

BLUMENTHAL V. DRUDGE

By Michelle J. Kane

Should Internet service providers be liable when they carry defamatory statements, authored by others, on their services? Congress established "Good Samaritan" immunity for Internet service providers ("ISPs") as part of the Communications Decency Act of 1996 to respond to this question. In *Blumenthal v. Drudge*,¹ a federal district court broadly interpreted the immunity provision and dismissed a defamation case against an ISP. The court found that the ISP, America Online ("AOL"), could not be liable for defamatory statements carried by AOL but written by gossip columnist Matt Drudge. The immunity provision applied despite the fact that AOL paid Drudge for the right to make his gossip column available to its subscribers and actively promoted the column as a benefit of subscription.

This Note explores how in the span of three years, the law shifted from allowing liability for ISPs even when they tried to screen offensive content, to barring liability for ISPs, even when they promoted such offensive content. Congress, in trying to encourage ISPs to monitor their own content, actually removed all legal incentives for the ISPs to do so. At the same time, the courts dramatically dismissed all traditional defamation principles in expanding the law's immunity provision farther than necessary.

In examining the outcome of *Blumenthal v. Drudge*, this Note balances the policy interest in protecting individuals against damage to their reputations with the dual legislative goals of encouraging the growth of the Internet and maintaining standards of decency. Congress should have allowed the courts to test the application of old defamation laws to the new technology of the Internet incrementally before prematurely legislating. The courts in turn should have been more cautious in expanding immunity under language that did not compel such an expansion and contrary to the statute's intent.

1. 992 F. Supp. 44 (D.D.C. 1998).

I. INTERNET SERVICE PROVIDERS

Internet Service Providers (ISPs)² make it possible for individuals to access the international network of computers known as the Internet.³ Many ISPs charge a flat monthly fee for unlimited access, while some charge a per hour rate.⁴ A basic ISP may simply provide a telephone number that enables the customer to gain access to the Internet.⁵ A more elaborate ISP may provide e-mail service,⁶ proprietary "chat rooms," and specific content, such as news, banking or travel services.⁷ AOL, the subject of this case, is the largest ISP in the world.⁸ AOL features wide-ranging content through contracts with leading companies such as Bloomberg, Waterhouse Securities and Eastman Kodak.⁹

2. The statute at issue here, 47 U.S.C. § 230 (1996), uses the term "interactive computer service," defined 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 or any other interactive computer service." 47 U.S.C. § 230(e)(2) (1996). This Note uses the more common term, ISP, to refer to the same type of entity.

3. See 47 U.S.C. § 230(e)(1) (1996). "The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks."). For a general description of the Internet and the World Wide Web, see *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996), aff'd 521 U.S. 844 (1997).

4. See Peter H. Lewis, *More Users Now Taking Direct Route to Internet*, N.Y. TIMES, Sept. 23, 1996, at D1.

5. See *id.*

6. E-mail messages are protected by the Electronic Communications Privacy Act, Pub. L. No. 99-508, § 1, 100 Stat. 1848 (1986) (codified as 18 U.S.C. §§ 2510-2522 and §§ 2701-2710 (1986)). Because of this protection, ISPs are generally unable to screen the e-mail messages they transmit, thus such messages fall outside the realm of content which ISPs can monitor for defamatory or otherwise offensive content. See 47 U.S.C. § 230(d)(4) (1996) ("Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law."). See generally Diana J.P. McKenzie, *Practical Protection in Cyberspace*, 3 STAN. J.L. BUS. & FIN. 84 (1997).

7. See Lewis, *supra* note 4.

8. At the close of fiscal year 1998 AOL reported 12.5 million members. See America Online, *Report on Operations*, ¶ 2, (visited 2/15/99) <<http://www.aol.com/corp/inv/reports/1998/operations2.html>>. In 1998, of households with Internet access, fifty-five percent used AOL. See USA TODAY, July 7, 1998 at 1D.

AOL provides Internet content to non-AOL registrants through its website, "AOL.com." See America Online, *Report on Operations*, *supra*, at ¶ 7. Its search engine, "AOL NetFind," is also available to the public. See *id.* at ¶ 8.

9. See America Online, *Report on Operations*, *supra* note 8, ¶¶ 3, 5 and (visited Feb. 15, 1999) <<http://www.aol.com/corp/inv/reports/1998/operations3.html>>.

II. DEFAMATION LAW

A. The Common Law

The tort of defamation protects individuals against harm to their reputations.¹⁰ The common law elements of defamation were: (1) publication, (2) a false and defamatory statement, (3) about another.¹¹ Once a plaintiff established these three elements, common law courts imposed strict liability against the defendant, with no need for a finding of fault.¹² The courts presumed damages without the plaintiff proving any actual harm to reputation.¹³ The common law defenses were substantial truth and certain absolute and qualified privileges.¹⁴ Any repetition, or republication of the defamatory statement was also publication and could trigger defamation liability.¹⁵

B. Constitutional Considerations

At least since the Supreme Court's landmark 1964 decision in *New York Times v. Sullivan*,¹⁶ American courts have granted First Amendment protection to certain statements that would be actionable under traditional common law rules. To encourage free political discussion, the Supreme Court has required that when the plaintiff is a public official or other public figure he or she must prove that the defendant acted with "actual malice," meaning that the defendant had knowledge that the statement was false, or recklessly disregarded whether or not it was false.¹⁷ When the

10. See RESTATEMENT (SECOND) OF TORTS § 577 cmt. a (1977) ("The law of defamation primarily protects only the interest in reputation. ... [R]eputation is the estimation in which one's character is held by his neighbors or associates."); See also *Auvil v. CBS "60 Minutes,"* 800 F. Supp. 928, 931 (E.D. Wash. 1992) ("The action for defamation is to protect the personal reputation of the injured party; it arose out of the old actions for libel and slander.").

11. See RESTATEMENT OF TORTS § 558 (1938); RODNEY A. SMOLLA, *THE LAW OF DEFAMATION* § 1.03[2] (1998).

12. See RODNEY A. SMOLLA, *THE LAW OF DEFAMATION* § 1.03[1]-[2].(1998).

13. See *id.*

14. See *id.* Absolute privileges included, among others, consent and statements made relevant to judicial proceedings. Qualified privileges included exculpatory statements and reports on employees. These common law privileges are still used in modern defamation law. See *id.* §§ 8.02, 8.03, 8.08.

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

16. 376 U.S. 254 (1964).

17. See *New York Times v. Sullivan*, 376 U.S. at 254 (requiring the plaintiff, a police chief, to demonstrate that a newspaper acted with actual malice in printing an advertisement describing the plaintiff's allegedly racist acts); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (finding that a plaintiff who is "widely known" or "voluntarily in-

plaintiff is a private citizen, but the matter is of public concern, the Supreme Court has denied the strict liability standard of the common law, but otherwise has left the matter for state law.¹⁸

Under these defamation standards newspapers and other traditional media such as television and radio programmers can be liable as publishers or "republishers" of defamatory statements, even if someone else makes the statements.¹⁹ For example, a magazine that prints a defamatory letter to the editor is liable for defamation, just as if the magazine's editor had written the letter.²⁰

Similarly, distributors, such as bookstores and newsstands, can be held liable for defamatory statements contained in the material they sell. Because they do not generally have editorial control over those materials, however, the standard of fault is different for distributors than for original publishers:

The vendor or lender is not liable, if there are no facts or circumstances known to him which would suggest to him, as a reasonable man, that a particular book contains matter which upon inspection, he would recognize as defamatory.²¹

jects himself or is drawn into a particular public controversy" is a public figure and must also prove actual malice).

18. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (requiring some degree of fault for defamation action). As a practical matter, when there is a "media defendant," it is almost always a matter of public concern. See also *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (finding that the Constitution requires that private-figure plaintiff in a defamation suit against a media defendant bears the burden of proving falsity of statements, contrary to common law rule that defendant bear burden of proving truth).

19. RESTATEMENT (SECOND) OF TORTS, §§ 578, 581(2), and 581 cmt. g (1977). While those who create television content, e.g., networks, are liable as publishers, those who merely broadcast the programs, e.g., network affiliates, are considered distributors for purposes of defamation. See *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W.D.Mo. 1934) (holding that broadcasters are liable as publishers); *c.f.* *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928 (E.D. Wash. 1992) (holding that local network affiliates did not have a duty to censor a news show in order to avoid defamation liability)..

20. See *Smolla*, *supra* note 11, § 3.23[5]. Note that the same Constitutional standards apply, e.g., a public-figure plaintiff would have to prove that the magazine acted with actual malice.

21. RESTATEMENT (SECOND) OF TORTS, § 581(1) and cmts. d and e (1977). See also *Balabanoff v. Fossani*, 81 N.Y.S.2d 732 (1948) (holding that lack of knowledge by a newspaper distributor is a valid defense to libel).

This distributor liability is rarely invoked because a plaintiff cannot often prove that a distributor had the knowledge required to impose fault.²²

C. Internet Defamation Before the Communications Decency Act

With the advent of the Internet, courts struggled to stretch defamation law to cover statements made in cyberspace. In attempting to fit this new medium into the old law, courts analogized between people who post statements to online chat rooms and bulletin boards, and those who write old-fashioned "letters to the editor." Thus, courts analyzed ISP liability under the same standards applied to newspapers and other media.

In *Cubby, Inc. v. CompuServe, Inc.*,²³ a court found an ISP not liable for a defamatory statement made on its service by a third party. Because the ISP, CompuServe, proved that it had no editorial control of the postings made by an independent contractor, the court found that CompuServe had no knowledge of the contents and, as a news distributor, was therefore not liable for defamation.²⁴

In *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*,²⁵ however, a court imposed liability against an ISP for third party statements. The court's finding was based in large part on the fact that Prodigy had advertised the editorial control that it held over its computer bulletin boards.²⁶ The court found that such control made the online service much like a newspaper, and therefore deserving of a similar standard of liability—that of an original publisher.²⁷

D. The Creation of 47 U.S.C. § 230—"Good Samaritan Immunity"

The *Stratton Oakmont* decision was heavily criticized by commentators. Many argued that such limitations would drive ISPs to forego all editorial control to avoid tort liability.²⁸ Fearing that this would add to the looming specter of an Internet choked with indecent speech, Congress en-

22. 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, 154 n. 43 (1997). For a discussion of the detailed pleadings needed to assert libel against a distributor, see *Lewis v. Time Inc.*, 83 F.R.D. 455 (E.D. Cal. 1979).

23. 776 F. Supp. 135 (S.D.N.Y. 1991).

24. See *id.* at 141.

25. 23 Media L. Rep 1794 (N.Y. Sup. Ct. 1995) (finding that defendant Prodigy was a "publisher" of statements concerning plaintiffs and therefore granting plaintiffs motion for partial summary judgment).

26. See *id.* at 1797.

27. See *id.*

28. See, e.g., Alex Alben, *What Is an On-line Service?*, COMPUTER LAW., June 1996 at 1.

acted, as part of the Communications Decency Act of 1996 ("CDA"), a "Good Samaritan" immunity for online service providers.²⁹ Section 230(1)³⁰ reads, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."³¹ Congress recorded as its express purpose in enacting § 230 the intent to overrule *Stratton Oakmont*, and to allow ISPs to exercise editorial discretion without fear of publisher liability.³²

While most of the CDA was struck down as unconstitutional, § 230 remained standing.³³ The immunity provision faced its first major test in *Zeran v. America Online*.³⁴ In *Zeran*, an anonymous subscriber repeatedly posted allegedly defamatory statements about the plaintiff to an AOL bulletin board.³⁵ The plaintiff, Zeran, argued that § 230 did not bar his action, because once he notified the service of the first message, it had knowledge of the defamatory statement and had a duty to remove the posting

29. 47 U.S.C. § 230 (1996) [hereinafter "§ 230"].

30. § 230 was originally § 509 of the CDA.

31. 47 U.S.C. § 230(d)(1) (1996). Note that 47 U.S.C. § 230(d)(2) reads: "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)." This provision effectively provides "Good Samaritan" immunity against any action brought against an ISP by someone whose content the ISP has blocked because of its objectionable characteristics. See Monroe E. Price and John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976, 992 (1997) (comparing this provision to the Cable Act of 1992 which allows, but does not require, cable operators to screen objectionable content).

32. H. R. REP. NO. 104-458, at 1130 (1996). The statute included a section that asserted that the policy of the statute was to "promote the continued development of the Internet and other interactive computer services and other interactive media . . . to remove disincentives for the development and utilization of blocking and filtering technologies." 47 U.S.C. § 230(b)(1) and (3) (1996).

33. See *Reno v. ACLU*, 521 U.S. 844 (1997) (holding that the CDA's "indecent transmission" and "patently offensive display" provisions violate the First Amendment).

34. 129 F.3d 327 (4th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 2341 (1998).

35. See *Zeran v. AOL*, 129 F.3d at 329. The postings suggested that Zeran sold T-Shirts, bumper stickers and key chains with "tasteless slogans related to the Oklahoma City bombing" and offered Zeran's home phone number. Within a few days, Zeran was receiving up to two abusive phone calls per minute, some of which included death threats. *Id.*

promptly and notify its members of the falsity of the statement.³⁶ Zeran argued that § 230 only immunized “publishers;” he claimed that AOL was a “distributor” for purposes of defamation law. The court, however, held that § 230 did indeed immunize AOL against liability for defamatory statements of content providers.

The court found that holding AOL liable would chill Internet speech, contrary to the statute’s goals.³⁷ Also, the court rejected Zeran’s argument that § 230 did not bar distributor liability, finding that distributors were liable as a sub-type of publisher, not as a separate category. Thus § 230’s ban on service provider liability as a publisher or speaker applied to AOL in this context.³⁸ Following the *Zeran* decision, § 230 provided broad immunity for online service providers for third party statements; it was, however, uncertain just how far courts would extend this immunity.³⁹

III. SUMMARY OF THE CASE

A. Factual Background

In 1995, Matt Drudge created an Internet gossip column called “The Drudge Report.”⁴⁰ Drudge collected gossip, and having billed himself an “old-fashioned troublemaker,” reported news and rumors from Hollywood, CA and Washington, D.C.⁴¹ By 1997, Drudge allegedly had 85,000 subscribers to his report.⁴² Topics that have appeared in Drudge’s column range from the innocuous—“Gates sees ‘living computers,’”⁴³ to the risqué—“Lewinsky warned about Clinton Blisters.”⁴⁴

In late May or early June 1997, Drudge entered into a licensing agreement with AOL. AOL would make The Drudge Report available on

36. *See id.* at 330.

37. *See id.* at 331-333.

38. *See id.* at 332.

39. *Sheridan, supra* note 22, at 179.

40. Jenet Conant, *L.A. Confidential*, VANITY FAIR, Dec. 1997, at 160.

41. Prior to his rise to media celebrity, Drudge had no training as a journalist. In 1996, Drudge quit his job as the manager of a gift store to devote himself to his Internet column. By April 1997 he had attended the White House Correspondents Association Dinner and been the guest of honor at a party thrown by writer David Brock and television pundit Laura Ingraham. At that party *Newsweek’s* Howard Fineman said Drudge was “the biggest thing to come along in journalism since Hunter S. Thompson.” *Id.* at 164-165.

42. *See id.*

43. Matt Drudge, *The Drudge Report*, (visited 10/15/98) <<http://www.drudgereport.com/matt.htm>>.

44. *Id.* (visited 11/1/98).

its service for one year, while Drudge would receive a flat monthly payment of \$3,000 as a royalty from AOL.⁴⁵ Under the agreement, Drudge was to create, edit, update and “otherwise manage” the content of the Drudge Report, and AOL could “remove content that AOL reasonably determine[d] to violate AOL’s then standard terms of service.”⁴⁶ AOL promoted its addition of Drudge’s column to the service by advertising to its users: “AOL Hires Runaway Gossip Success Matt Drudge.”⁴⁷

On Sunday, August 10, 1997, Drudge transmitted an edition of the Drudge Report that stated in part:

Charge: New White House Recruit Sidney Blumenthal Has Spousal Abuse Past.

The DRUDGE REPORT has learned that top GOP operatives who feel there is a double-standard of only reporting republican shame believe they are holding an ace card: New White House recruit Sidney Blumenthal has a spousal abuse past that has been effectively covered up.

There are court records of Blumenthal’s violence against his wife, one influential republican, who demanded anonymity, tells the DRUDGE REPORT....

One White House source, also requesting anonymity, says the Blumenthal wife-beating allegation is a pure fiction that has been created by Clinton enemies. [The First Lady] would not have brought him in if he had this in his background, assures a well-placed staffer. This story about Blumenthal has been in circulation for years.⁴⁸

Following publication of the above Drudge Report, Drudge received a letter from Sidney and Jacqueline Blumenthal’s counsel.⁴⁹ Both Drudge and AOL retracted the story through a special edition of the report and an e-mail to Drudge Report subscribers.⁵⁰ The Blumenthals alleged that the column was defamatory and filed a complaint against both Drudge and AOL in the Federal District Court for the District of Columbia.⁵¹

45. *Blumenthal v. Drudge*, 992 F. Supp. 44, 47 (D.D.C. 1998).

46. *Id.*

47. Jonathan Broder, *Libel Suit Tests the Limits of Freewheeling Net Speech*, Salon, Aug. 1997 (visited 9/9/98) <<http://www.salonmagazine.com/aug97/news/news2970829.html>> (quoting AOL press release).

48. *Blumenthal v. Drudge*, 992 F. Supp. at 46.

49. *See id.* at 48.

50. *See id.*

51. *See id.* at 46.

B. The District Court Decision⁵²

In *Blumenthal v. Drudge*, the district court further extended the immunity applied in *Zeran v. AOL* and granted AOL's summary judgment motion, dismissing the Blumenthal's defamation suit against AOL.⁵³ The court found that, as an ISP, AOL could not be liable for the statements of another "information content provider."⁵⁴ Despite the fact that AOL paid Matt Drudge for his column, the court refused to allow liability.⁵⁵ The court declined to distinguish publisher liability from distributor liability by holding that when Congress used the term "publisher" in § 230, Congress intended to preclude both publisher and distributor liability.⁵⁶

First, the court determined that AOL's conduct in this case was irrelevant.⁵⁷ Based on the statutory language, the court found that Congress had barred liability for information provided by another information content provider.⁵⁸ The district court noted that the plaintiffs conceded that AOL was a provider of interactive computer service and thus fit under the defi-

52. In a separate holding, not examined in depth for this Note, the district court rejected defendant Drudge's summary judgment motion. The court found it did have personal jurisdiction over Drudge, despite the fact that he wrote the column from his home in California. The court based its analysis on three factors: 1) whether Drudge regularly did or solicited business in the District of Columbia; 2) whether he derived substantial revenue from goods used or consumed, or services rendered in the District; and 3) whether he engaged in a persistent course of conduct in the District. Specifically, the court found that Drudge operated an interactive Internet site, maintained sufficient non-Internet contacts in the District of Columbia, and engaged in a persistent course of conduct in the District, marked by visits from his California home. The court relied in part on the jurisdictional analyses of websites in *Zippo Manufacturing Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Penn. 1997), *Cybersell Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) and *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996).

A full exploration of the issue of personal jurisdiction on the Internet is beyond that scope of this Note; however, for a discussion of Internet jurisdiction, see Robert M. Harkins, Jr., *The Legal World Wide Web: Electronic Personal Jurisdiction in Commercial Litigation, or How to Expose Yourself to Liability Anywhere in the World with the Press of a Button*, 25 PEPP. L. REV. 451, 468-480 (1997); See also Brian Covotta, Note, *Personal Jurisdiction and the Internet: An Introduction*, 13 BERKELEY TECH. L.J. 265 (1998); Anindita Duta, Note, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 13 BERKELEY TECH. L.J. 289 (1998); Colleen Reilly, Note, *Bensusan Restaurant Corp. v. King*, 13 BERKELEY TECH. L.J. 271 (1998).

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

54. *Id.* at 50.

55. See *id.* at 51.

56. See *id.* at 52-53.

57. See *id.* at 49.

58. See *id.*

dition of § 230.⁵⁹ The plaintiffs also conceded that Matt Drudge was an “information content provider” for purposes of the statute.⁶⁰ The court found that § 230’s language, which refers to “otherwise objectionable” material, is broad enough to cover defamatory statements.⁶¹ Thus, the situation fit the statutory requirements and the court applied immunity.⁶² The court concluded that in enacting § 230, Congress had “made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others.”⁶³

Originally, the plaintiffs had asserted that Matt Drudge was an employee or agent of AOL; the court, however, found no evidence to support the existence of a genuine issue of material fact on that subject.⁶⁴ Similarly, the court noted that there was no support for the plaintiffs’ earlier argument that AOL was liable because it had edited or written the article in some way.⁶⁵

The court recognized, and AOL acknowledged, that § 230 would not immunize AOL in the case of any statement or information AOL had prepared itself.⁶⁶ The court further stated that “[s]ection 230 does not preclude joint liability for the joint development of content.”⁶⁷ Neither of the exceptions fit the situation in *Blumenthal v. Drudge*.

The district court first held that, although AOL paid Matt Drudge for his column, § 230 still precluded defamation liability.⁶⁸ The court acknowledged that “Drudge was not just an anonymous person who sent a message over the Internet through AOL,” and that it would seem “only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied

59. *See id.* at 49-50.

60. *Id.* at 50.

61. *See id.* at 52.

62. *See id.*

63. *Id.* at 49.

64. *See id.* at 50, n. 9 (“Plaintiffs’ Statement of Genuine Issues of Material Facts does not identify any evidence to support their conclusory assertion that there are genuine issues of fact as to whether Drudge was an employee or agent of AOL.”).

65. *See id.* at 49-50. The district court noted, “[P]laintiffs seem to have all but abandoned that argument.” *Id.*

66. *See id.* at 50.

67. *Id.*

68. *See id.* at 51.

to a distributor.”⁶⁹ However, the court noted that it was not writing on a clean slate, and found that § 230, as interpreted in *Zeran*, excused AOL.⁷⁰

Second, the court also held that “any attempt to distinguish between ‘publisher’ liability and notice-based ‘distributor’ liability and to argue that Section 230 was only intended to immunize the former would be un-availing.”⁷¹ The court found that in enacting § 230 Congress had made no distinction between the two forms of defamation liability.⁷² The district court noted with approval the Fourth Circuit’s statement in *Zeran* that, “[i]f computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any part, concerning any message,” and such notice-based liability “would deter service providers from regulating the dissemination of offensive material over their services.”⁷³

IV. DISCUSSION

A. The Case Against § 230

At the time of the *Stratton Oakmont* decision, Prodigy was adapting its service to the rapid growth of the Internet.⁷⁴ While earlier Prodigy had advertised its editorial control as an advantage over other services, by 1995 Prodigy admitted that the burgeoning volume of messages it carried made it impossible to maintain its former standards of control.⁷⁵ Based on such technological constraints, it is unlikely that any ISP could have continually monitored the content of its BBSs, chat rooms and other interactive forums. If ISPs did not exercise editorial control, future cases like *Stratton Oakmont* would have been analyzed using the distributor standard, as in *Cubby*. Congress, however, jumped in to legislate immediately following

69. *Id.*

70. *Id.* at 51. The district court, in acknowledging the unfairness of the immunity provision, noted that in the briefs the Plaintiffs had compared AOL’s advertising of Matt Drudge’s column to promotion of a “new purveyor of child pornography or other offensive material.” *Id.* at 40.

71. *Id.* at 42.

72. *See id.*

73. *Id.* (quoting *Zeran v. America Online Inc.*, 129 F.3d 327, 333 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 2341 (1998)).

74. For example, between winter 1995 and spring 1996 the traffic on one company’s Internet “backbone” increased 3,000 percent. *See The Net Is Falling! The Net Is Falling!*, PC WORLD, October 1996.

75. *See, e.g.*, *Stratton Oakmont v. Prodigy*, 23 Media L. Rep. 1794, 1796 (N.Y. Sup. Ct. 1995) (noting Prodigy’s statements that it was in the process of changing its policies regarding BBS postings due to the increased volume).

the decision, precluding the courts from establishing this distinction, and freeing ISPs from all liability for defamatory content. It would have been better to allow the common law to develop slowly in the context of the new technology. Alternatively, Congress should have created a law that recognized that ISPs act in a number of different capacities depending on the method of communication being considered, making one overarching liability scheme unrealistic.⁷⁶

The court in *Stratton Oakmont* expressly stated that Prodigy was unique among ISPs and that most services should be examined, as in *Cubby*, in the same way as traditional distributors: "Let it be clear that this court is in full agreement with *Cubby* and *Auvil*. Computer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates."⁷⁷ This comment by the court indicates the unlikelihood that any other ISP would be analyzed under the same publisher liability as Prodigy. This is not because ISPs would change their behavior in response to *Stratton Oakmont*, as Congress feared. Rather, as Prodigy admitted, it had already grown beyond its capacity to screen BBS postings.⁷⁸

Thus, if ISPs were not screening postings, for whatever reason, they would not be liable as publishers. Instead, they would be examined as distributors, with the heightened requirements of knowledge.⁷⁹ Furthermore, the volume and nature of BBS postings and similar communications would likely preclude a court with more understanding of Internet technology from finding that an ISP was under a duty to screen.⁸⁰ Such a result would maintain common law protection against defamation, while allowing ISPs to continue providing discussion forums.

Blumenthal v. Drudge, however, involved not BBS postings, but commercial content, paid for by the ISP. Thus, under the common law, the

76. Alternatively, Congress could have enacted a law that recognized the different capacities that ISPs serve depending, for example, on whether they are providing access to outside newsgroups, subscriber generated content or commercial content. An immunity statute should have recognized the fundamental differences between the roles ISPs play. As it stands now, § 230 is akin to a law that attempts, in one sentence, to regulate magazines, public libraries and cable TV companies. For some possible models of the different roles that ISPs play, see Alex Alben, *supra* note 28. For a proposed change to § 230 that would account for at least some of these different roles, see Keith Siver, *Good Samaritans in Cyberspace*, 23 RUTGERS COMPUTER & TECH. L.J. 1 (1997).

77. *Stratton Oakmont*, 23 Media L. Rep. at 1798.

78. *See Id.* at 1796.

79. *See Id.*

80. *See, e.g.*, Douglas B. Luftman, Note, *Defamation Liability for On-Line Services: The Sky Is Not Falling*, 65 GEO. WASH. L. REV. 1071, 1096 (1997) (suggesting that the *Stratton* court overestimated the capabilities of Prodigy's screening software).

court would have had the opportunity to apply traditional defamation law in a new context. Because the case dealt with commercial content that AOL had purchased from another source to then pass on to its subscribers, AOL was acting like a bookstore or library and could thus have been found open to liability as a distributor. Under such an analysis, the defamation charge against AOL would have at least survived the summary judgment motion.

Is it desirable for courts to examine cyberspace by such an analogy to other, traditional "spaces?" In fact, Professor Lessig maintains that this is the only realistic way for us to interpret cyberspace and the Internet.⁸¹ In this particular case, the analogy seems to work. For example, in *Cubby*, CompuServe had no editorial control and merely distributed content prepared by another commercial provider.⁸² Thus, again, the court's conclusion that CompuServe was like a library works because CompuServe had no reason to know of the defamatory remarks, and thus should not bear liability for defamation.⁸³

In a plea for judicial restraint, Professor Lessig calls for the Supreme Court to act cautiously in applying the First Amendment to cyberspace.⁸⁴ He argues that trial courts should examine the new medium in small steps, before the Supreme Court takes the big, and almost irreversible, step of applying constitutional analysis to cyberspace and its laws.⁸⁵ Thus, in the same way that the common law has been adapted to fit other new developments over hundreds of years, the law will develop incrementally to fit the new realm of cyberspace.⁸⁶

In the context of § 230, Congress should have followed Professor Lessig's recommendations. Just as Constitutional analysis by the Supreme Court is almost impossible to undo, the broad immunity Congress has arguably provided in § 230 may have far reaching implications that will not be easily undone. By overruling centuries of common law in response to one case, Congress acted too hastily in the face of new technology.

81. See Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743. (1995).

82. See *Cubby v. CompuServe*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991).

83. This analysis fails only when applied to an ISP that truly screens all postings and thus would be considered a publisher similar to a newspaper that prints letters to the editor under defamation law. The facts in *Stratton Oakmont* indicate that few, if any, ISPs actually do this. For an approach to such a situation, see Luftman, *supra* note 80.

84. See Lessig, *supra* note 81.

85. See *id.* at 1753 (suggesting we follow the "meandering development of the common law").

86. See *id.*

If Congress had not been so incautious, the outcome described above, with ISPs liable as distributors for content they know or have reason to know to be defamatory, would have fully served the policy recognized here: to protect individuals from libel on the Internet, while encouraging the growth of the Internet and simultaneously encouraging ISPs to monitor their content. This policy could have been realized without unfairly removing liability that applies without question to other, similar methods of distributing information.

B. The District Court's Expansion of Immunity

Blumenthal v. Drudge's potentially far-reaching implications are based on an interpretation of 47 U.S.C. § 230, the service provider immunity clause.⁸⁷ Because § 230 was specifically designed to overrule *Stratton Oakmont*, to understand the statute it makes sense to examine the case.⁸⁸ An exploration of *Stratton Oakmont* reveals that the New York court had the distinction between publisher and distributor in mind in formulating its opinion. In *Blumenthal v. Drudge*, the court erred by not considering this distinction when interpreting the statute. The court should have declined to follow *Zeran*, which ignored this distinction, and instead interpreted the statute differently to promote the dual goals of encouraging the growth of the Internet and encouraging ISPs to monitor their content. Such an interpretation would have maintained the common law's protections for individuals against damage to their reputations, damage that is all the more easily done in the international forum of cyberspace. Congress may have written a bad statute, but the language was ambiguous enough that the court could have still put it to good use.

In the *Stratton Oakmont* decision, the New York trial court found itself in the unenviable position of attempting to understand Internet communications and simultaneously analyze those communications in the context of the centuries-old common law of defamation, using only one case as precedent.⁸⁹ In its analysis, the court attempted to draw parallels between the Internet message at issue and traditional forms of communication for which the law was already settled.⁹⁰ Thus, the court stated, "the critical issue to be determined by this court is whether the foregoing evidence establishes a prima facie case that [Prodigy] exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the

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

88. See *Stratton Oakmont v. Prodigy*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995).

89. See *id.* at 1797.

90. See *id.* at 1796.

same responsibilities as a newspaper.”⁹¹ The trial court was therefore looking specifically at comparing publisher liability for bulletin board messages to liability of newspaper editors.

In analyzing this publisher liability, the *Stratton Oakmont* court recognized the distinction between publishers and distributors in defamation law.⁹² The court stated that “[a] finding that [Prodigy] is a publisher is the first hurdle for Plaintiffs to overcome in pursuit of their defamation claims, because one who repeats or otherwise republishes a libel is subject to liability as if he had originally published it.”⁹³ The court proceeded to distinguish this from distributor liability:

In contrast, distributors such as bookstores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue. A distributor, or deliverer of defamatory material is considered a passive conduit and will not be found liable in the absence of fault.⁹⁴

The court then explored publisher liability, using newspapers as an example. A newspaper, the court found, “is more than a passive receptacle or conduit for news, comment and advertising.”⁹⁵ The editorial control of a newspaper goes hand-in-hand with increased liability.⁹⁶ The court quoted Prodigy marketing materials which touted the service’s pursuance of a “value system” and stated, “[c]ertainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate.”⁹⁷ Thus, Prodigy’s own admission that it was similar to a newspaper in its editorial policy condemned the service to face liability as a publisher.

The *Stratton Oakmont* court expressly distinguished Prodigy, a service with editorial control over its content, from CompuServe, which had no such control. CompuServe, the subject of the *Cubby* case, was more like an electronic library with no editorial control over the contents of the publications it made available to its users. The *Stratton Oakmont* court noted with implicit approval that the *Cubby* court had characterized CompuServe as a distributor:

91. *Id.*

92. *See id.* at 1795.

93. *Id.* at 1796 (citations omitted).

94. *Id.* (citations omitted).

95. *Id.* (citations omitted).

96. *See id.* (citations omitted).

97. *Id.* (quoting statements made by Geoffrey Moore, Prodigy director of Market Programs and Communications; Exhibits I and J to Plaintiff’s moving papers).

A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information.⁹⁸

The court in *Stratton Oakmont* found two main distinctions between Prodigy and CompuServe. First, Prodigy advertised itself as controlling the content of its computer bulletin boards. Second, Prodigy used an automatic screening program and guidelines for Board Leaders to enforce its standards.⁹⁹ Based on those distinctions, the court stated, "Prodigy is a publisher rather than a distributor."¹⁰⁰

As such, the *Stratton Oakmont* court felt that Prodigy had developed its service as uniquely moderated when compared to other ISPs such as CompuServe; a service that did not profess to maintain such editorial control would fit into the same category as bookstores and libraries for purposes of defamation law.¹⁰¹ This is a final indicator that when the court said that Prodigy was a "publisher", it meant "publisher" as in newspaper, and specifically did not mean distributor as in bookstore.

In remarking on the *Stratton Oakmont* decision, one scholar noted the court's central distinction between publishers and distributors. David Sheridan asserted,

Both the text of the CDA and its meager legislative history support the conclusion that when Congress said "publisher," it meant "publisher" and not "distributor." The publisher and distributor terminology have been used in cases and commentary on the subject of defamation in interactive networks. It would be reasonable to surmise that Congress would say "distributor" in addition to "publisher" if it meant "distributor" in addition to "publisher." The statement in the Conference Report that 230 is intended to overrule *Stratton Oakmont* supports this conclusion. The court in *Stratton Oakmont* specifically contrasted publisher and distributor liability.¹⁰²

98. *Id.* at 1797 (quoting *Cubby v. Compuserve*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991)).

99. *See id.*

100. *Id.* at 1797.

101. *See id.* at 1798.

102. *Sheridan, supra* note 22, at 168.

While the court in *Stratton Oakmont* used the terms “publisher” and “distributor” to identify two distinct forms of tort liability, other legal sources sometimes use different conventions. The Restatement of Torts, for example, uses “publisher” and “republisher” to distinguish between the original author of a statement and one who merely passes the statement on.¹⁰³ Thus, there can admittedly be confusion as to what “publisher” means when there is no further description. To add further variety to the term, the dictionary definition of “publisher,” “the reproducer of a work intended for public consumption” would not include newsstands or libraries, which are not commonly considered in the business of “reproduction.”¹⁰⁴

Considering the multiple definitions of the word “publisher,” its use in § 230 without an accompanying definition is ambiguous.¹⁰⁵ The only assistance in interpreting “publisher” then, comes from the stated purpose of the statute, which was to overrule *Stratton Oakmont*’s finding of “publisher” liability for an ISP, distinguished from “distributor” liability.¹⁰⁶ Thus, in considering § 230 it makes sense to interpret “publisher” as the *Stratton Oakmont* court did.¹⁰⁷ Under this analysis, then, by precluding publisher liability for ISPs, Congress did nothing to alter distributor liability, which would continue to be analyzed under common law and Constitutional principles.

Using this analysis of the term “publisher” in § 230, the court in *Blumenthal v. Drudge* could have analyzed AOL’s liability as a traditional distributor. Distributor analysis would have been entirely appropriate because AOL distributed content provided by Drudge. AOL’s actions were analogous to a bookstore or library. Under the Restatement interpretation such vendors are liable only if they have reason to know of defamatory content, e.g., the vendor distributes the work of an author or publisher known for “notoriously sensational or scandalous” material.¹⁰⁸ This interpretation would have allowed liability in a case such as AOL’s where the ISP promoted an irresponsible journalist, yet barred liability in the vast

103. RESTATEMENT (SECOND) OF TORTS, § 581.

104. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1837 (1993).

105. Interpreting the legislative intent through the use of the word “publisher” in defamation caselaw and other sources is complicated by the fact that § 230 applies not only to defamation, but also to many other types of obscenity and indecent speech. 47 U.S.C. § 230 (1996).

106. H. R. REP. 104-458, at 1130 (1996).

107. See discussion *supra* Part II.C.

108. See discussion *supra* Part II.B.

majority of situations where ISPs have no reason to know of the possibility of defamation.¹⁰⁹

Such an approach to interpreting the statute should not be considered radical; rather it follows established methods of statutory construction.¹¹⁰ While courts are bound to abide by the statutory language when the meaning is clear,¹¹¹ when the terms are ambiguous, as in § 230, courts may, and often must, look to the intent of the law in order to glean its meaning.¹¹² The court's interpretation should maintain coherence in a statute. "Over and over we have stressed that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."¹¹³ By considering the fact that Congress was specifically legislating in response to *Stratton Oakmont*, the court would have been giving a reasonable meaning to an ambiguous term.

This reading of the statute would thus have been reasonable in light of both the statute's express terms and its legislative history. By taking this approach, and not following *Zeran*, the court in *Blumenthal v. Drudge* could have applied the statute in a way that would foster the legislative goals of advancing Internet growth while encouraging self-policing. As it is, the decision instead frees ISPs of any responsibility to monitor their own content for defamatory statements.

109. See Sheridan, *supra*, note 22, at 168, 177 (assuming that by using the term publisher in the statute, Congress had left open the possibility of distributor liability for ISPs).

110. There are endless "rules" of statutory construction; this Note attempts to use only those which are almost universally agreed upon. For a legal realist criticism of the use of such rules, see Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950) (demonstrating that for each rule, there is an opposing rule that demands a contrary interpretation). For a legal process defense of the rules of statutory construction, see HENRY HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS* 1191 (1994 ed.) (responding to Llewellyn's criticism and suggesting that there is still some useful function in the rules of construction).

111. See, e.g., *Robinson v. Shell Oil Co.*, 519 U.S. 337, 847 (1997) (finding the term "employees" ambiguous); *Norfolk and Western Ry. Co. v. American Train Dispatchers Assoc.*, 499 U.S. 117, 128 (1991) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

112. See, e.g., *U.S. v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952) ("For that reason we may utilize, in construing a statute not unambiguous, all the light relevantly shed upon the words and the clause and the statute that express the purpose of Congress.").

113. *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am.*, 508 U.S. 439, 454 (1993) (citation omitted).

V. CONCLUSION

The court in *Blumenthal v. Drudge* forthrightly recognized that, “[i]f it were writing on a clean slate, this Court would agree with plaintiffs. AOL ... has affirmatively promoted Drudge as a new source of unverified instant gossip on AOL. Yet it takes no responsibility for any damage he may cause.”¹¹⁴ Thus, the court acknowledged the fundamental unfairness of a case that allows AOL to benefit from Drudge’s attraction, yet bear no burden for his carelessness. The court went on to state, “[b]ecause it has the right to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standard applied to a publisher or, at least, like a book store owner or a library, to the liability standards applied to a distributor.”¹¹⁵ The trial court recognized that its interpretation of the statute let AOL get away with actions that would never be tolerated in any other medium.

While defamation on the Internet is perhaps not as permanent as “ink on dead trees,” as one commentator has put it,¹¹⁶ statements on the Internet are also instantaneous and more pervasive than statements made on television or in the newspaper. All members of society deserve some protection against unwarranted attacks on their reputations regardless of whether such attacks are made on paper or in cyberspace.¹¹⁷ Justice McReynold’s warning in 1919, that the widespread circulation of newspapers presented increased power for doing injury to reputations, is still relevant.¹¹⁸ The Internet is today’s new medium of mass communication, but it does not follow that we must throw out these time-honored protections when faced with an unfamiliar technology.

While Congress and the court certainly acted admirably in attempting to encourage the development of the Internet, both erred in excusing AOL from its duty under the common law to guard against damage to others’ reputations. A more cautious approach to regulation on the Internet, and more restraint in interpreting such regulations, would allow the Internet to develop as a forum of free speech while continuing to offer legal protection to those who may be damaged by careless citizens of cyberspace.

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

115. *Id.*

116. Mike Godwin, *The Drudge Retort*, REASON, Feb. 1998, No. 9, vol. 29, at 40.

117. See T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 69 (Vintage 1967) (“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.”).

118. See *Washington Post v. Chaloner*, 250 U.S. 290, 294 (1919) (encouraging strict enforcement of doctrine that “whatever a man publishes, he publishes at his peril”).

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