

BATZEL V. SMITH & BARRETT V. ROSENTHAL: DEFAMATION LIABILITY FOR THIRD-PARTY CONTENT ON THE INTERNET

By Jae Hong Lee

[I]t has grown faster than a teenager, and now it is time to grow up. . . . The power of instantaneous sight and sound is without precedent in mankind's history. This is an awesome power. It has limitless capabilities for good—and for evil. And it carries with it awesome responsibilities, responsibilities which you and I cannot escape.¹

When Newton N. Minow delivered those words before the National Association of Broadcasters in 1961, the world had yet to see the Internet's birth. He was, of course, speaking of another unruly young medium that was just then entering its adolescence: television. But his words could easily be applied to the Internet today. Although every new medium presents new challenges for society and the law, closer inspection uncovers a rather unflattering truth: a medium that appears completely fresh and unique in its infancy soon reveals, during adolescence, some of the same pimples and warts that have plagued other young media in the past.

One such wart is the inevitable appearance of undesirable content. Minow described living in a "television age" but lamented that television had become a "vast wasteland."² He questioned whether television's "powerful voice" would be used "to enrich the people or debase them."³ Today, we live in the "Internet age" and some have wondered whether the Internet, too, is becoming a vast wasteland.⁴ Indeed, Congress passed the Communications Decency Act (CDA)⁵ in 1996 to help combat what it

© 2004 Berkeley Technology Law Journal & Berkeley Center for Law and Technology.

1. Newton N. Minow, Speech Before the National Association of Broadcasters (May 9, 1961), available at <http://www.americanrhetoric.com/speeches/newtonminow.htm>.

2. *Id.*

3. *Id.*

4. See Zoë Baird, *Promoting Innovation to Prevent the Internet from Becoming a Wasteland*, 55 FED. COMM. L.J. 441, 442 (2003) (noting that "the Internet is confronting several important challenges that, if left unattended, could take us down a path leading toward a new form of Minow's wasteland").

5. Pub. L. No. 104-104, 110 Stat. 133 (1996) (codified as amended at 47 U.S.C. § 230 (2000)).

viewed as the proliferation of “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” material on the Internet.⁶

While old problems invariably show up in new media, this does not mean that political leaders will choose to employ old solutions. In passing the CDA, Congress rejected the traditional model of limited content regulation by government agencies such as the Federal Communications Commission.⁷ Instead, Congress sought to encourage providers and users of Internet services to practice self-regulation with respect to offensive material.⁸

The CDA was designed to encourage self-regulation by permitting Internet service providers (ISPs) to exercise their editorial powers in regulating offensive material without incurring strict liability for defamation as publishers of third-party content.⁹ This was achieved through § 230(c)(1), which granted ISPs and users immunity from treatment as “the publisher or speaker of any information provided by another information content provider.”¹⁰

Courts have interpreted this immunity provision so broadly as to provide virtually complete immunity for ISPs from defamation liability for third-party content,¹¹ a result that the original co-sponsors of the bill probably did not intend.¹² As seen in two recent cases, *Batzel v. Smith*¹³ and *Barrett v. Rosenthal*,¹⁴ this broad immunity “can sometimes lead to troubling results.”¹⁵ By exceeding the intent of Congress and granting near-absolute immunity from defamation liability, the courts have departed from traditional defamation tort law and have provided protections for the Internet that no other medium has enjoyed in the past.

6. 47 U.S.C. § 230(c)(2)(A).

7. As noted by one of the CDA’s original co-sponsors, the bill was intended to “establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet.” 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

8. See 47 U.S.C. § 230(b)(4).

9. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (holding the ISP, Prodigy, strictly liable for the actions of the board leader of one of Prodigy’s computer bulletin boards).

10. 47 U.S.C. § 230(c)(1).

11. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

12. See *Barrett v. Rosenthal*, 5 Cal. Rptr. 3d 416, 435 (Cal. Ct. App. 2003).

13. 333 F.3d 1018 (9th Cir. 2003).

14. 5 Cal. Rptr. 3d 416.

15. *Batzel*, 333 F.3d at 1031, n.19.

This Note presents several propositions regarding the scope of CDA immunity: (1) courts have generally misinterpreted the scope of immunity from defamation liability provided by § 230(c)(1); (2) the overly broad immunity has been conferred by the courts, in part, to foster the continued growth of the Internet; (3) the Internet is a robust medium that is beyond its infancy and does not require such broad protection from defamation liability; and (4) the Internet, while unique in many respects, is not so exceptional as to require a complete departure from traditional defamation law. As background for this review and assessment of defamation liability for Internet content, Part I of this Note briefly summarizes defamation law before and after the CDA. Part II discusses two recent cases that have interpreted the scope of defamation liability immunity in markedly different ways. Finally, Part III discusses the current approach to defamation liability on the Internet in the context of more traditional approaches applied to other media. The Note concludes by advocating the return to a more traditional approach to defamation liability for the Internet.

I. BACKGROUND

A. Common Law Defamation Tort

The common law tort of defamation protects individuals against published statements that are false and harmful to their reputation.¹⁶ Traditional defamation law categorized information disseminators into three groups to which very different legal standards were applied to determine defamation liability related to third-party content: (1) publishers (e.g., newspapers) exercise great control over final content and were therefore subject to strict liability; (2) distributors (e.g., booksellers) merely distribute content and were therefore subject to liability only upon a showing of knowledge or negligence; and (3) common carriers (e.g., telephone companies) only transmit information with no control over content and were therefore not liable at all.¹⁷

B. Court Cases Before the Communications Decency Act

Certain features of the Internet have fueled the growth of defamatory speech in cyberspace. Among these features are the relative anonymity of authors and the ease of publishing unscreened and unedited writing and

16. RESTATEMENT (SECOND) OF TORTS §§ 558-59, 577 (1977); Michelle J. Kane, Note, *Blumenthal v. Drudge*, 14 BERKELEY TECH. L.J. 483, 485 (1999).

17. Paul Ehrlich, Note, *Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401, 403 (2002).

research to a potentially world-wide audience.¹⁸ In dealing with the problem of defamation on the Internet, the courts attempted to apply traditional defamation law to the new medium, an exercise which brought mixed results.¹⁹

Part of the early struggle for courts was determining whether ISPs were “publishers” that exercised significant control over content—and therefore were subject to strict liability for content provided by third parties—or “distributors” who were liable only if they knowingly or negligently distributed defamatory content.²⁰ In *Cubby, Inc. v. CompuServe Inc.*, a district court held that CompuServe, an ISP, was not liable for defamatory content provided by a third party in Rumorville USA, an Internet forum to which CompuServe had provided access for its subscribers.²¹ The court determined that CompuServe was a *distributor* that had “no more editorial control over such a publication than does a public library, book store, or newsstand.”²² The court further determined that the plaintiffs had failed to show that CompuServe knew or had reason to know of the defamatory statements in Rumorville, and therefore could not be held liable *as a distributor* for defamation.²³

The New York Supreme Court reached a strikingly different result in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*²⁴ The *Stratton Oakmont* court held that Prodigy, an ISP with more than two million subscribers, was strictly liable as a *publisher* for libelous statements on one of its message boards.²⁵ The court in *Stratton Oakmont* distinguished Prodigy from *Cubby*’s CompuServe by noting that Prodigy had “held itself out to the public and its members as controlling the content of its computer bulletin boards” and had “implemented this control through its automatic software screening program [and] Guidelines.”²⁶ Prodigy’s “conscious choice, to gain the benefits of editorial control, [had] opened it up to a greater liability than CompuServe and other computer networks that make no such choice.”²⁷ However, the *Stratton Oakmont* court declared that it was “in full agreement with *Cubby*” and that interactive computer bulletin boards

18. *See id.* at 401.

19. *See Kane, supra* note 16, at 487.

20. *See Ehrlich, supra* note 17, at 403.

21. 776 F. Supp. 135, 137-38 (S.D.N.Y. 1991).

22. *Id.* at 140.

23. *Id.* at 141.

24. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

25. *Id.* at *3-4.

26. *Id.* at *4.

27. *Id.* at *5.

are generally analogous to “bookstores, libraries and network affiliates.”²⁸ In other words, absent an overt policy of assuming editorial control over third-party content, the *Stratton Oakmont* court believed that ISPs should generally be held to the defamation liability standards applied to *distributors* in the older, more established media of print and television.²⁹

C. The Communications Decency Act of 1996

1. Immunity Provided by the CDA: Primary Legislative Objectives

The decision in *Stratton Oakmont* seemed to punish a well-intentioned effort to provide a “family-oriented” computer service. In response, Congress passed the Communications Decency Act of 1996 to overturn the result in *Stratton Oakmont* and to remove any disincentives for ISPs to police their services for offensive content.³⁰ Congress achieved the first goal by passing § 230(c)(1) which reads in relevant part: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”³¹ Disincentives against self-policing are addressed in § 230(c)(2):

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).³²

It is important to note that the text of § 230(c)(1) does not specifically mention protection for distributors, only for “publisher[s] or speaker[s]” of content.³³ The House Conference Report explicitly states that “[o]ne of the specific purposes of [§ 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers [of] objectionable material.”³⁴ The *Stratton*

28. *Id.*

29. *See id.*

30. H.R. CONF. REP. NO. 104-458, at 194 (1996).

31. 47 U.S.C. § 230(c)(1) (2000).

32. *Id.* § 230(c)(2).

33. *Id.* § 230(c)(1).

34. H.R. CONF. REP. NO. 104-458, at 194.

Oakmont court clearly distinguished distributors from publishers and did not impose distributor liability on Prodigy.³⁵ Therefore, there was no need for Congress to grant immunity from distributor liability in order to overrule *Stratton Oakmont*, and it seems reasonable to assume that if Congress had wanted to grant immunity from distributor liability, it would have done so explicitly.³⁶

2. *Other Legislative Objectives: Fostering the Growth of the Internet*

Congress also had broader policy objectives in mind when it passed the CDA, namely to “promote the continued development of the Internet and other interactive computer services and other interactive media [and] 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.”³⁷ Congress passed § 230(c)(1) not only to encourage ISPs to self-regulate obscene and offensive content, but also to prevent lawsuits—especially those for defamation—from shutting down websites and other Internet services.³⁸ Besides “keeping offensive material away from our kids,”³⁹ Congress sought to nurture the growth of the Internet, a medium that was commonly perceived to be in its infancy.⁴⁰

D. **Defamation Liability on the Internet After the Communications Decency Act**

Congress’s effort to encourage ISPs to self-regulate offensive material provided through their services eventually produced, through the courts, a broad immunity for ISPs that extended well beyond the intended scope of the CDA. Interestingly, the most influential court decision interpreting § 230, *Zeran v. America Online, Inc.*,⁴¹ did not address the dissemination of generally offensive material on the Internet, but rather a dispute over

35. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995).

36. See David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 168-69 (1997).

37. 47 U.S.C. § 230(b)(1)-(2).

38. *Barrett v. Rosenthal*, 333 F.3d 1018, 1028 (9th Cir. 2003).

39. 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

40. See, e.g., Michael Hadley, Note, *The Gertz Doctrine and Internet Defamation*, 84 VA. L. REV. 477, 507 (1998) (stating that “while the Internet is in its infancy, fundamentally altering the balance in favor of shielding false defamatory statements against private persons is both premature and dangerous”).

41. 129 F.3d 327 (4th Cir. 1997).

the defamation liability of an ISP for third-party content.⁴² The *Zeran* court granted ISPs and their users virtually complete immunity from defamation liability for third-party content, a decision intended to safeguard the continued development of “the new and burgeoning Internet medium.”⁴³ The *Zeran* court’s broad interpretation of § 230 immunity produced some troubling results.

I. Zeran v. America Online, Inc.

Just six days after the Oklahoma City bombing of April 19, 1995, an anonymous individual posted a message on an America Online (AOL) bulletin board describing the sale of shirts featuring offensive and tasteless slogans related to the tragedy.⁴⁴ The message instructed those interested in purchasing the shirts to call Kenneth Zeran’s home phone number.⁴⁵ As a result of this malicious prank, Zeran began receiving a large number of hostile calls, including numerous death threats.⁴⁶ Zeran contacted AOL and informed a representative of the company of his predicament. AOL promised to remove the posting but refused to post a retraction as a matter of policy.⁴⁷ The postings continued and eventually reached an Oklahoma City radio station, which encouraged its listeners to call Zeran’s phone number.⁴⁸ By this time, Zeran was completely inundated with death threats.⁴⁹ After repeated calls to AOL, Zeran was told that the company would soon close the accounts under which the defamatory messages had been posted.⁵⁰ The flood of violent phone calls subsided only after a local newspaper exposed the defamatory prank and after the local radio station made an on-air apology.⁵¹ The ugly episode vividly demonstrated the muscular and robust power of the Internet as a medium for rapidly spreading harmful lies.

Zeran eventually filed a suit against AOL, arguing in the district court that once he had notified AOL of the unidentified third-party’s defamatory hoax, AOL had a duty to remove the defamatory message promptly, post retractions, and screen for similar defamatory postings.⁵² AOL responded

42. *Id.* at 328.

43. *Id.* at 330.

44. *Id.* at 329.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 330.

by citing § 230 immunity as an affirmative defense and moved for judgment on the pleadings, which the district court granted.⁵³ Zeran appealed to the Fourth Circuit, arguing that § 230 immunity eliminated only publisher liability, leaving notice-based distributor liability intact.⁵⁴ The Fourth Circuit disagreed, declaring that distributor liability was “merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230.”⁵⁵ The *Zeran* court further stated that interpreting § 230 as denying immunity for distributor liability “would defeat the two primary purposes of the statute,” namely, maintaining the robustness of Internet communication by minimizing government interference and encouraging ISP self-regulation of offensive content.⁵⁶

The *Zeran* court concluded that “Congress’ desire to promote unfettered speech on the Internet must supersede conflicting common law causes of action.”⁵⁷ In doing so, the Fourth Circuit deduced that Congress had chosen to protect the “new and burgeoning Internet medium” from the “specter of tort liability” over providing legal redress for victims of serious defamation.⁵⁸ Many disagreed with this assessment.⁵⁹ In holding that distributor liability is a subset of publisher liability, the *Zeran* court effectively granted providers and users of interactive computer services virtually complete immunity from defamation liability for third-party content.⁶⁰ As discussed above, it is far from clear that Congress intended such a dramatic break from the past with the passage of § 230(c)(1).⁶¹

53. *Id.* at 329-30.

54. *Id.* at 330-31.

55. *Id.* at 332.

56. *Id.* at 330-31, 334.

57. *Id.* at 334.

58. *See id.* at 330-31.

59. *See Barrett v. Rosenthal*, 5 Cal. Rptr. 3d 416, 429 (Cal. Ct. App. 2003); Sheridan, *supra* note 36, at 178 (footnotes omitted). One such commentator noted that freedom from distributor liability for AOL [may] be necessary in order to protect people who want to run newsgroups or listservs [and] to preserve the ‘never-ending worldwide conversation’ on ‘the most participatory form of mass speech yet developed, the Internet . . .’ This is a choice that Congress may want to make, but there is little evidence that, in enacting the CDA, Congress made that choice.

Sheridan, *supra* note 36, at 178 (footnotes omitted).

60. *See Zeran*, 129 F.3d at 332; *see Sheridan*, *supra* note 36, at 165-166.

61. Sheridan, *supra* note 36, at 168. For an excellent and fairly comprehensive discussion on this issue, *see Barrett*, 5 Cal. Rptr. 3d at 425-35.

2. *The Post-Zeran World: Some Troubling Results*

Several courts reached troubling results by following *Zeran*.⁶² For example, in *Blumenthal v. Drudge*, a district court held that AOL could not be held liable for the false and defamatory statements written by a third party, Internet news columnist Matt Drudge, despite the fact that AOL: (1) had made monthly payments to Drudge for his electronic publication under a licensing agreement; (2) could have chosen, under the licensing agreement, to remove content that it reasonably determined violated its standard terms of service; (3) knew that Drudge specialized in rumor and gossip; and (4) made editions of Drudge's publication available to its subscribers after first receiving them from Drudge by e-mail.⁶³ Following *Zeran*, the *Blumenthal* court concluded that "Congress made no distinction between publishers and distributors in providing immunity from [defamation] liability."⁶⁴ The *Blumenthal* court apparently was troubled by its own holding, declaring that if "it were writing on a clean slate, this Court would agree with plaintiffs."⁶⁵ The court noted that while AOL promoted Drudge as a new source of "unverified instant gossip," AOL took no responsibility for any damage his gossip may have caused.⁶⁶

II. DEFAMATION LIABILITY IN TWO RECENT CASES

Recent cases illustrate two markedly different approaches to the immunity enjoyed by ISPs and users under § 230. In *Batzel v. Smith*,⁶⁷ the Ninth Circuit continued the pattern established in other courts by setting a low bar and broadening § 230 immunity in defamation cases involving third-party content, despite the court's clear misgivings in doing so.⁶⁸ In contrast, the California Court of Appeals in *Barrett v. Rosenthal* became perhaps the first court in the nation to explicitly reject the *Zeran* court's broad interpretation of § 230.⁶⁹

62. See, e.g., *Doe v. Am. Online, Inc.*, 783 So. 2d 1010 (Fla. 2001) (holding that 47 U.S.C. § 230 preempts state law as to causes of action based in negligence against an ISP accused of distributing obscene materials related to child pornography).

63. 992 F. Supp. 44, 47-48, 53 (D.D.C. 1998).

64. *Id.* at 52.

65. *Id.* at 51.

66. *Id.*

67. 333 F.3d 1018 (9th Cir. 2003).

68. See *id.* at 1020, 1030, 1031 n.19.

69. *Barrett v. Rosenthal*, 5 Cal. Rptr. 3d 416, 429 (Cal. Ct. App. 2003).

A. *Batzel v. Smith*

In *Batzel v. Smith*, the Ninth Circuit examined the question of whether a moderator of a listserv and operator of a website who posts an allegedly defamatory e-mail authored by a third party can be held liable for doing so.⁷⁰ In addressing this question, the Ninth Circuit tackled the more specific issue of when a third party may be deemed to have *provided* information for possible distribution within the meaning of § 230(c)(1). In holding that a service provider or user is shielded from liability when that provider or user *reasonably perceived* that the third party provided the information for the purpose of publication or distribution,⁷¹ the *Batzel* court established yet another standard promoting irresponsibility on the Internet.

1. *Facts and Procedural History*

During the summer of 1999, handyman Robert Smith was performing some contract work at the North Carolina home of Ellen Batzel, an attorney.⁷² For various reasons, Smith became concerned that Batzel was in possession of artwork looted from European Jews during World War II.⁷³ After a search for websites concerning stolen art work, Smith came upon the Museum Security Network (“the Network”), which was solely operated by Ton Cremers, then-Director of Security at Amsterdam’s Rijksmuseum.⁷⁴ Smith then sent an e-mail message to Cremers, stating that Batzel possessed art that Smith believed had been looted during World War II.⁷⁵

70. 333 F.3d at 1020.

71. *Id.* at 1034.

72. *Id.* at 1020.

73. *Id.* at 1020-1021.

74. *Id.* at 1021.

75. The e-mail message read in relevant part:

From: Bob Smith [e-mail address omitted]

To: securma@museum-security.org [the Network]

Subject: Stolen Art

Hi there,

I am a building contractor in Asheville, North Carolina, USA. A month ago, I did a remodeling job for a woman, Ellen L. Batzel who bragged to me about being the grand daughter [sic] of “one of Adolph Hitler’s right-hand men.” At the time, I was concentrating on performing my tasks, but upon reflection, I believe she said she was the descendant of Heinrich Himmler.

Ellen Batzel has hundreds of older European paintings on her walls, all with heavy carved wooden frames. She told me she inherited them.

I believe these paintings were looted during WWII and are the rightful legacy of the Jewish people. Her address is [omitted]. I also believe that the descendants of criminals should not be persecuted for the crimes of the [sic] fathers, nor should they benefit. I do not know who to contact

Cremers eventually distributed Smith's e-mail message, with some minor wording changes, through the Network listserv and published the listserv with Smith's message on the Network website.⁷⁶ After viewing the posting, Smith explained in an e-mail to a subscriber that he had no idea that his e-mail would be posted to the listserv or placed on the Network website.⁷⁷

Several months later, Batzel discovered the e-mail message and complained to Cremers about it.⁷⁸ Cremers then contacted Smith, who insisted on the truth of his statements.⁷⁹ However, Smith told Cremers that if he had known that his e-mail message would be posted, he would never have sent it in the first place.⁸⁰ To support his contention that he intended to have kept the message from publication, Smith pointed out that he sent the e-mail message to an address that was different from the one used by listserv subscribers to send messages for inclusion in the listserv.⁸¹

Batzel disputed Smith's account and believed that Smith defamed her because she had refused to pass on an amateur screenplay written by him to her contacts in Hollywood.⁸² Claiming injuries to her social and professional reputation, she filed suit against Smith and Cremers in federal court in Los Angeles.⁸³ The district court denied Cremers's motions to dismiss the case⁸⁴ and declined to extend the immunity conferred under § 230(c), holding that Cremers's Network was not an ISP.⁸⁵ Cremers appealed to the Ninth Circuit Court of Appeals.⁸⁶

about this, so I start with your organization. Please contact me via email [. . .] if you would like to discuss this matter.
Bob.

Id.

76. *Id.* at 1022.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* Batzel also filed suit against the Netherlands Museum Association, and Mosler, Inc., a financial sponsor of the Network. *Id.*

84. Cremers filed a motion to strike under the California anti-SLAPP statute (CAL. CIV. PROC. CODE § 425.16 (West 1973)), and a motion to dismiss for lack of personal jurisdiction. *Batzel*, 333 F.3d at 1023. The district court denied both motions. *Id.*

85. *Id.* at 1026. Batzel had also alleged that Mosler was vicariously liable for her injuries because Cremers had been acting as Mosler's agent; the district court issued a summary judgment in favor of Mosler and Batzel appealed that decision. *Id.* at 1023.

86. *Id.*

2. *The Ninth Circuit's Analysis*

After disposing of the procedural issues that Cremers had raised,⁸⁷ the Ninth Circuit focused on the heart of the case: whether Cremers qualified for the immunity provided under § 230(c)(1). The court first determined that Cremers's Network website and listserv qualified as a "provider or user of an interactive computer service" under § 230(c)(1).⁸⁸ The Ninth Circuit then noted that § 230 limits immunity to information "provided by another information content provider."⁸⁹ The court determined that because "Cremers did no more than select and make minor alterations to Smith's e-mail, Cremers cannot be considered the content provider of Smith's e-mail for purposes of § 230."⁹⁰ The key question, therefore, was

87. The Ninth Circuit first addressed Cremers's motion to dismiss for lack of personal jurisdiction, determining that the district court's denial of that motion was not an appealable order and therefore dismissed Cremers's appeal on that issue. *Id.* The Ninth Circuit next addressed Cremers's motion to strike under California's anti-SLAPP statute. California law permits the pre-trial dismissal of SLAPPs—Strategic Lawsuits Against Public Participation. CAL. CIV. PROC. CODE § 425.16. These are lawsuits that are aimed at discouraging freedom of expression through costly, time-consuming litigation. *See Batzel*, 333 F.3d at 1023-24. The Ninth Circuit first determined that it had jurisdiction over Cremers's immediate interlocutory appeal of the district court's denial of his motion. *Id.* at 1024-25. It then noted that successfully defeating the anti-SLAPP motion required a showing that Batzel would prevail on the merits of her complaint. *Id.* at 1026. But the Ninth Circuit refused to conclusively deny the motion because it was inclined to agree that Batzel had made such a showing only "*absent* 47 U.S.C. § 230." *Id.* (emphasis added).

88. *Batzel*, 333 F.3d at 1030-31. The CDA broadly 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 operated or services offered by libraries or education institutions." 47 U.S.C. § 230(f)(2) (2000) (emphasis added). The district court narrowly construed § 230(f)(2) to cover only services that provide access to the Internet as a whole, and therefore concluded that Cremers did not qualify for section 230(c)(1) immunity. *See Batzel v. Smith*, No. CV 00-9590 SVW(AJWX), 2001 WL 1893843, at *7-8 (C.D. Cal. June 5, 2001). The Ninth Circuit reversed this holding, citing numerous examples in which the statute had referred to the "Internet and *other* interactive computer services." *Batzel*, 333 F.3d at 1030 (emphasis added); *see, e.g.*, 47 U.S.C. § 230(a)(1). Furthermore, the Ninth Circuit stated that there was "no need here to decide whether a listserv or website itself fits the broad statutory definitions of 'interactive computer service,' because the language of § 230(c)(1) confers immunity not just on 'providers' of such services, but also on 'users' of such services." *Batzel*, 333 F.3d at 1030 (citing 47 U.S.C. § 230(c)(1)). The Ninth Circuit determined that "both the Network website and the listserv are potentially immune under § 230." *Id.* at 1031.

89. *Batzel*, 333 F.3d at 1031 (quoting CAL. CIV. PROC. CODE § 230(c)(1)) (emphasis added).

90. *Id.*

whether Smith had actually *provided* his e-mail within the meaning of § 230.

This issue was not a simple matter because Smith insisted that he never “imagined [his] message would be posted on an international message board.”⁹¹ Cremers claimed that § 230(c)(1) immunity should be available simply because Smith was the author of the e-mail and nothing more. But the Ninth Circuit rejected this interpretation, noting that users and providers of interactive computer services could then post with impunity material that they knew was never meant to be published on the Internet.⁹² However, the Ninth Circuit also declined to place the primary focus on the information provider’s intentions—fearing that free speech would be chilled (and Congress’s purpose thwarted) if service providers or users could not tell whether a posting was contemplated.⁹³

Instead, the Ninth Circuit placed the focus squarely on the service provider’s or user’s “reasonable perception of those intentions or knowledge.”⁹⁴ The court held that

a service provider or user is immune from liability under § 230(c)(1) when a third person or entity . . . furnished [information] to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other ‘interactive computer service.’⁹⁵

In a vigorous dissent, Judge Gould objected to shifting the inquiry away from the defendant’s *conduct*. Judge Gould claimed that, by providing immunity for parties that disseminate writings whose authors intend to have published, the court had developed a rule that not only “encourages the casual spread of harmful lies”⁹⁶ but also “licenses professional rumormongers and gossip-hounds to spread false and hurtful information with impunity.”⁹⁷ He further stated that the “problems caused by the majority’s rule all would vanish if we focused our inquiry not on the *author’s intent*, but on the *defendant’s acts*.”⁹⁸

91. *Id.* at 1032.

92. *See id.* at 1033.

93. *Id.* at 1034.

94. *Id.*

95. *Id.* The Ninth Circuit vacated the district court’s order denying Cremers’s anti-SLAPP motion and remanded to the district court for further proceedings to develop the facts under the new standard. *Id.* at 1035.

96. *Id.* at 1038 (Gould, J., dissenting).

97. *Id.* (Gould, J., dissenting).

98. *Id.* (Gould, J., dissenting).

B. *Barrett v. Rosenthal*

In *Barrett v. Rosenthal*, a case with some factual similarities to *Batzel*,⁹⁹ the California Court of Appeals examined the central question of “the extent to which [§ 230] abrogated the common law of defamation.”¹⁰⁰ In so doing, the *Barrett* court explicitly rejected *Zeran*’s construction of § 230, believing that “*Zeran*’s analysis of section 230 is flawed, in that the court ascribed to Congress an intent to create a far broader immunity than that body actually had in mind or is necessary to achieve its purposes.”¹⁰¹ The Court of Appeals concluded that § 230 of the CDA “cannot be deemed to abrogate the common law principle that one who republishes defamatory matter originated by a third person is subject to liability *if he or she knows or has reason to know of its defamatory character*.”¹⁰²

The court noted that the trial court had relied on *Zeran*, acknowledging that the “effect of *Zeran* is to confer on providers and users of interactive computer services complete immunity from liability for transmitting the defamation of a third party.”¹⁰³ However, the court emphatically declined to follow *Zeran* on two critical points. First, the *Barrett* court disagreed that the word “publisher” in § 230(c)(1) included not only primary pub-

99. Stephen J. Barrett and Terry Polevoy were physicians who sought to discredit alternative or nonstandard healthcare practices and products. *Barrett v. Rosenthal*, 5 Cal. Rptr. 3d 416, 418-19 (Cal. Ct. App. 2003). Ilena Rosenthal was a participant in two Usenet newsgroups that focused on alternative medicine. *Id.* at 419. On or about August 14, 2000, Rosenthal began distributing through the Usenet newsgroups an e-mail message that she had received from Timothy Bolen, another defendant in the case. *Id.* at 420. The message accused Polevoy of “stalking women” and urged “health activists . . . from around the world to file complaints to government officials, media organizations, and regulatory agencies.” *Id.* Bolen’s message claimed that Polevoy was part of a “criminal conspiracy” and urged a criminal investigation of Polevoy’s “subversive” activities. *Id.* Shortly after Rosenthal distributed Bolen’s message, Polevoy and Barrett informed her that it was false and defamatory and asked that it be withdrawn, threatening a lawsuit if it was not. *Id.* Rosenthal refused to withdraw the message and instead posted thirty-two additional messages on various Internet newsgroups describing the threat of a lawsuit accompanied by a copy of Bolen’s allegedly defamatory message and referring to Polevoy and Barrett as “quacks.” *Id.* Rosenthal later posted a number of additional messages that disparaged Polevoy and Barrett. *Id.* at 421. The trial court found Rosenthal immune from defamation liability for the reposting of Bolen’s statements under § 230 of the CDA. *Id.* Polevoy and Barrett appealed the decision to the California Court of Appeal, arguing, in part, that § 230 of the CDA bars treatment of providers and users of interactive computer services as primary publishers, subject to strict liability, but does not bar treating them as distributors, subject to notice-based liability. *Id.* at 426.

100. *Id.* at 425.

101. *Id.* at 429.

102. *Id.* at 426-27.

103. *Id.* at 428.

lishers, but distributors as well. Second, the *Barrett* court challenged the *Zeran* court's conclusion that leaving distributor liability intact would not accomplish the policies that § 230 was designed to effectuate.¹⁰⁴

On the textual issue of whether distributors fall within § 230(c)(1), the *Barrett* court noted that in "order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law."¹⁰⁵ It challenged the *Zeran* court's assertion that "Congress has indeed spoken directly to the issue by employing the legally significant term 'publisher,' which has traditionally encompassed distributors and original publishers alike."¹⁰⁶ The *Barrett* court deemed it "entirely reasonable to assume Congress was aware of [the] significant and very well-established [common law] distinction" between primary publishers and distributors.¹⁰⁷ Citing *Stratton Oakmont* as an example, the *Barrett* court also noted that courts commonly used the word "publisher" to refer only to primary publishers and not distributors.¹⁰⁸ The court also reasoned that if, "as *Zeran* says, Congress's use of the word 'publisher' covers distributors as well as [primary] publishers, and therefore reflects an intent to create absolute immunity, it would not have been necessary for Congress to specifically protect providers and users who monitor content; [§ 230(c)(2)] would be mere surplusage."¹⁰⁹ Finally, the court stated that the legislature's express desire to overturn *Stratton Oakmont*, while remaining silent on *Cubby*, was "consistent with exclusion of distributor liability from the statutory immunity."¹¹⁰

On the second critical issue—whether imposing distributor liability would defeat § 230's purpose—the *Barrett* court began by challenging the *Zeran* court's assertion that § 230 was designed to promote unfettered speech on the Internet. Specifically, the *Barrett* court questioned "whether a statute that encourages the restriction of certain types of [offensive] online material [can] fairly be said to reflect a desire 'to promote unfettered speech.'"¹¹¹ The *Barrett* court also was not convinced that "[distributor] liability would actually have an unduly chilling effect on cyber-speech";¹¹² it cited authorities that praised the benefits of defamation law

104. *Id.* at 430.

105. *Id.* (citing *United States v. Texas*, 507 U.S. 529, 534 (1993)) (emphasis added by *Barrett* court).

106. *Id.* (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 334 (4th Cir. 1997)).

107. *Id.* at 431.

108. *Id.* at 432.

109. *Id.* at 433.

110. *Id.* at 435.

111. *Id.* at 436-37.

112. *Id.* at 437.

on public discourse.¹¹³ Furthermore, the *Barrett* court concluded that if “ISPs are granted absolute immunity for disseminating third-party defamatory material, then ISPs will not bother to screen their content [for offensive material] because they will never be subject to liability.”¹¹⁴

III. DISCUSSION

Batzel and *Barrett* present two dramatically different approaches to addressing the problem of defamation on the Internet. *Batzel* seems to follow the more recent trend of courts granting ever-broader immunity to ISPs and their users against defamation liability for the transmission of third-party content, driving common law defamation tort further into the legal background. The *Barrett* court, in contrast, seems intent on leading a retreat from this brave new world, commanding a return of distributor liability under § 230 and completely rejecting the direction towards absolute immunity pioneered by the *Zeran* court.¹¹⁵ By so doing, the *Barrett* court was taking action in response to the “overarching theme of *Zeran*’s critics [that] the [*Zeran*] court’s analysis is unbalanced”¹¹⁶ and had created a significant imbalance between promoting the growth of the Internet and protecting individuals against defamation.¹¹⁷

The difference between the two approaches becomes readily apparent upon comparing the level of responsibility demanded by each court from individuals distributing third-party messages. The *Batzel* majority would grant an ISP or user immunity from defamation liability merely because that provider or user reasonably perceived that the third-party information was provided for publication on the Internet.¹¹⁸ In stark contrast, the *Bar-*

113. *Id.*

114. *Id.* at 436.

115. *Id.* at 442.

116. *Id.* at 439.

117. *See, e.g., Kane, supra* note 16, at 483.

118. *Batzel v. Smith*, 333 F.3d 1018, 1034 (9th Cir. 2003). One unfortunate consequence of setting the bar so low would be the increased legal vulnerability of third-party content providers. Although *Batzel*’s *Smith* is hardly a sympathetic figure, he did insist that he never “imagined [his] message would be posted on an international message board or [he] never would have sent it in the first place.” *Id.* at 1032. His contention is bolstered by the fact that *Smith* submitted his message to *Cremers* through an e-mail address that was different from the one that subscribers used to submit messages for possible inclusion in the Network’s listserv. *Id.* at 1022. As a direct consequence of *Cremers*’s decision to distribute *Smith*’s e-mail on the Network’s listserv, *Smith* is a defendant in *Batzel*’s defamation suit. Since Congress clearly intended to maintain the Internet and other interactive computer services as a “forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues

rett court demanded a certain level of adult responsibility from intermediaries, proclaiming that one could infer “malice and reckless disregard for the truth” when a party failed “to conduct a reasonable investigation regarding the truth of [an] accusation of criminal conduct and [relied] on obviously biased sources.”¹¹⁹

This discussion will examine whether there is a good rationale for granting providers and users of Internet services greater immunity from defamation liability than their print or broadcast counterparts.¹²⁰ To place this analysis in historical context, this Part will first review some of the past struggles to adapt common law defamation tort to new and emerging media. It will then revisit the *Batzel* case, applying common law distributor liability to the facts of the case. Finally, this Part presents the argument that the Internet has grown into a powerful medium for both commerce and speech, a behemoth that is not likely to be crippled by the return of distributor liability.

A. That Which is New is Old

[I]t has been pointed out in a number of decisions that the large number of messages which a [company] is required to transmit, the speed expected in the transmission of the messages, the number and character of the minor employees needed in the business, and the difficulty of the legal questions involved make it impractical for the company to withhold or deliver messages

for intellectual activity,” 47 U.S.C. § 230(a)(3) (2000), it would seem prudent to protect ordinary individuals like Smith who—for better or worse—provide much of the content on the Internet. Ironically, even *Cremers* seems to understand this, for he stated that he has “the responsibility to protect third parties against fault [sic] intent and protect their privacy . . . [I] should be the guardian of those sending messages and protect them against harming themselves.” Appellant’s Opening Brief at *19, *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2002) (No. 01-56556), 2002 WL 32126255. But the Ninth Circuit’s new standard hardly provides any protection at all for third-party content providers such as Smith.

119. See *Barrett*, 5 Cal. Rptr. 3d at 425. The *Batzel* court’s decision would have been more reasonable if it had required a showing by *Cremers* that he took reasonable measures to confirm that Smith provided his e-mail message for distribution. After all, Smith concluded his e-mail message to *Cremers* by encouraging *Cremers* to contact him if he wanted to discuss the matter further. *Batzel*, 333 F.3d at 1021. By relieving Internet service providers and users of the responsibility to conduct even the most minimal confirmatory measures, the Ninth Circuit majority probably did craft a rule that “encourages the casual spread of harmful lies.” *Id.* at 1038.

120. Interestingly, Judge Berzon, writing for the majority in *Batzel*, begins her opinion by stating there “is no reason inherent in the technological features of cyberspace why First Amendment and defamation law should apply differently in cyberspace than in the brick and mortar world.” *Id.* at 1020.

until it can make an investigation as to their truth or privileged character. Hence, it is only when the company has knowledge or reason to know that the messages are not privileged [i.e., true or legitimate] that it becomes liable for libelous matter contained therein.¹²¹

The quotation above could have been excerpted from a case involving an Internet service provider or user, but in fact it is from a case involving telegrams—hardly a new technology, even in 1950.¹²² Nevertheless, telegraph technology was once relatively new, and the courts struggled for years to develop a standard of defamation liability for telegraph operators.¹²³ The issue was finally resolved in 1950, with the adoption of a distributor-type standard of liability for telegraph operators.¹²⁴ This is just one example in which traditional common law defamation liability standards were adapted for new technologies.

Other “new” technologies that caused courts to struggle with defamation liability standards were radio and television.¹²⁵ One court seemed to give up rather quickly on the notion that traditional categories of defamation could be applied to the relatively new media of radio and television, and chose instead to introduce a novel defamation category which it called a “defamacast.”¹²⁶ However, this new defamacast tort was not adopted by any other court.¹²⁷ Instead, traditional approaches to defamation eventually were reformulated and adapted for the new radio and television technolo-

121. *W. Union Tel. Co. v. Lesesne*, 182 F.2d 135, 137 (4th Cir. 1950).

122. *See id.*

123. Finley P. Maxson, *A Pothole on the Information Superhighway: BBS Operator Liability for Defamatory Statements*, 75 WASH. U. L.Q. 673, 676 (1997).

124. *Western Union*, 182 F.2d at 136-37 (holding that the telegraph “company was liable for transmitting the defamatory message if it knew or should have known that the sender of the telegram was not acting in the exercise of a legitimate or privileged interest but in bad faith for the purpose of defaming another”).

125. Maxson, *supra* note 123, at 677.

126. *Am. Broad.-Paramount Theatres, Inc. v. Simpson*, 126 S.E.2d 873, 882 (Ga. Ct. App. 1962). One perceived problem was applying the traditional libel-slander dichotomy to radio and television broadcasts:

Commercial television began during the latter part of the decade beginning in 1940 and commercial radio less than forty years ago. Thus both media present new factual situations with respect to defamation, and we have pointed out above some of the difficulties that the courts have had in reconciling this type of defamation with the tradition libel-slander dichotomy. In truth, these new media pose new problems which cannot realistically be solved by resort thereto.

Id. at 878.

127. Maxson, *supra* note 123, at 676 n.14.

gies, as had been done with telegrams earlier.¹²⁸ For example, in one case involving alleged defamation in a television broadcast, the court followed the traditional liability standard that one who distributes (transmits) defamatory material published by a third person is subject to liability only if he knew or had reason to know of the material's defamatory character.¹²⁹

In the examples above, courts were initially distracted by the new technology. However, they eventually turned their focus away from the medium of transmission and towards the speech itself as well as traditional defamation doctrine. But in the case of the Internet, Congress altered this process with the passage of the CDA, and the *Zeran* court subsequently derailed the process completely by interpreting the CDA so broadly.

B. The Internet: Not Too Exceptional for Traditional Doctrines

It has been suggested that the virtually complete immunity conveyed to providers and users of interactive computer services in § 230(c)(1) resulted in part after heavy lobbying by the online industry.¹³⁰ This would not be the first time that a communications industry has lobbied for broad protection against defamation liability for third-party content. Indeed, more than five decades ago, the National Association of Broadcasters encouraged broad immunity for radio and television broadcasters through proposed model legislation that would have imposed defamation liability only if a broadcaster had failed to exercise "due care" to prevent the distribution of defamatory material.¹³¹

The provisions in § 230 originated in the House of Representatives as the Cox-Wyden Amendment,¹³² and its supporters clearly believed that the Internet and other interactive computer services were somehow unique in the legislative challenges that they posed. As Representative Wyden noted

128. *Id.* at 676-77.

129. *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 931-32 (E.D. Wash. 1992).

130. *See* Maxson, *supra* note 123, at 690.

131. The proposed model legislation read in relevant part:

The owner, licensee or operator of a visual or sound broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast.

Donald H. Remmers, *Recent Legislative Trends in Defamation by Radio*, 64 HARV. L. REV. 727, 741 n. 71 (1951).

132. 141 CONG. REC. H8468-8472 (1995).

during House discussions on the Cox-Wyden Amendment, “the new media is simply different. We have the opportunity to build a 21st century policy for the Internet employing the technologies and the creativity designed by the private sector.”¹³³ However, as this discussion has shown, some of the characteristics of this latest “new medium,” such as the transmission of vast quantities of information, have been seen before. Some of the proposed legal solutions also echo those proposed in the past for other then-new media; radio broadcasters proposed broad immunity from defamation liability for third-party content, an idea that resembles § 230 immunity. The Internet, while unique in many respects, is probably not so unique as to require the formulation of a truly novel approach to defamation liability.

C. Applying an Old Approach to a New Medium

1. *Debating the Return of Distributor Liability Under § 230(c)(1)*

A number of commentators have advocated the retention of distributor liability for ISPs and users.¹³⁴ After all, traditional defamation doctrine has been successfully adapted for the “new” media of the past.¹³⁵ The *Stratton Oakmont* court implicitly bound the Internet to traditional defamation doctrine in stating that interactive computer services “should generally be regarded in the same context as bookstores, libraries and network affiliates”—that is, traditional “brick and mortar” distributors.¹³⁶

2. *The Batzel Court Implicitly Followed Zeran’s Approach to § 230(c)(1) Immunity*

It is worthwhile now to revisit the *Batzel* case to see how the result might have been different had the court applied more traditional common law tort doctrine. The *Batzel* court implicitly accepted *Zeran’s* approach to § 230(c)(1) immunity. Furthermore, *Cremers* would likely have been liable for defamation under a more traditional common law approach.

The *Batzel* court claimed that it had made no decision on whether § 230(c)(1) encompasses both publishers and distributors.¹³⁷ It noted that Ellen *Batzel’s* complaint had referred to *Cremers* as the publisher of *Smith’s* e-mail and that *Batzel* had not argued that *Cremers* should have been treated as a distributor, so the court claimed to have had no need to

133. *Id.* at H8470.

134. *See, e.g., Ehrlich, supra* note 17, at 409-10; *Kane, supra* note 16, at 494-95.

135. *See Maxson, supra* note 123, at 676-77.

136. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995).

137. *Batzel v. Smith*, 333 F.3d 1018, 1027 n.10 (9th Cir. 2003).

address the issue.¹³⁸ In any case, the *Batzel* court seemed wary of challenging the *Zeran* court's reasoning, noting that "so far, every court to reach the issue [of § 230(c)(1) immunity] has decided that Congress intended to immunize both distributors and publishers."¹³⁹ This statement suggests that the holding in *Batzel* would not have changed even if the court had classified Cremers as a distributor.

Despite its denial of having addressed the issue, the Ninth Circuit implicitly followed the *Zeran* court's holding that distributor liability was a subset of publisher liability, and therefore also barred by § 230.¹⁴⁰ Publishers generally take an active role in the development of published content, but the Ninth Circuit determined that Cremers's "minor alterations of Smith's e-mail prior to its posting or his choice to publish the e-mail [did not] rise to the level of 'development.'"¹⁴¹ However, the *Batzel* court also refused to view Cremers as a mere conduit of Smith's message, rejecting Cremers's contention that "§ 230(c)(1) immunity should be available [to Cremers] simply because Smith was the author of the e-mail, without more."¹⁴² If Cremers's role in the matter is somewhere between that of a publisher and a mere conduit of Smith's third-party content, then his role must have been similar to that of a distributor. Therefore, if the district court on remand held that it could reasonably be perceived that Smith provided his message for use on the Internet or an interactive computer service, then Cremers presumably would enjoy § 230(c)(1) immunity *in his role as a distributor*.¹⁴³

3. *Batzel v. Smith Analyzed Under a Traditional Distributor Liability Approach*

In order to impose liability on a distributor of information for distributing allegedly defamatory content, the plaintiff must show that the distributor knew or had reason to know of the defamatory content.¹⁴⁴ This requirement is firmly rooted in First Amendment protections for freedom of speech and freedom of the press.¹⁴⁵ This standard of liability also reflects a pragmatic concern that is wholly relevant to providers and users of interactive computer services: it is unreasonable to expect distributors, whether they be traditional booksellers or ISPs, to inspect the contents of all the

138. *Id.*

139. *Id.*

140. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997).

141. *Batzel*, 333 F.3d at 1031.

142. *Id.* at 1033.

143. *Id.* at 1033-1034; *see also Zeran*, 129 F.3d at 329.

144. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991).

145. *Smith v. California*, 361 U.S. 147, 152-53 (1959); *Cubby*, 776 F. Supp. at 139.

information that they distribute. As the Supreme Court wrote in *Smith v. California*, “[i]f the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed.”¹⁴⁶ Because of these First Amendment concerns, Batzel would have to show that Cremers knew or had reason to know of the defamatory content of Smith’s e-mail message in order for Cremers to be held liable as a distributor of Smith’s message.

To begin an analysis of *Batzel v. Smith* under a traditional distributor liability analysis, it is worthwhile to distinguish Cremers’s role as a distributor of the Network’s listserv from CompuServe’s role as a distributor of Rumorville USA in the *Cubby* case. The *Cubby* court determined that once CompuServe had decided to carry Rumorville USA, it had “little or no editorial control over [Rumorville’s] contents.”¹⁴⁷ In contrast, Cremers had *absolute* editorial control over Smith’s e-mail message, even though Cremers largely elected not to exercise his editorial privileges.¹⁴⁸ Furthermore, the *Cubby* court determined that the plaintiffs had failed to show that CompuServe even knew or had reason to know of Rumorville’s contents.¹⁴⁹ There is no question that Cremers knew of the contents of Smith’s message.¹⁵⁰ Clearly, Cremers played a much more active role in the distribution of Smith’s e-mail message than CompuServe did in its distribution of Rumorville USA.

A key question in assessing Cremers’s liability as a distributor of Smith’s e-mail message was whether he knew or had reason to know that Smith’s message contained defamatory content. A close examination of Smith’s e-mail message shows that Cremers, an art security expert, should have known that some of the information in Smith’s message was probably false. First, Smith identified himself as a “building contractor,” which is not a profession that suggests expertise in art history.¹⁵¹ Second, Smith admitted that he had been distracted, “concentrating on performing [his remodeling] tasks,” when he allegedly heard Batzel claim that she was the descendant of Heinrich Himmler.¹⁵² Finally, Smith reported seeing “hundreds of older European paintings on [Batzel’s] walls,” which, if true, strongly suggests that Batzel was the owner of a sizable museum rather

146. 361 U.S. at 153.

147. *Cubby*, 776 F. Supp. at 140.

148. *See Batzel*, 333 F.3d at 1031.

149. *Cubby*, 776 F. Supp. at 141.

150. *Batzel*, 333 F.3d at 1021.

151. *Id.*

152. *Id.*

than a private home in the mountains of North Carolina.¹⁵³ Some of the Network's subscribers apparently had their doubts too, since a number of them criticized Cremers for forwarding Smith's message.¹⁵⁴ From these facts, it seems reasonable to believe that Cremers should have known that Smith's message possibly contained defamatory information. Under a traditional (pre-CDA, pre-*Zeran*) distributor liability analysis, Cremers might be held liable for the allegedly defamatory content of Smith's message.

D. The Internet in Adolescence

One of the clearly stated goals of § 230 is "to promote the continued development of the Internet."¹⁵⁵ The *Zeran* court seemed determined to protect ISPs from the specter of tort liability, fearing that ISPs "would face potential liability each time they receive notice of a potentially defamatory statement."¹⁵⁶ Others have questioned the danger, noting that "[i]t is not at all clear that being exposed to distributor liability would be a disaster for online services."¹⁵⁷ Certainly, some of the impetus for "protecting" the Internet must arise from the perception of the Internet as a medium in its infancy.¹⁵⁸ Congress has nurtured and subsidized the growth of the young medium by, for example, instituting a moratorium on taxing Internet services.¹⁵⁹

But the Internet is no longer in its infancy, having grown into a vigorous and muscular adolescent. This is certainly the case when it comes to commerce. Indeed, U.S. consumers spent an estimated \$8.5 billion online in November 2003 alone, a 55% increase over the previous year.¹⁶⁰ It is questionable whether the Internet continues to need such subsidies as the Internet access tax ban or, as relevant here, broad protection from defamation liability.

153. *Id.* at 1020-21 (emphasis added); Smith eventually admitted that "he saw many paintings, but probably not literally 'hundreds.'" Appellant's Opening Brief, *supra* note 118, at *19.

154. Appellant's Opening Brief, *supra* note 118, at *17.

155. 47 U.S.C. § 230(b)(1) (2000).

156. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).

157. Sheridan, *supra* note 36, at 173.

158. See, e.g., Hadley, *supra* note 40, at 507.

159. Associated Press, *Temporary Ban on Internet Tax Nears End*, CNN.COM (Oct. 31, 2003), available at <http://www.cnn.com/2003/TECH/internet/10/31/internet.taxes.ap/index.html>.

160. Garrett Glaser, *Online Retail Sales Clicking*, MSNBC NEWS (Dec. 10, 2003), available at <http://msnbc.msn.com/id/3678537>.

Nevertheless, other commentators argue against a return to distributor liability because of the potentially “heavy burden on free speech.”¹⁶¹ This was certainly one of the main concerns of the *Zeran* court.¹⁶² However, the *Barrett* court was clearly skeptical, stating that it thought it “debatable whether notice liability would actually have an unduly chilling effect on cyberspeech” and describing the *Zeran* court’s concerns as “speculative.”¹⁶³ The *Barrett* court supported this position by noting how even traditional defamation cases are difficult to prove.¹⁶⁴ For example, a plaintiff must show that an allegedly defamatory statement is “not an opinion or satire or mere hyperbole [and] even then knowledge and the requisite degree of fault must be shown.”¹⁶⁵ The difficulty of prevailing as a plaintiff in defamation cases is likely to prevent a flood of such suits, and the *Zeran* court probably “overstated the danger such claims present to Internet intermediaries.”¹⁶⁶

It is important to emphasize that distributor liability would not require ISPs to review individual messages before they are posted on the Internet. Instead, ISPs would only be required to take reasonable measures after receiving notice that a particular message is defamatory.¹⁶⁷ This liability regime would be analogous to the notice-based system established under the Digital Millennium Copyright Act, which requires an ISP to take certain measures only when it receives adequate notice of potential copyright infringement.¹⁶⁸ This limited duty is not likely to be a heavy burden on free speech. After all, with an estimated 500 billion documents on the Internet already (and counting),¹⁶⁹ speech on the Internet appears to be in no immediate danger. Indeed, as Ellen Batzel and Kenneth Zeran can attest, the Internet can be an undisciplined, adolescent brute with respect to its power in disseminating speech. Even free speech advocates should be a little wary of the hulking lad roaming the neighborhood.

161. Ehrlich, *supra* note 17, at 416-17.

162. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

163. *Barrett v. Rosenthal*, 5 Cal. Rptr. 3d 416, 437 (Cal. Ct. App. 2003). But the *Barrett* court emphasized that it took “no position on whether distributor liability would unduly chill online speech” because it claimed to have insufficient evidence before it to make such a determination. *Id.* at 439-40.

164. *Id.* at 437-38.

165. *Id.* at 437.

166. *Id.*

167. *Id.* at 438.

168. See Stephanie Blumstein, Note, *The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act to the Libelous “Re-Poster”*, 9 B.U. J. SCI. & TECH. L. 407, 425-26 (2003).

169. Lev Grossman, *Search and Destroy*, TIME, Dec. 22, 2003, at 46.

E. Revisiting the Communications Decency Act

The district court that initially heard the *Zeran* case concluded that “the Internet is a rapidly developing technology [and that] Congress is likely to have reasons and opportunities to revisit the balance struck in [the CDA].”¹⁷⁰ If it does, Congress should consider amending § 230 to explicitly impose notice-based distributor liability for third-party content. But Congress would not have to act at all if the courts adhered to the narrower construction of § 230 advocated by the *Barrett* court.

IV. CONCLUSION

Batzel v. Smith is the latest in a series of court decisions that have broadly interpreted the immunity from defamation liability granted under § 230. The broad construction of § 230 by the courts is not entirely consistent with the intent of Congress and has produced a number of troubling results. The Internet has matured into a strong and vigorous adolescent, and a return to more traditional standards of defamation liability, including distributor liability, is unlikely to hinder its continuing growth. Congress should consider revising the Communications Decency Act in order to restore some of the balance between fostering the growth of the Internet, encouraging self-regulation of undesirable content, and protecting individuals from the harm of defamation. Congressional action may not be necessary if the courts adhere to the narrower construction of § 230 developed in *Barrett v. Rosenthal*—a construction of § 230 that is probably more consistent with the original intent of Congress.

170. Sheridan, *supra* note 36, at 166-67.

BERKELEY TECHNOLOGY LAW JOURNAL