

LUNNEY V. PRODIGY SERVICES CO.

By *Suman Mirmira*

I. INTRODUCTION

The Internet is expanding at an extraordinary rate with the number of Internet users estimated to have increased from forty million in 1996¹ to over 240 million by the beginning of 2000.² Many users gain access to the Internet from internet service providers (“ISPs”) such as America Online (“AOL”), Prodigy Services Company (“Prodigy”) or CompuServe, which, for a fee, offer access to their own networks as well as a link to the much larger resources of the Internet.³

Among the legal questions created by the Internet is the liability of ISPs or their users for a defamatory posting, such as an e-mail or news posting. Who should be at fault when an individual user uses the services of an ISP to post a defamatory message on the Internet—the author of the statement, the service provider or both? Until recently, courts applied common law definitions of “publisher” to decide whether or not the ISP should be held liable for a defamatory statement authored by a third party.⁴ In 1996, Congress established “Good Samaritan” immunity for ISPs⁵ to respond to the growing concerns of whether ISPs should be held liable for defamatory statements authored by third parties who use their services to disseminate content.⁶ This provision, although intended to en-

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1. See *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (discussing the findings of the Advanced Research Project Agency).

2. See NUA Internet Surveys, *How Many Online* (visited Jan. 28, 2000) (http://www.nua.ie/surveys/how_many_online/index.html) (estimating that as of January 2000 there were approximately 249 million Internet users); *Global Internet Statistics (by Language)* (last revised Jan. 20, 2000) (<http://glreach.com/globstats/>) (estimating the number of world-wide Internet users at 243 million as of January 2000).

3. See *Reno*, 521 U.S. at 850.

4. See, e.g., *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *10 (Sup. Ct. May 24, 1995) (finding that Prodigy was a “publisher” because it screened messages posted on its bulletin boards, and hence it was liable for the defamatory statements posted by a third party).

5. See 47 U.S.C. § 230 (Supp. IV 1998).

6. See James F. Breisford, *Online Liability Issues: Defamation, Invasion of Privacy and Negligent Publishing*, 482 PLI/PAT 471, 489 (1997).

courage ISPs to self-regulate their content,⁷ actually removed all legal incentives for them to do so. Further, by providing broad immunity to ISPs, Congress has removed all incentives for them to monitor the activities of their users and identify the authors of defamatory messages so that the plaintiff can sue the truly liable party. The outcome in *Lunney v. Prodigy Services Co.*⁸ is a perfect example of this problem.

II. DEFAMATION LAW

A. Traditional Defamation Law

The common law of defamation includes the distinct torts of slander and libel.⁹ The tort of slander provides redress for harmful oral statements that are not embodied in at least semi-permanent form,¹⁰ whereas the tort of libel provides redress for printed or written statements, or statements in permanent form.¹¹ In order to establish a cause of action for defamation, four essential elements must be satisfied.¹² Actionable defamation requires “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.”¹³

Traditional law has developed a sliding scale of liability for those who distribute defamatory information.¹⁴ Disseminators of defamatory material are divided into three categories: the primary publisher, the secondary publisher and the common carrier.¹⁵ The categorization is based on the discretion a disseminator of news has to modify the published information; the higher the discretion, the higher the duty of care and corresponding

7. See *id.* § 230(b); See also H.R. REP. NO. 104-458, at 86 (1996).

8. 683 N.Y.S.2d 557 (App. Div. 1998), *aff'd*, No. 164, 1999 N.Y. LEXIS 3746 (Dec. 2, 1999).

9. See RESTATEMENT (SECOND) OF TORTS § 568 (1977).

10. See *id.* § 568(2).

11. See *id.* §§ 568(1), 568 cmt. d.

12. See *id.* § 558.

13. *Id.* § 558. A defamatory statement is one that has the tendency 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.” *Id.* § 559.

14. See Kean J. Decarlo, *Tilting at Windmills: Defamation and the Private Person in Cyberspace*, 13 GA. ST. U. L. REV. 547, 552 (1997).

15. See *id.* at 552-53. Common carriers, such as telephone and telegraph companies, were free from liability for the transmission of defamatory messages “if they did not have knowledge of the defamer’s lack of privilege to send the message.” *Id.* at 558.

liability.¹⁶ Historically, a publisher of print material, such as a newspaper, was considered a “primary publisher” and was liable regardless of fault.¹⁷ A distributor, such as a bookstore or a library, was considered a secondary publisher¹⁸ and was liable only if it knew or should have known the defamatory nature of the material it was distributing.¹⁹

In its landmark decision in *New York Times v. Sullivan*,²⁰ the Supreme Court concluded that, in order to prevail in a defamation lawsuit against a newspaper, a public official must establish that the defendant acted with “actual malice,” which is defined as actual knowledge that the statement was false, or reckless disregard for its truth.²¹ For libels of a private individual, the Court, in *Gertz v. Robert Welch, Inc.*,²² denied the strict liability standard of common law, but otherwise left the matter to individual states.²³

The common law rule as it originally developed in New York was:

[H]e who furnishes the means of convenient circulation, knowing, or having reasonable cause to believe, that it is to be used for that purpose, if it is in fact so used, is guilty of aiding in the publication and becomes the instrument of the libeler.²⁴

If taken literally, the application of this rule could, hypothetically, render IBM liable for selling typewriters to The National Enquirer or Xerox Corporation liable for the damages caused by the copying of a libelous document on one of its machines.²⁵ Subsequent authority establishes that a finding of liability requires that the defendant had some editorial, or at

16. *See id.* at 552.

17. *See* Loftus E. Becker, *The Liability of Computer Bulletin Board Operators for Defamation Posted by others*, 22 CONN. L. REV. 203, 221.

18. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 113, at 803 (5th ed. 1984).

19. *See* Becker, *supra* note 17 at 221; *see also* RESTATEMENT (SECOND) OF TORTS §§ 581, 612; *Osmond v. EWAP, Inc.*, 153 Cal. App. 3d 842, 847 (Ct. App. 1984) (affirming trial court’s grant of summary judgment motion to defendant because “plaintiff failed to raise a triable issue on the question of malice, an element of libel which must be proved to impose liability on a distributor which merely disseminated libelous material published by others.”).

20. 376 U.S. 254 (1964).

21. *See id.* at 279-80 (limiting this standard only to public officials).

22. 418 U.S. 323 (1974).

23. *See id.* at 347 (requiring at minimum, a showing that defendant was negligent). The Court also extended the *New York Times* standard to include public figures. *See id.* at 345.

24. *Lunney v. Prodigy Servs. Co.*, 683 N.Y.S.2d 557, 560 (App. Div. 1998).

25. *See id.*

least participatory function, in connection with the dissemination of the defamatory material.²⁶

B. Internet Defamation Law Prior to the Communications Decency Act

Prior to the 1996 enactment of the Communications Decency Act ("CDA"), courts viewed defendant ISPs as either primary or secondary publishers. Hence, the courts imposed liability on ISPs rather arbitrarily depending on their perception of whether or not the ISP exercised editorial control.²⁷ In an early online tort case, *Daniel v. Dow Jones & Co.*,²⁸ the plaintiff sued Dow Jones News Retrieval, which provided on-line electronic news reports, alleging harm for a mistake in one of defendant's reports.²⁹ In granting defendant's motion to dismiss,³⁰ the court stated that the plaintiff's relationship to the defendant was functionally similar to that of a purchaser of a newspaper,³¹ and a newspaper, whether in paper or electronic form, should not be liable for false information in the reports on a showing of "mere negligence."³²

In *Cubby, Inc. v. CompuServe Inc.*,³³ the defendant was treated as a secondary publisher and held not liable for defamatory postings by a third party.³⁴ In *Cubby*, the plaintiff brought an action against the defendant for libel, business disparagement, and unfair competition.³⁵ The defendant asserted that an independent content provider posted the information without the editorial supervision of the defendant.³⁶ The trial court granted defendant's motion for summary judgment,³⁷ reasoning that the defendant

26. See *Anderson v. New York Tel.*, 345 N.Y.S.2d 740 (App. Div. 1973), *rev'd*, 35 N.Y.2d 746, 750 (1974) (holding that the defendant telephone company could not be held liable for its client's actions because a caller communicates directly with another party without any intervention by the telephone company).

27. Compare *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *10 (Sup. Ct. May 24, 1995) (holding defendant ISP to the strict liability standard of a publisher because defendant exerted some control over material posted on its service), with *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (holding defendant ISP to the lower standard of a secondary publisher and thus not liable because plaintiff could not establish malice on defendant's part).

28. 520 N.Y.S.2d 334 (Civ. Ct. 1987).

29. See *id.* at 335.

30. See *id.* at 340.

31. See *id.* at 337.

32. See *id.* at 338.

33. 776 F. Supp. 135 (S.D.N.Y. 1991).

34. See *id.* at 140-41.

35. See *id.* at 137.

36. See *id.*

37. See *id.* at 144.

was a secondary publisher—no different from “a public library, book store, or newsstand”—and should not be held liable absent a showing of malice.³⁸

By contrast, in *Stratton Oakmont, Inc. v. Prodigy Services Co.*,³⁹ an anonymous person posted a message on Prodigy’s bulletin board, “Money Talk,” that a securities offering being made by Stratton Oakmont, a securities investment firm, was a major fraud.⁴⁰ The message also claimed that Stratton’s president would soon be proven a criminal, and that Stratton brokers were pressured to lie for a living, on pain of being fired.⁴¹ The court held Prodigy to the strict liability standard normally applied to original or primary publishers of defamatory statements.⁴² The court reasoned that the defendant acted more like an original publisher than a distributor, both because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.⁴³

The *Stratton Oakmont* decision was heavily criticized by scholars and legislators, who argued that the court’s ruling would discourage ISPs from maintaining editorial control over content posted on its services.⁴⁴ It can also be argued, however, that because the message was apparently posted by someone using a former employee’s unretired access code,⁴⁵ Prodigy had been negligent and was correctly held liable.

C. The Communications Decency Act and Its Impact on Internet Defamation Law

The holding in *Stratton Oakmont*, which penalized self-regulation, was viewed as a disincentive for service providers to self-regulate the dissemi-

38. *Id.* at 140-141.

39. No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (Sup. Ct. May 24, 1995).

40. *See id.* at *1-*2.

41. *See id.* at *2.

42. *See id.* at *13.

43. *See id.* at *10.

44. *See, e.g.,* David P. Miranda, *Defamation in Cyberspace: Stratton Oakmont, Inc. v. Prodigy Services Co.*, 5 ALB. L.J. OF SCI. & TECH. 229, 244-45 (1996); *see also* Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 61-62 (1996).

45. *See* Robert B. Charles & Jacob H. Zamansky, *Liability for Online Libel After Stratton Oakmont, Inc. v. Prodigy Services Co.*, 28 CONN. L. REV. 1173, 1189 n.68 (1996) (citing claims made in the Plaintiffs’ Memorandum of Law In Support of Motion For Partial Summary Judgment). These claims were, however, not addressed in the summary judgment motion, nor discussed in detail in the Charles article. *See id.*

nation of offensive information over their services.⁴⁶ Fearing that the specter of liability would deter service providers from blocking or screening offensive material, Congress enacted a broad "Good Samaritan" immunity for ISPs.⁴⁷ The relevant part of section 230 states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁴⁸ Congress explicitly stated that it enacted the provision:

to promote the continued development of the Internet and other interactive computer services . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation . . . [and] to remove disincentives for the development and utilization of blocking and filtering technologies⁴⁹

After the enactment of this statute, the law shifted dramatically from finding an ISP liable despite its attempt to block the posting of offensive material⁵⁰ to finding it not liable even when it had knowledge of offensive content on its services,⁵¹ or even when it promoted the offensive posting.⁵² In attempting to remove disincentives for ISPs or interactive computer service⁵³ providers ("ICS providers") to monitor postings over their services, Congress has in fact removed all legal incentive for ICS providers to do so.

D. Internet Defamation Law after the Enactment of the CDA

Very few cases have been decided after the enactment of the CDA. In *Zeran v. America Online*,⁵⁴ the first reported case to consider the scope of

46. See Cannon, *supra* note 44 at 62-63.

47. 47 U.S.C. § 230 (Supp. IV 1998).

48. *Id.* § 230(c)(1).

49. *Id.* § 230(b); see also H. R. REP. NO. 104-458 at 86 (1996).

50. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *13 (Sup. Ct. May 24, 1995).

51. See *Zeran v. America Online, Inc.*, 129 F.3d 327, 332-33 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998).

52. See *Blumenthal v. Drudge*, 992 F. Supp. 44, 51-52 (D.D.C. 1998).

53. "The term 'interactive computer service' means 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. . . ." 47 U.S.C. § 230(f)(2) (1996).

54. 958 F. Supp. 1124 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998).

ISP immunity conferred by section 230, an unidentified person, acting without Zeran's knowledge, posted a message on AOL's bulletin board advertising T-shirts and other items with offensive slogans related to the 1995 bombing of the Federal Building in Oklahoma.⁵⁵ The message directed those interested in purchasing the T-shirts to call the plaintiff at his home telephone number.⁵⁶ The plaintiff, Zeran, received a flood of abusive telephone calls and even death threats.⁵⁷ Zeran informed AOL of the posting and demanded that the posting be removed and a retraction posted.⁵⁸ Although AOL removed the message the next day, "various similarly offensive notices continued to appear" over the next few days.⁵⁹ In addition, AOL refused to publish a retraction on its network, as a matter of policy.⁶⁰

Zeran sued AOL for negligent distribution of defamatory material, but his common-law negligence claim was dismissed on the grounds that it conflicted with the CDA's prohibition against treating ISPs as publishers and was thus preempted.⁶¹ Zeran argued on appeal that section 230 immunity barred only publisher liability, but left distributor liability intact for ICS providers who had notice of the defamatory postings.⁶² The Fourth Circuit, however, held that the CDA barred his claims even if AOL could be considered a "distributor," because a distributor would be immune under section 230 as a type of "publisher."⁶³ Not only did this decision give AOL broad immunity, but because the author apparently established an AOL account under a false name and was never identified by AOL,⁶⁴ Zeran was completely denied compensation for the harm caused to him. Whether the *Zeran* holding is supported by the text of the law is not

55. See *Zeran*, 958 F. Supp. at 1126.

56. See *id.*

57. See *id.* at 1127.

58. See *id.*

59. *Id.* at 1128.

60. See *id.* at 1127.

61. See *id.* at 1133. The court noted that the CDA did not expressly preempt the field of liability for ICS providers. See *id.* at 1130-31. The CDA states that "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3) (Supp. IV 1998).

62. See *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998).

63. See *id.* at 332.

64. See *id.* at 330; see also *Zeran v. America Online, Inc.*, 958 F. Supp. 1124, 1126 (E.D. Va. 1997).

clear,⁶⁵ however, it is arguably consistent with Congress's intent, expressed in the CDA itself.⁶⁶

After the *Zeran* decision, other state and federal courts were faced with the issue of ISP liability. For example, in *Blumenthal v. Drudge*,⁶⁷ the court not only followed *Zeran* but also expanded the broad immunity conferred to AOL.⁶⁸ The plaintiffs in *Blumenthal* sued Matt Drudge, the creator of the "Drudge Report," and AOL for defamation.⁶⁹ The day before Blumenthal started a new job as an aide to President Clinton, the Drudge Report reported that Blumenthal allegedly had "a spousal abuse past that has been effectively covered up."⁷⁰ Blumenthal argued that AOL was not immune under section 230 of the CDA because Drudge was not merely an anonymous person who sent a message through AOL; rather, he had a contract with AOL and was paid \$3,000 a month for his postings.⁷¹ Despite AOL's knowledge of the postings and AOL's affirmative act of paying for them, the court did not find AOL liable.⁷² This result differs dramatically from those of the pre-section 230 era. It also differs from the current treatment of publishers of print material, who are accountable for the material they publish.⁷³

In *Doe v. America Online*,⁷⁴ the plaintiff brought charges against AOL and Richard Lee Russell under state law. Russell videotaped and photographed his sexual assault of the plaintiff's minor son and later advertised the videotapes and photographs for sale by openly describing their con-

65. 47 U.S.C. § 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The plain text of the law would support the conclusion that the law immunizes ICS providers from publisher liability. It is unclear whether distributor liability is also included.

66. See 47 U.S.C. § 230(b) (Supp. IV 1998); see also *supra* Section II.C.

67. 992 F. Supp. 44 (D.D.C. 1998).

68. See Michelle Kane, Note, *Blumenthal v. Drudge*, 14 BERKELEY TECH. L.J. 483, 491 (1999).

69. See *Blumenthal* 992 F. Supp. at 46-47.

70. See *id.* The allegations of past spousal abuse were attributed to "top GOP operatives." See *id.*

71. See *id.* at 51.

72. See *id.* at 51-52 (stating that because Congress made the choice to immunize ISPs even when they had an active, aggressive role in making the content available, the court was faced with no choice but to find AOL not liable even though it may have been inclined to find otherwise). The court stated that AOL "has taken advantage of all the benefits . . . [of the CDA], and then some, without accepting any of the burdens Congress intended. . . ." *Id.* at 52-53.

73. See Becker, *supra* note 17, at 222.

74. No. CIV. CL 97-631 AE, 1997 WL 374223 (Fla. Cir. Ct. June 26, 1997), *aff'd*, 718 So.2d 385 (Fla. Dist. Ct. App. 1998), *review granted*, 729 So.2d 390 (Fla. 1999).

tents on AOL's chat rooms.⁷⁵ Doe sued AOL, asserting, in addition to other complaints, that AOL negligently breached its "duty to exercise reasonable care to ensure that its services not be used for the 'purposes of the sale or distribution of child pornography.'" ⁷⁶ She asserted that AOL did nothing to prevent these postings despite being "on notice" that its services were being used to market child pornography.⁷⁷

AOL moved to dismiss on three separate grounds, the first of which was that all of Doe's claims were barred by section 230 of the CDA.⁷⁸ The Florida circuit court granted AOL's motion and held that section 230 effectively barred any cause of action Doe may have against AOL.⁷⁹ Based on the ruling of the federal court in *Zeran*, the court dismissed Doe's argument that AOL was a "distributor" rather than a "publisher."⁸⁰ In addition, the court decided that holding AOL liable for negligence for harm caused by third-parties would defeat one of the purposes of the section 230, namely to remove disincentives for providers of online services to voluntarily screen or block objectionable content from their services.⁸¹ On appeal, the court held that the trial court's decision that section 230 preempted statutory and common laws of Florida was consistent with *Zeran* and affirmed the trial court's ruling.⁸² Plaintiff's motion for review has been granted by the Supreme Court of Florida.⁸³

Zeran, *Blumenthal*, and *Doe* typify the problems encountered with section 230: the potential for overly broad application and a lack of ISP accountability. Not only do the ICS providers have no incentive in monitoring the postings on their services, but they also have little or no incentive to maintain adequate records so that the original party responsible for the defamation can be identified. *Lunney* is a perfect example of a case

75. See No. CIV. CL 97-631 AE, 1997 WL 374223, at *1 (Fla. Cir. Ct. June 26, 1997).

76. *Id.* at *2.

77. See *id.* at *1.

78. See *id.* at *2.

79. See *id.*

80. See *id.* at *3.

81. See *id.* at *4 (citing 47 U.S.C. § 230(b)(4), which states that "[i]t is the policy of the United States . . . 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. . .").

82. See *Doe v. America Online, Inc.*, 718 So.2d 385, 389, (Fla. Dist. Ct. App. 1998).

83. *Doe v. America Online, Inc.*, 729 So.2d 390 (Fla. 1999).

where the plaintiff had no redress because of the ICS provider's failure to maintain adequate records.⁸⁴

III. SUMMARY OF THE CASE

A. Summary of Facts and Procedure

Alex G. Lunney, then a fifteen-year-old prospective Eagle Scout, brought this state cause of action against Prodigy asserting claims of libel per se, negligence, and intentional infliction of emotional distress from libelous statements "published" by Prodigy over its network through fictitious accounts opened at Prodigy in Lunney's name.⁸⁵ The imposter, after opening several accounts in Lunney's name and posing as Lunney, posted two vulgar bulletin board messages and sent an offensive e-mail message to a local scoutmaster threatening to kill him and molest his children.⁸⁶ The scoutmaster reported the e-mail to the local police and to Lunney's scoutmaster.⁸⁷ Although the police took no action against Lunney, his scoutmaster questioned Lunney in his mother's presence.⁸⁸ Lunney denied sending the message and his denial was accepted by the Boy Scout authorities.⁸⁹

Prodigy, presuming that Lunney was responsible for the e-mail, informed him that his account had been suspended for transmitting an obscene and sexually explicit e-mail.⁹⁰ Lunney denied sending the defamatory e-mail and informed Prodigy that he had never subscribed to their service and that whoever had opened the accounts in his name and thereby sent the e-mail had done so fraudulently.⁹¹ Prodigy apologized to Lunney and informed him that the unauthorized accounts had been terminated.⁹²

84. See Jacob H. Zamansky, *Issues Unresolved in E-mail Libel Ruling*, N.Y.L.J., Jan. 26, 1999, at 5. The article quotes from the deposition of a Prodigy security representative, who conceded that at the time of the transmission of the defamatory messages, Prodigy was "the only on-line service . . . that didn't require a credit card, [and] people were enrolling in Prodigy services [using false information]." See *id.* (last alteration in original). Such lax policies allowed the anonymous imposter to remain unidentified and denied redress to Lunney.

85. See *Lunney v. Prodigy Servs. Co.*, 683 N.Y.S.2d 557, 559 (App. Div. 1998).

86. See *Lunney v. Prodigy Servs. Co.*, No. 164, 1999 N.Y. LEXIS 3746, at *1-*2 (Dec. 2, 1999).

87. See *id.* at *2.

88. See *Lunney*, 683 N.Y.S.2d at 559.

89. See *id.*

90. See *id.*

91. See *id.*

92. See *id.*

On July 2, 1997, the Supreme Court of New York, Westchester County, denied Prodigy's motion for summary judgment and Prodigy appealed.⁹³ On December 28, 1998, the Appellate Division voted unanimously to dismiss the case, and on December 2, 1999, the New York Court of Appeals affirmed the order of the Appellate Division.⁹⁴

B. The Appellate Division's Decision

In granting summary judgment to Prodigy, the Appellate Division held that the messages were not "of and concerning" Lunney and therefore did not defame him; while the messages did portray the plaintiff as a bully, the stigma associated with them did not amount to defamation.⁹⁵ The court further held that Prodigy was not the publisher of the messages, but even if it could be so considered, a New York common law privilege afforded to telegraph and telephone companies protected it from liability absent any proof that Prodigy knew such a statement would be false.⁹⁶

The Appellate Division relied heavily on *Anderson v. New York Telephone Company*,⁹⁷ the "key case on this point."⁹⁸ In *Anderson*, the lessee of the defendant's telephone equipment played a recorded message containing accusations of misconduct by the Presiding Bishop of the Church of God in Christ of Western New York, including allegations that he fathered illegitimate children.⁹⁹ The Bishop sued the telephone company, and the New York Court of Appeals held that the Bishop had no cause of action because the telephone company's role was merely passive.¹⁰⁰

The court reasoned that not only was there similarity between the *Lunney* fact pattern and the *Anderson* fact pattern, but that Lunney's case was even weaker than the plaintiff's in *Anderson*.¹⁰¹ In *Anderson*, the defendant telephone company had actually been notified of the improper use to which its equipment was being put and the plaintiff had made repeated

93. *See id.*

94. *See Lunney v. Prodigy Servs. Co.*, No. 164, 1999 N.Y. LEXIS 3746, at *14 (Dec. 2, 1999).

95. *See Lunney*, 683 N.Y.S.2d at 559-60.

96. *See id.* at 560.

97. 345 N.Y.S.2d 740 (App. Div. 1973), *rev'd*, 35 N.Y.2d 746 (1974). The opinion of the New York Court of Appeals was merely a statement adopting Judge Witmer's dissenting opinion from the Appellate Division and reinstating the order from the Supreme Court. *See id.* at 748.

98. *See Lunney*, 683 N.Y.S.2d at 560.

99. *See Anderson*, 345 N.Y.S.2d at 741-42.

100. *See id.* at 752; *see also Anderson*, 35 N.Y.2d at 749-50 (Gabielli, J., concurring).

101. *See Lunney*, 683 N.Y.S.2d at 560.

requests to stop the messages.¹⁰² In fact, company employees had dialed the numbers and actually listened to the defamatory messages.¹⁰³ Nevertheless, the telephone company did nothing to stop the messages.¹⁰⁴ Prodigy, on the other hand, learned of the problem only when Lunney wrote to the company indicating that he had never subscribed to Prodigy's service and that the statements in the e-mails were false.¹⁰⁵

The *Lunney* court was not persuaded by the argument that, because Prodigy had devised a method to automatically exclude certain epithets from messages sent via its network, its role could be equated to that of an editor or publisher.¹⁰⁶ The court reasoned that a highly offensive message could be composed without the use of these epithets; therefore, editorial control required the use of judgment.¹⁰⁷ Because a computer program cannot exercise judgment, and there was no evidence that any of Prodigy's employees monitored the e-mail transmissions or bulletin board postings, Prodigy exercised no editorial control and therefore could not properly be considered a publisher of that material.¹⁰⁸

The court in *Lunney* found *Stratton Oakmont* not controlling because Prodigy did not exercise editorial control over its e-mail messages in *Lunney* as it did with its bulletin board service in *Stratton*.¹⁰⁹ The court also stated that Prodigy abandoned the editorial efforts cited in *Stratton Oakmont* prior to the posting of the obscene messages.¹¹⁰ For these reasons, as well as its reliance on *Anderson*, the court in *Lunney* held that *Stratton Oakmont* had no impact on its decision to grant Prodigy's motion for summary judgment.¹¹¹ The court reasoned that its decision, unlike *Stratton Oakmont*, was based on fairness.¹¹² The *Lunney* court stated that the defendant in *Stratton Oakmont* was being penalized for inadequately performing a task which it had no legal duty to perform and that the *Stratton Oakmont* outcome actually discouraged ISPs from performing the very task that the plaintiff argued should be encouraged.¹¹³

102. See *Anderson*, 345 N.Y.S.2d at 748.

103. See *id.*

104. See *id.*

105. See *Lunney*, 683 N.Y.S.2d at 561.

106. See *id.*

107. See *id.*

108. See *id.*

109. See *id.* at 562.

110. See *id.*

111. See *id.*

112. See *id.*

113. See *id.*

Lunney claimed that at the time the defamatory messages were posted, Prodigy was negligently soliciting members by requesting just a name and an address and not verifying the bona fides of any person before opening an account.¹¹⁴ While the *Lunney* court went into great detail on its reasons for dismissing the libel claim, it cursorily dismissed the other claims, including Lunney's negligence claim, as "patently meritless."¹¹⁵

C. The Decision of the New York Court of Appeals

On December 2, 1999, the Court of Appeals unanimously affirmed the Appellate Division's decision to dismiss the case against Prodigy.¹¹⁶ The court initially noted that, because Lunney's defamation action was grounded in New York common law, it would be evaluated in accordance with established New York tort principles.¹¹⁷ The court observed that, although these principles were established before the advent of e-mail, they could accommodate the advanced technology comfortably.¹¹⁸

With regard to the e-mail message, the court, relying on *Anderson*, held that an ISP was merely a conduit for information, as opposed to a publisher, and consequently was no more responsible than a telephone company for the transmission of defamatory material over its lines.¹¹⁹ The court in *Anderson* drew a distinction between telegraph companies, which may be considered to have published the messages submitted by telegraph senders because a telegraph is sent only "through the direct participation of the agents of the telegraph company," and telephone companies, which may not properly be considered publishers because "the caller communicates directly with the listener over the facilities of the telephone company, with no publication by the company itself."¹²⁰ The *Lunney* court concluded that the role played by Prodigy in connection with the offensive messages sent in Lunney's name was more analogous to that of a tele-

114. See Jacob H. Zamansky, *supra* note 84, at 5. The Appellate Division opinion mentions that Lunney brought a negligence claim against Prodigy, but fails to give any details of it. See *Lunney*, 683 N.Y.S.2d at 559. The opinion of the Court of Appeals states that, Lunney claimed that Prodigy was negligent in failing to safeguard against an imposter opening the accounts in his name. See *Lunney v. Prodigy Servs. Co.*, No. 164, 1999 N.Y. LEXIS 3746, at *11 (Dec. 2, 1999).

115. *Lunney*, 683 N.Y.S.2d at 563.

116. See *Lunney*, 1999 N.Y. LEXIS 3746, at *14.

117. See *id.* at *7.

118. See *id.*

119. See *id.* at *8.

120. *Anderson v. New York Tel. Co.*, 345 N.Y.S.2d 740, 752.

phone company than to that of a telegraph company, and under the holding in *Anderson*, Prodigy could not be considered a publisher.¹²¹

Further, the court stated that, based on *Anderson*, even if Prodigy could be considered a publisher, it was protected by a qualified immunity accorded to telephone and telegraph companies, under which the defendant could be held liable only upon a showing of actual malice.¹²² The court was “unwilling to deny Prodigy the common-law qualified privilege accorded to telephone and telegraph companies” and stated that “[t]he public would not be well served by compelling an ISP to examine and screen millions of e-mail communications, on pain of liability for defamation.”¹²³

The court distinguished bulletin board messages from e-mails because there was a greater level of cognizance that bulletin board operators could have over them.¹²⁴ The court recognized that different bulletin boards operate differently; some post messages instantly and automatically without any editing, while others edit the messages and decide whether or not to post them.¹²⁵ The court found unpersuasive Lunney’s argument that Prodigy was liable in tort because, in its membership agreements, it reserved the right to screen its bulletin board messages.¹²⁶ The court held that Prodigy merely reserved the right, but was not obligated, to edit any material that was transmitted via its network.¹²⁷ The court agreed with the Appellate Division’s decision that merely screening for vulgarities in postings did not alter Prodigy’s “passive character.”¹²⁸

Unlike the Appellate Division, the Court of Appeals specifically addressed Lunney’s claim that Prodigy was negligent in failing to safeguard against an imposter opening the accounts in his name.¹²⁹ The court, in dismissing the claim, found Lunney’s proposed requirement that ISPs verify applicants’ bona fides and credit cards too burdensome to the ISPs; it would unjustifiably open ISPs to liability for the “wrongful acts of countless potential tortfeasors committed against countless potential victims.”¹³⁰

121. See *Lunney*, 1999 N.Y. LEXIS 3746, at *8.

122. See *id.*, at *8-*9.

123. *Id.*

124. See *id.* at *9.

125. See *id.* at *9-*10.

126. See *id.* at *10-*11.

127. See *id.*

128. *Id.* at *11.

129. See *id.* *11-*12.

130. *Id.* at *11.

In a one-line statement, without addressing the claim of intentional infliction of emotional distress specifically, the court dismissed “any remaining causes of action” against Prodigy.¹³¹ Further, holding that the case “does not call for it,” the court declined to rule on the applicability of the CDA to this case.¹³²

IV. DISCUSSION

A. Analysis of *Lunney*

The *Lunney* decision was the first major ruling by the New York Court of Appeals on privacy and defamation in cyberspace.¹³³ In its opinion, the court made it clear that the case was decided under New York common law and declined to enter the fray over whether section 230 renders an ISP unconditionally immune from notice-based liability, stating that it was “beyond the issues necessary to decide the case at hand.”¹³⁴ Although *Lunney* decided the issue of ISP liability under New York common law, the court stated that the decision was in accord with the CDA and the *Zeran* decision.¹³⁵ It failed to mention, however, that it had no alternative but to be consistent with section 230, and it is only because New York common law was in harmony with the congressional intent to immunize ISPs that it could apply State law in this case.¹³⁶ In any case, whether the decision was based on the CDA or New York common law, the *Lunney* decision was fair in that the defendant, who had no knowledge of the defamatory posting, was held not liable.¹³⁷

131. See *id.* at *14.

132. *Id.* at *13-*14.

133. See John Caher, *No Liability for Internet Bulletin Board Provider; Prodigy Not at Fault for Postings Defaming Boy*, N.Y.L.J., Dec. 3, 1999, at 1.

134. See *Lunney v. Prodigy Servs. Co.*, No. 164, 1999 N.Y. LEXIS 3746, at *13-*14 (Dec. 2, 1999); see also *Lunney v. Prodigy Servs. Co.*, 683 N.Y.S.2d 557, 563 (App. Div. 1998) (stating that the court need not decide the “essentially academic question” of whether the federal statute would apply to the case).

135. See *Lunney v. Prodigy Servs. Co.*, 683 N.Y.S.2d 557, 562-63 (App. Div. 1998) (stating that its decision was consistent with contemporary federal and state case law as well as with the federal statute).

136. See *supra* note 61 and accompanying text.

137. It is not clear, however, that the decision would have been any different had the defendant possessed the required knowledge. See, e.g., *Zeran v. America Online, Inc.*, 129 F.3d 327, 329-330 (4th Cir. 1997) (finding that *Zeran*'s case against AOL was barred by section 230 even though AOL was informed of the defamatory postings); see also 47 U.S.C. § 230(e)(3) (Supp. IV 1998) (stating that no liability may be imposed on an ICS provider that is inconsistent with section 230).

The problem with the *Lunney* decision is that, as the poster was anonymous and the ISP was immune, no one is legally accountable for the plaintiff's injuries. Lunney claimed that at the time the defamatory messages were posted, Prodigy was negligently soliciting members by requesting just a name and an address and not verifying the bona fides of any person before opening an account.¹³⁸ This set of policies, Lunney claimed, made it easy to open fictitious accounts.¹³⁹ The Court of Appeals dismissed the negligence claim finding Lunney's proposal that ISPs verify applicants' bona fides and credit cards would require ISPs "to perform investigations on millions of potential subscribers" and subject them to "a limitless field of liability."¹⁴⁰ The "court was confronted with a basic policy choice, and it found in favor of the [Internet] industry over . . . very elementary individual rights."¹⁴¹

B. The Problems with Current Internet Defamation Law

Congress passed section 230 of the CDA in 1996 to remove the disincentives to self-regulation created by the New York state court's decision in *Stratton Oakmont*.¹⁴² Congress's intent in enacting section 230 was to prevent the chilling effect of *Stratton Oakmont* and to encourage ICS providers to monitor the content of their bulletin board and other postings.¹⁴³ Congress' "Good Samaritan" law seems perfectly rational when applied to a situation as in *Lunney* where the ISP played no part in disseminating the offensive e-mail.¹⁴⁴ The law, however, inadequately addresses the accountability for defamatory statements made on the Internet, and as seen in *Lunney*, leaves the plaintiff without any compensation for his injuries when an ISP is negligent in allowing users access to its services.¹⁴⁵ What is needed is a balance between an individual's right to free speech and Congress' policy of promoting the Internet and growth of technology on the one hand, and protecting innocent people from serious harm to their

138. See Zamansky, *supra* note 84, at 5.

139. See *id.*

140. *Lunney v. Prodigy Servs. Co.*, No. 164, 1999 N.Y. LEXIS 3746, at *11-*12 (Dec. 2, 1999).

141. Judy Greenwald, *Prodigy is Not Held Liable For False Information Online*, BUSINESS INSURANCE, Jan. 3, 2000, at 2 (quoting Thomas Marino, a New York-based attorney who represented Lunney).

142. See, e.g., Cannon, *supra* note 44, at 61-62.

143. See 47 U.S.C. § 230(b) (Supp. IV 1998); see also H.R. REP. NO. 104-458, at 86 (1996) ("It is the policy of the United States . . . 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. . .").

144. See *Lunney v. Prodigy Servs. Co.*, 683 N.Y.S.2d 557, 560 (App. Div. 1998).

145. See *supra* note 84 and accompanying text.

reputation on the other. To achieve this balance, it is necessary that the law should, at a minimum, require ISPs to keep accurate records of their clients and their usage and to release these records when a court orders them to do so.

Congress also enacted a sub-section of the CDA which provided immunity for the good-faith blocking or removal of any defamatory statements.¹⁴⁶ While its intentions may have been good, what Congress seems to have overlooked is that, although the CDA protects ICS providers from liability to persons whose material they exclude, it provides no incentive for ICS providers to monitor their web sites. This is because they can no longer be held accountable for any third party posting over their services. Also, in not clearly defining the scope of the statute, Congress may have empowered the courts to allow overly-broad immunity to ICS providers.¹⁴⁷

More importantly, the blanket immunity of the CDA has left no incentive for ICS providers to maintain records of their users to identify the authors of defamatory messages to allow the plaintiff to seek redress. While the author of the defamatory statement should be held primarily liable for the harm caused, there is a very practical reason to hold ICS providers liable for statements that it permits, after being notified, to remain on its services—such liability is the only way to motivate them to either remove the message or to reveal the identity of the author so that plaintiff may sue the truly liable person. If ICS providers fail to do either, then it is only fair that they compensate the plaintiff for the harm resulting from the statement. Current law would need to be modified in order to be fair to both the plaintiff and ICS providers.

C. A Proposed Solution for Internet Defamation Liability

Various solutions have been proposed to solve the problem of liability for anonymous postings on the Internet. One proposal would require ICS providers to maintain records of users' names and addresses, to warn subscribers, to review posted messages in public space within a reasonable

146. See 47 U.S.C. § 230(c)(2) (Supp. IV 1998) (stating that “[n]o 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 [§ 230(c)](1)).

147. See Kane, *supra* note 68 at 495.

amount of time and to remove offensive or defamatory messages.¹⁴⁸ Under this system, the ICS provider remains liable for knowingly or negligently transmitting defamatory messages.¹⁴⁹ The merits of this proposal are that it solves the accountability problem and provides a way for the injured party to be made whole by the defaming party. In addition, individuals would be deterred from posting defamatory messages because they would be identifiable. Under this scheme, an ICS provider would not be liable if these steps were taken, but, it would be liable if it knowingly or negligently allowed defamatory messages to be posted. One of the proposal's most significant drawbacks is that there are millions of messages posted every day—it would be virtually impossible to efficiently review them. Another problem is the difficulty in pointing to the exact point at which it is appropriate to say that the ICS provider is liable for the posted statement. Further, there is no way for a provider to distinguish messages that are defamatory from those that are true.¹⁵⁰ The removal of innocent messages by such a law would curtail people's First Amendment right to free speech.

Another proposal, because of problems with anonymous and insolvent users, advocates strict liability standards for ICS providers.¹⁵¹ This proposal suggests that strict liability would force each provider "to determine the most advantageous mix of preventative measures," including the need to ensure user solvency, to perform message screening, to limit uploading, as well as to spread the losses from wrongful messages over all its users.¹⁵² Proponents defend this proposal by stating that the law has shown a tendency "to hold new activities, the safety of which is not well understood, to strict liability until more is known about the activities."¹⁵³ This proposal solves the problem of plaintiff compensation for anonymous defamatory postings. A criticism of this proposal is that it was tried in *Stratton Oakmont* and it failed because Congress reacted immediately to *Stratton Oakmont* by enacting section 230 of the CDA.¹⁵⁴ This approach is not very different from that taken by the *Stratton Oakmont* court in holding

148. See Robert Charles, Note, *Computer Bulletin Boards and Defamation: Who Should be Liable? Under What Standard?* 2 J.L. & TECH. 121, 147 (1987).

149. See *id.* at 147-48.

150. For example, a posting stating that a particular doctor is "terrible and should be avoided" may be true and based on a bad experience or may be untruthful and made purely to harm the doctor's practice and reputation.

151. See I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993, 1044 (1994).

152. *Id.* at 1044.

153. *Id.*

154. See James F. Breisford, *Online Liability Issues: Defamation, Invasion of Privacy and Negligent Publishing,* 482 PLI/PAT 471, 489 (1997).

the defendant ISP liable without a showing of knowledge or negligence. Indeed, it would have the same chilling effect on the growth and development of ICS providers and provide a disincentive for self-regulation. This proposal may also face a First Amendment challenge under *Gertz* for holding a defendant liable for defamation without a showing of fault.

A third scheme would hold an ICS provider liable if it failed to remove postings within a reasonable period after being notified.¹⁵⁵ Unlike the first proposal, this one does not impose the burden of verifying users' names and their addresses nor the burden of monitoring the numerous messages that get posted. It is also fair to the service provider, as it requires a showing of fault before the provider can be held liable. In failing to require the provider to maintain any records of the users or clients,¹⁵⁶ however, this proposal fails to provide a solution whereby the plaintiff could be compensated if the message was posted anonymously.

A better solution would be one in which the ICS providers would be required to maintain records of users' names and addresses, to remove defamatory messages within a reasonable period of time after notification, and to release the user's true identity if issued a subpoena. Under this proposal, a user must provide a name and either a credit card or driver's license number to the ICS provider who would then verify the information. Upon verification, the service provider would notify the user that his or her account is "active." Only after being so notified would the user have access to the Internet via the ICS provider's services. Whether the ICS provider charges the user a fee for allowing access to its services is left to the provider, but the provider must maintain a record of the verified identity of each user. Further, it should keep an accurate record of the activities of the user so as to enable even an anonymous posting on a public bulletin board to be traced to the poster.

These requirements may, at a first glance, appear to be too burdensome to ICS providers and to violate individual users' privacy, but it is by and large the existing practice. Most ICS providers charge their clients an hourly or monthly fee for accessing the Internet, and maintain records of the client's name, address and credit card number for billing purposes. This information has been used to identify users indulging in Internet-related criminal activities and to prosecute them.¹⁵⁷ This proposal would require that this widely prevalent practice become law, i.e., it would no

155. See Frank P. Darr, *A Proposed Defamation Standard for Commercial Computer Information Systems*, 18 HASTINGS COMM/ENT L.J. 267, 284-285 (1996).

156. See *id.* at 285.

157. See Noah Levine, Note, *Establishing Legal Accountability for Anonymous Communication in Cyberspace*, 96 COLUM. L. REV. 1526, 1526-27 (1996).

longer be optional for ICS providers to maintain records of its users' identities and activities; they would be required to do so.

Another argument against this solution could be that there may be a time lag between applying for an Internet account and gaining Internet access.¹⁵⁸ While that may be true, one must keep in mind that not all applications are processed instantaneously. ISPs who collect a fee may require the client to wait while the bona fides are verified. Similar delays are seen in other related industries too—one cannot get telephone or credit card accounts instantaneously. This has not had a significant effect on people's lives. An Internet account need not be any different.

The records that this proposal requires an ICS provider to keep are no different from those which a phone company keeps. Extending the analogy of a phone company to an ICS provider, as *Lunney* did,¹⁵⁹ one could argue that if a person used his phone to make obscene calls to another, then the phone company's records could trace the call to the person who made it. ICS providers should not be permitted to get away with anything less.

This solution therefore requires that the ISPs have a duty to maintain accurate records of user identities and activities and to release them if ordered by a court to do so. In addition, if the ISP is notified that a particular posting or message is defamatory, the ISP has a duty to look into the matter. If the ISP determines that the posting is, most likely, defamatory, then it has a duty to remove the posting. The ISP would not be liable to the poster for removing the message because the law protects ISPs who remove postings in good faith.¹⁶⁰ While not required under this proposal, an ISP could, in order to show good faith, inform the author of the removed posting that it was compelled to remove the posting because of a complaint it received indicating that the message was defamatory in nature. This proposal also mandates that the ISPs post a retraction to any message that was proven to be defamatory. This would compensate the plaintiff at least partially for the damage done to his reputation. This solution is fair to the provider as well as to the defamed plaintiff, who has no other recourse but to turn to the ISP to track the identity of the poster.

There is one situation where the proposed solution would fail. If a user were to go to a public library or any other place where there is an anony-

158. This may happen in some cases, but it need not be true all the time. As customers shopping with a credit card in a store have experienced, current technology is advanced enough to verify credit cards instantaneously.

159. See *Lunney v. Prodigy Servs. Co.*, 683 N.Y.S.2d 557, 560 (App. Div. 1998).

160. See 47 U.S.C. § 230(c)(2) (Supp. IV 1998).

mous link to the Internet, the user could circumvent the system and access the Internet directly with no record of his identity. This is no different from a person escaping detection by using a public phone to make an obscene phone call. Not all activity can be prevented by any law. The goal should be to deter the activity in general, to make it difficult for a person to indulge in it, and to catch the majority of wrong-doers. Reasonable precautions should be taken to prevent wrong doing.

V. CONCLUSION

The Internet has created a forum in which everyone can instantaneously disseminate their comments worldwide with only a few keystrokes and at little or no cost. The pervasiveness of the Internet calls for some need to balance the promotion of technology and the protection of ISPs as well as the First Amendment right to free speech with an equally important goal—protection of innocent citizens' reputations from unwarranted attacks.¹⁶¹

While the *Lunney* decision was fair to the defendant, Prodigy's lax enrollment policy left the plaintiff with absolutely no compensation for his injuries. The decision of the Court of Appeals weighed the impracticality of demanding that ISPs keep an accurate record of the identities and activities of its users against an individual's right to protection against defamation, and came out in favor of the ISPs. One solution to protect the defamed plaintiff would be to require ICS providers to maintain accurate records of their clients and their activities and to produce the records when the courts order them to do so. If the ICS provider is going to profit from the large number of clients who use its services, it is only fair that it take on the burden of maintaining accurate records of its clients' usage. It is only the ICS provider who can track and record client usage; Lunney had no way to determine the identity of the anonymous person who posted the vulgar messages in his name.

While ICS providers are very similar to telephone companies, the liability of ICS providers for third-party postings is not as easily analogized to a telephone service as the court in *Lunney* made it out to be.¹⁶² ICS providers combine the elements of both telephone companies and traditional media services like newspapers and magazines. There is a need to redefine

161. See THOMAS IRWIN EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 68 (1966) (stating that, "[a] member of a civilized society should have some measure of protection against unwarranted attack upon his honor, his dignity and his standing in the community.").

162. See *Lunney*, 683 N.Y.S.2d at 560.

the duties that ICS providers have to their clients and to the public. Congress should balance the needs of ICS providers with those of their users and ensure that all individuals are protected from the serious damage that could result from a reckless statement made over the Internet.

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