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Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go?

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I. INTRODUCTION

On April 25, 1995, a notice titled "Naughty Oklahoma T-shirts" appeared on an America Online ("AOL") bulletin board.[1] The notice advertised T-shirts with slogans such as "Visit Oklahoma . . . It's a BLAST!" and "Putting the kids to bed . . . Oklahoma 1995."[2] In short, the notice glorified the Oklahoma City bombings of 1995, which killed 168 people.[3] Under the only known identity of "Ken ZZ03,"[4] the author invited readers to call "Ken" at the listed phone number, which belonged to a Mr. Kenneth Zeran.[5] While Mr. Zeran's first name was in fact Ken, Mr. Zeran was not responsible for posting the notice.[6] Rather, the bogus notice was part of a vicious prank played upon Mr. Zeran.[7] As a result of this prank, Mr. Zeran received a series of angry, intimidating phone calls, including some death threats.[8] The advertisement notice also had a serious, negative impact upon Mr. Zeran's business,[9] which was dependent upon his ability to communicate by telephone.[10] The constant, offensive

1. Zeran v. Am. Online, Inc., 958 F. Supp. 1124, 1127 (E.D. Va. 1997).
2. *Id.* at 1127 n.3.
3. *Id.* at 1126.
4. *Id.* at 1127.
5. *Id.*
6. *Id.*
7. *See id.*
8. *Id.* By April 30, just five days after the posting of the first notice, Mr. Zeran received an abusive phone call about every two minutes. Zeran v. Am. Online, Inc., 129 F.3d 327, 329 (4th Cir. 1997).
9. *Zeran*, 958 F. Supp. at 1127. At the time, Mr. Zeran operated a publishing business from his home in Seattle, Washington. *Id.* at 1127 n.4.
10. *Id.* at 1127. Mr. Zeran could not change his phone number because his business relied upon the availability of his current phone number to the public. *Zeran*, 129 F.3d at 329.

phone calls severely interrupted Mr. Zeran's work, thereby causing him both emotional and economic suffering.[11]

Mr. Zeran immediately contacted AOL and asked them to remove the bogus advertisement, informing AOL of the harm that it was causing him.[12] AOL promptly complied with Mr. Zeran's request.[13] The next day, however, a second notice, just as vulgar as the first, appeared on AOL's bulletin board.[14] Again, Mr. Zeran demanded that AOL remove the notice and take steps to block future false notices bearing his name and phone number.[15] While AOL informed Mr. Zeran that they were taking steps to delete the notice and terminate the account that was posting the notices,[16] a series of these offensive notices continued to appear on AOL through May 1, 1995.[17] As a result, the threatening and abusive phone calls persisted long after the notices were finally removed.[18]

About a year later, Mr. Zeran decided to seek redress for the injuries that he had suffered as a result of the defamatory statements[19] posted on AOL.[20] In April 1996, Mr. Zeran sued AOL for failing to respond adequately to the bogus notices posted on its bulletin board after he informed AOL that the notices were false and defamatory.[21] In response to Mr. Zeran's claim, the District Court of the Eastern District of Virginia granted, and the Fourth Circuit affirmed, AOL immunity from any liability for the defamatory notices under § 230(c) of the Communications Decency Act of 1996

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11. *See Zeran*, 958 F. Supp. at 1127-28.

12. *Id.* at 1127.

13. *Id.*

14. *Id.* The second notice declared that T-shirts from the previous notice had "SOLD OUT," and announced that new T-shirt slogans were available. *Id.* Among the new advertised slogans were "Finally a day care center that keeps the kids quiet—Oklahoma 1995" and "Forget the rescue, let tbe maggots take over—Oklahoma 1995." *Id.* at 1127 n.5.

15. *Id.* at 1127.

16. *Id.* at 1127-28.

17. *Id.* at 1128. The effect of the AOL notices was magnified when an Oklahoma City radio broadcaster for KRXO read the slogans from the notices on the air and encouraged listeners to call "Ken" at the listed phone number. *Id.*

18. *Id.* The threatening phone calls diminished to approximately fifteen phone calls a day after May 15, 1995. *Id.*

19. *Black's Law Dictionary* defines a defamatory statement as "a statement that tends to injure the reputation of a person referred to in it." BLACK'S LAW DICTIONARY 428 (7th ed. 1999).

20. *Zeran*, 958 F. Supp. at 1128.

21. *Id.* First, Zeran filed suit in the United States District Court for the Western District of Oklahoma against the radio station, KRXO, on January 4, 1996, for broadcasting the notices on the air. *Id.* Then, in April 1996, Zeran filed a separate action against AOL in the same court. *Id.* In response, AOL filed a motion to transfer the case to the Eastern District of Virginia, where AOL is headquartered. *Id.* The motion was granted, and Zeran's suit against AOL was tried in Virginia. *Id.*

(the "CDA").[22] Thus, Mr. Zeran lost his case and was provided no remedy or compensation for the harm he suffered as a result of the defamatory notices posted about him on AOL.

Mr. Zeran is not alone; his case exemplifies a problem that is becoming more and more common in today's society as the Internet becomes increasingly pervasive. Albeit an extreme example, Mr. Zeran's case nonetheless illustrates the gravity of the problem of defamation over the Internet and the severity of the harm that it can cause. These instances of so-called third-party Internet defamation are uniquely problematic because Internet Service Providers ("ISPs") are usually granted immunity from any liability, leaving the plaintiff with no remedy. In the past five years, there has been an influx of cases in which unknown third parties have posted defamatory statements over the Internet through message boards,[23] chat rooms,[24] or e-mail.[25] The victims of this type of third-party defamation[26] often suffer real harm, such as termination or loss of reputation, as a direct result of the false statements made about them. Increasingly, people are opting to sue their ISP,[27] such as AOL, for posting these allegedly defamatory statements, since the actual defamers are usually unknown.[28] Because the Internet is a

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22. Zeran v. Am. Online, Inc., 129 F.3d 327, 335 (4th Cir. 1997); *Zeran*, 958 F. Supp. at 1137.

23. A message board is an electronic bulletin board displayed over the Internet that allows computer users to post messages to others, or write comments about a particular subject matter. *See* Lunney v. Prodigy Servs. Co., 723 N.E.2d 539, 542 (N.Y. 1999). Message boards are often analogized to the editorial pages of newspapers. *See id.*

24. A chat room is an Internet forum in which computer users can log on and "chat" with or correspond with other users who are online and are in the chat room at the same time. *See id.* at 542 n.4.

25. E-mail is a form of communication used over the Internet in which a computer user can send electronic messages to another user through accounts established by an ISP. *See id.* at 541.

26. Third-party defamation cases are distinguishable from other defamation cases because third-party defamation cases involve suing someone other than the actual defamer, such as an ISP or a newspaper. *See, e.g.*, *Zeran*, 129 F.3d at 328-31. In third-party defamation cases, the defamer is often unknown, and therefore, the plaintiffs opt to sue the disseminator of the defamatory material. *See id.*

27. An ISP is a commercial service that offers access to a computer network and organizational software, which allows subscribers to interconnect easily with other computer networks on the Internet. *See Zeran*, 958 F. Supp. at 1126 (citing ACLU v. Reno, 929 F. Supp. 824, 830-38 (E.D. Pa. 1996)). ISPs are also referred to as OSPs, online service providers. *See id.* at 1126 n.1.

28. Some choose to sue the ISP in order to force it to release information ahout the identity of the unknown defamer, and thereby proceed in a defamation suit against that person. *See generally* Does v. Hvide, No. 99-22831 (Fla. Cir. Ct.), *cert denied*, 770 So. 2d 1237 (Fla. Dist. Ct. App. 2000) (denying review of a lower court's ruling that Yahoo! and AOL must reveal the identity of eight anonymous John Doe defendants in a defamation case in which the plaintiff alleged that he got fired from his job because the defendants posted defamatory statements about him on their message boards); Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div.

recent, complex medium that cannot be neatly reconciled with established common law defamation principles, these Internet defamation cases add a new dimension to existing defamation law, and make the analysis more complicated.

Under traditional defamation law, liability may be imposed upon the creator of a defamatory statement, as well as on the disseminator of the defamatory material.[29] There are currently three mediums of communication over which defamation may be disseminated: newspapers (publishers); libraries, bookstores, and news vendors (distributors); and telephone companies (common carriers). Existing case law in this area typically focuses on the issue of control.[30] In tort, control equals liability.[31] For example, as the amount of control that the disseminator has over the material increases, so does the liability for the publishing of the defamation.[32] Accordingly, newspapers are often subject to publisher liability for printed defamation, or libel, because they have editorial control over what is published.[33] Telephone companies, on the other hand, generally have no risk of liability for defamatory statements communicated over phone lines because they have no control over what is said.[34] Libraries, bookstores, and news vendors fall in between the two extremes of newspapers and telephone companies;[35] they are viewed as distributors of the information that they carry and are only li-

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2001) (rejecting a corporation's discovery request, which required the ISP to disclose the John Doe defendants' identities in an online defamation); Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001) (involving an anonymous corporation's request for a subpoena requiring AOL to disclose the identities of John Doe defendants who allegedly defamed the corporation by publishing confidential, insider material on the ISP's chat room); Cohen v. John Does, No. 99-5116, 1999 WL 1419239 (Va. Cir. Ct. Aug. 17, 1999) (involving plaintiff who first sought to obtain information from Yahoo!, Inc. concerning the identity of the 100 John Doe defendants who allegedly posted defamatory material about the plaintiff on Yahoo's message board). Even when the defamer is known, some still choose to sue the ISP instead in an attempt to sue an entity with deeper pockets and more capital. *See* Jay M. Zitter, Annotation, *Liability of Internet Service Provider for Internet or E-mail Defamation*, 84 A.L.R.5th 169, 178-79 (2000).

29. *See* Jonathan A. Friedman & Francis M. Buono, *Limiting Tort Liability for Online Third-Party Content Under Section 230 of the Communications Act*, 52 FED. COMM. L.J. 647, 650 (2000).

30. *See* Suman Mirmira, Prodigy Services Co., 15 BERKELEY TECH. L.J. 437, 440 (2000).

31. *See id.* at 438-39.

32. *See id.*

33. *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

34. *See* Anderson v. N.Y. Tel. Co., 320 N.E.2d 647, 648 (N.Y. 1974).

35. *See* Auvil v. CBS 60 Minutes, 800 F. Supp. 928, 932 (E.D. Wash. 1992); Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991); Lerman v. Chuckleberry Publ'g, Inc., 521 F. Supp. 228, 235 (S.D.N.Y. 1981).

able for defamatory material if they had knowledge that the material was defamatory before they distributed it.[36]

As this Note will demonstrate, attempting to analogize ISPs to the traditional common law defamation mediums can be problematic. While ISPs may share similarities with all three mediums, they do not fit properly into any of the existing categories. As a result, it is difficult to determine which standard of defamation liability should be applied to ISPs in Internet defamation cases. This difficulty mandates a need for clarification regarding how defamation law should be implemented in the Internet context.

To date, the Supreme Court has not addressed the question of whether ISPs should be held liable for third-party defamation or libel published over the Internet. Traditionally, lower courts have addressed this issue using the established defamation common law framework.[37] With the growth of technology and the expansion of the Internet, however, Congress recognized a need to address the issue of publisher liability for ISPs.[38] In an attempt to promote technology, and encourage ISPs to regulate content over the Internet, Congress created § 230 of the CDA, which essentially immunizes ISPs from publisher liability.[39] Specifically, § 230(c) of the CDA contains a "Good Samaritan" provision, which states that a provider or user of an interactive computer service should not be treated as the publisher or speaker of any information provided by another information provider.[40] The CDA defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems oper-

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36. *See Auvil*, 800 F. Supp. at 932; *Cubby*, 776 F. Supp. at 139; *Lerman*, 521 F. Supp. at 235.

37. *See* discussion *infra* Part III.A. For an explanation of established defamation law principles, see *infra* Part II.

38. *See infra* notes 104–06 and accompanying text.

39. 47 U.S.C. § 230(b)-(c) (Supp. V 1999) (amending a statute originally enacted in 1996). Congress passed the CDA in an attempt to protect minors from harmful material displayed over the Internet, such as pornography. *See* Reno v. ACLU, 521 U.S. 844, 849-58 (1997). Congress granted ISPs immunity from publisher liability in § 230(c) of the CDA with the purpose of encouraging ISPs to monitor content in order to prevent minors from being able to view objectionable material over the Internet. § 230(c). While the Supreme Court struck down the provisions of the CDA prohibiting transmission of obscene or indecent communications by means of telecommunications or through an ISP to persons under the age of eighteen, the constitutionality of the immunity granted to ISPs under § 230(c) remains intact. *See ACLU*, 521 U.S. at 844 (striking down certain provisions of the CDA because they constituted content-based restrictions on speech in violation of the First Amendment).

40. § 230(c)(1).

ated or services offered by libraries or educational institutions."[41] Thus, under the CDA, an ISP qualifies as an interactive computer service provider.[42]

Since the passage of the CDA in 1996, lower courts have interpreted § 230(c) as providing ISPs with "Good Samaritan" immunity from publisher liability for third-party defamatory statements posted over the Internet.[43] Lower courts have applied this immunity broadly for ISPs, as evidenced by the fact that since the CDA was passed, there has not been a single case holding an ISP liable for third-party defamatory material on the Internet.[44] This ISP immunity has also been extended to cases in which the ISP has been informed of the defamatory statements, but still fails to remove them from the Internet.[45]

This broad interpretation of the immunity granted to ISPs in § 230 of the CDA has led to a concern that the CDA immunity is essentially becoming an absolute bar to a plaintiff's recovery.[46] If ISPs are never held liable for third-party defamation published over the Internet, particularly in cases in which the ISP had some control over the publishing or distribution of the materials, then the plaintiff is left without a remedy. In order to avoid impeding the development of technology, ISPs should continue to receive a broad immunity under the CDA. In cases in which the ISP has been informed of the defamation, but fails to remove the defamatory material, however, ISPs should be liable under the theory of distributor liability. This approach is not only consistent with § 230(c) and common law defamation principles, but also balances the CDA's two competing policies of promoting technology and ensuring that the plaintiff is not left without a tort remedy. Furthermore, subjecting ISPs to distributor liability is in line with the CDA's policy of encouraging content regulation over the Internet. If ISPs are immunized from both publisher and distributor liability, and are never held responsible for third-party defamation, then ISPs will have no incentive to spend time and money regulating content.

In advocating this approach, this Note begins in Part II by providing an overview of traditional defamation common law prin-

41. § 230(f)(2).

42. *See* Zeran v. Am. Online, Inc., 958 F. Supp. 1124, 1132 (E.D. Va. 1997).

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

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

45. *See Zeran,* 958 F. Supp. at 1134.

46. *See* Mirmira, *supra* note 30, at 452-54; 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, 147-52 (1997).

ciples. Part III details lower court decisions regarding defamation in the Internet context and describes how lower courts have analyzed ISP liability for third-party defamation displayed on the Internet. Part III also discusses cases decided under common law, both before and after the passage of the CDA. Part IV then discusses the current problem created by lower courts' interpretations of the CDA's "Good Samaritan" immunity granted to ISPs. Finally, Part V poses a better solution to the problem of what type of liability ISPs should be subjected to in third-party Internet defamation claims. This solution entails preserving distributor liability for ISPs. In support of this solution, this section also includes a more accurate interpretation of § 230(c), an analysis regarding the value of preserving distributor liability for ISPs, a discussion emphasizing the importance of balancing crucial policy matters, and analogizes copyright law to defamation law in the Internet context.

II. TRADITIONAL DEFAMATION LAW

Before addressing whether ISPs should be held liable for third party defamation published over the Internet, it is first necessary to understand the contemporary framework of defamation law. The *Restatement (Second) of Torts* defines a defamatory communication as one 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."[47] Defamation can be referred to as either libel or slander.[48] Libel consists of written or printed publication of defamatory material that is embodied in physical form, or any other form of communication, that has the potentially harmful characteristics of written or printed words.[49] Slander, on the other hand, consists of the publication of defamatory matter by spoken words, transitory gestures, or by any other type of communication, other than those that are included in the definition of libel.[50] For example, if *A* prepares a wax figure that is a recognizable representation of *B* and places it among other effigies of famous murderers in "The Chamber of Horrors," where it is seen by a number of people, *A* has just libeled *B*.[51] *A*'s actions cannot be characterized as slander because the publication of the defamatory material is embodied in a physical form and is not transi-

47. RESTATEMENT (SECOND) OF TORTS § 559 (1977).
48. *See id.* § 568.
49. *Id.* § 568(1).
50. *Id.* § 568(2).
51. *Id.* § 568 illus. 3.

tory in nature.[52] Furthermore, three factors that make published material libel rather than slander are: (1) the deliberate and premeditated character of the publication, (2) the wide area of dissemination, and (3) the persistence of the defamation.[53]

Defamation law is primarily designed to protect an individual's reputation.[54] For example, if defamatory material has not been communicated to a third party, then there is no loss of reputation, and therefore, no cause of action.[55] The common law elements necessary to establish a defamation cause of action are: (1) a false and defamatory statement concerning another, (2) an unprivileged publication to a third party,[56] (3) fault amounting to at least negligence on the part of the publisher, and (4) the existence of actual harm.[57] More specifically, in libel cases, publication of the defamatory material in the form of written or printed words is essential to finding liability.[58] Section 577 of the *Restatement (Second) of Torts* states that publication of defamatory matter "is . . . communication intentionally or by a negligent act to one other than the person defamed."[59] Furthermore, section 577 indicates that "one who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on property in his possession or on an entity that is within his control is subject to liability for its continued publication."[60] Thus, one who republishes defamatory material over which he has control assumes liability equal to that of the original publisher.[61]

Prior to 1964, defamation was considered to be a strict liability tort.[62] In *New York Times v. Sullivan*, the Supreme Court estab-

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52. *See id.* § 568(1)-(2).

53. *Id.* § 568(3). Accordingly, the Internet publication of defamatory statements made by an unknown third party qualifies as libel because it is embodied in a physical form on the Internet, is widely disseminated, is premeditated and deliberate, and is persistent in character. *Id.* § 568 cmt. d; *see also* Sylvia Khatcherian, *Liability on the Internet*, N.Y. ST. B.J., May/June 1996, at 34, 36 (indicating that defamatory statements published over the Internet are libelous statements).

54. RESTATEMENT (SECOND) OF TORTS § 577 cmt. b (1977). "[R]eputation is the estimation in which one's character is held by his neighbors or associates." *Id.*

55. *Id.*

56. An unprivileged publication refers to one that is not based upon the consent of the person affected or one that is not justifiable or necessary to the protection of an important interest. *Id.* § 558.

57. *Id.*

58. *Id.* § 577 cmt. a; *see also id.* § 558 (stating the elements of a defamation cause of action).

59. *Id.* § 577(1).

60. *Id.* § 577(2).

61. *Id.*; *see also* Cianci v. New Times Publ'g Co., 639 F.2d 54, 61 (2d Cir. 1980) (referring to RESTATEMENT (SECOND) OF TORTS §§ 577-578 (1977)).

62. *See* Friedman & Buono, *supra* note 29, at 665 n.15. A strict liability tort can be defined as a tort in which the liability "does not depend on actual negligence or an intent to harm," but is

lished that the First Amendment demands a minimum constitutional fault standard of "actual malice"[63] for defamation claims involving public figures.[64] Later, in *Gertz v. Robert Welch, Inc.*, the Court established a minimum fault standard of negligence for claims brought by private figures[65] regarding matters of public concern.[66] The Court left the question open for individual states to decide which standard to impose in cases involving claims brought by private figures involving private matters.[67] The Court stated that unless the state law indicated otherwise, a standard of negligence, instead of actual malice, could be used for private claims involving private matters.[68]

Generally, common law recognizes three different standards of liability for the dissemination of defamatory material: publisher liability, distributor liability, and common carrier liability.[69] The duty of care and liability increases as the discretion that the disseminator has over the published information increases.[70] Accordingly, publishers generally experience the greatest amount of liability, while common carriers experience the least.[71]

Publisher[72] liability may be attributed to any entity that exercises a high degree of editorial content control over the dissemination of defamatory material.[73] A newspaper serves as a common example of a medium that is often subject to publisher liability because a newspaper usually exercises editorial control over what is

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instead based on the breach of a duty that is imposed by the law. BLACK'S LAW DICTIONARY 926 (7th ed. 1999).

63. "Actual malice" means that the defendant had knowledge that the statement was false, or recklessly disregarded whether or not the statement was false. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

64. *See id.* at 254 (requiring the plaintiff, a police chief, to demonstrate that a newspaper acted with actual malice in printing an advertisement that described plaintiff's allegedly racist acts); *see also* Friedman & Buono, *supra* note 29, at 650 n.15.

65. A private figure is distinguished from a public figure because a public figure is one who is known to "thrust himself to the forefront of the particular controversy" that gave rise to the defamation, while a private figure does not thrust himself to the forefront of the controversy. Lerman v. Chuckleberry Publ'g, Inc., 521 F. Supp. 228, 235 (S.D.N.Y. 1981). Just because a person is successful or popular does not mean that he is a public figure. *Id.*

66. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974); *see also* Friedman & Buono, *supra* note 29, at 650 n.15.

67. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 749-50 (1985).

68. *See id.*

69. *See* Friedman & Buono, *supra* note 29, at 650; *see also* Mirmira, *supra* note 30, at 438.

70. *See* Mirmira, *supra* note 30, at 438-39.

71. *See id.*

72. "A 'publisher' is an entity, such as a book or newspaper publisher, who is responsible for the creation or editing of content in a publication." Sheridan, *supra* note 46, at 153.

73. *See id.*

published.[74] A publisher has an obligation to monitor the content of its publications, and therefore, is held liable for any third-party defamation contained in the publication, even if the defamation was simply an oversight or was not intended.[75] For example, a newspaper can be held liable for defamation if it publishes a letter to the editor that contains false and defamatory statements.[76]

Distributor[77] liability may be attributed to any entity that distributes, but does not exercise editorial control over, defamatory material, such as a news vendor, bookstore, or library.[78] A distributor can be characterized as an entity that transmits or delivers information that is created or published by a third party.[79] Distributors are only held liable if they knew or had reason to know of the defamation.[80]

Lastly, common carrier liability applies to any entity that acts as a passive conduit for the transmission of defamatory material.[81] Thus, even if it knew or had reason to know of the defamation, it may escape liability for defamation due to its lack of editorial control over the material.[82] For example, in *Anderson v. New York Telephone Co.*, the New York Court of Appeals indicated that even when a court characterizes a common carrier, such as a telephone company, as a publisher, the common carrier should be entitled to qualified immunity from liability according to the common law exception for actual malice.[83] Thus, common carriers are generally immune from liability for third-party defamation.[84]

The common carrier is clearly distinguishable from the other two categories of disseminators because it lacks discretion over the published material.[85] It is not as easy, however, to tell the differ-

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74. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 260-65 (1964).

75. *See* Friedman & Buono, *supra* note 29, at 650.

76. *Id.*

77. A "distributor" is an entity, such as a library or bookseller, which disseminates a publication created by a third party to the public. Sheridan, *supra* note 46, at 150.

78. *See* Auvil v.CBS 60 Minutes, 800 F. Supp. 928, 932 (E.D. Wash. 1992); Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991); Lerman v. Chuckleberry Publ'g, Inc., 521 F. Supp. 228, 235 (S.D.N.Y. 1981).

79. RESTATEMENT (SECOND) OF TORTS § 581(1), § 581 cmts. b, d, e (1977).

80. *See Auvil*, 800 F. Supp. at 932; *Cubby, Inc.*, 776 F. Supp. at 139; *Lerman*, 521 F. Supp. at 235.

81. Examples of common carriers are telephone companies and telegraph companies. *See* Anderson v. N.Y. Tel. Co., 345 N.Y.S.2d 740, 752 (N.Y. App. Div. 1973).

82. *See* Anderson v. N.Y. Tel. Co, 320 N.E.2d 647, 648 (N.Y. 1974).

83. *See id.*; *see also Anderson*, 345 N.Y.S.2d at 752-53 (indicating that the common law exception for malice exempts a common carrier from liability for delivering libelous messages unless the plaintiff furnishes evidence of actual malice, or bad faith, on the part of the carrier).

84. *See Anderson*, 320 N.E.2d at 648.

85. *See id.*

ence between a publisher and a distributor. A publisher is often referred to as a primary publisher because he is the one who has editorial control over the content of the publication.[86] A distributor, on the other hand, is sometimes called the secondary publisher, or "republisher," because he simply makes the material available to others, but is not involved with the creative or editorial processes.[87] A distributor does, however, have the ability to remove defamatory material from distribution once it has knowledge of a publication's defamatory nature.[88] This distinction between publisher and distributor can become blurred, however, because an entity, such as a newspaper or magazine, which is commonly considered a publisher, can be held liable as either a primary publisher or a secondary publisher of information.[89] For example, a television network[90] is responsible for creating the content that it broadcasts and may therefore be found liable as a publisher of defamatory material.[91] A network affiliate, however, is considered a distributor of defamatory information because it does not create the content that it distributes, or exert editorial control over the substance of the material displayed.[92] As the next section will demonstrate, the blurring of the distinction between publisher and distributor is the main source of confusion and controversy in third-party Internet defamation cases.

III. DEFAMATION IN THE INTERNET CONTEXT

A. Cases Before § 230 of the CDA

Prior to the passage of the CDA in 1996, lower courts interpreted third-party Internet defamation cases using solely common law defamation principles.[93] When assessing ISP liability for defamation published over the Internet, the courts used a case-by-case approach in which they tried to fit ISPs into one of the three tradi-

86. Sheridan, *supra* note 46, at 154.
87. *Id.*
88. *Id.*
89. Michelle J. Kane, Blumenthal v. Drudge, 14 BERKELEY TECH. L.J. 483, 486 (1999).
90. *Id.* at 501 n.19.
91. *Id.* (citing Coffey v. Midland Broad. Co., 8 F. Supp. 889 (W.D. Mo. 1934)).
92. *Id.*
93. *See generally* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991) (holding that CompuServe was a distributor); Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995) (holding that Prodigy was subject to publisher liability).

tional categories of publisher, distributor, or common carrier.[94] In 1991, for example, in *Cubby, Inc. v. CompuServe, Inc.*, the New York Court of Appeals held that CompuServe qualified as a distributor of information, similar to a library or news vendor, and was therefore only liable for defamation if it had knowledge that the statements in question were defamatory.[95] The court reasoned that a computerized database, like CompuServe's Computer Information Service ("CIS"),[96] on which the defamatory statements were made, exemplifies an electronic for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications.[97] Based on this finding, and the relative lack of evidence that CompuServe was aware of the defamatory statements posted on its CIS, the court held that CompuServe was not liable under distributor liability principles.[98]

In the 1995 case of *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the Supreme Court of New York held that Prodigy, the ISP, should be subjected to publisher liability, rather than distributor liability, for the defamatory information published on Prodigy's bulletin boards.[99] In *Stratton Oakmont, Inc.*, the plaintiff, an investment banking firm, sued Prodigy for publishing third-party defamatory statements made by unknown parties on its "Money Talk" bulletin board.[100] The defamatory statements asserted that the plaintiff committed criminal and fraudulent acts in connection with

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94. *See Cubby, Inc.*, 776 F. Supp. at 139-40; *Stratton Oakmont, Inc.*, 1995 WL 323710, at *5.

95. *Cubby, Inc.*, 776 F. Supp. at 140. In *Cubby, Inc.*, plaintiffs sued CompuServe for displaying libelous defamatory statements in the Rumorville publication that CompuServe carried as part of the Journalism Forum in its computerized database, CompuServe Information System ("CIS"). *Id.* at 139.

96. CIS is an online general information service or "electronic library" that subscribers may access from a personal computer for a membership fee. *Id.* at 137. CIS contains various forums with different publications. *Id.* The Journalism Forum contains a publication called "Rumorville USA," a daily newsletter that provides reports about broadcast journalism. *Id.* Rumorville is published by Don Fitzpatrick Associates of San Francisco ("DFA"), which is headed by defendant Don Fitzpatrick. *Id.* CompuServe has no direct employment or contractual relationship with DFA or Fitzpatrick. *Id.* CompuServe also has no opportunity to review Rumorville's contents before DFA uploads it into CompuServe's computer banks and receives no part of the fees that DFA charges for access to Rumorville. *Id.*

97. *Id.* at 140.

98. *Id.*

99. *Stratton Oakmont, Inc.*, 1995 WL 323710, at *3. It is important to note that the court in *Stratton Oakmont, Inc.* court characterized publisher liability and distributor liability as two distinct sources of defamation liability, rather than stating that they both belonged within the broad category of publisher. *Id.*

100. *Id.* at *2.

the initial public offering of Solomon-Page Ltd. stock.[101] The *Stratton Oakmont, Inc.* court reasoned that Prodigy was liable as a publisher of defamatory content because: (1) Prodigy held itself out to the public and its members as controlling the content of its computer bulletin board and (2) the evidence indicated that Prodigy exerted editorial control over its content through the use of an automatic screening software program, content guidelines, and board leaders hired to enforce these guidelines.[102]

Stratton Oakmont, Inc. and *Cubby, Inc.* are two of the most prominent Internet defamation decisions rendered prior to 1996. *Stratton Oakmont, Inc.*, in particular, was significant because it attributed publisher liability to an ISP in a third-party defamation case, greatly increasing liability for ISPs, many of which operate bulletin boards.[103] The *Stratton Oakmont, Inc.* decision also raised concern that imposing publisher liability upon ISPs would produce large damage judgments for ISPs, forcing them to either shut down their bulletin boards or suspend their services altogether, thereby severely impeding technology.[104] Another concern that arose from the *Stratton Oakmont, Inc.* decision was that it would create disincentives for ISPs to engage in self-regulation because they would be subject to publisher liability every time they exerted editorial control over the content of third-party information.[105] In order to address these concerns, Congress passed § 230(c) of the CDA, which

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101. *Id.* Specifically, the alleged defamatory material included the following statements: "(a) Stratton Oakmont, Inc. ('Stratton'), a securities investment banking firm, and Daniel Porush, Stratton's President, committed criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page Ltd.; (b) the Solomon-Page offering was a 'major criminal fraud' and '100% criminal fraud'; (c) Porush was 'soon to be proven criminal'; and (d) Stratton was a 'cult of brokers who either lie for a living or get fired.' " *Id.*

102. *Id.* at *3-6. The court also stated that, for these two reasons, Prodigy was distinguishable from CompuServe, in *Cubby, Inc.*, in which the court held that CompuServe was a distributor. *Id.* The court essentially reasoned that because Prodigy exerted sufficient editorial control over its bulletin boards, it was more like a newspaper (publisher) than a distributor (library or news vendor). *Id.* Furthermore, the court stated, "Let it be clear that this court is in full agreement with *Cubby* and *Auvil*. Computer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates. It is Prodigy's own policies, technology and staffing decisions which have altered the scenario and mandated the finding that it is a publisher." *Id.* at *5. Thus, the court acknowledged that Prodigy was unique among most ISPs. *See* Kane, *supra* note 89, at 494.

103. *See Id.* at 494.

104. *See* Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998) (indicating that the *House Conference Report* and the statute itself uphold the policy that technology should not be impeded).

105. *See id.*

essentially overruled the *Stratton Oakmont, Inc.* decision by granting ISPs immunity from publisher liability.[106]

B. The Impact of the CDA on Internet Defamation Cases

Section 230(c) of the CDA, the "Good Samaritan" provision, provides that an ISP shall not be considered a publisher of any information provided by an information content provider.[107] The "Good Samaritan" provision also indicates that no provider or user of an interactive computer service shall be held civilly liable for any action voluntarily taken in good faith to restrict access to obscene or otherwise objectionable material.[108] The CDA attempts to promote and encourage the continued development and use of the Internet and technology.[109] Thus, lower courts have used both the traditional common law framework as well as the "Good Samaritan" provision to assess defamation cases over the Internet.[110]

Lower courts have interpreted the "Good Samaritan" provision as providing ISPs with a very broad immunity in third-party Internet defamation cases.[111] The courts have construed the ISP immunity broadly, in the spirit of the CDA's stated purpose of promoting rather than impeding technology and Internet use.[112] As evidenced by the remainder of this section, since the CDA's enactment in 1996, there has not yet been a single case that has held an ISP liable for disseminating third-party defamatory statements over the Internet.[113]

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106. H.R. CONF. REP. NO. 104-458, at 194 (1996); *see also Blumenthal*, 992 F. Supp. at 52 (explaining that Congress enacted § 230(c) of the CDA to overrule *Stratton Oakmont, Inc.*).

107. 47 U.S.C. § 230(c)(2) (Supp. V 1999).

108. § 230(c)(2)(A).

109. § 230(b)(1)-(3).

110. *See* discussion *infra* Part III.

111. *See generally* Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998) (emphasizing that the "Good Samaritan" provision of the CDA was intended to grant ISPs immunity from both distributor and publisher liability due to the policy purpose of promoting technology); Zeran v. Am. Online, Inc., 958 F. Supp. 1124, 1132-35 (E.D. Va. 1997) (holding that the "Good Samaritan" provision of the CDA provided ISPs immunity from both publisher and distributor liability, and therefore, AOL was not liable for failing to remove defamatory statements from its bulletin board after gaining knowledge of the defamation); Lunney v. Prodigy Servs. Co., 723 N.E.2d 539, 542 (N.Y. 1999) (holding that the *Zeran* court's broad interpretation of the "Good Samaritan" immunity granted to ISPs under the CDA should be upheld).

112. *See Zeran*, 958 F. Supp. at 1131-35.

113. *See infra* note 154 and accompanying text.

1. *Zeran v. America Online, Inc.*

The U.S. District Court for the Eastern District of Virginia's 1997 decision in *Zeran v. America Online, Inc.* established the trend of granting ISPs broad immunity from defamation liability under § 230(c) of the CDA.[114] In *Zeran*, Mr. Kenneth Zeran sued AOL for failing to remove defamatory notices about him that were posted on an AOL message board after AOL had been informed about the notices.[115] Zeran sued AOL for negligence under the distributor liability theory that distributors of information are liable for disseminating material that they knew or should have known was defamatory in character.[116] AOL responded to Zeran's suit by filing a motion for judgment on the pleadings, arguing that the enactment of the CDA preempted Zeran's state tort action and mandated that AOL be granted "Good Samaritan" immunity.[117] AOL's motion did not contend, however, that Zeran did not allege the elements of distributor liability; the motion rather relied solely on the CDA.[118] The district court granted AOL's motion and held that AOL was not liable for failing to remove the defamatory notices due to the "Good Samaritan" immunity granted to ISPs.[119]

The district court in *Zeran* substantiated its holding by indicating that the Supremacy Clause of the Constitution mandates that federal laws, like the CDA, preempt state laws when state law directly conflicts with federal law.[120] The court identified three types of conflicts that give rise to preemption: (1) the impossibility of compliance with state and federal law, (2) the conflict between the state law and the language of the federal statute, and (3) when the state tort liability conflicts with the purposes and objectives of a federal statute.[121] The first type of preemption conflict arises when compliance with both federal and state regulation is "a physical impossibility."[122] The court dismissed this type of preemption problem by stating that an ISP can comply with the CDA even if it is subjected to state liability for negligent distribution of defamatory ma-

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114. *Zeran*, 958 F. Supp. at 1132-35.
115. *See supra* notes 1-22 and accompanying text.
116. *Zeran*, 958 F. Supp. at 1128.
117. *Id.*
118. *Id.*
119. *Id.* at 1136.
120. *Id.* at 1129.
121. *See id.* at 1131-33; *see also* Sheridan, *supra* note 46, at 163-65.
122. *Zeran*, 958 F. Supp. at 1131 (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).

terial; thus, there is no physical impossibility of compliance between the CDA and state tort law.[123]

Instead, the court focused more heavily on the second type of preemption conflict, asserting that state tort distributor liability principles conflicted directly with the "express" language of the CDA.[124] The court indicated that § 230(c)(1) directly conflicts with attributing distributor liability to an ISP under state tort law.[125] Section 230(c)(1) provides 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."[126] According to the court, the conflict between the CDA and applying distributor liability to an ISP arises because distributor liability is essentially the same thing as publisher liability.[127] The court indicated that distributor liability—liability for knowingly or negligently distributing defamatory material—is just a specific type or degree of publisher liability.[128] Therefore, since § 230(c) of the CDA granted ISP immunity from publisher liability, ISPs should be immune from distributor liability as well.[129] Relying upon both section 577 of the *Restatement (Second) of Torts*[130] and the Seventh Circuit's decision in *Tacket v. General Motors Corp.*, the court concluded that a distributor is a type of publisher.[131] Furthermore, the court indicated that these two authorities revealed that distributor liability treats a distributor as a "publisher" of third-party statements when that distributor knew or had reason to know that the statements were defamatory.[132] Thus, according to the court, an attempt to impose distributor liability upon AOL is, in effect, an at-

123. *Id.* at 1132.

124. *Id.*

125. *Id.*

126. 47 U.S.C. § 230(c)(1) (Supp. V 1999). For the CDA's definition of an "interactive computer service," *see supra* note 41 and accompanying text. AOL qualifies as an interactive computer service system. *Zeran*, 958 F. Supp. at 1132.

127. Zeran, 958 F. Supp. at 1132-33.

128. *Id.* at 1132.

129. *Id.* at 1132-33.

130. For a description of section 577 of the *Restatement (Second) of Tort*, see *supra* notes 59–60. Relying on the *Restatement's* definition of a publication, the *Zeran* court concluded that the law treats a publisher as both one who intentionally communicates defamatory information and one who fails to take reasonable steps to remove defamatory statements under his control. *See* 958 F. Supp. at 1133.

131. *Zeran*, 958 F. Supp. at 1132-33. In *Tacket v. General Motors Corp.*, 836 F.2d 1042, 1046 (7th Cir. 1987), the Seventh Circuit held that one who intentionally and unreasonably failed to remove defamatory material constituted the publisher of the content of the information. *Zeran*, 958 F. Supp. at 1133.

132. *Zeran*, 958 F. Supp. at 1133.

tempt to treat AOL as the publisher of defamatory material.[133] In other words, the state law's classification of AOL as a "publisher" of defamatory material is contrary to § 230(c)(1), and therefore, the CDA preempted Zeran's claim for the negligent distribution of the notice on the AOL message board.[134]

Lastly, the *Zeran* court discussed the third type of preemption,[135] finding that state law distributor liability can also be preempted by the CDA if the state law stands "as an obstacle to the accomplishment of the full purposes and objectives of Congress in passing [section] 230 of the CDA."[136] Thus, the court held that distributor liability frustrates the purpose of the CDA, and therefore, the CDA preempts any state tort law liability.[137] The court reasoned that imposing distributor liability upon an ISP would, in effect, make it less likely that an ISP would edit or block the content of its bulletin boards.[138]

In conclusion, the *Zeran* court acknowledged that, while the CDA does not preempt all state law causes of action concerning ISPs, it did indeed preempt Zeran's claim because his negligent distributor liability cause of action conflicts with the express language and purposes of the CDA.[139]

Zeran appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit.[140] The Fourth Circuit upheld the district court's decision, affirming that ISPs that distribute and disseminate defamatory material fall within the traditional definition of publisher, and therefore, are protected by § 230(c) immunity.[141] The court emphasized that distributors belong to the larger category of publisher, which has a minimum knowledge requirement as a prerequisite to liability.[142] Indicating that distributors should be regarded as mere conduits, the Fourth Circuit explained that distributors should be subjected to a different

133. *Id.*
134. *Id.*
135. *Id.* at 1134.
136. *Id.* The purpose of the CDA is "to encourage the development of technology" and "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to . . . inappropriate . . . material." *Id.* (internal quotation marks omitted) (quoting 47 U.S.C. § 230(b) (1996)).
137. *Zeran*, 958 F. Supp. at 1134-35.
138. *Id.*
139. *Id.* at 1135.
140. *Zeran*, 129 F.3d 327, 327 (4th Cir. 1997).
141. *Id.* at 332.
142. *Id.*

standard than other types of publishers.[143] Accordingly, the court stated, "this distinction signifies only that different standards of liability may be applied within the larger publisher category, depending on the specific type of publisher concerned."[144] Thus, both the district court and the Fourth Circuit rejected the contention that distributor liability and publisher liability are two distinct categories.[145]

Furthermore, the Fourth Circuit asserted that the fact that an ISP is given notice does not transform the ISP from a publisher to a distributor under the law.[146] According to the court, once an ISP receives notice of an allegedly defamatory posting, the ISP is then thrown into the role of publisher because it "must decide whether to publish, edit, or withdraw the posting."[147] Thus, an ISP's actions of removing defamatory material after receiving notice makes the ISP a publisher rather than a distributor, and § 230(c) specifically immunizes an ISP from liability for exercising this role as publisher.[148]

Addressing policy concerns, the Fourth Circuit noted that imposing notice-based liability, or distributor liability, upon ISPs would create incentives for ISPs "to restrict speech and abstain from self-regulation," which would be in direct contradiction to the policies that Congress intended to promote in passing the CDA. The court reasoned that if ISPs were subject to distributor liability, then ISPs would have an incentive to remove messages upon notification, whether or not the contents were defamatory; thus, "liability upon notice [would have] a chilling effect on the freedom of Internet speech."[149] Furthermore, notice-based liability would deter ISPs from regulating the distribution of offensive material over its services because any efforts to investigate, screen, or monitor material would lead to increased liability.[150] The Fourth Circuit hypothesized that ISPs would avoid facing increased liability by avoiding or refraining from self-regulation.[151] Also, the Fourth Circuit noted that

143. *Id.* While distributors must have knowledge of the existence of a defamatory statement to be held liable for defamation, this minimum knowledge requirement is not necessary to attribute liability to a publisher. *Id.* A publisher can be held liable for disseminating defamatory material if it has editorial control over the content of the material. *Id.*

144. *Id.*

145. *Id.* at 331; Zeran v. Am. Online, Inc., 958 F. Supp. 1124, 1133 (E.D. Va. 1997).

146. *Zeran*, 129 F.3d at 332.

147. *Id.*

148. *Id.* at 332-33.

149. *Id.* at 333.

150. *Id.*

151. *Id.*

due to the large volume of speech communicated over the Internet, imposing distributor liability upon ISPs would produce an "impossible burden," since they would be faced with "ceaseless choices of suppressing controversial speech or sustaining prohibitive liability."[152]

2. The Trend Created by *Zeran*: Moving Towards Absolute Immunity for ISPs from Defamation Liability

The *Zeran* court's broad conceptualization of "publisher" has become the basis for the application of a broad immunity to ISPs in Internet defamation claims. Since the *Zeran* decision, there have not been an abundance of cases regarding the specific issue of ISP liability for third-party defamation published over the Internet.[153] Each of the cases that have arisen, however, have followed the trend established in *Zeran* of granting ISPs immunity from both distributor and publisher liability under § 230(c).[154] Because lower courts have granted ISPs immunity from publisher and distributor liability, they have essentially granted ISPs absolute immunity from defamation liability. The only other form of liability that can be attributed to disseminators of defamatory material is the common carrier, which is generally exempt from tort liability due to its lack of discretion over the material.[155] To make matters worse,

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152. *Id.*

153. *See* Mirmira, *supra* note 30, at 442. A possible explanation for this could be that many third-party defamation suits brought against ISPs settle before going to trial.

154. *See infra* Part III.B.2.a-c. Note that lower courts have also applied the *Zeran* court's broad interpretation of the CDA immunity to exempt ISPs from liability in cases in which the ISP disseminated objectionable material other than defamation over the Internet, even after receiving notice or having knowledge about the material. *See* Doe v. Am. Online, Inc., 783 So. 2d 1010, 1025-28 (Fla. 2001) (indicating that because of the federal immunity granted to ISPs under § 230(c) of the CDA, AOL was not liable as the negligent distributor or the publisher of pornography displayed in one of its "chat rooms" by a third party, even though the ISP had knowledge of the pornography and failed to remove it); Stoner v. eBay, Inc., No. 305666, 2000 WL 1705637, at *2-4 (Cal. App. Dep't Super. Ct. Nov. 1, 2000) (holding that since eBay qualifies as an "interactive service provider" under the CDA, it is immune from any liability arising from its distribution, advertisement, or sale of unauthorized "infringing" sound recordings through its online auction service). *But see* Gucci Am., Inc. v. Hall & Assocs., 135 F. Supp. 2d 409, 412-17 (S.D.N.Y. 2001) (holding that § 230(c) does not immunize an ISP from a trademark infringement claim because § 230(e)(2) of the CDA indicates that the CDA should not limit the intellectual property laws that attribute distributor liability to ISPs in trademark infringement context). Courts have also extended § 230(c) immunity to exempt ISPs from liability in breach of contract claims. *See* Schneider v. Amazon.com, Inc., 31 P.3d 37, 39-43 (Wash. 2001) (holding that § 230(c) immunity exempted an online bookseller, which qualified as an ISP, from liability for breach of contract, defamation, and negligent misrepresentation in a suit that the plaintiff brought against the bookseller after it failed to remove negative reviews about the plaintiff's book from its website).

155. *See* Anderson v. N.Y. Tel. Co., 35 N.Y.S.2d 740, 752-53 (N.Y. 1974).

lower courts have managed to expand the already broad immunity granted to ISPs in *Zeran* by holding that ISPs are immune from liability, even when they play an active, aggressive role in disseminating defamatory content.[156] Thus, it appears that lower courts are moving toward absolute immunity for ISPs.

a. Blumenthal v. Drudge

In 1998, one year after the *Zeran* decision, a district court in *Blumenthal v. Drudge* upheld the *Zeran* court's broad interpretation of the CDA's "Good Samaritan" immunity.[157] The *Blumenthal* court not only followed *Zeran* with respect to the CDA, but it further expanded the broad, almost-absolute immunity granted to ISPs in *Zeran*.[158] In *Blumenthal*, plaintiff Sydney Blumenthal sued both Matt Drudge, the creator of the defamatory statements, and AOL, the disseminator of the statements.[159] The defamatory statements were displayed through AOL's service connection on an electronic publication called "The Drudge Report,"[160] which Matt Drudge authored.[161] The day before Blumenthal started working as an aide to President Clinton, The Drudge Report alleged that Blumenthal had a "spousal abuse past that has been effectively covered up."[162] AOL played an active role in publishing The Drudge Report[163]: (1) AOL and Drudge entered into a written license agreement, which made The Drudge Report available to all members of AOL's service for a period of one year;[164] and (2) AOL had certain editorial rights with respect to The Drudge Report, including the right to remove or make changes to the content.[165]

Blumenthal sued AOL under the theory that § 230 of the CDA did not provide immunity to AOL because Drudge was not an

156. *See* Ben Ezra, Weinstein & Co. v. Am. Online, Inc., 206 F.3d 980, 983 (10th Cir. 2000); Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998). The broad *Zeran* immunity was expanded to immunize ISPs from immunity even when distributing defamatory content provided by the ISPs service partner. *See Ben Ezra, Weinstein, & Co.*, 206 F.3d at 983.

157. *Blumenthal*, 992 F. Supp. at 52.

158. *See* Kane, *supra* note 89, at 491; Mirmira, *supra* note 30, at 444.

159. *Blumenthal*, 992 F. Supp. at 46-47.

160. The Drudge Report is an electronic gossip column published over the Internet, which focuses on gossip from Hollywood and Washington, D.C. *Id.*; *see also* Kane, *supra* note 89, at 483.

161. *Blumenthal*, 992 F. Supp. at 46-47.

162. *Id.*; *see also* Mirmira, *supra* note 30, at 437.

163. *Blumenthal*, 992 F. Supp. at 51. AOL paid Drudge to include The Drudge Report on its service and actively advertised the Report, which encouraged its subscribers to sign up for AOL in order to receive the benefit of viewing The Drudge Report. *Id.* at 51-52.

164. *Id.*

165. *Id.*

anonymous third party who published a defamatory statement through AOL's service.[166] Blumenthal emphasized that AOL specifically contracted with Drudge, and paid him $3,000 a month to publish The Drudge Report.[167] The court held that AOL was not liable for disseminating the defamatory statements, due to the broad immunity granted to ISPs according to the *Zeran* court's interpretation of § 230.[168] The court reasoned that because AOL was an ISP,[169] AOL could not be held liable for the defamatory statements of another "information content provider," according to § 230(c)(1)[170] and § 230(c)(2).[171] Furthermore, the court rejected the argument that AOL could be held liable for distributor liability since the text of § 230(c) exempted ISPs only from publisher liability.[172] The court indicated that, when Congress used the term "publisher" in § 230(c), it intended to immunize ISPs from both publisher and distributor liability.[173]

The *Blumenthal* court not only upheld the *Zeran* court's broad interpretation of § 230(c) immunity, but went one step further by immunizing ISPs from claims pertaining to the content provided to the ISP by its service partner, as opposed to content provided by third-party subscribers.[174] *Blumenthal* expanded ISP immunity from defamation liability by applying it to cases in which the ISP was more than just a passive conduit for the third-party defamer's postings; and by doing this, the court essentially disregarded the ISP's role in disseminating the content, which is generally the main focus when assessing liability.[175] Based on the statu-

166. *Id.* at 51-52.

167. *Id.* at 51.

168. *See id.* at 50-53.

169. Plaintiffs also conceded that Matt Drudge was an "information content provider" for the purposes of the CDA. *Id.* at 50.

170. For the contents of § 230(c)(1), see *supra* note 126 and accompanying text.

171. CDA § 230(c)(2) states: "No provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)." 47 U.S.C. § 230(c)(2) (Supp. V 1999).

172. *Blumenthal*, 992 F. Supp. at 52-53.

173. *Id.*

174. *See* Friedman & Buono, *supra* note 29, at 658; Kane, *supra* note 89, at 491; Mirmira, *supra* note 30, at 444.

175. *See* Friedman & Buono, *supra* note 29, at 657-58. In *Zeran*, the court granted the ISP, AOL, immunity from defamation liability under § 230(c) of the CDA. *Id.* The facts in *Zeran*, however, were different than those in *Blumenthal* because in *Zeran*, AOL acted as a mere con-

tory language of the CDA and the *Zeran* holding, the court applied the "Good Samaritan" immunity to AOL.[176] The court stated that because Congress made the choice to immunize ISPs, even when they had an active, aggressive role in making the content available, the court had no other choice but to find AOL not liable.[177]

b. Lunney v. Prodigy Services Co.

In *Lunney v. Prodigy Services Co.*, the New York Court of Appeals upheld the trend amongst lower courts of granting ISPs broad immunity from defamation liability.[178] The *Lunney* court, however, relied solely on common law defamation principles, rather than the CDA, to reach its conclusion.[179]

In *Lunney*, a fifteen-year-old prospective Eagle Scout sued Prodigy for negligently publishing defamatory statements[180] over its network through fictitious Prodigy accounts opened under Lunney's name.[181] Affirming the Appellate Division's opinion, the court held: (1) although the messages were not tasteful, they did not amount to defamation,[182] and (2) even if Prodigy was considered the publisher of the messages, it was not liable according to the common law qualified privilege granted to common carriers, such as telephone companies.[183]

When assessing whether Prodigy was liable for publishing the allegedly defamatory messages, the court analyzed the e-mail messages and bulletin board messages separately.[184] Regarding the e-mail messages, the court relied on *Anderson v. New York Telephone Co.* and asserted that, under common law, an ISP was merely a passive conduit for the information, similar to a telephone company, and therefore, was not liable for the transmission of defama-

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duit for the defamatory postings; unlike Prodigy, AOL did not play an aggressive role in making the defamatory content available. *Id.*

176. *Blumenthal*, 992 F. Supp. at 49-53.

177. *Id.* at 51-52. The court also indicated that if it were writing on a clean slate, it would rule in favor of the plaintiffs. *Id.* at 51.

178. 723 N.E.2d 539, 541-43 (N.Y. 1999).

179. *Id.*

180. Under Lunney's name, an unknown third party transmitted vulgar e-mail messages entitled, "HOW I'M GONNA KILL YOU" to a local scout master. *Id.* at 540. The impostor also posted two vulgar messages in Lunney's name on a Prodigy bulletin board. *Id.*

181. *Id.* at 539-40.

182. The court reasoned that the e-mail and bulletin board messages could not be considered defamatory because they did not involve communications that directly defamed the plaintiff. *Id.* at 540-41. The messages were not written about the plaintiff, Lunney, but instead they were ascribed to him. *Id.* at 541.

183. *Lunney*, 723 N.E.2d at 540-42.

184. *Id.* at 541-42.

tory material over its service lines.[185] Thus, the court characterized the ISP as a common carrier, rather than a publisher, and exempted Prodigy from liability for the e-mail messages.[186] Regarding the bulletin board messages, the court stated that Prodigy could not be considered the publisher of the allegedly defamatory messages.[187] The court reasoned that even if Prodigy exercised the power to exclude vulgar messages from its bulletin board, this still did not alter the ISP's "passive character in 'the millions of other messages in whose transmission it did not participate.' "[188] Thus, in the context of bulletin board messages, the court also asserted that Prodigy was a common carrier, and therefore, was not liable for defamation.[189]

Additionally, the court rejected Lunney's claim that Prodigy was negligent in failing to prevent an impostor from opening an account under his name.[190] According to the court, requiring ISPs to verify applicants would be too burdensome and would open an ISP to "liability for the wrongful acts of countless potential tortfeasors committed against countless potential victims."[191]

Furthermore, the *Lunney* court did not invoke the "Good Samaritan" immunity.[192] The court contended that the case could be resolved using solely common law principles and policy implications.[193] Moreover, the *Lunney* court asserted that this case did not call for a decision regarding whether the CDA should be interpreted so as to render an ISP "unconditionally free from notice-based liability," as in the *Zeran* decision.[194]

Even though the *Lunney* decision did not involve an analysis and application of § 230(c), *Lunney* significantly contributed to the broad immunity granted to ISPs by categorizing ISPs as common

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185. *Id.* Furthermore, the court stated that, according to *Anderson*, even if Prodigy could be considered a publisher, it would still be protected by the qualified immunity granted to telephone companies, in which case the defendant could only be held liable upon the showing of actual malice. *Id.*

186. *Id.*

187. *Id.* at 542. The court agreed with Prodigy's argument that it is not a publisher because even though it reserved the right to screen its bulletin board messages, it is not required to do so and does not normally do so. *Id.*

188. *Id.*

189. *Id.*

190. Id. at 543.

191. *Id.* This policy purpose of the court, as stated, closely mirrors the underlying policy of the CDA that technology should not be impeded, and therefore, ISPs should not be subject to limitless liability. 47 U.S.C. § 230(b)(1) (Supp. V 1999).

192. 723 N.E.2d at 543.

193. *Id.*

194. *Id.*

carriers and emphasizing the policy that ISPs should not be subject to limitless third-party defamation liability.[195]

c. Ben Ezra, Weinstein, & Co. v. America Online, Inc.

In 2000, another district court upheld a broad immunity for ISPs by exempting an ISP from defamation liability, even though the ISP played an active role in displaying the content.[196] In *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, the plaintiff company sued AOL for defamation, alleging that it published inaccurate information about the plaintiff's stock price and share volume.[197] AOL conducted a "Quotes & Portfolios" service, on which it made available stock quotation information provided by two independent third parties.[198] AOL moved for summary judgment on the grounds that § 230(c)(1)[199] of the CDA provided AOL with immunity from liability as the "publisher" or "speaker" of the information.[200] The plaintiff argued in response that AOL was not immune from suit under § 230 because AOL acted both as an "interactive computer service"[201] and an "information content provider,"[202] because they participated in the "creation and development" of the stock quotes.[203] The court, however, rejected plaintiff's argument and as-

195. *See* Mirmira, *supra* note 30, at 451-52.

196. *See* Ben Ezra, Weinstein & Co. v. Am. Online, Inc., 206 F.3d 980, 983 (10th Cir. 2000); *see also* Jane Doe One v. Oliver, 755 A.2d 1000, 1002-03 (Conn. Super. Ct. 2000) (holding that both the CDA and common law principles immunize the defendant ISP in a claim in which the plaintiff sued the ISP for disseminating defamatory material over e-mail, which was created by a third party who sent the e-mail to about thirty-one addresses in an attempt to "get even" with the plaintiff who purportedly "stole her man").

197. 206 F.3d at 983.

198. *Id.* The two independent third parties are S&P ComStock, Inc., a stock quote provider, and Townsend Analytics, Ltd., a software provider designated by ComStock. *Id.*

199. *See supra* note 126 and accompanying text (describing § 230(c)(1)).

200. *Ben Ezra, Weinstein, & Co.*, 206 F.3d at 983. Note that the *Ben Ezra, Weinstein, & Co.* court held that § 230(c) immunity exempted AOL from liability both in the form of damages and injunctive relief. *See id.* at 983-86. There is a split in the courts regarding the issue of whether § 230(c) immunity applies to injunctive relief. *See* Morrison v. Am. Online, Inc., 153 F. Supp. 2d 930, 934 (N.D. Ind. 2001) ("A review of the various cases addressing whether the statutory immunity of Section 230 applies to injunctive relief reveals a disagreement among the various courts."); *see also* Mainstream Loudoun v. Bd. of Trs., 24 F. Supp. 2d 552, 561 (E.D. Va. 1998) (holding that CDA § 230 provides ISPs immunity from actions for damages and not from actions for declaratory or injunctive relief).

201. For the CDA's definition of an "interactive computer service," *see supra* note 41 and accompanying text.

202. The CDA defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3) (Supp. V 1999).

203. *Ben Ezra, Weinstein, & Co.*, 206 F.3d at 984. The plaintiff argues that defendant, AOL, deleted some stock symbols or other information from the data base to correct the errors, which

serted that, by deleting the symbols, AOL simply "made the data unavailable and did not develop or create the stock quotation information displayed."[204] Thus, the court held that AOL was not an information content provider, but was an interactive computer service that was exempt from publisher liability under § 230.[205]

The *Ben Ezra, Weinstein, & Co.* decision is significant because, like the *Blumenthal* opinion, it expanded ISP immunity to situations in which the ISP played an active role in displaying the defamatory information. Furthermore, the court in *Ben Ezra, Weinstein, & Co.*, in a sense also broadened the ISP immunity by narrowly defining[206] an information content provider,[207] making it more likely that an ISP will escape liability by being labeled an interactive computer service,[208] rather than an information content provider.

IV. THE CURRENT PROBLEM

A. The Need for Reassessment

As detailed in Part III, recent common law developed by lower courts regarding Internet third-party defamation cases has created a trend that effectively grants ISPs an absolute immunity from liability.[209] This presents a problem because this immunity virtually nullifies Internet defamation cases and prevents a plaintiff from receiving compensation for any harm suffered as a result of the defamation. While it is apparent that Congress and the lower courts granted such a broad immunity to ISPs, in the vein of promoting rather than impeding the development of technology, it is unlikely that the intent was to make it practically impossible for an ISP to be held liable for defamation over the Internet. In their attempt to uphold the policy of promoting technology, lower courts have overlooked the adverse effect that broadly immunizing ISPs would have upon some plaintiffs in defamation cases. Thus, the

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constitutes the "creation or development" of information and transforms the defendant ISP to an "information content provider." *Id.* at 985.

204. *Id.* at 985-86.

205. *Id.* at 983.

206. The court in *Ben Ezra, Weinstein & Co.* essentially stated that deleting statements alone did not make an ISP an information content provider under the CDA. *Id.* at 985-86.

207. For the CDA's definition of an "information content provider," see *supra* note 202.

208. For the CDA's definition of an "interactive computer service," see *supra* note 41 and accompanying text.

209. *See* discussion *supra* Part III.

common law regarding Internet defamation law needs to be reformulated to balance more properly the two competing policies of providing the tort plaintiff with a remedy and ensuring that technology is not impeded.

B. Painting a Picture of the Problem—Understanding the Elements and Technology Involved

There are three parties involved in a third-party Internet defamation case: the plaintiff,[210] the unknown third party,[211] and the ISP.[212] Third-party Internet defamation cases brought against ISPs are usually analyzed on a case-by-case basis because the liability of the ISP is dependent upon the role that the ISP plays in disseminating the defamation in each specific case. Analysis of the case also focuses on the Internet medium over which the defamation is displayed, whether it be through e-mail, on a bulletin board, or in a chat room. This is because an ISP's control over the dissemination and content of the information varies in these different contexts.

1. E-mail

On the Internet,[213] there are three main forums over which defamation can be displayed: e-mail, a bulletin board, and a chat room.[214] An ISP is involved in the dissemination of information in all three of these contexts.[215]

E-mail has been referred to as "the day's evolutionary hybrid of traditional telephone line communications and regular postal service mail."[216] To transmit an e-mail message, one must have ac-

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210. The plaintiff is the victim of the defamatory statement.

211. The unknown third party is the creator and poster of the defamatory material over the Internet. Usually, the plaintiff is unable to sue the unknown third party because of the difficulties arising from trying to find out the party's identity.

212. The ISP plays the role of distributing the defamation by providing the service by which a third party can publish information. Generally, a plaintiff will choose to sue an ISP for defamation published over the Internet because the identity of the creator is unknown and the plaintiff seeks to sue the entity with the "deep pockets."

213. One commentator described the Internet as a collection of thousands of local, regional, and global interconnected computer networks that "enable users to share digital information, search for data, and communicate electronically with one another." Douglas B. Luftman, *Defamation Liability for On-Line Services: The Sky Is Not Falling*, 65 GEO. WASH. L. REV. 1071, 1077 (1997).

214. *See* Lunney v. Prodigy Servs. Co., 723 N.E.2d 539, 541-42 (N.Y. 1999); Luftman, *supra* note 213, at 1080-83; Sheridan, *supra* note 46, at 152-53.

215. *Lunney*, 723 N.E.2d at 541-42.

216. *Id.* at 541.

cess to an ISP's e-mail system and must know the recipient's personal e-mail address.[217] A person can then transmit an e-mail message by sending it through the telephone lines to a recipient's electronic mailbox in the computer e-mail system.[218] Once a message is sent, the recipient receives it instantly.[219] The recipient can then forward the message, or reply in a similar manner.[220] A commercial ISP, such as AOL, transmits the private e-mail messages, but does not exert editorial control over the distribution of the e-mail.[221] Therefore, ISPs are usually absolved of any potential third-party defamation liability transmitted through e-mail.[222]

2. Bulletin Boards

An electronic bulletin board or message board is a forum where people who log on to the board from their computers, through an ISP connection, can post messages or information.[223] A bulletin board has been defined as "storage media," such as a computer memory or hard disk, that is controlled by a computer and is connected to a telephone line through a modem.[224] The user can either compose a message while connected to the ISP's service, or upload a previously composed message onto the bulletin board.[225] The message can be posted in one of three manners: (1) it can be posted immediately and can be made available on the server to people with access to the bulletin board, (2) it can be delayed briefly to prevent the bulletin board from becoming a chat room,[226] or (3) it can be edited or removed from publication.[227] Technology enables an ISP, or message board operator, to read every message before posting it on the board, if it so chooses.[228] Thus, an electronic bulletin board may resemble a newspaper's editorial page or may be closer to a chat room, depending on the way the ISP chooses to operate the board.[229]

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217. Luftman, *supra* note 213, at 1081.
218. *Lunney*, 723 N.E.2d at 541.
219. Luftman, *supra* note 213, at 1081.
220. *Lunney*, 723 N.E.2d at 541.
221. Luftman, *supra* note 213, at 1081; *Lunney*, 723 N.E.2d at 541.
222. Luftman, *supra* note 213, at 1081; *Lunney*, 723 N.E.2d at 541-42.
223. Sheridan, *supra* note 46, at 152.
224. *Lunney*, 723 N.E.2d at 542.
225. Sheridan, *supra* note 46, at 152-53.
226. "Chat rooms" are forums on the Internet provided by ISPs that allow multiple users "to talk" or communicate online through simultaneous text postings. *Lunney*, 723 N.E.2d at 542 n.4.
227. Sheridan, *supra* note 46, at 153.
228. *Id.*
229. *Lunney*, 723 N.E.2d at 542.

In many respects, an electronic bulletin board functions the same way as a traditional thumbtacks and plywood bulletin board except that its availability to the public is magnified through the use of the Internet.[230]

3. Chat Rooms

Operationally, a chat room is similar to a bulletin board.[231] They both provide forums over the Internet through ISP services where a user can post a message that can be read by other users subscribing to the forum.[232] The main difference between a chat room and an electronic bulletin board is that the messages posted in a chat room are automatically displayed—they are not delayed briefly before being posted, which is available on a bulletin board.[233] A chat room allows multiple users to "chat" or "talk" over the Internet through the use of simultaneous text postings, which appear instantly.[234] Because the messages in a chat room instantly appear on the screen, the ISP has less editorial control over what is published than it may have on one of its bulletin boards.[235]

C. The Problem with Applying Defamation Principles in the Internet Context

Generally, lower courts have attempted to approach the problem of how to analyze Internet third-party defamation cases by applying common law defamation principles to the Internet context.[236] Two main problems that arise when trying to do this: (1) analogizing ISPs to the three common law categories for disseminators (publisher, distributor, and common carrier) can be difficult

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230. *Id.*

231. Sheridan, *supra* note 46, at 152-53.

232. *Id.*

233. *Id.*

234. *Lunney*, 723 N.E.2d at 542 n.4.

235. *Lunney*, 723 N.E.2d at 542; Sheridan, *supra* note 46, at 152-53. Nothing in the technology of a chat room, however, prevents an ISP from removing or editing a defamatory statement after it is published by a user and the ISP is informed of the statement. *Lunney*, 723 N.E.2d at 542.

236. *See* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991) (holding that CompuServe was a distributor); *Lunney*, 723 N.E.2d at 541-42 (holding that Prodigy was exempt from liability because it was comparable to a common carrier under *Anderson*, case precedent involving a telephone company which established that common carriers are not liable for the dissemination of defamatory statements); Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995) (holding that Prodigy was a subject to publisher liability).

because ISPs share similarities with each category; and (2) even if the courts categorize ISPs in one of the three common law categories, the categorization is not applicable to all contexts since ISPs exert different amounts of control in different areas of the Internet (e-mail, chat rooms, bulletin boards). Thus, ISPs are categorized inconsistently, and precedent regarding third-party Internet defamation cases does not offer much guidance.

For example, ISPs resemble telephone companies because in the e-mail context they generally have no editorial control over the content of statements.[237] In the bulletin board and chat room context, however, some ISPs may exert a degree of editorial control over the messages posted, and therefore, may not be analogous to telephone companies. ISPs are also similar to newspapers because the material printed over both of these mediums mass produces information and makes it publicly available. Because newspapers and the Internet are so pervasive in our society, defamatory material published on these mediums is likely to be read by a large number of people, and therefore, may cause the victim greater harm.[238] Also, in the bulletin board context, an ISP has the technology to exert editorial control over what is published and is therefore comparable to a newspaper as well.[239]

Furthermore, ISPs are comparable to the third medium of distributors, which lie in between the two extremes of newspapers and telephone companies. ISPs are similar to distributors, such as libraries, bookstores, and news vendors, because they disseminate information and materials without first examining the content.[240] Also, all of these entities have the power to remove or refrain from distributing defamatory material once they have knowledge of the defamation.[241] Like the other established distributors, ISPs have some control over the content they distribute, and therefore, they fit into the category of distributors as well.[242]

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237. *See Lunney*, 723 N.E.2d at 541-42.

238. Greater harm will be caused because more people will be exposed to false, disparaging statements about the victim, which will spoil the victim's reputation. *See* Robert Langdon, *The Communications Decency Act § 230: Make Sense? Or Nonsense—A Private Person's Inability to Recover if Defamed in Cyberspace*, 73 ST. JOHN'S L. REV. 829, 829-31 (1999). The tarnishing of the victim's reputation may, in turn, have a negative impact upon other aspects of the victim's life, such as his or her employment and well-being. *Id.*

239. *See* Sheridan, *supra* note 46, at 152-53.

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

241. *See id.*

242. *See id.*

The inconsistency and confusion caused by applying common law defamation principles to third party Internet defamation cases is exemplified in *Cubby, Inc.*, *Stratton Oakmont, Inc.*, and *Lunney*.[243] In *Cubby, Inc.*, the court held that an ISP that ran a computerized database was most comparable to a distributor, and therefore, should be subject to distributor liability.[244] In *Stratton Oakmont, Inc.*, the court held that Prodigy should be subject to publisher liability for the defamation displayed on its service because Prodigy exerted editorial control over the information published.[245] In *Lunney*, however, the court held that the same ISP, Prodigy, should be exempt from defamation liability both in the e-mail and bulletin board context because Prodigy was comparable to a telephone company, or common carrier, and had no editorial control over the information.[246]

D. The Problems Arising From the Ambiguities in the CDA

After the enactment of the CDA in 1996, most lower courts analyzed third-party Internet defamation cases brought against ISPs by granting ISPs "Good Samaritan" immunity under § 230(c).[247] Although this immunity is applicable to ISPs in third-party defamation suits, the statute is ambiguous as to how broadly the immunity should be applied. The plain language of the CDA indicates that an ISP should not be considered a publisher, and therefore, should be immune from publisher liability.[248] The CDA does not expressly immunize ISPs from distributor liability.[249] Thus, § 230(c) immunity can be interpreted in two different ways.[250] First, a narrow interpretation calls for only immunizing ISPs from publisher liability.[251] Second, a broad interpretation requires immunizing ISPs from both publisher and distributor liability, since a distributor can be categorized as a republisher, which falls within the overarching publisher category.[252]

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243. *See* discussion *supra* Parts III.A, III.B.2.b.

244. *See* 776 F. Supp. at 139-40.

245. 1995 WL 323710, at *3-5 (N.Y. Sup. Ct. May 24, 1995).

246. Lunney v. Prodigy Servs. Co., 723 N.E.2d 539, 541-42 (N.Y. 1999).

247. *See* discussion *supra* Part III.B. The *Lunney* court is the exception, because it used solely common law principles to analyze the case and still exempted the ISP from liability. *See* discussion *supra* Part III.B.2.b.

248. 47 U.S.C. § 230(c)(1) (Supp. V 1999).

249. *See id.*

250. *See* Zeran v. Am. Online, Inc., 958 F. Supp. 1124, 1131-35 (E.D. Va. 1997).

251. *Id.*

252. *Id.*

Lower courts attempted to solve this problem by adopting a broad interpretation of the CDA immunity, which began with *Zeran*.[253] The problem is that this trend has essentially led to an absolute immunity for ISPs in third-party Internet defamation suits, which has the adverse effect of nullifying defamation suits against ISPs in the Internet context.[254] Another problem created by the blanket immunity provided to ISPs is that it has left no incentive for ISPs to monitor or edit their content, or maintain records of their users so that plaintiffs can identify the authors of the defamatory statements and seek redress.[255] Arguably, the creation of an absolute immunity for ISPs is the result of a misinterpretation of the CDA immunity and Congress's intent under the statute.

V. A BETTER SOLUTION

Since 1996, lower courts have used both the CDA and common law defamation principles to grant ISPs a blanket immunity from third-party defamation suits.[256] Section 230(c) immunity has been interpreted to exempt ISPs from both publisher and distributor liability, even in situations in which the ISP played an aggressive role in the distribution of the information or had knowledge of the defamatory statements but failed to remove them.[257] Even when courts resorted to common law defamation principles, the ISP was still not held liable for the dissemination of defamatory material under the common carrier exception.[258] For the reasons stated in the previous section,[259] lower courts' approach to ISP liability for third-party defamation on the Internet needs to be changed. A better solution calls for applying a broad immunity to ISPs with the following three restrictions: (1) immunity granted under § 230(c) of the CDA should only immunize ISPs from publisher liability, not distributor liability; (2) ISPs that are notified of defamatory statements on the Internet over which they can exert some editorial control should be subject to distributor liability for failing to remove the statements within a reasonable amount of time; and (3) ISPs that disseminate defamatory material created by a service partner,

253. *See* discussion *supra* Part III.B.

254. *See* discussion *supra* Parts III.B.2, IV.A.

255. Mirmira, *supra* note 30, at 453.

256. *See* discussion *supra* Part III.B.

257. *See* Ben Ezra, Weinstein & Co. v. Am. Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000); Zeran v. Am. Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997); Blumenthal v. Drudge, 992 F. Supp. 44, 49-53 (D.D.C. 1998).

258. *See* Lunney v. Prodigy Servs. Co., 723 N.E.2d 539, 541-42 (N.Y. 1999).

259. *See* discussion *supra* Parts IV.A, D.

rather than an unknown third party, should not be automatically exempt from liability under section 230.[260] This proposal will help prevent ISP immunity from turning into an absolute immunity.

The solution this Note proposes is better than the trend created in lower courts because: (1) it is based on a more accurate interpretation of the CDA's purpose; (2) its application of the CDA immunity requires the use of common law defamation principles in the analysis as opposed to applying CDA immunity independently or in lieu of the common law principles; (3) it allows for a better balancing of the crucial policy matters involved; and (4) it is in line with the policies and approaches involved in other types of law that are commonly applied to the Internet context, namely copyright law.

A. Interpretation of the CDA Immunity

The CDA immunity granted to ISPs in third-party Internet defamation suits comes from § 230(c), titled "Protection for 'Good Samaritan' blocking and screening of offensive material."[261] This "Good Samaritan" immunity essentially exempts ISPs from publisher liability.[262] The CDA is ambiguous, however, as to how broadly this immunity should be applied to ISPs, or more specifically, if it should apply to publishers only or if it should apply to both publishers and distributors.[263] Lower courts applying this law have all followed the *Zeran* court's interpretation of the "Good Samaritan" immunity, indicating that, under the CDA, ISPs should be immunized from both publisher and distributor liability in the defamation context.[264] The court in *Zeran* reached its conclusion regarding the CDA's intent by looking at two factors: (1) the plain language of the statute coupled with an understanding of common law defamation principles, and (2) the purposes and objectives of the CDA.[265] A closer analysis of these two factors, however, leads to the conclusion that the *Zeran* court may have misinterpreted the

260. ISPs that disseminate defamatory material can be subject to two kinds of liability under the proposed solution: (1) they can be considered an "information content provider" and be subject to liability as the creator of the defamatory material, or (2) they can be subject to distributor liability as an ISP, or an "interactive computer service" under the CDA. *See* 47 U.S.C. § 230(f)(2)-(3) (Supp. V 1999).

261. § 230(c).

262. § 230(c)(1).

263. *See* Zeran v. Am. Online, Inc., 958 F. Supp. 1124, 1131-35 (4th Cir. 1997).

264. *See* discussion *supra* Part III.B.

265. 958 F. Supp. at 1131-35.

CDA. Arguably, these two factors demonstrate that the CDA immunity was meant to immunize ISPs from publisher liability only.

1. Plain Language of the Statute Coupled with a Correct Understanding of Common Law Defamation Principles

The *Zeran* court asserted that subjecting ISPs to distributor liability would directly conflict with the language of the CDA because a distributor is, in effect, a type of publisher, and § 230(c) expressly immunizes ISPs from publisher liability.[266] Thus, the court rejected the argument that distributor liability should be considered independently from publisher liability because distributors were distinct from publishers.[267] As support for its assertion, the court indicated that section 577 of the *Restatement (Second) of Torts* and the Seventh Circuit stated that an entity which intentionally and unreasonably fails to remove material that it knows or has reason to know is defamatory should be subject to liability for its continued publication.[268] Simply because the word "publication" was used by these two sources, the court concluded that distributors belonged within the larger category of publisher.[269] According to the court, a proper understanding of distributor liability treats a distributor as a "publisher" of third-party statements when the distributor had knowledge or should have had knowledge that the statements were defamatory.[270]

The *Zeran* court's characterization of distributor liability does not reflect a "proper understanding" of common law defamation principles because it ignores the fact that in the common law of libel the publisher/distributor distinction has existed for many years.[271] While a distributor has similarities to a publisher, and is occasionally called a secondary publisher, the common law has always considered the categories of publisher and distributor as two separate categories subject to two independent types of liability.[272] The common law created the distinction between a publisher and

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266. *Id.* at 1132-33.

267. *Id.* at 1133.

268. *Id.*

269. *See id.*

270. *Id.*

271. *See Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991); R. James George, Jr. & James A. Hemphill, *Defamation Liability and the Internet*, *in* 18TH ANNUAL INSTITUTE ON COMPUTER LAW 1998, at 694 (PLI Patents, Copyrights, Trademarks, & Literary Prop. Course, Handbook Series No. G4-4042, 1998); Langdon, supra note 238, at 840-42.

272. *See* George & Hemphill, *supra* note 271, at 694; Kane, *supra* note 89, at 486; Langdon, *supra* note 238, at 841; Sheridan, *supra* note 46, at 153-54.

distributor based on the common sense policy that a publisher has a higher degree of involvement in the dissemination of defamatory material and should therefore be subject to a separate, higher standard of liability.[273] The purpose behind this characterization is reflected in section 581 of the *Restatement (Second) of Torts*, titled "Transmission of Defamation Published by a Third Person."[274] This section states:

> (1) Except as stated in subsection (2), one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.
>
> (2) One who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher.[275]

Thus, section 581 makes it clear that a distributor, or one who delivers or transmits defamatory material published by a third party, is subject to a liability that is separate and distinct from publisher liability.[276] Section 581(1) of the *Restatement* addresses the notice liability that distributors are held accountable for while section 581(2) offers two exceptions to the rule. Furthermore, comments b, d, and e to section 581 indicate that distributors, such as libraries, news vendors, and bookstores, are to be included under section 581(1), and should therefore not be liable as publishers.[277]

Section 578 of the *Restatement* also substantiates the assertion that publisher and distributor liability are two independent, distinct sources of liability.[278] Section 578 states: "Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."[279] Thus, section 578 acknowledges that a distributor who only delivers

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273. *See* George & Hemphill, *supra* note 271, at 694.

274. RESTATEMENT (SECOND) OF TORTS § 581 (1977); George & Hemphill, *supra* note 271, at 694.

275. RESTATEMENT (SECOND) OF TORTS § 581 (1977).

276. *See id.*

277. *Id.* § 581 cmts. b, d, e. Comment (g) indicates that radio and television broadcasters are excluded from the distributor category described in section 581(1) because they are more similar to publishers in the sense that they not only distribute the material, but also have some control over the selection of the content displayed. *Id.* § 581 cmt. g. Thus, section 581 indicates that radio and television broadcasters are subject to publisher liability, while other transmitters of third-party defamation, such as libraries and bookstores, should be subject to distributor liability. *Id.* § 581 cmts. e, g. ISPs more likely resemble the distributor category because unlike radio and television broadcasters, they do not participate in the selection of the content that a third party chooses to display over the Internet.

278. RESTATEMENT (SECOND) OF TORTS § 578 (1977).

279. *Id.*

or transmits the defamatory material published by a third party should be exempted from publisher liability.[280] Section 578 also serves to rebut the *Zeran* court's argument that the common law indicates that one who fails to remove defamatory material of which he has knowledge is considered to be a republisher that is subject to publisher liability. Rather, section 578 arguably indicates that while a distributor, who merely disseminates or transmits defamatory material, may be considered a republisher in some contexts, it is not to be subjected to publisher liability.[281] Thus, section 578 emphasizes that a distributor should be subjected to a notice-based distributor liability, not publisher liability.[282] A proper understanding of defamation common law, therefore, indicates that distributor and publisher liability are to be considered separately.

The *Zeran* court's interpretation of the CDA not only mischaracterizes the defamation common law, but it also assumes that Congress had the same oversight. The distinction between a publisher and distributor is a well-understood distinction that has been around for many years.[283] Undoubtedly, Congress was aware of this distinction when it enacted § 230(c) of the CDA. If Congress intended for ISPs to be immunized from distributor liability as well as publisher liability, it would have included the word "distributor" in the plain language of the immunity under § 230(c).[284] Thus, the fact that section 230(c) only states that ISPs should not be liable as the publisher of information that it did not create indicates that the immunity should exempt ISPs solely from publisher liability.

The *Zeran* decision states that its broad application of CDA immunity stems from the intent of the plain language of the statute and an understanding of common law defamation principles.[285] A more careful analysis of the common law and the statute, however, demonstrates that the *Zeran* decision is actually more a reflection of the court's desire to promote technology and apply the ISP immunity broadly, rather than an accurate interpretation of the statute and common law principles.

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280. *See id.*

281. *See id.*

282. *See id.*

283. *See supra* Part II.

284. *See* Friedman & Buono, *supra* note 29, at 660-61; Sheridan, *supra* note 46, at 168. Both of these commentators acknowledge the supported by this Note as a valid criticism of *Zeran*.

285. 1124, 1131-35 (E.D. Va. 1997).

2. The Purposes and Objectives of the CDA

The *Zeran* court also granted ISPs broad immunity from both publisher and distributor liability under the premise that applying the immunity broadly coincided with the purposes and objectives that Congress had in mind when enacting the CDA.[286] The court stated that both the plain language of the CDA and its legislative history indicate that Congress enacted the CDA to prevent ISPs from being held liable as publishers for restricting access to objectionable material created by third parties.[287] According to *Zeran*, attributing distributor liability to ISPs would serve as an obstacle to the achievement of Congress's goal because ISPs are less likely to edit or block defamatory material if an attempt to do so can serve as a basis for liability.[288] The *Zeran* court reasoned that distributors of information are held liable if they had knowledge or should have had knowledge of the defamatory nature of statements made by a third party.[289] When ISPs attempt to monitor content, they are more likely to know or have a reason to know of defamatory material on their servers.[290] Thus, the *Zeran* court hypothesized that being subject to distributor liability would cause many ISPs to refrain from implementing monitoring policies[291] in an attempt to avoid the implication that the ISP had knowledge or reason to know about alleged defamatory material.[292]

The *Zeran* court's conclusion is weakly supported. The stated policy objectives in the plain language and the legislative history of the CDA actually compel the conclusion that Congress intended for ISPs to remain subject to distributor liability in certain contexts. Section 230(b) states that "[i]t is the policy of the United States" to:

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286. *Id.* at 1134-35.

287. *Id.* at 1134. The *Zeran* court also noted that § 230(b) states that it is the policy of the United States:

> "[T]o 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; [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 . . . ."

Id. (quoting 47 U.S.C. § 230(b)).

288. *Id.*

289. *See id.*

290. *See id.*

291. Examples of some monitoring policies that ISPs use are maintaining a record of subscribers who persist in posting objectionable material or providing hotline services where users can report objectionable content. *See id.* at 1135.

292. *Id.*

(1) "encourage the development of technologies that maximize user control over what information is received" over the Internet, and (2) "remove disincentives [for ISPs to] develop[ ] and utiliz[e] . . . blocking and filtering technologies" in order to facilitate the screening of "objectionable" material displayed over the Internet.[293] In other words, in enacting the CDA, Congress intended to create incentives for ISPs to screen and edit the content of information displayed over the Internet.[294] If ISPs were immune from both publisher and distributor liability in third-party defamation claims, they would essentially be given blanket immunity from liability.[295] This interpretation of the "Good Samaritan" immunity, which is advocated in *Zeran*, would frustrate, rather than follow, the purpose of the CDA. Congress intended to encourage ISPs to monitor the content on the Internet, but if ISPs are granted absolute immunity for disseminating third-party defamatory material, then ISPs will not bother to screen their content at all because they will never be subject to liability.[296] If, on the other hand, ISPs could be held liable as a distributor for neglecting to monitor information or failing to remove objectionable content that is brought to their knowledge, then ISPs would have a greater incentive to screen content. Common sense dictates that an ISP will not waste its time and money monitoring content over the Internet when it will suffer no repercussions from failing to do so. Thus, immunizing ISPs from distributor liability would frustrate Congress's objectives under the CDA much more than would subjecting ISPs to distributor liability.

Furthermore, the CDA addresses the concerns expressed in *Zeran* that applying distributor liability to ISPs may discourage ISPs from attempting to edit their content. Section 230(c)(2)(A) states that no ISP or user of an ISP should be held liable for any action taken in good faith to restrict access voluntarily to material that they consider to be "obscene . . . or otherwise objectionable."[297] Thus, Congress made sure that subjecting ISPs to distributor liability would not frustrate its stated purpose of removing disincentives for ISPs to develop filtering technologies to screen or remove third-party content over the Internet. If Congress intended for ISPs to be

293. 47 U.S.C. § 230(b) (Supp. V 1999).

294. *See id.*

295. *See* discussion *supra* Part III.B.2.

296. *See* Mirmira, *supra* note 30, at 453 ("[T]he blanket immunity of the CDA has left no incentive for [ISPs] to maintain records of their users to identify the authors of defamatory messages to allow the plaintiff to seek redress.").

297. § 230(c)(2)(A).

immunized from both publisher and distributor liability (which would be the same thing as absolute immunity), it would not have bothered to put a safe harbor in the CDA for ISPs that may incur liability as a result of monitoring content.

Yet another indication that Congress did not intend to immunize ISPs from distributor liability can be found in the legislative history of the CDA. Quoting from the legislative history accompanying passage of § 230, the court in *Zeran* noted that " '[o]ne of the specific purposes of this section is to overrule [*Stratton Oakmont, Inc. v. Prodigy Services Co.*] and any other similar decision which has treated providers and users as publishers or speakers of the content that is not their own because they have restricted access to objectionable material.' "[298] Thus, the legislative history makes it clear that Congress intended to immunize ISPs from publisher liability to prevent creating disincentives for ISPs to screen content.[299] This congressional intent is further emphasized by the fact that Congress named the CDA immunity section: "Protection for 'good samaritan' blocking and screening of offensive material."[300] Seemingly, Congress intended to prevent ISPs from incurring liability for screening and blocking content over the Internet. Thus, lower courts' application of the CDA immunity to ISPs in instances in which the ISP failed to restrict access to objectionable, defamatory material after receiving notice seems to contradict Congress's intent under the CDA.

In *Stratton Oakmont, Inc.*, the court held Prodigy liable as the publisher of third-party defamation because it engaged in screening procedures of the content it displayed on its bulletin board.[301] The *Stratton Oakmont, Inc.* court, however, indicated that Prodigy was an exception, and generally, ISPs that ran computer bulletin boards should be subject to distributor liability under the *Cubby, Inc.* precedent.[302] The legislative history of the CDA indicates that Congress only intended to overrule the part of *Stratton Oakmont, Inc.* that subjected ISPs to publisher liability.[303] There is no evidence in the legislative history or the language of the CDA that Congress intended to overrule the *Cubby, Inc.* precedent,

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298. *See* H.R. CONF. REP. NO. 104-458, at 194 (1996) (cited in Zeran v. Am. Online, Inc., 958 F. Supp. 1124, 1134 n.21 (E.D. Va. 1997)).

299. *See id.*

300. § 230(c).

301. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995).

302. *Id.* at *5.

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

which subjected ISPs to distributor liability, or the portion of *Stratton Oakmont, Inc.* that upheld *Cubby, Inc.*[304] If Congress intended § 230(c) to immunize ISPs from distributor liability, the legislative history would have asserted the intent to overrule *Cubby, Inc.* as well as *Stratton Oakmont, Inc.*[305] Accordingly, it appears as though section 230(c) was only meant to immunize ISPs from publisher liability, and not distributor liability.

B. Harmonizing Common Law Defamation Principles with CDA Immunity

Preserving distributor liability for ISPs has the dual effect of preventing the broad immunity granted to ISPs from turning into an absolute immunity and allowing common law defamation principles to be harmonized with the application of CDA immunity. After the enactment of the CDA, most lower courts decided third-party defamation suits brought against ISPs by broadly applying § 230(c) immunity to exempt ISPs from both publisher and distributor liability. These cases did not involve any application of common law principles, but instead consisted of a straightforward application of CDA immunity.[306] Applying the common law principle of distributor liability to ISPs in third-party Internet defamation suits serves the function of maintaining a balance between promoting technology and screening information on the Internet and ensuring that tort plaintiffs are compensated for their injuries.

Furthermore, exposing ISPs to distributor liability in third-party Internet defamation cases is valuable because, in most contexts (with the possible exception of e-mail), ISPs resemble other distributors of information. In *Cubby, Inc.*, the court held that an ISP which ran a computerized database should be subject to distributor liability because it could be considered an electronic news vendor, which was similar to the traditional distributor categories of a library, bookstore, or newsstand.[307] In *Stratton Oakmont, Inc.*, the court also acknowledged that computer bulletin boards ran by ISPs should generally be regarded as distributors in the same

304. § 230; H.R. CONF. REP. NO. 104-458, at 194.

305. *See* Friedman & Buono, *supra* note 29, at 660-61 (noting that other commentators have also made this argument).

306. *See* discussion *supra* Part III.B. The *Lunney* court is the exception to the lower courts' trend of broadly applying the CDA immunity to ISPs without applying any common law defamation principles. *See* discussion *supra* Part III.B.2.b. In *Lunney*, the court used solely common law principles and held that the ISP, Prodigy, was exempt from liability as a common carrier in both the e-mail and bulletin board context. *See* Lunney v. Prodigy Servs. Co, 723 N.E.2d 539, 541-43 (N.Y. 1999).

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

ISPs should generally be regarded as distributors in the same context as bookstores, libraries, and network affiliates.[308]

In the bulletin board and chat room context, ISPs most closely resemble distributors, rather than publishers or common carriers. In these contexts, ISPs basically deliver or transmit the information over the Internet without exerting editorial control over the material before it is displayed.[309] Like other distributors, however, ISPs do have the technology to remove or edit information that they know or should have known is defamatory.[310] ISPs are different from newspaper publishers because they do not generally edit all of the material they publish or distribute, and they usually play no role in the selection or creation of the material's content. Because ISPs have some control or ability to remove or screen material that is displayed on bulletin boards or chat rooms, however, they cannot be considered common carriers of the information.[311] ISPs can realistically be characterized as distributors in many Internet contexts. Therefore, there is certainly great value in retaining distributor liability for ISPs in third-party Internet defamation suits.

C. Balancing Policy Matters

In assessing whether ISPs should be held liable for defamatory statements published by unknown third parties over the Internet, policy considerations are crucial. On one hand, there is a concern that imposing liability on ISPs would impede the progression of technology. Holding ISPs liable for every defamatory statement printed over the Internet would put some ISPs out of business and

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308. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995). The court held that the ISP, Prodigy, was a publisher of the information rather than a distributor because it had increased editorial control over the information. *Id.* The court noted, however, that Prodigy was an exception and that most ISPs that ran computer bulletin boards should be subject to distributor liability rather than publisher liability. *Id.*

309. *See* Sheridan, *supra* note 46, at 152-53. Some ISPs do have screening policies in which they exert editorial control over the material before it is displayed. *Id.* These policies do not insure that all of the material has been screened due to the sheer volume of information over the Internet. *See Lunney*, 723 N.E.2d at 541-42.

310. *See* Sheridan, *supra* note 46, at 152-53.

311. *See* Anderson v. N.Y. Tel. Co., 345 N.Y.S.2d 740, 751-53 (N.Y. App. Div. 1973) (Witmer, J., dissenting). In *Lunney*, the court held that in the e-mail context, ISPs should be considered common carriers because they act as passive conduits with no editorial control over the private e-mail messages. 723 N.E.2d at 541-42. The court in *Lunney* also indicated that ISPs remain passive in the bulletin board context and should be considered common carriers in that context as well. *Id.* This Note disagrees with characterizing ISPs as common carriers in the bulletin board and chat room context because ISPs have the technology and editorial control to remove information that they know or should know is defamatory.

cause others to shut down their chat rooms, message boards, or e-mail services in order to avoid paying large damage awards. In either instance, the use of the Internet would be severely limited. Thus, holding ISPs liable for third-party defamation on the Internet would impede technology and be detrimental to the functioning of an advanced society.[312] On the other hand, because the Internet is so widely used, more and more third-party defamation cases are arising. If ISPs are totally immune from liability, many plaintiffs will have no remedy for the harm that they suffer. These two policy considerations need to be balanced properly when considering the issue of ISP liability for third-party Internet defamation.

In those instances that ISPs have some control over the situation, in the sense that they can mitigate the effects of the situation by preventing defamation from continuing, ISPs who have knowledge of the defamation should be subject to distributor liability. Distributor liability is different than publisher liability because distributors generally do not exert any editorial control over materials they distribute, and thus, they are not held liable for the dissemination of defamatory materials unless they first had notice or knowledge of the defamation.[313] While subjecting ISPs to distributor liability may have the effect of increasing costs for ISPs,[314] it is better than providing a broad blanket immunity that essentially results in an absolute immunity. Providing a blanket immunity to ISPs may have the negative consequence of wiping out the existence of tort defamation claims altogether in the Internet context.

Attempts to avoid impeding technology need to be balanced against the policy of compensating tort victims for their injuries. Furthermore, it is not unreasonable to expect a paid service, such as an ISP, to remove defamatory materials once they know or have

312. *See* Friedman & Buono, *supra* note 29, at 663-64.

313. *See supra* note 77-80.

314. It is important to note that the costs that distributor liability will impose upon ISPs may be limited by the fact that the plaintiff still has the burden of first proving that the ISP had knowledge of or reason to know about the allegedly defamatory material before the ISP incurs liability. *See* Cubby, Inc. v. CompuServe, Inc, 776 F. Supp. 135, 141 (S.D.N.Y. 1991). Thus, if an ISP receives notice of allegedly defamatory material and fails to remove it, the ISP will only be held liable if the plaintiff can offer specific facts indicating that the ISP had knowledge or reason to know of the defamation; conclusory allegations are insufficient. *See id.* For example, the knowledge requirement is not satisfied if the ISP was merely informed that a third party may be engaged in "hacking" in order to obtain unauthorized access to an online information service run by the ISP. *See id.* The burden of proof regarding the notice/knowledge requirement rests upon the plaintiff, and this fact may limit some of the negative effects of imposing distributor liability upon ISPs. *See id.*

reason to know of its existence.[315] This remedy may be of little cost or effort to the ISP and allows for a balance between the two competing policy considerations.

In order to ensure that imposing distributor liability upon ISPs is not unduly burdensome both to ISPs and technology in general, courts can apply distributor liability in a manner that may limit or restrict the liability that the ISP incurs. For example, courts can provide ISPs with a reasonable amount of time to remove the defamatory messages after receiving notice, allowing ISPs to avoid liability.[316] Thus, preserving distributor liability in the Internet context provides an effective solution, providing the plaintiff with a remedy without significantly impeding technology.

D. Analogizing Copyright Law to Defamation Law

Just as ISPs can be held liable for distributing over the Internet defamatory material that is created and published by third parties, they can also be held liable for distributing copyrighted material communicated over the Internet by a third party without consent.[317] In copyright law, a person can be liable for copyright infringement if the plaintiff establishes: (1) ownership of a valid copyright, and (2) that the alleged infringer engaged in the actual "copying" of the material.[318] Thus, the person who actually copies the copyrighted work can be held liable for direct infringement of the copyright laws.[319] A person or entity that participated in the copying of the material can also be held liable for copyright infringement, even if it did not directly infringe the plaintiff's works.[320] Under the theory of contributory infringement, those that participate in the copyright infringement of a third party will be held liable if it is established that the defendant had knowledge of the infringing

315. Many ISPs already control or screen some of the material published on their servers. *See, e.g.*, Friedman & Buono, *supra* note 29, at 664 (stating that while AOL does not prescreen content, it does aggressively monitor its message boards and chat rooms for offensive or objectionable content). Thus, removing defamatory material would not be too much of an extra effort. For those ISPs who do not routinely screen or monitor the material on their servers, the cost of deleting defamatory statements will still be small. Locating and deleting statements takes little time and effort. Asking ISPs to remove defamatory material once they are informed about its existence is quite different than asking them to screen for defamatory material online. Furthermore, Congress encourages ISPs to block and screen objectionable content on-line, even though it may increase costs for ISPs. *See* 47 U.S.C. § 230(c) (Supp. V 1999).

316. *See* Mirmira, *supra* note 30, at 453-57.

317. *See generally* Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995).

318. *Id.* at 1366-67.

319. *Id.*

320. *Id.* at 1373.

activity and materially contributed to the infringement.[321] For example, in *Religious Technical Center v. Netcom On-Line Communication Services, Inc.*, the court held that Netcom could be held liable for contributory infringement if it distributed information over the Internet that it knew or should have known was copyright-infringed material.[322] Thus, when applying copyright law to the Internet context, lower courts have upheld the policy that ISPs should be subject to liability for distributing objectionable material over the Internet if they had knowledge or should have had knowledge of the objectionable nature of the information.[323] Therefore, it makes sense that courts should use the same policy when applying defamation law to the Internet context. Distributor liability is similar to contributory infringement in the sense that ISPs and other distributors can be held liable for third-party content that is objectionable if knowledge of the objectionable nature existed or should have existed.[324] Analogizing copyright law to defamation law as applied in the Internet context, therefore, indicates that ISPs should be subject to distributor liability.[325]

Accordingly, policy matters, common sense, an understanding of common law defamation principles, congressional intent, and proper statutory interpretation of the CDA all indicate that this Note's proposal to preserve distributor liability for ISPs provides the most practical solution to the problem posed in third-party Internet defamation cases.

VI. CONCLUSION

The U.S. Supreme Court needs to reassess the common law that has been created for defamation in the Internet context. Lower courts have applied the CDA's "Good Samaritan" immunity for ISPs so broadly that this immunity has essentially become a blanket

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321. *Id.*

322. *Id.* at 1374.

323. *Id.* at 1373. In *Religious Technical Center*, the court noted that the express language of the copyright statute does not create a rule of liability for contributory infringement, but that this theory of liability should still exist because contributory infringement is "merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another." *Id.* The policy stated in *Religious Technical Center* can also be used as grounds to substantiate applying distributor liability, which is similar to contributory infringement, to defamation law in the Internet context.

324. *Cf. Religious Technical Center*, 907 F. Supp. at 1373; Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991).

325. Applying the same underlying policies to copyright law and defamation law in the Internet context will have the overall favorable effect of increasing consistency in cases dealing with the Internet context.

immunity that shields ISPs from any liability for defamation by a third party.[326] Since many publishers of defamatory statements are unknown users, granting ISPs a total immunity from third-party Internet defamation suits can have adverse effects. If ISPs are never held liable for third-party defamation, the plaintiffs that suffer as a result of this defamation will be left with no one to sue and no remedy for the harms incurred. When applying CDA immunity to ISPs, the policy of promoting technology needs to be balanced with the policy that tort plaintiffs should be compensated for their injuries. The solution this Note sets forth allows for a proper balancing of policy concerns through the preservation of distributor liability for ISPs. Thus far, the solution presented by lower courts allows for the promotion of technology, but neglects to ensure recovery for tort plaintiffs. Furthermore, the solution espoused in lower courts goes against Congress's policy objectives for enacting the CDA, since immunizing ISPs from third-party defamation liability creates disincentives for ISPs to monitor content.[327]

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326. *See* discussion *supra* Part III.B.

327. *See* discussion *supra* Part V.A.2.

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