Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran?

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I. INTRODUCTION

The Internet has challenged the legal community to apply common law legal theories to modern "high tech" issues. Case law and subsequent law review articles have addressed legal issues involving the liability of Online Service Providers (OSPs) in areas of defamation, copyright infringement, trademark infringement, and various First Amendment issues.

The courts, however, have not yet addressed the following question: is the system operator of an electronic bulletin board liable for the property damage or personal injury that results from a person's reliance on inaccurate information posted on the operator's electronic bulletin board? More specifically, can a person bring a negligent misrepresentation or a strict liability claim against a system operator who knowingly posts the misstatements of a third person on an electronic bulletin board?

1. The Internet is an interconnected system of computer networks that allows individuals, through the use of a computer, to communicate with other users all over the world. See generally Kelly Tickle, The Vicarious Liability of Electronic Bulletin Board Operators for the Copyright Infringement Occurring on Their Bulletin Boards, 80 IOWA L. REV. 391 (1995) (providing definitions of various computer related technical terms).


4. See id.


6. See discussion infra Part II.A.

7. See discussion infra Part II.A.

8. See discussion infra Part II.E.1.

Companies are increasingly using the Internet and electronic bulletin boards to facilitate communication with customers.\(^{10}\) Companies must, therefore, be aware of the possible liability electronic bulletin boards can create. How property damage or personal injury might result from the negligent publication of inaccurate content on an electronic bulletin board is best illustrated by the following hypothetical.

Suppose a large software manufacturer offers access to its online technical support bulletin board as part of the purchase of its software product. The company offers the bulletin board to allow users of the software product to interact and communicate with one another about the company’s products. This company-controlled bulletin board enables anyone to post questions about the software product, and anyone who accesses the bulletin board can post an answer to the inquiry. The online electronic bulletin board is offered only to purchasers of the product and is monitored and controlled by the software manufacturer.

Assume someone posts on the bulletin board, “I have a problem doing X with my computer,” and someone else responds by posting “I had that problem, try changing Y on your computer.” Assume further that the system operator company employee recognizes that the information is in fact false, but posts the information anyway. A third person, also a customer, reads the dialogue posted on the bulletin board and modifies her computer as indicated in the dialogue on the bulletin board. This adjustment results in property damage and/or personal injury.

This hypothetical presents legal questions that sound familiar to issues presented under the common law theory of negligent publication. However, the example contains a new twist—it involves the use of the Internet and an electronic bulletin board as the medium of communication. The courts have yet to consider the facts presented in the hypothetical. When the proper case is presented, legislation,\(^ {11}\) case law

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11. See discussion infra Part II.D.
dealing with the Internet and defamation,12 and common law negligent publication13 may provide the legal framework for the court’s analysis. This comment discusses these common law legal theories and provides an analysis of the possible liability that the hypothetical presents.

Part II presents some technical background pertaining to the Internet and considers common law theories that have been applied to the Internet. Specifically, common law defamation and defamation law as applied to the Internet will be discussed to understand how “system operators” and “service providers” have been legally defined by Congress and subsequently interpreted by the courts to determine liability for the publication of third party statements.14 Also, Zeran v. America Online, Inc.,15 will be examined because the Zeran court interpreted section 230 of the Communications Decency Act of 1996 (CDA)16 to give broad immunity to system providers that publish third party statements on the Internet.17 Specifically, the court held that “[section] 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”18

Although stated in the context of a defamation claim,19 the holding in Zeran conflicts with other common law legal theories (other than defamation) that find liability when a person knowingly allows inaccurate information to be published—liability known as negligent publication. Thus, the legal background to this theory of liability will be discussed.20

12. See discussion infra Part II.D.
13. See discussion infra Part II.E.
14. See discussion infra Part II.
17. Id. See also Blumenthal v. Drudge, 992 F. Supp. 44 (D.C. Cir. 1998) (granting summary judgment to the system operator because of the immunity granted by the CDA, even though it paid the defendant gossip columnist who created allegedly defamatory statements).
20. See discussion infra Part II.E.
Two kinds of negligent publication claims will be presented: (1) negligent publication based on misrepresentation and (2) negligent publication based on strict liability for defective products.

Part III of the comment articulates the legal problem: the broad holding of Zeran conflicts with the common law legal theory of negligent publication. Did Congress intend to immunize system operators from any cause of action involving posting of third party statements on electronic bulletin boards by system operators or did Congress only intend to immunize system operators from defamation claims?

In Part IV, this comment contends that the Zeran court was too broad in its holding and that the CDA should only be construed to immunize system operators in the context of defamation claims. Traditional theories of negligent publication based on misrepresentation should still be applied to system operators of specialized bulletin boards, such as technical support sites, when they negligently publish inaccurate content. Further, this comment argues that defective content posted on a technical support electronic bulletin board can be defined as a "product" for the purpose of finding strict liability for defective products.

Part V articulates a proposal to help define how the courts should apply negligent publication cases in light of the Zeran decision. First, Congress should address this broad interpretation in Zeran in order to clarify whether or not it intended to grant such broad immunity to all system operators. Second, courts should recognize that the CDA was enacted in light of defamation claims against online service providers and construe the CDA narrowly when deciding whether or not to deny a plaintiff a cause of action not based

22. See discussion infra Part II.E.2. The defective product here would be defective "content" found on the bulletin board.
24. See discussion infra Part IV.
25. The CDA was enacted because Congress wished to address the court's holding in Stratton Oakmont, Inc. v. Prodigy Services, Inc., 23 Med. L. Rep. (BNA) 1794, (N.Y. Sup. Ct. 1995). "The congressional Conference Committee Report specifically states that section 509(c)(1) [section 230 (c)1] is intended to overrule Stratton Oakmont's holding that online service providers can be held to be 'publishers' of third party statements." Breisford, supra note 2, at 489. Thus, Congress could speak to the holding in Zeran as well.
on a defamation claim. Third, courts should recognize that Congress found "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," and "[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services." Thus, courts must distinguish between content forums that provide political discourse, such as typical "chat rooms," from technical support sites. The former example warrants the immunity granted by the CDA, the latter does not.

Courts should also distinguish between defamation claims and causes of action such as negligent publication, which are claims brought by consumers against companies that in some form sell content with their product. When companies provide defective content, the CDA should not shield companies from liability just because an electronic bulletin board is used in connection with the product. Part VI concludes that negligent publication of inaccurate statements made by third parties based on a misrepresentation or a strict liability theory should be applied to system operators who knowingly publish false statements on electronic bulletin boards.

II. TECHNICAL AND LEGAL BACKGROUND

A. The Technical Language of the Internet

The Internet is an international network of interconnected computers, used by millions of people worldwide—one estimate indicates 200 million users by 1999. It is the medium by which thousands of users through computer networks are able to connect and communicate with one another.

28. A chat room is a "section of an on-line service where interactive textual communication occurs among multiple users." Clara A. Pope, Liability Issues for Online Service Providers, SB34 ALI-ABA 639, 643 (1997).
29. For example, access to technical support sites is often provided with the purchase of a product. See Dell Computer Corporation <http://support.dell.com/support/delltalk.htm>.
The Internet is used to gain access to information all around the world—to colleges and universities, corporations, and public libraries. Generally, one must subscribe to one of the various commercial online services to have access to the Internet. Under the definitions provided by the CDA, these companies are referred to as "interactive computer services."

Most information on the Internet is found at electronic locations called web sites. In order to access a web site, a user merely enters the electronic address of the site desired or the user conducts a search and "surfs the web." It is estimated by some that trillions of bits representing millions of messages and files travel through [the Internet] each day. This vast amount of communication traffic prevents operators of large online service providers from completely policing or otherwise controlling the content of all the messages that are transmitted over the Internet.

More control over content is exercised by using "bulletin board services" on the Internet. Many Internet users utilize electronic bulletin boards to interact with other users on web

31. See Ballon, supra note 3, for an excellent discussion of Internet issues and technical language.
32. Reno, 521 U.S. at 850.
33. Examples of commercial on-line service providers are America Online, Inc., CompuServe, Inc., the Microsoft Network, and Prodigy. Id.
34. The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.
36. A web site is an electronic location on the Internet, which is made up of "[a] collection of documents (graphics, text, etc.) that are linked together [using Internet communication language] . . . ." Pope, supra note 28, at 643.
37. "Surfing the web" is a phrase used to describe the activity of browsing different subjects on the Internet; one need not have a target site in mind when browsing.
39. A bulletin board service is the equivalent of a corkboard, except that it is electronic. Generally, electronic bulletin boards consist of a public message area, e-mail services, and uploading and downloading areas. Bulletin boards vary in size, from large corporate sponsored boards to small privately operated bulletin boards. See generally Tickle, supra note 1, at 394-95 (explaining the technical details of how bulletin boards operate).
sites by sending and receiving messages posted on the bulletin board. Many online companies, corporations, and private individuals offer bulletin board services on the Internet. The individual or company that operates the bulletin board is the "system operator" and ultimately controls who has access to the system.

The system operator may screen messages that are delivered to the bulletin board and if monitoring the bulletin board, may decide which messages to post. Thus, online companies arguably exert more control over content posted on bulletin boards than they do over messages transmitted over the Internet in general. Newsgroups, user groups, and the Usenet are some common bulletin board services.

B. Common Law Defamation

The first case dealing with tortious conduct on the Internet involved defamation. Defamation is the uttering of words that "expose one to public hatred, shame, . . . contempt, ridicule, aversion, ostracism, degrada-

40. Users may post messages and "speak" contemporaneously or post messages and delay answering. Thus, bulletin boards act like telephone conversation or the mail. See generally Giorgio Bovenzi, Liabilities of System Operators on the Internet, 11 BERKELEY TECH. L.J. 93, 130-31 (1996) (comparing phone communication to chat group bulletin boards).

41. See Tickle, supra note 1, at 395.


43. See Bovenzi, supra note 40, at 99.

44. See id.


46. A user group is generally a private bulletin board, limited in accessibility by the system operator. A private phone number or a password can limit accessibility to the user group. See Bovenzi, supra note 40, at 99.

47. A Usenet is "a worldwide community of electronic [ bulletin board services] that is closely associated with the Internet and with the Internet community." Ballon, supra note 3, at 567.

48. See Ballon, supra note 3, at 567.


50. This area of law and the Internet has been extensively discussed in various articles and law reviews, so only a brief discussion will be given here. See generally Pope, supra note 28 (discussing liability issues for online service providers).
tion or disgrace, or . . . deprive one of their confidence and friendly intercourse in society." 51 Essential to tort liability is communication of the defamation to someone other than the person defamed. 52

"Publication" is the communication of a defamatory statement to someone other than the person defamed. 53 Publication can be oral or written, and under common law, one who repeats, prints, or otherwise publishes a defamatory statement made by another person is as liable for the statement as the original speaker. 54 Therefore, those who manufacture books and print newspapers or magazines that contain defamatory statements are liable "because they have the opportunity to know the content of the material being published." 55

C. Distinction Between Distributors and Publishers

A person or entity (e.g., a newspaper) is a "publisher" of defamation when the entity or individual takes part or otherwise exercises control in the repetition of a statement. 56 As explained above, publishers can be held liable for defamatory statements contained in their publications even if they did not know that the statement was in the publication because they have the opportunity to know the content of the publication. 57

53. Id.
54. See generally Cianci v. New York Times Pub. Co., 639 F.2d 54 (2d Cir. 1980) (expressing the general rule that a republisher of defamatory material is subject to the same liability as the original publisher); see also RESTATEMENT (SECOND) OF TORTS § 578 (1977) (explaining the liability of one who republishes).
55. KEETON ET AL., supra note 52, § 113, at 810.
57. Those who manufacture books by way of printing and selling them, and those who print and sell newspapers, magazines, journals, and the like, are subject to liability as primary publishers because they have the opportunity to know the content of the material being published and should therefore be subject to the same liability rules as are the author and originator of the written material. This does not mean that such a primary publisher is vicariously liable for the author's tortious conduct. It only means that the publisher is subject to liability for publishing with actual malice or negligence, depending upon the plaintiff's status.
Distributors, however, are held to a different standard than newspaper publishers in defamation claims.\textsuperscript{58} A distributor is one "who circulates, sells or otherwise deals in the physical embodiment of the published material."\textsuperscript{59} A distributor of defamatory statements cannot be held liable for defamation unless it is shown that the distributor knew or should have known of the defamatory nature of the statement.\textsuperscript{60}

Unlike a "publisher," a distributor is under no duty to examine the publications and determine if any statements found therein are defamatory.\textsuperscript{61} Lack of control over the content of the statement is the key element that shows that the individual or entity is a distributor and, therefore, immune from liability.\textsuperscript{62} However, this lack of control is a presumption, and if it is shown that the distributor knew or should have known of the defamation, liability can be found.\textsuperscript{63}

D. Defamation and the Internet

In \textit{Cubby v. CompuServe, Inc.},\textsuperscript{64} the plaintiff brought a libel action against CompuServe for an alleged libel that was posted on one of CompuServe's bulletin boards.\textsuperscript{65} CompuServe owned and operated the bulletin board, but the court held that it could not have been aware of the alleged statements and was in fact not aware because of the number of messages posted.\textsuperscript{66}

The \textit{Cubby} court held that CompuServe had no more editorial control over the publication than did a library or bookstore, and that CompuServe was essentially "the functional

\textsuperscript{59} Bovenzi, \textit{ supra} note 40, at 135. Examples of distributors include news dealers, bookstores, and libraries.
\textsuperscript{60} See generally \textsc{Restatement (Second) of Torts} \S 581, cmt. d (1977) (discussing the liability of written or printed repetition of oral defamation).
\textsuperscript{61} See \textit{id}.
\textsuperscript{63} See generally \textsc{Restatement (Second) of Torts} \S 581, cmt. d (1977) (discussing the liability of written or printed repetition of oral defamation).
\textsuperscript{64} \textit{Cubby}, 776 F. Supp. at 135.
\textsuperscript{65} \textit{Id} at 137.
\textsuperscript{66} \textit{Id}.
equivalent of a more traditional news vendor.\textsuperscript{67} Based on this lack of control, the court held that CompuServe was a mere "distributor" and could not be held liable for defamation unless it could be shown that CompuServe knew or should have known of the defamation posted on its bulletin board.\textsuperscript{68}

In \textit{Stratton Oakmont, Inc. v. Prodigy Services, Inc.},\textsuperscript{69} the court held that an online service provider, Prodigy, was liable for a defamatory statement posted on its bulletin board.\textsuperscript{70} The court found that Prodigy exercised sufficient control over its bulletin board, thereby classifying the service provider as a "publisher."\textsuperscript{71} Prodigy used an automatic software screening program to police activity on the bulletin board.\textsuperscript{72} Additionally, Prodigy used employees to monitor the content of the bulletin boards in order to comply with certain company guidelines.\textsuperscript{73} By making the choice to regulate content on its bulletin boards, Prodigy exerted control over its bulletin board service. Therefore, the \textit{Stratton} court held that Prodigy was a publisher and not a "mere distributor."\textsuperscript{74} Prodigy was found liable for the defamation.\textsuperscript{75}

Congress responded to the holding reached in \textit{Stratton} by passing section 230 of the CDA.\textsuperscript{76} The relevant portion of the CDA states, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Section 230 of the CDA overruled \textit{Stratton} and appeared to confer distributor status to online service providers.\textsuperscript{77} Congress intended to "remove the liability 'pen-

\begin{thebibliography}{99}
\bibitem{67}Id. at 140.
\bibitem{69}23 Med. L. Rptr. 1794 (N.Y. Sup. Ct. 1995).
\bibitem{71}Id. at 1796-97.
\bibitem{72}Id. at 1797.
\bibitem{73}Id. These guidelines were used to ensure that the content on the bulletin board was free from pornography or other offensive material. \textit{Id.}
\bibitem{74}Id. at 1798.
\bibitem{75}Id.
\bibitem{77}Id. § 230(c)(1).
\bibitem{78}The Act provides "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." \textit{Id.} Distributor status is not specifically
\end{thebibliography}
altery Stratton Oakmont imposed on those who exercised some control over online content generated by others, including third-party statements.\textsuperscript{79}

Congress enacted the legislation to remove the disincentive to online service providers to self-regulate created by the Stratton court.\textsuperscript{80} Further, Congress wished to promote a policy that would encourage online service providers to block and screen offensive material without fear of liability.\textsuperscript{81} Therefore, Congress established that control was no longer enough to maintain a defamation action against a system operator. However, the question of whether or not liability would be imposed on a system operator that knew or should have known of the defamatory statement was left unanswered.\textsuperscript{82}

In Zeran v. America Online, Inc.,\textsuperscript{83} the plaintiff sued the defendant online service provider, America Online, Inc. (AOL), arguing that section 230 of the CDA was inapplicable to online service providers who possess notice of defamatory material posted on their bulletin boards.\textsuperscript{84} Central to the plaintiff’s claim was his assertion that AOL acted as a distributor and, therefore, section 230 of the CDA did not apply in granting the defendant immunity.\textsuperscript{85}

After the Oklahoma City bombing of the federal building on April 19, 1995, an unknown individual posted on AOL’s

mentioned in the CDA, but arguably “Congress conferred ‘distributor’ status on website owners and online service providers.” Breisford, \textit{supra} note 2, at 489.

\textsuperscript{79} Breisford, \textit{supra} note 2, at 489-90.

\textsuperscript{80} See Zeran v. America Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).

“The congressional Conference Committee Report specifically states that section 509(c)(1) [section 230 (c)(1)] is intended to overrule Stratton Oakmont’s holding that online service providers can be held to be ‘publishers’ of third party statements.” Breisford, \textit{supra} note 2, at 489.

\textsuperscript{81} Zeran, 129 F.3d at 331. “Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230’s broad immunity ‘to remove disincentives of the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.’” \textit{Id.} (quoting 47 U.S.C. § 230(b)(4) (West Supp. 1998)).


\textsuperscript{83} Zeran, 129 F.3d at 331.

\textsuperscript{84} \textit{Id.} at 328. The plaintiff contended that “§ 230 [of the CDA] does not apply . . . because his claims [arose] from AOL’s negligence prior to the CDA’s enactment.” \textit{Id.}

\textsuperscript{85} \textit{Id.} at 330. The act states that online service providers shall not be treated as publishers; no mention is made whether they can be treated as distributors. \textit{See supra} note 78.
bulletin board an advertisement for the sale of offensive and tasteless T-shirts relating to the bombing.\textsuperscript{86} Those wishing to purchase the products were instructed to call "Ken" at the plaintiff's home phone number.\textsuperscript{87} The plaintiff received abusive phone calls, often every two minutes, including death threats.\textsuperscript{88} The plaintiff chose not to change his number as he relied on it in running his business in his home.\textsuperscript{89}

The plaintiff contacted AOL and urged them to retract the statement.\textsuperscript{90} AOL did so, only to have another message posted anonymously the next day, which related the same content as the first message, but with new tasteless slogans concerning the bombing.\textsuperscript{91} Over the next four days, new messages appeared on the bulletin board including advertisements for bumper stickers and key chains, along with instructions for callers to call back if busy due to high demand.\textsuperscript{92} Matters became worse when a radio station announcer in Oklahoma City received a copy of the first posting and urged listeners to call the number.\textsuperscript{93} The plaintiff was "inundated with death threats and other violent calls from Oklahoma City residents."\textsuperscript{94}

The plaintiff urged AOL to retract the statements and AOL told him that the account from where the messages were posted would soon be closed.\textsuperscript{95} In bringing the action against AOL, the plaintiff argued that AOL was negligent by unreasonably delaying in removing the defamation, refusing to post retractions, and failing to screen for similar postings thereafter.\textsuperscript{96} The plaintiff argued that by notifying AOL about the message, AOL knew about the defamatory content and thereby had a duty to remove the message promptly.\textsuperscript{97} Further, the plaintiff asserted that AOL's knowledge of the defamation created a duty to screen for future defamatory

\begin{itemize}
\item \textsuperscript{86} Zeran v. America Online, Inc., 129 F.3d 327, 329 (4th Cir. 1997).
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Id.
\item \textsuperscript{90} Id.
\item \textsuperscript{91} Zeran v. America Online, Inc., 129 F.3d 327, 329 (4th Cir. 1997).
\item \textsuperscript{92} Id.
\item \textsuperscript{93} Id.
\item \textsuperscript{94} Id.
\item \textsuperscript{95} Zeran, 129 F.3d at 330. AOL stated that they would close the account from where the messages were originating.
\item \textsuperscript{96} Zeran v. America Online, Inc., 129 F.3d 327, 327 (4th Cir. 1997).
\item \textsuperscript{97} Id.
\end{itemize}
material and was thus negligent in not doing so.\textsuperscript{98}

The plaintiff's assertion that AOL acted as a distributor and not a publisher was central to the claim.\textsuperscript{99} Plaintiff argued that although section 230 barred liability to service providers as publishers, it did not immunize distributors who have knowledge of defamatory content.\textsuperscript{100} As discussed above, under common law, a distributor can be held liable for disseminating defamatory content if it can be shown that the distributor knew or should have known of the defamation.\textsuperscript{101} The defendant asserted the affirmative defense of section 230 of the CDA, claiming immunity from the alleged defamation.\textsuperscript{102}

The court stated that "[b]y its plain language, [section] 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."\textsuperscript{103} The court held that AOL was not a distributor and as a publisher was protected by section 230 of the CDA.\textsuperscript{104} Further, the court elaborated why distributors who receive notice about defamatory content should also be immune from third-party defamation claims: "[i]f computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement from any party, concerning the message."\textsuperscript{105} Also, the court stated, "[b]ecause the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to [section] 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice [i.e., distributor liability] intact."\textsuperscript{106}

\begin{itemize}
\item \textsuperscript{98} Id.
\item \textsuperscript{99} Id.
\item \textsuperscript{100} Id. at 332.
\item \textsuperscript{101} See supra text accompanying notes 58-60. Further, the CDA states specifically that online service providers cannot be treated as a publisher or speaker of any information provided by another information content provider. The section leaves open the question of whether or not the online service provider could be treated as a distributor, and if as a distributor it knew or should have known of the defamation, whether liability could be found. See supra note 78.
\item \textsuperscript{102} Zeran v. America Online, Inc., 129 F.3d 327, 327 (4th Cir. 1997).
\item \textsuperscript{103} Id. at 330.
\item \textsuperscript{104} Id. at 327.
\item \textsuperscript{105} Id. at 332.
\item \textsuperscript{106} Id. "Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA." Id. at 333.
\end{itemize}
Thus, Zeran held that according to the policy behind section 230 of the CDA, even a service provider acting as a distributor with knowledge of defamatory content is immune from liability. Additionally, the court stated that "[section] 230 creates federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." Did Congress intend to grant immunity from all causes of action against service providers for the publication of information that originates from third-party users? Or was section 230 only intended to immunize third party publishers of defamatory content from defamation claims?

This question is significant because other torts may present themselves to online service providers that publish third party statements over the Internet. For example, negligent publication based on a misrepresentation theory or based on a theory of strict liability for defective products may find liability for the willful publication of inaccurate content. In order to analyze whether these claims may be brought against system operators that control electronic bulletin boards given the immunity granted by the CDA, it is necessary to understand the background and legal theory of negligent publication.

E. Negligent Publication

Negligent publication describes the various kinds of negligence suits brought by plaintiffs against publishers of defective information. Typically, claims involve plaintiffs who have relied on content written in a publication (such as a book or magazine), and as a consequence, suffer personal injury or property damage. Plaintiffs have generally sued under either (1) a misrepresentation theory of negligence, or

107. Id. The court stated "[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." Zeran, 129 F.3d at 330 (emphasis added).
109. See discussion infra Part II.E.
(2) based on a theory of strict liability for defective products.\textsuperscript{112}

Claims against publishers of content based on the misrepresentation theory of negligence have not been very successful in the courts.\textsuperscript{113} Courts have stated that "so long as the publisher has neither authored nor guaranteed the accuracy of the publication, injuries sustained by a plaintiff acting in reliance on information contained in the publication [are] not redressable under a negligence theory."\textsuperscript{114} It is significant to note, however, that courts have not found publishers to be completely immune; the publisher may in fact be liable if he guarantees the accuracy of the publication.\textsuperscript{115} A publisher guarantees the accuracy of a publication when he "willfully originates" the content or circulates the information knowing it to be false.\textsuperscript{116}

Strict liability claims for defective products have also not been very successful.\textsuperscript{117} Courts have refused to define "inaccurate content" found in publications such as textbooks as "products" for the purposes of strict liability suits.\textsuperscript{118} However, although courts have generally not imposed strict liability against publishers for the "defective ideas" they publish, courts have permitted suits brought by plaintiffs against aeronautical chart publishers to go forward based on strict liability for the defective content found in the chart.\textsuperscript{119}

\textsuperscript{112} See Day, supra note 110, at 98.
\textsuperscript{113} Id. The author notes:

[1] In the publisher liability context, it is common practice for publishers to publish and distribute a third-party author's work. Consequently, courts have been reluctant to impose a guarantor's duty on publishers. According to many courts, to impose such a duty would severely burden publishers by requiring them to 'scrutiniz[e] and even [test] all procedures contained in any of their publications.'


\textsuperscript{114} Id.
\textsuperscript{115} See id.
\textsuperscript{117} See discussion infra Part II.E.2.
\textsuperscript{118} See discussion infra Part II.E.2.
\textsuperscript{119} Aeronautical charts, also referred to as instrument approach charts, are navigational aids used by pilots in making instrument approaches to airports. The charts depict measurements of distance between airports, mountain heights, runway lengths, directional headings, etc., essential for safely navigating and landing an airplane. See Aetna Cas. & Sur. Co. v. Jeppesen & Co., 642 F.2d 339, 341-42 (9th Cir. 1981) (allowing plaintiff to establish that an aeronautical chart and the content in the chart were "products" for the pur-
Thus, if inaccurate content is found in a textbook, courts will not allow a strict liability claim to go forward against the publisher of the textbook. However, if the defective content is found in an aeronautical chart, courts may find strict liability for defective products.\textsuperscript{120} Therefore, pertinent to the legal issue presented in this comment\textsuperscript{121} is whether defective content knowingly published by a system operator on an electronic bulletin board is more like defective content published in a textbook or an aeronautical chart.\textsuperscript{122}

1. **Negligent Publication Cases Based on Misrepresentation**

A noted case advancing the theory of negligent publication is Winter v. G.P. Putnam's Sons.\textsuperscript{123} In Winter, the plaintiffs relied on information given in a mushroom encyclopedia to decide which mushrooms were edible.\textsuperscript{124} The plaintiffs picked wild mushrooms, compared them to the descriptions in the book, and cooked and ate their "harvest."\textsuperscript{125} The plaintiffs became critically ill and both required liver transplants.\textsuperscript{126}

The plaintiffs argued that the publisher had a duty to investigate the accuracy of the content of the mushroom book.\textsuperscript{127} The Winter court granted summary judgment for the defendant publisher and held that the publisher had "no duty to investigate the accuracy of the contents of the books it publishes. A publisher may of course assume such a burden, but there is nothing inherent in the role of publisher or the surrounding legal doctrines to suggest that such a duty should be imposed on publishers."\textsuperscript{128} The court's statement that a

\begin{footnotesize}
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\item \footnote{This distinction is pointed out in several case books and is the subject of several Law Review articles. Why courts treat aeronautical charts differently than textbooks will be discussed in detail in Part II.E.2. See, e.g., Day supra note 110.}
\item \footnote{See discussion infra Part III.}
\item \footnote{See discussion supra Part II.E.2.}
\item \footnote{938 F.2d 1033 (9th Cir. 1991).}
\item \footnote{Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1034 (9th Cir. 1991). The Encyclopedia of Mushrooms is "a reference guide containing information on the habitat, collection, and cooking of mushrooms." Id.}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Id. at 1033.}
\item \footnote{Id. at 1037.}
\end{enumerate}
\end{footnotesize}
publisher may assume the burden is relevant to the question presented in this comment. By investigating the content of a textbook, the publisher assumes a duty of care to the readers of third party statements.

In Gutter v. Dow Jones, Inc., the plaintiff, a newspaper reader and securities investor, brought an action for negligence against the defendant, Dow Jones, Inc., the publisher and owner of the Wall Street Journal. The plaintiff alleged that he relied to his detriment on incorrect information that was printed in the Wall Street Journal concerning certain corporate bonds. The Journal mistakenly listed the corporate bonds as trading with interest when in fact they were trading flat. The plaintiff asserted that when the information was corrected in a later publication, the market value of the bonds decreased. This drop in value forced him to sell the bonds and he suffered a $1,692.50 loss.

The Gutter court dismissed the plaintiff's suit for failure to state a claim and granted summary judgment for the defendant publisher. The court's reasoning paralleled that of the Winter court:

[in absence of a contract, fiduciary relationship, or intentional design to cause injury, a newspaper publisher is not liable to a member of the public to whom all news is liable to be disseminated for a negligent misstatement in an item of news, not amounting to libel, published by the publisher, unless he willfully originates or circulates it knowing it to be false, and it is calculated and does, as the proximate cause, result in injury to another person.]

Thus, absent the special criteria articulated by the Gut-
ter court, publishers are generally immune from suits brought by plaintiffs who rely on inaccurate information contained in their publications.\textsuperscript{140} The Gutter court stated that a publisher would be liable if he willfully originates the inaccurate information or disseminates it knowing it to be false.\textsuperscript{141}

It should be pointed out now that the holding in Gutter,\textsuperscript{142} stated in the context of negligent publication based on misrepresentation, is contrary to the holding articulated in Zeran.\textsuperscript{143} In the context of electronic bulletin boards, Zeran would hold that even if a system operator disseminates the information knowing it to be false and an individual is injured due to reliance on the inaccurate content, the system operator would nonetheless be immune.\textsuperscript{144}

In other negligence claims against publishers, plaintiffs have attempted to base their claims on the theory that the content of the publication was a "product."\textsuperscript{145} By defining the content in this way, the plaintiff argues that the defendant publisher of the defective content should be strictly liable under section 402A of the Restatement (Second) of Torts.\textsuperscript{146} Courts, however, have not allowed such a suit to go forward and continue to hold for the defendant publishers.\textsuperscript{147}

\textsuperscript{140} Id.

\textsuperscript{141} Id.

\textsuperscript{142} Id.

\textsuperscript{143} The Zeran Court stated, "[b]ecause the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact." Zeran v. America Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997).

\textsuperscript{144} Id.

\textsuperscript{145} This legal definition is significant, as it allows the plaintiff to sue under the theory of strict liability for defective products. See Restatement (Second) of Torts § 402A (1965).

\textsuperscript{146} See discussion infra Part II.E.2.

\textsuperscript{147} See Herceg v. Hustler Magazine, Inc., 565 F. Supp 802, 803-04 (S.D. Tex. 1983) (explaining where an individual died after attempting "autoerotic asphyxiation" described in the magazine article and the court held that the content did not fall within the meaning of section 402A of the Restatement); See also Walter v. Bauer, 439 N.Y.S.2d 821, 822-23 (Sup. Ct. 1981) (explaining where a child plaintiff suffered eye injuries while performing an experiment detailed in a science textbook that involved a ruler and a rubber band and the court held that the plaintiff was not injured by use of the textbook in the manner in which it was designed to be used, i.e., to read).
2. *Publication Cases Based on Strict Liability for Defective Products*

Several cases involving negligent publication have addressed the theory of strict liability for defective products.¹⁴⁸ In *Jones v. J.B. Lippincott Co.*, a nursing student brought a products liability action against a publisher of a medical textbook.¹⁴⁹ The plaintiff, after consulting the textbook, treated herself for constipation by taking an enema consisting of hydrogen peroxide and consequently suffered personal injuries.¹⁵⁰

The plaintiff argued that the content in the textbook was a "product" and that because the content was defective and resulted in her personal injury, the court should find the defendant strictly liable.¹⁵¹ Section 402A of the Restatement (Second) of Torts states:¹⁵²

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:

(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the use or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.¹⁵³

The *Lippincott* court declined to extend strict liability to the plaintiff's "defective content" theory and found that "no case has extended section 402A to the dissemination of an idea or knowledge in books or other published material."¹⁵⁴ The court aimed to protect "fundamental free speech princi-

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¹⁴⁸ See *supra* note 147 and accompanying text.
¹⁵⁰ *Id.* at 1216.
¹⁵¹ *Id.* at 1217.
¹⁵² *Restatement (Second) of Torts § 402A (1965).*
¹⁵³ *Id.*
ples” and protect against the chilling effect on expression. Although holding that inaccurate content was not a product, the court failed to discuss its rationale. However, the court in Winter v. G.P. Putnam’s Sons offered a rationale as to why defective ideas in books are not products. As previously discussed, the plaintiffs suffered personal injury after relying on information published in a mushroom guide. In addition to the negligent misrepresentation claim, the plaintiff argued that the defendant publisher was liable under a theory of strict liability for defective products. The Winter court rejected this theory as well, focusing on the fact that strict product liability law focuses on the “tangible world” and the content in the publication could not be defined as a product.

In rejecting the theory that “defective content” qualified as a product, the Winter court looked to the intent of the drafters of section 402A. The court stated, “[t]he American Law Institute clearly was concerned with including all physical items but gave no indication that the doctrine should be expanded beyond that area.” Also, the court emphasized that society places a high priority on the “unfettered exchange of ideas” and “[t]he threat of liability without fault (financial responsibility for our words and ideas in the absence of fault or a special undertaking or responsibility) could seriously inhibit those who wish to share thoughts and theories.”

155. Id.
156. Id.
157. 938 F.2d 1033, 1033 (9th Cir. 1991).
158. Winter v. G.P. Putnam’s Sons, 938 F.2d 1033, 1033 (9th Cir. 1991).
159. See supra notes 124-131 and accompanying text.
160. Winter, 938 F.2d at 1033.
161. Id. at 1034.
162. Id.
163. Id.
164. Winter v. G.P. Putnam’s Sons, 938 F.2d 1033, 1034 (9th Cir. 1991). In addition, the court stated that the policy of applying strict liability to defective products rests on the theory that “the costs of damaging events due to defectively dangerous products [are] best ... borne by the enterprisers who make and sell these products.” Id. at 1035 (citing PROSSER AND KEATON ON THE LAW OF TORTS § 98, at 962-63 (5th ed. 1984)).
165. Id. See also Beasock v. Dioguardi Enterprises, 494 N.Y.S.2d 974 (Sup. Ct. 1985) (stating that strict liability is imposed “only against defendants who are directly involved in the manufacture or distribution of the product which caused the injury”). Although the publication involved in the Beasock case con-
However, not all publishers are impervious to strict liability under a section 402A claim. The Winter court noted that publishers of aeronautical charts have been found strictly liable under section 402A. Indeed, courts have consistently ruled that instrument approach charts and their content are products under section 402A.

The court first applied strict liability to an aeronautical chart in Aetna Casualty & Surety Co. v. Jeppesen & Co. While on approach to Las Vegas, Nevada, an airplane from Phoenix, Arizona crashed killing all aboard. In Aetna, the airline insurer sued the publisher of instrument approach charts, seeking indemnity for money paid in settlement of several wrongful death actions filed by representatives of deceased passengers.

The plaintiff insurance company argued that the approach chart used by the pilots incorrectly depicted the geography and scale of the landscape, and thus the graphics relating to proper elevation were "defective." The plaintiff produced a witness that testified that a pilot and navigator that relied on this information would make the incorrect assumption about the scale of the approach in relation to proper altitude, and a conflict would be created between the chart and the information in the airplane's instruments. This conflicting information would result in an unreasonable risk, as the pilot would question the accuracy of the on-board instruments and the geographic chart.

The Aetna court held that the Las Vegas chart "radically departed" from the graphics in other charts. Further, the

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167. See supra note 119.
169. Aetna, 642 F.2d 339.
170. Id.
171. Id. at 341.
173. Id.
174. Id.
175. Id. at 343.
court held that the conflict created by the chart and the information conveyed by the airplane’s instruments and words from the control tower rendered the chart unreasonably dangerous and a defective product. The Aetna court did not elaborate as to why erroneous content in an aeronautical chart qualified as a product whereas content in other publications do not. This analysis did not appear until another claim was brought against Jeppesen in another aeronautical chart case, Halstead v. United States.

In Halstead, a small private plane crashed while attempting a full instrument landing in West Virginia. All three passengers were killed including the pilot, his father, and the pilot’s son. Because the airfield was not equipped to execute a full instrument landing, it was unable to inform the descending pilot of his approach altitude, causing the pilot to crash into a ridge. The plaintiff estate of the deceased showed that the pilot relied on a Jeppesen aeronautical chart, which incorrectly indicated that the airfield could execute a full instrument landing.

The plaintiff argued that the incorrect information rendered the chart defective, and that Jeppesen should be held strictly liable. The defendant argued that it provided “professional services” rather than products, so that strict liability arising out of a sale of a defective product could not be imposed. Further, the essence of the sale of the paper chart to the plaintiff “was the conveyance of information, [which] constituted a service rather than a product and that the paper the map was printed on was merely the method by which the information was conveyed to subscribers.”

The Halstead court acknowledged that the defendant’s

177. Id.
179. Id. at 783. Airfields that are capable of “full instrument landings” are able to inform pilots of approach altitudes. The pilot relied on the chart, which indicated that the airport could inform him of his altitude, when in fact it could not. Id.
180. Id.
181. Id. at 784.
182. Id. at 783.
183. Id. at 784.
185. Id.
service/product distinction created "an elusive question."\textsuperscript{186} However, the court determined that the chart fit the definition of a product according to the policy rationale behind section 402A.\textsuperscript{187} "The official comments to Restatement Section 402A establish the doctrine of strict tort liability was principally intended to impose a special liability on those who market defective products to the general public in a mass-distribution context."\textsuperscript{188}

The Halstead court indicated that the defendant fit the traditional strict liability defendant; the company mass-produced and distributed thousands of charts on the aviation market.\textsuperscript{189} Therefore, reasoning that the defendant could bear the cost by allocating the risk of injury through higher prices and insurance, strict liability should be imposed.\textsuperscript{190}

Thus, the reason that the defective content in the publication qualified as a product was not because it met the definition of a "tangible object."\textsuperscript{191} Publishers of aeronautical charts are held liable for defective content because it is consistent with the policy behind section 402A to hold them strictly liable.\textsuperscript{192} Thus, an additional question is raised in this comment: does the defective content published on an electronic bulletin board meet the policy standards behind section 402A to bring a strict liability claim for defective products?

III. IDENTIFICATION OF THE LEGAL PROBLEMS

Two legal problems are presented in this comment. The answers to these questions are speculative, as there are no cases that address negligent publication based on misrepresentation in connection to section 230 of the CDA.\textsuperscript{193} Cases subsequent to the enactment of section 230 of the CDA are

\begin{itemize}
\item \textsuperscript{186} Id.
\item \textsuperscript{187} Id. at 790-91. The court noted that section 402A applied because Jeppe-
\item sen "mass produced and distributed thousands of charts." Id.
\item \textsuperscript{188} Id. 790-91. See also RESTATEMENT (SECOND) OF TORTS §402A cmts. c
\item \item and f (1965).
\item \textsuperscript{189} Halstead, 535 F. Supp. 791.
\item \textsuperscript{190} See Andrew T. Bayman, Strict Liability for Defective Ideas in Publica-
\item \item tions, 42 VAND. L. REV. 557, 571 (1989).
\item \textsuperscript{191} See supra note 162 and accompanying text.
\item \textsuperscript{192} Halstead v. United States, 535 F. Supp. 782, 791 (D. Conn. 1982).
\item \textsuperscript{193} Communications Decency Act of 1996, 47 U.S.C.A. § 230 (West Supp.
\item \item 1998).
\end{itemize}
clear as to the liability of system operators in relation to a
defamation claim.\textsuperscript{194}

The first legal problem is whether the CDA should be in-
terpreted to provide immunity to system operators in all
negligence claims for third party statements published on the
Internet. Second, when access to an online technical support
bulletin board is purchased as part of a software product, is
the content conveyed on the bulletin board a "product?"\textsuperscript{195} In
other words, can a strict liability claim for defective products
be applied to a company that maintains and controls a tech-
nical support electronic bulletin board containing defective
information?

IV. ANALYSIS

The broad ruling in \textit{Zeran} would indicate that service
providers are immune from all tort-based claims for the pub-
lication of third-party statements on the Internet because of
section 230 of the CDA.\textsuperscript{196} Thus, \textit{Zeran} not only affects
\textit{Cubby}\textsuperscript{197} in the context of defamation
claims,\textsuperscript{198} but also af-
facts \textit{Winter}\textsuperscript{199} and \textit{Gutter}\textsuperscript{200} in claims involving negligent
publication based on misrepresentation.\textsuperscript{201} \textit{Zeran} would
thereby alter the rule of law established by \textit{Winter} and \textit{Gut-
and although the central holding of Winter and Gutter would be preserved, the rationale that publishers are not completely immune from third party statements would be overruled. Was the Zeran court correct in assuming that Congress intended to grant system operators broad immunity from all tort-based causes of action for the publication of third-party statements, or was the immunity granted by the CDA intended only to cover defamation claims?

A. The CDA Was Only Intended to Overrule Stratton

Congress, in enacting section 230 of the CDA, specified its intent to overrule the holding in Stratton. The context of the Stratton case involved liability for the repetition of defamatory third party statements. Recognizing that system operators policed offensive content posted on their bulletin boards, Congress enacted legislation that would not discourage system operators from exercising control over their web sites. Therefore, because Congress only intended to overrule Stratton, the courts should read the statute more narrowly and only apply it in the context of defamation claims.

Zeran infers that the statute applies to all causes of action relating to third party statements. However, given the context of the statute, this is not necessarily the case. Congress wished to protect and encourage the “positive” policing of the Internet and bulletin boards. Although Congress wished to “preserve the vibrant and competitive free market that presently exists for the Internet,” the statute should

202. Gutter v. Dow Jones, Inc., 490 N.E.2d 898, 900 (Ohio 1986). The rule simply stated is that a publisher of a third-party statement can be held liable for the accuracy of the statement if it assumes the burden by “investigating the accuracy of the statement” or “willfully originates or circulates the statement knowing it to be false.” Id.

203. Courts have stated that “so long as the publisher has neither authored nor guaranteed the accuracy of the publication, injuries sustained by a plaintiff acting in reliance on information contained in the publication [are] not redressable under a negligence theory.” See Day, supra note 110.

204. See discussion supra Part II.E.1.

205. “The Conference Committee Report specifically states that section 509(c)(1) [section 230(c)(1)] is intended to overrule Stratton Oakmont's holding . . . .” Breisford, supra note 2, at 489.

206. See supra notes 69-75 and accompanying text.

207. See discussion supra Part II.D.

208. See supra notes 107-108 and accompanying text.

209. See supra note 81 and accompanying text.

210. Congressional findings were noted in the CDA’s enactment. See Breis-
not necessarily protect system operators from all torts related to the publication of third party statements. Immunizing a system operator who knowingly and willfully transmits inaccurate content on an electronic bulletin board does not promote the "vibrant speech" policy behind the CDA. Some bulletin boards, such as technical support sites, are not intended to be a forum for exchanging "ideas" at all. Rather, individuals accessing these sites specifically rely on the content found on the electronic bulletin board in order to maintain and service a product purchased from the company operating the technical support site. Given this example, it should not be the case that because an individual or entity is a system operator and publisher of inaccurate content of a third person, that he or she will automatically receive the broad immunity of the CDA as interpreted by the Zeran court.

B. System Operators May Act as Distributors

As the court in Cubby explained, system operators may act more like a distributor of information than a publisher.\footnote{Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991). The court stated that CompuServe was the equivalent of "an electronic, for profit library." Id. at 140-41.} Finding for the defendant system operator, the Cubby court stated that CompuServe could only be liable as a distributor if it knew or had reason to know of the defamation.\footnote{Id. at 142.} The court recognized potential liability of the system operator if the defendant would have published the defamatory statements with knowledge.\footnote{Cubby v. CompuServe does not resolve what happens when the [system operator] is aware of the contents and allows distribution anyway. It might be inferred from the decision that in such a case the [system operator] would be as liable as the primary publisher." See Bonvenzi, supra note 40, at 124.}

This potential liability recognized by the court in Cubby were presented as facts in Stratton Oakmont, Inc. v. Prodigy Services, Inc.,\footnote{23 Med. L. Rptr. 1794 (N.Y. Sup. Ct. 1995).} which involved a system operator that actively policed third party statements and allowed a defamatory statement to be published. The court found the defendant liable for the defamation and prompted Congress to decree that "[n]o provider or user of an interactive computer...
service shall be treated as the publisher or speaker of any information provided by another information content provider.\textsuperscript{215} Although the CDA was created specifically in response to \textit{Stratton's} holding,\textsuperscript{216} the \textit{Zeran} court interpreted the statute to create "federal immunity to \textit{any} cause of action that would make service providers liable for information originating with a third-party user of the service."\textsuperscript{217} This language in \textit{Zeran} may therefore be too broad; Congress enacted the legislation in the context of a defamation claim and wished to promote positive "policing" by system operators.

C. \textit{Zeran} Overrules a Portion of \textit{Cubby}

According to \textit{Zeran}, system operators of bulletin boards would be impervious to \textit{any} claim involving the transmission of information originating from third parties, with or without knowledge.\textsuperscript{218} The \textit{Zeran} court, therefore, would overturn rules of law established in \textit{Cubby}.\textsuperscript{219}

The \textit{Zeran} court reasoned that Congress intended to grant broad immunity to system operators for the statements of third parties regardless of the system operator's knowledge of the statements.\textsuperscript{220} The court stated that distributor liability might be feasible "for the traditional print publisher, [but] the sheer number of postings on interactive computer services would create an impossible burden in the Internet context."\textsuperscript{221} If the court in \textit{Zeran} is correct, system operators receive protection not only from defamation claims, but from negligent publication claims as well.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{216} \textit{Zeran} v. America Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997). "The congressional Conference Committee Report specifically states that § 509(c)(1) [§ 230(c)(1)] is intended to overrule \textit{Stratton Oakmont's} holding that online service providers can be held to be 'publishers' of third party statements.” Breisford, \textit{supra} note 2, at 489.
\item \textsuperscript{217} \textit{Zeran}, 129 F.3d at 330 (emphasis added). The court further stated, "[Section] 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role." \textit{Id}.
\item \textsuperscript{218} \textit{Id}.
\item \textsuperscript{219} See discussion \textit{supra} Part II.D. See also \textit{supra} note 68 and accompanying text.
\item \textsuperscript{220} \textit{Zeran}, 129 F.3d at 333.
\item \textsuperscript{221} \textit{Id}.
\end{itemize}
\end{footnotesize}
D. Zeran Would Overrule Law Articulated in Winter and Gutter

Immunity from liability for third party statements in all causes of action would logically include claims for negligent publication based on a misrepresentation theory or strict liability for defective products.\(^2\) Thus, even if a system operator knew of inaccurate content posted by a third party on a bulletin board, and circulated it anyway, another person who relied on that information to his or her detriment would not have a claim.\(^2\) This result would be contrary to the rationale expressed in Gutter and Winter, which would find publishers liable for the inaccurate statements of third parties when the publishers have knowledge of the statements.\(^2\)

The defendant publishers were found not liable for negligent publication in Winter and Gutter.\(^2\) However, the system operator in the hypothetical expressed in Part I would be found liable according to the rationale of the Winter and Gutter courts.\(^2\) The Winter court expressed that although no duty of inspection existed, the publisher could assume the duty to investigate the accuracy of the content, and would thereby owe a duty to a reader of that information.\(^2\) By investigating the accuracy of the content, it could be argued that the publisher becomes the guarantor of the information by subsequently choosing to circulate the inaccurate information.\(^2\) By analogy, a system operator of a technical support site that has knowledge of false information disseminated on its bulletin board would in effect act as a guarantor of that information.

The Gutter court also held the publisher could be liable if it willfully circulated inaccurate information that it knew was false.\(^2\) The Gutter court was concerned about "ex-
tend[ing] liability to all the world and not a limited class, and discussed that these limited groups may be liable in certain fiduciary relationships. A bulletin board operator of a specialized technical support site chooses which information to post and which information not to post. The choice a system operator has to post the inaccurate information of a third party arguably qualifies as willful circulation. A specialized bulletin board like a technical support web site does not carry the danger of extending liability to "all the world," but only to a limited class of customers. Under the facts of the hypothetical, a bulletin board operator should be liable for the publication of inaccurate content if it knew that the information was inaccurate.

E. Congressional Intent Promoting Free Speech Does Not Apply to Technical Support Sites

Congress stated that the policy behind section 230 of the CDA was to promote the Internet as a "forum for a true diversity of political discourse," and also to allow a "vibrant and competitive free market [of ideas]." Technical support bulletin boards that allow customers to interact about a company's product are not the kind of speech Congress intended to protect. The statute was enacted in light of defamatory speech.

The rule established in Zeran, however, creates immunity for any liability associated with promoting the circulation of inaccurate statements occurring on a company operated bulletin board. A highly specialized bulletin board owned by a company offering technical support for its product hardly fits into the "true diversity of ideas" realm that Con-

231. Id.
232. See supra note 42 and accompanying text.
233. See supra note 230 and accompanying text.
234. See discussion of hypothetical supra Part I.
235. See discussion of hypothetical supra Part I.
238. Id.
239. See discussion of hypothetical supra Part I.
240. See supra Part II.D.
241. See hypothetical supra Part I.
gress intended to promote by granting immunity to online system providers.242 A specialized system operator that uses the statute to shield liability when she knows information relating to her products is inaccurate runs counter to the congressional policy of promoting political discourse and allowing "vibrant" speech.243

Thus, the argument that Congress intended to grant immunity to all causes of action relating to the dissemination of third party statements is not clear, as was held by the Zeran court.244 Zeran's broad ruling would overturn significant legal precedents established in Winter and Gutter. This holding by the Zeran court would allow a system operator publisher to promote and sell its products without fear of liability—while profiting from the use of electronic bulletin boards which may cause harm to the user.245

F. Bulletin Board Content is Arguably a Product When Included as Part of the Purchase of Other Products

Although the Internet itself is a vast medium of communication,246 the operation of bulletin board services creates the ability of system operators to take control over the content circulated.247 Inquiries concerning the company products and dialogue from various customers arguably represent a financial interest to the company. The company may become aware of product problems more quickly and efficiently and may be able to learn the product needs and desires of its customers. This efficiency is an economic incentive to offer the electronic bulletin board as part of the purchase of its product. Thus, promoting free speech may not be the purpose for operating a technical support site; it is to sell more and better quality products to the company's customers.248

Technical support is often a reason why individuals pur-
chase certain computer and software products.\textsuperscript{249} Although the information on a technical support site is "intangible," and therefore difficult to conceive that the content found on it is a "product," the policy rationale behind section 402A and articulated by the \textit{Halstead} court may nonetheless find liability.\textsuperscript{250}

The \textit{Jones} court noted that no case had extended strict liability to the dissemination of ideas or knowledge in books or other published material.\textsuperscript{251} The rationale for not doing so was stated to protect the principles of free speech and ensure that "a chilling effect" would not be felt on expression.\textsuperscript{252} The \textit{Winter} court stated that strict liability should only be applied when supported by the policy behind section 402A.\textsuperscript{253} The court stated "the costs of damaging events due to defectively dangerous products [are] best ... borne by the enterprisers who make and sell these products."\textsuperscript{254} Since textbook publishers did not, according to the court, meet these criteria, textbook publishers could not be held strictly liable under section 402A.\textsuperscript{255}

Subsequent "aeronautical chart cases" clarified the distinction and rationale for holding publishers of defective charts strictly liable.\textsuperscript{256} The defendant in \textit{Halstead} argued that the information on the chart was a service to the cus-

\begin{itemize}
\item \textsuperscript{249} Many computer users require excellent technical support as a criterion for making a computer purchase. Thus, companies advertise what their "technical support rating" is in order to attract customers. \textit{See Dell Computer Corporation} <http://www.dell.com/support/index.htm> (technical support site stating "[c]ustomers rank Dell #1 for web-based support").
\item \textsuperscript{250} In considering whether or not to apply section 402A of the Restatement to defective content in textbooks, the court in \textit{Winter} stated, "[t]he American Law Institute clearly was concerned with including all physical items but gave no indication that the doctrine should be expanded beyond that area [into the area of intangibility]." \textit{Winter v. G.P. Putnam's Sons}, 938 F.2d 1033, 1034 (9th Cir. 1991). However, in \textit{Halstead}, the court applied strict liability to the defective content in the aeronautical chart based on the policy rationale of section 402A. "The official comments to Restatement Section 402A establish the doctrine of strict tort liability was principally intended to impose a special liability on those who market defective products to the general public in a mass-distribution context." \textit{Halstead v. United States}, 535 F. Supp. 782, 790-91 (D. Conn. 1982).
\item \textsuperscript{251} \textit{Jones v. J.B. Lippincott Co.}, 694 F. Supp. 1216, 1217 (D. Md. 1988).
\item \textsuperscript{252} \textit{Id.}
\item \textsuperscript{253} \textit{Winter v. G.P. Putnam's Sons}, 938 F.2d 1033, 1034-35 (9th Cir. 1991).
\item \textsuperscript{254} \textit{Id.} at 1035.
\item \textsuperscript{255} \textit{See discussion supra} Part II.E.2.
\item \textsuperscript{256} \textit{See discussion supra} Part II.E.2.
\end{itemize}
The defendant raised the tangible/intangible distinction made by the courts in the textbook cases. The chart manufacturer urged that its “service” was “intangible” and it thus should not be held strictly liable. Nonetheless, the defendant was found strictly liable.

The operator and owner of a technical support site could make the same arguments that the defendant did in Halstead. A system operator might argue that the technical support site is a “service” to the customer, as it allows the customer to engage in dialogue with other customers concerning the product. Furthermore, the essence of the transaction is the purchase of the software itself, not the bulletin board service. Finally, the American Law Institute, in drafting section 402A, certainly did not contemplate the intangible realm of the Internet.

However, courts have acknowledged that the “intangible” and “tangible world” argument is problematic and, therefore, is not determinative in finding strict liability. What is determinative is whether or not it is good policy to hold the publisher of third party statements strictly liable. The fact that the company mass-produces the product to the general public is one factor used to determine candidacy for strict liability. The other factor indicated by the court is whether or not the company has the ability to bear the cost by allocating the risk of injury through higher prices.

Computer hardware and software, for example, are mass-produced to the general public. The Internet is becoming the dominant medium of communication to sell and support these mass-produced products. Also, the operation of a specialized technical support site is not significantly different from customers who come to the manufacturer’s store

258. Id.
259. Id.
260. Id. at 791.
261. See Winter v. G.P. Putnam’s Sons, 938 F.2d 1033, 1034 (9th Cir. 1991) (rationalizing that if the American Law Institute did not consider it, it was probably not meant to be covered under strict liability).
264. Id.
265. Id.
266. See generally Tickle, supra note 1.
to discuss its products.\textsuperscript{267}

The policy and rationale articulated by the \textit{Halstead} court in strict liability claims for defective content is satisfied in technical support bulletin board cases. If the product is software, prices can be raised to insulate the manufacturer from risk if the manufacturer chooses to offer a technical support bulletin board.\textsuperscript{268} The fact that the manufacturer economically benefits from the operation of a technical support site gives further indication that the manufacturer can insulate the risk by passing that cost onto the customer. Thus, technical support sites, when purchased as part of software or hardware products, for example, are arguably more like aeronautical charts than textbooks.

\section*{V. Proposal}

As Congress drafted the CDA in reaction to the holding in \textit{Stratton}, Congress should articulate whether the holding in \textit{Zeran} was correct in granting immunity to system operators for \textquote{all claims involving statements made by third parties.}\textsuperscript{269} Prohibiting claims involving negligent publication on technical support bulletin boards will deprive injured claimants of a remedy and at the same time shield the enriched manufacturer. This is not good policy.

It is reasonable to shield system operators from the liability associated with third party statements in order to promote free speech concerns articulated in \textit{Zeran}. However, when free speech is not at issue, as with specialized technical support bulletin boards such as the one hypothesized in Part I of this comment, liability should not be shielded. As discussed, financial concerns, not the \textquote{promotion of free speech}, motivate companies to utilize technical support sites. Thus, these forums should not be protected by the CDA.

Congress, in its clarification of the CDA, should identify the kinds of bulletin boards that are protected under the CDA. Those bulletin boards that are identified as promoting the policies of the CDA will maintain protection, while those that are created and designed to promote a company's prod-

\textsuperscript{267} The transmission of inaccurate information in a manufacturer's store has been the basis of many \textquote{failure to warn} cases brought under section 402A. \textit{See generally} \textsc{Restatement (Second) of Torts} § 402A cmt. a (1965).

\textsuperscript{268} \textit{See supra} note 190 and accompanying text.

\textsuperscript{269} \textit{See supra} note 108 and accompanying text.
ucts will not be immunized. Certainly, Congress can establish criteria that would aid the courts in distinguishing “free speech” bulletin boards and bulletin boards that are solely used to sell and maintain products.

For example, courts could consider who operates the bulletin board and their relationship with the user of the bulletin board. This criterion would distinguish company technical support forums, from electronic forums used for political or societal discussions between users. Customer support forums should not receive the protection from the CDA. Again, promoting free speech is not the intent of operating a technical support site; the intent is to promote and maintain company products.

The number of users of the bulletin board may be relevant in discerning whether the bulletin board is specialized like a technical support site, or if it is a more general forum for all forms of discussion. Generally, technical support sites offer a limited number of users the ability to discuss a common concern—the product of the company. In addition, courts could consider how the user is able to access the web site—whether accessibility was purchased as part of a product from the owner of the electronic bulletin board, or if the user pays a fee in order to “chat” with other users. This criterion will distinguish free speech forums from “forums for product development.” The latter should not be protected by the CDA.

The attempt to classify bulletin board content as a product for the purpose of finding strict liability may be problematic. However, it is plausible to conceive of information on the bulletin board as a “product” when included with the purchase of software or hardware. The potential injury caused by defective content on an electronic bulletin board may be considered less in magnitude than an airplane crash, but the potential number of injuries from defective information is substantial considering the fact that millions of Internet users access bulletin boards. Defective content has the poten-

270. Considering the fact that strict liability has only been found in a few select content cases, like aeronautical charts, it seems unlikely that the courts will be inclined to open a new door of strict liability in the publication context.
271. See hypothetical supra Part I.
273. See supra note 30 and accompanying text.
tial to reach more people, more quickly than ever before.\textsuperscript{274} When a system operator of a technical support electronic bulletin board knows that the content is inaccurate, the system operator should be liable for the personal injury or property damage that results.\textsuperscript{275}

The courts should consider strict liability claims against system operators of technical support bulletin boards because it is consistent with the policy considerations behind section 402A. When an individual purchases both software and the ability to access a technical support electronic bulletin board, the content found on the bulletin board is arguably a product. Finding strict liability for defective content found on technical support sites would be consistent with the policy behind section 402A.\textsuperscript{276}

VI. CONCLUSION

If the system operator of a technical support bulletin board has knowledge of inaccurate information disseminated on his or her bulletin board, that operator should be liable for personal injury or property damage that a customer suffers because of his or her reliance on that information. The customer should be able to bring a negligent misrepresentation claim or a strict liability claim against the hardware or software manufacturer. Section 230 of the CDA should be construed as granting immunity to system operators in defamation claims only and courts should limit the holding of Zeran.

In the hypothetical posed in Part I of this comment, a customer that has purchased, as part of her software product, the ability to access a technical support bulletin board, should not be left without a remedy. Immunizing all claims against a system operator who knows of inaccurate content as described in the hypothetical would create an unfair result. Until Congress offers a clarification as to the narrowness or broadness of the CDA, courts should allow claims of negligent publication against operators of technical support electronic bulletin boards to go forward.

\textit{David Wiener}

\textsuperscript{274} See supra note 30 and accompanying text.
\textsuperscript{275} See supra Part III.F.
\textsuperscript{276} See supra note 192 and accompanying text.