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ONE CLICK LIABILITY: SECTION 230 AND THE ONLINE MARKETPLACE

*“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.”*¹

I. INTRODUCTION

Often referred to as the “law that built the Internet,” these twenty-six words make up the Communications Decency Act (“CDA”), commonly known as Section 230(c)(1).² Passed in 1996, this federal statute was envisioned as a way to protect fledgling Internet companies, while also allowing companies to police their platforms without liability.³ Section 230’s protections gave permission to entrepreneurs for the innovation we see on the Internet today.⁴ It has also become one of the first invoked lines of defense for online marketplaces seeking to avoid liability for faulty products or onerous regulations governing transactions.⁵

Since the passing of the CDA, Amazon has risen to become an e-commerce giant, becoming the world’s largest retailer.⁶ Founded in 1994,⁷ Amazon has consistently been a disruptive force.⁸ Amazon created the Amazon Marketplace in 2000, offering the chance for third-party vendors and users to start their own stores on Amazon’s online

1. Communications Decency Act, 47 U.S.C. § 230(c)(1) (2018).

2. Colin Lecher, *Sen. Ron Wyden on Breaking Up Facebook, Net Neutrality, and the Law That Built the Internet*, THE VERGE (July 24, 2018, 10:32 AM), <https://www.theverge.com/2018/7/24/17606974/oregon-senator-ron-wyden-interview-internet-section-230-net-neutrality>.

3. *See id.*

4. Derek Khanna, *The Law that Gave Us the Modern Internet—and the Campaign to Kill It*, THE ATLANTIC (Sept. 12, 2013), <https://www.theatlantic.com/business/archive/2013/09/the-law-that-gave-us-the-modern-internet-and-the-campaign-to-kill-it/279588/>.

5. Benjamin Edelman & Abbey Stemler, *From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces*, 56 HARV. J. ON LEGIS. 141, 143 (2019).

6. *See* Lauren Debter, *Amazon Surpasses Walmart As The World’s Largest Retailer*, FORBES (May 15, 2019, 5:50 PM), <https://www.forbes.com/sites/laurendebter/2019/05/15/worlds-largest-retailers-2019-amazon-walmart-alibaba/#12b882364171>.

7. *Amazon Startup Story*, FUNDABLE, <https://www.fundable.com/learn/startup-stories/amazon>.

8. Ted Gross, *The Power & Art Of Being A Disruptive Force*, MEDIUM (July 28, 2015), <https://medium.com/@tedwgross/the-power-art-of-being-a-disruptive-force-1c571cab10b>.

infrastructure.⁹ The Amazon Marketplace has been mostly beneficial for sellers and consumers: granting vendors a feeling of security in the marketplace, giving customers competitive rates, and allowing Amazon the chance to profit off every sale on their website with services like Fulfillment by Amazon.¹⁰

However, recent court decisions have put the state of this relationship in jeopardy. In cases such as *Oberdorf v. Amazon.com, Inc.*,¹¹ *State Farm Fire and Casualty Company v. Amazon.com, Inc.*,¹² and *Fox v. Amazon.com, Inc.*,¹³ the shield given by Section 230, and utilized by Amazon to grow their Marketplace, began to deteriorate. Courts have now found ways to hold Amazon liable for negligence and strict liability claims for the actions of third-party sellers, despite the supposed Section 230 protection.¹⁴ A break from tradition, these decisions have ignited a possible “firestorm” of liability lawsuits with far reaching legal consequences.¹⁵ These decisions may also have given the online markets a roadmap to rein in the worst overreaches of Section 230,¹⁶ and best protect customers from fraudulent third-party vendors on marketplace platforms.¹⁷

This Comment seeks to analyze the relationship between Section 230 of the CDA and online third-party marketplaces (with an emphasis on market leader Amazon Marketplace). Within the rapidly changing world of e-commerce, this Comment will explore interplay between Section 230 and the online marketplace, and the ways that product liability claims are circumventing this affirmative protection. It will then propose changes to the online marketplace model, including a proportional due diligence requirement facilitated and enforced by an independent licensing board, and contractual and structural

9. AMAZON, 2019 AMAZON SMB IMPACT REPORT, 1, 2–3 (2019), <https://d39w7f4ix9f5s9.cloudfront.net/61/3b/1f0c2cd24f37bd0e3794c284cd2f/2019-amazon-smb-impact-report.pdf> [hereinafter SMB IMPACT REPORT].

10. Daniel Keyes, *3rd-party sellers are thriving on Amazon*, BUS. INSIDER (May 13, 2019, 8:44 AM), <https://www.businessinsider.com/amazon-third-party-sellers-record-high-sales-2019-5>.

11. 930 F.3d 136 (3d Cir. 2019), *vacated, reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019).

12. 390 F. Supp. 3d 964 (W.D. Wis. 2019).

13. 930 F.3d 415 (6th Cir. 2019).

14. Michael Hoenig, *Is Products Liability Closing In on Amazon?*, N.Y.L.J. (Aug. 9, 2019, 1:00 PM), <https://www.law.com/newyorklawjournal/2019/08/09/is-products-liability-closing-in-on-amazon/>.

15. *Id.*

16. Danielle Citron, *Tech Companies Get a Free Pass on Moderating Content*, SLATE (Oct. 16, 2019, 4:47 PM), <https://slate.com/technology/2019/10/section-230-cda-moderation-update.html>.

17. Gus Hurwitz, *The Third Circuit's Oberdorf v. Amazon opinion offers a good approach to reining in the worst abuses of Section 230*, TRUTH ON THE MKT. (July 15, 2019), <https://truthonthemarket.com/2019/07/15/the-third-circuits-oberdorf-v-amazon-opinion-offers-a-good-approach-to-reining-in-the-worst-abuses-of-section-230/>.

changes to the fulfillment model used by Amazon Marketplace and other similar sellers.

Part I will introduce the major players involved: Section 230 and how early case law helped shape the online marketplace model; Amazon Marketplace's third-party vendor business model, with attention paid to their program policies, and issues that have arisen from them; and an examination of three recent cases, *Oberdorf*, *State Farm Fire*, and *Fox*, discussing how plaintiffs circumvent the affirmative Section 230 defense.

Part II explores possible changes to the current online marketplace model, arguing that an increased due diligence standard should be required, "reasonably proportional" to their size and market share. Further, the creation of an independent certification body, supported both by fees from third-party vendors and the marketplaces themselves, should be used as an enforcement mechanism, bringing the marketplace back into line with consumer perception, while allowing the online third-party marketplace to assert substantive Section 230 protection in a good faith manner. Finally, changes to the fulfillment model itself are proposed to further insulate the online marketplace from liability for its vendors.

Part III looks to the impact of an independent certification body and a reworked fulfillment system on the online marketplace, and the positive effects such actions would have on the online marketplace, consumer trust, and all stakeholders involved in the e-commerce ecosystem.

II. BACKGROUND

This Section will analyze the current status of Section 230 jurisprudence in relation to the online marketplace and product liability suits. Part A discusses the creation of Section 230, and how the "Safe Harbor" provision granted to hosting platforms by Section 230 influenced the growth of third-party vendor marketplaces. Part B looks at the rise of the Amazon Marketplace, with a focus on their terms of service and their fulfillment structure. Finally, Part C will introduce the three July 2019 cases that indicate a possible judicial sea change in the relationship between the online marketplace and its interaction with Section 230.

A. *The “Law That Built the Internet”*

When the CDA was conceived in 1995, it was not intended to be the “foundation on which the modern internet was built[.]”¹⁸ The Act began as an amendment to the Telecommunications Reform Act.¹⁹ The CDA’s initial purpose was to criminalize the act of making indecent material available to minors.²⁰ However, the broad, often ambiguous language of the statute²¹ elicited free speech concerns, from parties as varied as Newt Gingrich to the editors of *Wired Magazine*.²² In response, the Internet Freedom and Family Empowerment Act (“IFFEA”) was introduced, crafted by cyber lobbyists and their allies in the House of Representatives.²³

At the time, the IFFEA represented a compromise between the contentious indecency provisions of the CDA²⁴ and those who wanted

18. See Felix Gillette, *Section 230 Was Supposed to Make the Internet a Better Place. It Failed*, BLOOMBERG BUSINESSWEEK (Aug. 7, 2019, 3:00 AM), <https://www.bloomberg.com/news/features/2019-08-07/section-230-was-supposed-to-make-the-internet-a-better-place-it-failed>.

19. *Id.*

20. *Id.*

21. The Supreme Court noted these concerns in *Reno v. ACLU*, 521 U.S. 844, 870–72 (1997) (citations omitted).

[E]ach of the two parts of the CDA uses a different linguistic form. The first uses the word “indecent,” while the second speaks of material that “in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.” Given the absence of a definition of either term, this difference in language will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean. Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequences of prison rape would not violate the CDA? This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials. The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. Second, the CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.

For the statutes themselves, see *infra* note 24.

22. Gillette, *supra* note 18.

23. *Id.*

24. The two provisions of the Communications Decency Act most widely protested—due to their ambiguous language—were 47 U.S.C. § 223(a) and § 223(d). Section 223(a) provides in pertinent part:

Whoever—

(1) in interstate or foreign communications—

.....

(B) by means of a telecommunications device knowingly—

(i) makes, creates, or solicits, and

complete free speech on the internet.²⁵ Ron Wyden and Christopher Cox, the drafters of the IFFEA, felt that the private sector was in a far better position to moderate user-provided content on “interactive computer services” than the government.²⁶ Wyden envisioned the IFFEA as a “Good Samaritan” provision, granting the growing internet industry the right to regulate itself.²⁷ As the companies were in the best position “to guard the portals of cyberspace,” this “Good Samaritan” provision gave internet companies enough legal breathing room to moderate their online communities, without fear of legal repercussions should something awful be posted.²⁸ Titling the effective provision “Protection for ‘Good Samaritan’ blocking and screening of offensive material,”²⁹ the Act would grant both a shield and a sword—a shield to protect an enterprising company’s opportunity to secure capital and attract investors, and a sword to allow these private entities to police their platforms in whatever way they saw fit without facing liability over the practice.³⁰

(ii) initiates the transmission of,
any comment, request, suggestion, proposal, image, or other communication which is obscene or child pornography, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

.

(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18 or imprisoned not more than two years, or both.

47 U.S.C. § 223(a) (2018). Section 223(d) provides in pertinent part:

Whoever—

(1) in interstate or foreign communications knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age,

any comment, request, suggestion, proposal, image, or other communication that is obscene or child pornography, regardless of whether the user of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunications facility under such person’s control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18 or imprisoned not more than two years, or both.

Id. § 223(d).

25. See generally Gilette, *supra* note 18.

26. *Id.*

27. *Id.*

28. *Id.*

29. 47 U.S.C. § 230(c)(1).

30. Lecher, *supra* note 2.

While much of the CDA was struck down as unconstitutional,³¹ the IFFEA, now known as Section 230, remained in effect, leaving in place a safe harbor provision, protecting internet service providers from the actions of a third-party on their platform.³²

1. *The Shield—Section 230(c)(1)*

Section 230(c)(1) begins:
 “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.”³³

Section 230(f) defined “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server”³⁴ At the time of drafting, it seemed this clause was only granting a limited “safe harbor” from liability, allowing online providers to regulate themselves.³⁵

Subsection (c)(1) is often seen as the shield of Section 230, protecting service providers from tort liability for the content of a third-party.³⁶ Conversely, the shield can be removed via voluntary action—if a service provider becomes involved in the creation or development of the published material, they no longer can assert this protection against liability.³⁷

2. *The Sword—Section 230(c)(2)*

While Section 230(c)(1) was intended as a shield, Section 230(c)(2) granted internet service providers the other half of their power: the ability to censure and moderate without facing liability for the practice.³⁸ The statute states:

(2) Civil liability - No provider or user of an interactive computer service shall be held liable on account of—

31. See *Reno v. ACLU*, 521 U.S. 844 (1997). In *Reno*, two consolidated suits (totaling forty-seven plaintiffs) were filed against the Attorney General, challenging Sections 223(a) and 223(d) of the Communications Decency Act as restrictive of free speech. *Id.* Both sections regulated the transmission of “obscene” or “patently offensive” material. *Id.* The Supreme Court struck down both provisions, holding that they were unconstitutionally vague. *Id.*

32. Gillette, *supra* note 18.

33. 47 U.S.C. § 230(c)(1).

34. *Id.* § 230(f)(2).

35. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 *FORDHAM L. REV.* 401, 403 (2017).

36. VALERIE C. BRANNON, CONG. RESEARCH SERV., *LSB10306, LIABILITY FOR CONTENT HOSTS: AN OVERVIEW OF THE COMMUNICATION DECENCY ACT’S SECTION 230 2* (2019).

37. *Id.* at 2–3.

38. See Lecher, *supra* note 2.

(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).³⁹

While subsection (c) protects interactive computer service providers broadly from the actions of their users, this section is more proactive. Unlike Section 230(c)(1), which applies when providers “refrain from filtering or censoring the information on their sites,” Section 230(c)(2) applies when a service provider “does filter out offensive material.”⁴⁰ This filtering must be premised on actions “taken in good faith,” making the affirmative immunity narrower than Section 230(c)(1), which does not have this limitation.⁴¹

In practice, this is the sword of Section 230, allowing a provider to moderate the content placed on their platforms without exposure to liability.⁴² This subsection was clearly influenced by the events of *Stratton Oakmont, Inc. v. Prodigy Services Co.*,⁴³ abrogating that decision and placing the power to moderate back in the hands of online service providers.⁴⁴

3. *The Legal Effect*

While Section 230 “sought to empower the Internet platforms to self-regulate under a light-touch framework in exchange for liability protection,”⁴⁵ the judiciary was quick to interpret Section 230 broadly.⁴⁶ In *Zeran v. AOL*,⁴⁷ the Fourth Circuit considered the breadth of the “shield” asserted by Section 230, stating in dicta:

39. 47 U.S.C. 230(c)(2).

40. BRANNON, *supra* note 36, at 3 (emphasis omitted).

41. *Id.* at 3.

42. Lecher, *supra* note 2.

43. See generally *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). In *Stratton Oakmont*, the plaintiff sued Prodigy for defamation, claiming Prodigy should be held liable as “publisher” for an anonymous defamatory statement posted on their service. *Id.* The New York Supreme Court noted Prodigy’s involvement with their content, including “content guidelines,” the employment of monitors, and a software screening program, showed that Prodigy had exercised enough editorial control to be considered “publisher” of the anonymous statement. *Id.*

44. BRANNON, *supra* note 36, at 2.

45. Memorandum from the Committee Republican Staff, U.S. House of Representatives Committee on Energy and Commerce (Oct. 11, 2019), <https://republicans-energycommerce.house.gov/wp-content/uploads/2019/10/Final-10.16.19-230-Hrg-Republican-Memo.pdf>.

46. Edelman & Stemler, *supra* note 5, at 160.

The amount of information communicated via interactive computer services is . . . staggering. The specter of tort liability in an area of such prolific speech would have an obviously chilling effect. 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. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.⁴⁸

The Fourth Circuit ultimately settled upon a broad interpretation of Section 230: “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”⁴⁹ As long as a platform or service provider⁵⁰ were not active in the creation of the message, thus becoming the “original culpable party,” the intermediary platform would avoid tort liability.⁵¹

The judiciary has also repeatedly emphasized Section 230’s nature as an “express pre-emption” clause.⁵² Section 230(e)(3) states that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”⁵³ However, it only expressly prohibits actions or liability *inconsistent* with the meaning of the CDA.⁵⁴ The CDA “does not rise to the level of complete preemption.”⁵⁵ Any express preemption would only arise in defense to certain causes of action authorized by the state legislature that is inconsistent with Section 230.⁵⁶

With the power of Section 230 construed so broadly, internet platforms were able to utilize the safe harbor provision of Section

47. *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). In *Zeran*, an anonymous poster placed advertisements containing slogans glorifying the Oklahoma City Bombing and instructed anyone interested to call plaintiff. *Id.* AOL removed messages when contacted but did not proactively remove future posts containing the same slogans and misinformation. *Id.* Plaintiff sued AOL, alleging negligence in failing to respond adequately to the fraudulent and malicious postings. *Id.*

48. *Id.* at 331.

49. *Id.* at 330. *See also* *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (further solidifying this interpretation of the statute).

50. For a further explanation of the concept of “platform or service provider,” see *infra* Part I.A.5.

51. *Id.* at 330–31.

52. Cary Glynn, *Section 230’s Applicability to ‘Inconsistent’ State Laws*, *TECH. & MKTG. BLOG* (Oct. 3, 2017), <https://blog.ericgoldman.org/archives/2017/10/section-230s-applicability-to-inconsistent-state-laws-guest-blog-post.htm>.

53. 47 U.S.C. 230(e)(3).

54. Glynn, *supra* note 52.

55. *Cisneros v. Sanchez*, 403 F. Supp. 2d 588, 593 (S.D. Tex. 2005).

56. *Id.*

230(c)(1) to make decisions without fear of liability.⁵⁷ As Section 230 “immunize[d] not only efforts to moderate user content but also decisions not to moderate,” how those decisions played out changed from platform to platform.⁵⁸

4. Section 230 and the Online Marketplace

It was not long before the effect Section 230’s safe harbor provision would have on the online marketplace became clear. In *Gentry v. eBay, Inc.*, Lars Gentry sued eBay in California state court, alleging that eBay had knowledge of fraudulent sports memorabilia being sold on its platform.⁵⁹ He claimed that eBay’s inaction was purposeful, allowing it to reap millions of dollars in profit.⁶⁰ The Court of Appeals found that Section 230 immunity preempted any claim he may have under state statute.⁶¹ In reaching its conclusion, the Court looked to three elements it felt were required by the statute to assert a Section 230 defense.⁶² To claim an assertive defense would require the defendant to “(1) be a provider or user of an interactive computer service; (2) the cause of action treat[s] the defendant as a publisher or speaker of information; and (3) the information at issue be provided by another information content provider.”⁶³ The Court found that eBay met all three elements, ruling that holding eBay liable “when it merely made the individual defendant’s false product descriptions available to other users on its [w]eb site, or provided the [w]eb site on which the individual defendants designated their collectibles as autographed” was inconsistent with the “full purposes and objectives” of Section 230.⁶⁴

In ruling for eBay, the Court further broadened the meaning of “interactive computer service.”⁶⁵ Courts have primarily focused on the fact that their operations are grounded in an “interactive” element, allowing users to find one another to transact.⁶⁶ Upon this ruling, busi-

57. See Matt Laslo, *The Fight Over Section 230—and the Internet as We Know It*, WIRED (Aug. 13, 2019, 3:18 PM), <https://www.wired.com/story/fight-over-section-230-internet-as-we-know-it/>.

58. Edelman & Stemler, *supra* note 5, at 159; see also *Blumenthal*, 992 F. Supp. at 49; *Doe v. Backpage.com, LLC*, 817 F.3d 12, 16 (1st Cir. 2016); *Doe v. MySpace, Inc.*, 528 F.3d 413, 415 (5th Cir. 2008).

59. See *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 821–22 (2002).

60. See *id.* at 822.

61. . *Id.* at 831–32.

62. *Id.* at 830.

63. *Id.* (citing 47 U.S.C. § 230(c)(1)).

64. *Id.* at 832–33.

65. See Edelman & Stemler, *supra* note 5, at 162.

66. *Id.*

nesses that rely on third-party, user-generated content, such as Craigslist, StubHub, and Airbnb, have held themselves out to have near complete immunity from liability for the unlawful or tortious conduct of such third-party users, describing themselves as an intermediary hosting platform, rather than a publisher.⁶⁷

5. *Platform or Publisher?*

The distinction between “publisher” and “interactive service platform” is important and has been hotly contested as online marketplaces continue to evolve.⁶⁸ While online marketplaces have used Section 230 to challenge and invalidate laws or regulations they do not care for,⁶⁹ whether they continue to be the provider of an “interactive computer service” has been debated as their services grow into those fields that could not escape liability in a physical marketplace.⁷⁰ Despite a prima facie appearance of providing an “interactive computer service,” additional actions taken by marketplaces to cause, assist, and facilitate disputed transactions have given rise to conflicts over whether they provide an “interactive computer service” or act as “information content providers,”⁷¹ a label that would remove an online marketplace from Section 230 protection. Recent cases have asked the courts to look beyond the online platforms, and into the “substance” of the transaction.⁷² Providing incentives to bring in service providers, detailed rules for the users, or the personal guarantee of quality through insurance, investigations, make-goods, and credits are all factors that show a deepening involvement in the disputed transaction.⁷³

Extending liability to these platforms for the actions of their users has had mixed success, showcasing some of the limits of Section 230.⁷⁴ While the contours of the law have allowed online marketplaces to operate with some degree of legal certainty for its users’ actions, it can still only claim such immunity when it acts solely as an interactive platform, and not an active participant.⁷⁵ A platform will not be cov-

67. See *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008); see also *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 552 (N.C. Ct. App. 2012); *Airbnb, Inc. v. City & Cty. of S.F.*, 217 F. Supp. 3d 1066, 1073 (N.D. Cal. 2016).

68. See, e.g., Steven Kramer, *Online Marketplaces: Continuing Product Liability, CDA Issues*, LAW360 (July 10, 2019, 5:06 PM), <https://www.law360.com/articles/1175289/online-marketplaces-continuing-product-liability-cda-issues>.

69. Edelman & Stemler, *supra* note 5, at 161.

70. See Citron & Wittes, *supra* note 35, at 412.

71. See Edelman & Stemler, *supra* note 5, at 163.

72. See *id.* at 168–70.

73. *Id.* at 170.

74. Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 145 (2016).

75. *Id.* at 145–46.

ered by the CDA where its action affords a “‘material contribut[ion]’ in [the] branding and shaping [of] the transaction.”⁷⁶ What exactly constitutes “‘material contribution’ in the branding or shaping of the transaction” is still unclear.⁷⁷ While the Ninth Circuit in *Fair Housing Council of San Fernando Valley v. Roommates.com* attempted to explain this exact conundrum, the decision only listed a non-exhaustive list of examples of what amounts to “material contribution.”⁷⁸ In listing their examples, the Ninth Circuit hoped to avoid confusion as to when a website helps to develop illegal content, and avoid allowing the CDA to make the internet a “lawless no-man’s land.”⁷⁹

The power of Section 230 over the growth of the Internet is undeniable. While it provides powerful and broad protections, uncertainties remain as to its application, especially in regard to platforms not imagined at the drafting of the statute. However, its existence has allowed many platform providers to flourish, changing the way our culture interacts with the internet.⁸⁰

76. *Id.* at 145.

77. *Id.*

78. See 521 F.3d 1157, 1169 (9th Cir. 2008). In an attempt to clarify “material contribution,” the Ninth Circuit stated:

If an individual uses an ordinary search engine to query for a “white roommate,” the search engine has not contributed to any alleged unlawfulness in the individual’s conduct; providing *neutral* tools to carry out what may be unlawful or illicit searches does not amount to “development” for purposes of the immunity exception. A dating website that requires users to enter their sex, race, religion and marital status through drop-down menus, and that provides means for users to search along the same lines, retains its CDA immunity insofar as it does not contribute to any alleged illegality; this immunity is retained even if the website is sued for libel based on these characteristics because the website would not have contributed materially to any alleged defamation. Similarly, a housing website that allows users to specify whether they will or will not receive emails by means of *user-defined* criteria might help some users exclude email from other users of a particular race or sex. However, that website would be immune, so long as it does not require the use of discriminatory criteria. A website operator who edits user-created content—such as by correcting spelling, removing obscenity or trimming for length—retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner that contributes to the alleged illegality—such as by removing the word “not” from a user’s message reading “[Name] did *not* steal the artwork” in order to transform an innocent message into a libelous one—is directly involved in the alleged illegality and thus not immune.

Id. This attempt to clarify has often created more confusion than it alleviated.

79. *Id.* at 1164, 1175.

80. Khanna, *supra* note 4.

B. *The Marketplace that Changed Online Commerce*

It is nearly impossible to overstate the importance of Amazon in disrupting and shaping e-commerce.⁸¹ Founded in 1994, and promoting itself as “Earth’s Biggest Bookstore,” even Jeff Bezos did not expect to succeed as wildly as he has.⁸² With a stated goal to become the “everything” store, Amazon has served as an “intermediary between the customers and manufacturers,” nowadays selling “nearly every type of product, all over the world.”⁸³ Over the course of its existence, Amazon has gone from the self-proclaimed “biggest bookstore” to the world’s largest retailer, surpassing Walmart in size in 2018 with over \$10 billion in profits and \$900 billion in market capitalization.⁸⁴ At one point capturing 49% of U.S. retail e-commerce sales, when one imagines the online marketplace, it is hard *not* to picture Amazon.⁸⁵

While Amazon has defined itself by its attempts to become the largest first-party “everything store,”⁸⁶ the year 2000 marked a turning point—Amazon opened up its platform to third-party vendors, allowing small to medium-sized businesses (SMB) to sell on Amazon’s virtual shelf.⁸⁷ Since opening the Amazon Marketplace to these third-party SMBs, growth has been astronomical, with sales growing from \$0.1 billion to \$160 billion over a twenty-year period.⁸⁸ Aggregate sales by SMBs on the Amazon Marketplace have recently even outpaced its main business, leading Jeff Bezos to write that “[t]hird-party sellers are kicking our first party butt. Badly.”⁸⁹ Data now shows that third-party vendors make up more than 58% of all sales made on Amazon.⁹⁰

To join as a third-party vendor, the seller must agree to the terms of the “Amazon Services Business Solutions Agreement,” as well as all

81. Gross, *supra* note 8.

82. Makeda Easter & Paresh Dave, *Remember when Amazon only sold books?*, L.A. TIMES (June 18, 2017, 12:40 PM), <https://www.latimes.com/business/la-fi-amazon-history-20170618-htmlstory.html>.

83. Shana Lebowitz, *How Jeff Bezos decided the first thing Amazon would sell was books*, BUS. INSIDER (Apr. 5, 2019, 2:34 PM), <https://www.insider.com/how-amazon-decided-to-sell-books-2018-4>.

84. Debter, *supra* note 6.

85. Jeff Desjardins, *Chart: Amazon’s Dominance in Ecommerce*, VISUAL CAPITALIST (Aug. 17, 2018), <https://www.visualcapitalist.com/chart-shows-amazons-dominance-ecommerce/>.

86. Lebowitz, *supra* note 83.

87. SMB IMPACT REPORT, *supra* note 9, at 3.

88. *Id.*

89. Mary Hanbury, *Amazon reveals how third-party sellers are kicking its butt on sales as part of small business charm offensive*, BUS. INSIDER (May 7, 2019, 5:35 AM), <https://www.businessinsider.com/amazon-reveals-how-third-party-sellers-kick-its-butt-in-sales-2019-5>.

90. *Id.*; SMB IMPACT REPORT, *supra* note 9, at 2.

applicable “Program Policies.”⁹¹ These terms govern the entirety of the contract between Amazon and the seller.⁹² While Amazon reserves the right to remove listings or terminate Marketplace services for any reason,⁹³ registration otherwise requires very little beyond good legal standing and the authority to enter the terms of the Business Services Agreement.⁹⁴ There appears to be no general vetting process beyond this; Amazon often accepts the representations at face value.⁹⁵ Amazon distinguishes these third-party vendors by identifying them prominently next to the price and shipping information, and repeating that information on the confirmation page.⁹⁶ The Amazon Marketplace’s “Conditions of Use” further state, in regard to third-party sellers, that “[the buyer is] purchasing directly from those third parties, not from Amazon . . . Amazon does not assume any responsibility or liability for the actions, product, and content of all these and any other third parties,”⁹⁷ echoing some of the language of Section 230 within their terms.

For each listing, Amazon requires certain details to be listed on the third-party vendor’s product detail pages, in order to make sure sellers

91. See *Amazon Services Business Solutions Agreement*, AMAZON SELLER CENT., https://sellercentral.amazon.com/gp/help/external/G1791?language=EN_US;%20https://sellercentral.amazon.com/gp/help/external/G521?language=EN_US.

92. *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136 (3d Cir. 2019), *vacated, reh’g en banc granted*, 936 F.3d 182 (3d Cir. 2019).

93. One sample provision includes: “Amazon reserves the right to refuse service, terminate accounts, terminate your rights to use Amazon Services, remove or edit content, or cancel orders in its sole discretion.” See also *Conditions of Use*, AMAZON SELLER CENT., https://sellercentral.amazon.com/gp/help/external/G201824360?language=EN_US&ref=efph_G201824360_cont_G521 (last updated Aug. 1, 2019); “We may terminate your use of any Services or terminate this Agreement for convenience with 30 days’ advance notice.” AMAZON SELLER CENTRAL, *supra* note 91.

94. Each party represents and warrants that: (a) if it is a business, it is duly organized, validly existing and in good standing under the Laws of the country in which the business is registered and that you are registering for the Service(s) within such country; (b) it has all requisite right, power, and authority to enter into this Agreement, perform its obligations, and grant the rights, licenses, and authorizations in this Agreement; (c) any information provided or made available by one party to the other party or its Affiliates is at all times accurate and complete; (d) it is not subject to sanctions or otherwise designated on any list of prohibited or restricted parties or owned or controlled by such a party, including but not limited to the lists maintained by the United Nations Security Council, the US Government (e.g., the US Department of Treasury’s Specially Designated Nationals list and Foreign Sanctions Evaders list and the US Department of Commerce’s Entity List), the European Union or its member states, or other applicable government authority; and (e) it will comply with all applicable Laws in performance of its obligations and exercise of its rights under this Agreement.

Id.

95. See *id.*; see also *Oberdorf*, 930 F.3d at 145.

96. *Oberdorf*, 930 F.3d at 155–56.

97. AMAZON SELLER CENTRAL, *supra* note 93.

are acting in a “fair and honest” manner.⁹⁸ This includes guidelines on how to structure the title, brand, manufacturer, description, and images of the product.⁹⁹ Failure to follow these guidelines may cause Amazon to suppress the listing from the Marketplace.¹⁰⁰ Sellers are responsible for setting their own prices, but are subject to Amazon’s Fair Pricing Policy.¹⁰¹ This limits several pricing practices that, in Amazon’s words, “harm customer trust,” including setting misleading pricing, listing the same product on Amazon at significantly higher prices than other recent prices for the same product on Amazon, or selling multiple units for more per unit than the single unit price.¹⁰² In exchange for these listings, Amazon gets one of two different kinds of fees—either a commission ranging from 7-15%, or a fee (paid either per item or monthly).¹⁰³ Amazon also receives a royalty-free, non-exclusive, worldwide, perpetual, irrevocable right and license to commercially, or non-commercially, exploit in any manner the information provided to Amazon by third-party vendors.¹⁰⁴

While the rampant growth and success of the third-party marketplace appears to be an overall victory for Amazon and its business model, issues remain. One of the greatest among them is the true level of control Amazon exerts in this business arrangement.¹⁰⁵ All contact with customers (or “buyers”) must be done through Amazon’s proprietary Buyer-Seller messaging system.¹⁰⁶ Amazon also reserves the right to cancel orders, issue refunds, and withhold payments to vendors with third-party sellers, all at its discretion.¹⁰⁷ Amazon’s ability to commercially exploit the licenses of other brands means that third-party vendors can often find themselves in direct competition, not just

98. *Selling Policies and Seller Code of Conduct*, AMAZON SELLER CENT., https://sellercentral.amazon.com/gp/help/external/G1801?language=en_US&ref=EFph_G1801_cont_G521.

99. *See generally* Amazon Services Quick Start Style Guide, AMAZON SERVS., https://images-na.ssl-images-amazon.com/images/G/01/Lite_Inventory_Templates/Selling_on_Amazon_Quick_Start_Style_Guide.pdf.

100. *Id.*

101. *See generally* Amazon Marketplace Fair Pricing Policy, AMAZON SELLER CENT., https://sellercentral.amazon.com/gp/help/external/G5TUVJKZHUVMN77V?language=en-US&refefph_G5TUVJKZHUVMN77V_cont_521.

102. *Id.*

103. Hoenig, *supra* note 14.

104. AMAZON SELLER CENTRAL, *supra* note 91.

105. Shaoul Sussman, *How Amazon Controls Its Marketplace*, THE AM. PROSPECT (July 26, 2019), <https://prospect.org/economy/amazon-controls-marketplace/>.

106. AMAZON SELLER CENTRAL, *supra* note 98.

107. AMAZON SELLER CENTRAL, *supra* note 91.

with each other, but also with Amazon.¹⁰⁸ Amazon is under no obligation to share the proprietary information it collects with third-party vendors, information that includes email addresses and a user's pre-purchase browse history.¹⁰⁹ Other sellers note that the price model of Amazon encourages a race to the bottom, likening the Marketplace to a "flea market."¹¹⁰

Amazon further obfuscates the factors of control through its bifurcated selling structure.¹¹¹ While some third-party vendors exist solely as a virtual storefront, handling and shipping their own products, Amazon also offers Fulfillment by Amazon.¹¹² This service allows a seller to take advantage of Amazon's delivery network, as well as giving access to Amazon's Prime network.¹¹³ Utilizing Fulfillment by Amazon allows the customer to store goods with Amazon, and have Amazon ship them upon purchase, with Amazon never taking title to the seller's goods.¹¹⁴ While Amazon has argued that this is simply an extension of their goal to connect sellers to customers,¹¹⁵ this extra level of "control" has created legal issues, with lawsuits concerning taxation issues,¹¹⁶ product liability,¹¹⁷ and contributing to the infringement of registered copyrights.¹¹⁸

108. Jennifer Rankin, *Third-party sellers and Amazon - a double-edged sword in e-commerce*, THE GUARDIAN (June 23, 2015, 9:31 AM), <https://www.theguardian.com/technology/2015/jun/23/amazon-marketplace-third-party-seller-faustian-pact>.

109. *Id.*

110. *Id.*

111. Tara Johnson, *How To Sell on Amazon in 2020: Setup, Fees, & Strategy*, TINUITI (Mar. 2, 2020), <https://tinuiti.com/blog/amazon/sell-on-amazon/>.

112. *Fulfillment by Amazon*, AMAZON, <https://www.amazon.com/fulfillment-by-amazon/b?ie=UTF8&node=13245485011>.

113. *Id.*

114. Jeffrey D. Neuburger, *Recent Rulings Highlight Limits of CDA Immunity in Products Liability Cases against E-Commerce Platforms*, NAT'L L. REV. (Aug. 15, 2019), <https://www.natlawreview.com/article/recent-rulings-highlight-limits-cda-immunity-products-liability-cases-against-e>.

115. *See generally Getting started with Fulfillment by Amazon*, AMAZON SELLER CENT., <https://sellercentral.amazon.com/gp/help/external/53921>.

116. Kiri Masters, *California Lawsuit Says Amazon Should Pay Billions In Back Taxes*, FORBES (Aug. 8, 2019, 6:43 AM), <https://www.forbes.com/sites/kirimasters/2019/08/08/california-lawsuit-says-amazon-should-pay-billions-in-back-taxes/#4a4c534b729a>.

117. Elizabeth Blossfield, *Amazon Not Liable for Selling Product that Allegedly Caused \$300K in Fire Damage*, INS. J. (June 4, 2019), <https://www.insurancejournal.com/news/east/2019/06/04/528240.htm>.

118. Guadalupe Gonzalez, *Amazon's Third-Party Sellers Just Landed the Company in Hot Water*, INC.COM (Dec. 20, 2018), <https://www.inc.com/guadalupe-gonzalez/williams-sonoma-sues-amazon-lawsuit-counterfeit-west-elm.html>.

Despite this, the Amazon Marketplace has generally been successful in defending itself from being considered a “seller.”¹¹⁹ In reaching this conclusion, courts have focused on the traditional definition—that of “passing of title from the seller to the buyer for a price.”¹²⁰ While recognizing that Amazon’s business model is that of a “disruptor,” and often holds an outsized role in the transaction, the judiciary seems to have acknowledged that current statutory authority often does not allow any court to hold Amazon liable for the power it does exert.¹²¹

Another issue has been a byproduct of Amazon’s supposed neutrality—the rise of bad actors and a lack of quality control.¹²² Amazon exercises limited oversight over its marketplace, with investigations finding 4,152 items for sale that have been declared unsafe by federal agencies.¹²³ Many of the sellers were anonymous, overseas, or offered scant information.¹²⁴ Utilizing the Fulfillment by Amazon program can make determining who the bad actor is even more difficult—many third-party items are listed as Prime-eligible, are shipped from Amazon warehouses, and packed in Amazon boxes.¹²⁵

While Amazon states they act quickly on any reported bad actors, there is mounting evidence that they have lost control of their platform or simply decline to control it.¹²⁶ Internal bribery, insider trading, abused report systems, and fake reviews are issues that continue to plague the platform.¹²⁷ Even the Department of Homeland Security has taken an interest, noting in a 2020 report to the President the important role that e-commerce, and specifically third-party marketplaces, play in the distribution of counterfeit goods.¹²⁸

119. See *Garber v. Amazon.com, Inc.*, 380 F. Supp. 3d 766, 778 (N.D. Ill. 2019); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 137 (4th Cir. 2019); *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 400 (S.D.N.Y. 2018); *Milo & Gabby LLC v. Amazon.com, Inc.*, 693 F. App’x 879, 885 (Fed. Cir. 2017).

120. *Erie Ins. Co.*, 925 F.3d at 141.

121. *Id.* at 144–145 (Motz, J., concurring).

122. Alexandra Berzon et al., *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products*, THE WALL ST. J. (Aug. 23, 2019, 9:56 AM), <https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990>.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. See generally Jon Emont et al., *Amazon, Amid Crackdown on Seller Scams, Fires Employees Over Data Leak*, THE WALL ST. J. (Dec. 10, 2018, 5:30 AM), <https://www.wsj.com/articles/amazon-amid-crackdown-on-seller-scams-fires-employees-over-data-leak-1544437800?mod=djem10point>.

128. COMBATING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS, DEP’T HOMELAND SEC. 20–24 (Jan. 24, 2020), https://www.dhs.gov/sites/default/files/publications/20_0124_pclcy_counterfeit-pirated-goods-report_01.pdf.

C. *The Cases That Could Change Everything*

1. *The beginning of the end?*

While Amazon Marketplace's legal foothold seemed secure at the beginning of 2019, several cases showcased the erosion of Section 230 shield in relation to online marketplaces. While Amazon Marketplace continues to invoke Section 230 in defense to these claims, pleadings have relied on state statutes in order to circumvent the liability shield that Section 230 provides.¹²⁹ The following three cases all appear to turn on the idea of whether Amazon Marketplace is a true neutral platform, or whether they have become a "material" participant in the transaction, and show that product liability in tort may slowly be closing in on the Amazon Marketplace for the actions of its third-party sellers.¹³⁰

a. *Oberdorf v. Amazon.com, Inc.*

At first glance, the facts of *Oberdorf* do not seem any more remarkable than any other Amazon Marketplace product liability lawsuit that would normally be dismissed due to Section 230. Heather Oberdorf purchased a dog collar from a third-party vendor on Amazon called "the Furry Gang."¹³¹ The vendor shipped the collar directly from Nevada to Oberdorf's home.¹³² There was no evidence that "the Furry Gang" was a member of Fulfillment by Amazon; instead, they shipped the collar themselves.¹³³ While walking her dog, the D-ring of the collar broke, and the leash Oberdorf was using recoiled into her eyeglasses, causing permanent damage in her left eye.¹³⁴ A representative of "the Furry Gang" could not be found by either Oberdorf or Amazon, with the vendor's account going inactive in May 2016.¹³⁵ With "the Furry Gang" unable to be found, Oberdorf instead filed a complaint against Amazon, alleging claims of strict product liability and negligence actionable under Pennsylvania law.¹³⁶ Amazon, in re-

129. See, e.g., *Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136, 143 (3d Cir. 2019), *vacated, reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019); see also *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 421 (6th Cir. 2019); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 966 (W.D. Wis. 2019).

130. Hoenig, *supra* note 14.

131. *Oberdorf*, 930 F.3d at 142.

132. *Id.*

133. *Id.* at 154.

134. *Id.* at 142.

135. *Id.*

136. *Id.* Claims included failure to provide adequate warnings regarding the use of the dog collar and defective design of the dog collar, negligence, breach of warranty, misrepresentation, and loss of consortium.

sponse, filed a motion to dismiss, which asserted two main theories: (1) that Amazon cannot be sued under Pennsylvania's strict liability statute because it does not constitute a "seller," and (2) that Oberdorf's claims were barred by the CDA, as she was seeking to hold Amazon liable for its role as the online publisher of a third-party's content.¹³⁷

The Third Circuit dealt with both claims by primarily by analyzing Amazon's actions under state law.¹³⁸ First, utilizing the Restatement of Torts 402A, they found Amazon liable as a "seller" under Pennsylvania state law, despite only acting as a virtual storefront for the third-party vendor.¹³⁹ To determine whether an actor can be held liable as a "seller," the Third Circuit applied a four-factor test based on the Restatement (Second) of Torts 402A and articulated in *Musser v. Vilsmeier Auction Co, Inc.*¹⁴⁰

The four factors analyzed included:

- (1) Whether the actor is the "only member of the marketing chain available to the injured plaintiff for redress";
- (2) Whether "imposition of strict liability upon the [actor] serves as an incentive to safety";
- (3) Whether the actor is "in a better position than the consumer to prevent the circulation of defective products"; and
- (4) Whether "[t]he [actor] can distribute the cost of compensating for injuries resulting from defects by charging for it in his business, i.e., by adjustment of the rental terms."¹⁴¹

The Third Circuit found all four factors overwhelmingly in Oberdorf's favor, distinguishing each from prior case law.¹⁴² For the first factor, the Court distinguished Amazon from an auction house or traditional marketplace, noting that Amazon controlled all communication between the vendor and the customer, and that Amazon had no vetting process to ensure that a third-party vendor was amenable to the legal process.¹⁴³ The second factor was weighed against Amazon as well, as the Court found that Amazon exerted substantial control over third-party vendors, and the imposition of strict liability

137. *Oberdorf*, 930 F.3d at 143.

138. *Id.*

139. *Id.*

140. *Id.* at 144; *Musser v. Vilsmeier Auction Co., Inc.*, 562 A.2d 279 (Pa. 1989). The plaintiff in *Musser* was injured by a tractor bought from an auction house. Following his injury, he sought to hold the auction house strictly liable as a "seller" of the allegedly defective tractor. The Pennsylvania Supreme Court held that the auction house could not be considered a "seller," using the policy rationale concerning those who supply products which may endanger people's safety, illustrated in comment f of § 402A of the Restatement (Second) of Torts.

141. *Oberdorf*, 930 F.3d at 144.

142. *Id.* at 145-47.

143. *Id.* at 145.

would only serve to incentivize Amazon to control what products appeared on its platform, and remove those that were unsafe.¹⁴⁴ The Court again looked to Amazon's influence in the third factor, noting that they were in a unique position to control what was posted on the Marketplace, and that by curtailing the ability of third-party vendors to see the same mechanisms and reports they see, they were placing themselves in a position to determine whether certain products should be circulated.¹⁴⁵ Lastly, the Court viewed Amazon as better able to take the cost of compensation, looking both at their indemnification clause, and their ability to change fees or contract structures based on the risk assessment of a particular third-party vendor.¹⁴⁶ Further rejecting Amazon's arguments that they could not be a "seller," as they did not take title or possession of the products sold by third-party vendors, the Third Circuit found that strict liability should apply to the Amazon Marketplace.¹⁴⁷

In addressing the affirmative Section 230 defense, the Third Circuit held that only some claims were barred by the CDA, but affirmed that the claims related to Amazon's direct role in the sale and distribution processes could proceed.¹⁴⁸ Here, the Court looked instead to the heart of the claim: whether Amazon acted in an editorial or publishing function.¹⁴⁹ Where the plaintiffs alleged a failure to warn on Amazon's part, Section 230 would bar such a claim.¹⁵⁰ However, where the plaintiffs alleged a more direct role for Amazon in the sales and distribution process, including marketing, distribution, design, or failure to test, the Court held that if such an allegation were proven, it would move beyond a mere editorial function and the CDA could not act as a bar.¹⁵¹ This made the initial categorization of Amazon Marketplace even more important—by deeming Amazon a "seller" as per the state statute, there was no inconsistency between Pennsylvania law and the CDA, allowing the suit to move forward.

Given the significance of the issue, it was no surprise to see the decision vacated soon after its release and granted *en banc* review by the Third Circuit.¹⁵² Following a remand to the Pennsylvania Supreme

144. *Id.* at 145–146.

145. *Id.* at 146–147.

146. *Id.* at 147.

147. *Oberdorf*, 930 F.3d at 147–148.

148. *Id.* at 153.

149. *Id.* at 151–152.

150. *Id.* at 153.

151. *Id.*

152. Max Mitchell, *3rd Circuit Grants En Banc Review of Amazon's Liability for Defective Products Sold by 3rd Parties*, LAW.COM (Aug. 26, 2019, 11:55 AM), <https://www.law.com/thele->

Court,¹⁵³ the parties have since settled, leaving open the question as to whether state tort statute can hold online retailers liable for defective products sold by third-parties at the Circuit Court level.¹⁵⁴

b. *Fox v. Amazon.com, Inc.*

While *Oberdorf* looked to whether Amazon was a seller, the Sixth Circuit found a different way to circumvent the CDA in a tort claim. Once again relying on state law, *Fox* instead focused on whether Amazon Marketplace could assume duties, even incidentally, from its third-party vendors.¹⁵⁵

The facts of *Fox* arose from a defective product action. Spurred by an advertised sale, the plaintiffs, the Fox family, purchased a hoverboard off the Amazon marketplace.¹⁵⁶ Sold by a third-party vendor, the Foxes received receipt verification from “amazon.com,” which noted that the product was “sold by -DEAL-.”¹⁵⁷ The package arrived between November 10, 2015, and November 17, 2015, in an Amazon-labeled box, and very likely was shipped from an Amazon Fulfillment Center overseas.¹⁵⁸

In November 2015, spurred by news reports of hoverboard explosions and fires, Amazon itself was also investigating the possible dangers of the particular product line of hoverboards purchased by the Foxes.¹⁵⁹ Ultimately concluding that the entire product line was bad, Amazon ceased all hoverboard sales worldwide.¹⁶⁰ On December 12, 2015, Amazon sent an email to all 250,000 hoverboard purchasers, with the intention to notify their customers in a “non-alarmist” way.¹⁶¹ Titled “Important Product Safety Notification Regarding your Amazon.com Order,” the body of the email stated “[t]here have been news reports of safety issues involving products like the one you purchased that contain rechargeable lithium-ion batteries. As a precaution, we

galintelligencer/2019/08/26/3rd-circuit-grants-en-banc-review-of-amazons-liability-for-defective-products-sold-by-3rd-parties/.

153. *Oberdorf v. Amazon.com Inc.*, 818 Fed. App'x 138 (3d Cir. 2020). As a matter of first impression, the Third Circuit declined to predict how the Pennsylvania Supreme Court would rule and instead requested that the Pennsylvania Supreme Court certify the issue.

154. Max Mitchell, *Products Liability Lawsuit Against Amazon Has Settled, Mooting Pa. Supreme Court Argument*, LAW.COM (Sept. 23, 2020, 6:21 PM), <https://www.law.com/thelegalintelligencer/2020/09/23/products-liability-lawsuit-against-amazon-has-settled-mooting-pa-supreme-court-argument/>.

155. *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 426 (6th Cir. 2019).

156. *Id.* at 418.

157. *Id.* at 419.

158. *Id.*

159. *Id.* at 419–20.

160. *Id.*

161. *Fox*, 930 F.3d at 420.

want to share with you some additional information about lithium-ion batteries and safety tips for using products that contain them.”¹⁶² It further contained information concerning safety tips, a link to initiate any possible returns, and a request to pass the email along to the proper recipient should the board have been bought as a gift.¹⁶³

Although the December 12 email was sent to the plaintiffs, they did not recall reading or receiving it.¹⁶⁴ Thus, when the hoverboard caught fire in their home on January 9, 2016, destroying almost all their personal property, they claimed to be caught off-guard.¹⁶⁵ Soon after the fire, the plaintiffs filed an action alleging that Amazon breached a duty to warn the plaintiffs about the defective or unreasonably dangerous nature of the product, in violation of Tennessee tort law.¹⁶⁶

While the Sixth Circuit did not follow *Oberdorf's* ruling in categorizing the Amazon Marketplace as a “seller,”¹⁶⁷ the Court did find a path to hold Amazon Marketplace liable. Relying on the Restatement (Second) of Torts Sections 323¹⁶⁸ and 324A,¹⁶⁹ the Court agreed with the plaintiffs that despite not being a “seller,” Amazon had gratuitously assumed a duty of care through the sending of their warning email.¹⁷⁰ As Amazon had “plainly recognized the warning as neces-

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 420–21.

166. *Id.* at 421. Plaintiffs also alleged that Amazon sold the Foxes a defective or unreasonably dangerous product, in violation of the Tennessee Products Liability Act of 1978, and that Amazon caused confusion or misunderstanding about the source of the product, in violation of the Tennessee Consumer Protection Act. *Id.* These allegations were decided for Amazon Marketplace on summary judgment. *Id.*

167. *Fox*, 930 F.3d at 425, 428–29.

168. Section 323 provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to the liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if:

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) the harm is suffered because of the other's reliance upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW INST. 1965).

169. Section 324A provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognizes [*sic.*] as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Id. § 324A.

170. *Fox*, 930 F.3d at 427.

sary for the protection of [the plaintiff], a third party, or their things,”¹⁷¹ the Court found they met the elements under Sections 323 and 324A for both the plaintiff as well as the plaintiff’s family.¹⁷² With the duty assumed, the Sixth Circuit remanded the case to see if the duty was breached, or if enough facts existed whereby the plaintiffs could have acted in reliance on the email.¹⁷³

While the Sixth Circuit did not discuss Section 230 in relation to its decision concerning the duty to warn, it almost certainly should have.¹⁷⁴ The decision in *Fox* followed in the footsteps of several other decisions—most notably, the Ninth Circuit’s *Doe v. Internet Brands* decision¹⁷⁵—looking to whether the duty to warn falls within Section 230. By refusing to engage with the CDA in this context, the Sixth Circuit provided another method to plead tort liability in circumvention of Section 230.

c. *State Farm Fire and Casualty Company v. Amazon.com, Inc.*

Building upon the legal precedent set by the *Oberdorf* decision, *State Farm* established the most stringent state regulation of the Amazon Marketplace yet. This case arose from a product liability claim made under Wisconsin state law.¹⁷⁶ Luke Cain purchased a swing-arm adapter from Amazon for a bathtub faucet in his home.¹⁷⁷ The adapter was listed by XMJ, a Chinese company with no presence in the United States.¹⁷⁸ As a third-party vendor, XMJ participated in the Fulfillment by Amazon program.¹⁷⁹ Cain’s home was flooded when the adapter proved to be defective.¹⁸⁰ State Farm, who insured the

171. *Id.*

172. *Id.*

173. *Id.* at 427–28.

174. This may be due to the fact that Amazon conceded that Section 230 did not apply to this action. *Id.* at 428 n.8.

175. *Doe v. Internet Brands*, 824 F.3d 846 (9th Cir. 2016). In *Internet Brands*, the plaintiff sued for one count of negligent failure to warn, alleging that the defendant, an online networking site for models, had knowledge of a scheme by defendants to drug and rape women. *Id.* at 848–49. The Ninth Circuit held that the plaintiff’s claim that they were owed a duty to warn to the plaintiff under California law was not barred by section 230. *Id.* In reaching this conclusion, the Ninth Circuit analyzed the Congressional intent behind the statute, focusing on the “Good Samaritan” clause of section 230(c). *Id.* at 852. The court noted that the plaintiff’s claim did not seek to hold the defendant as the “publisher or speaker” of any information, and that holding the defendant liable for failing to generate a warning concerning known risks would not discourage the core policy of the “Good Samaritan” clause. *Id.* at 851, 853.

176. *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 967–68 (W.D. Wis. 2019).

177. *Id.* at 967.

178. *Id.*

179. *Id.*

180. *Id.* at 968.

home and paid for the property damages, brought a subrogation claim against Amazon, suing for strict product liability under the applicable Wisconsin statute.¹⁸¹ Amazon moved for summary judgment, arguing that it was not a “seller” within the meaning of the statute, and that it could not be held liable for third-party content due to Section 230.¹⁸²

In its denial of the motion, the *State Farm* Court took an approach that appeared similar to that used by the Third Circuit just weeks before.¹⁸³ For the first claim, the Western District analyzed the meanings of “seller” and “distributor,” looking to statutory interpretation and instructive case law in determining whether Amazon could potentially be labeled a seller under Wisconsin statute.¹⁸⁴ Relying on the Wisconsin Supreme Court case *Kemp v. Miller*,¹⁸⁵ the court found that the concept of “seller” should be “construed more broadly to effectuate the purposes of the strict liability doctrine.”¹⁸⁶ Analyzing it in a similar manner to the Third Circuit in *Oberdorf*, the District Court looked to *Kemp* to explain the ways that the definition of seller can be

181. *Id.* at 966, 968–69. The court primarily looked to Wisconsin Statute Section 895.047(2), which states in part:

(2) Liability of seller or distributor.

(a) A seller or distributor of a product is not liable based on a claim of strict liability to a claimant unless the manufacturer would be liable under sub. (1) and any of the following applies:

1. The claimant proves by a preponderance of the evidence that the seller or distributor has contractually assumed one of the manufacturer’s duties to manufacture, design, or provide warnings or instructions with respect to the product.

2. The claimant proves by a preponderance of the evidence that neither the manufacturer nor its insurer is subject to service of process within this state.

3. A court determines that the claimant would be unable to enforce a judgment against the manufacturer or its insurer.

(b) The court shall dismiss a product seller or distributor as a defendant based on par. (a)2. if the manufacturer or its insurer submits itself to the jurisdiction of the court in which the suit is pending.

WIS. STAT. § 895.047(2) (2011).

182. *State Farm*, 390 F. Supp. 3d at 966.

183. *Id.* at 973.

After briefing was completed, the Third Circuit concluded that Amazon was strictly liable for a defective product sold by a third-party seller, applying principles from § 402A of the Restatement (Second) of Torts, and Pennsylvania common law. The Third Circuit’s reasoning, particularly its careful consideration of the factors in § 402A of the Restatement (Second) of Torts, would be persuasive under Wisconsin law, too. *Oberdorf*’s reasoning is very similar to *Kemp*’s.

Id. (internal citations omitted).

184. *Id.* at 969.

185. *Kemp v. Miller*, 453 N.W.2d 872 (Wis. 1990). This case centered on an attempt to hold Budget Rental as strictly liable for a defective automobile the plaintiff had rented from them.

186. *State Farm*, 390 F. Supp. 3d at 971.

extended, using the example of sellers and lessors.¹⁸⁷ *Kemp* explored three material ways in which sellers resemble lessors:

(1) both sellers and lessors “introduce potentially dangerous instrumentalities into the stream of commerce;” (2) like sellers, lessors are in a better position than the end user to allocate the cost of product dangerousness by purchasing insurance or adjusting the price of the lease; and (3) both sellers and lessors implicitly represent that their products are safe by advertising them and providing them to the market.¹⁸⁸

Under this precedent, the court found that formal transfer of ownership is not required for an entity to be held strictly liable, but rather that the entity must be an integral part of the chain that puts the defective product in the stream of commerce.¹⁸⁹ Looking at many of the same factors of control analyzed in *Oberdorf*, the court determined that *but for* Amazon, the product never would have reached a Wisconsin customer.¹⁹⁰

For the second claim, the District Court once again echoed the Third Circuit in its treatment of Section 230. While the court acknowledged that Section 230 would immunize Amazon were they only the publisher of the third-party vendor’s product description (thus eliminating any claims of negligence or misrepresentation), the District Court held that Amazon’s actions were not publication, but rather active participation in the sale.¹⁹¹ The court differentiated another Wisconsin case that looked to Section 230 jurisprudence, *Daniel v. Armslist*.¹⁹² It noted that the defendant in *Armslist* was only tangentially related to the transaction,¹⁹³ doing nothing except creating the forum that connected the buyer and seller, with no other control factors present in relation to placing the product in the stream of commerce.¹⁹⁴ However, under *State Farm*, the court attributed to Amazon “all the roles of a traditional—and very powerful—reseller/distributor. The only thing Amazon did not do was take ownership of the [third-party vendor’s] goods.”¹⁹⁵ As Amazon Marketplace was an active participant, *State Farm*’s claim was an attempt to hold Amazon

187. *Id.* at 971–72.

188. *Id.*; *see generally Kemp*, 453 N.W.2d at 878.

189. *Id.* at 972.

190. *Id.*

191. *Id.* at 973–74.

192. *State Farm*, 390 F. Supp. 3d at 974 (citing 926 N.W.2d 710 (Wis. 2019)).

193. *Id.* This idea of “tangential relation” to the transaction at issue arises in *Oberdorf* as well. *See Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 157–58 (3d Cir. 2019), *vacated, reh’g en banc granted*, 936 F.3d 182 (3d Cir. 2019).

194. *Id.* at 158.

195. *See, e.g., State Farm*, 390 F. Supp. 3d at 972.

strictly liable for Amazon's active participation in placing the product in the stream of commerce.¹⁹⁶ As an actor in the process for strict liability purposes, the Western District determined that Section 230 could not apply to Amazon in this context.¹⁹⁷

III. ANALYSIS

This Section will analyze the judicial exceptions to Section 230 created by *Fox*, *Oberdorf*, and *State Farm*, arguing that expanding either exception would create unsolvable problems for both the online marketplace and the stakeholders that rely on them. It will then propose two ideas: (1) an independent regulatory body for third-party merchants selling on online marketplaces, and (2) for Amazon Marketplace to conduct institutional and contractual changes to mitigate tort liability.

A. *The Eroding Protection of Section 230*

These three decisions represent a radical departure from precedent, with some influence arriving from a longer lasting jurisprudential arc against online marketplaces.¹⁹⁸ The decisions expose the discomfort that the current judiciary has with the “disruptor” economy these online marketplaces represent.¹⁹⁹ As such, *Fox*, *Oberdorf*, and *State Farm* reveal two ways that the judiciary has circumvented Section 230 and weakened the presumptive immunity that the CDA grants.

1. *The “Assumption of Duty” Exception*

Fox creates the clearest line to online marketplace liability, circumventing Section 230 protection through an “assumption of duty” exception. In their determination that by sending their hoverboard

196. *Id.* at 973–74

197. *Id.* at 974.

198. Eric Goldman, *Amazon May Be Liable for Marketplace Items—Oberdorf v. Amazon, TECH. & MKTG. L. BLOG* (July 8, 2019), <https://blog.ericgoldman.org/archives/2019/07/amazon-may-be-liable-for-marketplace-items-oberdorf-v-amazon.htm>.

199. Best stated by Judge Motz's concurrence in *Erie Insurance Co. v. Amazon.com, Inc.*:

By design, Amazon's business model cuts out the middlemen between manufacturers and consumers, reducing the friction that might keep foreign (or otherwise judgment-proof) manufacturers from putting dangerous products on the market. Today, Amazon makes up at least 46 percent of the online retail marketplace, selling more than its next twelve online competitors combined. Yet Amazon's business model shields it from traditional products liability whenever state law strictly requires the exchange of title for seller liability to attach, in many cases forcing consumers to bear the cost of injuries caused by defective products (particularly where the formal “seller” of a product fails even to provide a domestic address for service of process).

925 F.3d 135, 144 (4th Cir. 2019) (Motz, J., concurring) (internal citations omitted).

customers an email illustrating the dangers of the product, Amazon assumed a duty to warn,²⁰⁰ the Sixth Circuit created a possible “back-door” to liability, while never acknowledging the implications of the CDA in its decision.²⁰¹

In fact, it is almost impossible to look at this decision without seeing the mixed messages given by the differing circuit courts. In its *Internet Brands* opinion, the Ninth Circuit pointed to the fact that the “duty to warn” exception could be found if there is a “special relationship” between the online platform and its user, requiring the online platform to issue a warning.²⁰² *Fox* may have found such a “special relationship,” looking to the Restatement (Second) of Torts sections 323²⁰³ and 324A²⁰⁴ to illustrate ways in which an online marketplace could find itself owing duties to customers of third-party vendors. However, unlike *Internet Brands*, where the defendant’s failure to warn the plaintiff created the possibility of tort liability,²⁰⁵ Amazon’s affirmative warning, meant to help their customers, yet created the same possibility of tort liability.²⁰⁶

This decision is one of perverse incentives—would Amazon have been better off not sending any warning whatsoever?²⁰⁷ The Sixth Circuit appeared to implicitly punish Amazon for sending the warning email, the lesson being that online marketplaces should instead do nothing and shield themselves behind Section 230(c)(1), taking no responsibility for the damage caused by a third-party vendor.²⁰⁸ Expanding this exception would simply reinforce that behavior. In cases like *Fox* and *Doe*, where the damage was catastrophic to those involved, it is unfair to punish these platforms for attempting to warn. In fact, it seems to run contrary to the very core of Section 230—to support the Good Samaritan actions by online platforms in situations like these.

200. *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 427 (6th Cir. 2019).

201. *Id.* at 428 n.8.

202. *See, e.g.*, Eric Goldman, *Section 230 Baffles 9th Circuit (Again)—Doe #14 v. ModelMayhem*, TECH. & MKTG. L. BLOG (May 31, 2016), <https://blog.ericgoldman.org/archives/2016/05/section-230-baffles-9th-circuit-again-doe-14-v-modelmayhem.htm>.

203. *See supra* note 168.

204. *Erie Ins. Co.*, 925 F.3d at 141.

205. *Doe v. Internet Brands*, 824 F.3d 846, 854 (9th Cir. 2016).

206. *Fox*, 930 F.3d at 427, 428.

207. Eric Goldman, *Amazon Might Be Liable for Defective Marketplace Items (But Only When It Tries to Warn Consumers)—Fox v. Amazon*, TECH. & MKTG. L. BLOG (July 2, 2019), <https://blog.ericgoldman.org/archives/2019/07/amazon-might-be-liable-for-defective-marketplace-items-but-only-when-it-tries-to-warn-consumers-fox-v-amazon.htm>.

208. *Id.*

Despite the early stages of this “duty to warn” jurisprudence, it is difficult to see that this exception will lead anywhere worthwhile. While it does create a route for plaintiffs to circumvent a Section 230 defense, enforcing this exception would create more problems than solutions. Here, the judiciary seems more concerned with the reports illustrating an allegedly widespread problem Amazon has vetting third-party vendors, including problems with counterfeiting,²⁰⁹ fake reviewers,²¹⁰ and the sale of outlawed, and oftentimes dangerous, products.²¹¹ Online marketplaces should be encouraged to act in the best interests of their consumers and stakeholders; expanding the “duty to warn” exception would encourage these marketplaces to do nothing, even in situations where they absolutely could have done something.

2. The “Stream of Commerce” Theory

State Farm and *Oberdorf* took a more nuanced approach, relying on specific state statutes to apply the same duties and immunities to the platforms that are integral in the chain of distribution in introducing dangerous products into the stream of commerce.²¹² The immediate effect of these decisions was enough to send Amazon, as well as other online marketplaces, scrambling to deal with legal consequences.²¹³

In the majority opinions, the judges of *State Farm* and *Oberdorf* made clear they were thinking about the transformation of the marketplace from brick-and-mortar to the internet, and the changes that have been brought about by such a shift.²¹⁴ The focus on Amazon’s active participation in the sale mirrors two decisions arising out of the Ninth Circuit: *HomeAway.com v. City of Santa Monica* and *Airbnb*

209. See generally Department of Homeland Security, *supra* note 128.

210. See generally Josh Dzieza, *Dirty Dealing in the \$175 billion Amazon Market Place*, THE VERGE (Dec. 19, 2018, 8:31 AM), <https://www.theverge.com/2018/12/19/18140799/amazon-marketplace-scams-seller-court-appeal-reinstatement>.

211. See generally Berzon et al., *supra* note 122.

212. *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 973–74 (W.D. Wis. 2019).

213. See Goldman, *supra* note 202.

Because Amazon is the “seller” (and exposed to strict liability, no less), Section 230 doesn’t apply to the sale of goods; though it still protects the predicate content publication. So that means Amazon’s conduct as a seller . . . is eligible for regulators to impose unrestricted legal conditions. With that power, you know that regulators will cook up some crazy stuff. If this ruling establishes that it’s open season on online marketplaces, online marketplaces can’t withstand the current liability exposure or the onslaught of new rules inevitably coming for them.

Id.

214. See *State Farm*, 390 F. Supp. 3d at 974; see generally *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 145–58 (3d Cir. 2019), *vacated, reh’g en banc granted*, 936 F.3d 182 (3d Cir. 2019).

Inc. v. City & County of San Francisco.²¹⁵ The courts in these cases seem less focused on the publication of information (which is protected by Section 230), but rather more focused the fact that the publisher actively helped place—and took a cut of the payment from—an illegal or defective product into the stream of commerce that otherwise would not have been present.²¹⁶

These decisions also illustrate that the judiciary was interested in exploring the control Amazon wields over its third-party vendors, and whether that puts Amazon and other similar online marketplaces in a position beyond that of a traditional internet service platform. Under this theory, any distributing platform that plays an outsized role in introducing the potentially dangerous product to the “stream of commerce” (through, for example, the Fulfillment by Amazon program) could find themselves liable as a seller, as the Court decided that the online marketplace was in the better position to halt the flow of goods and absorb and allocate the risk through indemnification agreements.²¹⁷

At first glance, these decisions look to be in the best interest of the consumers. This aggressive strict liability allows plaintiffs to sue Amazon in tort for defective products, increasing their chance of settlement or damages. However, while it is clear that Amazon and other online marketplaces can improve their processes in many ways, there are legitimate social and market dangers to holding these marketplaces strictly liable for every defective product in which they took a more active role in.

First, there is a high likelihood that these decisions will create a fragmented approach to regulation that Section 230 was expressly created to avoid. The decisions of *Oberdorf* and *State Farm* had their basis in state product liability law.²¹⁸ Should these decisions continue to be upheld, there is almost no doubt that other states will follow suit and attempt to regulate online marketplaces in a similar manner. This will lead to state-by-state challenges of statutes on the theory that they are inconsistent with Section 230. Rising legal challenges will only lead to rising costs for both the online marketplaces and the consumers who use them.

215. 918 F.3d 676, 682–83 (9th Cir. 2019); 217 F. Supp. 3d 1066, 1075 (N.D. Cal. 2016); see Eric Goldman, *Wisconsin Court Holds Amazon Can Be Strictly Liable for Marketplace Items—State Farm v. Amazon*, TECH. & MKTG. L. BLOG (July 25, 2019), <https://blog.ericgoldman.org/archives/2019/07/wisconsin-court-holds-amazon-can-be-strictly-liable-for-marketplace-items-state-farm-v-amazon.htm>.

216. See generally *id.*; see generally *Airbnb Inc.* 217 F. Supp. 3d at 1073.

217. See *State Farm*, 390 F. Supp. 3d at 972–73.

218. *Id.* at 969; *Oberdorf*, 930 F.3d at 143.

Secondly, while this is normally the kind of situation that insurance would prevent in a brick-and-mortar store, Amazon specifically runs razor-thin profit margins in order to grow their online marketplace.²¹⁹ With the number of lawsuits that could arise, given the plaintiff-friendly nature of the *Oberdorf* and *State Farm* decisions, Amazon could make many decisions that would change how the online marketplaces are used. These business decisions could take on many forms, ranging from determining that insurance is too expensive and simply eliminating their third-party marketplace, to changing the structure of the store to pass along costs to consumers, to consumer unfriendly, possibly monopolistic agreements, in return for using their platform.

Lastly, while the judiciary has been rightly suspicious of Amazon's true role in adjudicating third-party vendor liability cases,²²⁰ the creation of common law or enabling of regulation targeting Amazon will almost certainly have collateral effects beyond Amazon Marketplace itself. Other marketplaces that operate under Amazon's model will almost certainly find themselves at risk.²²¹ With fears of monopoly already surrounding Amazon,²²² eliminating all possible competition through the over-application of varying state tort laws would do nothing for the stakeholders that rely on online marketplaces. A hodge-podge of common law would also likely cause online marketplaces to remove many otherwise legitimate third-party vendors, eliminating much of the savings consumers can expect from these online marketplaces. Many online shoppers consider themselves savvy and utilize Amazon for price comparisons.²²³ This kind of reaction could easily affect a consumer's ability to choose the most cost-effective option for themselves.

219. Karen Weise, *Amazon's Profit Falls Sharply as Company Buys Growth*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/technology/amazon-earnings.html>.

220. See Krystal Hu, *This court ruling could change who's responsible for your amazon purchases*, YAHOO FIN. (July 5, 2019), <https://finance.yahoo.com/news/amazon-third-circuit-third-party-liability-204536359.html> ("The decision doesn't apply to other online marketplaces, the Third Circuit judges ruled, which highlights Amazon's unique offering to lure sellers. Amazon has differentiated itself by providing full services from shipping to payment and limit customers' direct contact with the seller.").

221. Sarah K. Rathke, *Supply Chain Decision: Online Marketplaces At Risk Due To Federal Court Ruling in Oberdorf v. Amazon.com Inc.*, NAT'L L. REV. (July 22, 2019), <https://www.natlawreview.com/article/supply-chain-decision-online-marketplaces-risk-due-to-federal-court-ruling-oberdorf>.

222. Ben Piven, *Is Amazon a true monopoly or does the Bezos behemoth not qualify?*, AL JAZEERA NEWS (July 15, 2019), <https://www.aljazeera.com/ajimpact/amazon-true-monopoly-bezos-behemoth-qualify-190712212903436.html>.

223. Pamela N. Danziger, *Amazon's Customer Loyalty Is Astounding*, FORBES (Jan. 10, 2018, 9:40 AM), <https://www.forbes.com/sites/pamdanziger/2018/01/10/amazons-customer-loyalty-is-astounding/#3e1f814011fe>.

While the jurisprudence of *Oberdorf* and *State Farm* looks attractive from the outset, the “stream of commerce” exception, if continued, would almost certainly end the online marketplace as it is known today, leaving in place the risk of monopoly and reduced market presence.

B. *Is There a Middle Road?*

This leaves the question—what is best for all stakeholders? Is there a solution that takes into account the need for consumer protection from bad actors, while keeping in place the broad protections of Section 230 that allow online marketplaces to innovate further? Or should consumer protection be emphasized over all else, forcing an unwelcome change to Amazon and the other online marketplaces that could hurt consumers’ choice in the end?

Instead of seeking to plug the myriad of ways that plaintiffs attempt to bypass Section 230, the concerns put forward in *Fox*, *Oberdorf*, and *State Farm* should be addressed in two distinct manners. First, by tying the currently presumptive Section 230 defense to a certain level of due diligence on the part of the marketplace, some of the worst abuses of the online market can be reined in. This can be done via two main functions: a voluntary re-emphasis on the Good Samaritan clause of Section 230, and the creation of a licensing body whereupon third-party vendors can register, acting as a prima facie due diligence check for online marketplaces.

Secondly, the platforms must analyze and adapt their fulfillment models. Platforms like Amazon Marketplace should look to their own fulfillment policies, reworking their institutional policies and the contractual obligations given to third-party vendors.

C. *Regulation of Third-Party Vendors through an Independent Regulatory Body*

The first step the online marketplace should take is effectuating a more aggressive form of due diligence. In this context, proper due diligence could take on many forms, including actions such as establishing the identity of sellers, tracking IP addresses, performing risk analyses based on their area of origination, and requiring escrow accounts for high-risk sellers. This would provide two benefits. First, through proper interpretation and utilization of Section 230(c)(2)(A),²²⁴

224. Section 230(c)(2)(A) states:

No provider or user of an interactive computer service shall be held liable on account of — [] any action voluntarily taken in good faith to restrict access to or availability of

proper due diligence would allow the marketplace platforms some ability to control what is allowed to be published, while still allowing the marketplace to utilize the Section 230 defense in most circumstances. The second benefit of due diligence would be a liability shift—by giving the consumer more knowledge into the supply chain, as well as some degree of confidence into the liquidity of the seller, it would allow Amazon to avoid third-party tort liability.

The jurisprudence of *Oberdorf* gives the start of a solution. By emphasizing the availability of Amazon as the only reachable plaintiff, along with the lack of any strong vetting factors,²²⁵ the decision implies that if:

[T]here are readily available ways to establish some form of identity for users – for instance, by email addresses on widely-used platforms, social media accounts, logs of IP addresses – and there is reason to expect that users of the platform could be subject to suit – for instance, because they’re engaged in commercial activities or the purpose of the platform is to provide a forum for speech that is likely to be legally actionable – then the platform needs to be reasonably able to provide reasonable information about speakers subject to legal action in order to avail itself of any Section 230 defense.²²⁶

1. *The Proportionality Requirement*

The key is reasonability—the amount of information a platform is reasonably expected to collect should be proportional to the size of market share, and possibility of harmful or illegal activity on the platform in question.²²⁷ This proportionality requirement would protect different websites with different purposes—a baking website might just need to record Internet provider addresses, where a multinational corporation like Amazon may be required to show they reasonably attempted to gather full identification.²²⁸

This “proportional reasonability” requirement would become even stronger when argued in conjunction with a proper reading of Section 230(c)(2)(A), as well as giving proper meaning to subsection (c)’s heading—“Protection for ‘Good Samaritan’ blocking and screening of offensive material.”²²⁹ Subsection 230(c)(2)(A) states that “[n]o pro-

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.

47 U.S.C. § 230(c)(2)(A).

225. *E.g.*, *Oberdorf*, 930 F.3d at 149.

226. Hurwitz, *supra* note 17.

227. *Id.*

228. *Id.*

229. 47 U.S.C. § 230(c).

vider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be . . . *otherwise objectionable*, whether or not such material is constitutionally protected.”²³⁰ While much more emphasis has been placed on the original twenty-six words,²³¹ this clause, the basis for Wyden’s sword metaphor,²³² allows a platform to moderate objectionable content in good faith. With a reasonable amount of due diligence, it would be easier for an online marketplace to argue that the screening of third-party vendors was taken in good faith to prevent customers from buying false, misleading, or otherwise counterfeit goods. It would allow Amazon to become a “Good Samaritan” in terms of customer protection, without falling outside of Section 230’s broad liability shield.

2. *The Creation of External Licensing Organizations*

To best effectuate these goals, other organizations or enforcement mechanisms should be looked at. Similar to how other statutes or commissions work, one solution that would protect all parties and stakeholders involved would be the creation of an external, independent organization responsible for identifying and confirming the information on each vendor, certifying them as trustworthy. Taking inspiration from the enforcement mechanisms of the Digital Millennium Copyright Act (DMCA)²³³ or Children’s Online Privacy Protection Act (COPPA),²³⁴ third-party vendors could register with this organization, providing information that, at minimum, would meet the “reasonable good faith” standard for more laissez-faire entry level markets (such as eBay or Craigslist). If one wants to access a more premier marketplace (like Amazon), more information would need to be provided, including the existence of assets for indemnification, the registered agent who could be held personally liable, and a risk assessment of the business. Part of an online marketplace’s due diligence

230. *Id.* § 230(c)(2)(A) (emphasis added)

231. Lecher, *supra* note 2.

232. *Id.*

233. 17 U.S.C. § 512 (2010). While the DMCA has no direct enforcement mechanism, all online platforms must have a registered agent who is responsible for enforcing copyright claims. Individuals with copyright claims must file with these DMCA agents, whereupon a “takedown” (or removal) of the copyrighted material must be instituted.

234. 15 U.S.C. § 6503 (1998). COPPA provides that operators of websites and online services directed at children under the age of 13 “may satisfy the requirements . . . of this title by following a set of self-regulatory guidelines, issued by representatives of the marketing or online industries . . .” *Id.*; see generally 16 C.F.R. § 312.11 (2013) (describing the criteria for these “Safe Harbor” programs).

would be to buy into this system, give such an organization funding, and help provide their marketplaces vendors who have been approved or earned a certification. This private body would act only in relation to collecting data on vendors for online marketplaces—similar to COPPA, any independent organization would need to be certified with all regulatory bodies, but it would not act as a body to dictate the terms of Section 230 to any other organization.²³⁵

The advantages of such a system would benefit all stakeholders. For companies like Amazon Marketplace, it would act as a *prima facie* due diligence check in regard to their third-party vendors, allowing them to continue to run their platform as they have without needing to change the business model of the marketplace. The decisions of *Oberdorf* and *State Farm* turned upon the inability of the consumer to find the manufacturer or seller of the product, leaving Amazon as the only visible member of the marketing chain left.²³⁶ If an outside organization was to put forward a reasonable effort into gathering and verifying information about these vendors, licensing only those that were able to be identified and confirmed, it would allow the consumer to bring action against the seller directly, rather than bringing action against Amazon only due to their visibility. For consumers, such an organization would add another layer of trust to any purchase they might make through an online marketplace; instead of appearing as if it was a “flea market” where consumers might get fleeced, consumers could trust that they could find the seller when a product is defective or not as advertised.

The most difficult part about the creation of such an organization would be setting the standards by which this regulatory body can license and moderate international sellers. While domestic vendors must often be licensed by their respective states, cities, or counties, and, thus, have objective records already filed, the standards for international vendors often vary by jurisdiction.²³⁷ While there is no way to

235. This distinction is important. In the settlement between the Federal Trade Commission and YouTube, the emphasis was primarily on the difference between “operators” and “publishers” regarding the collection of data under the COPPA statute. While one could argue that data-collection of some kind is a “publisher” function in the context of the internet, here, by collecting information and acting as a licensing body, it would create a business model that would alleviate many of the section 230 concerns that have been discussed in this comment. For more information, see John Bergmayer, *Speech and Commerce: What Section 230 Should and Should Not Protect*, PUB. KNOWLEDGE (Sept. 24, 2019), <https://www.publicknowledge.org/blog/speech-and-commerce-what-section-230-should-and-should-not-protect/>.

236. *Oberdorf*, 930 F.3d at 144–45; *State Farm*, 390 F. Supp. 3d at 973.

237. See, e.g., *Knowledge guide to international company registration*, INST. OF CHARTERED ACCTS. IN ENG. & WALES, <https://www.icaew.com/library/subject-gateways/business-management/knowledge-guide-international-company-registration> (last accessed Apr. 26, 2021); An-

create a perfect system of certification, such system should incorporate elements like the geographic area the vendors emanate from (and its relation to already reported fraud), such as whether the vendor's IP address or email address has been linked to other fraudulent activity, and whether other identifying factors (such as the grammar or language used in product descriptions) raise red flags that warrant further analysis. Working with groups like the World Customs Organization²³⁸ would be important in establishing known characteristics of fraudulent businesses. Other factors would be identified as the certifying body matures and the online marketplaces report back. These could include factors such as whether certain products or product markets have shown a higher rate of fraud, whether prices vary too far from fair market value, or if too many complaints concerning faulty products have arisen.

While this appears to simply shift the burden of moderation to another organization, it would also shift the burden to a platform that would clearly not be involved in the transaction. This point is important, as ideally, it would settle several other concerns. First, the concern that marketplaces approve otherwise compromised third-party vendors to increase their profits. And secondly, it would help the selling platform avoid assuming any liability through their implicit approval of merchants on the platform.²³⁹ An independent certifying body will create the perception that a positive mark from the certifying body means that the seller has been vetted properly for that platform. While this model of subsidizing an independent group would most likely increase overall transaction costs for all online marketplaces (which would almost certainly be passed to the consumer), this cost would be offset by boosting consumer confidence in the platform. Customers would be satisfied knowing their legal rights would be easier to enforce, and Amazon could once again assert themselves as a marketplace platform without fear of "participant" liability.

It is important to note, however, that lack of licensure or certification from this body would not preclude sellers from joining the online marketplace. While Amazon could screen known bad actors from

toine Boquen, *9 Steps to Starting a Business In China as a Foreign Company*, NEW HORIZONS, <https://nhglobalpartners.com/starting-a-business-in-china/> (last updated Mar. 11, 2021).

238. WORLD CUSTOMS ORG., <http://www.wcoomd.org/en/about-us/what-is-the-wco/discover-the-wco.aspx>. The World Customs Organization works as an independent intergovernmental body, working with countries to make customs more effective and efficient. "As the global centre of Customs expertise, the WCO is the only international organization with competence in Customs matters and can rightly call itself the voice of the international Customs community." *Id.*

239. *See generally* Fox v. Amazon.com, Inc., 930 F.3d 415, 427 (6th Cir. 2019).

their platform utilizing 230(c)(2)(A), they could also choose to allow uncertified vendors on their platform. A lack of licensure or certification would instead act as a self-moderated warning, putting the consumers of the marketplace on notice that any transaction with the company could be risky. Should a consumer choose to do business with a company, they willingly take on any risk that the transaction entails at the likely benefit of cheaper pricing. This specific market label will allow Amazon to shift the assumption of risk, while still keeping the marketplace open for commerce. This could assuage several of the concerns voiced by the judiciary against Amazon, namely that Amazon has knowledge of bad actors on their platform and does nothing to curb such behavior, but instead utilizes the shield of Section 230 to incubate themselves from liability.

This kind of outside organization would be a large step in the right direction to reforming the reputation of the online marketplace, while avoiding any drastic changes to Section 230. It would still allow an online marketplace like Amazon, as well as its consumers, to feel secure in its offering of a wide variety of products, while giving credence to any good faith effort made by the online marketplaces in how they choose to moderate the vendors who utilize their services.

C. *Restructuring the Contractual Basis for the Fulfillment Model*

While an independent, certified licensing organization would fix many problems, it would take time to establish. A more immediate decision would be to look at the contractual and institutional frameworks that make up the fulfillment model. The decisions of *Oberdorf* and *State Farm* also focused on whether Amazon Marketplace (and by proxy, most online marketplaces) functioned as a “seller” through their exertion of control over their third-party vendors, thus removing them from Section 230’s safe harbor.²⁴⁰ While federal legislative relief would be the best-case scenario, given the political climate currently surrounding Amazon,²⁴¹ online marketplaces should look to self-regulate.

As *Oberdorf* and *State Farm* establish, the Fulfillment by Amazon model looks to be under more and more scrutiny. Moving forward, simply not taking title, then stating on their website that the order is “a third-party vendor” may not be enough to disclaim responsibility. If the online market platform in question exerts control over every

240. *Oberdorf*, 930 F.3d at 149; *State Farm*, 390 F. Supp. 3d at 972.

241. See generally Alison Griswold, *Hating Amazon is one thing the hard left and hard right agree on*, QUARTZ (Sept. 8, 2018), <https://qz.com/1380446/hating-amazon-is-one-thing-the-hard-left-and-hard-right-agree-on/>.

other aspect of the transaction, they may still be considered a primary actor, and thus fall outside of Section 230 protection. As Amazon's fulfillment structure gets analyzed state-by-state, it is clear that more thought is being put into Amazon's place in the chain of commerce. While some courts may be "bending their prudential determinative factors" simply to find companies like Amazon liable,²⁴² this "bending" is a reaction to the often-large differences between traditional "selling" and the online marketplace model currently being utilized.²⁴³

This means that online marketplaces should look into preemptively changing their structure and contractual obligations to avoid a state-by-state fight over whether they are a "seller," and thus liable to state tort law. This should include an examination of many different e-commerce practices, "including third-party vendor contracts, fees, oversight, and the extent of fulfillment activities."²⁴⁴ Looking to *Fox*, *Oberdorf*, and *State Farm*, the federal courts have laid out suggestions for an online marketplace to avoid liability.

First, much weight is put on the fact that Amazon "implicitly" approves of every product sold through Fulfillment by Amazon, the placement on their website, to their packaging, to their express guarantees of quality and condition.²⁴⁵ By making changes to their websites and packaging so as to better distinguish third-party vendors from their primary business, online marketplaces could simply prevent this implication. Even a small structural change, such as changing the wording, logo, or branding on a shipping package to reflect that it originated from a third-party vendor, could be enough to refute the implication that Amazon is as much a part of the sale as the vendor themselves. The creation of a different web portal to the Amazon Marketplace could also be used to disclaim Amazon as a "seller"—the *State Farm* Court in particular looked to the mixing of their own products with third-party vendors on Amazon to show that Amazon was holding themselves out as the seller.²⁴⁶

A second change would be to restructure their institutional obligations owed to third-party vendors. *Fox*, *Oberdorf* and *State Farm* all include bailment in their definition of "seller," and imply that strict liability could be applied to a bailment relationship in the right circumstances.²⁴⁷ While Amazon's Service Business Solutions Agree-

242. *E.g.*, Goldman, *supra* note 202.

243. *State Farm*, 390 F.3d at 974.

244. . Neuburger, *supra* note 114.

245. *See State Farm*, 390 F.3d at 972.

246. *Id.*

247. *Id.* at 970; *Oberdorf*, 930 F.3d at 149.

ment disclaims all bailment and warehouseman duties,²⁴⁸ these global and wholesale disclaimers are not always effective, depending on how states' statutes have interpreted this in line with public policy.²⁴⁹ To remain as efficient as it is currently, the online marketplace model must act as a distribution network; the more a contractual agreement shows any kind of control over the product (even if the title does not change hands), the less likely Amazon will be in disclaiming "seller" liability. This will include any assumed bailment relationship. Institutionally, this may require separating the Fulfillment by Amazon distribution network as a separate entity from Amazon itself. Contractually, this would require a more comprehensive look at the responsibilities both parties owe, changes to the disclaimer that appear less global, and specific target amounts to disclaim.

Finally, companies like Amazon may want to remove themselves from the financial process as much as possible, without affecting their customer's trust in the marketplace. *State Farm* and *Oberdorf* both discuss financial influence when discussing "control."²⁵⁰ From handling the money,²⁵¹ to guaranteeing refunds with their A-to-Z guarantee,²⁵² to imposing transaction limits or withholding payments,²⁵³ to the idea that the promise of continuing sales grants a more long-term relationship between the parties,²⁵⁴ both courts looked deeply into the financial power Amazon wields in the relationship between third-party vendors and the online marketplace. This could be as simple as restructuring their fees, removing transaction limits, or giving up control by leaving refunds and financial decisions to the vendors themselves. While the online marketplace has the absolute right to control their brand through their financial planning, utilizing a lightest-touch approach would certainly remove much of what the courts looked to when viewing them as a seller.

IV. IMPACT

The recent decisions in the Third, Sixth, and Seventh Circuits show the importance of balancing the desires of the online marketplace platforms with the needs of the stakeholders. This Section will detail

248. *AMAZON SELLER CENTRAL*, *supra* note 91, § F-12.

249. Brian Faherty et al., *An Introduction to Bailee Liability Concepts*, IMUA BAILEES & PROCESSERS COMM. (1994), <https://www.imua.org/Files/reports/An%20Introduction%20to%20Bailee%20Liability%20Concepts.html>.

250. *Oberdorf*, 930 F.3d at 146; *State Farm*, 390 F. Supp. 3d at 972.

251. *State Farm*, 390 F.3d. at 973.

252. *Id.* at 972.

253. *Oberdorf*, 930 F.3d at 146.

254. *Id.*

the impact that self-regulation, due diligence, and the creation of an independent licensing body would have. It will discuss the effects an independent licensing body—coupled with a more expansive reading of Section 230(c)(2)—will have in solving many of the issues that courts have seen in the online marketplace model. This Section will then discuss how self-regulating through contractual and institutional changes will mitigate the opportunity to circumvent Section 230 altogether. Finally, this Section will discuss the effects on stakeholders should the online marketplace model choose to adopt these suggestions.

A. The Effect of an Independent Licensing Body

With litigation becoming increasingly creative to hold an online marketplace liable in tort for the actions of third-party vendors, online marketplaces need to channel the spirit behind the original Section 230 amendment once again: light-touch self-regulation and the ability to moderate in good faith. The creation of an independent, certified licensing body, supported both by fees from third-party vendors and the marketplaces themselves, is one promising solution to bring the online marketplace back into line with consumer perception, without damaging the free-market effects or the substantive Section 230 protection.

First, licensure from this independent body would lend a strong presumption that vendors featured on the market are there to do exactly what they are supposed to do—sell. Those consumers willing to take risks can always test the open, uncertified market. Making sure the body stayed completely independent of the biggest marketplaces would also provide an external, objective party in any dispute between a third-party vendor and an online marketplace. It would also give an online marketplace a *prima facie* avenue to show they have performed due diligence, releasing them from having to prove that the platform's policies not only serve themselves, but also serve their consumers and their vendors.

Licensure would also strengthen an online marketplace's ability to effectuate Good Samaritan moderation. Using the "sword" of Section 230 to screen out fraudulent or otherwise problematic third-party participants would allow a company like Amazon Marketplace to preemptively protect itself from liability through the elimination of fraudulent vendors. With the information collected through this independent licensing body, an online marketplace would have far more knowledge with which to make a moderating decision in good faith. This extra layer of due diligence could lead to tort claims like *Fox*,

Oberdorf, or *State Farm* being headed off by redirecting consumers to properly vetted third parties before the offending purchase is even made.

Finally, voluntarily submitting to such a licensing mechanism would be seen as a good faith business decision on the part of the online marketplaces, in order to best protect the interests of both the platform and the consumer. Creating an independent organization, one that would have to be certified under standards agreed to by both the government and the marketplaces, would help to curtail any more federal regulation. With the risk of regulation redacting many of the protections afforded currently through Section 230, any preemptive action taken to self-regulate in a fair and objective way should be considered.

B. *The Advantages of Self-Regulation*

It is also important for online marketplaces to start analyzing what they would like their exact relationship to their third-party vendors to look like. By restructuring the institutional framework and contractual relationships that comprise the fulfillment model used by most online marketplaces, marketplaces can mitigate the amount of liability they could potentially be exposed to.

First, by instituting organizational change, online marketplaces should make themselves far less vulnerable to the control factors accepted by recent courts. These organizational changes could be as simple as the creation of separate web portals for their third-party marketplace, contracting the shifting refunds on to the vendors themselves, or even through the removal of any implicit approval of third-party vendors through product mixing. By alleviating the amount of control they exert, an online marketplace would make themselves much less likely to be labeled as a “material participant,” placing them squarely in Section 230’s safe harbor once again. This must, of course, take branding and marketing concerns into account, but any organizational expense paid to address the control concerns that have arisen in *Oberdorf*, *Fox*, and *State Farm* will pay off in the ability to assert Section 230’s shield once again.

Secondly, any attempt to self-regulate can only help the image of the online marketplace in general, a fact which may prove crucial in future lawsuits. The business practices of marketplace leader, Amazon Marketplace, which have led to many investigations and lawsuits, in-

cluding antitrust investigations in the European Union²⁵⁵ and U.S.,²⁵⁶ have engendered a mindset in the judiciary that they must be held responsible for *something*. A good faith effort to regulate the very issues the circuit courts point out in *Oberdorf*, *Fox*, and *State Farm* would go far in keeping the judiciary from bending factors towards the plaintiff in tort suits.

While Amazon has every right to protect its brand and innovate ways to reach consumers faster and more efficiently, it must also balance being the intermediary for delivery with the possible liabilities that could be incurred. Performing better due diligence on the front end and releasing more control to the third-party vendors in regard to how they run their business would satisfy many of the issues that have continued to bother the judiciary in third-party liability cases involving Amazon.

C. *The Stakeholders and Section 230*

With the necessity of Section 230 being hotly debated,²⁵⁷ it is important to remember that, despite its well-publicized abuses, Section 230 is still working for many of its intended purposes.²⁵⁸ The protections afforded by statutes like Section 230 have allowed online platforms to grow and innovate, with the most recent studies showing that Section 230's effects contributed nearly 4.25 million jobs and \$440 billion in GDP through 2017.²⁵⁹ Provided protections like Section 230 continue to exist, the expected market share of online marketplaces is expected to grow, bringing many new prospective merchants and customers into the market.²⁶⁰

Thus, the greatest impact of upholding the many protections of Section 230, tied together with external licensing and regulation, would be the continued growth of opportunities, both in relation to the economy and diversity of goods. Online marketplaces will continue to offer more options. Vendors will have more options of platforms and will be able to find the right fit for their products. Customers will continue to

255. Press Release, European Commission, Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon (July 17, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291.

256. Spencer Soper & Ben Brody, *Amazon Probed by U.S. Antitrust Officials Over Marketplace*, BLOOMBERG (Sept. 11, 2019, 5:00 AM), <https://www.bloomberg.com/news/articles/2019-09-11/amazon-antitrust-probe-ftc-investigators-interview-merchants>.

257. Paris Martineau, *An Actual Debate Over the Internet's Favorite Legal Shield*, WIRED (Oct. 17, 2019, 7:00 AM), <https://www.wired.com/story/debate-internets-favorite-legal-shield/>.

258. Hurwitz, *supra* note 17.

259. CHRISTIAN M. DIPPON, NAT'L ECON. RES. ASSOCS., ECONOMIC VALUE OF INTERNET INTERMEDIARIES AND THE ROLE OF LIABILITY PROTECTIONS 7–8 (2017).

260. *Id.* at 4.

see more and more variety, both price-wise and goods-wise. Investors can continue to feel confident that businesses will continue to innovate and compete. While more can, and should, be asked of these platforms in the regulation of third-party vendors, the continued erosion of Section 230 is not the answer.

These changes to the marketplace, along with the creation of an external licensing and certification organization, would create a stronger online marketplace, able to invest money in innovation without fear of liability, while also giving consumers a more informed choice into the products and distribution chains available to them.

V. CONCLUSION

While these cases may eventually be dismissed as aberrations that went on to be overruled, *Oberdorf*, *Fox*, and *State Farm* all expose the judiciaries willingness to circumvent Section 230's affirmative protections. Through the use of state statutes in holding the online marketplace as a "material participant" in one way or another, the courts have elucidated fears that the online marketplace would be wise to heed. While there are no easy answers for online marketplaces like Amazon, instead of trying to plug the dam of suits, or challenging upcoming federal regulations, they should instead look to the very tenants that helped inform section 230 originally: light-touch self-regulation and continued innovation.

While online marketplaces have many options on how to achieve this, their best choices appear to be ones in which they can affirmatively show "good faith," as defined in section 230(c)(2). Voluntarily moving towards a more formalized structure of their own creation would be the wisest choice. The creation of an independent licensing organization to perform reasonably proportional due diligence and restructuring their institutional and contractual obligations are both innovations that would serve to limit the amount of liability online marketplaces expose themselves to.

However, embracing the spirit of Section 230 will do more than act as a shield, it should also help the online marketplaces fulfill their original endeavors—to connect consumers to the goods they want to buy, as safely and efficiently as possible. By fulfilling their obligation to be "Good Samaritans" in light of Section 230(c)(2), online marketplaces could once again assert their neutral intent as an intermediary platform, one that benefits both stakeholders and themselves through the creation of mutually agreeable transactions.

With the importance of online marketplaces and Section 230 to the internet-using public, it is notable that change would not take a

reinvention of the wheel, but instead a refocusing on how Section 230 can best serve all stakeholders interests, and continue to fuel the American e-commerce economy.

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