographical information, list of friends with whom the user interacts, and a list of Facebook pages the user has liked. *Id.*

thing,” and “What’s the difference between liking an item a friend posts and liking a Page.”<sup>141</sup>

After reviewing the effect of likes on user profiles and the meaning society gives to pressing the *thumbs up* button, the court concluded that liking something on Facebook is “an easy way to let someone know that you enjoy it.”<sup>142</sup> The court explained that when plaintiffs liked the campaign page in question the like: (1) caused an announcement in the News Feed of the plaintiffs’ friends; (2) added the name and photo of the campaign page to the plaintiffs’ profile; and (3) added the plaintiff’s profile photos to the campaign page under people who have liked the page.<sup>143</sup> The court concluded that a like is a substantive statement and held, “[o]nce one understands the nature of what [plaintiff] did by liking the Campaign Page, it becomes apparent that his conduct qualifies as speech.”<sup>144</sup> The opinion further explained a Facebook like “is the Internet equivalent of displaying a political sign in one’s front yard, which the Supreme Court has held is substantive speech.”<sup>145</sup>

The Fourth Circuit’s analysis of the First Amendment issue in *Bland* differed significantly from the district court’s discussion. The lower court looked only to two prior cases and distinguished contexts where courts had found constitutional protection for Facebook posts.<sup>146</sup> The district court had not seriously considered ways in which likes could amount to protected speech. Furthermore, the district court had not tried to understand the technical role likes have within the structure of Facebook or the substantive meaning users attach to likes.

The Fourth Circuit’s informed and comprehensive opinion embodies the type of decision that could result from courts participation in the proposed Judicial Cyber Education Program.<sup>147</sup> Had the district court received information under the Judicial Cyber Education Program, the court could have avoided the Fourth Circuit’s reversal. That would further the Judicial Cyber Education Program’s overarching goal of creating efficiency.<sup>148</sup>

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141. *Id.*

142. *Id.* (citation omitted).

143. *Id.* at 385–86.

144. *Id.* at 386.

145. *Id.* (citation omitted).

146. *Bland v. Roberts*, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012).

147. *See* discussion *infra* Part III.B.

148. *See id.*

### III. A Judicial Cyber Education Program Can Educate Judges and Enable More Effective and Efficient Decisions

#### A. Patent Pilot Program as a Prototype

The United States already recognized the need for the enhanced education of district court judges to aid in patent litigation and, as a result, established the Patent Pilot Program.<sup>149</sup> Courts were becoming bogged down with technically challenging and time-consuming patent cases.<sup>150</sup> In response, Congress proposed a ten-year program, which would direct patent cases to interested judges to encourage them to build an expertise in the field.<sup>151</sup> Congress’s idea was that judges who are more familiar with the intricate nature of patent law would make more-informed decisions, which would result in faster, cheaper, and more accurate litigation.<sup>152</sup>

Not every district court is eligible for the Patent Pilot Program.<sup>153</sup> Due to the high costs associated with hiring experts, Congress limited availability to the top fifteen districts where patent case filings are most concentrated.<sup>154</sup> Eligible districts must have a minimum of ten judges and at least three who opt to participate in order to receive funding for the program.<sup>155</sup> Congress’s initial legislation authorized not less than \$5 million per fiscal year, allocated among the districts, to install training programs for participating judges and hire additional clerks with technical backgrounds.<sup>156</sup>

To evaluate the effectiveness of the program, the courts must give Congress periodic reports.<sup>157</sup> At least two reports are mandatory: one approximately five years after implementation and another immediately following the ten-year pilot.<sup>158</sup> The reports must contain information and analysis about the program’s success in increasing judicial expertise in patent law and the adjudicative efficiency of patent cases.<sup>159</sup> The reports must also contain empirical comparisons of the rates of reversal of designated patent judges with non-designated

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149. Pub. L. No. 111-349, 124 Stat. 3674 (2011) (codified at 28 U.S.C. § 137 note (2012)).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* § 1(b)(2)(A)(i), 124 Stat. at 3675.

154. *Id.*

155. *Id.*

156. H.R. 628, 111th Cong. § 1(f)(1) (2009).

157. Pub. L. No. 111-349, § 1(e)(2)(A)–(B), 124 Stat. at 3676.

158. *Id.*

159. *Id.* § 1(e)(1)(A)–(B), 124 Stat. at 3675.

judges, and “the period of time elapsed from the date on which a case is filed to the date on which trial begins or summary judgment is entered.”<sup>160</sup>

## **B. The Judicial Cyber Education Program Design**

The Judicial Cyber Education Program would incorporate elements of the Patent Pilot Program to demonstrate the Judicial Cyber Education Program’s high degree of feasibility. The program would be implemented in U.S. District Courts that have high concentrations of cases involving digital and online intermediaries which would remedy the judges’ lack of knowledge of cyberspace. The goals of this ten-year program would be to increase efficiency in cyberlaw cases by decreasing the reversal rate of district court decisions and to promote increased judicial participation in cases involving online intermediaries.

### **1. Case Selection and Determination**

To determine district eligibility, all district courts would conduct an internal analysis to assess the frequency in which cases regarding online or digital intermediaries are filed within one calendar year. The types of cases sought to be included in the district’s count are those where the plaintiff’s alleged harm stems from interactions with an online or digital intermediary.

After each district completes its analysis, the Director of the Administrative Justice of the United States Courts would designate the thirty district courts with the largest number of qualifying cases and assign not less than fifteen to participate in the program. The assigned courts must cover at least five different judicial circuits. The Judicial Cyber Education Program would permit a greater number of district courts to participate than does the Patent Pilot Program.<sup>161</sup> Issues involving online and digital intermediaries arise in more legal contexts than patent issues.<sup>162</sup> Although the number of patent suits may be higher than the number of cases falling under the scope of the Judicial Cyber Education Program, there is a trend of geographic concentration in patent case filings and venue that this Comment does not

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160. *Id.* § 1(e)(1)(C)(i)–(ii), 124 Stat. at 3675.

161. *See id.* § 1(b)(2)(A)(i), 124 Stat. at 3675.

162. *See supra* Parts IA–B (providing examples of cases in the defamation, First Amendment, and Fourth Amendment contexts).

anticipate occurring for online intermediary related cases.<sup>163</sup> Thus, it is necessary for the program to afford greater participation to affect more jurisdictions.

## 2. Advisors and Memoranda

Similar to the Patent Pilot Program, participating districts would receive an allocated amount of federal funding to hire clerks and other advisory support staff.<sup>164</sup> The advisors would provide memoranda to the participating judges for cases falling within the scope of the program. The memoranda would summarize the state of technical science<sup>165</sup> at issue as well as the state of pertinent social science.<sup>166</sup>

Copies of the memoranda generated by the assigned clerks would be given to each party prior to trial and publically disclosed prior to adjudication. Built-in transparency requirements afford parties to the suit—as well as any interested third parties<sup>167</sup>—the opportunity to rebut or contest information included in the memoranda. Disclosure serves as a procedural safeguard to ensure that the information included in the memoranda is accurate. Upon request, parties would have the ability to redact information from the memoranda before publication to avoid disclosure of trade secrets or other potentially privileged information.<sup>168</sup>

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163. See James C. Pistorino, *2012 Trends in Patent Case Filings and Venue: Eastern District of Texas Most Popular for Plaintiffs (Again) but 11 Percent Fewer Defendants Named Nationwide*, BLOOMBERG BNA (Feb. 18, 2013), <http://www.uslawwatch.com/2013/02/18/intellectual-property/2012-trends-patent-case-filings-venue-eastern-district-texas-popular-plaintiffs-11-percent-defendants-named-nationwide/>.

164. Based on the initial Patent Pilot Program’s \$5 million proposal, I can speculate that no more than \$8-9 million would be needed to fully effectuate the program. The estimate is calculated as follows: Patent Pilot Program’s proposed \$5 million divided by the three circuits the program must cover, which results in \$1.67 million per circuit. Thus, \$1.67 million per circuit multiplied by the five circuits the Judicial Cyber Education Program would cover equals \$8.3 million.

165. For example, an instructional summary regarding the particular code used in the creation of the intermediary’s website, the relevant functional aspects of the site, and the state of current and potential technical enhancements being developed.

166. For example, an overview or survey conducted regarding the public’s views and general cultural attitudes toward the intermediary’s website or particular features of the site, or a summary of the level of integration or influence the website has in its particular market and the manner in which the website is intended to be used versus actually used.

167. For example, academic professionals, experts, and interest groups.

168. The redaction aspect differs from the Patent Pilot Program. Patents are publically disclosed inventions and thus would not have a need for such an option. Since the Judicial Cyber Education Program could encompass a variety of legal disciplines, provisions protecting trade secret or personal anonymity concerns need to be implemented.

To ensure the Judicial Cyber Education Program functions as intended, two reports would be given to Congress by each participating district during the program's ten-year duration.<sup>169</sup> Like the Patent Pilot Program, the first report would be provided five years after the initial implementation, and the second report at the end of the ten-year pilot period.<sup>170</sup> The reports would include analysis about the extent to which the program succeeded in developing enhanced judicial comprehension and ease in managing cyberlaw cases. The reports would also contain studies measuring the degree to which the program has improved the courts' efficiency by examining reversal rates from the courts of appeal and the period of time elapsed between the date a claim is filed to the date on which the case is resolved.<sup>171</sup>

The Judicial Cyber Education Program is designed to promote efficiency and enhance judicial cyber-knowledge. Since the proposed program closely resembles a broadened Patent Pilot Program, Congress should find that implementation and management of this program is feasible and advisable.

#### IV. Potential Criticisms and Caveats of the Program

##### A. Judges are Capable of Self-Education

Critics of the Judicial Cyber Education Program may argue that this system is unnecessary because judges are perfectly capable of educating themselves about digital and online intermediaries. As evidenced by Judge Kozinski in *Roommates*, generalist judges can acquire the detailed information needed to conduct the type of analysis this Comment recommends.<sup>172</sup> This criticism ignores the fact the majority of judges decline to engage in self-study due to the intrinsic limitations on a judge's knowledge base<sup>173</sup> and extrinsic restrictions on the

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169. See Pub. L. No. 111-349, § 1(e)(2)(A)–(B), 124 Stat. 3674, 3676 (2011).

170. *Id.*

171. In the event a case does not go to trial but renders a summary judgment, the efficiency measurement required by the reports would change to reflect the period of time elapsed between the date a claim is filed and the date on which summary judgment is granted.

172. See *supra* Part II.A.

173. LeRoy L. Kondo, *Untangling the Tangled Web: Federal Court Reform Through Specialization for Internet Law and Other High Technology Cases*, 6 UCLA J.L. & TECH. 1, 40 (2002), [http://www.lawtechjournal.com/articles/2002/01\\_020309\\_kondo.pdf](http://www.lawtechjournal.com/articles/2002/01_020309_kondo.pdf).

time needed to acquire such knowledge.<sup>174</sup> Self-study does not promote effective decision making in the most efficient manner.<sup>175</sup>

Even with intensive self-study, judges may be unable to identify technological nuances in the make-up of a particular online intermediary or fully appreciate its role in modern society.<sup>176</sup> As discussed in Part I, judges tend to avoid participating on social media platforms due to ethical concerns.<sup>177</sup>

Judges participating in the Judicial Cyber Education Program would have advisors dedicated to informing them on matters relevant to their cyberlaw cases. Informative guidance guarantees that time is not wasted by having generalist judges engage in self-study. Instead of identifying superficial and suboptimal information, such judges would benefit from the in-depth insights of experts.

## B. Potential for Special Interest Group Manipulation

Critics of specialist judges or courts assert that such specialization may open the door for political lobbying or interest group manipulation.<sup>178</sup> This argument presupposes that interest groups have agendas that are “contrary to the societal interests of the general public,” and that they have the ability to significantly influence the judicial system.<sup>179</sup> Whether that is true, there is no reason to believe that specialized judges or courts will succumb to political pressures more than the Supreme Court has in the past.<sup>180</sup>

Under the Judicial Cyber Education Program, expert advisors would be hired to be neutral third parties and provide detailed information reflecting a balanced outlook. Experts spend years educating themselves and acquiring knowledge. It seems unlikely that interest groups would alter such thoroughly educated perspectives. Additionally, even if interest groups influence the expert advisors such that the

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174. *See id.* at 41.

175. *See id.* at 40 (“It is difficult to imagine that generalist judges, even through intensive self-study, may, in a short period of weeks or months, obtain sufficient knowledge of highly specialized areas of high technology to comprehend the finer nuances of these complex fields.”).

176. *Id.*

177. *See supra* Part I.B.3.

178. Kondo, *supra* note 173, at 38.

179. *Id.*

180. Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 61, 104 (1995) (stating that Democratic and Republican Supreme Court appointees have different ideological concerns based upon each respective party’s social agenda). “[T]he ideological battles between interest groups will not differ dramatically in the generalist arena from the more honed battles over specialized tribunals.” *Id.*

memoranda reflect one-sided or incomplete information, the Judicial Cyber Education Program's transparency requirements would serve as procedural checks.<sup>181</sup>

### C. Judicial Reliance on Clerks and Consultants

Potential problems could arise if judges assume the advisors' assertions in the Judicial Cyber Education Program's memoranda are unquestionably correct. The harm would manifest in a judge's unfair reliance on the report's information and failure to give proper weight to the parties' papers or oral arguments. Overreliance could result in judges not actually gaining additional understanding of the cyberspace issues.<sup>182</sup> This notion undermines a foundational goal of the Judicial Cyber Education Program—to increase judicial knowledge regarding digital and online intermediaries.<sup>183</sup> Thus, judges must maintain the ability to receive information from their advisors without being unduly influenced or becoming reliant on the memoranda.

The overreliance risk can be mitigated by the public availability of court documents and opinions, as well as the public disclosure of the advisor's memoranda. If the memoranda unfairly or incorrectly portrayed an aspect of an intermediary's technology or a particular societal view, transparency enables challenges to be brought to the attention of the court.<sup>184</sup>

### Conclusion

Professor Lawrence Lessig,<sup>185</sup> founder of Stanford Center for Internet and Society, observed, "we are far from a time when our government in particular can properly regulate in this [cyberspace] context."<sup>186</sup> Unnecessary deferral by courts to *Zeran's* 1997 decision in CDA § 230 cases, reluctance to account for changing societal norms regarding First Amendment protected speech in *Bland*, and the unwillingness to opine on Fourth Amendment analysis as seen in *Quon*, all support Lessig's statement.<sup>187</sup> Failure to produce educated decisions about cyberspace issues has led many people to lose faith in the

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181. See *supra* Part III.B.2.

182. See Sheldon L. Trubatch, *Informed Judicial Decision Making: A Suggestion for a Judicial Office for Understanding Science and Technology*, 10 COLUM. J. ENVTL. L. 255, 264 (1985).

183. See *supra* Part III.B.

184. See *supra* Part III.B.2.

185. Lawrence Lessig, HARVARD L. SCH., <http://www.law.harvard.edu/faculty/directory/10519/Lessig> (last visited July 5, 2014).

186. LESSIG, *supra* note 15, at 27.

187. See *supra* Parts I.A.3, I.B.1–2.

ability of the judicial system to properly serve its function in modern society.<sup>188</sup> Many “Internet exceptionalists”<sup>189</sup> and others yearn for judges to “take the time and effort to learn about the technology they see fit to regulate.”<sup>190</sup>

The Judicial Cyber Education Program would address the lack of technical judicial knowledge by focusing on cases involving online and digital intermediaries at the district court level. The memoranda provided by the advisors in the program would give judges the background information necessary to help adjudicate complex cyberspace issues. The Patent Pilot Program shows that Congress has recognized the need for a specialized program in another context, which should increase the likelihood of legislative passage. Complexities involving online and digital intermediaries persist, and with the Patent Pilot Program as a model, the Judicial Cyber Education Program should be viewed as a positive approach. Once implemented, judges would no longer feel “at sea” in the cyberspace arena, and when judges regain their sea legs, society will benefit from the courts’ flexibility.

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188. Dyson, *supra* note 78 (stating the effect of all the laws trying to regulate technology and the “absurdities” that have come about through their application have caused people “to turn against the laws and to have a greater mistrust for prosecutors, judges, and legislators”).

189. See Adam Thierer & Berin Szoka, *Cyber-Libertarianism: The Case for Real Internet Freedom*, TECH. LIBERATION FRONT (Aug. 12, 2009), <http://techliberation.com/2009/08/12/cyber-libertarianism-the-case-for-real-internet-freedom/> (“Internet exceptionalists . . . believe that the Internet has changed culture and history profoundly and is deserving of special care before governments intervene.”).

190. Dyson, *supra* note 78.

