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# Damnum Absque Inujria: Zeran v. AOL and Cyberspace Defamation Law

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Cover Page Footnote
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# COMMENT

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Steven M. Cordero*

## INTRODUCTION

At 2:54 p.m. on April 25, 1995, a message was posted on an America Online[1] ("AOL") bulletin board,[2] which advertised "Naughty Oklahoma T-Shirts" for sale, six days after the explosion at the Alfred P. Murrah Federal Building in Oklahoma City.[3] Six slogans were available, including "*Visit Oklahoma... It's a BLAST!!!*," "*Putting the kids to bed... Oklahoma 1995*," *and*

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* J.D. Candidate, 1999, Fordham University School of Law. The author thanks the editors and staff of the *Fordham Intellectual Property, Media & Entertainment Law Journal* for their tireless efforts. This Comment is dedicated to my family and dearest friends for their unmitigated love and unwavering support.

1. America Online, Inc. is the world's leading multi-brand interactive service company. AOL Interactive Services is AOL's core Internet online service, with a membership base of over eleven million households, making it the largest interactive community in the world. *See About the Company: AOL Profile.* (visited Mar. 15, 1999) <http://www.aol.com/corp/profile>.

2. A "computer bulletin board" is any computer system that is both accessed remotely by users and administered by an operator capable of limiting access to the system and establishing guidelines for its use. *See* EDWARD A. CAVAZOS & GAVINO MORIN, CYBERSPACE AND THE LAW: YOUR RIGHTS AND DUTIES IN THE ON-LINE WORLD 3-4 (1994) (discussing bulletin board systems, the Internet, and the law); Erik Swenson, *Redefining Community Standards in Light of the Geographic Limitlessness of the Internet: A Critique of United States v. Thomas*, 82 MINN. L. REV. 855, 858 (1998). Users can access databases, download files, leave messages, and engage in chat sessions. *See* Eric Schlechter, *Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 HASTINGS COMM. & ENT. L.J. 87, 90 (1993) (describing the functions of a BBS). Bulletin board systems are inexpensive to create and easy to maintain. *See id.* at 91.

3. Zeran v. America Online, Inc., 958 F. Supp.1124, 1127 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

*"McVeigh for President 1996."*[4] The message was posted by someone who established an AOL account under a false name, and who was never identified by AOL.[5] The message said that the T-shirts could be obtained by calling the telephone number listed in the message.[6] The phone number was that of Kenneth Zeran's home office in Seattle.[7] Very quickly, Zeran was overwhelmed by harassing, derogatory, and threatening telephone calls by outraged AOL subscribers.[8] Zeran, who operated a business that depended on people calling him, learned of the hoax, contacted AOL the same day, denied that he originated the message, and demanded that the posting be removed and a retraction posted.[9] As a matter of policy, AOL refused to publish a retraction, but it removed the posting the next day.[10] The same day AOL removed the posting, a new notice appeared, and Zeran once again asked for it to be removed.[11] Similar deplorable notices appeared through May 1, 1995.[12] On May 1, 1995, Mark Shannon, a broadcaster at the Oklahoma City radio station KRXO Radio, read on of the notices on the air including slogans purportedly displayed on the T-shirts, during the morning drive.[13] Shannon engaged in dialogue with his co-host regarding the posting and urged listeners to call Zeran's telephone number, which Shannon read repeatedly on the air, and express their displeasure.[14]

Kenneth Zeran was the unfortunate victim of an Internet ploy known as "trolling."[15] Trolling occurs when someone posts a message on the Internet and makes it appear as if the message came

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4. *Id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See* Zeran v. America Online, Inc., 958 F. Supp. 1124, 1127 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).
10. *See id.*
11. *See id.*
12. *See id.*
13. *See* Zeran v. Diamond Broad. Inc., 19 F. Supp. 2d 1249, 1251 (W.D. Okla. 1997).
14. *See id.*
15. *See* Meeka Jun, *'Trolling' on the Internet: Win for On-line Services*, N.Y.L.J., Nov. 21, 1997, at 5.

from someone else.[16] Zeran sued both KRXO Radio and AOL.[17] The suit against KRXO Radio was eventually dismissed because of lack of evidence of injury to reputation.[18] In his suit against AOL, Zeran argued that AOL had negligently failed immediately to remove the defamatory postings, to post a retraction notifying subscribers of the message's false nature, and to screen for future defamatory postings.[19] The United States District Court for the Eastern District of Virginia granted AOL's motion to dismiss Zeran's action, holding that section 230 ("section 230") of the Communications Decency Act of 1996[20] ("CDA") barred suit against Internet Service Providers[21] ("ISP" or "Internet Provider") such as AOL.[22] Section 230 of the CDA states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information

16. *See id.*

17. *See Zeran v. America Online, Inc.*, 958 F. Supp. at 1128.

18. *See Zeran v. Diamond Broad. Inc.*, 19 F. Supp. 2d at 1253.

19. *See Zeran v. America Online, Inc.*, 958 F. Supp. at 1128-29.

20. Communications Decency Act of 1996, Pub. L. 104-104, Title V, 110 Stat. 133 (codified as amended in scattered sections of 47 U.S.C.). The Communications Decency Act of 1996 is Title V (§§ 501-509) of the Telecommunications Act of 1996. Section 509 of the Telecommunications Act of 1996, entitled "Online Family Empowerment," adds to Title II of the Communications Act of 1934, section § 230, entitled "Protection for private blocking and screening of offensive material." Section 502 of the Telecommunications Act of 1996 amended 47 U.S.C.A. § 223 to criminalize certain offensive, but not obscene, communications via an interactive computer network. That portion of the law was held unconstitutional in *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997), and *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), *aff'd*, 521 U.S. 1113 (1997). Neither *ACLU* nor *Shea* affected § 230.

21. An Internet Service Provider ("ISP") is an entity whose function is to allow dial-in users to access the Internet. *See* Jamie N. Nafziger, *Time to Pay Up: Internet Service Providers' Universal Service Obligations Under the Telecommunications Act of 1996*, 16 J. MARSHALL J. COMPUTER & INFO. L. 37, 62 (1997). ISPs vary in many dimensions including their target market served, their area of coverage, and their organizational form, for-profit versus non-profit. *See id.*; ROBERT H. ANDERSON ET AL., UNIVERSAL ACCESS TO E-MAIL: FEASIBILITY AND SOCIETAL IMPLICATIONS 96 (1995). To serve its customers, an ISP sets up a center which has modems, "routers," World Wide Web servers, authentication servers, and mail servers. Nafziger, *supra*. From this dial-up center, customers' traffic is routed to the Internet over dedicated facilities or to other on-line services. *See id.* ISPs like AOL usually lease long distance transmission facilities from common carriers such as AT&T and MCI. *See id.*; JOHN C. MORLEY & STAN S. GELBER, THE EMERGING DIGITAL FUTURE: AN OVERVIEW OF BROADBAND AND MULTIMEDIA NETWORKS 89 (1996).

22. *Zeran*, 958 F. Supp. at 1137.

content provider."[23] The Court of Appeals for the Fourth Circuit affirmed, rejecting Zeran's argument that computer service providers such as AOL are Distributors, like traditional news vendors or book sellers and thus could be held liable for defamation.[24] Unlike Publishers who are strictly liable for defamatory statements, Distributors are only liable if they have actual knowledge of the defamatory statements upon which liability is predicated.[25] The Fourth Circuit held that AOL was a Publisher, immune from liability.[26]

On June 22, 1998, the Supreme Court of the United States denied certiorari, declining to address the question of whether a computer service provider with notice of a defamatory third party posting is entitled to immunity under section 230 of the Communications Decency Act.[27] The Court's denial of certiorari leaves this question without a definitive answer.[28] The Court's denial ignores the social, political, and public concerns of ISP liability at the turn of the millenium. The *Zeran* decision has spawned a progeny of cases where ISPs are cloaked in the CDA, immunizing liability against their own reckless conduct.

This Comment argues that the Fourth Circuit decision in *Zeran* misapplied section 230 immunity, overextending protection to Internet Providers. Part I briefly introduces traditional defamation law concerning Publishers and Distributors, and on-line defamation law. Part II discusses the facts of *Zeran*, the district court's decision to grant AOL's motion for summary judgment, and the Fourth Circuit's affirmance. Part III argues that the Fourth Circuit incorrectly decided *Zeran* and proposes that section 230 immunity shielding Internet Providers from liability should not be extended to immunize such providers under the defamation standard applicable to Distributors. Accordingly, this Comment concludes that the Fourth Circuit wrongfully disregarded the legal distinction

23. 47 U.S.C.A. § 230(c)(1) (West Supp. 1999).

24. *See* Zeran v. America Online, Inc., 129 F.3d 327, 331-32 (4th Cir. 1997).

25. *See id.* at 332.

26. *See id.* at 332.

27. *See* Zeran v. America Online, Inc., __U.S.__, 118 S. Ct. 2342 (1998).

28. *See generally* Texas Const. Co. v. United States for Use of Caldwell Foundry & Mach. Co., 236 F.2d 138 (5th Cir. 1956) ("Federal Supreme Court's denial of certiorari is not an adjudication of anything.").

between Publishers and Distributors of defamatory material, provided Internet Providers unfettered protection beyond the scope of section 230, and placed Internet Providers on a level of First Amendment protection that far exceeds the Congressional goal of encouraging ISPs to self regulate.

## I. DEFAMATION AND CYBERSPACE

The *Restatement (Second) of Torts* defines a defamatory statement as a communication that tends "to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[29] Liability for defamation involves analysis of a combination of state laws, common law, and First Amendment principles.[30] Any unprivileged, false statement made to a third person concerning and harming a person's reputation is defamatory.[31] All that is required is an intent to communicate the statement to a third party, and thus, a desire to harm the person is unnecessary.[32]

Traditionally, defamation liability is based upon the status of the defamed.[33] To determine liability for defamation of a public figure, the plaintiffs must prove: (1) that the statement is false; (2) that the content defamed plaintiffs' reputation; (3) that the alleged defamatory statement is 'of and concerning' the plaintiff; and (4) that the defendant acted with knowledge that the statement was false or acted in reckless disregard of the truth.[34] Private plaintiffs, unlike public figures, do not need to prove actual malice, i.e. knowledge or reckless disregard.[35] However, a lesser standard of fault such as negligence is required.[36]

Section A briefly discusses traditional defamation law. Section B reviews significant cases involving on-line defamation law.

29. RESTATEMENT (SECOND) OF TORTS § 559 (1977).
30. *See* Michael Melton, *International Cyberspace Licensing Perils*, 496 PLI/PAT 95, 112 (1997).
31. *See id.*
32. *See id.*
33. *See id.*
34. *See* New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).
35. *See* Gertz v. Robert Welch Inc., 418 U.S. 323, 348 (1974).
36. *See id.*

Section C analyzes section 230 of the Communications Decency Act.

### A. *Traditional Defamation Law*

Defamation traditionally requires a "publication" by the defendant of a false and defamatory communication, of and concerning the plaintiff, to a third person, and which would have the effect of damaging the plaintiff's reputation.[37] A statement is considered published if it is communicated, either intentionally or negligently, to a third party who understands the communication.[38] A defamatory publication is libel if it is communicated by written or printed words or by any other means that has the permanent characteristic of written or printed words.[39]

Existing law has developed a sliding scale of liability for those who distribute defamatory information.[40] The general rule is that the more discretion a disseminator of information has to modify the published content, the higher is the disseminator's duty of care and corresponding liability.[41] Courts have divided third parties involved in defamation suits into three functional categories: the Common Carrier,[42] the Publisher,[43] and the Distributor.[44] Publish-

37. Kennedy v. Children's Serv. Soc'y of Wis., 17 F.3d 980, 983 (7th Cir. 1994); Guaranty Nat'l Ins. Co. v. International Ins., Co., 994 F.2d 1280, 1284 (7th Cir. 1993); RESTATEMENT (SECOND) OF TORTS § 577; *see also* Kean J. Decarlo, *Tilting at Windmills: Defamation and Private Person in Cyberspace*, 13 GA. ST. U. L. REV. 547, 558 (1997).

38. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 798 (5th ed. 1984); Decarlo, *supra* note 37, at 551.

39. *See* RESTATEMENT (SECOND) OF TORTS § 568; Decarlo, *supra* note 37, at 558.

40. *See* Decarlo *supra* note 37, at 552.

41. *See id.*

42. Common carriers, such as telephone, telegraph, and microwave communication services, enjoy immunity from liability for the transmission of defamatory messages, if they do not have knowledge of the defamer's lack of privilege to send the message. *See* Decarlo, *supra* note 37, at 558. This limited liability is based on the rationale that the common carrier has an obligation to serve the public, and it ensures efficiency and privacy to not require obtrusive monitoring of rapid, mechanical processing of voluminous, mundane messages. *See id.*; *see also* Douglas B. Luftman, *Defamation Liability for Online Services: The Sky is Not Falling*, 65 GEO. WASH. L. REV. 1071, 1083 (1997) (discussing the traditional principles of defamation law); Eric C. Jensen, *An Electronic Soapbox: Computer Bulletin Boards and the First Amendment*, 39 FED. COMM. L.J. 217, 249-52 (1987); Eric Schlachter, *supra* note 2, at 112 (1993).

43. *See* Luftman, *supra*, note 42 at 1083. This category encompasses the alleged

ers and Distributors exert some level of editorial control, which expose them to potential third party defamation liability.[45] The original defamer—the author or editor, as well as the publishers of magazines, newspapers, and books, are generally considered Publishers and are fully liable for defamation.[46] A Publisher is considered to have knowledge of the defamatory material because it is assumed that she is creatively involved in the process of publication.[47] Bookstores and libraries are Distributors and are liable only if they know or have reason to know that the information they are transmitting is defamatory.[48] Distributors are not required to investigate the contents of what they distribute in order to preclude liability.[49] The Distributor's ignorance of the defamatory material and her inability to modify the defamatory statement justifies this lower standard of liability.[50] On the other hand, a Common Carrier, such as a telephone company that exerts no editorial control over the content of its transmissions, is not subject to defamation liability because it merely acts as a passive conduit for information.[51]

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defamer and the initial Publisher of the statement, both of whom are referred to as the "primary Publisher," *see* Edward A. Cavazos, *Computer Bulletin Board Systems and the Right of Reply: Redefining Defamation Liability for a New Technology*, 12 REV. LITIG. 231, 234 (1992), as well as any subsequent Publisher of the statement, known as a "re-Publisher," *see* Jensen, *supra* note 42, at 247-49.

44. *See* Luftman, *supra* note 42, at 1083. Some commentators, including Loftus Becker and Eric Schlachter, use the term "secondary Publisher" to describe the category that this Comment refers to as a "Distributor." *See* Loftus E. Becker, Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 CONN. L. REV. 203, 215; Schlachter, *supra* note 67, at 112.

45. *See* Becker, *supra* not 44, at 215.

46. *See* KEETON, *supra* note 38, at 810; Decarlo, *supra* note 36, at 552.

47. *See* KEETON, *supra* note 38, at 810; Decarlo, *supra* note 36, at 552.

48. *See* RESTATEMENT (SECOND) OF TORTS § 581, cmt. d, e (1977); *see* KEETON, *supra* note 38,at 803-04; Decarlo, *supra* note 36, at 552.

49. RESTATEMENT (SECOND) OF TORTS § 581, cmt. d.

50. *See* Decarlo, *supra* note 36, at 552.

51. *See* Becker, *supra* note 44, at 215. ("the telephone company[ ] may pass information along but [is] not said to have published it and thus [is] not liable at all"); Schlachter, *supra* note 67, at 119.

1. Publisher Standard

A Publisher, such as a newspaper, that exerts comprehensive editorial control[52] over its distribution of information is liable for defamation if four elements are satisfied: (1) the statement at issue is false and defamatory; (2) the statement is an unprivileged communication to a third party; (3) the Publisher is at fault, amounting to at least negligence; and (4) the statement's communication causes harm.[53] The extent of the Publisher standard of liability was well articulated late in the Eighteenth Century in the New York case *Youmans v. Smith*.[54] The New York Court of Appeals held that "[h]e who furnishes the means of convenient circulation, knowing or having reasonable cause to believe that it is to be used for that [libelous] purpose, if it is in fact so used, is guilty of aiding in the publication, and becomes the instrument of the libeler."[55]

In *New York Times Co. v. Sullivan*,[56] the Supreme Court refused to hold a Publisher strictly or negligently liable for disseminating defamatory material.[57] Without confirming the accuracy of the statements, the defendant, New York Times, had printed an advertisement that falsely described police actions against civil rights activists in Montgomery, Alabama.[58] L.B. Sullivan, a Montgomery Police Commissioner, argued that these false accounts damaged his personal reputation and that the New York Times should be held liable for defamation.[59] The Court rejected this claim by declaring that the First Amendment guarantees the need for a degree of fault on the part of the Publisher before such liability attaches.[60] Moreover, a public official could not claim damages from a pub-

52. "Comprehensive" editorial control includes editing for offensiveness as well as for the truth of facts asserted, which often requires independent research. Eugene Volokh, *Chilled Prodigy*, REASON, Aug./Sept. 1995, at 50 (explaining the difference between varying levels of editorial control).

53. *See* RESTATEMENT (SECOND) OF TORTS § 588 (1977).

54. 153 N.Y. 214 (1897).

55. *Id.* at 218-19.

56. 376 U.S. 254 (1964).

57. *See id.* at 287.

58. *See id.* at 258-59, 261.

59. *See id.* at 256.

60. *See id.* at 278-79.

lished defamatory statement concerning his official conduct unless he established that the statement was made with "knowledge that it was false or with reckless disregard of whether it was false or not."[61] Without such knowledge or reckless disregard, a party is not liable for circulating defamatory statements about the official conduct of public officials.[62]

With regard to private individuals, the Supreme Court in *Gertz v. Robert Welch, Inc.*[63] reinforced *Sullivan* by holding that "so long as [the States] do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a Publisher . . . of defamatory falsehood injurious to a private individual."[64] Therefore, a Publisher may be subject to as little as a negligence standard when it prints a statement defaming a private individual.[65]

2. Distributor Standard

A Distributor exerts more editorial control than a Common Carrier but less than a Publisher.[66] A Distributor, like a bookstore owner, 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."[67] This imputation of fault based upon knowledge depends heavily upon the degree of editorial control that a party exerts over its mode of

61. *Id.* at 279-80.

62. *See id.*

63. 418 U.S. 323 (1974).

64. *Id.* at 347.

65. *See id.* at 347-48 & n.10; Luftman, *supra* note 42, at 1084.

66. *See* Luftman, *supra* note 42, at 1084; Cavazos, *supra* note 43, at 234, 237-38, 240 (discussing distinction between Publisher and Distributor).

67. RESTATEMENT (SECOND) OF TORTS § 581(1) (1977); Eric Schlachter, *Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 HASTINGS COMM. & ENT. L.J. 87, 118 (1993) (stating that Distributors "are liable for defamatory statements by others only if they 'knew or had reason to know of the existence of defamatory material contained in the matter published . . . [unless] (a) the originator had a privilege or (b) the disseminator reasonably believed that the originator had a privilege.'") (omission and alteration in original) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 810-11 (5th ed. 1984)).

distribution.[68]

In *Smith v. California*,[69] the Supreme Court first addressed the relationship between a Distributor's editorial control and its liability.[70] In *Smith*, a Los Angeles bookseller was convicted of violating a municipal ordinance that made "it unlawful 'for any person to have in his possession any obscene or indecent writing, [or] book . . . [i]n any place of business where . . . books . . . are sold or kept for sale.'"[71] The Court expressed a concern that "[b]y dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tend[ed] to impose a severe limitation on the public's access to constitutionally protected matter."[72] By holding booksellers to a strict liability standard, "'[e]very bookseller [was placed] under an obligation to make himself aware of the contents of every book in his shop.'"[73] A bookstore would likely respond to such a burdensome requirement by selling only those books that had been thoroughly inspected.[74] In effect, the ordinance restricted the sale of both obscene literature and constitutionally protected material.[75] The Court concluded that the ordinance's "tendency to inhibit constitutionally protected expression" was impermissible.[76] Accordingly, the Court held that the ordinance was unconstitutional because it made distribution of obscene material unlawful even in the absence of a Distributor's knowledge of the content.[77]

In *Auvil v. CBS 60 Minutes*,[78] a Federal District Court pursued a

68. *See* Luftman, *supra* note 42, at 1084; *see also* Heller v. Bianco, 244 P.2d 757, 759-60 (Cal. Dist. Ct. App. 1952) (holding that republication occurred when defendant tavern owner was on notice of a defamatory message on a bathroom wall but allowed the message to remain); *but see* Scott v. Hull, 259 N.E.2d 160, 162 (Ohio Ct. App. 1970) (holding that a building owner who failed to remove defamatory graffiti painted on the building was not liable in the absence of an affirmative act.).

69. 361 U.S. 147 (1959).

70. *See id.* at 148-49.

71. *Id.* at 148 (quoting Los Angeles, Cal., MUNI. CODE § 41.01.1 (declared unconstitutional in 1959)).

72. *Id.* at 153.

73. *Id.* (quoting The King v. Ewart [1905] 25 N.Z.L.R. 709, 729 (C.A.)).

74. *See id.* at 153-54.

75. *See id.* at 154

76. *Id.* at 155.

77. *See id.*

78. 800 F. Supp. 928 (E.D. Wash. 1992).

similar approach by focusing on the degree of knowledge or, more specifically in that case, the degree of editorial control that a CBS television affiliate exerted over a network-produced program.[79] In *Auvil*, nearly five thousand Washington apple growers filed a defamation suit against CBS affiliates for broadcasting an episode of "60 Minutes" criticizing the use of "Alar," a growth regulator heavily relied upon by the apple industry.[80] The program publicized various public interest groups' concerns about research indicating that "Alar" chemically degrades into a carcinogen.[81] The broadcast prompted the removal of "Alar" from the market.[82] As a result, growers who depended upon "Alar" sustained losses amounting to as much as $75 million.[83] Although, on earlier occasions, the CBS affiliates had censored other CBS programs, in this case, the parties did not dispute that the affiliates exercised no editorial control over the "60 Minutes" broadcast.[84] The plaintiff contended, however, that the CBS affiliates had a duty to censor[85] because the affiliates possessed a telexed communiqué describing the "60 Minutes" piece[86] and had three hours prior to air time to visually review the program.[87] The court rejected this argument for two reasons.[88] First, the court concluded that the duty to censor might arise only if the broadcast was not an original piece, like a "re-run movie[ ], the content of which is already widely known and/or catalogued."[89] In this case, "[t]here was not a hint . . . that

79. *See id.* at 931-32.

80. *Id.* at 930-31.

81. *Id.* at 930.

82. *Id.*

83. *Id.* at 930-31.

84. *See id.* at 931.

85. *See Auvil*, 800 F. Supp. at 931.

86. The telex read, "A is For Apple—Ed Bradley reports on the inability of federal regulators [sic] eliminate known carcinogenic chemical sprayed on produce. (Shot in Seattle, Spokane; Minneapolis; Portland O.; Albany; Boston and Washington)." *Id.* at 932 (alteration in original).

87. The three-hour lead time was due only to the fact that these CBS affiliates were on the West Coast, but the program was transmitted by satellite to the affiliates at the time of the East Coast broadcast. *See id.* at 931. Thus, affiliates on the East Coast had no time to review the program in advance of airing. *See id.* at 932; *see also* Luftman, *supra* note 42, at 1086.

88. *See id.*

89. *Id.*

the content would be defamatory."[90] Second, the court expressed a concern that if the affiliates had a duty to censor in this situation, affiliates would be forced to create "full time editorial boards . . . which possess sufficient knowledge, legal acumen and access to experts to continually monitor incoming transmissions and exercise on-the-spot discretionary calls."[91] The court, therefore, absolved the affiliates of any defamation liability.[92]

Unlike *Auvil*, in which the defendant affiliates did not exercise editorial control, a New York state court in *Misut v. Mooney*[93] dealt with the issue of whether a contract printer[94] that reviewed fifteen articles prior to publication had exercised enough editorial control to establish the requisite knowledge for defamation liability.[95] The defendant's editorial control over the articles entailed "scrutiniz[ing] the offered materials for nudity, profanity and vulgarity for the purpose of eliminating such elements from the final, printed version."[96] The court observed that aside from its objective review of the content for obviously offensive material, the defendant "had no other input into the material which it printed."[97] Because the printer neither attempted to confirm the underlying facts or sources in the articles nor exercised any "editorial judgment,"[98] the court concluded that the defendant merely acted as a "mechanical means of printing."[99] Because the defendant printer lacked comprehensive editorial control over the publication, particularly with respect to the truth of the statements in the articles, the court found that actual or constructive knowledge of the publication's libelous contents did not exist and, accordingly, dismissed the plaintiff's defamation claim.[100]

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90. *Id.* at 932.
91. *Id.* at 931.
92. *See id.* at 932.
93. 475 N.Y.S.2d 233 (Sup. Ct. 1984).
94. A "contract printer" provides printing facilities and services for Publishers and writers. *See id.* at 233.
95. *See id.*
96. *Id.*
97. *Id.*
98. *See id.* at 234-36.
99. *Id.* at 233-34.
100. *See id.* at 236-37.

Under these three traditional defamation cases, a Distributor's liability is dependent upon whether it had notice of the defamatory nature of the material that it distributed.[101] *Auvil* further suggests that a Distributor generally does not have a duty to determine whether the material it distributes is defamatory.[102] When a Distributor exercises some editorial control, *Misut* holds that constructive notice is not established unless the Distributor's actual "editorial judgment" exceeded the mere mechanical activities of distributing information.[103] Thus, in the absence of comprehensive editorial control, a Distributor does not have the requisite notice to be found liable for distributing defamatory material.[104]

### B. *On-line Defamation Law*

ISPs faced similar issues of editorial control and defamation liability, just as the pioneers of previously emerging media like the telephone,[105] broadcast television,[106] and cable television[107] confronted fundamental First Amendment and defamation issues that have come to define their very nature.[108] Courts have provided a framework for determining whether ISPs are held to a Publisher standard by applying a sliding scale of editorial control, from comprehensive editorial control to no control at all.[109] Eventually, dis-

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101. *See* Smith v. California, 361 U.S. 147, 154 (1959); Auvil v. CBS "60 Minutes", 800 F. Supp. 928, 931-32 (E.D. Wash. 1992); *Misut*, 475 N.Y.S.2d at 236.

102. 800 F. Supp. at 931-32.

103. 475 N.Y.S.2d at 233, 236.

104. *See* Luftman, *supra* note 42, at 1087.

105. *See* Philip H. Miller, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L. REV. 1147, 1162-67 (1993); Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1065-66 (1994).

106. *See* Miller, *supra* note 105, at 1170-76; Note, *supra* note 105, at 1070-75.

107. *See* Miller, *supra* note 105, at 1080-89; Note, *supra* note 105, at 1075-76, 1079-80.

108. R. Hayes Johnson, Jr., *Defamation in Cyberspace: A Court Takes a Wrong Turn on the Information Superhighway in Stratton Oakmont, Inc. v. Prodigy Services Co.*, 49 ARK. L. REV. 589, 614 & n.112 ("New technologies always have created wrinkles in Defamation law."); Luftman, *supra* note 42, at 1088.

109. *See* Luftman, *supra* note 42, at 1088; *see, e.g.*, Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139-41 (S.D.N.Y. 1991); Daniel v. Dow Jones & Co., 520 N.Y.S.2d 334, 337-38 (Civ. Ct. 1987); *see also* Schlachter, *supra* note 44, at 116-19; Jeffrey E. Faucette, *The Freedom of Speech at Risk in Cyberspace: Obscenity Doctrine and a Frightened University's Censorship of Sex on the Internet*, 44 DUKE L.J. 1155, 1172

solution by judicial decisions, Congress made the determination whether an ISP is a Publisher a moot point.[110]

1. *Daniel v. Dow Jones & Co.*

In *Daniel v. Dow Jones & Co.*,[111] one of the early on-line tort cases, the court applied a functional analysis and found that an on-line service was analogous to a Distributor or, more specifically, a news vendor.[112] The defendant, Dow Jones News/Retrieval, was an on-line service that provided its users with electronic news reports.[113] The plaintiff, a securities investor, alleged that he was harmed by a mistake in a report relating to the restructuring of a Canadian corporation.[114] The report failed to mention that the cited prices were in Canadian, not American, currency.[115] The court rejected the plaintiff's claim because the plaintiff's relationship to Dow Jones was "functionally identical to that of a purchaser of a newspaper."[116] Accordingly, the court granted Dow Jones's motion to dismiss because a seller of news, whether in paper or electronic form, is not liable for false statements in the reports.[117]

2. *Cubby, Inc. v. CompuServe, Inc.*

In *Cubby, Inc. v. CompuServe, Inc.*,[118] the United States District Court for the Southern District of New York affirmed the functional approach from *Daniel*, by applying the *Smith* doctrine[119] to on-line defamation issues.[120] The *Cubby* court equated a commercial on-line service to a Distributor, like a bookstore or electronic

(1995) ("Network operators face a 'sliding scale' of analogous roles running from primary Publisher to [Distributor] to common carrier.").

110. *See* David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 160 (1997).

111. 520 N.Y.S.2d 334 (Civ. Ct. 1987).

112. *See id.* at 337.

113. *See id.* at 335.

114. *See id.*

115. *See id.*

116. *Id.* at 337.

117. *See id.* at 337-38, 340.

118. 776 F. Supp. 135 (S.D.N.Y. 1991).

119. *See* Smith v. California, 361 U.S. 147, 152-53 (1959); *supra* Part I.B.

120. *See Cubby*, 776 F. Supp. at 139-40.

library.[121] Similar to Dow Jones News/Retrieval, CompuServe offered its users on-line information.[122] The plaintiffs alleged that CompuServe was liable for distributing the Journalism Forum's[123] electronic newsletter, Rumorville USA, which allegedly carried false and defamatory statements about the plaintiffs.[124] CompuServe, however, did not have an opportunity to review the electronic publication's content before the newsletter was loaded onto its system.[125]

The court responded to the plaintiffs' complaint by observing that third-party defamation liability arises only if that party "'repeats or otherwise republishes defamatory matter.'"[126] In this case, the court affirmed that "'vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation.'"[127] The court characterized CompuServe's computerized databases as a "functional equivalent of a more traditional news vendor" and alternatively as an "electronic library."[128]

Drawing on the logic of *Smith*, the court further explained that "CompuServe [had] no more editorial control over such a publication than [did] a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carrie[d] for potentially defamatory statements than it would be for any other distributor to do so."[129] The court added that, although "CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's

121. *See id.* at 140.

122. *See id.* at 137.

123. The Journalism Forum, like most forums on CompuServe, is operated by third parties who, under a contract with CompuServe, "'manage, review, create, delete, edit and otherwise control the contents' of the Journalism Forum." *Id.*

124. *See id.* at 137-38.

125. *See id.* at 137.

126. *Id.* at 139 (quoting Cianci v. New Times Publ'g Co., 639 F.2d 54, 61 (2d Cir. 1980)).

127. *Id.* (quoting Lerman v. Chuckleberry Publ'g, Inc., 521 F. Supp. 228, 235 (S.D.N.Y. 1981)).

128. *Id.* at 140.

129. *Id.* at 137.

contents."[130] Because CompuServe is a nationwide electronic Distributor of information, like a national Distributor of hundreds of periodicals, it has "'no duty to monitor each issue of every periodical it distributes.'"[131] To hold otherwise, the court observed, "would impose an undue burden on the free flow of information."[132] Moreover, the court reasoned, reviewing every publication accessible to subscribers would be difficult and impractical.[133]

### 3. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*

Unlike *Cubby*, which involved a commercial on-line service's "electronic library" feature, *Stratton Oakmont, Inc. v. Prodigy Services Co.*[134] concerned issues of editorial control over a bulletin board system[135] ("BBS") forum postings.[136] This case arose out of allegedly defamatory statements posted to Prodigy's "Money Talk" BBS forum[137] about Stratton Oakmont, an investment banking firm, and its president, Daniel Porush.[138] Unable to identify the alleged defamer, Stratton Oakmont sued Prodigy for allowing the message to be posted.[139] On a motion for partial summary judgment, the court held Prodigy to a Publisher's standard for liability purposes, distinguishing the case from Cubby and that court's application of the Distributor standard to CompuServe.[140] The court

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130. *Id.* at 140.

131. *Id.* (quoting Lerman v. Flynt Distrib. Co., 745 F.2d 123, 139 (2d Cir. 1984)).

132. *Id.*

133. *See id.*

134. 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995).

135. A bulletin board system ("BBS") is a central system accessed using a computer, a modem, phone lines, or a network connection, where data is placed by users for dissemination to one or more other users. *See* Joseph J. Cella & John Reed Stark, *SEC Enforcement and the Internet: Meeting the Challenge of the Next Millennium a Program for the Eagle and the Internet*, 1022 PLI/CORP 79, 82 (1997). BBS's are inexpensive to create and easy to maintain. *See* Schlechter, *supra* note 2, at 91. Technically, ISP's such as AOL are actually huge BBSs. Generally, most BBSs are much smaller. *See* Cella & Stark, *supra*; DANIEL P. DERN, THE INTERNET GUIDE FOR NEW USERS 196-98 (1994).

136. *See id.*

137. "Money Talk" receives an estimated 12,000 to 15,000 messages per month. *See* Luftman, *supra* note 42, at 1090; Richard P. Hermann II, *Who Is Liable for On-line Libel?*, 8 ST. THOMAS L. REV. 423, 431 n.54 (1996).

138. *See Stratton*, 23 Media L. Rep. (BNA) at 1795.

139. *See id.*

140. *See id.*

differentiated Prodigy from CompuServe by observing, "[f]irst, Prodigy held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, Prodigy implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce."[141] The court concluded that Prodigy's use of technology and manpower to edit offensive postings transformed Prodigy from a Distributor of information to an on-line service that, like a newspaper, "is clearly making decisions as to content."[142]

The court dismissed Prodigy's argument that it's editorial "control is not complete" by explaining that Prodigy assumed a "role of determining what is proper for its members to post and read on its bulletin boards."[143] Because Prodigy "virtually created an editorial staff of Board Leaders who have the ability to continually monitor incoming transmissions and in fact do spend time censoring notes,"[144] the court found that Prodigy should not be regarded as analogous to a bookstore or network affiliate.[145] Thus, implicitly relying upon a "sliding scale" analysis of on-line services, the court asserted that its finding Prodigy a "Publisher" was nonetheless "in full agreement with *Cubby* and *Auvil*."[146]

Following the court's decision holding Prodigy to a Publisher's standard, Prodigy obtained new counsel and filed a motion for renewal and/or re-argument on the issue of whether Prodigy was a Publisher.[147] Prior to the court's ruling on this motion, Stratton Oakmont agreed to settle the dispute with Prodigy if the court vacated its finding that Prodigy was equivalent to a Publisher.[148] The court refused to allow such a condition to be part of a settlement agreement and denied Prodigy's motion for renewal.[149] Neverthe-

141. *Id.*

142. *Id.* ("The choice of material to go into a newspaper, and the decisions made as to . . . content of the paper . . . constitute the exercise of editorial control and judgment." (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974))).

143. *Id.*

144. *Id.*

145. *See id.*

146. *Id.*

147. *See id.*

148. *See id.*

149. *See id.*

less, Stratton Oakmont and Prodigy settled the suit.[150]

Regardless of the distinction between the treatment of Prodigy in *Stratton Oakmont* and CompuServe in *Cubby*, the treatment of Prodigy was the same as is accorded any newspaper for a message printed on a Letters to the Editor page.[151] Furthermore, although one may argue that CompuServe's treatment in *Cubby* was unfairly lenient compared to the treatment accorded Prodigy in *Stratton Oakmont*, CompuServe's treatment was eminently fair compared to that afforded other Distributors, such as libraries and newsstands.[152] Nonetheless, *Stratton Oakmont* created a minor sensation.[153] The paradox existed that ISPs that tried to provide decent, family-oriented content were subject to defamation lawsuits and liability on account of their efforts, while those who made no efforts to control content would be free of liability.[154] Congress eventually resolved the debate.[155]

### C. *Section 230 of the Communications Decency Act of 1996*

The main focus of the Communications Decency Act of 1996, which constitutes Title V of the Telecommunications Act of 1996,[156] is to promote decency.[157] The CDA was signed into law and became effective on February 8, 1996.[158] In introducing the Act, Senator James Exon stated that the "information superhighway should not become a red light district."[159] The CDA "will

150. *See* Elizabeth Corcoran, *$200 Million Libel Suit Against Prodigy Dropped: On-Line Industry Had Worried About Case*, WASH. POST, Oct. 25, 1995, at F2.

151. *See* Sheridan, *supra* note 110, at 159.

152. *See id.*

153. *See* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 62 nn.51-52 (1996).

154. *See* Sheridan, *supra* note 110, at 159.

155. *See id.*

156. Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 15 & 47 U.S.C.).

157. *See* Sheridan, *supra* note 110, at 159.

158. *See* Zeran v. America Online, Inc., 958 F. Supp. 1124, 1129 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

159. 141 CONG. REC. S1953 (daily ed. Feb. 1, 1995). The Senator's concern about pornography proliferating on the Internet was not necessarily unfounded. Smut peddlers apparently are prospering on the Internet while other types of businesses struggle. *See* Sheridan, *supra* note 110, at 159. However, the Senator's concern that indecencies

keep that from happening and extend the standards of decency which have protected telephone users to new telecommunications devices. Once passed, our children and families will be better protected from those who would electronically cruise the digital world to engage children in inappropriate communications and introductions."[160] Finally, the CDA "will also clearly protect citizens from electronic stalking and protect the sanctuary of the home from uninvited indecencies."[161]

Section 230 of the CDA, titled "Protection for private blocking and screening of offensive material," represents an initial Federal effort to define the appropriate scope of Federal regulation of the Internet.[162] In enacting section 230, Congress found that the "rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens."[163] These services "offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops."[164] As well, Congress recognized that the Internet and other interactive computer services "offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[165] These services "have flourished, to the benefit of all Americans, with a minimum of government regulation. Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services."[166]

Section 230 specifically states various policy reasons behind the enactment of the statute.[167] First, section 230 is to promote the

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would come into the home "uninvited" was rejected by the court in *ACLU v. Reno*, 929 F. Supp. 824, (E.D. Pa. 1996), which stated that "[u]sers seldom encounter content 'by accident.'" *Id.* at 844.

160. 141 CONG. REC. S1953 (daily ed. Feb. 1, 1995).

161. *Id.*

162. Zeran, 958 F. Supp. at 1129 (citing 47 U.S.C.A. § 230).

163. 47 U.S.C.A. § 230(a)(1)-(5) (West Supp. 1999).

164. *Id.*

165. *Id.*

166. *Id.*

167. *See id.* § 230(b).

continued development of the Internet and other interactive computer services and other interactive media.[168] Second, section 230 is to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.[169] Third, section 230 is to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services. As well, section 230 is to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material.[170] Lastly, section 230 is to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.[171]

Prodigy faced liability in *Stratton Oakmont* because it had taken steps, or at least said it had taken steps, to prevent dissemination of material over its service that was lewd and lascivious.[172] Consequently, to protect a service such as Prodigy from liability based upon its efforts to prevent dissemination of lewd and lascivious material over its network, Congress passed section 230, which states that a provider or user of an interactive computer service will not be held liable for two types of actions.[173] A provider or user of interactive computer service will not be held liable for "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 . . . ."[174] As well, such provider or user of an interactive computer service will not be held liable for "any action taken to enable or make available to information content providers or others the technical means to restrict access to material [that is the pro-

168. *See id.* § 230(b)(1).
169. *See id.* § 230(b)(2).
170. *See id.* § 230(b)(3).
171. *See id.* § 230(b)(4).
172. 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995).
173. *See* 47 U.S.C.A. § 230(c)(2); *see also* Sheridan, *supra* note 110, at 160.
174. *Id.*

vider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected]."[175]

The language of section 230(c)(2) seems broad enough to preclude a finding that a service is a Publisher merely because it makes efforts to restrict content.[176] Congress also enacted section 230(c)(1), which states that "[n]o 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."[177] An information content provider is defined in section 230(e)(3) 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."[178]

The conference report on section 230 specifically states that "[t]his section provides 'Good Samaritan' protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material."[179] The conference report further reveals that "[o]ne of the specific purposes of [section 230] is to overrule *Stratton-Oakmont v. Prodigy* 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."[180] Finally, the report concluded that "[t]he conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services."[181]

Section 230(c) is entitled "Protection for 'Good Samaritan' blocking and screening of offensive material."[182] Section 230(c)(2) indeed provides protection from Good Samaritan liability in im-

175. *Id.*

176. *See* Sheridan, *supra* note 110, at 160.

177. 47 U.S.C.A. § 230(c)(1).

178. *Id.* § 230(e)(3).

179. S. CONF. REP. No. 104-230, at 435 (1996); *see also* Sheridan *supra* note 110, at 159;

180. *Id.*

181. *Id.*

182. 47 U.S.C.A. § 230(c).

munizing someone who does something perceived as good in restricting access to offensive material, from suffering a consequence that is seen as bad, being held liable as a Publisher or speaker.[183] Arguably, section 230(c)(1) hardly qualifies as Good Samaritan protection since in order to qualify for protection, one need merely be a provider or user of an interactive computer service.[184] These activities are not self-evidently an unmitigated good.[185]

On its face however, section 230(c)(1) does not absolve an operator or user from all liability.[186] More importantly, for purposes of construing the statute, as discussed in *Stratton Oakmont*, the case which section 230 was intended to overrule, there are at least two kinds of liability—Publisher liability and Distributor liability.[187] Section 230(c)(1) states only that providers and users of interactive computer services shall not incur liability as Publishers or speakers of information provided by other content providers.[188] It does not say that they cannot be held liable as Distributors.[189] Indeed, one could argue from the enumeration of Publisher and speaker in section 230(c)(1) that Distributor was deliberately omitted.[190] However, the first court to construe the CDA held otherwise.[191]

## II. *ZERAN V. AMERICA ONLINE, INC.*

### A. *Facts*

At 9:02 a.m. on April 19, 1995, a car bomb went off with a thunderous explosion, ripping through the Alfred P. Murrah Federal Building in Oklahoma City, collapsing walls and floors, killing 168 people including nineteen children, injuring hundreds and

183. *See* Sheridan, *supra* note 110, at 161.
184. *See* 47 U.S.C.A. § 230(c).
185. *See* Sheridan, *supra* note 110, at 161.
186. *See id.*
187. *See id.*
188. 47 U.S.C.A. § 230(c)(1).
189. *See id.*; *see also* Sheridan, *supra* note 110, at 161 (discussing the enactment of Section 230).
190. *See* Sheridan, *supra* note 110, at 161.
191. *See* Zeran v. America Online, Inc., 958 F. Supp. 1124, 1133 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied* __U.S.__, 118 S. Ct. 2341 (1998).

horrifying a nation.[192] By April 25th, Federal Investigators had pieced together a circumstantial case against Timothy J. McVeigh,[193] a Persian Gulf War Veteran decorated with the Bronze Star.[194] Officials based their charges against McVeigh on his identification by witnesses, forensic evidence, and correspondence in which McVeigh vented his rage at the United States Government over the death of Branch Davidians in Waco, Texas.[195]

In the Spring of 1995, Kenneth M. Zeran operated a publishing business from his home in Seattle, Washington.[196] Zeran's publications included a monthly listing of apartments available in the Puget Sound area of Seattle.[197] At 2:54 p.m. on April 25, 1995, a notice appeared on AOL's bulletin board authored by an unknown person or persons identified only as "Ken ZZ03" and titled "Naughty Oklahoma T-Shirts."[198] The notice advertised T-shirts with vulgar and offensive slogans related to the Oklahoma City tragedy.[199] Readers were invited to call "Ken," at Zeran's telephone number.[200] Zeran's publication listings, as well as his other

192. *See* John Kifner, *Terror in Oklahoma City: At Least 31 are Dead, Scores are Missing After Car Bomb Attack in Oklahoma City Wrecks 9-Story Office Building*, N.Y. TIMES, Apr. 20, 1995, at A1; Jo Thomas, *The Oklahoma City Bombing: McVeigh Guilty on All Counts in the Oklahoma City Bombing, Jury to Weigh Death Penalty*, N.Y. TIMES, June 3, 1997, at A1.

193. On June 3, 1997, a Federal jury found Timothy J. McVeigh guilty on eleven counts of conspiracy and murder. *See* Thomas, *supra* note 192, at A1. They concluded that he had conspired with Terry L. Nichols, a friend he had met while they were both in the U.S. Army, and others unknown, to use a truck bomb to destroy the Alfred P. Murrah Federal Building on April 19, 1995. *See id.* The jury found Mr. McVeigh guilty of first-degree murder in the deaths of eight Federal law-enforcement agents who were at work in the building that day. *See id.*

194. *See* David Johnston, *Terror in Oklahoma: Oklahoma Bombing Plotted for Months, Officials Say*, N.Y. TIMES, Apr. 25, 1995, at A1.

195. *See id.* Branch Davidians were a religious group that followed David Koresh, a self-described messiah. *See* Sam Howe Verhovek, *Death in Waco: Scores Die as Cult Compound is Set Afire After FBI Sends in tanks With Tear Gas*, N.Y. TIMES, Apr. 20, 1993, at A1. Eighty Branch Davidians including Koresh perished when their compound in Waco Texas went ablaze on April 19, 1993 after Federal Agents sprayed tear gas inside. *See id.*

196. *See* Zeran v. America Online, Inc., 958 F. Supp. 1124, 1127 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

197. *See id.*

198. *See id.*

199. *See id.*

200. *See id.*

commercial ventures, depended on his ability to communicate frequently with businesses via a publicized telephone number.[201] This publicized telephone number was the number listed in the bogus AOL notice.[202] Zeran never subscribed to AOL's Internet services and was never involved in any way with the sale of the advertised T-shirts.[203]

Zeran was inundated with calls, most of which were derogatory and some of which included death threats and intimidation.[204] On April 25, 1995, the day the notice first appeared, Zeran also received a call from a reporter investigating the advertisement of the tasteless T-shirts.[205] Zeran informed the reporter that he was neither responsible for, nor associated with, the advertisement, and that he planned to contact AOL to demand prompt removal of the notice and a retraction.[206] Zeran did precisely this that same day, and an AOL representative assured him that the offending notice would be removed.[207] However, as a matter of policy, AOL declined to post a retraction on its network.[208] Zeran, to his dismay, continued to be inundated with offensive and threatening telephone calls.[209] Unable to suspend or change his telephone number due to business necessity, Zeran was forced to tolerate the harassment and threats occasioned by the hoax.[210]

While the first notice was deleted from AOL by April 26, 1995, a new notice appeared on the network that same date under a slightly modified identifier of "Ken ZZ033."[211] This second notice declared that some T-shirts from the prior day's notice had "SOLD OUT," and announced that several new slogans were now avail-

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201. *See id.*

202. Zeran v. America Online, Inc., 958 F. Supp. 1124, 1127 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

203. *See id.*

204. *See id.*

205. *See id.*

206. *See id.*

207. *See id.*

208. *See* Zeran v. America Online, Inc., 958 F. Supp. 1124, 1127 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

209. *See id.*

210. *See id.*

211. *See id.*

able.[212] The new slogans were at least as vulgar and offensive as those listed in the prior day's notice.[213] Among the new slogans were "*Forget the Rescue, Let the Maggots Take Over—Oklahoma 1995*," and "*Finally a Day Care Center That Keeps the Kids Quiet—Oklahoma 1995*."[214] The second notice also announced that one dollar from every sale would be donated to the victims of the bombing.[215] The new notice ended by listing Zeran's first name and telephone number.[216]

Zeran learned of the second notice when he received a telephone call on from a reporter who faxed him a printed copy of the new AOL posting.[217] Again, the barrage of threatening and angry phone calls began, receiving one approximately every two minutes.[218] Zeran once again called AOL to demand that AOL delete the notice and take steps to block further bogus messages using his name and phone number.[219] An AOL operator advised him that steps were being taken to delete the notice and terminate the account that was posting the notices.[220] The operator also suggested to Zeran that he call the police and report this incident.[221] Zeran accepted this suggestion and called the FBI in Seattle to report the situation. Despite AOL's assurance that the notice would be promptly deleted, various similarly offensive notices continued to appear through May 1, 1995. These notices, like those posted earlier, purported to be authored by "Ken Z033" and advertised offensive Oklahoma City bombing paraphernalia, including bumper stickers, key chains and T-shirts, and even computer software and hardware packages.

A copy of the April 29 notice was brought to the attention of

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212. *See id.*

213. *See id.*

214. Zeran v. America Online, Inc., 958 F. Supp. 1124, 1127 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

215. *See id.*

216. *See id.*

217. *See id.*

218. *See id.*

219. *See id.*

220. *See* Zeran v. America Online, Inc., 958 F. Supp. 1124, 1127-28 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

221. *See id.* at 1128.

Mark Shannon, a broadcaster at radio station KRXO in Oklahoma City.[222] An AOL subscriber using the screen name "EckieA" and identifying himself as "Eck (Hollywood) Prater," e-mailed a copy of the April 25 AOL posting to Mark Shannon.[223] Shannon, who did not know Prater, tried unsuccessfully to e-mail Kenn ZZ03 through AOL.[224] Shannon learned that Ken ZZ03 was not an AOL member or was no longer using that screen name.[225] Shannon did not attempt to call the phone number listed on the advertisement.[226] On May 1, 1995, Shannon read the slogans from the notice on the air, and encouraged listeners to call "Ken" at Zeran's telephone number to register their disgust and disapproval.[227] Zeran was once again bombarded with a cascade of threatening, intimidating, and angry telephone calls.[228] Seattle police kept Zeran's house under protective surveillance because some callers were ominously threatening and abusive.[229] Although an Oklahoma City newspaper ran a story exposing the T-shirt advertisements as a hoax and KRXO broadcast an apology, the deluge of threatening and abusive telephone calls persisted.[230] Not until May 15, 1995, did the threatening and abusive telephone calls subside to approximately fifteen per day.[231]

Zeran filed suit on January 4, 1996, against radio station KRXO in the United States District Court for the Western District of Oklahoma, asserting defamation, false light invasion of privacy, intentional infliction of emotional distress, and punitive damages claims.[232] The United States District Court for the Western District of Oklahoma on December 29, 1997 dismissed the suit against KRXO.[233] KRXO contended that it was entitled to summary judg-

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222. *See id.*

223. Zeran v. Diamond Broad. Inc., 19 F. Supp. 2d 1249, 1251 (W.D. Okla. 1997).

224. *See id.*

225. *See id.*

226. *See id.*

227. *See* Zeran v. America Online, Inc., 958 F. Supp. 1124, 1127-28 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

228. *See id.*

229. *See id.*

230. *See id.* at 1127.

231. *See id.*

232. *See id.*

233. *See* Zeran v. Diamond Broad. Inc., 19 F. Supp. 2d 1249, 1251 (W.D. Okla.

ment because Zeran had not demonstrated the special damages required to sustain a slander per quo claim.[234] KRXO claimed that the broadcast was not "of and concerning" Zeran, there was no actual injury to his reputation; he could not prove any false statement of fact, and he could not establish fault.[235] Judge Ralph G. Thompson for the Western District of Oklahoma agreed and granted KRXO's motion for summary judgment.[236] Judge Thomson held that even assuming that Zeran had demonstrated the requisite "special damages," the evidence was insufficient to establish any injury to his reputation.[237]

In April 1996, Zeran filed a separate action against AOL in the same court, alleging that AOL was negligent in failing to respond adequately to the bogus notices on its bulletin board after being made aware of their malicious and fraudulent nature under the theory that Distributors of information are liable for the distribution of material, which they knew or should have known was of a defamatory character.[238] In response, AOL filed a motion to dismiss for failure to state a claim, or in the alternative, to transfer the action from Oklahoma to Eastern District of Virginia, where AOL maintains its headquarters.[239] On October 16, 1996, the United States District Court for the Western District of Oklahoma granted AOL's motion to transfer.[240]

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1997).

234. *See id.* Under Oklahoma law, defamation characterized statutorily as slander is "a false and unprivileged publication which (1) charges a person with a crime; (2) accuses him of having an infectious, contagious or loathsome disease or (4) being impotent or promiscuous; (3) maligns him with respect to his office, profession, trade or business, or (5) by its natural consequences, causes actual damage." OKLA. STAT. tit. 12, § 1442 (1991). Judge Ralph G. Thompson held that the "only possible category into which the KXRO broadcast can fall is § 1442(5), which constitutes slander per quod." Zeran v. Diamond Broad. Inc., 19 F. Supp. 2d at 1252.

235. *See Zeran v. Diamond Broad. Inc.*, 19 F. Supp. 2d at 1252.

236. *See id.*

237. *See id.*

238. *See* Zeran v. America Online, Inc., 958 F. Supp. 1124, 1128-29 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

239. *See id.*

240. *See id.* at 1127.

B. *District Court*

After reviewing all relevant facts, District Court Judge Thomas S. Ellis III, held that Zeran's common-law negligence claim against AOL for negligent distribution of defamatory material on AOL's bulletin board directly conflicted with the CDA's prohibition against treating ISPs as Publishers or speakers and thus, was preempted.[241] Judge Ellis recognized that Congress may expressly preempt an entire field of regulation, so that any state law in that field is invalid even if it does not directly conflict with federal law.[242] The court noted that the CDA did not expressly preempt the field of liability for providers of online interactive computer services.[243] The court stated that "Congress's purpose in enacting [section 230] was not to preclude any state regulation of the Internet, but rather to eliminate obstacles to the private development of blocking and filtering technologies capable of restricting inappropriate online content."[244] The court then noted that "even where Congress does not intend to occupy a field exclusively, the Supremacy Clause commands preemption of state laws to the extent that such laws directly conflict with federal law."[245]

The court identified three types of conflicts between State and Federal laws that give rise to preemption.[246] The court observed that "[n]othing in the CDA imposes a duty on AOL that would conflict with a State law duty to avoid negligent distribution of defamatory material," and found the first type of preemption inapplicable.[247] The second type involves conflict between State law and "the express language of a Federal statute."[248] The court noted that

241. *See id.* at 1134.

242. *See id.* at 1129-30. Section 230(d)(3) states that "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C.A. § 230(d)(3) (West Supp. 1999).

243. *See Zeran*, 958 F. Supp. at 1130.

244. Zeran v. America Online, Inc., 958 F. Supp. 1124, 1131 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

245. *Id.*

246. *See id.*

247. *Id.* at 1132.

248. *Id.*

the CDA provided that no operator of an interactive computer service was to be treated as the "Publisher or speaker" of material provided by another information content provider.[249] The court reasoned that "a Publisher is not merely one who intentionally communicates defamatory information. Instead, the law also treats as a Publisher or speaker one who fails to take reasonable steps to remove defamatory statements from property under her control."[250] The court concluded, that Distributor liability treats a Distributor as a Publisher and is inconsistent with the CDA.[251]

Judge Ellis also considered the third type of preemption, which arises if State tort liability is an obstacle to the accomplishment of the full purposes and objectives of Congress in enacting section 230.[252] The court quoted section 230(a)(3) and (4), which state "it is the policy of the United States . . . to encourage the development of technologies which maximize user control over what information is received by . . . interactive computer service [users, and] to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material."[253] The court noted that the legislative history suggested that "the 'disincentive' Congress . . . had in mind was liability of the sort described in *Stratton Oakmont*."[254] Judge Ellis stated that subsection (c)(2), which precludes liability based upon good faith actions to restrict access to objectionable material, is intended to immunize providers and users against liability to persons whose content is blocked.[255] The court reasoned that subsection (c)(1), which provides broad protection against liability as a speaker or Publisher is intended to bar liability of the type imposed in *Stratton Oakmont* and proposed in *Zeran*.[256]

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249. *Id.*

250. Zeran v. America Online, Inc., 958 F. Supp. 1124, 1133 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

251. *See id.*

252. *See id.* at 1134.

253. *See id.* (citing 47 U.S.C.A. § 230(a)(3)-(4)).

254. *Id.* (citing H.R. REP. NO. 104-458, at 194 (1996).

255. *See Zeran*, 958 F. Supp. at 1134 n.22.

256. *See* Zeran v. America Online, Inc., 958 F. Supp. 1124, 1134 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

The court stated that if interactive computer services were subject to Distributor liability, which depends upon knowledge or reason to know of the content of the communication, then they would have an incentive to ensure ignorance of the content of the communications on their sites or networks.[257] The court concluded that Congress wanted such services to "review online content and delete objectionable material . . . ."[258]

### C. *Court of Appeals for the Fourth Circuit*

Zeran appealed the decision of Judge Ellis, granting AOL's motion for judgment on pleadings, arguing that section 230 immunity eliminates only Publisher liability leaving Distributor liability intact for interactive computer service providers who possess notice of defamatory material posted through their services.[259] Zeran contended that he provided AOL with sufficient notice of the defamatory statements appearing on the company's bulletin board.[260] This notice is significant, because AOL could be held liable as a Distributor only if it acquired knowledge of the defamatory statements' existence.[261] The United States Court of Appeals for the Fourth Circuit affirmed the decision of Judge Ellis, for the United States District Court for the Eastern District of Virginia, holding that the CDA preempted Zeran's claim.[262]

Chief Judge Wilkinson, writing the opinion for the Fourth Circuit, noted that "[b]y its plain language, [section 230] creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."[263] The court continued, stating that section 230 "precludes courts from entertaining claims that would place a computer service provider in a Publisher's role."[264] Further, "lawsuits seeking to hold a service provider liable for its exercise of a

257. *See id.* at 134-35.

258. *Id.* at 1135.

259. *See* Zeran v. America Online, Inc., 129 F.3d 327, 328, 332 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

260. *See id.* at 331.

261. *See id.*

262. *See id.* at 334.

263. *Id.* at 330.

264. *Id.*

Publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."[265] The court recognized the Congressional rationale for statutory immunity in that tort-based lawsuits pose a threat to freedom of speech in the new and burgeoning Internet medium.[266] The court viewed the imposition of tort liability on service providers for the communications of others another form of intrusive government regulation of speech.[267] The court acknowledged that section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.[268]

The court cited two Congressional purposes in providing section 230 immunity.[269] First, ISPs have millions of users with the amount of information communicated via interactive computer services staggering, the specter of tort liability in an area of such prolific speech "would have an obvious chilling effect."[270] Second, the purpose of section 230 immunity is to encourage service providers to self-regulate the dissemination of offensive material over their services.[271] The court acknowledged that Congress enacted section 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision.[272]

The Fourth Circuit rejected Zeran's contention that the term "Distributor" carried a legally distinct meaning from the term "Publisher."[273] The court recognized that the terms "Publisher" and "Distributor" derive their legal significance from the context of defamation law.[274] The court considered Distributors to be Publishers for defamation law and any distinction only signifies that

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265. *Id.*

266. *Id.*

267. *See* Zeran v. America Online, Inc., 129 F.3d 327, 328, 332 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

268. *See id.*

269. *See id.*

270. *See id.*

271. *See id.*

272. *See id.*

273. *See* Zeran v. America Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

274. *See id.*

different standards of liability may be applied within the larger Publisher category, depending on the specific type of Publisher concerned.[275] The court viewed Zeran's complaint as treating AOL as a Publisher.[276] The court opined that AOL is cast in the same position as the party who originally posted the offensive messages.[277] The court further reasoned that if the original party is considered a Publisher of the offensive messages, liability could not be attached to AOL under the same theory without conceding that AOL too must be treated as a Publisher of the statements.[278] Thus, the court concluded that AOL was legally a Publisher and immune to liability under section 230.[279]

After concluding that AOL was a Publisher, the court then attacked Zeran's emphasis on the notice element of Distributor liability.[280] Further, "[t]he simple fact of notice surely cannot transform one from an original Publisher to a Distributor in the eyes of the law."[281] The court noted that liability upon notice would defeat the dual purposes advanced by section 230.[282] The court opined that "[l]ike the strict liability imposed by the *Stratton Oakmont* court, liability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation."[283]

The court presumed that "[i]f computer service providers were subject to Distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message."[284] Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the

275. *See id.*
276. *See id.*
277. *See id.*
278. *See id.*
279. *See* Zeran v. America Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).
280. *See id.*
281. *Id.*
282. *See id.* at 333.
283. *Id.*
284. *See id.*

continued publication of that information.[285] The court recognized that "[a]lthough this might be feasible for the traditional print Publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context."[286] Further, "[b]ecause service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not."[287] The court concluded that liability upon notice, like strict liability has a chilling effect on the freedom of Internet speech.[288]

The court further reasoned that notice-based liability would deter service providers from regulating the dissemination of offensive material over their own services.[289] Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability.[290] Instead of subjecting themselves to further possible lawsuits, service providers would likely eschew any attempts at self-regulation.[291]

The court finally opined that notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits.[292] Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply "notify" the relevant service provider, claiming the information to be legally defamatory.[293] The court further presumed that "[i]n light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with

285. *See id.*
286. *Id.*
287. Zeran v. America Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).
288. *See id.*
289. *See id.*
290. *See id.*
291. *See id.*
292. *See id.*
293. Zeran v. America Online, Inc., 129 F.3d 327, 322 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

ceaseless choices of suppressing controversial speech or sustaining prohibitive liability."[294] Finally, the Fourth Circuit offered that they were not willing to assume that Congress intended to leave liability upon notice intact because the probable effects of Distributor liability on the vigor of Internet speech and on service provider self-regulation were directly contrary to section 230's statutory purposes.[295]

### D. *Zeran's Precedent*

After the *Zeran* decision, both state and federal courts were faced with the issue of ISP immunity under the CDA. All agreed with the *Zeran* decision. In *Blumenthal v. Drudge*,[296] Sidney Blumenthal, Assistant to the President of the United States, brought suit for defamation against Matt Drudge, the creator of the electronic publication the "Drudge Report," and AOL in the United States District Court for the District of Columbia.[297] The Drudge Report available on AOL on August 10, 1997 accused Blumenthal of having a history of spousal abuse.[298] In 1997, Drudge entered into a written license agreement with AOL. The agreement made

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294. *Id.*

295. *See id.*

296. 992 F. Supp. 44 (D.D.C. 1998).

297. *See id.* at 46-47.

298. *See id.* at 46. The Drudge Report in question stated as follows:

> The DRUDGE REPORT has learned that top GOP operatives who feel there is a double-standard of only reporting Republican shame believe they are holding an ace card: New White House recruit Sidney Blumenthal has a spousal abuse past that has been effectively covered up. The accusations are explosive. There are court records of Blumenthal's violence against his wife, one influential Republican, who demanded anonymity, tells the DRUDGE REPORT. If they begin to use [Don] Sipple and his problems against us, against the Republican Party . . . to show hypocrisy, Blumenthal would become fair game. Wasn't it Clinton who signed the Violence Against Women Act? . . . One White House source, also requesting anonymity, says the Blumenthal wife-beating allegation is a pure fiction that has been created by Clinton enemies. [The First Lady] would not have brought him in if he had this in his background, assures the wellplaced staffer. This story about Blumenthal has been in circulation for years. Last month President Clinton named Sidney Blumenthal an Assistant to the President as part of the Communications Team. He's brought in to work on communications strategy . . . . Every attempt to reach Blumenthal proved unsuccessful.

*Id.*

the Drudge Report available to all members of AOL's service for a period of one year.[299] In exchange, Drudge received a flat monthly "royalty payment" of $3,000 from AOL, which was his only source of income.[300] Under the licensing agreement, Drudge was to create, edit, update, and "otherwise manage" the content of the Drudge Report, while AOL could "remove content that AOL reasonably determine[d] to violate AOL's then standard terms of service."[301] Drudge transmitted new editions of the Drudge Report by e-mailing them to AOL and AOL then posted the new editions on the AOL service.[302]

AOL moved for summary judgment, arguing that they were immune under section 230 of the CDA and the court agreed.[303] District Court Judge Paul L. Friedman relied on the *Zeran* decision rejecting Blumenthal's argument as irrelevant that the Washington Post would be liable if it had published Drudge's story as AOL did.[304] Judge Friedman also rejected the argument that the CDA did not provide immunity for AOL since Drudge was under a contractual relationship with AOL and his report was promoted by AOL.[305] Though Judge Friedman recognized the inequitable result in allowing AOL "to tout someone as a gossip columnist or rumor monger who will make such rumors and gossip 'instantly accessible' to AOL subscribers, and then claim immunity when that person, as might be anticipated, defames another," he nevertheless concluded that AOL was immune.[306] Judge Friedman opined that Congress has provided immunity "even where the interactive service provider has an active, even aggressive role in making available content prepared by others." Finally, Judge Friedman rejected the argument of Publisher liability versus Distributor liability, offering that Congress has made no distinction in the CDA.[307]

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299. *See id.*
300. *Id.* at 47.
301. *Id.*
302. *See* Blumenthal v. Drudge, 992 F. Supp. 44, 47 (D.D.C. 1998).
303. *See id.* at 48.
304. *See id.* at 49.
305. *See id.* at 51.
306. *Id.*
307. *See id.*

In *Doe v. America Online, Inc.*,[308] the Florida District Court of Appeal faced the issue of ISP immunity, not in a defamation case, but rather a claim that AOL was offering for sale obscene material involving the plaintiff's son.[309] On January 23, 1997, the plaintiff Jane Doe filed a six count complaint against Richard Lee Russell and AOL to recover for emotional injuries suffered by her son, John Doe who at the age of eleven in 1994 was lured by Russell to engage in sexual activity with other male minors and Russell.[310] Russell photographed and videotaped these acts and utilized AOL's "chat rooms" to market the photographs and videotapes, and to later sell the videotape to an individual in Arizona.[311] Doe alleged that AOL violated Florida law by knowingly allowing and permitting Russell "to sell, distribute, transmit or offer to sell, distribute or transmit photographs and videotape containing the images of [a minor] which were unlawful and obscene."[312] She also alleged that AOL violated Florida law by allowing Russell to distribute an advertisement offering "a visual depiction of sexual conduct involving [a minor]" and by allowing Russell to sell child pornography, thus aiding in the sale and distribution of child pornography.[313] Finally, Doe asserted a claim for negligence based on the premise that AOL knew, or should have known, that Russell and others like him used the service to market and distribute child pornographic materials; that it should have used reasonable care in its operation; that it breached its duty; and that the damages to her son were reasonably foreseeable.[314]

The trial court, relied on the *Zeran* decision and dismissed Doe's claim with prejudice and the Florida District Court of Appeal agreed, affirming the trial court's decision.[315] The District Court of Appeal rejected the Does argument that section 230 im-

308. 718 So. 2d 385 (Fla. Dist. Ct. App. 1998), *review granted*, 729 So. 2d 390 (Fla. 1999).

309. *See id.* at 386.

310. *See id.*

311. *See id.*

312. *See id.*

313. *See id.*

314. *See* Doe v. America Online, Inc., 718 So. 2d 385 (Fla. Dist. Ct. App. 1998), *review granted*, 729 So. 2d 390 (Fla. 1999).

315. *See id.* at 387.

munity did not apply because she sought to hold AOL liable as a Distributor of child pornography, not as a Publisher or a speaker.[316] The court noted that section 230 created a federal immunity to *any* cause of action that would make service providers liable for information originating with a third-party user of the service.[317] The District Court of Appeal recognized that the "questions raised as to the application of section 230 . . . to be of great public importance" and certified to Florida Supreme Court the question "whether a computer service provider with notice of a defamatory third party posting is entitled to immunity under section 230 of the Communications Decency Act?"[318]

Finally, in *Lunney v. Prodigy Services Co.*,[319] the New York Supreme Court, Appellate Division was faced with the issue of ISP liability in a defamation case and resolved the matter under New York common law, though recognizing the applicability of the CDA and the rationale of the *Zeran* decision.[320] Alex G. Lunney, a prospective Eagle Scout, sued Prodigy for libel and intentional infliction of emotional distress because an offensive e-mail was sent by a practical joker to a Boy Scout leader, who had Lenney's name appear as the signatory and author of the e-mail.[321] The Appellate Division held that Prodigy Services Company ("Prodigy"), the company which furnished the medium through which the offensive message was sent, was entitled to the privilege historically afforded to telegraph companies and was entitled to summary judgment.[322] The court relied on the New York Court of Appeals case *Anderson v. New York Telephone Co.*,[323] which held that no potential for liability exists, unless a defendant has some "editorial or at least participatory function" in connection with the dissemination of the defamatory material.[324] The Appellate Division recognized

316. *See id.* at 388-89.

317. *See id.*

318. *Id.* at 389-90.

319. 683 N.Y.S.2d 557 (App. Div. 1998).

320. *See id.* at 563.

321. *See id.* at 559.

322. *See id.* at 562. Review was granted on April 12, 1999. *See* Doe v. America Online, Inc., 729 So. 2d 390 (Fla. 1999).

323. 35 N.Y.2d 746 (1974).

324. *Lunney*, 683 N.Y.S.2d at 560 (citing *Anderson*, 35 N.Y.2d at 750).

that "even a telecommunications company, which in some measure participates in the transmission of a libelous message cannot be held liable unless it knew that the message was in fact libelous, a circumstance which will rarely, if ever, be proved."[325] The court concluded that the application of New York common law was in "complete harmony" with section 230 and *Zeran*.[326]

## III. *ZERAN V. AMERICA ONLINE* WAS INCORRECTLY DECIDED BECAUSE INTERNET PROVIDERS SHOULD BE HELD LIABLE AS DISTRIBUTORS FOR DISPLAYING INFORMATION THEY KNOW IS DEFAMATORY

### A. *The Distributor Defamation Standard is Distinct from Publisher Standard and Imposes Liability on Culpable Internet Providers*

The Fourth Circuit in *Zeran* wrongfully disregarded the legal distinction between Publishers and Distributors of defamatory material.[327] Traditional defamation law recognized the different level of culpability afforded Publishers, those who exert comprehensive editorial control and Distributors, conduits of defamatory material.[328] A Distributor is *only* liable if he or she delivers or transmits material that he or she knows or has reason to know is defamatory.[329] The requisite knowledge is absent in Publisher liability.[330] Though texts and commentators refer to Distributors as "Publishers," "Secondary Publishers," or "Re-publishers," to hold the status of Distributor to be virtually synonymous with that of Publisher for defamation law and section 230 is unsound.[331]

The *Restatement (Second) of Torts* formulation for Distributors requires that "one who only delivers or transmits defamatory mat-

325. *Id.* at 562.

326. *See id.*

327. *See supra* Part II.C for a discussion of the Fourth Circuits decision.

328. *See* Luftman, *supra* note 42, at 1084-85.

329. *See* RESTATEMENT (SECOND) OF TORTS § 581.

330. *See* Stratton Oakmont, Inc. v. Prodigy Servs., Co., 23 Media L. Rep. (BNA) 1794, 1796-98 (N.Y. Sup. Ct. 1995).

331. *See* KEETON, *supra* note 38, at 803 ("[t]hose who play a secondary role in delivering and transmitting the possession of a physical embodiment of the defamatory matter, including selling and renting, are secondary publishers or disseminators.").

ter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character."[332] The Restatement further explains that when dealing with a Distributor, such as a news vendor, the "news dealer is not liable for defamatory statements appearing in the newspapers or magazines that he sells if he neither knows nor has reason to know of the defamatory article."[333] When such vendor offers for sale a particular paper or magazine that "notoriously persists in printing scandalous items, the vendor may do so at the risk that any particular issue may contain defamatory language."[334] The *Restatement* recognizes a knowledge based standard of liability that is distinct from Publisher liability, which does not require a showing that the defendant was aware of the content of the defamatory material.[335]

Cases such as *Smith v. California*, *Cubby, Inc. v. CompuServe, Inc.*, and *Stratton Oakmont, Inc. v. Prodigy Services Co.*, embrace the distinction between Publisher and Distributor.[336] In *Smith*, the Supreme Court held a Los Angeles municipal ordinance unconstitutional because it made distribution of obscene material unlawful even in the absence of knowledge of the content by a bookseller, a classic Distributor.[337] In *Cubby*, the United States District Court for the Southern District of New York, in characterizing CompuServe as a "functional equivalent of a more traditional news vendor," recognized that "vendors and distributors of defamatory publications are not liable if they neither know or have reason to know of the defamation."[338] In *Stratton Oakmont*, the New York court specifically contrasted Publisher and Distributor liability.[339] The court stated that a finding that "Prodigy is a publisher is the first hurdle for Plaintiffs to overcome in pursuit of their defamation claims, because one who repeats or otherwise republishes a libel is

332. RESTATEMENT (SECOND) OF TORTS § 581 (1977); *see also* Decarlo, *supra* note 42, at 576.

333. RESTATEMENT (SECOND) OF TORTS § 581, cmt. d (1977); *see also* Decarlo, *supra* note 42, at 576.

334. RESTATEMENT (SECOND) OF TORTS § 581, cmt. d.

335. *See* Sheridan, *supra* note 110, at 151.

336. *See supra* Part I.A.2 for a discussion of each individual cases.

337. *See* Smith v. California, 361 U.S. 147, 155 (1959).

338. Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991).

339. *See* Stratton Oakmont, Inc. v. Prodigy Services Co., 23 Media L. Rep. (BNA) 1794, 1796 (N.Y. Sup. Ct. 1995).

subject to liability as if he had originally published it." [340] The court noted that in contrast, distributors "such as bookstores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue."[341] A Distributor, or deliverer of defamatory material, "is considered a passive conduit and will not be found liable in the absence of fault."[342]

Allowing AOL, as an Internet Service Providers to be subject to Distributor liability places fault where it belongs, on culpable ISPs. AOL, under section 230 is immune from strict liability for defamatory material as a Publisher regardless of the extent of editorial control, and rightfully so.[343] AOL would be subject to liability and not per se liable, for defamatory material posted on their bulletin boards that they know or have reason to know is defamatory.[344] The notice element confers knowledge on AOL for the existence of the possible defamatory material, but not that the material is actually defamatory.[345] The Fourth Circuit's assertion that "notice based liability would deter service providers from regulating dissemination of offensive material over their own services" is misguided.[346] Notice is separate from editorial discretion which section 230 seeks to protect.[347] AOL is not deterred from screening materials, because of knowledge based liability just as a large book store is not deterred from doing the same.[348] The *Zeran* holding allows for the absurd result that an ISP is not liable for a defamatory posting on a bulletin board it carries that they know is defamatory and refuse to remove.[349] New York common law clearly articulates the underlying principle of Distributor liability in defamation law. A party who in some measure "participates in the transmission of a libelous message cannot be held liable *unless it*

340. *Id.*
341. *Id.*
342. *Id.*
343. *See* 47 U.S.C.A. § 230(c)(2).
344. *See* RESTATEMENT (SECOND) OF TORTS § 581.
345. *See id.*
346. *See* Zeran v. America Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).
347. *See* 47 U.S.CA. § 230.
348. *See* Sheridan, *supra* note 110, at 151.
349. *See id.*

*knew that the message was in fact libelous . . . .*"[350] Holding AOL to a Distributor standard of liability does not mean that AOL was in fact liable for defamation. The burden still would lie with Mr. Zeran and other plaintiffs in similar cases, to prove liability.

The Distributor liability standard is an equitable balance between the interests of the defamed and service provider's relevant interests and would be retroactive only.[351] It would not require the service providers to engage in any proactive procedures to minimize its liability.[352] Under traditional defamation law, a Distributor was not required to investigate the contents of what they are transmitting is defamatory.[353] As such, Distributor liability would be minimally intrusive and would not act to encourage censorship or stifle free speech.[354] Therefore, the Fourth Circuit's concern that Distributor liability would provide a disincentive to self-regulate is misguided.[355]

### B. *Holding Internet Service Providers Immune from Distributor Liability is not Supported by the Language of Section 230 or its Legislative History*

Both the text of the CDA and its meager legislative history support the conclusion that when Congress referred to "Publisher," it meant "Publisher," rather than "Distributor."[356] The Publisher and Distributor terminology has been known to Congress and has been used in cases and commentary on the subject of defamation in interactive networks.[357] It is reasonable to surmise that Congress

350. Lunney v. Prodigy Serv. Co., 683 N.Y.S.2d 557, 562 (App. Div. 1998) (emphasis added).

351. *See* Decarlo, *supra* 37, at 579.

352. *See id.*

353. *See* RESTATEMENT (SECOND) OF TORTS § 581, cmt. d (1977).

354. *See* Decarlo, *supra* 37, at 579.

355. *See* Zeran v. America Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

356. Sheridan, *supra* note 110, at 168.

357. *See id.*; *see also* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995); Loftus E. Becker, Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 CONN. L. REV. 203, 225-28 (1989); Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65, 95-99 (1992); Jeffrey M. Taylor, *Liability of Usenet Moderators for Defamation Published by Others: Flinging the Law of Defa-*

would use "Distributor" in addition to "Publisher" if it meant "Distributor" and "Publisher."[358] The statement in the Conference Report that section 230 was intended to overrule *Stratton Oakmont* supports this conclusion.[359] Congress sought to overrule *Stratton Oakmont* and immunize ISPs from the imposition of strict liability for their self-regulating efforts, a standard that is in no way involved with Distributor liability.[360]

Since *Stratton Oakmont* did not impose Distributor liability, it was not necessary for Congress to obviate Distributor liability in order to overrule the case.[361] Immunizing interactive computer services from Distributor liability addresses a concern that was not present in *Stratton Oakmont*.[362] Both Prodigy and Congress were concerned because Prodigy was held liable in *Stratton Oakmont* as a Publisher of a defamatory message rather than a mere conduit.[363] However, for a Distributor to be held liable for defamation, there must be proof that he or she knew that the message was defamatory.[364] Thus, a problem that Prodigy and Congress perceived with *Stratton Oakmont* is absent with Distributor liability, and need not be addressed by extending "Publisher" in section 230(c)(1) to include Distributor.[365]

A lack of Congressional intent to immunize Distributor liability can also be inferred from Congressional purpose in enacting the Communications Decency Act, to encourage interactive computer services to eliminate offensive material from the Internet.[366] In this

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*mation into Cyberspace*, 47 FLA. L. REV. 247, 273-75 (1995); Robert Charles, *Computer Bulletin Boards and Defamation: Who Should be Liable? Under What Standard?* 2 J.L. & TECH. 121, 130-31 (1987).

358. Sheridan, *supra* note 110, at 169.

359. *See* H.R. CONF. REP. NO. 104-458, at 194 (1996).

360. *See* S. CONF. REP. NO. 104-230, at 435 (1996).

361. *See* Sheridan, *supra* note 110, at 169; Stratton Oakmont, 23 Media L. Rep. (BNA) at 1796.

362. *See* Sheridan, *supra* note 110, at 169; Stratton Oakmont, 23 Media L. Rep. (BNA) at 1796.

363. *See id.* at 1796-98; *see also* Zeran v. America Online, Inc., 958 F. Supp. 1124, 1134-35 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998) (noting conflict between Stratton and the objectives of the CDA).

364. *See Zeran*, 958 F. Supp. at 1132.

365. *See* 47 U.S.C.A. § 230(c)(1) (West Supp. 1999).

366. *See* Sheridan, *supra* note 110, at 169.

regard, it is commonsensical for Congress to immunize interactive computer services from liability for defamation based on unsuccessful efforts to find offensive content on their systems.[367] Congress desired to encourage interactive computer services to locate offensive content by removing the penalty in the form of Publisher status, for doing so.[368] Yet, it is quite disingenuous for a Congress that wanted to encourage ISPs to find offensive material and remove it, to immunize such ISPs from liability that found offensive material but deliberately failed to remove it.[369]

Concededly, freedom from Distributor liability for AOL may be necessary to protect individuals who desire to operate newsgroups or other services on novel topics, and to preserve the "never-ending worldwide conversation"[370] on "the most participatory form of mass speech yet developed, the Internet . . . ."[371] This is a decision that Congress may desire to make, yet there is little evidence that Congress made that choice in enacting the CDA.[372]

### C. *The Growth of Cyberspace Would Not Be Impeded by the Imposition of a Distributor Defamation Standard*

Though anything less than absolute immunity inevitably results in the chilling of some speech, the view that exposing online services to Distributor liability would be damaging to the service provider and Cyberspace as a whole, is attenuated at best.[373] An interactive computer service does not commit the tort of distribution of defamatory material until it knows of the content and, with the requisite degree of fault, fails to take steps to remove the offending posting.[374] Logically, an ISP's liability would not arise until well after the message at issue was posted.[375] An ISP service that was found liable under a Distributor standard of liability would argua-

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367. *See id.*

368. *See id.*

369. *See id.* at 170.

370. ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996), *aff'd*, 521 U.S.844 (1997); *see also* Sheridan, *supra* note 110, at 178.

371. *Id*; *see also* Sheridan, *supra* note 110, at 169.

372. *See* 47 U.S.C.A. § 230(c)(2); *see also* Sheridan, *supra* note 110, at 178.

373. *See* Sheridan, *supra* note 110, at 178.

374. *See id.*

375. *See id.*

bly face minimal damage awards, considering the Internet Provider is only liable for the damages caused by its tortious conduct and damages would occur before the ISP committed any tort.[376]

The facts in *Zeran* support the notion of limited damages.[377] According to Kenneth Zeran, the first defamatory message was posted on April 25, 1995, and after he notified AOL, was removed the next day and a new posting appeared the following day.[378] AOL asserted that it removed the second posting no later than April 27, 1995.[379] On April 29, 1995, someone contacted an Oklahoma City radio station concerning the April 25 posting where the Oklahoma City radio station broadcast material that was the subject of a separate suit by Zeran.[380] Therefore, even if Zeran's complaint against AOL had not been dismissed, he might not have been able to prove that any tortious act of AOL caused him substantial damages.[381] As well, AOL arguably did not commit a tort with respect to the April 25 posting.[382] Furthermore, any damages Zeran incurred may have resulted from the redistribution of the April 25 posting before AOL had reason to know it was defamatory.[383] Thus, any damages resulted before AOL committed any tort with respect to that posting.[384]

There is a great economic disincentive to a bulletin board operator's examination of every message before it is posted, though there is no technological bar.[385] Hiring editors to peruse messages before they are publicly posted would obviously be expensive.[386] Yet this is exactly what Congress intended ISPs do.[387] The Fourth Circuit recognized that section 230 immunity is provided to safeguard Internet Provider's self-regulation and the removal of offen-

376. *See id.*

377. *See* 958 F. Supp. 1124 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

378. *See* 958 F. Supp. 1124, 1127 (E.D. Va. 1997).

379. *See id.*

380. *See id.* at 1128.

381. *See* Sheridan, *supra* note 110, at 173

382. *See id.*

383. *See id.* at 174.

384. *See id.*

385. *See id.* at 175.

386. *See id.*

387. *See* 47 U.S.C.A. § 230 (b)(3).

sive material.[388] The expense incurred is congressionally encouraged for a proactive search for offensive material, and such expense is unnecessary for a retroactive process applicable to Distributor liability.[389]

In *Stratton Oakmont*, Prodigy argued that since there were approximately sixty-thousand messages per day were received, it was not feasible to examine them all before posting.[390] While this is a valid argument against Publisher liability, its probative value is diminished when attempting to avoid Distributor liability.[391] Avoiding Distributor liability does not require that an ISP review any messages prior to posting, but rather that such Internet Provider act reasonably.[392] The ISP is encouraged to act, after being made aware that a message is claimed to be false and defamatory.[393] An Internet Provider may investigate in order to determine whether the statement is actually defamatory.[394] A final determination imposes actual knowledge and a decision that the posting is defamatory compels the ISP to remove the message.[395] Removing the message is expedient, simple, and relatively free of risk in the interim and obviously minimizes the risk for Defamation liability.[396]

A service that removes a message may be protected from liability by the CDA to its subscriber who posted the message or its agreement with the subscriber, or both.[397] Section 230(c)(2) provides that a service shall not be held liable for actions taken voluntarily and in good faith to restrict access to material that the service considers offensive.[398] This defense is not all encompassing, because a person aggrieved by removal of a message could

388. *See* Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998).

389. *See* Decarlo, *supra* note 37, at 579.

390. *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 23 Media L. Rep. (BNA) 1794, 1796 (N.Y. Sup. Ct. 1995).

391. *See* Sheridan, *supra* note 110, at 175.

392. *See id.*

393. *See id*; *see also* Spence v. Flynt, 647 F. Supp. 1266, 1273 (D. Wyo. 1986).

394. *See* Sheridan, *supra* note 110, at 176.

395. *See* Sheridan, *supra* note 110, at 176.

396. *See id.*

397. *See id.*

398. *See* 47 U.S.C.A. § 230(c)(2).

question whether removal of a message without any investigation of its truth or falsity was undertaken in good faith.[399] The aggrieved may also question whether removal constituted restriction of access within the meaning of section 230(c)(2), or whether the removal under the threat of a lawsuit was voluntary.[400] However, even if removal of a particular message were not protected by section 230(c)(2), contractual protection would prevent ISPs from facing liability for removal of a posting.[401] For example, AOL documents, including AOL's Terms of Service Agreement and AOL's Rules of the Road,[402] provide substantial protection to AOL against any claim for damages by a member whose posting is removed.[403]

*Zeran* demonstrates the power of users of interactive computer services to inflict severe damage on the reputations of those who may have a limited ability to defend themselves.[404] Generally, a person who composes and publicly disseminates a defamatory statement should be held primarily liable for damage the statement causes.[405] It is rational for the person who controls the object on which the defamatory statement is displayed, be held responsible if the owner has notice of the existence of the statement and fails within a reasonable time to make reasonable efforts to remove it.[406]

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399. *See* Sheridan, *supra* note 110, at 176.

400. *See id.*

401. *See id.*

402. *See id.* The AOL Terms of Service Agreement is a binding agreement between AOL and its members. *See id.* It enumerates the rights and responsibilities of AOL and its members, the privacy policy, and guidelines for international content and the Internet. *See id.* The AOL Rules of the Road is part of the Terms of Service Agreement and enumerates guidelines or policies for members to follow when operating on AOL. *See id.*

403. *See id.* The AOL Terms of Service Agreement produced in *Zeran* explicitly prohibited AOL members from posting objectionable material, and gave AOL the right to prohibit communication or content that it deemed to be harmful to third-party rights. *See id.* AOL's Rules of the Road, state that "[i]f [AOL is] notified about [defamatory] [c]ontent that doesn't conform to our [Terms of Service], we'll try to investigate . . . . If we decide it violates our [Terms of Service], we'll ask for its removal or remove it ourselves." *Id.* AOL's Rules of the Road further provide that AOL "shall be held harmless for any performance or non-performance by AOL, Inc., of such activities, as long as it has acted in good faith." *Id.*

404. *See* 958 F. Supp. 1124 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, __U.S.__, 118 S. Ct. 2341 (1998); *see also* Sheridan, *supra* note 110, at 172.

405. *See id.*

406. *See id.* at 173.

Holding an individual property owner liable for a defamatory statement that he or she permits to remain on his or her property that he or she knew was defamatory is primarily the defamed plaintiff's only recourse.[407] Imposing liability motivates the individual property owner to remove the defamatory message or compensating the plaintiff for the harm that results if she did not.[408]

Holding AOL to a Distributor standard of liability, does not discourage it from removing offensive material, such self-regulation is safeguarded by section 230.[409] Yet, AOL should not be free to remove offensive material, which is generally constitutionally protected by the First Amendment,[410] without recourse while being held harmless for failing to remove defamatory statements that are not constitutionally protected.[411] Imposing Distributor standard of liability does not threaten the existence of AOL, the world's largest Internet Service Provider, or the vibrant world of Cyberspace.

## CONCLUSION

*Zeran v. America Online* was incorrectly decided, overextending protection to Internet Providers. The immunity standard shielding Internet Providers from liability should not be extended to immunize such providers under the defamation standard applicable to Distributors. Such standard, which contains an element of knowledge absent from the harsher Publisher standard, would not chill the speech of Internet Providers or force them to censor speech rather than produce it. Such a standard would promote responsibility on the part of AOL without retarding the growth of the Internet.

What results from *Zeran*, is an outcome that would be ap-

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407. *See id.*

408. *See id.*

409. *See* 47 U.S.C.A. § 230(c)(3).

410. *See* Reno v. American Civil Liberties Union, 521 U.S. 844, 874-75 (1997) ("we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.").

411. *See* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.").

plauded by many First Amendment advocates and Internet Service Providers. But the decision essentially sharpens a powerful weapon used by unscrupulous individuals to perpetrate attacks without detection. Ultimately, the *Zeran* decision may eliminate traditional defamation law from Cyberspace. Under Supreme Court precedent in *Gertz v. Robert Welch*, and other like cases, Private Plaintiffs such as Mr. Zeran have been afforded greater protection against defamatory statements than Public Officials or Figures. The development of traditional defamation law grew out of restrictions imposed on a medium that enjoys full First Amendment protection—-print. The Internet, which enjoys similar First Amendment protection, is apparently immune to liability for defamation where publications such as the *New York Times* is not. The *Zeran* decision also elicits a paradoxical result. If an article that is defamatory was printed in the *New York Times*, the publication would be subject to liability. But, if the *Times*, put the same article unedited on their web-site or on an AOL bulletin board, the *Times* would not be subject to defamation liability.

Courts and Congress must recognize that the Internet is a World resource that is growing exponentially and would not be injured by enforcing traditional defamation law. The precedent set by *Zeran* underestimates the harm done by tolling, overestimates the power of defamation law to injure the Internet, and leaves victims of insidious hoaxes *Damnum Absque Injuria*—-harmed without recourse.