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Myspace, but Whose Responsibility - Liability of Social-Networking Websites When Offline Sexual Assault of Minors Follows Online Interaction

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MYSPACE, BUT WHOSE RESPONSIBILITY?
LIABILITY OF SOCIAL-NETWORKING WEBSITES WHEN OFFLINE SEXUAL ASSAULT OF MINORS FOLLOWS ONLINE INTERACTION

Legend has it that every new technology is first used for something related to sex or pornography. That seems to be the way of humankind.  

I. INTRODUCTION

"Historians may one day mark 2003 as the year social relationships were irrevocably altered." In 2003, two Internet entrepreneurs at MySpace.com ("MySpace") initiated "an original but straightforward" idea. Recognizing that persons share a fundamental need to interact and bond with others, MySpace's founders created interconnected personal web pages on the Internet where individuals could fulfill this need. On these personal web pages, users can create profiles that reveal interests, pictures, and journals, as well as view other users' profiles, communicate with friends, and meet new people. These personal web pages, located on websites

1. Exaggerated Promise, TORONTO STAR, Aug. 6, 2006, at D01 (quoting Tim Berners-Lee, credited inventor of World Wide Web).
2. Karen Brooks, Look at Me, COURIER MAIL (Austl.), Aug. 19, 2006, at 53. See generally Michelle Andrews, Decoding MySpace, U.S. NEWS & WORLD REP., Sept. 18, 2006, at 48 (recognizing social-networking sites as new place where youths can "hang out, gossip, posture, dare, and generally figure out how the world works"). "The difference [between online and offline social interaction] is that [online interaction is] less physical and more word-based." Id. at 48-50 (quoting Danah Boyd, Berkeley doctoral candidate studying children's online social practices).
4. See Brooks, supra note 2, at 53 (emphasizing that anyone with Internet access and desire to connect can interact with others on social-networking websites); see also Robert Crosnoe, Friendships in Childhood and Adolescence: The Life Course and New Directions, 63 SOC. PSYCHOL. Q. 377, 378 (2000) (noting that, from developmental perspective, friendships fulfill human need for intimacy and help children refine "socioemotional skills" and "relationship templates"); John Cassidy, Me Media, NEW YORKER, May 15, 2006, at 50, 52 (recounting Facebook.com's founding by Harvard student who tapped into "desire of hundreds of ambitious and impressionable young people to establish themselves and make friends in an unfamiliar environment"). But see id. at 55 (stating that users enjoy social-networking websites because of voyeuristic and exhibitionistic, as opposed to networking, inclinations).
5. See MySpace Privacy Policy, Aug. 26, 2005, http://www.myspace.com/Modules/Common/Pages/Privacy.aspx (requesting users "display some personal information to other members and visitors, which allows our users to identify each

(363)
such as MySpace and Facebook.com ("Facebook") which contain a creator's posted information, allow a range of viewing, from nearly public to highly restrictive.6

While posting information on social-networking websites can facilitate personal expression and relationship building, these sites also create an environment in which adult sexual offenders easily can initiate communication with potential child victims.7 For example, a fourteen-year-old girl and her mother currently are suing MySpace, MySpace's parent company News Corporation, and the girl's rapist for $30 million because the rapist first communicated with the girl on MySpace.8 With the commencement of this lawsuit, and the recognition of countless other cases of adults sexually assaulting minors after initial interaction on MySpace, teens, parents,

6. See Cassidy, supra note 4, at 52 (noting that Facebook's success stemmed from restriction that members only can view profiles of other students at own college unless permitted by member at another school to list that member as friend); see also id. at 54 (recognizing that Facebook users can choose from different privacy levels to make own user pages accessible only to friends, to other undergraduates, or to everybody at particular school); Andrews, supra note 2, at 54 (indicating that all users can make their MySpace profiles private, thus allowing only creator's listed friends to see creator's profile).

7. For a further discussion of instances of adults initially interacting with minors on MySpace and the minors' subsequent sexual assaults, see infra note 9 and accompanying text.

and lawmakers cannot deny that relationships now exist in an alternative online world and communal responsibilities thus have changed forever.\textsuperscript{9}

This Comment explores the liability of social-networking websites when minors are sexually victimized after interacting with adults in these online forums.\textsuperscript{10} Section II provides the social backdrop inspiring the birth of these websites and notes both minors' prevalent Internet use and the Internet sexual predators' pervasive nature and activities.\textsuperscript{11} Additionally, Section II outlines the tremendous societal benefits and marketing opportunities that arise from these sites.\textsuperscript{12} Noting that a fourteen-year-old is suing MySpace because an adult man initially communicated with her on MySpace and subsequently raped her, Section III analyzes the likelihood of


\textsuperscript{10} For a further discussion of specific instances of sexual victimization of minors by persons met on MySpace, see \textit{infra} note 9 and accompanying text.

\textsuperscript{11} For a further discussion of the history of social-networking websites and the Internet habits of minors and sexual predators, see \textit{infra} notes 17-29 and 34-71 and accompanying text.

\textsuperscript{12} For a further discussion of the tremendous marketing opportunities available on MySpace, see \textit{infra} notes 30-33 and accompanying text.
her lawsuit’s success. Section IV proposes alternative avenues for recovery within the girl’s suit. Section V discusses government responses to social-networking websites. Finally, Section VI concludes that parents and social-networking websites should work together to promote children’s safety in using such forums.

II. A Colorful Background

Considering that MySpace has over one hundred million registered users, and Facebook has over eight million registered users, one cannot overstate the pervasive nature and rampant use of social-networking websites. MySpace alone accounts for eighty-one percent of all social-networking traffic on the Internet, with Facebook trailing far behind. For a further discussion of the minor Julie Doe’s rape, the minor and her mother’s lawsuit, and the likely outcome of the case, see infra notes 85-178 and accompanying text.

13. For a further discussion of the minor Julie Doe’s rape, the minor and her mother’s lawsuit, and the likely outcome of the case, see infra notes 85-178 and accompanying text.

14. For a further discussion of potential theories of tort recovery against MySpace, see infra notes 179-201 and accompanying text.

15. For a further discussion of the recently passed Deleting Online Predators Act, see infra notes 202-06 and accompanying text.

16. For a further discussion of the necessary collaboration between parents and MySpace, see infra note 207 and accompanying text.


18. See Stone, supra note 5, at 76 (emphasizing site’s particular popularity with college students). Stone also notes that “[c]reating a page on a social-networking site is now a cherished form of self-expression at universities around the world.”

two percent of web traffic among hundreds of social-networking websites. MySpace records roughly 280,000 new registrants each day. Having surpassed Google.com in web traffic, MySpace’s one billion-daily page views ranks second only to Yahoo.com.

A. MyHistory

After studying online dating forums and existing online communities, MySpace founders Tom Anderson and Chris DeWolf began to investigate the possibilities of social-networking websites. The two founders launched MySpace in 2003 by inviting local bands and club owners to create and publish web pages to which others could link as “friends.” Anderson and DeWolf insisted on an open environment in which anyone could join the community, browse others’ user profiles, and post their own information.

As MySpace swelled in popularity, major investors took notice. Although Anderson and DeWolf feared losing the personality of their grassroots website and its growing culture, the two founders could not ignore both the exceptional earning potential in the sale of MySpace and the partners’ need for capital to con-

20. See Sellers, supra note 17, at 68 (indicating MySpace’s dominant market share in social-networking category which also includes websites such as Facebook, Friendster.com, Xanga.com, and Bebo.com); see also MySpace Gains Top Ranking of US Web Sites, supra note 19 (highlighting Facebook’s “distant second” claim on 7.6% of visits to social-networking websites).

21. See Spencer Reiss, His Space, WIRED, July 2006, at 143, 146 (comparing number of MySpace daily registrants to large U.S. city’s daily newspaper circulation).

22. See Sellers, supra note 17, at 68 (revealing that MySpace hosts “2.2 million bands, 8,000 comedians, thousands of filmmakers, and millions of striving, attention-starved wannabes”).

23. See Sellers, supra note 17, at 70 (noting Anderson’s recognition of social-networking websites as founders’ “next big bet”).

24. See id. (“[C]reative people became ambassadors for MySpace by using [MySpace] as their de facto promotional platform . . . .”); see also Andrews, supra note 2, at 48 (noting MySpace’s beginnings as place for musicians and artists to meet and interact). “Friend” on MySpace:

doesn’t necessarily have the same meaning . . . that it does in the offline world. . . . A teen may add a friend because she wants to receive bulletins from this person. . . . Or the new pal could be someone who shares a similar interest, such as the same hobby or sport. More troubling though, some teens accept total strangers as friends in an attempt to boost the total number of friends noted on their page and so appear popular.

25. See id. at 70 (recognizing users’ abilities to control appearance and content of own MySpace pages).

26. See id. at 68 (highlighting Redpoint Ventures’s $15 million investment in MySpace in early 2005).
continue MySpace’s tremendous growth.\textsuperscript{27} In July 2005,\textsuperscript{28} the multimedia conglomerate News Corporation (“News Corp.”) paid $580 million for MySpace.\textsuperscript{29} Recognizing that “MySpace has simply exploded since the deal,”\textsuperscript{30} many commentators agree that News Corp. actually may have underpaid for the site.\textsuperscript{31} Because partner-

\textsuperscript{27} See id. at 70-72 (indicating Anderson and DeWolf’s reluctance to sell MySpace to News Corp. when News Corp. approached founders). “Suddenly, social-networking sites, as they are called, are starting to look like the latest incarnation of the Internet’s Holy Grail: an entry point onto the Web, where an owner can sell [marketers] access to all the consumers that come there.” Delaney et al., supra note 19, at A1. Cf. id. (forwarding report that Yahoo offered Facebook $1 billion for site and later lowered offer). Yahoo instead offered to pay about $900 million for Facebook. See Saul Hansell, Yahoo Woos a Social Networking Site, N.Y. TIMES, Sept. 22, 2006, at C1 (noting Yahoo’s acquisition of other websites with social component like photo-sharing website Flickr.com); see also Catherine Holahan, Yahoo Keeps Its Eyes on Facebook, BUSINESSWEEK ONLINE, Sept. 22, 2006, http://www.businessweek.com/technology/content/sep2006/tc20060922_967099.htm?chan=technology_technology+index+page_internet (“Independent social networking sites, such as Facebook, have become some of the hottest properties on the Web thanks to an ability to engage the large, young Internet audiences with whom advertisers want to develop lasting relationships.”).

\textsuperscript{28} See Sellers, supra note 17, at 66 (stating date of sale of MySpace to News Corp.).

\textsuperscript{29} See Marc Gunther, News Corp. (Hearts) MySpace, CNNMONEY.COM, Mar. 29, 2006, http://money.cnn.com/2006/03/28/technology/pluggedin_fortune (evidencing selling price of MySpace as $580 million); see also Reiss, supra note 21, at 145 (highlighting News Corp.'s outbidding of rival Viacom, which was already well into to negotiation process with MySpace).

\textsuperscript{30} Gunther, supra note 29. “MySpace’s membership . . . more than quadrupled [within one year after] the News Corp. deal . . . confounding predictions that the new management would send members stampeding for the door.” Reiss, supra note 21, at 146. See generally Google to Pay $900 Million to Handle MySpace Search, WALL ST. J. ONLINE, Aug. 7, 2006, available at http://online.wsj.com/article/SB115498180133429011.html (promulgating recent multi-year agreement under which Google agrees to power search functions on MySpace, provide text-based and keyword advertisements, and pay MySpace at least $900 million).

\textsuperscript{31} See Gunther, supra note 29 (highlighting MySpace’s status as second-most popular website on Internet as measured in page views and noting that price for advertising on MySpace’s homepage is expected to climb to $750,000 per day). Marketers presently pay under $600,000 per day to place an advertisement on MySpace’s homepage. See Sellers, supra note 17, at 72 (noting advertisers’ current price to advertise on MySpace’s homepage is less than Yahoo’s price to advertise); see also MySpace Could Be Worth $15 Billion, REUTERS, Sept. 27, 2006, http://www.newsmax.com/archives/ic/2006/9/27/211622.shtml?sl=ue (quoting Wall Street media analyst’s forecast that MySpace could have shareholder value of about $15 billion within three years). But see Aline van Duyn, Time Warner Chief Queries Internet Prices, FT.COM, Sept. 21, 2006, http://www.msnbc.com/id/14941695/ (stating belief of Time Warner’s chief executive officer that, “[v]aluations . . . put on those [social-networking] businesses that currently make no money are astronomical and you have to have a big leap of faith . . . .”). For a further discussion of YouTube.com surpassing MySpace in terms of global Internet visits, see Sweney, supra note 19.
MySpace is assembling its sales force to draw national advertisers and sell the information collected from MySpace users to companies wishing to target products to specific groups.33

B. MyUsers

MySpace attracts users of many ages.34 Thirteen percent of MySpace users are minors, while over fifty percent of MySpace users are thirty-five-years-old or older.35 According to the National Center for Missing and Exploited Children ("NCMEC"), sixty-one percent of children between the ages of thirteen- and seventeen-years-old have posted a personal profile on a social-networking website like MySpace.36 Furthermore, over eighty percent of teenagers

32. See Sellers, supra note 17, at 72 (predicting several e-commerce arrangements involving MySpace). Cf. Aline van Duyn, News Corp to Sell Films Online, FT.com, Aug. 14, 2006, http://www.ft.com/cms/s/9d8e7e8a-2ae8-11db-b77c-0000779e2340_i_rssPage=6700d4e4-6714-11da-a650-0000779e2340.html (forwarding prediction that News Corp.'s Internet properties, including MySpace, will sell downloadable Fox films and television content to gain market share of online films and television downloads).

33. See Sellers, supra note 17, at 72-74 (revealing MySpace's current advertisers including: Coke, Pepsi, Proctor & Gamble, major automakers, mobile phone carriers, and film distributors). But see News Corp to Sell Films Online, supra note 32 ("MySpace has yet to prove it can develop video advertising around its user-generated content and that it can work as a platform to sell other products."); Sara Kehaulani Goo, Cleaning Up the Board, WASH. POST, June 8, 2006, at D1 (recognizing marketers' apprehensions of advertising on social-networking websites because of nudity, vulgarity, and sex displayed and portrayed on websites).

34. See News Corp to Sell Films Online, supra note 32 (noting MySpace's particular appeal to users in their teenage years and twenties). For a further discussion of the myriad ages of persons using MySpace, see Sellers, infra note 35, and accompanying text.

35. See Sellers, supra note 17, at 74 (noting that fifty-two percent of MySpace users are thirty-five-years-old or older). But see Gunther, supra note 29 (highlighting that, compared to users of MySpace, Facebook users are typically college students); Justin Pope, Colleges Warn About Networking Sites, MSNBC.COM, Aug. 2, 2006, http://www.msnbc.msn.com/id/14155373/wid/11915829/page/i/ (emphasizing that Facebook seeks membership by college students). Facebook originally attempted to restrict access to its site by requiring an email address ending in "@edu." See id. (noting Facebook registration requirement). Facebook has expanded, however, allowing access to those with an email address from a high school, college, or participating company. See Age Verification at Social-Network Sites Could Be Difficult, TECH. REV., July 17, 2006, http://www.technologyreview.com/read_article.aspx?id=17177&pg=1&ch=inftech (recognizing Facebook's expanding use by persons outside collegiate environment). As of March 2006, Facebook was the seventh most-trafficked website on the Internet. See Michael Duffy, A Dad's Encounter with the Vortex of Facebook, TIME, Mar. 19, 2006, http://www.time.com/time/magazine/printout/0,8816,1174704,00.html (emphasizing Facebook's user registration limitations as compared to open access of MySpace).

36. See Press Release, Nat'l Center for Missing & Exploited Child., New Study Reveals 14% of Teens Have Had Face-to-Face Meetings with People They've Met
use the Internet for at least one hour per day, and over sixty percent of teenagers visit online social-networks. Females are more likely than males to visit and register to join social-networking websites.

To join MySpace, “you answer a few questions, upload a photo or two, and voila, you’ve got a MySpace profile.” Potential users must agree that they are at least fourteen-years-old to create a profile on MySpace. MySpace profiles of persons younger than sixteen-years-old are automatically private; that is, only persons listed as the sixteen-year-old’s friends can view the minor’s MySpace page. When registering for MySpace, however, “[m]ost teens know how to get around the system,” and so to appear older, many “type ninety-nine as their age.” MySpace employees who police the website delete over 25,000 profiles of children under fourteen years of age every week. Notwithstanding MySpace’s efforts, when a person registers for a MySpace account and provides their date of


38. See id. (emphasizing different social-networking behaviors between the sexes).


40. See MySpace.com Terms of Use Agreement June 15, 2006, http://collect.MySpace.com/misc/terms.html (requiring truthfulness of user’s reported age to satisfy registration eligibility). At one time, MySpace blocked access to those under the age of sixteen. See Julia Angwin & Brian Steinberg, News Corp. Goal: Make MySpace Safer for Teens, WALL ST. J., Feb. 17, 2006, at B1 (recognizing that MySpace claims to have computer program that searches for clues of users’ age misrepresentations). MySpace lowered the minimum age requirement to fourteen-years-old because many registrants lied about their ages to gain access to the website. See id. (noting some communication features still limited for users under age sixteen).

41. See Brandy Brubaker, Teen on MySpace: ‘You Have to Be Careful,’ DOMINION POST (Morgantown, W. Va.), Aug. 27, 2006 (requiring teenagers under age of sixteen-years-old to authorize every person who attempts to view their profile).

42. See MySpace: How to Hide and Make a Profile Private, TECH-RECIPES.COM, http://www.tech-recipes.com/rx/1159/myspace-how_to_hide_make_profile_private (last visited Feb. 20, 2007) (suggesting that MySpace users wishing to reduce number of persons able to see user’s profile list profile age as sixteen).

43. Brubaker, supra note 41 (noting lack of verification system which could defeat dishonesty by users sixteen-years-old and younger). See also Age Verification at Social-Network Sites Could Be Difficult, supra note 35 (“A [twelve]-year-old can quickly mature to meet [a site’s] minimum age requirements . . . .”).

44. See Andrews, supra note 2, at 54 (reiterating that MySpace deletes profiles of underage users); see also Gunther, supra note 29 (noting that about one-third of MySpace’s 280 employees work on site-related safety issues, including removal of approximately 220,000 profiles since MySpace’s inception).
birth, that person must simply check a box indicating agreement to MySpace's "Terms of Service" and "Privacy Policy."45

C. MyRules

In June 2006, MySpace instituted heightened privacy mandates.46 These privacy rules prohibit adult access to the profiles of fourteen- or fifteen-year-olds unless an adult provides the younger person's full name or email address and the minor lists the adult as a "friend."47 Although prohibited, adults can register as fourteen- and fifteen-year-olds, request friendship status with other fourteen- and fifteen-year-olds, and gain access to the minors' full profiles.48 To combat this problem, MySpace users of all ages now have the option of allowing only limited viewing of their profiles.49

D. MyFriends

Social-networking sites are replacing the malls and burger stands of past generations and serving as forums for persons to communicate with others and develop self-identities.50 Described

45. See MySpace Registration Page, http://signup.myspace.com/index.cfm?fuseaction=join&MyToken=6da4557e-f8b0-4a09-9de8-68c1c6e2d387 (last visited Mar. 18, 2007) (requesting that users check box labeled, "By checking the box you agree to the MySpace Terms of Service and Privacy Policy"); see also Gunther, supra note 29 (acknowledging that MySpace does not currently employ technology for verifying registrants' ages).

46. See Andrews, supra note 2, at 54 (recognizing MySpace's attempts to enhance safety and security of website).

47. See id. (reiterating that MySpace's lack of age verification allows violations of these rules by persons misrepresenting their ages); see also Anick Jesdanun, MySpace Plans New Rules to Thwart Predators, MSNBC.COM, June 21, 2006, http://www.msnbc.msn.com/id/13447786/ (explaining cease of current mechanism by which adult could simply request "friend" status with minor, thus allowing adult to see minor's full profile). "Any user will still be able to get a partial profile of younger users by searching for [attributes such as display name]. . . . [P]artial profiles display gender, age and city." Id.

48. See Jesdanun, supra note 47 (demonstrating how adults registered as minors can see minors' full profiles that often provide personal details such as hobbies and names of users' schools).


50. See Andrews, supra note 2, at 48 (revealing that teenagers spend hours within social-networking virtual gathering spaces); see also Brooks, supra note 2, at 53 (noting that young and old are using Internet, as opposed to traditional gathering places, to meet new friends); Duffy, supra note 35 (analogizing Facebook's role as telephone, back fence, class bulletin board, and locker room). Research indicates that: forty-five percent of youth spend an hour or less on the Internet per day; thirty-one percent of youth spend between one and two hours on the Internet per day; and twenty-three percent of youth spend more than an hour per day on
as “infinite scrapbook[s],” social-networking sites allow users to forge “a sense of self [by] creating a distinct identity and [allowing self-promotion] outside the usual strictures of family, peers and colleagues.”

Personal pages on these social-network websites have “metamorphosed to the equivalent of a personal advertisement,” in which “[c]rafting the most attractive and interesting version of your ‘self,’ like a sales pitch, guarantees a market.”

For many users, social-networking sites serve as not only diaries and yearbooks, but also allow communication with persons one is unable to contact in the bricks-and-mortar world. Many users recognize that social-networking websites foster community building. While on these sites, users often retrieve messages others have left for them, as well as visit friends’ sites to look for new comments or changes in their friends’ profiles. Experts have lauded social-networking sites as communication channels for persons who have difficulty with face-to-face contact and as a means of forming camaraderie among often-ostracized groups such as homosexual youths.

E. MyDangers

While fewer children are sexually solicited online as compared to five years ago, the Internet remains a dangerous place for youth to tread. Since 2000, youth Internet users have experienced an
increase in unwanted exposure to sexual material. Moreover, the proportion of youth Internet users who received aggressive sexual solicitations — that is, solicitations most likely to evolve into crimes — remained constant. Statistics affirm that nine percent of thirteen- to fifteen-year-olds has met in person with someone known only through the Internet, while twenty-two percent of sixteen- to seventeen-year-olds have had such encounters.

F. MyPredators

Most teenagers do not want their parents to know about their online behavior. Many teenagers report that their parents know “very little” or “nothing” about their online activities. This parental unawareness, created by youth Internet users’ desires to keep online activities private, fosters a breeding ground for licentious Internet escapades.

The NCMEC estimates that about 50,000 sexual predators are perusing the Internet at any given hour. Moreover, many registered and unregistered sex offenders live freely within the United...
States. Attorney General Alberto Gonzales noted, “[b]efore the Internet, these pedophiles were isolated,” but “[t]hrough the Internet, they have found a community.”

Research on online victimization reveals that troubled youth and youth with high Internet use exhibit an increased likelihood of sexual solicitation. Online sexual solicitation is targeted at girls at almost twice the rate of boys. Children are younger than fourteen years of age in one-in-four instances of online sexual solicitation. In these cases, juveniles perpetrated about half of the victimization; adults perpetrated about one-quarter of the victimization; and, in the remaining one-quarter of the cases, the victims did not know the ages of their violators. In instances of online sexual solicitation, according to victims, men committed the victimization two-thirds of the time.
G. MyAccusations

Ernie Allen, President and Chief Executive Officer of the NCMEC, stated to the United States House of Representatives Committee on Energy and Commerce Subcommittee on Oversight and Investigations that "child predators consider [social-networking] sites to be an easy way to find child victims. They can use the information posted by children to pretend to be someone with shared interests, then develop a 'cyber-relationship' that can lead to [the child's victimization]." 72 The United States Department of Justice asserts, "the threat of sexual predators contacting children online, with the hope of luring them to meet in person, has been amply demonstrated . . . ." 73

1. Attention from Attorneys General

State attorneys general now recognize the dangers inherent in social-networking sites. Given the heightened media attention to the dangers of social-networking sites, most specifically MySpace, numerous state attorneys general have begun to pay considerable attention to these online communities and their potential injurious effects. 74 Moreover, United States Attorney General Alberto Gonzales, U.S. Att'y Gen., Prepared Remarks at Summer Conference of National District Attorneys Association (Aug. 1, 2006) ("The Internet provides elements that criminals love: a cloak of anonymity, speed of communication and global access to potential victims."); Mary Wakefield, I Looked at Her Page -- and Felt Like a Pervert, SUNDAY TELEGRAPH (London), Aug. 6, 2006, at 22 (noting that pedophile can "gather material to create a convincing teenage character for himself, or tailor-make a soul-mate for a particular victim, knowing that few children will have the worldliness to see through his disguise").

72. Sexual Exploitation of Children over the Internet, Before the H. Energy and Commerce Oversight and Investigations Comm., 109th Cong. (2006) (statement of Ernie Allen, President and Chief Executive Officer, Nat'l Center for Missing & Exploited Children). See also Alberto R. Gonzales, U.S. Att'y Gen., Prepared Remarks at Summer Conference of National District Attorneys Association (Aug. 1, 2006) ("The Internet provides elements that criminals love: a cloak of anonymity, speed of communication and global access to potential victims."); Mary Wakefield, I Looked at Her Page -- and Felt Like a Pervert, SUNDAY TELEGRAPH (London), Aug. 6, 2006, at 22 (noting that pedophile can "gather material to create a convincing teenage character for himself, or tailor-make a soul-mate for a particular victim, knowing that few children will have the worldliness to see through his disguise").


74. See Age Verification at Social-Network Sites Could Be Difficult, supra note 35 (highlighting demands of state attorneys general on social-networking sites to enhance age and identity safeguards); see also AG Reilly Demands Changes to Xanga.com Website to Protect Children from Online Predators, STS. NEWS SERVICE, Aug. 28, 2006 (indicating Massachusetts Attorney General Tom Reilly's demands of Xanga.com, another social-networking website, to increase its minimum user age from thirteen-to eighteen-years-old); AG: Xanga Needs to Protect Kids, CONN. POST ONLINE, Aug. 28, 2006 (noting Attorney General Reilly's demands of Xanga.com to implement "age and identity verification system"). "[Attorney General Reilly] also wants Xanga to increase the number of employees who review images and content on the Xanga Web site and implement filtering technology that blocks sexually explicit images." Id. (recognizing that Attorney General Reilly asked MySpace to also make similar changes); see also Attorney General Comments on Simsbury Sex Crime Arrest Tied to MySpace, U.S. FED. NEWS, Aug. 2, 2006 (quoting Connecticut Attorney General regarding case in which twenty-six-year-old man allegedly had sex with fifteen-year-old he met on MySpace as stating, "[t]his case is powerful, real-life proof that al-
les has emphasized the importance of Project Safe Childhood, a national program designed to protect children from Internet predators who use sites like MySpace to find and lure victims.75

2. Lawsuits Against MySpace

Recent media reports spotlight incidents of children meeting persons on MySpace and the subsequent sexual victimization of those children.76 In the most notorious case, a fourteen-year-old girl claimed that a nineteen-year-old man first interacted with her on MySpace and then raped her following offline contact.77 The minor victim, Julie Doe, and her mother, Jane Doe, subsequently are suing MySpace, News Corp., and Julie Doe’s rapist, Pete Solis.78 Julie Doe and Jane Doe seek $30 million in damages,79 and claim MySpace does not take sufficient steps to protect its underage

ollowing children to mix with adults seeking sex is a recipe for disaster. It should sound alarms at MySpace . . . to better protect children from pornography and sexual predators”); see also MySpace.com Subject of Connecticut Sex-Assault Probe, FOXNEWS.com, Feb. 6, 2006, http://www.foxnews.com/printer_friendly_story/0, 3566,183709,00.html (reiterating MySpace.com’s stated commitment to collaborating with Connecticut Attorney General Richard Blumenthal regarding his concerns of sexual predators on MySpace); see also Jake Stump, MySpace.com Not Only Risky Place on Internet, Officials Say, CHARLESTON DAILY MAIL (W. Va.), Aug. 7, 2006, at 1D (noting Texas Attorney General Greg Abbot’s criticism of MySpace for its failure to “impose safety measures to protect its users”).

75. See Jason Auslander, Child Predators Top Concern for U.S. AG, SANTA FE NEW MEXICAN, Aug. 1, 2006, at C1 (reiterating that “[p]rotecting children) is more important than anything we do”).

76. For a further discussion of specific instances of sexual offenses of minors following initial MySpace communication, see supra note 9 and accompanying text.

77. See Plaintiffs’ Original Petition, supra note 8 (describing progression of relationship between Julie Doe and Pete Solis). For a further discussion of the alleged facts of the progression of Julie Doe and Pete Solis’ relationship, see infra notes 86-91 and accompanying text.

78. See Plaintiffs’ Original Petition, supra note 8, at 1 (“[P]laintiffs seek] damages against Defendants MySpace Incorporated and News Corporation for negligence, gross negligence, fraud, fraud by nondisclosure and negligent misrepresentation . . . . Plaintiffs also seek damages against Defendant Pete I. Solis for sexual assault and intentional infliction of emotional distress.”).

79. See id. at 22 (noting that Plaintiffs seek “[c]ompensatory damages of no less than” $30 million).
users.\textsuperscript{80} Cases such as Doe v. America Online, Inc.,\textsuperscript{81} James v. Meow Media, Inc.,\textsuperscript{82} Zeran v. America Online, Inc.,\textsuperscript{83} and United States v. Carroll Towing Co.\textsuperscript{84} provide assistance in determining the outcome of Julie Doe’s claims in Doe v. MySpace, Inc. [hereinafter “Doe v. MySpace”].

III. ANALYSIS: SUITS AGAINST MYSPACE AND THEIR LIKELIHOOD OF SUCCESS

A. $30 Million Suit Against MySpace

According to the facts of the Plaintiffs’ Original Petition (“Plaintiffs’ Petition”) filed in Texas’s Travis County District Court in Doe v. MySpace, Julie Doe created a MySpace profile during the summer of 2005 at the age of thirteen.\textsuperscript{85} Nineteen-year-old Pete Solis (“Solis”) later contacted Julie Doe on MySpace on April 6, 2006.\textsuperscript{86} Julie Doe, then fourteen-years-old, responded to Solis’s communications, and the two began to email each other.\textsuperscript{87} Following Solis’ request for Julie Doe’s cell phone number, Solis and Julie Doe had several telephone conversations.\textsuperscript{88} On May 12, 2006, Solis met Julie Doe after school and later sexually assaulted her.\textsuperscript{89} The

\textsuperscript{80.} See id. at 14 (arguing MySpace’s knowledge of increasing occurrences of sexual assaults on underage MySpace users). The Plaintiffs’ Original Petition continues:

[d]espite all the warnings, the numerous incidents of sexual assaults on young underage MySpace users by adult MySpace users, and their widely-publicized claims of safety to the public, MySpace has still not instituted any meaningful changes or additional security measures to effectively increase the safety of their young underage users.

\textit{Id.}

\textsuperscript{81.} 783 So. 2d 1010 (Fla. 2001).

\textsuperscript{82.} 300 F.3d 683 (6th Cir. 2002).

\textsuperscript{83.} 129 F.3d 327 (4th Cir. 1997).

\textsuperscript{84.} 159 F.2d 169 (2d Cir. 1947).

\textsuperscript{85.} See Plaintiffs’ Original Petition, \textit{supra} note 8, at 12 (emphasizing Julie Doe’s age of thirteen-years-old when she created her MySpace profile). At the time Julie Doe registered for MySpace, MySpace prohibited registration by anyone younger than fourteen-years-old. \textit{See id.} (highlighting Julie Doe’s ability to circumvent MySpace’s age restrictions).

\textsuperscript{86.} See id. (indicating that Solis first communicated with Julie Doe).

\textsuperscript{87.} See id. (noting that Solis and Julie Doe engaged in “a series of emails”).

\textsuperscript{88.} See id. at 12-13 (highlighting Solis’s previous fabrication of his status as senior in high school and fabrication of his position on school’s football team).

\textsuperscript{89.} See id. at 13 (“In a videotaped confession, [Solis] admitted to initiating contact with [fourteen]-year-old Julie [Doe] on MySpace, soliciting her personal information, gaining her trust, and then sexually assaulting her.”).
Austin Police Department subsequently arrested Solis for sexual assault.  

Julie Doe and Jane Doe [collectively “the Plaintiffs”] accused MySpace of having “absolutely no meaningful protections or security measures to protect young underage users from being contacted by adult sexual predators on MySpace.” The Plaintiffs’ Petition asserted that MySpace has a strong financial incentive to encourage children to use its website. Furthermore, the Plaintiffs’ Petition alleged that MySpace lacked financial incentives to initiate significant security measures. For example, the Plaintiffs stated that MySpace knew sexual predators contacted minors on the site, did nothing to prevent this contact, and falsely claimed that the site maintained adequate security measures. The Plaintiffs based their claims against the parties in fraud and negligence.

1. Fraud Claim in Doe v. MySpace

First, the Plaintiffs accused MySpace of fraud. In Texas, fraud occurs when: (1) the defendant misrepresented a material fact; (2) the defendant knew of the falsity of the misrepresentation or made the misrepresentation recklessly without any knowledge of its truth; (3) the defendant intended that the plaintiff act on the misrepresentation; and (4) the plaintiff justifiably relied on the representation and thereby suffered injury. Here, the Plaintiffs can-
not claim that MySpace misrepresented the material fact that MySpace is safe for minority users.  

MySpace’s “MySpace.com Terms of Use Agreement” [hereinafter “Terms of Use Agreement”] affirmatively stated, “MySpace is not responsible for the conduct, whether online or offline, of any user of the [w]ebsite or [m]ember of the [s]ervice.” Rather, MySpace attempts to distance itself from its users’ conduct by noting that it is not responsible for any incorrect or inaccurate information on its website. The website’s Terms of Use Agreement did not make any false representations of material fact, but rather reiterated MySpace’s attempts to escape liability for the website’s possible dangers. The Plaintiffs, therefore, fail to state a claim for fraud because they are unable to prove that the defendant misrepresented a material fact.

In addition, the Plaintiffs accused MySpace of misrepresenting minors’ safety on MySpace to the public. While MySpace has  

deceive; and on which an action is taken in justifiable reliance upon the representation”).

98. Cf. Plaintiffs’ Original Petition, supra note 8, at 17 (declaring MySpace’s representations as untrue, deceptive, and misleading).


100. See MySpace.com Terms of Use Agreement July 16, 2005, supra note 99 (emphasizing MySpace’s freedom from liability for others’ misrepresentations); cf. MySpace.com Terms of Use Agreement June 15, 2006, supra note 40 (espousing current Terms of Use Agreement and noting only slight alterations to provisions in 2005 version).

101. See MySpace.com Terms of Use Agreement July 16, 2005, supra note 99 (“Under no circumstances shall MySpace.com be responsible for any loss or damage, including personal injury or death, resulting from use of the Website . . . or any interactions between users of the Website, whether online or offline.”). “IN NO EVENT SHALL MYSPACE.COM BE LIABLE TO YOU OR ANY THIRD PARTY FOR ANY . . . DAMAGES ARISING FROM YOUR USE OF THE WEB SITE OR THE SERVICE, EVEN IF MYSPACE.COM HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.” Id. “You agree to indemnify and hold MySpace.com, its subsidiaries, [and] affiliates . . . harmless from any loss, liability, claim, or demand, including reasonable attorney’s fees, made by any third party due to or arising out of your use of the [s]ervice in violation of this [a]greement . . . .” Id. “I HAVE READ THIS AGREEMENT AND AGREE TO ALL OF THE PROVISIONS CONTAINED ABOVE.” Id.

102. Cf. Fed. R. Civ. P. 9(b) (“In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity.”).

103. See Plaintiffs’ Original Petition, supra note 8, at 6 (accusing MySpace as presenting itself as place where adult MySpace users cannot contact fourteen- and fifteen-year-olds).
worked to improve the safety of its site, it never has asserted its absolute security. In regards to accurate age verification methods, Chris DeWolf stated, "[n]o one on the Internet with a free site has ever come up with a way to do that."

2. Fraud by Nondisclosure Claim in Doe v. MySpace

The Plaintiffs also stated a claim for "fraud by nondisclosure." In claiming fraud by nondisclosure, the Plaintiffs asserted that MySpace concealed or failed to disclose material facts regarding MySpace's lack of security and protection afforded to minors using the website. 

Fraud by nondisclosure requires the defendant to misrepresent a material fact, but the injured party can prove this element by showing nondisclosure of a material fact when there was a duty to disclose.

104. See Angwin & Steinberg, supra note 40 (espousing News Corp.'s plans to appoint "safety czar," launch education campaign involving schools and public-service announcements, and restrict underage user access to certain MySpace groups).

105. See MySpace Is Safe Despite Reports, CEO Says, supra note 9 (reiterating DeWolf's dual-assertions that "MySpace is a great place for all users over [fourteen]" and that persons who endanger themselves with Internet predators would do so elsewhere). DeWolf further stated that parents who teach their children social safety in the offline world need to teach their children corresponding safety in the online world. See id. (highlighting demands on parents).

106. Angwin & Steinberg, supra note 40.

107. Plaintiffs' Original Petition, supra note 8, at 18.

108. See id. ("MySpace had a duty to Plaintiffs to disclose [the lack of protection for young MySpace users] since [MySpace] knew their voluntary [and] partial disclosures regarding the alleged security and protections in place for young underage MySpace users was misleading, untrue, and created a false impression."). There are generally four circumstances under which nondisclosure or concealment may constitute actionable fraud:

(1) when the defendant is in a fiduciary relationship with the plaintiff;
(2) when the defendant had exclusive knowledge of material facts not known to the plaintiff;
(3) when the defendant actively conceals a material fact from the plaintiff; and
(4) when the defendant makes partial representations but also suppresses some material facts.

37 Am. Jur. 2d Fraud and Deceit § 200 (2006). To maintain an action for deceit by reason of concealment, a claim generally contains the following elements: (1) concealment of a material fact; (2) knowledge of the fact concealed; (3) intent to mislead another into relying upon such conduct; (4) reliance; and (5) resultant injury. See id. (listing requirements). "A crucial element in determining whether a duty of disclosure exists, and thus whether a failure to disclose is a misrepresentation, is whether the mistaken party would reasonably expect disclosure." Id. "[F]raudulent concealment requires some affirmative action, designed or intended to prevent, and which does prevent, the discovery of facts giving rise to the fraud claim." Id.

109. See United Teacher Assocs. Ins. Co. v. Union Labor Life Ins. Co., 414 F.3d 558, 567 (5th Cir. 2005) ("Courts in Texas have consistently held that fraud by nondisclosure or concealment requires proof of all of the elements of fraud by affirmative misrepresentation, including fraudulent intent, with the exception that
Even if MySpace had a duty to disclose the lack of protection afforded its minor users,\textsuperscript{110} the Plaintiffs' claim for fraud by nondisclosure would fail because the Plaintiffs cannot prove intent to mislead.\textsuperscript{111} In the complaint, the Plaintiffs reasoned that MySpace "intended to induce Plaintiffs" to post profiles on MySpace by "deliberately remaining silent and failing to disclose" the inadequacy of MySpace's security measures for protecting minor users.\textsuperscript{112} Intent to mislead requires a showing that the party advancing the misrepresentation or concealing the material fact had the intent to induce another to act on the concealment to one's detriment.\textsuperscript{113}

In the instant case, the Plaintiff's claim — that MySpace failed to disclose to users the lack of protection afforded to minors — should fail for want of: (1) concealment of a material fact and (2) intent that users act upon the concealment of a material fact. This fraud by nondisclosure claim should fail because of the information provided in the Terms of Use Agreement effective when Julie Doe created her profile. The Terms of Use Agreement reminded users to "please choose carefully" the information posted on MySpace because it is accessible by other members.\textsuperscript{114} At the time Julie Doe registered for MySpace, she asserted a false age of sixteen when she was, in fact, "only [thirteen] years-old."\textsuperscript{115} Moreover, likely MySpace does not intend to deceive users regarding MySpace's safety because MySpace has a financial incentive to ensure its members' safety: if users feel unsafe on the website or the media portrays MySpace as unsafe, users may stop frequenting MySpace.\textsuperscript{116}
3. **Negligence Claim in Doe v. MySpace**

In their complaint, the Plaintiffs also accused MySpace of negligence.\(^{117}\) To prove a claim for negligence, the plaintiff must establish that: the defendant owed a duty of care to the plaintiff; the defendant breached the duty of care; and the defendant's breach of the duty of care proximately caused the plaintiff's damages.\(^{118}\) *James v. Meow Media, Inc.* provides a vehicle to explore the substantive merit of this negligence claim.\(^{119}\)

In *James*, the United States Court of Appeals for the Sixth Circuit affirmed the United States District Court for the District of Kentucky's dismissal of the suit for failure to state a claim.\(^{120}\) Although the case also involved defendant firms that produced movies and video games, the Sixth Circuit devoted considerable attention to the liability of the defendants' Internet sites.\(^{121}\) This reasoning also applies to the Plaintiffs' accusations in *Doe v. MySpace.*

a. **Facts of *James v. Meow Media, Inc.***

In *James*, Michael Carneal entered his high school and shot and killed several of his classmates.\(^{122}\) According to the plaintiffs' complaint, Carneal regularly played video games, watched movies, and viewed Internet sites produced by the defendant firms.\(^{123}\) The plaintiffs argued that these activities desensitized Carneal to violence and incited his killing spree.\(^{124}\) While claiming that the distribution of these materials constituted actionable negligence, the plaintiffs also deemed the content of the video games, movies, and Internet sites defective products triggering strict products liability.\(^{125}\)

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117. See Plaintiffs' Original Petition, *supra* note 8, at 14 (noting negligence claim); see also Ramasastry, *supra* note 49 (asserting that plaintiffs are more likely to recover under negligence claim than under fraud claim).


119. For a further discussion comparing the reasoning of *James* to *Doe v. MySpace*, see infra notes 139-40.

120. See *James*, 300 F.3d at 701 (affirming district court's dismissal of all claims).

121. See id. at 687 (analyzing claims against certain sexually-explicit websites).

122. See id. (recounting facts of case).

123. See id. at 687-88 (listing Carneal's regular activities).

124. See id. at 688 (claiming material disseminated through these activities influenced Carneal).

125. See *James v. Meow Media, Inc.*, 300 F.3d 683, 688 (6th Cir. 2002) (alleging three causes of action against defendant firms to recover wrongful death damages). The plaintiffs claimed that the defendant firms knew or should have known...
b. Necessity of Duty for Negligence Claim in *James*

The Sixth Circuit first found that the defendant firms did not have a duty to protect the plaintiffs from Carneal's actions.\(^{126}\) Affirming Kentucky's "universal duty of care" rule,\(^{127}\) the Sixth Circuit reasoned that one's duty of care is limited to exercising ordinary care to prevent *foreseeable* harm.\(^{128}\) After analyzing the circumstances of the shooting, the Sixth Circuit declared Carneal's actions not reasonably foreseeable to the defendant media manufacturers.\(^{129}\) The court further reasoned that crimes are generally not foreseeable and do not require a tort defendant to foresee such incidents.\(^{130}\) Moreover, this occurrence did not present the extraordinary circumstances requiring the defendants to anticipate the third party's intentional acts.\(^{131}\)

c. Necessity of Proximate Causation for Negligence Claim in *James*

According to the Sixth Circuit, even if the defendants had a duty to protect the victims from Carneal's violent actions, the plain-
tiffs did not establish proximate causation. If it had found a duty, the Sixth Circuit stated it would likely hold Carneal's intentional, violent actions a superseding cause of the plaintiffs' injuries, thus severing the defendants' liability for the deaths of Carneal's victims. The Sixth Circuit reasoned that the unforeseeable, idiosyncratic nature of Carneal's reaction to the defendants' media compelled this holding.

d. Application of Products Liability to Internet Sites in James

According to the James court, the plaintiffs failed to prove that video games, movies, and Internet sites constituted "products" for purposes of strict products liability. The Sixth Circuit reaffirmed precedent holding that communicated words and pictures do not constitute "products." Also, the Sixth Circuit rejected the contention that the words and images purveyed through tangible videocassettes, video game cartridges, and "electronic pulses" of the Internet constituted "products." The Sixth Circuit specifically found that, "[I]nternet transmissions are not sufficiently 'tangible' to constitute products in the sense of their communicative content."

4. Discernment of Duty in Doe v. MySpace

Applying the reasoning in James — that the foreseeability of the harm determines the scope of a party's duty of care — MySpace owes its minor users a duty of care to enact reasonable safety measures to protect them from offline sexual victimization. It is foreseeable that children will, through using MySpace, meet offline with individuals who will sexually assault them. Common knowledge, numerous reported cases, and a growing number of academic studies reveal that pedophiles often troll the Internet, thus evidenc-

132. See James, 300 F.3d at 699 (finding plaintiffs did not allege sufficient facts on issue of proximate cause for prima facie negligence case).
133. See id. (reasoning that third-party's criminal action directly causing all damages will break chain of causation).
134. See id. at 700 (noting unpredictability of Carneal's actions).
135. See id. (reiterating rule that, "under Kentucky law, manufacturers, distributors, and retailers of 'products' are strictly liable for damages caused by 'defects' in those products").
136. See id. at 700-01 (reasoning that plaintiffs failed to meet burden of proving that video games, movies, and Internet sites are "products" for purposes of strict products liability).
137. See James, 300 F.3d at 701 (noting that courts have reasoned that tangible containers of ideas are products distinct from their communicative element for purposes of strict products liability).
138. Id.
ing the foreseeability of offline sexual assault. Moreover, MySpace’s status as a social-networking website envisages interactions beyond the bounds of the Internet, i.e., in the offline world. In Doe v. MySpace, MySpace breached this duty by failing to implement adequate security measures in light of the numerous offline sexual encounters between minors and adults following relations on the site.

5. Proximate Causation in Doe v. MySpace

Courts must limit legal responsibility to those causes so closely connected with the injury and of such significance that the law is justified in imposing liability. Proximate causation analysis involves the determination of whether the policy of the law will extend responsibility to the defendant for the consequences of the defendant’s actions. Even if MySpace owed its minor users a duty of care to protect the minors from offline sexual victimization, and MySpace breached this obligation, MySpace will escape liability if its actions did not proximately cause Julie Doe’s sexual assault.

a. Whether MySpace Proximately Caused Julie Doe’s Injuries

The stated policy of the Federal Communications Decency Act ("CDA") counters assertions that MySpace proximately caused Julie Doe’s injuries. In the CDA, Congress found that: (1) the Internet must be developed with a commitment to promote the continued development of the Internet; (2) to preserve the vibrant and competitive free market that presently exists for the Internet; (3) to encourage the development of technologies which allow users to control over what information is received by individuals, families, and schools who use the Internet; (4) to remove disincentives for the development and utilization of technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter
Internet improves the availability of educational and informational resources for many Americans; (2) interactive computer services offer users exceptional control over the information they receive; (3) the Internet and interactive computer services provide an environment for diverse political discussions, unique opportunities for cultural development, and alternative avenues for intellectual activity; (4) the Internet has thrived with minimal government regulation to the benefit of all Americans; and (5) Americans increasingly use interactive media for a variety of political, educational, cultural, and entertainment services. Through the CDA, Congress explicitly stated the United States' policy of both promoting the development of the Internet while ensuring vigorous enforcement of federal criminal laws. In the CDA, Congress noted the United States' policy of encouraging technology development to maximize user control over the online information received by individuals, families, and schools. Congress further sought to remove disincen-

and punish trafficking in obscenity, stalking, and harassment by means of computer.

Id. (emphasis added).


146. See 47 U.S.C.A. § 230(b) (listing crimes such as obscenity, stalking, and harassment).

147. See id. (emphasizing United States' policy of self-determination on Internet).
tives for the development and use of filtering technologies that allow parents to restrict children’s access to objectionable online material. Cases interpreting the CDA affirm Congress’s policy of reducing restrictions on Internet activities.

b. Precedent Interpreting Communications Decency Act and Proximate Cause Analysis

In Zeran v. America Online, Inc., the United States Court of Appeals for the Fourth Circuit held that the CDA barred the plaintiff’s defamation claim against America Online (“AOL”). In this case, AOL delayed in removing an unidentifiable third party’s defamatory messages posted on an AOL message board. AOL also refused to post retractions of these messages and failed to screen for subsequent similar postings. The Fourth Circuit reasoned that

148. See id. (empowering parents to determine children’s Internet activities).
149. Two cases, Stratton Oakmont and Cubby, Inc. v. CompuServe, Inc., influenced Congress to pass CDA. See Doe v. Am. Online, Inc., 783 So. 2d 1010, 1013-14 (Fla. 2001) (citing Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991), Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (noting cases’ use for understanding Congressional intent in passing CDA). In a claim for defamation in Cubby, the court held that CompuServe merely distributed information by providing its subscribers access to electronic news publications. See Cubby, Inc., 776 F. Supp. at 140 (referring to CompuServe as “electronic news distributor”). An independent party had placed false statements defamatory to the plaintiffs in CompuServe’s Journalism Forum. See id. at 138 (stating plaintiffs’ claims). The court reasoned that it could not hold CompuServe liable for libelous statements made in news publications absent a showing of CompuServe’s actual knowledge of the statements. See id. at 141 (“Because CompuServe, as a news distributor, may not be held liable if it neither knew nor had reason to know of the allegedly defamatory [ ] statements, summary judgment in favor of CompuServe on the libel claim is granted.”).

150. See 129 F.3d 327, 335 (4th Cir. 1997) (affirming United States District Court for District of Virginia).
151. See Personal Boards, http://www.personalboards.com/ (last visited Jan. 12, 2007) (defining “message board” as forum on Internet, much like bulletin board, where person posts or sends messages that are subsequently available for other Internet users to read and reply with comments).
152. See Zeran, 129 F.3d at 329 (noting unknown person’s posting on America Online [hereinafter “AOL”] message board advertising “Naughty Oklahoma T-Shirts”). The shirts featured “offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City.” Id. The posting instructed persons interested in purchasing a shirt to call plaintiff’s home. See id. (detailing posting on message board). Plaintiff did not know about the shirts or messages on the bulletin board until he investigated the calls. See id. (highlighting plaintiff’s ignorance of message board post). Plaintiff informed an AOL representative of the hoax and the representative assured him that AOL would remove the false postings. See id. (emphasizing plaintiff’s attempt to have AOL remove disruptive posting from AOL message board). The false postings continued, and persons enraged by the postings called the plaintiff about once every two minutes. See id. (stating posting’s disruptive effect on plaintiff’s life).
the CDA created a federal immunity to any cause of action that would make Internet service providers liable for information originating with a third-party user of the service. According to the Fourth Circuit, Congress, in writing the CDA, recognized the threat tort-based lawsuits posed to freedom of speech and the free flow of ideas on the Internet. The court further reasoned that Congress enacted the CDA to preserve the dynamic nature of Internet communications and, accordingly, to minimize government interference with this medium. The Zeran court highlighted Congress's findings, espoused in the CDA, that the Internet has "flourished, to the benefit of all Americans, with a minimum of government regulation." Finally, the Fourth Circuit noted that the policy of the CDA does not allow the party who posted a defamatory online message to escape offline liability. Nonetheless, the Fourth Circuit stated, "Congress made a policy choice not to deter harmful online speech through [the imposition of] tort liability on companies that serve as intermediaries for other parties' potentially injurious messages."

Using much of the reasoning from Zeran, the Supreme Court of Florida in Doe v. AOL, Inc. determined that AOL acted as a publisher of defamatory materials and thus received immunity under

153. See id. at 330 (noting that providers and users of interactive computer service are not publishers or speakers of any information provided by another information content provider according to section 230). Section 230 defines "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, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C.A. § 230(e)(2). Section 230 defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C.A. § 230(e)(3). The parties here did not dispute that AOL constituted an "interactive computer service" and the unidentified third party who posted the offensive messages constituted an "information content provider." See Zeran, 129 F.3d at 330 n.2, 331 (noting plaintiff's argument that, "computer service providers like AOL are normally considered instead to be distributors, like traditional news vendors or book sellers."). 154. See Zeran, 129 F.3d at 330 (noting Congress's belief that imposing tort liability on service providers for third party communications represented another form of intrusive government regulation of speech). 155. See id. (highlighting Internet's role as forum for political, cultural, and intellectual development). 156. Id. (quoting 47 U.S.C.A. § 230(a) (4)). 157. See id., 129 F.3d at 330 (reinforcing Congress's stated goals of upholding criminal laws to deter crimes committed over computer). 158. Id.
the CDA.\textsuperscript{159} In \textit{Doe v. AOL}, a mother sued Richard Lee Russell and AOL for her son’s emotional injuries.\textsuperscript{160} Russell had lured her son, then eleven-years-old, into engaging in sexual activities with other male youths and with Russell.\textsuperscript{161} Russell photographed and videotaped these acts and used AOL’s chat rooms to market this pornography.\textsuperscript{162}

The Supreme Court of Florida began its analysis of the certified questions by noting in dicta that distributor liability is merely a subset of publisher liability, and if AOL is a distributor, it receives immunity under the CDA because of overarching immunity granted to publishers.\textsuperscript{163} This court further held that AOL is a publisher, not a distributor, and is thus protected by AOL’s grant of immunity under the CDA.\textsuperscript{164} Both \textit{Zeran} and \textit{Doe v. AOL}, in granting immunity to AOL, provide structure for the analysis in \textit{Doe v. MySpace}.

c. Policy of Communications Decency Act and Proximate Cause

Proximate cause analysis involves deciding whether a law’s policy will extend responsibility to a defendant for an injury to the consequences of the defendant’s act.\textsuperscript{165} In both \textit{Zeran} and \textit{Doe v. AOL}, the courts classified AOL as an interactive computer service provider.\textsuperscript{166} While MySpace likely is better classified as an “access...
software provider" under the CDA, the policy considerations of the CDA remain applicable.167

In both Zeran and Doe v. AOL, the actual tort (i.e., the making of a defamatory statement) occurred on the defendant AOL's website.168 In instances of sexual victimization resulting from meeting persons on MySpace, the injury is further removed from the defendant's website. While the first interaction occurred on the MySpace webpage, Julie Doe's rape occurred only after the minor and adult took additional steps and met offline.169 For these reasons, the CDA's policy supports the finding that MySpace did not proximately cause plaintiff Julie Doe's injuries, and therefore MySpace is not liable for negligence or gross negligence.

d. One Common Economic Analysis of Negligence

Judge Learned Hand created the legal standard applicable to most negligence cases in United States v. Carroll Towing Co.: a defendant is negligent if the loss caused by the accident, multiplied by the probability of the accident's occurrence, exceeds the cost on a defendant to avoid the accident.170 Under this formula, the loss multiplied by the probability of the accident is the expected accident cost.171 "If a larger cost could have been avoided by incurring a smaller cost, efficiency requires that the smaller cost be incurred."172

whether computer service provider with notice of defamatory third party posting is entitled to immunity under section 230 of CDA).

167. See 47 U.S.C.A. § 230(e)(4) (1996) (defining "access software provider" as "provider of software (including client or server software), or enabling tools that do any one or more of the following: (A) filter, screen, allow, or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content"). For a further discussion of Internet communication policy in the United States under the CDA, see supra notes 146-49 and accompanying text.

168. See Zeran, 129 F.3d at 329 (forwarding posting by unidentified party advertising plaintiff's false sale of offensive and tasteless shirts); see also Doe v. AOL, 783 So. 2d at 1011-12 (noting presence of defamatory third-party posting advertising sale of pornographic images of plaintiff's minor son).

169. For a further discussion of the online and subsequent offline interaction between Julie Doe and Solis, see supra notes 86-90 and accompanying text.

170. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (stating formula in algebraic terms: "if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL.").


172. Id.
The import of the rule is that a party is required to bear a cost to prevent a loss, if that cost is less than the expected loss’s cost. In Julie and Jane Doe’s claims of MySpace’s negligence, the Plaintiffs argued that MySpace breached its duty to Julie Doe by failing to institute and enforce security measures and policies that would “substantially decrease the likelihood of danger and harm that MySpace posed to her.” Applying this formula to the Plaintiffs’ claim, MySpace should implement protections for minors when the cost of the protections is less than the expected loss to the minors.

In determining whether MySpace acted negligently, one needs to consider the potential implementation costs of additional protections. First, at one extreme, MySpace could have blocked access by everyone under the age of eighteen by requiring a credit card number for registration. The burden of this protection, however, is too great. Noting the high number of persons using MySpace under the age of eighteen, MySpace would lose many of its users, including advertisers who target that specific age group. Moreover, MySpace users under the age of eighteen would lose the social utility gained in using the site.

As an intermediate position, MySpace also could have mandated parental creation of MySpace accounts for minors. By requiring a credit card number of a person of majority, MySpace could store the identification information of a parent of an actual child or store the identification of a person acting as a minor on the site. If an adult chose to pose as a child for purposes of contacting other minors and a sexual assault occurred, the adult’s credit card information would provide identification of a suspect. Finally, at the other extreme, MySpace could have allowed unfettered interaction between persons registered as minors and persons registered as adults.

The Plaintiffs cannot use subsequent improvements to the safety of MySpace to prove MySpace’s negligence at the time of Julie Doe’s injuries. Nonetheless, MySpace acted negligently at the

173. Plaintiffs’ Original Petition, supra note 8, at 15.
174. See Age Verification at Social-Network Sites Could Be Difficult, supra note 35 (reasoning that credit card could demonstrate user’s age notwithstanding teenager’s ability to take parent’s credit card and subsequently register for site).
175. For a further discussion of the numbers of persons using social-networking websites, see supra notes 17-19 and accompanying text.
176. For a further discussion of credit card age verification capabilities, see infra notes 199-202 and accompanying text.
177. See Tex. R. Evid. 407 (emphasizing post-accident improvements are not admissible to prove negligence). “This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such
time of Julie Doe's harm because it did not bear the cost of the intermediate position requiring credit card identification for minors' accounts. Here, the expected cost of the loss is high considering that MySpace is a social-networking website that foresees both on- and offline interaction, and exceeds the cost of adequately separating minors and adults. Recognizing that the cost of credit card verification for minors is less than the cost of sexual assaults to minors, MySpace acted negligently in not implementing these procedures.

IV. GETTING CREATIVE WITH MYSPACE: ALTERNATIVE THEORIES OF RECOVERY AGAINST THE WEBSITE

A. Negligent Failure to Warn

Although never raised by Julie and Jane Doe, persons suing MySpace have a high likelihood of success should they accuse MySpace of negligent failure to warn. To claim negligent failure to warn, a plaintiff must prove: "(1) a duty to warn against reasonably foreseeable risks; (2) breach of this duty; and (3) an injury that is proximately caused by the breach" of the duty. Warnings must: (1) be reasonably designed to catch the consumer's attention; (2) include language that is comprehensible and provides a fair indication of the specific risks involved in a situation; and (3) be of specific intensity dictated by the magnitude of the risk. Adequacy of warnings is an issue of fact.

MySpace likely is liable for negligent failure to warn. Factually, MySpace's warnings are not reasonably designed to catch the registrant's attention; rather, the warnings presented on MySpace's site as proving ownership, control, or feasibility of precautionary measures, if disputed." Id.

178. For a further discussion of the requirement that a party bear a cost to prevent a loss if that cost is less than the expected cost of the loss, see supra notes 170-72 and accompanying text.

179. See Plaintiffs' Original Petition, supra note 8, at 1 (listing claims brought against MySpace including: negligence, gross negligence, fraud, fraud by nondisclosure, and negligent misrepresentation).


appear designed to escape attention. To explain, MySpace has a box for all users to "check" to consent to both the Privacy Policy and the Terms of Service Agreement. To access either of these agreements, users must actively "click" on the hyperlinks to these documents. Even when a user does open these agreements, the agreements are long and difficult to comprehend in their entirety. Fourteen- and fifteen-year-olds likely would have difficulty reading and understanding multi-page legal documents. These agreements therefore fail the "comprehensible" requirement of adequate warnings.

The warnings, moreover, do not provide a fair indication of the specific risks attendant to the use of MySpace. While many of the injuries attributed to MySpace include persons misrepresenting their ages and, more specifically, pedophiles' sexual assault of minors, MySpace makes no specific mention of these potential consequences and instead employs generic, broad language in its agreements. To warn its younger users of the dangers of its site, MySpace should employ simpler language, an easier-to-understand format, and more explicit details regarding the risks of its site.

B. MySpace as Attractive Nuisance

The doctrine of attractive nuisance reasons that, because of a child's immaturity and lack of judgment, a child may not appreciate the dangers in trespassing on land and may find those dangers enticing. With attractive nuisance, the social interest in child safety

183. See MySpace Registration Page, supra note 45 (showing ease in which registrant can overlook both the Privacy Policy and Terms of Use Agreement).

184. See id. (highlighting ease in which user consents to both Privacy Policy and Terms of Use Agreement).

185. See id. (showing ease in which user registers for MySpace's services).

186. See MySpace.com Terms of Use Agreement June 15, 2006, supra note 40 ("This Terms of Use Agreement ("Agreement") sets forth the legally binding terms for your use of the MySpace Services. By using the MySpace Services, you agree to be bound by this Agreement, whether you are a 'Visitor' (which means that you simply browse the MySpace Website) or you are a 'Member' (which means that you have registered with MySpace.com."); see also MySpace Privacy Policy, August 26, 2005, supra note 5 (outlining list of MySpace's and users' rights).

187. For a further discussion of specific instances of sexual victimization of minors following interaction on MySpace, see supra note 9 and accompanying text. See also MySpace Privacy Policy, supra note 5 ("MySpace members can view each others' profiles, communicate with old friends and meet new friends . . . .") (emphasis added).

188. See PROSSER, supra note 141, at 364 (noting that it is not customary or practical to expect parents to always accompany their children).
overpowers a possessor's ability to make use of the property.\textsuperscript{189} The elements for attractive nuisance include: (1) the possessor must know or have reason to know that children are likely to occupy the place of the unsafe condition; (2) the possessor should recognize that the unsafe condition is one which involves an unreasonable risk of harm to such children; (3) the child, because of the child's immaturity, either does not discover the condition or does not in fact appreciate the danger involved; and (4) the utility to the possessor of maintaining the condition is slight as compared with the risk to children involved.\textsuperscript{190} While one could argue that attractive nuisance applies only to land, it is not the land that presents the danger to the child. Rather, it is the dangerous, enticing structure — separate from the land — that presents the danger.

In applying the doctrine of attractive nuisance to MySpace, MySpace knows minors roam the pages of its site.\textsuperscript{191} Moreover, MySpace is aware of the numerous children who have met sexual predators on MySpace and later faced victimization.\textsuperscript{192} Children do not appreciate the dangers of sexual predators as demonstrated by their willingness to meet persons much older than themselves offline.\textsuperscript{193} Finally, considering the fourth element of attractive nuisance, the utility of retaining MySpace's current safety procedures is slight compared to the potential harm to children, i.e., the risk of sexual assault.\textsuperscript{194} While historically attractive nuisance has served as a doctrine regarding the trespass to land, it provides a framework for law relating to dangerous situations enticing to children.

C. Potential Changes to MySpace's Design

In factually evaluating MySpace, there is disagreement over whether age verification methods are effective for determining reg-

\textsuperscript{189} See id. (highlighting struggle within courts to arrive at reasonable compromise between the conflicting interests).

\textsuperscript{190} See id. at 368-75 (listing elements of attractive nuisance and illustrating policy of balancing society's interest in protecting children with landowner's freedom to use land).

\textsuperscript{191} For a further discussion of numbers of minors frequenting MySpace, see supra note 35 and accompanying text.

\textsuperscript{192} For a further discussion of attorneys general's attention to sexual victimization of minors following initial MySpace interaction with adults, see supra notes 74-75 and accompanying text.

\textsuperscript{193} For a further discussion of incidents in which minors met adults on MySpace and later engaged in offline sexual activities with the adults, see supra note 9 and accompanying text.

\textsuperscript{194} For a further discussion of the potential changes to MySpace's design, see infra notes 199-205 and accompanying text.
Current technology allows social-networking websites to verify adults' ages when the adults enter their credit card numbers. Students also can verify their ages by listing their high schools, which subsequently are contacted for enrollment confirmation. Experts agree, however, that age verification is very difficult for minors because minors cannot register for credit cards and have limited forms of identification. An adult easily can impersonate a child when registering for social-networking websites as children do not have methods for proving their ages. It is much easier, therefore, for persons to prove they are adults on these sites.

Another alternative to the website design would require children to pass a quiz — in age-appropriate language and complexity — in which children answer questions relating to online safety. Once a person enters their date of birth, the website can respond with an age-corresponding quiz. Although this would not solve the problem of persons misrepresenting their ages, this would provide more information to users — both young and old — regarding social-networking safety and responsible online habits. Also, this would decrease MySpace's potential liability for failure to warn. Implementing these changes is inexpensive, as it would require minimal page additions to the front page of the website.

MySpace also may wish to create two versions of their site: one site for adults and one site for minors. To register for the adult site,
a registrant would need to provide a credit card number, thus proving an age of majority. To register for the site as a minor, a registrant would need a parent to enter the parent’s credit card numbers.201 While this system will not prevent an adult from creating a fictitious child account and communicating with other minors through that account, it will provide MySpace with the credit card information identifying the adult should the adult initiate illegal interactions and communications with minors.

V. CONGRESSIONAL RESPONSE TO SOCIAL-NETWORKING WEBSITES

The United States House of Representatives has responded to the dangers of social-networking websites by recently passing202 the Deleting Online Predators Act (“DOPA”).203 DOPA, which passed through the House of Representatives by a landslide vote of 410 to fifteen,204 requires schools and libraries to block access to commercial websites that allow users to create pages or profiles or to offer communication with other users via forums, chat rooms, email, or instant messaging.205 After the vote in the House of Representatives, American Library Association President Leslie Burger stated, “[t]his unnecessary and overly broad legislation will hinder students’ ability to engage in distance learning and block library computer users from accessing a wide array of essential internet applications, including instant messaging, e-mail, wikis, and blogs.”206 DOPA’s constitutionality is thus yet to be determined.

201. See Age Verification at Social-Network Sites Could Be Difficult, supra note 35 (highlighting offering by Industrious Kid Inc. in which parents submit credit card numbers to vouch for age of their eight- to fourteen-year-old children).


205. See Debra Lau Whelan, House Republicans Introduce Bill to Thwart Online Predators, SLJ.com, May 19, 2006, http://www.schoollibraryjournal.com/article/CA6336267.html (noting that passage of bill would severely limit access to websites, such as MySpace, that allow public forums and personal profiles).

VI. CONCLUSION: LET THE BURDEN FALL ON THE CHEAPEST COST AVOIDER

Common economic analysis of negligence requires a determination of who is the cheapest cost avoider: parents or MySpace?\textsuperscript{207} Here, the lowest cost avoider actually is a combination of both MySpace and parents. MySpace should create and implement a system that allows parents and MySpace to work together because MySpace has information on minors’ activities, and parents have physical control over their children. While Julie Doe spent time on the computer during her online courtship, Jane Doe had the opportunity to warn her child about the dangers of online interaction. Jane Doe also had the opportunity to ask how and where her daughter met her date on the night of Julie Doe’s sexual assault. MySpace, however, had the opportunity to implement age verification procedures in which parents could register a person as their child following verification of credit card numbers. Once a parent has registered their child, the parent should have the control to set the age limits of persons who can interact with their child. While recognizing that MySpace has achieved its viral popularity from its unfettered nature and the freedom it provides, with changes, MySpace can advertise its status as a place where both parents and teenagers can safely form new relationships and meet new people. If both MySpace and parents initiate these measures, MySpace may no longer be a place of dangers but rather “a place for friends.”\textsuperscript{208}

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\textsuperscript{207} For a further discussion of the requirement that a party bear a cost to prevent a loss if that cost is less than the expected cost of the loss, see \textit{supra} notes 170-72 and accompanying text.
