2005

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Recommended Citation
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Internet Libel and the Communications Decency Act: How the Courts Erroneously Interpreted Congressional Intent with Regard to Liability of Internet Service Providers

BY EMILY K. FRITTS*

I. INTRODUCTION

Congress shall make no law . . . abridging the freedom of speech.1

While First Amendment absolutists may argue that “no law” means just what it says “without any ‘ifs’ or ‘butts’ or ‘whereases,’” in practical application the absolute terms of the First Amendment have never garnered an absolute right for the people.2 In fact, the amendment “has never meant . . . that people can say whatever they want wherever they want.”3 Undoubtedly, the Framers intended to target the two main controls on speech that they endured in England: the licensing system’s prior restraint on publication and punishment for seditious libel.4 However, according to Professor Chemerinsky, “[b]eyond this . . . there is little indication of what the framers

* J.D. expected 2005, University of Kentucky. I would like to thank Professor Richard Labunski of the University of Kentucky School of Journalism and Telecommunications for suggesting the topic and providing subsequent insights and advice.

1 U.S. CONST. amend. I.

2 MADELINE SCHACHTER, LAW OF INTERNET SPEECH 3 (2d ed. 2002) (quoting Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting)).


intended." Thus, in order to determine the constitutionality of government restrictions, the all-important question becomes "whether the particular 'speech' [at issue] is within the 'freedom' comprehended by the amendment." 

A judicially constructed analytical hierarchy of speech has emerged throughout the course of First Amendment jurisprudence. In accordance with this "non-absolutist" theory, the courts recognize various areas of unprotected speech including fighting words, obscenity, and incitement of illegal activity. Additionally, the courts recognize a category of speech worthy of some, but not absolute, First Amendment protection. Such speech includes commercial speech, symbolic speech, and defamation. But at the core of the First Amendment's protection rests political speech. Often, "[t]he Supreme Court has spoken of the ability to criticize government and government officers as 'the central meaning of the First Amendment.'"

Despite this tidy First Amendment hierarchy, the debate continues as to whether certain other areas of speech should be protected. With the emergence of new media outlets like the Internet, courts have been faced

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5 CHEMERINSKY, supra note 4, at 893–94.
6 Turner, supra note 3, at 59.
7 See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include . . . 'fighting' words—that which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").
8 See, e.g., Roth v. United States, 354 U.S. 476 (1957). The Court stated that:
All ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties . . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance . . . . We hold that obscenity is not within the area of constitutionally protected speech or press.
Id. at 484–85.
9 See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (recognizing that, consistent with the First Amendment, states may forbid or proscribe the incitement of illegal activity "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").
11 See, e.g., United States v. O'Brien, 391 U.S. 367, 376 (1968) ("This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").
12 See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) ("The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice . . . .'").
13 CHEMERINSKY, supra note 4, at 897 (quoting Sullivan, 376 U.S. at 273).
with the difficult issue of determining whether the same rules should apply in cyberspace as have been applied to the print and broadcast media.

Generally, this note will focus on how the courts have applied defamation law with regard to Internet Service Providers ("ISPs") both before and after Congress passed the Communications Decency Act ("CDA") of 1996. Part II provides a brief overview of the common law of defamation. Part III discusses Cubby, Inc. v. CompuServe, Inc. and Stratton Oakmont, Inc. v. Prodigy Services Co.—two important Internet libel cases decided prior to passage of the CDA. Part IV explains § 230 of the CDA, an effort by Congress to preempt Stratton Oakmont, focusing on both the text of the statute and the legislative history. Two major Internet libel cases, Zeran v. America Online, Inc. and Blumenthal v. Drudge, emerging post-CDA are critiqued in Part V. Part IV presents an illustrative case, wherein it becomes apparent that Congress never intended the CDA to be interpreted as it was in Zeran. Finally, Part VII argues that the courts have erroneously interpreted the CDA and that Congress should step in, as it did after the Stratton Oakmont decision, with a clearer mandate for the courts—a mandate that is more in line with the traditional common law of defamation in the United States.

II. THE LAW OF DEFAMATION

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash; 'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Rob me of that which not enriches him

15 See infra notes 25-43 and accompanying text.
18 See infra notes 44-64 and accompanying text.
19 See infra notes 65-78 and accompanying text.
22 See infra notes 79-115 and accompanying text.
23 See infra notes 116-41 and accompanying text.
24 See infra notes 142-46 and accompanying text.
And makes me poor indeed.  

Evidently our society agrees with the above assertion because liability exists to compensate the victim of the tort of defamation, also called "speech injurious to reputation." There are two forms of defamation: libel and slander. While libel deals with the printed word and slander with the spoken, this note focuses solely on libel.

Constitutional considerations naturally arise regarding defamation and it is worth noting that "recovery for defamation ... is limited by the First Amendment." The ultimate "challenge for the Court in this area is to balance the need to protect reputation, the obvious central concern of defamation law, with the desire to safeguard expression, which can be chilled and limited by tort liability." There are two ways the courts have attempted to strike this all-important balance: the first focuses on the status and actions of the plaintiff and the second on those of the defendant.

The plaintiff's status and actions determine the standard by which the defendant's conduct will be judged in a defamation suit. For example, the Court has held that, in order for a public official or public figure to succeed in a defamation suit, he or she must show a higher level of fault than a private figure is required to show. Public officials and public figures alike have sought the limelight, whether by running for political office and "appear[ing] to the public to have[] substantial responsibility for or control over the conduct of governmental affairs" or by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues

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25 William Shakespeare, Othello, act 3, sc. 3 (quoted in Schachter, supra note 2, at 271).
26 Chemerinsky, supra note 4, at 1007.
27 Schachter, supra note 2, at 271.
28 Chemerinsky, supra note 4, at 1008 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).
29 Id. at 1008.
30 See infra notes 32–37 and accompanying text.
31 See infra notes 38–42 and accompanying text.
32 See Gertz v. Welch, 418 U.S. 323, 327 (1974) (holding that private figures need not show actual malice as "the States may define for themselves the appropriate standard of liability for the [defamer of] a private individual"); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (holding that a "[p]ublic figure who is not a public official may recover damages for [defamation] on a showing of ... extreme departure from standards of investigation and reporting ordinarily adhered to by responsible publishers"); Sullivan, 376 U.S. at 283 (holding that public officials must prove actual malice to recover damages for defamation).
Thus, the Court has tagged each individual that steps onto the public stage with an implied acceptance of the increased exposure to and “risk of injury from defamatory falsehood.”

In addition to this “acceptance of the risk” rationale, the Court has recognized that both “[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than [sic] private individuals normally enjoy.” Furthermore, the subject matter of speech relating to public officials and public figures will most likely be “relevant to the political process and of public interest,” just the type of speech many argue the First Amendment is designed to protect.

The second aspect of the defamation analysis, and the primary focus of the remainder of this note, is the status of the defendant: the publisher or distributor. “A ‘publisher’ is an entity, such as a book or newspaper publisher, who is responsible for the creation or editing of content in a publication. A ‘distributor’ is an entity, such as a bookseller or library, that makes publications available to the public.” In order to establish liability against a publisher, such as a newspaper or an original author, a plaintiff need not show that the publisher was “aware of the content of the specific utterance that is the subject of the suit.” Publishers of defamatory statements made by third parties are treated as having “‘adopted’ the statement as [their] own.” However, distributors are held to a less strict standard of liability and are “not deemed responsible for defamatory statements contained in the materials they distribute unless they knew or had reason to know that the material was defamatory.” In fact, distributors are under no “duty to examine publications prior to offering them for sale” in order to determine whether or not they contain defamatory material. Thus, there is an added knowledge requirement for defendants deemed to be distributors.

Adherence to the status distinction reflects a judicial desire to increase the public’s ability to access information by “alleviat[ing] the
otherwise inevitable timidity of distributors . . . to disperse material that might subject them to liability." For example, it would be irrational to expect a bookstore owner to read every book on his shelf to ensure that no defamatory material is present. It would be equally irrational to hold a librarian accountable for defamatory comments penned by authors of books in her library. Liability in such circumstances would do little to protect the reputations harmed and would undoubtedly cause the bookstore owner and the librarian to shut their doors, thereby chilling free speech and inhibiting the ability of the public to have access to information. As a result, the courts rely on this status distinction between publishers and distributors in order to strike the appropriate balance between freedom of speech and protection of individual reputations. Although the historical reasons behind the Court's status distinction between publisher and distributor liability are clear, this same distinction is a problem for the courts in their interpretation of ISP defamation liability.

III. INTERNET LIBEL CASES PRIOR TO THE COMMUNICATIONS DECENCY ACT

A. Traditional Libel Standards Recognized in Cyberspace: Cubby, Inc. v. CompuServe, Inc.

In Cubby, Inc. v. CompuServe, Inc., the court applied traditional libel standards to assess the liability of an ISP. The case dealt with the posting of allegedly defamatory material by a third party on the ISP's bulletin board. In granting the defendant ISP's motion for summary judgment, the court found that the ISP had acted as a distributor, not a publisher, and thus could not be held liable for the defamatory material because it possessed no knowledge of the statements. New York courts have long held that distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation. The court determined that such a requirement "is deeply rooted in the First Amendment" for "'[t]he constitutional guarantees of the freedom of speech and of the press stand in the way of imposing' strict liability on distributors for the contents of the reading materials.

43 Id. at 276.
45 Id. at 139 ("Ordinarily, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.") (quoting RESTATEMENT (SECOND) OF TORTS § 578 (1977)).
46 Id. at 140–41.
47 Id. at 139 (quoting Lerman v. Chuckleberry Publ'g, Inc., 521 F. Supp. 228, 235 (S.D.N.Y. 1981)).
they carry." The court reasoned that to apply a stricter standard of liability on an ISP "than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information," thus tilting the balance the courts had worked so hard to attain.

Therefore, according to Cubby, distributor liability is the appropriate libel standard to apply to ISPs. Application of this standard makes sense considering the "speed with which information is gathered and processed" on the Internet and, in particular, on bulletin boards. It further makes sense in light of the fact that we do not expect bookstore owners to read the thousands of books in their shops. Surely courts would not expect Internet bulletin board operators to sift through the millions of messages posted daily in search of defamatory material. Cubby is therefore significant for paving the way for the application of traditional defamation principles, such as the publisher/distributor distinction, in the age of the Internet.

B. In Search of Someone to Blame in Cyberspace: Stratton Oakmont, Inc. v. Prodigy Services Co.

While the decision in Cubby seems rational and was met with little opposition, a subsequent case, Stratton Oakmont, Inc. v. Prodigy Services Co., attempted to dictate the circumstances in which an ISP could be deemed a publisher and, in doing so, caught the attention of Congress. In October 1994, an unidentified user of the ISP Prodigy posted a message on one of Prodigy’s bulletin boards about Stratton Oakmont, an investment banking firm. The original speaker of the posted message was unknown and could not be determined, but the firm sought compensation for the allegedly defamatory statements by filing a $200 million libel suit against Prodigy. While Cubby held flatly that ISPs are distributors, in Stratton Oakmont Justice Stuart Ain held that if an ISP takes affirmative steps to exercise editorial control over the contents of

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48 Id. (quoting Smith v. California, 361 U.S. 147, 152–53 (1959)).
49 Id. at 140.
50 Id. at 140–41.
51 See id. at 140.
52 See id.
54 Stratton Oakmont, 1995 WL 323710.
the bulletin board it should be deemed a publisher rather than a
distributor for purposes of libel.\textsuperscript{56}

Despite agreeing with the holding in \textit{Cubby}, Justice Ain
distinguished \textit{Stratton Oakmont} on two counts. "First, [the ISP] held
itself out to the public and its members as controlling the content of its
computer bulletin boards. Second, [the ISP] implemented this control
through its automatic software screening" technology as well as bulletin
board leaders who were required to delete certain material.\textsuperscript{57} Both
controls were designed to "delete notes from its computer bulletin boards
on the basis of offensiveness and 'bad taste.'"\textsuperscript{58} Justice Ain reasoned that
because "P[rodigy] has uniquely reserved to itself the role of determining
what is proper for its members to post and read on its bulletin boards," it
has altered the scenario present in \textit{Cubby} and "mandated the finding that
it is a publisher."\textsuperscript{59}

Justice Ain focused on the fact that Prodigy "virtually created an
editorial staff . . . [with] the ability to continually monitor incoming
transmissions and . . . censor[] notes."\textsuperscript{60} Because the ISP voluntarily
shouldered the editorial responsibilities of a publisher and notified the
public that it was doing so,\textsuperscript{61} Justice Ain believed it was only right to
attach to the ISP the same liability a publisher would face.\textsuperscript{62} Despite
Justice Ain's controversial position, he did recognize the potential that
freedom of speech would be chilled on the Internet if courts attached
publisher liability to ISPs in such circumstances. Even so, he offered
reasons why such a chill would not take place. Justice Ain suggested that
the market would react positively to ISPs that control the content of their
bulletin boards and he presumed that Prodigy, as well as other ISPs,
could attempt to "attract . . . users seeking a 'family-oriented' computer
service."\textsuperscript{63}

After \textit{Cubby} and \textit{Stratton Oakmont}, ISPs were subject to publisher
liability for libel if they exercised editorial control over the content of

\footnotesize{\textsuperscript{56} See \textit{Stratton Oakmont}, 1995 WL 323710, at *5.}  \textsuperscript{57} \textit{Id.} at *4.  \textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.} at *4, *5.  \textsuperscript{60} \textit{Id.} at *5.
\textsuperscript{61} \textit{Id.} at *2 (citing Exhibits I and J to plaintiffs' moving papers). In one newspaper
article P[rodigy] stated:

\textit{We make no apology for pursuing a value system that reflects the culture of the
millions of American families we aspire to serve. Certainly no responsible
newspaper does less when it chooses the type of advertising it publishes, the
letters it prints, the degree of nudity and unsupported gossip its editors tolerate.}
\textit{Id.}  \textsuperscript{62} \textit{Id.} at *4.  \textsuperscript{63} \textit{Id.} at *5.
their bulletin boards, and were treated as distributors if they did nothing to control the content. Based on these standards it seems reasonable to think that ISPs aware of defamation liability standards would do nothing to guard against defamation instead of taking a proactive stance and risking an encounter with a court willing to follow Justice Ain's lead. However, *Stratton Oakmont* was not the end of the story. As Justice Ain noted, his decision might be "preempted by federal law if the Communications Decency Act . . . is enacted." As it turns out, Justice Ain's hunch was correct.

IV. SECTION 230 OF THE COMMUNICATIONS DECENTY ACT

In an effort to "promote competition and reduce regulation" of the Internet and other emerging telecommunications technologies, Congress passed the Telecommunications Act of 1996, Title V of which is known as the Communications Decency Act. Congress viewed the Internet as a vast "educational and information resource[]" and desired to "preserve the vibrant and competitive free market . . . unfettered by Federal or State regulation." Furthermore, Congress viewed Justice Ain's holding in *Stratton Oakmont* as a major impediment to accomplishing such a goal.

A. Text of Section 230

Section 230 of the Communications Decency Act protects individuals and ISPs engaged in the "blocking and screening of offensive material." While Justice Ain contended that such voluntary action should be accompanied by publisher liability, Congress made clear in § 230(c)(1) that publisher liability is inappropriate for a "provider or user of an interactive computer service." Indeed, Congress went even further by indicating its desire to protect from civil liability, not to punish, ISPs that make an effort to edit their bulletin boards for "objectionable" conduct. These provisions have become widely known as the "Good

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64 *Id.*
68 47 U.S.C. § 230(c). Section 230(c), entitled "Protection for 'good samaritan' blocking and screening of offensive material," is the main source of these protections in the CDA.
69 § 230(c)(1). The specific text reads: "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." *Id.* (emphasis added).
70 § 230(c)(2)(A). The text of the statute limiting civil liability reads:
Samaritan” laws. Thus, Congress effectively overruled Stratton Oakmont by mandating that ISPs are not to be treated as publishers for purposes of libel simply because they undertake some editorial responsibilities with regard to the content of their bulletin boards.

B. Legislative History of Section 230

The Senate Conference Report describes the “Good Samaritan” laws as protecting ISPs from civil liability “for actions to restrict . . . access to objectionable online material.” Such actions undoubtedly refer to the editorial responsibilities upon which Justice Ain placed so much emphasis in Stratton Oakmont. The report goes on to assert that “[o]ne of the specific purposes of this section is to overrule Stratton Oakmont . . . and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.” Thus, the Senate Conference Report is consistent with the words of the text and reemphasizes the point that ISPs will not be deemed publishers merely because they have voluntarily undertaken some editorial responsibilities.

Furthermore, comments made by lawmakers reaffirm the notion that the intent of Congress in enacting § 230 was merely to overrule the Stratton Oakmont decision. Representative Barton of Texas stated that § 230 was intended to provide ISPs “a reasonable way to . . . help them self-regulate,” suggesting that the Stratton Oakmont decision discouraged ISPs from combating Internet libel for fear that they would be labeled publishers rather than distributors. In analyzing the unique circumstances of ISPs, Representative Goodlatte of Virginia implicitly rejected the use of publisher liability by noting the differences between newspapers and bulletin boards:

(2) Civil Liability
No Provider or user of an interactive computer service shall be held liable on account of—
(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

Id.

74 Id. (emphasis added).
There is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong.\footnote{76}{Id. at *H8471.}

Representative Goodlatte’s statement again focuses on the irrationality of imposing publisher liability on ISPs and highlights the reasons typically given for imposing distributor liability: enormous amounts of material from numerous sources.

The text and the legislative history of the CDA appear to clearly indicate Congress’s intent. Quite simply, it appears that the primary focus of § 230 was to overrule Stratton Oakmont and to ensure that courts would not impose publisher liability on ISPs merely because they voluntarily chose to edit the content of their bulletin boards. In the words of Representative Goodlatte, such an imposition would be “wrong.”\footnote{77}{Id.}

While § 230 of the CDA clarified an important aspect of the potential liability of ISPs as publishers in libel cases, it is important to note that § 230 does not affect distributor liability and leaves the Cubby decision intact.\footnote{78}{See Telecommunications Act, 47 U.S.C. § 230 (1996).}

V. INTERNET LIBEL CASES POST–COMMUNICATIONS DECENCY ACT

Despite what appears to be a clear mandate from Congress that ISPs should not be treated as publishers for purposes of libel merely because they have undertaken editorial responsibilities, the courts have declined to interpret § 230 in such a manner. In fact, in both Zeran v. America Online, Inc.\footnote{79}{Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997).} and Blumenthal v. Drudge,\footnote{80}{Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998).} the courts have expanded § 230 beyond what was intended by Congress, ignoring traditional libel law and tipping the balance between protection of reputation and protection of speech even further in the direction of the latter.

A. Ignoring Distributor Liability: Zeran v. America Online, Inc.

\textit{Zeran} was the first case to interpret § 230 of the CDA. The Fourth Circuit affirmed the granting of summary judgment to America Online (“AOL”) in a suit brought by a Seattle resident alleging unreasonable
delay in the removal of defamatory comments from the ISP's bulletin board.\(^{81}\)

On April 25, 1995, a message was posted to an AOL bulletin board advertising "Naughty Oklahoma T-Shirts" featuring "offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City." The prank came less than a week after the bombing. In addition to the advertisement, the unknown user listed the plaintiff, Zeran, and his home telephone number as the contact for interested buyers. Because of the "prank, Zeran received a high volume of calls, comprised primarily of angry and derogatory messages, but also including death threats." Zeran notified AOL of the bulletin board posting and requested its removal. However, despite AOL's repeated removal of the defamatory posting, the unknown user continued to re-post the "advertisement." Five days after the initial posting "Zeran was receiving an abusive phone call approximately every two minutes." By May 14, nearly three weeks after the initial posting, the calls had only "subsided to fifteen per day."\(^{82}\)

Initially, Zeran brought suit against AOL, charging that the ISP "unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter."\(^{83}\) AOL invoked § 230 of the CDA as an affirmative defense, claiming that the Act shielded ISPs from liability for defamatory messages posted to their bulletin boards.\(^{84}\) The district court found the defendant's argument based on the CDA persuasive and granted AOL's motion for judgment on the pleadings.\(^{85}\) The Fourth Circuit subsequently affirmed.\(^{86}\)

While this case may appear at first glance to fit nicely within the congressional mandate of § 230, upon closer analysis it is clear that Zeran is not a case about publisher liability for ISPs. Zeran did not ask the court to impose liability upon AOL merely because it edited content on its bulletin boards, a claim that would be governed by § 230. Instead, Zeran contended that AOL was liable as a distributor because it had knowledge of the defamatory material and failed to remove it accordingly. Thus, this case does not deal with publisher liability as outlined in § 230, but with distributor liability, an area not preempted by § 230. Such a distinction is important because, under distributor liability standards, AOL could be held accountable upon a showing that it had

\(^{81}\) Zeran, 129 F.3d at 328–29.
\(^{82}\) Id. at 329.
\(^{83}\) Id. at 328.
\(^{84}\) Id. at 329.
\(^{85}\) Id. at 330.
\(^{86}\) Id. at 328.
knowledge that the material was defamatory and failed to take action, consistent with Zeran's claims. Nonetheless, in Zeran the Fourth Circuit mixed distributor liability with publisher liability, giving ISPs blanket immunity against defamatory material posted by third parties on their bulletin boards.

The Zeran court recognized the fact that § 230 "precludes courts from entertaining claims that would place [an ISP] in a publisher's role." However, it rejected the plaintiff's argument that "the [§] 230 immunity eliminates only publisher liability, leaving distributor liability intact," disagreeing with the plaintiff's assertion that "Congress' use of only the term 'publisher' in [§] 230 indicates a purpose to immunize service providers only from publisher liability." Instead, the court illogically reasoned that when Congress said "publisher" it meant to include "distributor" as well because "[distributor] liability is merely a subset, or a species, of publisher liability."

Rather than recognizing the distinct categories of "publisher" and "distributor" that are a traditional staple of defamation law, the court manipulated the term "publication" by citing to the Restatement instead of looking to cases for resolution of the distinction. Relying on the Restatement (Second) of Torts § 558(b), the court argued that "only one who publishes can be subject to this form of tort liability" because publication is an element defamation. However, this logic completely ignores the distinction between the element of publication, a requirement relating solely to whether or not material has been published or communicated to the public, and the labels of "publisher" and "distributor," which identify the defendant based on his conduct. These inquiries are distinct. Thus, while a distributor might be "charged with publication" upon knowledge of the material and thereby held liable for defamation, such defendants are not identified as publishers for purposes of defamation law merely because the material has been published. In fact, such a spin on defamation law ignores a central holding in Cubby: that the appropriate standard for ISPs, and other "electronic news distributors" who do not or cannot monitor all the information on their sites, is distributor liability. While Cubby was merely persuasive authority for the Fourth Circuit, the court failed to recognize the basic

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87 See id. at 331.
88 Id. at 330.
89 Id. at 331.
90 Id. at 332.
91 Id.
92 Id.
93 Id.
94 Id.
tenets of traditional defamation law. The Fourth Circuit instead claimed that Zeran "simply attach[es] too much importance" to the labels and contends that both a publisher and a distributor fall into a "larger publisher category."\textsuperscript{96}

Furthermore, the court seemed to ignore the fact that § 230 does nothing to overrule Cubby and other traditional distributor cases\textsuperscript{97} which should have been persuasive to the outcome in Zeran. As David R. Sheridan notes in an article discussing the fallacies of the Zeran decision, "[i]t would be reasonable to surmise that Congress would say ‘distributor’ in addition to ‘publisher’ if it meant ‘distributor’ in addition to ‘publisher.’\textsuperscript{98} Congress did not make such a statement, choosing instead to say “publisher” only.\textsuperscript{99} The Zeran court, on the other hand, determined that even distributor liability, or liability upon notice, would have "a chilling effect on the freedom of Internet speech."\textsuperscript{100} However, the court does not support this assertion anywhere in its opinion. In fact, the court recognizes that the apparent purpose of § 230 was to prevent the chill on speech that would result if ISPs were required to "screen each of their millions of postings for possible problems\textsuperscript{101}—a purpose that would not be furthered if liability upon notice was imposed. Instead, a liability—upon—notice system would only hold an ISP liable when it had knowledge of defamatory material. The Zeran court claimed to be following the mandates of Congress, but it actually departed from traditional libel law. The problem with such a departure is that the blanket immunity created in Zeran

provide[s] an unprecedented means for irresponsible individuals to cause damage by propagating false and defamatory statements around the world at the speed of light. Broad immunity from liability for defamation is consistent with, if perhaps not essential to, the Internet’s ethic of free speech. However, broad immunity represents a value judgment not to be made lightly by Congress or to be inferred by a court from a statute that does not explicitly confer it and from contradictory signals in the legislative history and expressed intent of the statute. Unless and until Congress acts more clearly, courts should continue to resolve cases involving alleged distributor liability according to traditional tort principles, which provide extensive, but not absolute, protection for those who make publications available to others.\textsuperscript{102}

\textsuperscript{96} Zeran, 129 F.3d at 332.
\textsuperscript{97} See supra notes 65–78 and accompanying text.
\textsuperscript{98} Sheridan, supra note 38, at 168.
\textsuperscript{100} Zeran, 129 F.3d at 333.
\textsuperscript{101} Id. at 331.
\textsuperscript{102} Sheridan, supra note 38, at 151–52.
Zeran is not consistent with traditional concepts of libel law or with the legislative intent underlying § 230 of the CDA. Its holding departs from and confuses these basic concepts. As a result, so long as Congress does not expressly ban distributor liability for ISPs, the holding of Cubby should stand and ISPs with knowledge of defamatory material, like AOL in Zeran, should be held accountable.

B. Extending the Zeran Decision Beyond Bulletin Boards: ISPs with Contractual Obligations

The next major case to take a stab at interpreting § 230 of the CDA was Blumenthal v. Drudge.\(^{103}\) In 1997, Matt Drudge, a "cyber-journalist" whose claim to fame includes being the first to break the Monica Lewinsky scandal to the public, signed a deal with AOL. The contract provided that Drudge's gossip column "The Drudge Report," would be made available to all AOL members for one year, and in return Drudge would receive a monthly payment of $3000.\(^{104}\)

On August 10, 1997, Drudge wrote a story claiming that Clinton assistant Sidney Blumenthal had abused his spouse in the past.\(^{105}\) The story was made available to AOL subscribers pursuant to the contract. However, the following day, "[a]fter receiving a letter from [Blumenthal's] counsel . . . Drudge retracted the story," and on August 12, 1997, AOL posted the retraction.\(^{106}\) As it turned out, Drudge's sources had fabricated the story. Nevertheless, Blumenthal sought to hold AOL and Drudge accountable, basing his complaint on the contractual relationship between the two.\(^{107}\) AOL again invoked the protection of § 230 of the CDA, and the Blumenthal court granted summary judgment for the ISP.\(^{108}\)

Much like Zeran, Blumenthal appears at first glance to fall squarely within the mandates of § 230. However, the facts in Blumenthal are distinct from the facts of Zeran, Stratton Oakmont, and Cubby—each of which dealt with postings made to bulletin boards and the liability of the ISPs that controlled them. Blumenthal, on the other hand, dealt with a contract existing between a third-party producer of information, Drudge, and an ISP, AOL. In these altogether different circumstances, AOL was not faced with the burden of examining "thousands of pages of


\(^{104}\) Id. at 47.

\(^{105}\) Id. at 47–48 & n.4.

\(^{106}\) Id. at 48.

\(^{107}\) Id. at 50.

\(^{108}\) Id. at 46.
information every day" coming from unknown sources.\textsuperscript{109} Rather, AOL knew the nature of Drudge's column when it entered into the contract with the writer. After all, AOL "affirmatively promoted Drudge as a new source of unverified instant gossip."\textsuperscript{110} In fact, the contract was comparable to those made between writers and publishers in the traditional world of print.

The applicability of § 230 to a contractual situation between an ISP and the original source of defamatory material is a completely different inquiry than that involved in Zeran. As some contend, "[i]t is one thing to argue that AOL is not responsible for monitoring the huge number of messages that pass through its facilities every day; it is something else to assert that it did not have the staff available to read Drudge's copy before it was posted on the AOL site even though Drudge was under contract."\textsuperscript{111} Similarly, Blumenthal made the argument that "[s]ection 230 of the [CDA] does not provide immunity to AOL in this case because Drudge was not just an anonymous person who sent a message over the Internet through AOL," but was instead a contractual partner of AOL.\textsuperscript{112} However, believing it was bound by § 230, the court dismissed AOL from the suit.\textsuperscript{113}

Blumenthal is another example of a court erroneously interpreting § 230. As a House of Representatives Conference Report notes, ISPs should be protected from liability for "Good Samaritan" efforts "to restrict . . . access to objectionable online material," and should not be treated as publishers simply "because they have restricted access to objectionable material."\textsuperscript{114} However, § 230 does not address the situation present in Blumenthal, where an ISP actually served as a publisher by entering into a contract with a writer. The goal of § 230 was to prevent obstacles to self-regulation of Internet content. Nowhere in the text of the statute or in its legislative history does Congress mention a desire to provide blanket immunity for ISPs as the Blumenthal court's holding implies. Such an interpretation is erroneous and overbroad. The court should not have applied § 230 and should instead have followed its instincts by deeming AOL a publisher.\textsuperscript{115}


\textsuperscript{110} Blumenthal, 992 F. Supp. at 51.

\textsuperscript{111} Labunski, supra note 55, at 255.

\textsuperscript{112} Blumenthal, 992 F. Supp. at 51.

\textsuperscript{113} See id. at 53. The Blumenthal court indicated that they were led to the disputed result because they believed § 230 constrained them: "If it were writing on a clean slate, this Court would agree with plaintiffs." Id. at 51.


\textsuperscript{115} Blumenthal, 992 F. Supp. at 51.
VI. FOLLOWING THE ZERAN DECISION: ANOTHER COURT IS LED ASTRAY

In Doe v. America Online, Inc., 116 the Supreme Court of Florida relied exclusively on Zeran117 in determining that the ISP could not be held liable as a distributor when it failed to remove, upon notice, defamatory material posted by a third party.118 The third party in Doe used AOL chat rooms to market child pornography.119 AOL was made aware of the communications, but the ISP "neither warned [the user] to stop nor suspended his service."120 While not required to follow Fourth Circuit precedent, the Supreme Court of Florida opted blindly to follow the Zeran decision.121 As the dissent pointed out, following Zeran as the majority did "frustrates the core concepts explicitly furthered by the Act and contravenes its express purposes."122

The Doe dissent argues that neither the statute nor its legislative history "reflect an intent to totally exonerate and insulate an ISP from responsibility where . . . it is alleged that an ISP has acted as a knowing distributor."123 In particular, Justice Lewis's dissent contends that the "Decency Act" was never meant to protect an ISP from liability where it knowingly distributes "material leading to the . . . sale . . . of child pornography, after having been given actual notice of the particular activity, [and] by taking absolutely no steps to curtail continued dissemination of the information by its specifically identified customer, when it had the right and power to do so."124 The intent behind the CDA was to protect ISPs from being held accountable for sifting through the millions of messages posted daily on their bulletin boards. Accordingly, ISPs would not become "publishers" simply by taking a proactive approach in the regulation of material on their bulletin boards. However, when interpreted as in Zeran and Doe the CDA is not being used as a shield, but as a sword to combat any and all liability for ISPs.

The dissent also takes issue with the Zeran court's reliance on section 577 of the Restatement (Second) of Torts125 for the proposition that distributor liability is simply a subset of publisher liability.126 Justice

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118 See Doe, 783 So. 2d at 1011–12, 1017–18.
119 Id. at 1011.
120 Id. at 1012.
121 See id. at 1013, 1015, 1017, 1018.
122 Id. at 1019 (Lewis, J., dissenting).
123 Id. (Lewis, J., dissenting).
124 Id. (Lewis, J., dissenting).
125 Restatement (Second) of Torts § 577 (1997).
126 Doe, 783 So. 2d at 1020–21 (Lewis, J., dissenting).
Lewis asserts that section 577 does not support such a proposition and instead cites three Florida cases that reaffirm the publisher/distributor distinction.127 “[T]he classic illustration of [section 577] . . . is the situation of the tavern owner who fails to remove, after knowledge thereof, a libelous statement about plaintiff written by another on a wall in the restroom of his establishment.”128 Instead, Justice Lewis argues that section 581 of the Restatement “more properly defines distributor liability, and . . . appears most applicable” to an ISP.129 Section 581 deals with the transmission of defamation published by third parties. As Justice Lewis points out, “the function served by the provider of an Internet Service ‘bulletin board’” more closely resembles that of a “telephone, ticker, teletype or telegraph company,” to which section 581 applies, than “that of a physical establishment which maintains a cork bulletin board,” which is covered by the relied-upon section 577.130

Careful examination of the text of sections 577 and 581 of the Restatement makes apparent which section is most applicable to an ISP. Section 577(2) states, in relevant part, that “[o]ne who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.”131 Section 581, on the other hand, states that “one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.”132 Section 581 undoubtedly is a better fit for ISPs, and the Zeran and Doe majority’s reliance on section 577 for the proposition that distributor liability is merely a subset of publisher liability is unfounded. Put simply, section 577 applies to publishers while 581 applies to distributors. Justice Lewis argues that this publisher/distributor distinction “is key to an understanding of what Congress . . . intended to accomplish by enacting the CDA.”133

So, what did Congress intend? As noted by Justice Lewis, “[w]hile the legislative history reflects Congress’s intent to ‘overrule’ Stratton

127 Id. at 1021 & n.10 (Lewis, J., dissenting).
128 Id. at 1021 n.12 (Lewis, J., dissenting) (quoting Restatement (Second) of Torts § 577(2), cmt. p, illus. 15 (1997)).
129 Id. at 1022 (Lewis, J., dissenting).
130 Id. at 1021 n.12 (Lewis, J., dissenting).
131 Restatement (Second) of Torts § 577(2) (1997).
132 Id. § 581(1). This section does, however, provide an exception to the rule. Television and radio broadcasters are assigned the higher standard of liability usually attributed to a publisher because of their usual involvement in the production of the programs aired. Id. § 581(2) & cmt. g.
133 Doe, 783 So. 2d at 1023 (Lewis, J., dissenting).
Oakmont, there is no similar mention of a desire to 'overrule' Cubby.' Furthermore, statements from the floor debate on the matter indicate that Congress was aware of the decision in Cubby; in fact, "[t]he result of the CDA was the re-emergence of the holding in Cubby." Thus, "[i]f Congress had intended absolute immunity [for ISPs], why would it state only that no ISP 'shall be treated as a publisher or speaker of any information provided by another information content provider?' "

"[T]he legislation did not explicitly exempt ISPs from distributor liability, and its specific reference to 'publisher or speaker' is evidence that Congress intended to leave distributor liability intact.' As Justice Lewis asks, "[i]f blanket immunity were intended, why not state more broadly that no ISP 'shall be held liable' for any information provided on its service by another information content provider?"

Rather than recognizing the narrowing language of § 230, the Zeran court and others following its lead have undercut congressional intent and expanded protection for ISPs to irrational lengths. The statement in § 230 of the CDA that an ISP shall not be treated as a 'publisher or speaker' of third-party information has been interpreted to mean not only that an ISP can never be subject to liability for negligence as a 'publisher' of third-party information appearing on its service, but also that an ISP can never be subject to liability based upon its own patently irresponsible role as a distributor who has allegedly been given actual notice of materials published on its service by a specified customer (in furtherance of criminal conduct . . .) by soliciting the purchase and sale of explicit child pornography, yet has done absolutely nothing about it.

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134 Id. at 1024 n.15 (Lewis, J., dissenting) (emphasis added).
135 Justice Lewis states:

A Federal court in New York, in a case involving CompuServe, one of our online service providers, held that CompuServe would not be liable in a defamation case because it was not the publisher or editor of the material. It just let everything come onto your computer without, in any way, trying to screen it or control it.


137 Id. at 1025 (Lewis, J., dissenting) (quoting Telecommunications Act, 47 U.S.C. § 230(c)(1) (1996)).
139 Id. at 1025 (Lewis, J., dissenting) (footnote omitted).
140 Id. at 1024 (Lewis, J., dissenting) (footnote omitted).
Ultimately, erroneous interpretations of the CDA as found in the Doe majority "thrust[] Congress into the unlikely position of having enacted legislation that encourages and protects the involvement of ISPs as silent partners in criminal enterprises for profit."141

VII. CONCLUSION

Traditionally, courts have recognized the need to balance protection of an individual’s reputation with freedom of speech in the development of defamation laws. However, when considering the implications of § 230 of the Communications Decency Act, some courts have lost sight of this all-important balance and given little heed to the words of the statute. These courts interpreted the Act quite expansively to protect economic considerations, ensuring the growth of the Internet. But what will be the cost of this diversion from the text and intent of the CDA?

With the major holdings in Zeran142 and Blumenthal,143 courts have tipped the scales too far in the direction of free speech. As a result, the goal of protecting reputation will suffer because tort law will be unable to compensate victims for their injuries. Providing less protection for individual reputations on the Internet makes little sense. Whereas publishers in more traditional media outlets pay a price for voicing their opinions, speech on the Internet comes much cheaper and is often free. The combination of fewer structural disincentives with a shrinking potential for liability means that speakers are likely to voice their opinions more often, and in greater quantity, without due regard to the content of their speech.

Furthermore, the anonymity available to users of the Internet eliminates a major disincentive to attacking another’s reputation. Users are often identified only by screen names. While one might argue that the same anonymity has been available for years through the use of pseudonyms, the analogy is not wholly applicable. If a traditional publisher was not willing to publish the work of the anonymous author, the author would have to function as the publisher himself, bearing the costs of such an endeavor. Empowered by the Internet, an anonymous speaker of defamatory material may hide behind his screen name, pay little if any cost, and freely disseminate information to the masses. The Internet thus provides a medium to disseminate information which is much easier and less costly, both personally and financially, than any traditional medium. In such a cheap and user-friendly environment,

141 Id. at 1028 (Lewis, J., dissenting).
speech is capable of flourishing just as the drafters of the CDA intended. However, with the failure of some courts to align Internet speech with traditional defamation law, invidious speech is likely to result.

As the Cubby court first determined, the appropriate standard to be applied to ISPs is distributor liability. While Justice Ain's decision in Stratton Oakmont might have been too concerned with protecting reputation at the cost of free speech, Congress set the balance straight again with the Communications Decency Act. The Act, specifically § 230, was intended to overrule Stratton Oakmont, which attached publisher liability to an ISP that took affirmative steps in regulating the content of its bulletin boards. Thus, all the Communications Decency Act did was turn back the clock to Cubby and reaffirm the notion that ISPs should be considered distributors and not publishers, lessening, but not eliminating, their potential liability for libelous speech. The decisions in Zeran and Blumenthal, however, not only run counter to this assertion, but also run counter to traditional defamation analysis. Such a construction was not the intent of Congress and, unfortunately, these decisions have influenced similar rulings in subsequent cases requiring an interpretation of § 230 of the Communications Decency Act. Thus, the harm of this erroneous interpretation has not merely been confined to the circuits that created it. In order to right the all-important balance between freedom of speech and reputation, it is time for Congress to set the record straight: the Communications Decency Act was meant to overrule Stratton Oakmont and not Cubby. Ultimately, the publisher/distributor distinction must continue to be used in defamation analysis for individual reputations to receive the protection they deserve.

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