Commemorating the 20th Anniversary of Internet Law’s Most Important Judicial Decision

Introducing a series of essays curated by Eric Goldman and Jeff Kosseff about the seminal internet law case Zeran v. AOL.

By Eric Goldman and Jeff Kosseff
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Many factors contributed to the Internet’s growth over the past 25 years, but we’d like to highlight an underappreciated catalyst. In 1996, Congress enacted a law, 47 U.S.C. §230, to immunize websites from liability for third-party content. Section 230 is an “Internet exceptionalist” law; Congress made the liability rules for online content different from, and more favorable than, the rules for offline content.

Section 230’s immunity from liability for third-party content has provided the foundation for the Internet we know today. Each of the top 10 U.S. websites relies heavily on third party content and, in turn, §230.

Editor’s Note: This is a collection of essays submitted by internet law scholars and attorneys about Section 230 and the legacy of Zeran v. AOL. Continue scrolling down for links to the full articles.

However, the scope of §230’s immunity wasn’t necessarily clear from Congress’ words, which are characteristically inscrutable. Instead, §230’s implications first became clear from the first appellate court opinion interpreting it, the Fourth Circuit Court of Appeals’ ruling in Zeran v. AOL.

The Zeran case involved a pernicious cyber-harassment attack. An unknown perpetrator posted inflammatory messages to AOL purporting to be from Zeran, which prompted outraged readers to bombard Zeran with angry phone calls. The Fourth Circuit concluded that §230 protected AOL from liability for publishing the inflammatory messages.

The Zeran case interpreted §230 quite broadly, providing liability immunity even when online publishers exercise editorial control over third party content, and even when the online publisher fails to respond to takedown notices. Due to its timing and its breadth, the Zeran opinion had an enormous influence on subsequent courts’ interpretations of §230, leading them to apply the statutory immunity expansively across a wide range of circumstances.

Together, §230 and the Zeran ruling helped create a trillion-dollar industry centered around user-generated content. Because of its influence on such a key issue, the Zeran ruling is widely considered the most important Internet Law ruling ever.

It is also a controversial opinion, and debates about the ruling’s conclusion and implications continue to this day. Indeed, Congress is currently considering making its first major substantive reduction to §230’s immunity, and much of the debate over these proposals revisits the mid-1990s’ policy debates over how best to reduce anti-social behavior online. Despite the passage of time and evolution of technology, the underlying policy questions remain as fresh and important as they were two decades ago.

Zeran was decided 20 years ago-on Nov. 12, 1997. To commemorate this anniversary, we asked nearly two dozen experts in Internet Law to share their thoughts about the case. We invited authors with normative views that span the §230 debate, so the group of authors includes both fans and opponents of the Zeran ruling and §230 generally.

Their essays generally fit into two categories. Some essays take a historical approach, explaining how we got §230 or the Zeran ruling. The other essays discuss the legacy and impact of the Zeran ruling over the past two de-
cades, some enthusiastically celebrating the developments
and others issuing stinging criticisms and calls for reform.
We learned a lot from this collection of essays, and we
hope you will too.
‘Zeran v. AOL’ and Its Inconsistent Legacy

Ian Ballon discusses the differing approaches to how the Fourth Circuit’s ruling in ‘Zeran v. AOL’ is applied in different circuits.

By Ian C. Ballond

In January 1996, shortly after it was enacted, I wrote one of the first articles on the Good Samaritan exemption created by the Telecommunications Act of 1996 (47 U.S.C. §230(c)—popularly referred to as the Communications Decency Act or CDA), correctly arguing that it preempted claims against interactive computer service providers and users, not merely for defamation, but for a broad array of claims. I did not, however, envision that subsection 230(c)(1) would be construed as broadly as it has been over the past two decades, or that subsection 230(c)(2) would be applied as infrequently. Indeed, when the district court and then the circuit court decided Zeran v. AOL, I was critical of their analytic approach, as some may remember from early articles in The Cyberspace Lawyer.

The law, however, is written by courts, not commentators, and the rule of Zeran has been uniformly applied by every federal circuit court to consider it and by numerous state courts. And it has never been rejected in any precedential opinion. Indeed, it is perhaps a fitting tribute to the viability of Zeran that 20 year later the U.S. Court of Appeals for the Ninth Circuit, in its 12th opinion construing the CDA, barely spent even a sentence affirming dismissal of a defamation claim brought against Facebook over user content, pursuant to the CDA and the rule first developed in Zeran. See Caraccioli v. Facebook, 817 F.3d 12, 18-24 (9th Cir. 2016) (affirming dismissal of claims for civil remedies under the Trafficking Victims Protection Reauthorization Act, 18 U.S.C.A. §1595, and Massachusetts Anti-Human Trafficking and Victim Protection Act of 2010, Mass. Gen. Laws ch. 265, §50); Obado v. Magedson, 612 F. App’x 90, 91-94 (3d Cir. 2015) (affirming dismissal for failure to state claims for defamation, intentional and negligent infliction of emotional distress and invasion of privacy against various service providers, search engines and domain name registrars for republishing and allegedly manipulating search engine results to maximize the impact of allegedly defamatory content, based on the CDA).

The broad preclusive effect of the CDA recognized by Zeran has been extended beyond mere defamation cases to an array of disputes where third parties seek to hold Internet sites or mobile app providers liable for the misconduct of users. Because conduct online takes the form of content—as users act through key strokes, smart phone virtual buttons and emoji—the CDA has been applied where conduct ultimately is premised on user content. Thus, for example, courts have held that the CDA preempts claims by parents against Internet sites and services where children have met adults who then allegedly abused them, by the widows of personnel killed by ISIS, and by victims of sex traffickers against publishers of online classified ads that led to their victimization. It has also been held to preempt claims by a tort victim against the Internet service where the plaintiff’s assailant had allegedly purchased the gun used against him, against a social network for failing to promptly remove a profile that allegedly led to violence, for failing to act to prevent statements made in a chatroom, and for strict product liability and related claims brought against eBay for transactions between users of its platform. See Ian C. Ballon, E-Commerce & Internet Law: Treatise with Forms 2d ed. §37.05[1][C] (enumerating cases).

There are, however, differing approaches to how the U.S. Court of Appeals for the Fourth Circuit’s ruling in Zeran v. AOL is applied in different circuits.

Most circuits construe the CDA broadly, consistent with Zeran. See, e.g., Doe No. 1 v. Backpage.com, 817 F.3d 12, 18-24 (1st Cir. 2016) (affirming dismissal of claims for civil remedies under the Trafficking Victims Protection Reauthorization Act, 18 U.S.C.A. §1595, and Massachusetts Anti-Human Trafficking and Victim Protection Act of 2010, Mass. Gen. Laws ch. 265, §50); Obado v. Magedson, 612 F. App’x 90, 91-94 (3d Cir. 2015) (affirming dismissal for failure to state claims for defamation, intentional and negligent infliction of emotional distress and invasion of privacy against various service providers, search engines and domain name registrars for republishing and allegedly manipulating search engine results to maximize the impact of allegedly defamatory content, based on the CDA);
Doe v. MySpace, 528 F.3d 413, 420 (5th Cir. 2008) (rejecting the assertion that MySpace could be held liable for failing to implement measures that allegedly would have prevented a minor from being contacted by a predator, and stating that these “allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace’s role as a publisher of online third-party-generated content.”); Jones v. Dirty World Entertainment Recordings, 755 F.3d 398 (6th Cir. 2014) (vacating and reversing a jury award for the plaintiff over highly offensive comments posted on a gossip website); Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, 519 F.3d 666, 668–69 (7th Cir. 2008) (affirming dismissal of a Fair Housing Act claim).

On the other hand, the Ninth Circuit’s decision in Fair Housing Council v. Roommate.com, 521 F.3d 1157 (9th Cir. 2008) (en banc), broadly construed what constitutes development, which could strip away CDA protection for an interactive content provider by treating it as an information content provider for user content in narrow circumstances where the site is deemed to have developed the user content. While this interpretation ultimately is narrow, clever plaintiffs in the Ninth Circuit try to plead around the CDA by alleging development in the hope of moving a claim past motion practice to discovery.

The Ninth Circuit also has recognized a number of fact-specific, narrow exceptions to the CDA that have not been recognized by other circuits. See Doe No. 14 v. Internet Brands, 824 F.3d 846 (9th Cir. 2016) (holding that a service could be sued for failing to warn of a dangerous user of its site, but only to the extent the provider’s knowledge was acquired offline); Barnes v. Yahoo!, 570 F.3d 1096 (9th Cir. 2009) (holding that a provider could be sued for promissory estoppel if it voluntarily undertook to do something that the CDA otherwise would not require, such as removing user content); Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003) (carving out a narrow exception when a communication republished by a defendant was not originally intended for publication).

Courts also have taken differing approaches to the question of what constitutes a claim pertaining to intellectual property, within the meaning of section 230(e)(2), which creates an exclusion to the otherwise broad preemption provisions set forth in sections 230(c)(1) and 230(c)(2). Compare Perfect 10 v. CCBill, 488 F.3d 1102 (9th Cir. 2007) (holding that the CDA preempted a state right of publicity claim) with Doe v. Friendfinder Network, 540 F. Supp. 2d 288, 298-304 (D.N.H. 2008) (disagreeing with Perfect 10 and holding that the CDA did not preempt plaintiff’s right of publicity claim); and Atlantic Recording v. Project Playlist, 603 F. Supp. 2d 690, 702-04 (S.D.N.Y. 2009) (construing the literal language of the statute the same way as the court in Doe and declining to dismiss plaintiff’s common law copyright claim).

Depending where a party is sued, these differences can impact whether CDA immunity is determined early, and relatively inexpensively. The Fourth Circuit, which decided Zeran, observed 12 years later that CDA “‘immunity is an immunity from suit rather than a mere defense to liability’ and ‘it is effectively lost if a case is erroneously permitted to go to trial’ ….” Nemet Chevrolet v. Consumeraffairs.com, 591 F.3d 250, 254-55 (4th Cir. 2009) (citations omitted). Exceptions to and variations in the way the CDA is construed in different circuits, even if narrow, ultimately impact whether the immunity afforded by the CDA can be quickly vindicated or whether, in a given case, it may be lost—or at least diluted—through protracted litigation.
Section 230 Keeps Platforms for Defamation and Threats Highly Profitable

The modern legal dialectic around the First Amendment is harsh and dauntingly complicated. The prevailing topical U.S. Supreme Court jurisprudence values free speech because it can contribute to human meaning-making and construction of selfhood, and has the potential to produce the sorts of ideas and information that can lead to human enlightenment. The court also deeply distrusts governmental regulation of speech, and has articulated powerful doubts about the government’s ability to competently balance social costs and benefits pertaining to speech, especially when driven by censorial motives. Actual living human beings and their emotions do not much factor into either the court’s positive or negative justifications for free speech. See generally Toni Massaro, Helen Norton and Margot Kaminski, “SIRI-OUSLY 2.0: What Artificial Intelligence Reveals about the First Amendment,” 101 Minnesota Law Review 2481 (2017).

Section 230 takes this free speech-rooted disregard for people and their feelings, and ramps it up a few notches, immunizing online media companies from liability for hosting not only anything the First Amendment protects, but also from the reach of most of the very limited speech restrictions that First Amendment jurisprudence disdainfully tolerates.

Internet Service Providers (ISPs) can host maliciously defamatory speech that would not be protected by the First Amendment. They can host threats of violence that are outside the First Amendment. They can host obscenity as long as it is not comprised of child pornography, and they can host panic-inducing online equivalents of shouts of “Fire!” in crowded theaters without fearing civil suit or arrest, as long as no federal crime is committed.

As it happens, defamatory speech, threats and obscenity almost never rise to the level of federal crimes. According to one legal scholar, “it is now generally accepted that the First Amendment forbids criminal penalties for defamation.” Actionable threats must be “true threats” and require a higher level of culpability than negligence; it is not clear that even a showing of recklessness would be adequate. And the federal government has only rarely pursued obscenity charges for content that did not involve or depict children since 1988. Even when completely outside the protections of the First Amendment, almost any speech can be hosted on a wholly for-profit basis, featuring paid advertisements or charging subscription fees, without fear of legal responsibility.

Section 230 asks nothing in return for this extensive ISP immunity. The ISPs can’t be forced to remove offending content unless it fits within what are mostly very narrow exceptions, as demonstrated by twenty years of litigation. The only broadly interpreted immunity exception is for intellectual property, which §230 actually cares about because it is rooted in money and commerce and intangible “property” rather than people and their messy and seemingly inconsequential emotions.

ISPs don’t have to keep track of who posts what, or identify any person doing the offensive posting unless they want to, or choose to comply with an appropriately drafted and served subpoena, meaning legal representation is generally necessary to successfully identify the source of harmful speech.

Section 230 has therefore made hosting defamation, threats and exhortations that lead to panic or violence into a lucrative online business models. Twenty years ago, AOL strategically ignored Ken Zeran’s horrific victimization by an anonymous internet hoaxter.

Today, acts of online harassment directed at contemporary Ken Zerans are more likely to fill the enormous coffers of companies like Google, Facebook, Twitter, GoDaddy and Reddit. The platforms may change over time but the basic framework remains the same. Eyeball attraction generates demand for online services such as web hosting, cloud computing, advertising, data analytics, storage, and domain name registration.

Hatred can be very profitable. Research conducted by...
ProPublica “surveyed the most visited websites of groups designated as extremist by either the SPLC or the Anti-Defamation League ...”[and] found that more than half of them—39 out of 69—made money from ads, donations or other revenue streams facilitated by technology companies. At least 10 tech companies played a role directly or indirectly in supporting these sites.” ProPublica further found that: “PayPal, the payment processor, has a policy against working with sites that use its service for “the promotion of hate, violence, [or] racial intolerance.” Yet it was by far the top tech provider to the hate sites with donation links on 23 sites, or about one-third of those surveyed by ProPublica.

A recent Pew Research Center survey found that 41% of adult Americans “have been personally subjected to harassing behavior online, and an even larger share (66%) has witnessed these behaviors directed at others. ... [N]early one-in-five Americans (18%) have been subjected to particularly severe forms of harassment online, such as physical threats, harassment over a sustained period, sexual harassment or stalking.” A full 58% of those who have been harassed online said it happened via social media, while for 23% their “most recent” harassment experience occurred in the comments sections of a website; for 15% the harassment occurred via a text or messaging app. Occasionally, ISPs will help out individual harassment victims. But they are not required to do so, and usually they will not.

A few large social media platforms are voluntarily addressing some online harassment campaigns to appease advertisers and large, well-organized interest groups, with intermediations that focus on hate speech targeted at groups that share common characteristics such as race, gender, sexual orientation, political beliefs or religion. Some affected individuals see such interventions as inadequate, while other people see them as censorious threats to freedom of expression online. The companies that own these platforms are much more likely base their strategies for addressing online harassment on what is most profitable than striving to carefully balance privacy, safety, and speech interests. Section 230 endorses an approach to speech that is entirely driven by money. The online media companies that rein in threats and hate speech on their platforms in turn create profitable opportunities for the emergence of new social media platforms on which anything goes.

Even with a strong commitment to expansive free speech principles, a sense of decency and fair play should make one question the legitimacy of §230 as currently written and interpreted. Manufacturers, food producers, and companies in the service industries have to take responsibility for goods, no matter how large the company or how prodigious its output. But gigantic, fabulously wealthy companies like Facebook, Google and Twitter do not have to take any responsibility for the harms caused by the online platforms they own, control and profit from. Section 230 means that companies are allowed to facilitate or ignore speech-ignited harms they absolutely have the right and ability to control, as long as someone else is the speaker.

Some people tout §230 as the law that created the Internet. But given the willingness of social media, e-commerce, Internet search and web hosting businesses to do business in nations that lack laws anything like §230, his-trionic claims that without §230 successful and creative online companies like Google, Facebook and Twitter would not exist or could not thrive are unsustainable.

As I have argued before ISPs would still be profitable even if they were required to affirmatively mitigate the most severe of the harms that result from some portion of the online speech they host. China has one of the most highly censored Internets in the world, and it still has highly innovative and extremely profitable Internet companies. This is not at all, in any regard, a suggestion that the United States should follow China’s example with respect to Internet regulation. It is simply to note that China has high levels of both censorship and innovation simultaneously, and remains a desirable market for U.S. companies despite the intensive censorship. Chinese social media company Tencent is the second largest in the world, second only to Facebook, and both Tencent and its Chinese social media competitor NetEase are larger and more profitable than Twitter. And Facebook, currently blocked by the Great Firewall of China, is still trying to find its way back into the Chinese market, using innovative approaches. So is Google.

Germany has recently instituted a law against hate speech that will require ISPs to police their own platforms. This law applies to social media sites with more than two million users in Germany. Other European Union members may do the same. But no large Internet company has yet suggested it will retreat from the German Internet or from the European Union generally. Again, this is not an endorsement of Germany’s approach. It is simply offered as further evidence that the absence of §230 style ISP immunity does not dissuade large Internet companies from participation or profit seeking.

In the United States, as long as §230 remains in place and unchanged, the only options for badly victimized parties are to engage potentially costly lawyers who may not be able to help them, or to employ expensive and potentially unsavory reputation defense companies that have few if any effective tools to offer. Thoughtfully carving out a few more exceptions to §230 aimed at reducing serious online harassment will not break the Internet.

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Policy Architecture and Internet Freedom

What the ‘Zeran’ case reminds us is that the Internet could not become what it is today without a “policy architecture” that facilitates a no-gatekeeper technology.

By Jerry Berman

The Internet has emerged over the last two decades as the dominant medium of electronic communication, commerce, and speech in the world.

In the United States and other western democracies, this decentralized, no-gatekeeper network of networks allows billions to connect and communicate with each other and the world both individually and through intermediaries like AOL in the early days and Facebook and Twitter today. It is a medium of communication like no other. It allows anyone and everyone with a computer and Internet connection to publish and speak.

When we celebrate the Internet, we most often focus on the genius of the technology and the innovative technologists, the “Wizards who Stayed Up Late,” the creators of the World Wide Web, devices like the iPhone and incredible social applications like Google and Facebook. And we should!

However, what the Zeran case reminds us is that the Internet could not become what it is today without a “policy architecture” that facilitates a no-gatekeeper technology. Zeran, upholding §230 of the Communications Decency Act (CDA), embeds in law that Internet ISPs can connect millions of users without the burden of liability for the speech engaged in by those speakers.

ISPs may publish and post but only the speaker is liable for his or her speech, such as the arguably defamatory speech posted on AOL and directed at Zeran. And no liability meant no gatekeepers. And the shield of Zeran has stood up to protect ISPs from legal liability for a variety of objectionable speech published on the Internet.

Without §230 of the CDA, or some legal regime akin to it, the potential of the Internet would have been stifled. AOL and other intermediaries would have been forced to do the impossible: review and edit postings in advance, hire a squad of lawyers to limit postings, and defend a myriad of lawsuits. Large and well-financed operators could operate, but speech would be limited and new applications might never have emerged if required to finance costly legal overhead to do business on the Internet. It is almost impossible to imagine the rise of Facebook or Twitter without the “breathing room” afforded by §230.

It is important in this context to emphasize that §230 was not a foregone outcome of the legislative and legal battle from which it emerged. I was one of the leaders of the Interactive Working Group (IWG), an ad-hoc non-partisan coalition of industry and advocacy organizations formed to oppose the CDA. The IWG included companies, industry associations, and advocacy organizations that included a diversity of the communications and emerging Internet industry and advocacy organizations, both liberal and conservative.

I believe it is instructive to consider how IWG worked to bring about §230. The lessons learned are particularly important today in the face of mounting calls by legislators and states attorney generals to revisit and revise §230 to limit the liability shield of intermediaries to counter a growing list of harms including sex trafficking, cyber bullying, hate speech, fake news, and incitement to terrorism and violence.

In 1995 the CDA was proposed to address pornography on the Internet. The solution was simple: extend the indecency rules governing mass media radio and television to the...
As the CDA, sponsored by Senator James Exon (D-Neb.) moved through the Senate (hereinafter EXON CDA), the IWG faced an uphill battle. We decided to educate lawmakers that the Internet was fundamentally different in architecture and operation. The IWG worked to educate policymakers about the nature of the new technology and focused their attention on user empowerment blocking tools to empower users to control what was available on their computers to meet their own choices and protect children. We made the case that this was the only effective, and least restrictive, constitutional way to address objectionable speech in this new medium.

The IWG also sought persuade Congress to support a Sen. Patrick Leahy’s (D-VT) proposal (S. 714, the Child Protection, User Empowerment, and Free Expression in Interactive Media Study Bill, April 1995) to “study” the new medium.

However, Congress has never met a pornography proposal it did not embrace. Indeed, regulating pornography was a particular promise in the Republican “Contract with America” that Republicans used to frame the 1994 election, and it resulted in Republicans getting control of the House and Newt Gingrich the speakership. Thus, despite our efforts, the Exxon CDA passed the Senate in June 1995. (For more background on the CDA, see Robert Cannon, The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway).

In the House, the IWG moved in a different direction. We persuaded the House Speaker to declare Exxon unconstitutional. On June 20, 1995, Newt Gingrich put out the following statement:

I think that the Amendment you referred to by Senator Exon in the Senate will have no real meaning and have no real impact and in fact I don’t think will survive. It is clearly a violation of free speech and it’s a violation of the right of adults to communicate with each other. I don’t agree with it and I don’t think it is a serious way to discuss a serious issue, which is, how do you maintain the right of free speech for adults while also protecting children in a medium that is available to both? That’s also frankly a problem with television and radio, and it’s something that we have to wrestle with in a calm and mature way as a society. I think by offering a very badly thought out and not very productive amendment, if anything, that put the debate back a step.

Under that cover, IWG worked with Reps. Chris Cox (R-CA) and Ron Wyden (D-Ore.) to propose alternative legislation, H.R. 1978, the Internet Freedom and Family Empowerment Act, June 30, 1995 (hereinafter Cox-Wyden). IWG put together a study published by the Center for Democracy and Technology called Parental Empowerment, Child Protection and Free Speech in Interactive Media. Jerry Berman and Danny Weitzner of CDT, Jill Lesser of People for the American Way, and the late Ron Plessner of Piper and Marbury, wrote the study. The study recommended a non-regulatory approach along the lines of §230. As Sen. Leahy acknowledged, the IWG study became the policy framework for Cox-Wyden and §230.

Cox-Wyden passed the House as a freestanding amendment to the main Telecommunications Act then before the Congress in response to the Exxon CDA. Essentially, the House (by an overwhelming vote) took a wholly different approach to the problem of objectionable speech than the Senate.

Heading into conference, pressure from family groups supporting the Exxon CDA mounted; and neither Wyden nor Cox was appointed as conferees. But our coalition put up enough of a fight to persuade the conferees to adopt all of §230. The provision, as opposed to the creation of a “Federal Computer Commission,” nevertheless remained in the final CDA section of the Telecommunications Act to shield intermediaries from legal liability for defamation and other forms of objectionable speech or “Good Samaritan” efforts to protect and empower users against such speech. For more on this, see the panel discussion featuring Sen. Ron Wyden, Jerry Berman, Danny Weitzner and others on the Statute that Saved the Internet in 2013, celebrating §230 on its 15th Anniversary.

The subsequent court battle resulted in a Supreme Court decision striking down the Exxon CDA as violating the First Amendment, but also upholding as constitutional both the findings and operative provisions of §230. While we know the case as ACLU v Reno as the ACLU was the first to file a challenge to the law in court, the Circuit and Supreme Court adopted the reasoning of a second challenge to the CDA.

After the ACLU filed, three members of the IWG (CDT, AOL, and the American Library Association) organized a second challenge to the CDA, American Library Association v. Reno (hereinafter the ALA case), that was consolidated with the ACLU challenge. For the inside story of these challenges, see Kara Swisher, AOL.COM.

In court, ALA lawyers presented the case and focused on the nature of the technology. They argued that in this vast sea of content, the CDA violated the First Amendment because the most effective and least restrictive means for addressing objectionable content was to empower users to choose what content to access themselves. Adopting this rationale to strike down the Exxon CDA but leaving §230 in place, the decision transformed the Communications Decency Act into the “Communications Freedom Act.”

The lesson going forward is that a legal challenge was not enough to address the threat to the Internet. It required the presentation of an alternative solution that could prevail in Congress and pass muster in the courts. See John B. Morris, Jr and Cynthia M. Wong, Revisiting User Control: The Emergence and Success of a First Amendment Theory for the Internet Age. To achieve this result, defenders of the Internet had to engage in legislation and litigation and devise
practical effective policy alternatives and solutions.

Today, pressure is mounting to enact exceptions to §230. Civil liberties groups are making the case in litigation that exceptions that expose intermediaries to broad liability would fundamentally shift the Internet to a gatekeeper regime. But even if the 230 defense holds, there are problems to resolve that involve new policy initiatives in forums other than the courts.

Ironically, the Good Samaritan provisions that exempt intermediaries from liability for taking steps to limit “objectionable speech” could begin to have unintended negative impacts on speech if ISPs bow to pressure and censor hate speech or fake news and other forms of controversial speech under the “Good Samaritan” protection of §230 that shields them from liability for doing so. The drafters of §230 at the time envisioned an Internet of many ISPs competing for customers and providing such a wide range of speech platforms that censorship would be minimized. And this has worked well.

But today, with few ISPs exercising huge network effects (like Facebook that serves over 2 billion users), “Good Samaritan” speech limitations, however well intentioned, might curtail the ability of all to speak and access information because few entities control the platforms. This, in turn, might create pressure for government to regulate content decisions by intermediaries for or against one form of speech or another.

To address these new speech issues, we need a new Interactive Working Group coalition to oppose unwise tampering with §230 but who work together to flesh out and propose workable solutions and best practices to foster Internet industry self-government. If “intermediaries” like Backpage are in fact producing the content advertised on a site, lawmakers could find a solution that treated such a provider as a content producer outside the intermediary liability protection of §230. And if intermediaries take steps to limit content, they should be working together to develop “best practices and standards” to control objectionable speech without harming the First Amendment. Without workable private sector alternatives, the government may step in and pass legislation that would pass constitutional muster but hamper an open Internet.

The Internet was not born free. It was made free and will only remain free if a concerted effort is made to keep it free.
Sex, Scandal and Intermediary Liability: Imagining Life Without ‘Zeran v. AOL’

The Bazee.com legal saga highlights what could happen without a strong third-party liability protection standard for Internet businesses.

By Hillary Brill

As I was settling into my role as eBay’s first Legislative Counsel, my office received an urgent call from CEO Meg Whitman requesting help with the India Situation, a.k.a. “Operation Save Avi!”

It was 2004 and Avnish Bajaj, American citizen and Harvard Business school graduate, was head of eBay subsidiary Bazee.com. Up for auction, without his knowledge, was a link to a video clip of New Delhi students having oral sex. The seller, a different student, listed the item for a little under $3. The clip was never sold and was never shown. Avi had nothing to do with the video and never even viewed it.

The illicit item was immediately taken down by Bazee.com upon notification of its pornographic content. The end user license agreement prohibited pornography and Bazee.com acted accordingly. The company, and Avi personally, fully cooperated with all legal proceedings and complied with all requests by the Indian government. Despite his cooperation, Avi personally was arrested and charged with violating India’s Information Technology Act of 2000.

Avi’s arrest caused an uproar in the U.S. government. Members of Congress became involved and then Secretary of State Condoleeza Rice called on the Indian government to ensure Avi’s safety and to grant him a fair trial. The U.S. embassy submitted a statement indicating that there was a high level of interest in the U.S. government regarding the case. While eBay’s government relations team felt like we were doing our best to save Avi, it was almost Christmas Eve and Avi was sleeping on the floor of a jammed prison cell merely because of third-party content posted on an eBay site. For my team in Washington, it was unfathomable and terrifying.

Fortunately, cooler heads eventually prevailed, and soon after Avi was released and charges were dropped. But the Bazee.com legal saga highlights what could happen without a strong third-party liability protection standard for Internet businesses. Avi’s case is a real-world example where limited liability protections in §230 of the CDA did not exist. A petri dish scenario where we can observe what could happen if there were not protections—like those established in the seminal limited liability decision Zeran v. AOL—for intermediaries like Avi and Bazee.com from liability based on third-party content.

In the United States, however, these liability protections are in place and are the cornerstone of the modern day internet and an enabler of the burgeoning Internet of Things (IoT). Without the protections of §230, nascent e-commerce companies like eBay or Amazon might not have grown into thriving enterprises, and might not have survived at all. News of a CEO thrown into U.S. prison because of something unknowingly listed on a site (not even sold) could have poten-
tially brought e-commerce to a standstill.

In India, the impact of the Bazee.com case led to an appeal by industry to amend the Information Technology Act of 2000 to provide liability protection to intermediaries with respect to user-generated content. It took eight more years for India to begin to implement a better system to protect intermediaries from liability. In 2008, an amendment to §79 of the Information Technology Act created a new standard of limited liability: “an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him” and requires “actual knowledge.” Additionally, it established a new notice and take down regime with safe harbor provisions modeled after the EU Directive 2000/31 and similar U.S. laws such as §230 of the CDA and 17 USC § 512.

Even under this amended law, however, intermediary liability protections in India remained limited compared to the U.S. This proved true in Google India v. Visaka Industries, which involved a defamation lawsuit against Google for not taking down alleged defamatory third-party blog posts railing against the evils of an asbestos company. Google argued for third party immunity under §79 of India’s amended Information Technology Act 2000. The Indian court refused to drop the defamation charges against Google holding that Google failed to take any steps to block or stop the dissemination of the defamatory material despite receiving notice.

In essence, the Indian court took the opposite approach from the U.S. court in Zeran. Whereas Zeran construed §230 broadly to bar lawsuits seeking to hold an intermediary liable for objectionable third-party content, the court in the Google India case construed protections narrowly, such that an intermediary may be held liable if it had knowledge of allegedly defamatory content and failed to take it down, notwithstanding the absence of any judicial finding of defamation.

While the Google India case is still on appeal, a landmark decision in 2015 may increase Google India’s prospects and suggests third-party liability protections are broadening. In Singhal v. Union of India several liability-imposing provisions of the Information Technology Act were held unconstitutional. Singhal involved the arrest of two women using social media to criticize local government. The court absolved them of liability and struck down §66A of the Information Technology Act because it imposed criminal liability based on an unduly vague legal standard. Moreover, the court examined §79 (at issue in the Google India case), and, while it declined to strike down the measure, it held that liability may be imposed under the statute only if an Internet company refuses to take down objectionable material after a court orders it to do so.

Echoing the reasoning of Zeran, the Singhai court held that “it would be very difficult for intermediaries like Google, Facebook etc. to act [pre-emptively] when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not.” The Singhai case is a testament to just how far India has come since the “Save Avi” days.

As we celebrate the 20th anniversary of AOL v. Zeran, let us reaffirm that intermediary liability protections should remain strong to encourage innovation and promote a thriving civil society both in the United States and worldwide. Otherwise, another young legislative counsel may have to save another Avi one day soon.
How the Scam Artists at Stratton Oakmont Made ‘Zeran’ Possible and Unwittingly Saved the Internet

It would be fair to say that this hugely favorable result likely would never have come to pass without an earlier court decision involving the Stratton Oakmont brokerage firm, infamously memorialized in the movie “The Wolf of Wall Street.”

By Robert J. Butler

In Zeran v. America Online, the Fourth Circuit upheld the broad grant of immunity for interactive service providers set out in §230 of the Communications Act, 47 U.S.C. §230. The court found that the new statute established a clear Congressional intent to exempt the emerging online industry from the threat of liability for information posted by others on their networks or transmitted over and through them. Obviously, this decision was very gratifying to the industry, and especially to those of us who had spent many months crafting and negotiating that legislation. It would be fair to say, however, that this hugely favorable result likely would never have come to pass without an earlier court decision involving the Stratton Oakmont brokerage firm, infamously memorialized in the movie “The Wolf of Wall Street.”

The complex legal and political issues that ultimately generated §230 as it was reviewed in Zeran had their genesis in a Senator’s desire to protect kids from pornography and other objectionable materials available on this new technological medium called the Internet, and a New York court that found Prodigy Services Company, one of the preeminent online pioneers, liable for millions of dollars because it tried to do just that. Given the obvious disconnect between those perspectives, the path to a resolution that could protect Prodigy and the rest of the online industry from potentially crippling liabilities was both far from clear and littered with proverbial minefields. How we got from those early existential threats to Zeran is an interesting exercise in legislative craftsmanship and political theater, with a substantial dose of legal irony.

In brief, it all started with the Exon Amendment to §223 of the Communications Act, 47 U.S.C. §223, as amended. [A comprehensive early legislative history of this provision can be found here.] Senator James Exon of Nebraska proposed to update existing prohibitions in the Act related to obscene and other objectionable materials and activities using a telephone to include the new online medium. At virtually the same time, Prodigy Services Company was fighting a lawsuit filed by the Stratton Oakmont financial firm over allegedly defamatory comments posted on a Prodigy bulletin board by some of its users. Stratton Oakmont successfully argued that, since Prodigy screened its postings for profanity, it could not take advantage of the historical distributor/conduit immunity that had saved an online rival from liability in a similar case, Cubby v. Compuserve. As Washington counsel for Prodigy, I was tasked to work with Senator Exon’s staff to address both of these potentially devastating developments.

As originally introduced in 1994, Senator Exon’s amendment proposed simply to change references in §223 from “telephone” to “telecommunications device” and to add “communication” to “conversation” in order to accommodate “changing technologies.” The challenge facing the industry was to convince the Senator and others not to throw out the Internet baby with the “dirty” bath water of Internet porn. It would be impossible for online services to screen and block access to all prohibited material, especially when such...
activities would expose them to inordinate liabilities for the millions of other postings on their services. Unfortunately, that debate would have to be held against the backdrop of a Congress that had never seen anti-pornography legislation that it didn’t support. The Stratton Oakmont case, which was subsequently settled, provided the leverage to make a skeptical Congress receptive to the industry’s need for protections so that it could act responsibly in the ever evolving Internet environment.

After months of discussions with the online industry and other interest groups, Senator Exon agreed to add language to his Communications Decency Act (CDA) that disclaimed the Stratton Oakmont precedent, which would otherwise deter online actors from implementing his desired restrictions. See Report 104-23, 104th Cong., 1st Session (March 30, 1995). As further revised and adopted in conference as part of the Telecommunications Act of 1996, the expanded statutory language prohibited, in relevant part, the use of an interactive computer service to make indecent content available to minors absent the implementation of good faith restrictions on their access. However, it also ensured that online services would not be held liable for merely providing access (including incidental functionality such as browsers and search engines) to prohibited materials so long as they were not complicit in the creation, knowing distribution or advertising of those materials. 47 U.S.C. §§223(e)(1)-(3). This language was essential to recognize and protect the role of these new technologies in the expanding Internet space.

Moreover, while establishing the good faith provision of blocking and screening of children’s access to restricted content as a defense to liability, 47 U.S.C. §(e)(5), the Conference Committee version likewise expressly rejected Stratton Oakmont by: (1) declaring that no actions could be brought “against any person on account of any [lawful] activity … taken in good faith” to restrict access to prohibited content, 47 U.S.C. §223(f)(1); and (2) preempting States from imposing liability on commercial, nonprofit, and educational entities as well as libraries that is inconsistent with this regime, 47 U.S.C. §223(f)(2). We hoped that, with these and several other important revisions, public and private network providers could receive at least some benefit from passage of the CDA even if the remainder of the statute survived judicial review.

Notwithstanding our success in mitigating the risk posed by Stratton Oakmont and the CDA within the text of the CDA itself, we recognized that the online industry required more in the way of liability protection if it were to realize its full potential. If liability arose from content not addressed by the CDA, would the facially broad exculpatory language prohibiting lawsuits and disclaiming liability still hold? What would happen if key parts of the CDA were struck down by the courts, as we expected and in fact occurred? (See Reno v. ACLU.) How could we possibly anticipate how this technology would evolve and whether new capabilities would give rise to unforeseen liabilities? Would Cubby even remain good law for the Internet? Fortunately, another vehicle had appeared that the industry could work in parallel with the Senate’s CDA initiative.

Admittedly galvanized in opposition to the Stratton Oakmont decision, House members Chris Cox and Ron Wyden introduced bipartisan legislation to remove that decision’s glaring disincentive for online services to act responsibly with respect to the information transiting their networks. And other representatives of the online industry, as well as additional interest groups, were given the opportunity to work with those Congressmen on their draft of the Internet Freedom and Family Empowerment Act, including what became known as the Good Samaritan Provision, as eventually codified in new §230 of the Communications Act. As the latter name suggests, the initial core of that legislation essentially mimicked the CDA’s protection against liability for good faith blocking and screening of objectionable content. 47 U.S.C. §230(c)(2), (d)(3). But, the sponsors were determined to go a step further here.

Initially, they included findings recognizing the value of the Internet in making available “educational and informational resources to … citizens” and that it has “flourished … with a minimum of government regulation.” 47 U.S.C. §230(a). They then declared that it is U.S. policy “to promote the continued development of the Internet” and specifically “to remove disincentives [such as Stratton Oakmont] for the development and utilization of blocking and filtering technologies” to enable parents and providers to restrict “children’s access to objectionable” materials online. 47 U.S.C. §230(b) (emphasis added). Most importantly, they also inserted the affirmative, broadly exculpatory statement that “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.” 47 U.S.C. §230(c)(1) (emphasis added). In effect, this provision both codified Cubby for the online world and extended its reach beyond mere conduit services to cover all third party content. Despite the obvious overlap with sections of the CDA, the Conference Committee between the House and the Senate accepted both provisions in their entirety with only minor revisions, while specifically emphasizing their intent to overturn Stratton Oakmont. Conference Report at 194. The next step would be judicial construction.

In the Good Samaritan Provision’s first major test, the Fourth Circuit in Zeran concluded that subsection (c)(1) of §230, as supported by and interpreted consistent with Congress’ express goals in favor of the development of an unregulated Internet and the empowerment of families to control its use, does provide expansive immunity from liability for online services for content provided by others on their systems. Indeed, Zeran’s broad reading of the Good Samaritan Provision has been upheld and applied repeatedly over the past 20 years, and the Internet has flourished in large part as a result of that enlightened opinion. No other piece of legislation or judicial decision has had a more positive impact on the online industry and its users. But, ironically, neither may have existed absent the litigious actions of an unscrupulous brokerage firm in New York City.
Serendipity and Internet Law: How the ‘Zeran v. AOL’ Landmark Almost Wasn’t

Zeran v. AOL may not be a household name, but it is the Internet’s most important landmark ruling. This seminal court case, which was the first...

By Patrick J. Carome and Cary A. Glynn

Zeran v. AOL may not be a household name, but it is the Internet’s most important landmark ruling. This seminal court case, which was the first to consider the meaning and scope of §230 of the Communications Decency Act, has been a pillar of the legal framework that has permitted revolutionary services such as Google, Facebook, and Twitter to exist and thrive. Under Zeran, websites are generally immune from liability for unlawful or harmful third-party content. Put simply, this precedent is largely responsible for the Internet as we know it.

Over the past two decades, Zeran has been cited in over 250 judicial opinions and discussed in hundreds of law review articles. Judge J. Harvie Wilkinson III’s masterful opinion in Zeran has also stood the test of time. Virtually every U.S. Court of Appeals, and many state supreme courts, have looked to the decision as a reliable key for understanding the reach and meaning of the statute. The Supreme Court has denied dozens of cert petitions seeking to call Zeran and its progeny into question, including in Doe v. Backpage earlier this year. And Congress, in the course of enacting subsequent legislation extending the reach of §230, has hailed the decision as having “correctly interpreted” the statute.

But Zeran as we know it might never have happened. This essay examines various ways in which, if one or two stars had aligned differently, the first case decided under §230 would not have been Zeran, or at least not Judge Wilkinson’s profound and broad landmark. These many layers of serendipity highlight how important legal developments—that in hindsight may be taken for granted—may be affected by seemingly small and even random events.

For starters, it took the bizarre, cruel, and persistent actions of an unidentified troll to set the ball in motion. Whatever motivated the “author” of the online postings that launched this controversy will probably never be known. But his or her impact on Internet law is now clear. In April 1995, six days after the terrorist bombing of the Murrah Federal Building in Oklahoma City killed 168 people (including many children), this miscreant used a series of AOL screen names (including “Ken Z033” and “Ken ZZ03”) to post fake online advertisements for “Naughty Oklahoma T-shirts” purporting to celebrate the attack. T-Shirt “design #651,” for example, would read “Finally, a day care center that keeps the kids quiet – Oklahoma City 1995.” The slogan for “design #568” was “Visit Oklahoma . . . . It’s a BLAST.” The ads directed viewers to call a phone number that Kenneth Zeran, a free-lance artist and film producer in Seattle who had never been an AOL subscriber, used for his home office. The ads told them to “ask for Ken,” and added that, “due to high demand please call back if busy.” There has never been any hint of why the unfortunate Mr. Zeran was targeted.

See Figure 1, next page.

The cruel hoax might never have led to litigation if the fake ads had not gained notoriety outside whatever subset of AOL users (who then numbered around 2.5 million) might have encountered them on the AOL “classifieds” bulletin board where they were posted. But four days after the first

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ad appeared, someone emailed one of the ads to Mark Shannon, then the co-host of a popular morning radio show ("Shannon & Spinozi") on KRXO-FM in Oklahoma City. And two mornings later, while on-air, Shannon "read out the slogans purportedly displayed on the Oklahoma City T-shirts, attributed these slogans to Ken at the telephone number of Ken Zeran, characterized the person who did this as 'sick', and incited the audience to call" Ken. That broadcast, which Zeran's lawyers later described as "devastating," itself was not pre-ordained. Shannon had had the good sense to try to contact Zeran directly before the fateful broadcast. But there was yet another stroke of horrible bad luck for Mr. Zeran—and another bit of serendipity that pointed this controversy toward the courts: Shannon was unable to get through to him.

Just shy of a year later (on April 23, 1996), Mr. Zeran did, of course, commence litigation in federal court against AOL. But he did not sue AOL in a forum that was likely to lead to an appellate decision in the Fourth Circuit, where Zeran was ultimately decided. Nor did he sue in his home district in Washington state. Had he done so, any appeal in the case would have gone to the Tenth Circuit. That course was averted, however, because AOL's initial move was a motion that, in addition to seeking dismissal for improper venue and failure to state a claim, it was subject to personal jurisdiction there. Nevertheless, the judge granted transfer to Virginia as a matter of "convenience," mainly because AOL and its witnesses were there.

If Zeran's lawyers had sued Diamond/KRXO and AOL in a single lawsuit—which would have been perfectly natural, and which they unsuccessfully tried to accomplish after-the-fact by asking the Oklahoma judge to consolidate the two cases, the case probably would have stayed put in Oklahoma. Given the hoaxster's disgusting statements about the Oklahoma City bombing, one can only wonder whether an Oklahoma-based court would have had greater skepticism for AOL's novel §230 defense than the judges who in fact adjudicated the case: District Judge T. S. Ellis in Alexandria, Virginia, and the Fourth Circuit in Richmond, Virginia.

Aside from uncertainties regarding whether and where any claims by Mr. Zeran would be litigated, it was far from certain that the litigation would revolve around §230. In fact, as of late April 1995, when the fake ads appeared on an AOL bulletin board, §230 —along with the rest of the Communications Decency Act and the rest of the Telecommunications Act of 1996—was not even on the books. Indeed, those unfortunate events occurred a full two months before Representatives Christopher Cox (R-Cal.) and Ron Wyden (D-Ore.) introduced the original predecessor to §230, a bill called the “Internet Freedom and Family Empowerment Act” (H.R. 1978). And it would still be another seven months, until February 8, 1996, before the CDA, including the final version of §230, would be enacted and take effect.

Mr. Zeran waited until April 23, 2016—two days before the one-year anniversary of the posting of the first fake ad and eleven weeks after §230 was enacted—before suing AOL. Perhaps his lawyers were focused on the one-year statute of limitations for defamation actions under the laws of many states (including Oklahoma and Virginia). If they had been astute enough to know that §230 was under consideration and to recognize its potential impact, maybe they would have accelerated their efforts and filed suit against AOL a few months earlier, before President Clinton signed the bill into law. In that scenario, Zeran v. AOL likely would not have been the first case in which a court ruled on the scope of §230's protections for online intermediaries.

Both Judge Ellis and the Fourth Circuit later held that AOL's ability to invoke §230 in Zeran turned on the timing had occurred there.

If AOL had accepted Mr. Zeran's choice of venue, his case would never have come before Judge Wilkinson, and any appeal would have gone to the Tenth Circuit. That course was averted, however, because AOL's initial move was a motion that, in addition to seeking dismissal for improper venue and failure to state a claim, requested, in the alternative, a transfer to the Eastern District of Virginia, where AOL was headquartered. The Oklahoma judge held that venue was proper, based in part on AOL's concession that it was subject to personal jurisdiction there. Nevertheless, the judge granted transfer to Virginia as a matter of "convenience," mainly because AOL and its witnesses were there.
of the suit. Focusing on the language of what was then §230(d)(1)—“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section”—the Fourth Circuit held that “Congress clearly expressed its intent that the statute apply to any complaint instituted after its effective date, regardless of when the relevant conduct giving rise to the claims occurred.” Absent that holding and some fortuitous timing, Judge Wilkinson and his colleagues would never have reached the merits of AOL’s §230 defense.

The Oklahoma City lawyers who originally represented AOL in Zeran and succeeded in having the case transferred were aware of §230’s enactment. They briefly discussed the statute in the “merits” portion of the briefs supporting the motion to dismiss they filed in federal court in Oklahoma. Yet far from recognizing this might be a ground-breaking case about the meaning of the brand-new statute, they did not argue that the statute actually applied to the case. Instead, apparently because §230’s enactment post-dated the conduct at issue, they expressly conceded that “[t]he Act may not operate to control the events upon which this lawsuit is based unless it is found to be retroactive.” They offered no argument at all regarding why §230 should control despite the timing of its enactment.

The arguments for dismissal that AOL’s Oklahoma counsel did make focused on principles of negligence under Oklahoma common law, including duty, foreseeability, and non-liability for the deliberate acts of a third party. They briefly alluded to the First Amendment. The arguments for dismissal that AOL’s Oklahoma counsel had come close to conceding that §230 was inapplicable to the case, the Wilmer team devised a strategy to bring §230 front and center. Specifically, the team proposed that AOL (1) file an answer asserting §230 and the First Amendment as affirmative defenses, (2) move for judgment on the pleadings under Federal Rule 12(c) based solely on §230, and (3) argue in that motion that application of §230 would not be impermissibly “retroactive.” Wilmer also proposed a loss-leading fixed fee: $50,000 to defend the case through a decision on the proposed Rule 12(c) motion. Even 20 years ago, that was an aggressively low figure, especially because that fee would also have to cover Wilmer’s handling of many other tasks, including responding to pending discovery requests and taking Mr. Zeran’s deposition, which had to be done quickly to meet the demanding pretrial schedule set in the Eastern District of Virginia, which was then (and is now) commonly called “the rocket docket.”

Based on the competing firms’ written submissions and some follow-up telephone calls, AOL retained Wilmer. At least one of the other firms did not mention the §230 defense in its proposed case strategy. A reliable source recently said that AOL asked one or both of the other two firms to match Wilmer’s proposed fee, but they did not.

Wilmer’s §230-centric strategy also was important to AOL, which was keenly aware of the broader significance of this case to its business model. That strategy prevailed, both before District Judge Ellis and, ultimately, in the Fourth Circuit. Had Wilmer not been invited to pitch for the representation, or if AOL had chosen different lawyers, might the path and outcome have varied?

Nor, of course, was the role of the most important figure in this story—then Chief Judge Wilkinson—preordained. As of July 1997, when briefing of the appeal was completed, there were 16 judges on the Fourth Circuit (three of whom were on senior status), any of whom (absent a conflict of interest) could have been assigned to the case. In 1997, the Fourth Circuit issued 283 published decisions. Judge Wilkinson participated in 61 of them, and he wrote an opinion for the court or a concurrence in 33, with 24 for a unanimous court. So, when the long chain of events described above finally
landed Zeran in the Court of Appeals for the Fourth Circuit, the statistical chance that Judge Wilkinson would cast a vote in the case was at best one in five. And if there was to be a published decision from the Fourth Circuit in the case, the statistical chance (as of the time the appeal was filed) that it would turn out to be a unanimous opinion penned by Judge Wilkinson (as occurred in Zeran) was less than one in 10.

As Carome, his colleague Samir Jain, and AOL in-house counsel Randall Boe awoke in Richmond on October 2, 1997, none of them knew (or could know) which judges would be present when Zeran was called for oral argument later that morning. The Fourth Circuit’s protocol was then (and is now) not to announce the composition of its panels until the morning of oral argument. The first thing Carome did after checking in with the clerk’s office that morning was to go to a courthouse telephone booth to dial a colleague back in Washington, to get a quick read on the three judges he had just learned would hear the case: Chief Judge Wilkinson; Circuit Judge Donald S. Russell; and, sitting by designation, Judge Terrence Boyle, then the Chief Judge of the U.S. District Court for the Eastern District of North Carolina. Carome worried about the seemingly conservative bent of the panel—two Reagan appointees (Wilkinson and Boyle) and a Nixon appointee who before Watergate had served as a legislative assistant to U.S. Senator Jesse Helms (R-NC). He also worried whether any of the members of the panel had familiarity with an interactive computer service such as AOL, CompuServe, or Prodigy. All three judges had been on the bench since at least 1984, well before the popularization of email and the Internet. Judge Russell was 91 years old, and his appointment to the court (in 1971) predated “the first public demonstration of the ARPANET.”

One potentially hopeful note Carome gleaned from his team back in Washington was that Judge Wilkinson had a newspaper background. In between stints as a law professor at University of Virginia School of Law, he worked for three years at The Virginian-Pilot in Norfolk, including as editorial page editor. Perhaps his on-the-ground experience in traditional media would give him a heightened appreciation for the sort of free speech interests embodied in §230. In fact, that experience may well have had a bearing on the important First Amendment notes that Judge Wilkinson later struck in Zeran, including his reliance on the Supreme Court’s decision in Philadelphia Newspapers v. Hepps, which, he wrote, “recogniz[ed] that fears of unjustified liability produce a chilling effect antithetical to [the] First Amendment’s protection of speech.”

Having Judge Wilkinson on the panel, and having him be the author of the decision in favor of AOL, was no guarantee that the case would produce the broad, plain-spoken holding of Zeran that has been cited so often over the past twenty years: “By 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.” Judge Wilkinson and his colleagues might have hewed more closely to the ideal of judicial minimalism, heralded by scholars such as Harvard Law Professor Cass Sunstein, which expects judges to issue narrow rulings confined to the facts at hand. The opinion in Zeran may not have strictly adhered to that approach, broadly declaring websites immune from so-called “distributor liability” (i.e., the sort of notice-based liability that the First Amendment might allow the law to impose on a bookseller) and declining to confine §230 to only defamation claims. While the opinion was both brilliant and correct, a narrower ruling could have emerged. Fortunately, Judge Wilkinson instead took a deep interest in the case and issued a well-reasoned and sweeping opinion. Both in the case at hand and for years to follow, this ruling by a highly regarded conservative jurist, who was then Chief Judge of a conservative court, has ensured that §230 has had the effect Congress intended: lifting what would otherwise be, in Judge Wilkinson’s words, “an impossible burden in the Internet context.”

After the Fourth Circuit’s decision, the case was not entirely over. Mr. Zeran filed a cert petition for review in the Supreme Court. It seemed highly unlikely that the high Court would take an interest in the case. As this was the first case to construe §230, there obviously was no conflict among appellate courts, and the Supreme Court rarely engages in mere error correction. The Wilmer team and AOL advised the Supreme Court that it would not submit a brief in opposition to Mr. Zeran’s petition. But on April 21, 1998, three years to the week after the posting of the fake T-shirt ads, the Supreme Court called for a response to Mr. Zeran’s petition. The uncertainty finally ended two months later, when the Supreme Court denied the petition, leaving Judge Wilkinson’s landmark opinion in place as a steady and bright—perhaps not foreordained—beacon to lead other courts across the country.

* * *

In an alternate universe in which the Zeran landmark never materialized, the first judicial decision addressing the scope of §230 probably would have come from a state court in a case involving the “third rail” of child pornography. Captioned Doe v. AOL, that case was filed in the Circuit Court for Palm Beach County, Florida, on January 23, 1997. That was exactly nine months after Mr. Zeran sued AOL, and about ten months before the Fourth Circuit’s Zeran decision. After Zeran, Doe v. AOL was the next case to be filed anywhere that would produce a reported court decision construing §230. It also was the only other case to reach and resolve the “retroactivity” question that was decided in Zeran.
The plaintiff in Doe v. AOL was a mother, referred to as Jane Doe, suing on behalf of herself and her minor son, John Doe. The defendants were AOL and an AOL user named Richard Lee Russell. If the facts in Zeran were very bad, the facts in AOL v. Doe were horrible. In 1994, Russell, a neighbor of the Does, allegedly lured John Doe, then eleven years old, and two other boys to engage in sexual activity with each other and with Russell. Russell allegedly photographed and videotaped those acts, and then used AOL chat rooms to market those materials to other pedophiles, resulting in the sale of at least one of the videos. By the time the suit was filed, Russell was in federal prison based on these activities. Jane Doe alleged that AOL had known that its chat room feature was being used in this manner by pedophiles. One of the more memorable refrains of her court papers was that AOL had knowingly allowed its chat rooms to become the “Home Shopping Network” for child pornography. She asserted claims for negligence and negligence per se, referencing Florida criminal statutes prohibiting the sale or distribution of obscene materials. AOL could not remove the case from state to federal court because there was no diversity of citizenship (both Jane Doe and Russell were from Florida) and because the availability of a federal defense generally does not provide a basis for federal question jurisdiction.

As in Zeran, AOL retained Wilmer to defend Doe, and once again the defense strategy focused on §230. At each step of Florida’s multi-level court system, the presiding judges could look to, and rely on, Zeran as a basis for dismissing all of the claims asserted against AOL. In June 1997, the Florida Circuit Court (the trial-level court) granted AOL’s motion to dismiss based on §230, citing Judge Ellis’ three-month-old decision in Zeran. Jane Doe promptly appealed to the Florida District Court of Appeal. In October 1998, a three-judge panel of the Court of Appeal affirmed “[f]or the reasons expressed in Zeran.”

Although the Florida Court of Appeal’s decision in Doe was unanimous, it nevertheless called for the Florida Supreme Court to examine the case. “[D]eem[ing] the questions raised as to the application of §230 of the Communications Decency Act to be of great public importance,” it certified to the state high court three questions: whether §230 applies in cases where the events predate the statute’s effective date, whether §230 preempts Florida law, and whether §230 provides immunity to a computer service provider that had notice of the allegedly unlawful postings.

By a bare 4-3 vote, the Florida Supreme Court approved the decision of the Court of Appeal. The majority’s decision closely tracked Zeran’s reasoning and blockquoted large swaths of Judge Wilkinson’s opinion. Aligning with Judge Wilkinson, the slim majority held that “the gravamen of Doe’s alleged cause of action” was “liability based upon negligent failure to control the content of users’ publishing of allegedly illegal postings,” which are “analogous to the defamatory publication at issue in the Zeran decisions.”

Would the final vote in Doe v. AOL have been the same if Zeran had not already blazed the trail? The facts were arguably more shocking than in Zeran. Perhaps one of the justices of the Supreme Court of Florida would have tipped to weighing Floridian interests more heavily than federal interests. Even with the benefit of Zeran, the three dissenting justices met the majority with stinging disagreement. Justice Richard Lewis called the majority’s interpretation “absurd,” “totally unacceptable,” and based on “faulty analysis.” He asked why a website alerted to impermissible content posted by a customer of its service “may, with impunity, do absolutely nothing, and reap the economic benefits flowing from the activity?”

* * *

Judge Wilkinson got it absolutely right in Zeran. And, we are confident that, even if the Zeran landmark had never materialized, the courts of the United States nevertheless would ultimately have reached a consensus in construing §230 to provide broad immunity for online intermediaries, as Congress intended. But the path to that outcome might have been more difficult and tortured if the first appellate decision interpreting the statute had come from a less bold, brilliant, and respected jurist than Judge J. Harvie Wilkinson.
20 Years of Protecting Intermediaries: Legacy of ‘Zeran’ Remains a Critical Protection for Freedom of Expression Online

Section 230 has proven to be one of the most valuable tools for protecting freedom of expression and innovation on the Internet.

By Cindy Cohn and Jamie Williams

At the Electronic Frontier Foundation (EFF), we are proud to be ardent defenders of §230. Even before §230 was enacted in 1996, we recognized that all speech on the Internet relies upon intermediaries, like ISPs, web hosts, search engines, and social media companies. Most of the time, it relies on more than one. Because of this, we know that intermediaries must be protected from liability for the speech of their users if the Internet is to live up to its promise, as articulated by the U.S. Supreme Court in ACLU v. Reno, of enabling “any person … [to] become a town crier with a voice that resonates farther than it could from any soapbox” and hosting “content … as diverse as human thought.”

As we hoped—and based in large measure on the strength of the Fourth Circuit’s decision in Zeran—§230 has proven to be one of the most valuable tools for protecting freedom of expression and innovation on the Internet. In the past two decades, we’ve filed well over 20 legal briefs in support of §230, probably more than on any other issue, in response to attempts to undermine or sneak around the statute. Thankfully, most of these attempts were unsuccessful. In most cases, the facts were not pretty—Zeran included. We had to convince judges to look beyond the individual facts and instead focus on the broader implications: that forcing intermediaries to become censors would jeopardize the Internet’s promise of giving a voice to all and supporting more robust public discourse than ever before possible.

This remains true today, and it is worth remembering now, in the face of new efforts in both Congress and the courts to undermine §230’s critical protections.

Attacks on §230: The First 20 Years

The first wave of attacks on §230’s protections came from plaintiffs who tried to plead around §230 in an attempt to force intermediaries to take down online speech they didn’t like. Zeran was the first of these, with an attempt to distinguish between “publishers” and “distributors” of speech that the Fourth Circuit rightfully rejected. As we noted above, the facts were not pretty: the plaintiff sought to hold AOL responsible after an anonymous poster used his name and phone number on an AOL message board to indicate—incorrectly—that he was selling horribly offensive t-shirts about the Oklahoma City bombing. The court rightly held that §230 protected against liability for both publishing and distributing user content.

The second wave of attacks came from plaintiffs trying to deny §230 protection to ordinary users who reposted content authored by others—i.e., an attempt to limit the statute to protecting only formal intermediaries. In one case, Barrett v. Rosenthal, the attackers succeeded at the California court of appeals. But in 2006, the California Supreme Court ruled that §230 protects all non-authors who republish content, not just formal intermediaries like ISPs. This ruling—which was urged by EFF as amicus along with several other amici—still protects ordinary bloggers and Facebook posters in California from liability for content they merely

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republish. Unsurprisingly, the California Supreme Court’s opinion included a four-page section dedicated entirely to Zeran.

Another wave of attacks, also in the mid-2000s, came as plaintiffs tried to use the Fair Housing Act to hold intermediaries responsible when users posted housing advertisements that violated the law. Both Craigslist and Roommates.com were sued over discriminatory housing advertisements posted by their users. The Seventh Circuit, at the urging of EFF and other amici, held that §230 immunized Craigslist from liability for classified ads posted by its users—citing Zeran first in a long line of cases supporting broad intermediary immunity. Despite our best efforts, however, the Ninth Circuit found that §230 did not immunize Roommates.com from liability if, indeed, it was subject to the law. The majority opinion ignored both us and Zeran, citing the case only once in a footnote responding to the strong dissent. It found that Roommates.com could be at least partially responsible for the development of the ads because it had forced its users to fill out a questionnaire about housing preferences that included options that the plaintiffs asserted were illegal. The website endured four more years of needless litigation before the Ninth Circuit ultimately found that it hadn’t actually violated any anti-discrimination laws at all, even with the questionnaire. The court left its earlier opinion intact, however, and we were worried the exception carved out in Roommates.com would wreak havoc on §230’s protections. It luckily hasn’t been applied broadly by other courts—undoubtedly thanks in large part to Zeran’s stronger legal analysis and influence.

**The Fight Continues**

We are now squarely in the middle of a fourth wave of attack—efforts to hold intermediaries responsible for extremist or illegal online content. The goal, again, seems to be forcing intermediaries to actively screen users and censor speech. Many of these efforts are motivated by noble intentions, and the speech at issue is often horrible, but these efforts also risk devastating the Internet as we know it.

Some of the recent attacks on §230 have been made in the courts. So far, they have not been successful. In these cases, plaintiffs are seeking to hold social media platforms accountable on the theory that providing a platform for extremist content counts as material support for terrorism. Courts across the country have universally rejected these efforts. The Ninth Circuit will be hearing one of these cases, Twitter v. Fields, in December.

But the current attacks are unfortunately not only in the courts. The more dangerous threats are in Congress. Both the House and Senate are considering bills that would exempt charges under federal and state criminal and civil laws related to sex trafficking from §230’s protections—the Stop Enabling Sex Trafficking Act (S. 1693) (SESTA) in the Senate, and the Allow States and Victims to Fight Online Sex Trafficking Act (H.R. 1865) in the House. While the legislators backing these laws are largely well meaning, and while these laws are presented as targeting commercial classified ads websites like Backpage.com, they don’t stop there. Instead, SESTA and its house counterpart would punish small businesses that just want to run a forum where people can connect and communicate. They will have disastrous consequences for community bulletin boards and comment sections, without making a dent in sex trafficking. In fact, it is already a federal criminal offense for a website to run ads that support sex trafficking, and §230 doesn’t protect against prosecutions for violations of federal criminal laws.

Ultimately, SESTA and its house counterpart would impact all platforms that host user speech, big and small, commercial and noncommercial. They would also impact any intermediary in the chain of online content distribution, including ISPs, web hosting companies, websites, search engines, email and text messaging providers, and social media platforms—i.e., the platforms that people around the world rely on to communicate and learn every day. All of these companies come into contact with user-generated content: ads, emails, text messages, social media posts. Under these bills, if any of this user-generated content somehow related to sex trafficking, even without the platform's knowledge, the platform could be held liable.

Zeran’s analysis from 20 years ago demonstrates why this is a huge problem. Because these bills would have far-reaching implications—just as every other legislative proposal for limiting §230—they would open Internet intermediaries, companies, nonprofits, and community supported endeavors alike to massive legal exposure. Under this cloud of legal uncertainty, new websites, along with their investors, would be wary of hosting open platforms for speech—or of even starting up in the first place—for fear that they would face crippling lawsuits if third parties used their websites for illegal conduct. They would have to bear litigation costs even if they were completely exonerated, as Roommates.com was after many years. Small platforms that already exist could easily go bankrupt trying to defend against these lawsuits, leaving only larger ones. And the companies that remained would be pressured to over-censor content in order to proactively avoid being drawn into a lawsuit.

EFF is concerned not only because this would chill new innovation and drive smaller players out of the market. Ultimately, these bills would shrink the spaces online where ordinary people can express themselves, with disastrous results for community bulletin boards and local newspa-
pers’ comment sections. They threaten to transform the relatively open Internet of today into a closed, limited, censored Internet. This is the very result that §230 was designed to prevent.

Since Zeran, the courts have recognized that without strong §230 protections, the promise of the Internet as a great leveler—amplifying and empowering voices that have never been heard, and allowing ideas to be judged on their merits rather than on the deep pockets of those behind them—will be lost. Congress needs to abandon its misguided efforts to undermine §230 and heed Zeran’s time-tested lesson: if we fail to protect intermediaries, we fail to protect online speech for everyone.
How the Supreme Court Ignored the Lesson of ‘Zeran’ and Screwed Up Copyright Law on the Internet

Roger Allan Ford discusses the problem with Congress and the courts not extending the ‘Zeran v. AOL’ decision for defamation to its copyright counterparts.

By Roger Allan Ford

Twenty years ago, a federal appeals court said Kenneth Zeran couldn’t sue AOL for failing to remove defamatory posts. It is no exaggeration to say that had the court gone the other way, much of today’s Internet could not exist in its modern form. But when the issue is copyright instead of defamation, Congress and the courts have resisted this lesson; instead of nurturing new industries, they’ve snuffed them out. And just as it was impossible to guess in 1997 the many platforms, tools, and communities that would emerge after the Zeran v. AOL decision, it is impossible to know now how many innovative industries will never emerge due to its copyright counterparts.

Zeran answered a critical question for online services: If a user posts something that’s defamatory, and so violates the law, is the service liable? It’s easy to see why the answer must be no. An online community like AOL doesn’t work without content contributed by users; without that content there is no community. That was true in 1997, and it is even truer today, when content generated by users underlies all kinds of online services. But if a company had to police every piece of user-generated content or, worse, were liable every time a user went too far, it would be impossible to run online services at scale. Facebook and YouTube couldn’t vet each post for defamation liability; certainly a 10-person startup couldn’t do so.

So Zeran made it possible for online services to exist without incurring crippling liability. And that led to a surge of services that billions of users rely on, an explosion the scale and breadth of which the court could not have imagined in 1997. Some of these services are straightforward descendants of AOL and its contemporaries: discussion forums, search engines, and blogging platforms all resemble tools that existed in 1997. Others were less foreseeable. Social networks and online video existed in 1997, but the sheer variety and scope of platforms like Facebook, YouTube, and Snapchat would surprise someone from 1997; likewise, tools like Wikipedia, Genius, and Adblock Plus, which rely on content contributed by users, had few parallels when Zeran was decided.

Zeran’s rule of limited liability was a public-policy success because it created free space in which whole industries could develop. The same cannot be said of copyright policy on the Internet; if Zeran had sued AOL for failing to take down copyrighted content instead of defamatory content, he probably would have won. So new business models that involve copyrighted content are at much greater risk than those involving other kinds of user-generated content.

Take the case of Aereo, a service that let users watch broadcast TV on the Internet. Courts had long held that consumers can legally copy works for space-shifting and time-shifting, so they can watch and listen to video and music at different times on different devices. This is what iPods and DVRs do, and it’s also what Aereo promised to let users do. Aereo set up individual, dime-sized antennas for users so they could record and stream broadcast TV channels. This system
was just a remote DVR: instead of recording shows onto a hard drive in her home, a user could outsource that function to Aereo, just as she might outsource email or file storage to an online service. And so the U.S. Court of Appeals for the Second Circuit held that what Aereo did was legal, just like any other DVR would be.

The Supreme Court disagreed, in a funhouse mirror image of Zeran that destroyed innovation instead of encouraging it. The court noted that Aereo marketed itself as a replacement for cable TV and reasoned that since cable companies “perform the copyrighted work[s] publicly” when they transmit them to subscribers, Aereo must do so as well. It didn’t matter that Aereo’s transmissions were triggered by users, not Aereo itself, or that each user recorded and transmitted her own copy from her own antenna, or that the transmissions were available only to the user, not to the broader public. Instead of analyzing these key distinguishing features of the Aereo system, the court adopted what Justice Antonin Scalia, in dissent, called a “looks-like-cable-TV” test: if a company creates a new business model that competes with an incumbent technology, courts should bend the law to apply the same copyright rules to each. So while in Zeran the court took a narrow view of the plaintiff’s rights, requiring him to sue the people who posted defamatory content instead of the platform hosting that content, in Aereo it took the broadest possible view of the plaintiff’s rights.

Did the Aereo decision actually prevent any innovation? It’s impossible to tell for sure, but there are all sorts of possible business models that would run afoul of the court’s rule. One big contender would be a service to solve fragmentation in video streaming. When all TV was broadcast over the air, people could buy any TV set and pick up any show on any channel. As video moves online, though, there is no streaming service that has every show and no box that can run every streaming service. Instead of just changing the channel, today a user might have to skip a show if she doesn’t have a box that can play it. It’s easy to imagine a service, then, that could tune in and stream video from any service to a custom app or a web browser—effectively, space-shifting for streaming services. But under Aereo, that service is probably illegal. The result is that incumbent rights-holders can veto new businesses that might threaten their incumbency, a power they have been happy to exercise.

Copyright holders have long used their copyright monopoly—legally—to prevent competition, but they have been constrained by limitations like the first-sale doctrine. Back when Blockbuster Video was the state of the art in watching movies, studios couldn’t stop stores from renting them, since the law blocks a copyright holder from restricting what someone does with a copy after it has been sold. But the shift to online business models has upset this balance between creators and others using those creations, since online streaming inherently creates copies and so isn’t subject to the first-sale doctrine.

The Aereo court could have helped restore the balance between creation and competition by limiting rights-holders’ powers, letting people use online services to do the same things they have long been able to do offline. This would have encouraged entrepreneurs to create valuable new businesses and services, just as the Zeran decision did two decades earlier. Instead, the court went the other way. The fault may lie more with Congress than with the courts, since in Zeran, Congress had created an express immunity for businesses relying on user-generated content; Congress’s similar immunity for copyrighted content, a safe-harbor rule that applies when sites have notice and take down allegedly infringing content, is much more limited. Still, there is a long history in copyright law of technologies that look like pirates at first but eventually become respected businesses; recorded music, the VCR, even sheet music were all at one point seen as threats to rights holders. Congress and the courts should keep the Zeran lesson in mind before backing away from that history and preemptively killing off the online services of tomorrow.
Moral Hazard on Stilts: ‘Zeran’s’ Legacy

The Internet today is awash in threats, harassment, defamation, and conspiracy theories which disproportionately burden vulnerable citizens, while the websites, platforms, and ISPs that make it possible are protected from harm.

By Mary Anne Franks

Less than a week after the 1995 Oklahoma City bombing that left 168 people dead, Kenneth Zeran began receiving threatening phone calls at his home. He soon discovered the reason: without Zeran’s knowledge, an anonymous hoaxter had posted a message on an America Online (AOL) bulletin board advertising t-shirts and other paraphernalia glorifying the attack, providing Zeran’s home phone number for interested buyers to call. Although AOL complied with Zeran’s request that the message be removed, new messages with similar content continued to be posted to the site. At one point, Zeran was receiving threatening calls every two minutes. After an Oklahoma City radio station read the slogans on air and urged listeners to call Zeran, the phone calls became so threatening that Zeran’s house was placed under protective surveillance.

Zeran sued AOL for negligence, arguing that the company had failed to respond appropriately after being made aware of the nature of the posts. The case eventually made its way to the U.S. Court of Appeals for the Fourth Circuit, which held that Zeran’s claim was preempted by §230 of the Communications Decency Act (CDA). In reaching its decision, the court asserted that “Congress’ clear objective in passing §230 of the CDA was to encourage the development of technologies, procedures and techniques by which objectionable material could be blocked or deleted,” and holding AOL liable as a distributor for offensive content would conflict with this objective. The court reasoned that the possibility of distributor liability, which applies when a distributor is aware of the unlawful nature of the content, would prompt intermediaries like AOL to refrain from monitoring content at all.

In effect, the court held that entities such as AOL could not be held liable for being nonresponsive to unlawful content because doing so would encourage them to be nonresponsive to unlawful content. The court ignored the obvious point that Zeran’s experience suggested that online intermediaries were already insufficiently motivated to address unlawful content. The court provided no evidence for the claim that distributor liability would make them more so, and failed to recognize that taking distributor liability for websites and ISP off the table in fact “has the effect of discouraging self-policing of content,”[1] contrary to the goal the court itself cited. As one commentator describes it, “[w]ebsites and ISPs know that no matter how inflammatory third-party postings are, complaints from aggrieved parties will be to no avail, even after notice to the website or ISP.”[2]

In economics, the lack of incentive to guard against risk where one is protected from its consequences is known as a “moral hazard.” Zeran’s interpretation of §230 (c)(1), which states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider” creates a clear moral hazard. Twenty years on, there is no evidence that broad immunity from liability has done anything more than encourage websites and ISPs to be increasingly reckless with regard to abusive and unlawful content on their platforms. Today, the Internet is awash in threats, harassment, defamation, revenge porn, propaganda, misinformation, and conspiracy theories, which disproportionately burden vulnerable private

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citizens including women, racial and religious minorities, and the LGBT community. They are the ones who suffer while the websites, platforms, and ISPs that make it possible for these abuses to flourish are protected from harm.

The moral hazard created by protecting interactive computer service providers from liability, even when they knowingly feature, aggregate, and distribute unlawful content, is compounded by the increasing corporate domination of the Internet. Amazon, Apple, Facebook, Google, and Microsoft are now the five largest firms in the world based on market value, and they exert outsized influence on Internet communication and commerce. The corporate structure itself creates its own moral hazard: “the nature of corporate action, where bureaucracy dictates that most of the actors are far removed from the actual harm that might occur as a result of their decisions, increases the likelihood of egregious conduct.”[3] The corporations that exert near-monopoly control of the Internet are thus doubly protected from the costs of their risky ventures even as they reap the benefits. The dominant business model of websites and social media services is based on advertising revenue, and “abusive posts still bring in considerable ad revenue... the more content that is posted, good or bad, the more ad money goes into their coffers.” As Astra Taylor writes in The People’s Platform, these Internet entities are “commercial enterprises designed to maximize revenue, not defend political expression, preserve our collective heritage, or facilitate creativity.”[4] As currently interpreted, §230 provides virtually no way to hold these increasingly powerful entities accountable for the harm they cause.

In a footnote, the Zeran court writes that the “CDA reflects Congress’ attempt to strike the right balance between the competing objectives of encouraging the growth of the Internet on one hand, and minimizing the possibility of harm from the abuse of that technology on the other.” While the court reiterates that Congress has the right to decide how to fulfill its own purposes, it notes “today’s problems may soon be obsolete while tomorrow’s challenges are, as yet, unknowable. In this environment, Congress is likely to have reasons and opportunities to revisit the balance struck in CDA.” Twenty years of moral hazards might be enough.

Endnotes:


[2] Id.


The Possible Redundancy of §230

Both fans and foes of Zeran assume that its interpretation of §230 changed the scope of liability for ISPs under the common law republication rule. Author Brian L. Frye isn’t so sure.

By Brian L. Frye

While hard cases often make bad law, occasionally they also make good law, often by accident. And few cases are harder or made better law than Zeran v. America Online, Inc. (4th Cir. 1997), in which the court held that §230 of the Communications Decency Act of 1996 (CDA) exempts internet service providers (ISPs) from liability for statements made by third parties.

Many commentators believe Zeran “saved the internet” by enabling ISPs to permit unfiltered speech. But others argue Zeran misinterpreted §230, which was intended to encourage ISPs to filter speech. I think Zeran reached the right result, whatever Congress intended §230 to accomplish, because AOL wasn’t liable under the common law rule, either.

Both fans and foes of Zeran assume that its interpretation of §230 changed the scope of liability for ISPs under the common law republication rule. I’m not so sure. While §230 requires courts to use different words than the common law rule, the Zeran interpretation of §230 produces essentially the same results as the common law rule, properly applied.

The Common Law of Libel & the Republication Rule

Under the common law, a person who publishes a false and defamatory statement is liable for libel. The First Amendment sets a standard of fault of “actual malice” for statements about “public figures” and “negligence” for statements of “public concern” about “private figures.” And the “republication rule” provides that a person who knowingly or recklessly disseminates a libelous statement attributed to a third party is also liable for libel. Under the republication rule, “publishers” (e.g., newspapers) are liable because they necessarily know the content of a statement they publish, “distributors” (e.g., newsstands) are liable only if they know or should have known about the libelous content of a statement they distribute, and “conduits” (e.g., mail carriers) are not liable because they cannot know the content of a statement they deliver.

The Road to Zeran

Initially, courts simply applied the republication rule to libel claims against ISPs acting as intermediaries. Some courts held that ISPs were “distributors,” because they did not exercise editorial control over third-party statements. But in Stratton Oakmont v. Prodigy (N.Y. Sup. 1995), a New York trial court held that an ISP was a “publisher,” because it exercised some editorial control over third-party statements posted to a “bulletin board.” Congress enacted §230 explicitly in order to overrule Stratton Oakmont, providing that an ISP is not the “publisher” of “any information provided by another information content provider,” even if it filters that information.

In 1995, an anonymous AOL subscriber purporting to be Kenneth Zeran advertised offensive T-shirts on an AOL bulletin board. Zeran asked AOL to remove the posts, and it complied. But in 1996, Zeran filed a libel action against AOL, arguing that it was liable as a distributor because it knew about the defamatory posts. The district court granted AOL’s motion to dismiss on the pleadings and the 4th Circuit affirmed, holding that §230 exempted AOL from liability for all statements made by third parties.

The Zeran court explained that under the republication rule, anyone who disseminates a libelous statement is a “pub-
lisher” of that statement:

The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law. To the contrary, once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher.

The court also observed that treating ISPs as “distributors” would impose potential notice-based liability, and create “a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not,” thereby chilling speech.

**Section 230 v. the Republication Rule**

Zeran encouraged the development of social media by enabling ISPs to refrain from filtering speech, without fear of liability. But critics argued that it interpreted §230 too broadly, and improperly granted ISPs special protection against libel claims. The combination of §230 and Zeran certainly created a liability rule unique to ISPs. Rather than apply the republication rule, courts effectively ask whether ISPs are acting as speakers or intermediaries.

But Zeran also precluded courts from simply adapting the republication rule to ISPs. In theory, the republication rule applies to any dissemination of a libelous statement made by a third party, irrespective of the context in which it is presented. But in practice, a congeries of “privileges” and “exceptions” often preclude liability. Courts rarely find publishers liable for libelous statements attributed to a third party, unless the publisher knew or should have known the statement was false. And they are even more reluctant to find mere distributors liable.

The republication rule is sensitive to context, and the internet is just another context. A few early cases suggest that courts might have construed the republication rule favorably to ISPs. A 2010 empirical study of defamation claims against intermediaries found that §230 produced outcomes statistically similar to the common law rule. And some recent cases have exempted ISPs from liability for third-party statements without applying §230. In other words, §230 and the republication rule might have reached a similar result by slightly different paths. The medium is not the message.

While Zeran purported to invoke the republication rule, he actually asked the court to expand its scope, and the court wisely declined. The person harassing Zeran surely was liable for libel. But AOL was not, under §230 or the common law rule, because it was merely a conduit, or at most a distributor. AOL's bulletin boards were analogous to physical bulletin boards. No reasonable person could believe that the owner of a bulletin board in a public place endorses everything posted on it, and no reasonable person could believe that AOL endorsed its bulletin board postings. Owners of public bulletin boards – whether physical or virtual – are liable for libelous postings under the republication rule only if they refuse to remove them, thereby implicitly adopting the libel as their own.

The statements falsely attributed to Zeran were libelous because distasteful, but were otherwise perfectly legal, and could have been ads for an actual business. Zeran's complaint was that AOL didn't prevent their posting, or remove them quickly enough. But the republication rule doesn't attribute statements to distributors without knowledge, and doesn't require immediate removal.

Typically, ISPs voluntarily remove libelous statements, once they become aware of them. But it is unclear whether §230 shields ISPs from injunctions to remove libelous material. Some courts have held it does, and others have held it doesn't. Under the republication rule, ISPs would surely be liable for continuing to disseminate a third-party statement once they know it is libelous. I find it hard to believe that courts will ultimately construe §230 differently. At some point, refusal to remove a libelous statement must become an endorsement.

In addition, §230 may offer ISPs procedural advantages over the republication rule. Under §230, actions against ISPs are often dismissed on the pleadings, but under the republication rule actions often proceed to trial. This could reflect substantive differences in the facts: ISPs are typically entirely ignorant of the content of the statements they disseminate, while the ignorance of distributors of information in other media may be more qualified. But if §230 does offer procedural advantages on the same factual claims, perhaps courts ought to ask why, and consider which approach to procedure is most appropriate.
The First Hard Case: ‘Zeran v. AOL’ and What It Can Teach Us About Today’s Hard Cases

They say that bad facts make bad law. What makes ‘Zeran v. AOL’ stand as a seminal case in §230 jurisprudence is that its bad facts didn’t.

By Cathy Gellis

They say that bad facts make bad law. What makes Zeran v. AOL stand as a seminal case in §230 jurisprudence is that its bad facts didn’t. The Fourth Circuit wisely refused to be driven from its principled statutory conclusion even in the face of a compelling reason to do otherwise, and thus the greater good was served.

Mr. Zeran’s was not the last hard case to pass through the courts. Over the years there have been many worthy victims who have sought redress for legally cognizable injuries caused by others’ use of online services. And many, like Mr. Zeran, have been unlikely to easily obtain it from the party who actually did them the harm. In these cases courts have been left with an apparently stark choice: compel the Internet service provider to compensate for the harm caused to the plaintiff by others’ use of their services, or leave the plaintiff with potentially no remedy at all. It can be tremendously tempting to want to make someone, anyone, pay for harm caused to the person before them. But Zeran provided early guidance that it was possible to resist the temptation to ignore §230’s liability limitations - and early evidence that it was right to so resist.

Section 230 is a law that itself counsels a light touch. In order to get the most good content on the Internet and the least bad, Congress codified a policy that is essentially all carrot and no stick. By taking the proverbial gun away from an online service provider’s proverbial head, Congress created the incentive for service providers to be partners in achieving that policy goal. It did this in two complementary ways: First, it encouraged the most beneficial content by insulating providers for liability arising from how other people used their services. Second, Congress also sought to ensure there would be the least amount of bad content online by insulating providers from liability if they did indeed act to remove it.

By removing the threat of potentially ruinous liability, or even just the immense cost of finding itself on the receiving end of legal action arising from how others have used their services, more and more service providers have been able to come into existence and enable more and more uses of their systems. These providers have also been able to resist unduly censoring legitimate uses of their systems as a means of limiting their legal risk. And by being left with the discretion to choose what uses to allow or disallow from their systems, service providers have been free to allocate their resources more effectively to police undesirable use of their systems and services than if the threat of liability instead forced them to divert their resources in ways that might not be appropriate for their platforms, optimal, or even useful at all.

Congress could of course have addressed the developing Internet with an alternative policy, one that was more stick than carrot and that threatened penalties instead of offering liability limitations, but such a law would not have met its twin goals of encouraging the most good content and the least bad nearly as well as §230 actually has. In fact, it likely would have had the opposite effect, eliminating more good content.

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and missing more of the bad. The wisdom of Congress, and of the Zeran court, was in realizing that restraint was a better option.

The challenge we are faced with now is keeping courts, and §230's critics, similarly aware. The problem is that the §230 policy balance is one that works well generally, but not always specifically, and not always in ways people readily recognize. The reality is that people sometimes do use Internet services in bad ways, and these uses can often be extremely visible. What appears to be less visible, however, is how many good uses of the Internet §230 has enabled to be developed. In the 20-plus years since Zeran people have moved on from AOL to countless new Internet services, which now serve nearly 90 percent of all Americans and billions of users worldwide. Internet access has gone from slow modem-driven dial-up to seamless always-on broadband. We email, we tweet, we buy things, we date, we comment, we read, we research, we share what we know, all thanks to the services made possible by §230, but often without awareness of how much we owe to it and the early Zeran decision upholding its tenets. We even complain about §230 using services that §230 has enabled, and often without any recognition of the irony.

In a sense, §230 is potentially in jeopardy of becoming a victim of its own success. It's easy to see when things go wrong, but §230 has done so well creating a new normalcy that it's much harder to see just how much it has allowed to go right. Which means that when things do go wrong - as they inevitably will, because while §230 tries to minimize the bad uses of online services it's impossible to eliminate them all--we are always at risk of letting our outrage at the specific injustice cause us to be tempted to kill the golden goose by upending something that on the whole has enabled so much good.

When bad things happen there is a natural urge to clamp down, to try to seize control over a situation where it feels like there is none. In that microcosm the hands-off approach of §230 can seem like the wrong one, but Zeran has shown how it is still very much the right one.

In many ways the Zeran court was ahead of its time: unlike later courts that have been able to point to the success of the Internet to underpin their decisions upholding §230, the Zeran court had to take a leap of faith that the policy goals behind the statute would be born out as Congress intended. It turned out to be a faith that was not misplaced. Today it is hard to imagine a world without all that §230 has ushered in. But if we fail to heed the lessons of Zeran and exercise the same restraint it did, such a world may well be what comes to pass. As we mark 20 years since the Zeran court affirmed §230 we need to continue to carry its lessons forward in order to ensure that we are not also marking its sunset and closing the door on all §230 might yet bring.
Who Cyber-Attacked Ken Zeran, and Why?

More than 20 years later, it seems unlikely this case of cyber-harassment or “e-personation” will ever be solved.

By Eric Goldman

From late April through early May of 1995, Ken Zeran was the victim of an aggressive online attack—what we would now call a cyber-harassment or “e-personation,” though at the time we lacked this nomenclature. The attacker was pseudonymous, and AOL deleted the relevant server logs (pursuant to what AOL said was standard practice) that might have helped reveal the attacker. (Note: for this essay I’ll assume it was a single person and not multiple attackers, though that too remains unknown.) Zeran sued AOL and the Oklahoma radio station KRKO for their roles in the cyber-harassment, but he never sued the actual perpetrator. Indeed, over two decades later, the perpetrator remains unknown. This has emerged as one of the greatest unsolved mysteries in Internet law: who attacked Ken Zeran, and why?

As part of researching this question, I reviewed the 717-page transcript of AOL defense lawyer Pat Carome deposing Ken Zeran on Feb. 18-20, 1997. Plaintiff lawyer James Ikard represented Zeran at the deposition. The deposition transcript of Ken Zeran was never filed with the court and is not generally publicly available. It doesn’t answer the “whodunit” question, but it does suggest some clues.

Let’s start with Zeran’s own appraisal of the situation in response to Carome’s point-blank question (emphasis added):

Q: Is it your view that the person who posted the messages that you’re suing over here on AOL’s system is someone that does not know you at all?

A: Absolutely ... I believe I was picked at random.

Later in the deposition, Zeran said: “I never had the impression that this was done by somebody who knew me. I certainly, obviously wondered if there was anybody I knew who would do this, and I don’t know anybody that would do it.”

Zeran’s hypothesis that he was a random victim isn’t completely far-fetched. First, in 1995, anarchists and trolls already were making random and chaos-inducing online attacks. See, e.g., Josh Quittner, The War Between alt.tasteless and rec.pets.cats, Wired, May 1994. Second, the Secret Service agent investigating Zeran’s matter suggested it was a random attack. Zeran described the conversation:

[The Secret Service agent] said that—we were kind of in agreement about the—my name being picked—my number at random, because after asking me those questions, he came out and said that it seemed to him my number had been picked at random. I remember when he said that, ... that sort of confirmed my thoughts in a real positive way, that my number, in fact, had been selected randomly. And person from the Secret Service, he’s—he seemed to be experienced about this kind of stuff, so when he said that, you know, it sort of confirmed what my thoughts were.

Still, this hypothesis seems implausible. The attack on Zeran involved multiple postings over several days, was designed to inflict substantial damage, and involved a phone number that would have been hard for any stranger outside the Seattle metro area to attribute to Zeran. So let’s consider some of the most obvious alternative explanations:

• Romantic Entanglements. At the time of the attacks, Zeran had just started dating a new girlfriend for about six weeks. (Note: I’ve decided not to publish the names of any Zeran’s associates because they are unnecessary to the discussion, and I’m not sure their names have otherwise surfaced publicly). Around the same time, Zeran had another woman friend who was a former romantic partner; Zeran said “it was a casual, friendly relationship.” Maybe I’ve watched...
too many TV soap operas, but these facts set up several possibilities. Perhaps one of the women was jealous or upset about a possible love triangle; or perhaps one of the women’s current or former significant others felt anger about Zeran’s involvements.

• Competitors/Current Business Partners. Zeran worked on several wide-ranging projects throughout his career, including art, entertainment and real estate. At the time, in 1995, he was launching a new real estate apartment listing resource called “The Apartment Special.” This initiative was muscling into territory occupied by two competitors who also published guides to apartments for rent. Perhaps one of these competitors sought to sideline Zeran, or at least thwart his endeavor?

Zeran was working on other projects in this timeframe as well, including a Halloween-themed television show and the Puget Sound Money Connection, a publication that promoted various financial institutions. Neither project succeeded. Could the attacker have been an unhappy business partner or competitor?

• Other Creditors. Zeran’s financial picture didn’t clearly emerge in the deposition. Ikard objected to all questions about Zeran’s income because Zeran did not seek economic damages. Still, it’s clear that Zeran was in the midst of several ventures that had proven unsuccessful, and as one of the exhibits indicated, “Mr. Zeran is not a wealthy man.” Could some creditor have attacked Zeran over unpaid debts?

• Defendants. In 1993, Zeran sued two former business associates, claiming that they stole copyrighted content from his Apartment Special television show. The case settled, but could the defendants have held a grudge?

Zeran’s diverse professional activities put him in contact with hundreds of other people over his career, and his personal relationships surely involved hundreds more. While the deposition transcript does not suggest any of these people had malice towards him, such a large universe of professional and personal contacts surely contains numerous other suspects who are at least as plausible as the truly “random” attacker.

So who attacked Ken Zeran, and why? We still don’t know; and after more than 20 years, it seems unlikely this cold case will ever be solved.
No ESC

The thrust and parry of arguments about when online speech should stay up or come down recapitulate well-worn arguments about when offline speech should or shouldn’t be allowed.

By James Grimmelmann

Section 230 is subconstitutional free speech law. One might naively expect it can steer clear of the notorious complexity of First Amendment law, and for the most part it does. Both arms of §230 establish broad and simple rules. There is no mucking about with actual malice, public versus private figures, traditional versus limited public forums, tiers of scrutiny, or any of the other Ptolemaic doctrinal baggage of the First Amendment. Section 230(c)(1) avoids waking the slumbering giant by granting immunity rather than imposing liability for speech, §230(c)(2) by giving private actors rather than state actors a privilege to block speech on their platforms.

Even so, debates about §230’s reach have an oddly familiar ring to them. The thrust and parry of arguments about when online speech should stay up or come down recapitulate well-worn arguments about when offline speech should or shouldn’t be allowed. There are, I think, three things going on. One is that §230 itself is always open to challenge. It may be good law, but that doesn’t tell us whether it’s a good law.

The second is that even though §230’s protection is absolute and its coverage broad, its coverage still has limits (as any law’s must). Some of those limits look a lot like the limits on the scope of “speech” under the First Amendment. And the third is that §230 by design gives platforms substantial freedom to allow speech or to restrict it. In choosing how to exercise that freedom, they have to confront the same conflicts that animate First Amendment doctrine. All three of these open the door to the kinds of arguments that one regularly sees in First Amendment cases and free speech debates.

Speech vs. conduct. The line between “speech” and “conduct” in First Amendment doctrine is contested, and so is the corresponding line in §230 between “information” or “material” of which one can be the “publisher or speaker” and everything else. Some plaintiffs try to plead out of §230 by arguing that failing to supervise sex traffickers, or providing service to terrorists, is conduct rather than speech. And some sharing-economy platforms like AirBnB try to plead into §230 by arguing that they provide a forum for users to speak (albeit in ways that often lead to transactions).

Hate speech and harassment. When do hate speech against groups and harassing speech against individuals go too far? Different countries answer the question in different ways—and so do different platforms. Those arguing for tighter crackdowns make familiar claims about threats, coordinated attacks, psychological abuse, and expressive harms. Those arguing against make equally familiar claims about political speech, counter-speech, chilling effects, and excessive sensitivity.

Intellectual property. Section 230, for better or worse, carves out from its preemption “any law pertaining to intellectual property.” But for better or worse, the First Amendment also gives special deference to IP laws. The result is that invoking IP—particularly copyright—is a common plaintiffs’ tactic for avoiding §230. Some of this is boundary work: the IP fields have their own frameworks for dealing with secondary liability (e.g., §512). But there is also an interesting subconstitutional leveling taking place within IP: recent expansions in fair use are equally available to online and offline defendants.

Rules vs. standards. Very few platforms protected by §230 allow all of the speech they legally could. But policies distinguishing between permissible and impermissible speech (e.g., spam vs. ham), and policies backed up with sanctions (e.g., account deletion) raise familiar jurisprudential problems. In First Amendment terms, platforms and their critics worry about overbreadth, underinclusion, vagueness, and
discriminatory enforcement. Case in point: Twitter’s endless struggle to develop a workable harassment and hate speech policy and make it stick.

Contemporary community standards. The Internet’s breakdown of geographic barriers challenges the First Amendment’s reliance on local community norms to define obscenity. Section 230(e)(1) specifically defers to federal obscenity laws, so online platforms have to live with that uncertainty. But even if they didn’t, the same problem recurs one level down: how much should a platform allow for diverse and conflicting local norms about acceptable freedom of expression? Consider Reddit’s repeated near-meltdowns over the antics of “problematic” subreddits like r/creepshots and r/TheDonald. Any sufficiently large and diverse platform must confront Gödel’s Theorem of Liberalism: no social system can be both consistent and completely tolerant.

State action. One of the most important moving parts in the standard defense of strong First Amendment protections for noxious speech is that individuals can avoid most of it in practice because private actors are free to speak, listen, and convey speech as they choose. The state-action, public-forum doctrine, and government-speech doctrines may be confused and confusing, but they draw a crucial legal and normative line. Even if Internet platforms are currently clearly private for First Amendment purposes, they often regard themselves as having a responsibility to behave responsibly, which they define in ways that rely on traditionally public rule-of-law virtues like availability to all, neutrality, fair notice, and consistency.

Platform speech. Platforms are always ambivalent about the speech they carry: they want to be praised (and sometimes paid) for it, but they also don’t want to blamed for it. In the First Amendment context, every medium presents the issue of when a platform for others’ speech itself “speaks,” with all the attendant rights and responsibilities. Section 230(c)(1) allows platforms to be extraordinarily hands-off; §230(c)(2) lets them be extraordinarily hands-on; the combination of the two lets them be anywhere in between. Plaintiffs sometimes try to argue that one choice or another gives a platform an obligation to allow their speech or to remove someone else’s. These arguments usually fail – but there is a line here, and there has to be, because §230 by its very nature distinguishes between first-party and third-party speech. Perhaps the Roommates.com “contributes materially to the alleged illegality” test is messy for the same reasons that the First Amendment government-speech cases are messy.

Jurisdiction. Free speech issues are global, and different countries have different free speech norms. Anyone who speaks in a way accessible to people in more than one country has to contend with the differences. This is a context in which §230 may not make much of a difference. Any platform with an international reach is going to have to contend with other countries’ more restrictive laws anyway, and those countries may not much care whether American free speech law acts at the constitutional or statutory level. The most important piece of the puzzle here may actually be the SPEECH Act, which explicitly incorporates §230 in making it hard to enforce foreign defamation judgments in the United States – helping give local American platforms the ability simply to ignore what other countries have to say.

* * *

Section 230, everyone agrees, singles out online speech for special solicitude. One dimension of this solicitude is familiar. By protecting online speech more robustly than offline speech, §230 is an example of what Eric Goldman calls “Internet exceptionalism.” Zeran confirmed that online speech intermediaries would be shielded from liability in cases where their offline counterparts would not, and much of the debate around §230 is over the wisdom of this choice. (Personally, I agree with Felix Wu: the risks of collateral censorship on Internet-scale platforms are serious enough that this special immunity is usually justified.

But at the risk of stating the obvious, the other half of the term also matters. Section 230 protects online speech, yes, but it also protects online speech. It is the 21st-century First Amendment. Like any true heir, it has received a great deal from its predecessor: not just the family fortune, but the family feuds as well.
The Satellite Has No Conscience: §230 in a World of ‘Alternative Facts’

Section 230 of the CDA continues to be the right policy choice, but it is up to us to be critical readers, calling out untruths, highlighting and promoting that which is reliable and discrediting that which is not.

By Laura A. Heymann

Twenty-one years after the enactment of the Communications Decency Act, from which §230 survived, and 20 years after the U.S. Court of Appeals for the Fourth Circuit’s opinion in Zeran v. AOL, which set the standard by which §230 was to be interpreted, an increasing number of voices are questioning §230’s scope. The concerns that motivated §230—balancing the flourishing of the Internet against the very real likelihood that some participants would use it for socially undesirable, hateful, or threatening behavior—continue to be relevant today. Indeed, what seems to be a rise in hate speech, false information, and threatening behavior has suggested to some that the balance that Congress struck, and that the Fourth Circuit validated, should be reconsidered.

Section 230 states that “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” and that “no provider or user of an interactive computer service shall be held liable” on account of any good faith, voluntary actions to restrict access to material that the provider or user considers to be objectionable. In short, service providers may either publish the material of others or remove the material of others without risk of liability as a publisher or speaker of that material. The assumption is that without such protections, and given the vast amount of user-generated content on the Internet, providers will blindly delete any material claimed to be objectionable rather than risk liability for making the wrong judgment. Section 230 received its first major test when Kenneth Zeran sued America Online, seeking recompense for the harassment he suffered when unknown parties reacted to a false posting on the service claiming that a “Ken” at his business telephone number was selling offensive T-shirts relating to the Oklahoma City bombing. The Fourth Circuit interpreted §230 to bar liability, given that AOL was not the author of the posting and despite AOL’s reported inaction in the face of Zeran’s requests to immediately remove the posting. (Disclosure: I served as in-house counsel at America Online for three years in the early 2000s.)

The events in Charlottesville, Virginia, on Aug. 12 provide a sobering moment to re-engage with these concerns. Some platform providers have since taken a more active role regarding hateful content on their services (with some deciding to cease providing service altogether to white supremacist groups and other hate groups), while some third parties, in a replay of what befell Kenneth Zeran, publicly misidentified participants in the aftermath of the march, leading to harassment and threats—all activities that, absent §230, could have given rise to service provider liability. These scenarios are further complicated by the fact that, as with the poster in Zeran’s case, the authors of the problematic content may remain forever unknown to those harmed, either because the injured party would not be able to satisfy the legal process courts typically require to disclose user identity information or because of incomplete recordkeeping on the part of the service provider. The combination of these two limitations, some might say, creates an even greater likelihood of bad behavior: service providers freed de jure from the specter of liability and users freed de facto from responsibility for their activity.

Yet §230 continues to be, I believe, the right policy choice. As a result of §230, millions of individuals can communicate with the world virtually instantaneously, without
supervision, editing, or permission. Section 230 gives us a world that provides hundreds of book, film, and restaurant reviews; warns us about unscrupulous businesses; gives us first-hand reporting from war zones and disaster areas; and helps us to understand the plight of individuals who would not feel comfortable sharing their stories through intermediaries. We have moved from a world in which there were fewer content producers and relatively more distributors to a world in which we have many online authors and relatively fewer online distributors. Absent §230, a service provider would be put in the position of a newsstand with an endless supply of unknown publishers seeking to have their papers put out for sale. The scale alone would require any reasonable distributor to turn almost all of them away.

This means, for better or for worse, that more of the work on the Internet must be done by us. We cannot rely on an imprimatur of a newspaper publisher or a broadcast television network for much of the information we read online. We must be critical readers, calling out untruths, highlighting and promoting that which is reliable and discrediting that which is not. (Threats or other criminal behavior should, of course, be reported to and investigated by appropriate authorities.) We must reject information dressed up in the validation of look and feel and recognize that speed sometimes comes at the cost of truth. These are all responsibilities that Congress anticipated in enacting §230 by including in its findings its belief that the better policy is to leave control over the information they receive primarily in the hands of users so as to preserve the possibility of “true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity” with “a minimum of government regulation.” The Fourth Circuit’s decision in Zeran recognized that these findings were not simply rhetorical preamble but part and parcel of §230’s existence.

I say all of this this knowing that, as Kenneth Zeran discovered, we are often porous filters of information conveyed via the Internet, whether through inability, inexperience, inertia, or ignorance. The fourth player in Zeran’s story was KRKO Radio in Oklahoma City. Mark Fullerton, who co-hosted a morning drive-time radio show under the name Mark Shannon, was reportedly known for his “caustic observations” and “ridicule of his verbal targets;” he delighted in the “heated opinions” he fomented. Shannon saw the AOL posting when a listener unknown to him forwarded it to him. He tried to e-mail “Ken” at the AOL screen name in the posting and discovered that the screen name was inactive. He decided not to call the telephone number in the posting because it was before business hours. Despite this complete lack of vetting, Shannon read parts of the post on air and encouraged listeners to call the number and “let the seller know what Oklahomans thought of him.” (During his deposition, Shannon acknowledged that he had talked to Zeran before the broadcast, he would not have broadcast the phone number.)

Kenneth Zeran sued Diamond Broadcasting, the radio station’s parent company, in a separate action in which, of course, §230 was not available to the defendant. Nevertheless, every claim was dismissed. Zeran, the court held, could not succeed on a defamation claim because he could not show that his reputation had been sullied. (No one who knew him heard the broadcast, and no one who heard the broadcast knew him.) He could not succeed on a false light claim or a claim of intentional infliction of emotional distress because the radio station’s employees had been careless but not reckless or intentionally tortious. An on-air apology was apparently Kenneth Zeran’s total redress. (Mark Shannon, for his part, was fired in December 1999 from a later broadcasting position, reportedly for a producer’s offensive on-air comment about the Texas A&M bonfire tragedy that killed 12 students. The Oklahoman reportedly closed reader comments on the article about Shannon’s death in 2010 because of the offensive nature of some of the remarks.)

Kenneth Zeran’s story was rewritten largely because he pursued litigation. Although he lost his lawsuits against both AOL and Diamond Broadcasting, the opinions in those cases, and the publicity that surrounded them, confirmed for any reasonable reader that he was not the “Ken” of the posting on AOL and was, instead, the victim of a cruel hoax. But §230 had not then been tested, and filing today what we would now recognize as meritless litigation against a service provider cannot be the means of historical correction. So the burden is on us, as readers, to do better. As scholar Cathy Davidson writes, we must teach others “to be hypervigilant about veracity, analysis, critical thinking, historical depth, subterfuge, privacy, security, deception, manipulation, logic, and sound interpretation.” We should encourage service providers to consider the implications of their content policies. And we should engage in these efforts publicly, so that the Kenneth Zerans of the world can have the record, if not fully corrected, at least significantly amended.

This undertaking can sometimes seem, admittedly, like rowing against the current. What we should not do, however, is jettison the statute that almost certainly has kept the Internet as we now know it afloat, even as we know that this will bring both harms and benefits. Indeed, although these are incredibly difficult and, for the individuals involved, painful problems, they are not new ones. Section 230 was a response to the medium, not to the message. In his last public speech, in 1964, Edward R. Murrow said, “The speed of communications is wondrous to behold. It is also true that speed can multiply the distribution of information that we know to be untrue. The most sophisticated satellite has no conscience. The newest computer can merely compound, at
speed, the oldest problem in the relations between human beings and, in the end, the communicator will be confronted with the old problem of what to say and how to say it.” Section 230 recognizes that the satellite indeed has no conscience. We do, however, and if we acknowledge that we are better off with the satellite than without it, it falls on us to exercise that conscience as much as we are able.
The Non-Inevitable Breadth of the ‘Zeran’ Decision

When Kenneth Zeran filed his complaint against America Online (AOL) in April 1996, the internet as we know it today did not exist.

By Samir C. Jain

When Kenneth Zeran filed his complaint against America Online (AOL) in April 1996, the internet as we know it today did not exist. Numerous services that for many consumers are now integral to the internet—such as Google, Facebook, YouTube, Twitter and eBay—either had not yet been developed at all or were in their infancy. At the same time, the interpretation of §230 was an issue of first impression. Section 230 had not received nearly the same attention as the rest of the Communications Decency Act (which itself was a single title in the broader Telecommunications Act of 1996), either during the legislative process or in the immediate legal aftermath, in which a Constitutional challenge to the act’s indecency restrictions was already well on its way to the Supreme Court.

In the face of this relatively clean slate, one key strategic consideration was how broadly to frame the case. It was not immediately evident that Congress had enacted a far-reaching immunity in a one-sentence subsection—§230(c)(1)—in the midst of these other more prominent provisions. Such statutory immunity is relatively rare. By providing that “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,” had Congress intended to preempt virtually all state tort and statutory causes of action against service providers, as well as non-criminal federal claims, for third-party content? Would such immunity apply even when a service provider knew of the unlawful content and intentionally chose to take no action?

At least in isolation, it was possible to construe §230(c)(1) more narrowly. The terms “publisher or speaker” could be interpreted in a technical sense to refer to defamation law—libel is a published defamatory statement, while slander is a spoken defamatory statement. Moreover, as the legislative history makes clear, a significant impetus for §230 was overruling Stratton Oakmont v. Prodigy Services, which held a service provider potentially liable for a user’s defamatory posting. And, although Zeran’s claim was for negligence, at bottom the case concerned allegedly defamatory content about Zeran, and, as the Fourth Circuit recognized, the label attached to the claim should not be determinative. Thus, the core of the case could have simply been that, because publication is an element of defamation, holding a service provider liable for defamatory third-party content necessarily treats it as a publisher of that content in derogation of §230. That would have been sufficient for AOL to prevail and left the ultimate breadth of the immunity for another day.

From the start, however, AOL understood the potential significance of §230 to the growth and development of the internet. Although immunity from defamation claims for third-party content would be helpful, the specter of other tort and statutory liability for all other claims still would have a chilling effect on the amount and types of content service providers might permit and create disincentives to self-regulation. Moreover, §230 clearly was about more than defamation. Given the context, Congress at minimum also intended to remove disincentives for self-regulation of indecent and similarly objectionable content. Further, the statutory exceptions for intellectual property, privacy, and federal criminal enforcement would have been unnecessary if the statutory immunity were confined to defamation. Accordingly, the briefs framed the case broadly, explaining that imposing liability on a service provider necessarily treats it as a “publisher or speaker” of third-party content and focusing on the statutory purposes and the practical implications that potential liability would
have for both free speech on the Internet and incentives for self-regulation.

Although the district court wrote a relatively narrow opinion in AOL's favor “limited to the state law claim … asserted here,” the Fourth Circuit took a more expansive approach. Before turning to Zeran's specific arguments, the court described the statute in sweeping terms. In language that was cited repeatedly in subsequent cases, the court explained that “by 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 … lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred. And the court proceeded to discuss in detail how broad immunity was necessary to fulfill the purposes of the statute.

It is fortunate that the Fourth Circuit recognized the significance of §230 and chose to write such a defining opinion. The facts of Zeran—while involving a sympathetic plaintiff victimized for no apparent reason—made it easy to see the pernicious consequences if service providers could be held liable for third-party content. Some of the next few cases that arose, such as Doe v. AOL and Blumenthal v. Drudge, did not present the legal and policy issues as cleanly. The Zeran opinion provided an anchor that moored the decisions in those cases and many subsequent ones. Without the Zeran opinion, on the other hand, the case law might have evolved in a much messier way and not provided the same certainty and assurance that has been so important in fostering the growth of so many internet services.
The Judge Who Shaped the Internet

The outcome in ‘Zeran v. America Online’ is not entirely a result of the facts of the case. Section 230 caselaw might look very different today had other judges been assigned to ‘Zeran v. America Online’.

By Jeff Kosseff

The conventional wisdom about §230 is that the tech sector is lucky that Zeran v. America Online was the first federal appellate decision to interpret the statute. By affirming the dismissal of Ken Zeran’s lawsuit against America Online, the U.S. Court of Appeals for the Fourth Circuit set a precedent that would be difficult for other federal and state courts to overlook. A case involving circumstances that were even more tragic than Zeran’s might have resulted in a different first interpretation of §230.

But the outcome in Zeran v. America Online is not entirely a result of the facts of the case. Section 230 caselaw might look very different today had other judges been assigned to Zeran v. America Online. In particular, then-Chief Judge J. Harvie Wilkinson III’s authorship of the Zeran opinion was crucial.

Like other circuits, the Fourth Circuit randomly assigns three judges to a panel that reviews briefs, hears oral arguments, and issues decisions. The three judges assigned to the Zeran case were Donald S. Russell, a former South Carolina governor and U.S. Senator appointed by President Nixon in 1971; North Carolina district judge Terrence Boyle, a former assistant to Republican Sen. Jesse Helms who was sitting on the Fourth Circuit by designation; and Wilkinson.

At first glance, Wilkinson might not appear to be the most likely candidate to articulate robust online speech rights that would endure for decades. Wilkinson had served in the Reagan Justice Department, and was appointed to the Fourth Circuit by Reagan in 1984. Overall, Wilkinson had the reputation of a reliable conservative jurist.

But there was one tidbit in his biography that might provide some hope for the lawyers defending America Online: before joining the Justice Department, Wilkinson was the editorial page editor of the Virginian Pilot newspaper in Norfolk.

And since joining the court, he has issued strong opinions in favor of free speech protections that often deviate from the rulings of other Republican appointees. In some cases, his First Amendment views have been stronger than those of solidly liberal jurists.

Wilkinson’s first major statement about free speech came less than three years after he joined the Fourth Circuit. In 1986, a panel of three Fourth Circuit judges (not including Wilkinson), affirmed a verdict against the publisher of Hustler magazine stemming from a parody of the plaintiff, Rev. Jerry Falwell. Hustler asked the full Fourth Circuit to review the three-judge panel’s opinion.

The Fourth Circuit declined to rehear the case, and Wilkinson issued a blistering dissent from the denial. Hustler, he acknowledged, is “a singularly unappealing beneficiary of First Amendment values and serves only to remind us of the costs a democracy must pay for its most precious privilege of open political debate,” Wilkinson wrote. Nonetheless, he wrote, the First Amendment prevents public figures such as Falwell from recovering damages from a magazine due to the publication of a parody. The panel’s opinion “surely will operate as a powerful inhibitor of humorous and satiric commentary and ultimately affect the health and vigor of all political debate,” Wilkinson wrote.

The Supreme Court agreed with Wilkinson. Writing for a unanimous court in 1988, Chief Justice Rehnquist reversed the panel decision.

Also in 1988, Wilkinson joined a unanimous three-judge panel opinion that affirmed the Espionage Act conviction of a former Navy employee who sent top-secret satellite information about Soviet naval preparations to an English defense publication. The court’s opinion, written by Judge Russell,
swiftly dismissed the defendant’s claims that his conviction violated the First Amendment.

Wilkinson agreed with the ultimate outcome, but he wrote a separate concurring opinion to stress the importance of the First Amendment, even in national security cases. “I do not think the First Amendment interests here are insignificant,” Wilkinson wrote. “Criminal restraints on the disclosure of information threaten the ability of the press to scrutinize and report on government activity. There exists the tendency, even in a constitutional democracy, for government to withhold reports of disquieting developments and to manage news in a fashion most favorable to itself. Public debate, however, is diminished without access to unfiltered facts.”

A few years later, Judge Wilkinson wrote an opinion reversing a defamation and invasion of privacy judgment against a trade publication brought by the subject of one of its articles, a whistleblower who had worked at the National Cancer Institute. The court held that the whistleblower was a public figure who, under the First Amendment, must demonstrate that the publication acted with actual malice, a very high standard.

“It would be ideal if the truth or falsity of every charge could be instantly determined by the press,” Wilkinson wrote. “Unfortunately, however, truth or falsity is often not instantly ascertainable. In the hurly burly of political and scientific debate, some false (or arguably false) allegations fly. The press, however, in covering these debates, cannot be made to warrant that every allegation that it prints is true.”

True to his newspaper roots, many of Wilkinson’s opinions recognize the need for strong legal protections for the media to be a watchdog of the government. For instance, during the 1998 elections, the weekly St. Mary’s Today newspaper in Maryland was particularly critical of political allies of the county sheriff. On the night before the election, off-duty sheriff’s deputies visited 40 stores and 40 news boxes and bought out the copies of the newspaper. The newspaper sued the sheriff and other county officials, alleging a violation of the First Amendment. The district court granted summary judgment to the defendants. In a 2003 opinion, Judge Wilkinson wrote a unanimous opinion reversing the district court.

“The incident in this case may have taken place in America, but it belongs to a society much different and more oppressive than our own,” Wilkinson wrote. “If we were to sanction this conduct, we would point the way for other state officials to stifle public criticism of their policies and their performance.”

Unlike Wilkinson’ other free-speech cases, Zeran did not require him to apply the First Amendment; his decision was based entirely on his interpretation of §230. Yet Wilkinson managed to make similarly strong pronouncements about free speech, even when applying an obscure new communications statute.

Wilkinson read §230 as accomplishing Congress’s broad goal of fostering free and open online speech. “The amount of information communicated via interactive computer services is therefore staggering,” he wrote. “The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems.”

Zeran, like Wilkinson’s other opinions, recognized a strong free speech right. But the result was not entirely predictable. In fact, Wilkinson’s background as a journalist might have made him more likely to rule in favor of Zeran. America Online was asking Wilkinson to recognize free speech rights for Internet companies that exceeded the protections of the First Amendment. When Wilkinson was editorial page editor, his newspaper did not receive the same protection for printing letters to the editor that America Online was seeking in Zeran’s case. Why should America Online receive immunity that the Virginian Pilot does not receive?

Still, Wilkinson continued his track record as a defender of free speech, even in a new medium. Another judge, working from a blank slate with no other appellate court interpretation of §230, might have adopted a much narrower view of §230. The judge could have agreed with Zeran’s lawyers that §230 no longer immunized online services once they received notice of illegal user content.

But once the Fourth Circuit issued Wilkinson’s opinion, it was impossible for other judges to ignore. In some of the early court rulings interpreting §230, judges reluctantly immunized online services for claims arising from user content. They cited Zeran and ultimately agreed with the outcome, but not always with the same level of enthusiasm as Wilkinson.

For instance, five months after the Fourth Circuit ruled against Zeran, District of Columbia federal judge Paul L. Friedman dismissed a defamation case against America Online filed by a former Bill Clinton aide. America Online had provided users with access to Drudge Report, which alleged that the aide had abused his wife. Section 230, Friedman ruled, required him to dismiss the case. He relied heavily on Wilkinson’s Zeran opinion, including a block quote from the opinion of more than 250 words.

But Friedman appeared unhappy with the outcome. He wrote that §230 is “some sort of tacit quid pro quo arrangement” between Congress and service providers.

“Because 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 standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor,” Friedman wrote. “But Congress has made
a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.”

Had a judge who shared Friedman’s reservations about §230 been the first to issue a binding interpretation of the statute, the next two decades of §230 precedent—and the landscape of the Internet—might have been quite different.
Zeran’s Failed Lawsuit Against an Oklahoma Radio Station

Bodies of the victims of the April 19, 1995, bombing of the A. P. Murrah Federal Building in Oklahoma City were still being removed from the rubble on April 25 when an anonymous post appeared on AOL advertising “Naughty Oklahoma T-Shirts” for sale.

By Robert D. Nelon

Bodies of the victims of the April 19, 1995, bombing of the A. P. Murrah Federal Building in Oklahoma City were still being removed from the rubble on April 25 when an anonymous post appeared on AOL advertising “Naughty Oklahoma T-Shirts” for sale. The post used the screen name “Ken ZZ03” and said that items could be purchased by calling a Seattle phone number and asking for “Ken.” Similar posts advertising T-shirts and other items, from screen names “Ken ZZ033” and “Ken Z033,” appeared during the few days following. Each of the posts listed the same Seattle phone number and directed a caller to “Ask for Ken.” The phone number belonged to Ken Zeran, a Seattle resident who knew nothing about the posts.

The T-shirts being advertised bore tasteless slogans referring to the bombing (among the least offensive was “Visit Oklahoma–It’s a Blast”). Needless to say, AOL users were appalled—more accurately, angry—at the posts. So many decided to call “Ken” at the Seattle number and share their disgust that the phone rang incessantly for weeks, gradually tapering off in mid-May after local press in Oklahoma City exposed the postings as a cruel hoax using fake AOL accounts.

Around May 1, an AOL user emailed a copy of the April 25 post to Mark Shannon, who co-hosted a morning-drive talk show called “Shannon and Spinozi” on “classic rock” radio station KRXO in Oklahoma City. Shannon read the post on the air on May 1, including the Seattle phone number, and he and Spinozi expressed their views about the crude person who would post something so offensive online. They urged KRXO listeners to call the Seattle number, “ask for Ken,” and tell Ken what they thought of him. Zeran, of course, didn’t hear the broadcast, but he heard from lots of callers who did. Zeran called the KRXO general manager and, after learning of the content of the AOL post, demanded a retraction. The station didn’t do a retraction, but during drive time on the afternoon of May 1 and again the next morning, KRXO said that the man at the Seattle phone number claimed he was not connected to the AOL posts. That apparently didn’t satisfy Zeran; he sued KRXO, owned by Diamond Broadcasting, in January 1996, four months before he sued AOL.

Zeran alleged in the suit, filed in federal court in Oklahoma City, that the KRXO broadcast about the AOL post defamed him, invaded his privacy by placing him in an offensive false light, and intentionally inflicted emotional distress on him. The station, of course, didn’t have a Section 230 defense, but it moved to dismiss the complaint, arguing that Zeran had failed to state a claim. The court denied the motion, saying that the complaint “barely satisfies” the federal pleading standards. As for Zeran’s defamation claim, the court said it didn’t need to deal with some of the subtleties of Oklahoma defamation law such as special damages or whether KRXO’s broadcast was “of and concerning” Zeran that were part of KRXO’s argument; the simple fact was that defamation law protected reputation, and the court bought into KRXO’s argument that Zeran couldn’t identify a single person in the world who thought less of him after the broadcast than they did before. The false light claim fell, too, because there was no evidence that at the time of the broadcast Shannon or KRXO knew or recklessly disregarded the fact the AOL post was a hoax, and Zeran’s proof of that “actual malice” was essential to his recovery. Finally, the intentional infliction claim was not supported by any evidence, the court said, that Shannon’s publication of the AOL post was extreme and outrageous under the circumstances, a
requirement for recovery of damages under Oklahoma law. The court wrote that it sympathized with the unfortunate events Zeran experienced, but it concluded that he had no legal remedy against KRKO.

Zeran wasn’t satisfied with the district court’s judgment, so he appealed to the U.S. Court of Appeals for the Tenth Circuit. The appellate court was overly solicitous of Zeran-describing him as “an accomplished artist, photographer, and film maker”—but it was no more inclined to find him entitled to legal relief than was the district court. The Tenth Circuit affirmed the judgment in favor of Diamond Broadcasting (203 F.3d 714 (10th Cir. 2000)). With respect to the defamation claim, the circuit court affirmed on the ground that the evidence was insufficient to establish that Zeran suffered any loss of reputation; no one who heard the broadcast or called him even knew his last name. It also affirmed on the ground mentioned only in passing by the district court (but that seemed to capture the attention of the appellate panel during oral argument): that the particular kind of defamation claim asserted by Zeran—slander per quod—required proof of special damages under Oklahoma law, and neither emotional distress nor de minimis medical expenses qualified.

Zeran’s false light and intentional infliction claims didn’t pass muster, either, in the Tenth Circuit. The court affirmed the judgment on the false light claim on the ground there was no evidence of reckless disregard of falsity; and it rejected Zeran’s call to employ a negligence fault standard in place of the “actual malice” requirement adopted by the Oklahoma Supreme Court. (The Tenth Circuit declined to certify the question to the Oklahoma court.) The appellate court concluded that there was no evidence that Shannon and Spinozi had actual knowledge of probable falsity of the AOL post, and the court said that such subjective actual knowledge could not be established by the proffer of expert testimony. The intentional infliction claim also failed, the Tenth Circuit said, because proof of reckless disregard of falsity was required for the IIED claim just like it was for false light. The court also concluded that as a matter of law that Zeran’s emotional distress was not so severe that a reasonable person should not be expected to endure it, a conclusion that was also fatal to the intentional infliction claim.

The Tenth Circuit gave KRKO a small bonus on top of affirming the judgment in its favor. The district court, saying it did not condone Shannon’s on-air commentary, denied an award of costs to KRKO. The station cross-appealed the denial of its costs motion. The appellate court, while recognizing that an award of costs lies within the discretion of the district court, concluded that in this case the lower court had abused its discretion in denying costs because of the court’s personal disapproval of the defendant’s conduct. The Tenth Circuit held “that the district court’s own view of extra-judicial conduct, which the law does not recognize as legally actionable, should play no part in the district court’s decision whether to override the presumption that the prevailing party receives costs.”

The name Zeran will always be famously associated with his case against AOL, because the seminal decision broadly interpreting the protections of Section 230 had a universal impact beyond the affirmation of summary judgment in favor of KRKO in a traditional speech-based tort case under Oklahoma law. The Diamond Broadcasting case, however, at least for those in Oklahoma, will be remembered and appreciated as well. The case against KRKO started before Zeran sued AOL, and the Tenth Circuit did not render its opinion until 26 months after the Fourth Circuit issued the AOL opinion and nearly 19 months after the U.S. Supreme Court denied Zeran’s petition for certiorari. Zeran v. Diamond Broadcasting is often cited by Oklahoma defendants in defamation and other cases for the helpful principles that underlie both the district court and Tenth Circuit opinions. In their own way, those pinpoint holdings in Diamond Broadcasting are almost as impactful as the far-reaching decision in AOL. Zeran should be appreciated for having advanced the law the way he did; and in a strange way, First Amendment practitioners and internet users should be thankful for the anonymous poster who used the Oklahoma City bombing to offend us all.
The Chilling Effect Claims in ‘Zeran v. AOL’

It is now possible to critically assess the chilling effect claims, asserted in the Fourth Circuit’s ‘Zeran’ decision, with more insight and understanding than at any time previously.

By Jonathon W. Penney

In the two decades since it was decided, Zeran v America Online has been extensively analyzed, criticized, assessed and re-assessed by commentators, yet one of the Fourth Circuit’s central claims in the decision—that the “spectre” of tort liability on the internet would have an “obvious chilling effect”—has notably escaped more systematic study and evaluation, at least empirically. Despite the importance of these “chilling effect” claims to the court’s decision, this lack of empirical study is not altogether surprising. There has been strikingly little such systematic study of such chilling effect claims in various areas of law over the years. Part of the problem is that chilling effects are often subtle, difficult to measure, and require interdisciplinary research and methods going beyond traditional legal analysis. Thus, Leslie Kendrick found in 2013, after reviewing existing literature, that empirical support for such chilling effect claims was “flimsy” and thus requiring more far study.

Today, this systematic empirical study has finally begun to take shape. Several recent studies have documented “chilling effects” in different contexts, including my own work on surveillance related chilling effects, which received extensive media coverage last year, as well as a more recent study, examining the comparative dimensions of regulatory chilling effects online, which I wrote about recently in Slate. With these, and other recent empirical work, it is now possible to critically assess the chilling effect claims in Zeran with more insight and understanding than at any time previously.

Drawing on this research, including new findings from my own recently published chilling effects research paper, I argue that the Fourth Circuit was right to raise chilling effect concerns in this context but likely wrong about how they would arise.

Zeran was the first case wherein §230 of the Communications Decency Act was raised as a defense, and has also turned out to be the most important and influential (e.g., it has been cited at least 1,400 times). The facts essentially involved a case of online harassment whereby an unidentified person posted on America Online (AOL)’s message board false and defamatory messages about the plaintiff Kenneth Zeran, who sued AOL for failing to remove the postings promptly on notice.

In dismissing Zeran’s lawsuit, the Fourth Circuit made two chilling effect claims. First, that the possibility or “spectre” of tort liability more generally, would have an “obvious chilling effect” as it would lead online service providers (OSPs) to restrict speech on their services as policing “millions” of postings for problems would be “impossible.” Second, liability on notice would similarly have a chilling effect on internet speech due to over-enforcement — because OSPs would be liable only for publishing and not removal, they would have an incentive to remove content or messages on notice, whether defamatory or not. The court did not cite social science or empirical research to support either assertion. And while there were some previous studies concerning libel chill when Zeran was decided (see Ciolli’s work for a discussion) there were none dealing with chilling effects in online contexts.

Though these two claims are framed slightly differently—one speaks to tort liability more generally while the other concerns liability on notice—the central point of both is that OSPs, when faced with liability concerns arising from the activities of users of their services, will take steps to limit their exposure to liability by restricting those activities. Here, this would mean restricting and limiting internet speech, thus “chilling” it. Put succinctly, the OSP, through its liability concerns, is the main source for any chilling effects on internet
speech.

As with many chilling effect claims, this assertion is
difficult to assess because it would involve testing counter-
factuals—how does one test the proposition that but for the
broad §230 immunity for online service providers found in
Zeran there would have been a chilling effect on speech due
to OSP restrictions? Or that but for removing liability even
on notification, OSPs would have taken steps to limit and
thus chill speech?

Fortunately, recent research on the Digital Millennium
Copyright Act (DMCA) arguably allow us to do just that. As
with the defamatory content in Zeran, OSPs in the 1990s
faced liability for copyrighted materials users posted on
their services without authorization. But rather than §230’s
blanket immunity approach to deal with this challenge,
Congress instead enacted the DMCA, which employs a no-
tice-and-takedown system to enforce and police copyright
online. Someone who believes their copyrights are being
infringed can send a DMCA “takedown” notice to an OSP
to have the content removed. Put simply, like the liabili-
ty-on-notice schemes rejected in Zeran because they would
likely lead to a “chill” on internet speech, the DMCA pro-
vides OSPs with immunity so long as they remove infringing
content promptly upon notice. In other words, the DMCA
has, in ways, created the counterfactual regulatory state of
affairs to test the chilling effect claims in Zeran.

So, is there any evidence or empirical support for the
Fourth Circuit’s chilling effects concerns? On this count,
the Fourth Circuit in Zeran was right to raise chilling effect
concerns, but was wrong to predict that OSPs would pose
the real threat to speech.

The Zeran court, as noted, was primarily concerned
about OSPs restricting speech through a “liability on
notice” regime and the “spectre” of liability it constitutes.
There is certainly some evidence on this count, but the
case is largely circumstantial. For example, there has
long been anecdotal evidence of DMCA “abuse” whereby
invalid, false or improper DMCA notices lead to content
removal online, especially as automation is increasingly
used for enforcement. Moreover, the “compliance” rate
for DMCA notices, that is, the reported rate at which an
OSP report removing content in response to notification is
fairly high at various well known and popular OSPs. Goo-
gle, for example, removes websites or content either fuller
or partially in response to DMCA takedown notices in 98
percent of cases. Twitter, from January to June 2017, com-
plied with 75 percent of DMCA notices. WordPress reports
removal in 61 percent of cases. Those rates are not neces-
sarily a problem by themselves, though when combined
with studies that have documented substantial percentag-
es of invalid or problematic DMCA notifications — like this
2016 study by Jennifer Urban, Joe Karaganis and Brianna
Schofield finding that 30 percent of DMCA notices had
potential problems — then these rates and anecdotal
instances may suggest OSPs are opting for removal, and
thus speech restrictions, to avoid liability. Still, there is
no “smoking gun” here, and more research would need to
be done on OSP practices to substantiate chilling effect
concerns like those of Fourth Circuit in Zeran.

But this is not the end of the story. In fact, there is rea-
sion to suspect “liability on notification” schemes can have
a noteworthy chilling effect on online activities, but the
culprit is not the OSPs receiving the notifications, but the
notifications themselves.

This is among the key findings I discuss in my new
chilling effects research paper, published earlier this year,
based on an empirical case study from my doctorate at
the University of Oxford. The study involves an original
first-of-its-kind survey, administered to over 1,200 U.S.
based adult internet users, designed to explore different
dimensions of chilling effects, threats and concerns on-
line by comparing and analyzing participant responses to
hypothetical scenarios that, in theory, may cause chilling
effects or self-censorship. The study’s findings suggested,
among other things, that once internet users received a
personal legal notice for content they had posted online,
noteworthy percentages of internet users were less likely
to speak or write about certain things online, less likely
to share personally created content, less likely to engage
with social media, and more cautious in their internet
speech or search. In other words, there was a clear chilling
effect. And among all the scenarios studied, respons-
es suggested receiving a personal legal notice like this
would have the greatest comparative chilling effect on
people’s online activities. This is important as under the
DMCA, and similar liability-on-notice regimes, the user
posting the alleged illegal content, in addition to the OSP,
receives a copy of the legal notice. These findings offer
insights into the impact these legal notices, and the legal
threat therein, have on individual internet users.

For example, in terms of online speech, 75 percent of
respondents in the study indicated they would be “much
less likely” (40 percent) or “somewhat less likely” (35
percent) to “speak or write about certain topics online”
after receiving a personal legal notice about something
they had previously posted online. Similarly, 81 percent of
respondents indicating they “strongly agreed” (50
percent) or “somewhat agreed” (31 percent) with a state-
ment that they would be more cautious or careful about
their online speech after receiving such a personal legal
notice. There were similar findings suggesting a chilling
effect on other activities beyond speech, including online
search, content sharing, and social network engagement.
I also found evidence of a form of indirect chilling effects
where internet users suggested they would be less likely
to speak or share when a friend in their online social
network had received a personal legal notice for content they had posted online.

When you combine these empirical insights as to the impact of these “liability notifications” like DMCA (or libel) notices with the reality that literally tens of millions of these notices are now being sent weekly due to automation, a starker picture emerges of a substantial and noteworthy chilling effect on internet speech, and a range of other online activities, likely stemming from this broader regulatory ecosystem. Moreover, the notion that fear of legal or similar threats may “chill” online activities is consistent with a range of recent and comparable chilling effect studies in different contexts.

The chilling effect concerns raised in Zeran were essential to the Fourth Circuit’s reasoning as they were employed to justify rejecting alternatives to blanket immunity – like liability on notice. Years on, in light of new empirical studies on chilling effects, including my own, we are better situated to assess those claims. Today, the evidence suggests that the court’s concerns about chilling effects associated with “liability on notification” alternatives were sound. The court was just wrong on how they would arise.
‘Zeran v. America Online’ and the Development of Trolling Culture

Twenty years ago the Fourth Circuit decided Zeran v. America Online, a decision which, on the positive side, made possible the internet we have today. On the negative side... it made possible the internet we have today.

By Aaron Schwabach

The newest computer can merely compound, at speed, the oldest problem in the relations between human beings, and in the end the communicator will be confronted with the old problem, of what to say and how to say it. – Edward R. Murrow, quoted by Kenneth Zeran in “The Cultural High Road Along the Internet Landscape in The Pursuit of Happiness,” remarks at 15th Anniversary Conference of 47 Section 230 U.S.C.(a), March 4, 2011, Santa Clara High Tech Law Center.

Twenty years ago the Fourth Circuit decided Zeran v. America Online, a decision which, on the positive side, made possible the internet we have today. On the negative side... it made possible the internet we have today. The destructive culture of incivility and trolling are not an unavoidable consequence of a culture of near-universal online access, but a demonstration of the enormous power of law to shape society.

While the internet had existed in some form since the 1960s, and consumer access through Prodigy, Compuserve, AOL, and others was already widely available in the 1980s, the internet as a mass medium of communication did not really catch on until the invention of the World Wide Web and easily usable internet browsers in the early 1990s. Human beings being human, one of the early uses to which the new medium was put, like all new media before it, was pornography. (Others, reflecting equally universal human values, were gaming, shopping, and politics.)

In the United States, the ease of online access to pornography, fueled by, inter alia, Time magazine’s infamous “porn panic” cover—led to a demand from concerned voters that Congress do something. What Congress did was enact the Communications Decency Act, an idiotic piece of legislation that ignored the Miller test for obscenity and was, in due course, struck down by the Supreme Court.

Or mostly struck down. Section 230, protecting internet service providers (ISPs) from some forms of liability for content posted by their users, survived and remains part of US law to this day.

In the midst of the rapidly changing world of the 1990s came the terrorist attack on the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people, including 19 children. The attack created universal outrage, which was especially intense in Oklahoma City.

Beginning six days after the bombing, someone using the name Ken ZZ03 began to post ads on AOL purporting to be from “Ken,” offering T-shirts for sale mocking the bombing and the victims and listing Kenneth Zeran’s home phone number. Zeran, fifteen hundred miles away in Seattle, began to receive harassing and threatening phone calls, which intensified (from an already-high level of about one call every two minutes) after an Oklahoma City radio station, KRKO, broadcast the content of the first posting and urged listeners to call Zeran. Seattle police had to protect Zeran’s house.

Every year, when I teach Zeran, I ask students who they think posted the ads. Students are always quick to suspect an ex-lover or ex-spouse, or possibly a business rival or personal
enemy–and eventually come to the sobering realization that no motive was necessary: the poster might have been a bored teenager in Stuttgart or Canberra selecting Zeran to be the victim of a drive-by trolling. In other words, Kenneth Zeran could be any of us; some random stranger on the internet could decide to ruin another random stranger’s life for no reason other than entertainment.

Of course, such conduct is both criminal and tortious. However, locating the perpetrator may be difficult or impossible, and even if located the perpetrator may be judgment-proof or otherwise unreachable. And while the malice of the original poster is the root cause of the harm, the harm would have been minimal without the wider audience provided by AOL and KRKO.

Zeran lost his suit against AOL both at trial and on appeal. The outcome is unsurprising; §230 speaks so directly to this issue that the case got as far as it did: “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;” 47 U.S.C. sec. 230(c)(1). Both the trial court and the Fourth Circuit correctly applied the statute enacted by Congress; however, both went through considerable agonizing in doing so, because the facts of the case were, to a mid-1990s world not yet inured to far more horrible internet trolling, horrific.

A single throwaway line in the Fourth Circuit’s opinion illustrates the enormous cultural distance between the world of 1997 and the world of 2017: “‘The Internet is an international network of interconnected computers,’ currently used by approximately 40 million people worldwide.” Zeran, quoting Reno. Stop and think about that for a moment: Forty million users, out of a world population, at the time, of nearly six billion. In 1997 roughly one person out of every 150 had access to the internet, and in almost all cases that access was slow and cumbersome, restricted to desktops with wired, usually dial-up, connections. The internet was new, rare, and frightening. Today more than half of the world’s population has internet access, and that access is often mobile, enabling users to be constantly online. In the developed world most people use multiple internet-connected devices on a daily basis; even in the least-connected continent—Africa—a third of the population has internet access (more than in the United States at the time of Zeran), and the widespread use of phone-sharing in Africa as a business model means that far more people probably have at least intermittent access.

Mass internet access was a disruptive event, uprooting and replacing centuries-old industries, business models, and cultural norms. A different result in Zeran—say, a call for legislative change followed by a Congressional repeal of §230—would have slowed the growth of the internet and set it on a different path. ISPs would have had to devote resources to policing content and users, as well as devoting funds to insure themselves against the occasional malicious user, like Ken ZZ03, slipping through. Countless billions of dollars of economic growth would have been delayed or lost. The bulk of internet development might have shifted to other countries with their own legal equivalents of §230.

The trolling of Kenneth Zeran, as terrible as it was, seems almost quaint in light of what has come since, much as the online pornography—mostly slow-loading still images—that inspired the Communications Decency Act seems tame in comparison to the now-universal instant availability of hardcore pornographic videos that we have learned to accept as part of the background noise of our information society. Trolls now email grieving family members animated GIFs of accident victims, with cruel messages calculated to inflict emotional distress; they have driven emotionally vulnerable teenagers to suicide; they have rendered huge swathes of the gaming world unsafe for female gamers. This, too, we have learned to accept as more background noise. We convince ourselves that Gamergate and 4chan, or their equivalents, are simply the price of progress. Horrors that had nearly vanished by the early 1990s, including child pornography and Nazism, have come back. Websites devoted to hate speech played a crucial role in the most recent presidential election and appear to have influence at the highest levels of government. In a pre-internet, pre-Zeran world there could never have been a President Donald Trump.

Slower, more carefully managed internet growth might have achieved the same economic and social benefits without feeding the trolls. Zeran, though, was correctly decided; the fault lay not with the court, but with the sodden mess of political grandstanding and sloppy drafting that was the Communications Decency Act; in this case, bad laws made bad facts.
‘Zeran v. AOL’: The Anti-Circumvention Tool

Zeran v. AOL is the survivalist’s kit for websites.

By Maria Crimi Speth

If I were an expert survivalist who was offered one tool to survive alone in the elements, I would probably choose a fire starter ... but maybe a knife, a pot, or duct tape. Really, I would want all of those items because no one tool has the versatility I would want. But, for an expert in defending website operators from against claims, choosing one tool is easy. Zeran v. AOL is the survivalist’s kit for websites. Fortunately, lawyers almost never find ourselves in a situation where we can only cite one case. But if that were to happen, the Fourth Circuit’s thorough and well-reasoned decision in Zeran would likely be the one case I would choose.

Ever since Congress passed 47 U.S.C. §230, a federal law that says, “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,” creative lawyers have been searching for ways to circumvent the statute and nab website owners for the bad acts of their users. An often-made threat from attempted §230 circumventors is “this case is different.” Some assertions I often hear as to why §230 won’t protect my client in their “unique” situation are that his client asked for removal of the offending content, her client’s business was destroyed, my client said it would remove the post, my client refused to identify the author, or my client edited the post. All of these claims were eradicated twenty years ago in a single court decision in the Zeran case.

The most sure-fire way to plead around §230 and at least survive an early motion to dismiss is to allege that the service provider is the “information content provider.” 47 U.S.C. §230 defines the information content provider as any person or entity that is responsible, in whole or in part, for the creation or development of the content. Early case law, including Zeran, played a critical role in making clear that in order to be responsible for the creation or development of the content, the content had to originate with the service provider. “By 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 use of the service.” Zeran at 330. Had the Fourth Circuit defined “responsible” for the “development” in a broader fashion, that may have changed the course of case law history. As noted by the Ninth Circuit in Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008), “It’s true that the broadest sense of the term ‘develop’ could include the functions of an ordinary search engine – indeed, just about any function performed by a website.” Citing the Zeran Court’s early guidance, courts have instead adopted a far narrower definition.

We interpret the term “development” as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.

Roommates, 521 F.3d at 1167-68 (emphasis added)

As the Sixth Circuit stated in Jones v. Dirty World, 755 F.3d 398 (6th Cir. 2014), again citing Zeran, to define the term development broadly “would defeat the purposes of the CDA and swallow the core immunity that §230(c) provides for the exercise of a publisher’s traditional editorial functions.”

When attempting to circumvent §230 in making claims against the host of a website, a popular argument is that the website that encourages or solicits the content is, therefore, responsible for the development of the content. This argument evolved from a strained reading of the Ninth Circuit’s
decision in Roommates and more directly from the Tenth’s Circuit’s holding that a service provider is responsible for the development of offensive content “if it in some way specifically encourages development of what is offensive about the content.” F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1199 (10th Cir. 2009).

Initially, this argument got some traction. Relying on Roommates and Accusearch, the District of Kentucky Court adopted an encouragement test holding that:

Although Courts have stated generally that CDA immunity is broad, the weight of the authority teaches that such immunity may be lost. That is, a website owner who intentionally encourages illegal or actionable third-party postings to which he adds his own comments ratifying or adopting the posts becomes a “creator” or “developer” of that content and is not entitled to immunity.


The encouragement test did not survive appeal though. The Sixth Circuit dealt it a death blow stating, “[w]e do not adopt the district court’s encouragement test of immunity under the CDA.” The Court explained that there is a crucial distinction between the traditional publisher actions that Zeran and other courts held were protected under §230 and actual responsibility for what makes the displayed content illegal or actionable. Jones, 755 F.3d at 414.

Playing on the definition of development, another popular circumvention technique is to plead that a website operator is the information content provider because it edited the content. Here again, Zeran is the tool of choice. The Fourth Circuit held that “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.” Zeran at 330. This language laid the ground work for later cases to hold that merely editing content does not make an interactive service provider the developer of the content and hence the information content provider, unless the service provider materially contributed to the alleged unlawfulness of the content. Indeed, every published case that has rejected the argument that editing, altering, modifying, and deleting content makes the service provider an information content provider, has cited the Zeran case. See Doe v. Friendfinder Network, 540 F. Supp. 2d 288, 297 (D.N.H. 2008); Batzel v. Smith, 333 F.3d 1018, 1027 (9th Cir. 2003); Ben Ezra, Weinstein, & Co. v. Am. Online, 206 F.3d 980, 986 (10th Cir. 2000); Blumenthal v. Drudge, 992 F. Supp. 44, 51 (D.D.C. 1998).

The versatility of Zeran as a tool is perhaps best illustrated through the fact that it has been cited at least 259 times by other courts. Section 230 itself has been cited 645 times, meaning that Zeran has been cited in 40 percent of all §230 cases. So if you find yourself stranded on a virtual island fending off enemy attacks, turn to the well-trusted leader in protecting websites as your best survival tool.
The UK’s Broad Rejection of the §230 Model

When President Clinton signed the Communication Decency Act, online pornography—and not defamation—was the focus of debate. However, in Reno v. American... 

By Gavin Sutter

When President Clinton signed the Communication Decency Act, online pornography—and not defamation—was the focus of debate. However, in Reno v. American Civil Liberties Union, 521 U.S. 844 (1997), the Supreme Court struck down the pornography provisions, leaving §230’s protections from liability arising from third-party content.

On the other side of the Atlantic, however, the United Kingdom took a very different approach to online defamation. While the average British Parliamentarian may have had little experience of the internet at this time (by 2000, still only approximately one third of Westminster MPs were making use of the email facilities provided to them), concerns were raised about the Internet from early stages.

It would seem logical that the pronounced divergence between US and UK law in this regard was influenced by the context in which each first appeared: whereas Congress was seeking to shield service providers and intermediaries with the hope they would be emboldened to seek out pernicious sexual content and remove it from their systems, the UK instead saw the question of liability for third party provided libelous content in a pure defamation setting.

Much before 1995, legal academics speculated that the UK would go in much the same direction as the early US cases of Cubby v. CompuServe and Stratton Oakmont v. Prodigy, with liability being determined on the basis of awareness and potential for control. In Parliament, a Draft Defamation Bill was issued for public consultation in July 1995 by then Lord Chancellor, Baron Mackay of Clashfern. Mackay’s commentary in the consultation document made much of the rise of new technology via which “[i]nformation can be disseminated in a form which gives the recipient the option to convert it to a readable form, either presented on a VDU screen, or printed on the recipient’s own printer”, before intoning, darkly: “Progress is now so rapid, that tomorrow’s technology may well make even these advances appear old fashioned.” Nonetheless, Mackay, and subsequently Parliament, felt that in principle the pre-existing common law defense of innocent dissemination (Emmens v. Pottle) could and should be set on a statutory footing, in a form which applies to Internet intermediaries. Thus, on July 4, 1996, just a few months after the CDA came into force, the Royal Assent was given to a very different legal rule.

Under §1 of the Defamation Act 1996, any person other than the author, editor or publisher—that is, any secondary distributor, including online parties—who is found to have either been actually aware, or in a position in which the court considers they should, objectively, have been aware, of a defamatory statement published via their channels, will face legal liability for publication of a defamatory statement.

The first ruling on the matter came in the form of an early hearing on whether the §1 defense would be available to an ISP which was hosting a Usenet newsgroup on which a defamatory posting had appeared. In Godfrey v. Demon, Morland J ultimately ruled that a single, defamatory posting buried in an otherwise innocuous newsgroup, one of many hundreds of thousands of pages hosted but not edited or in any way monitored by the ISP, would not be something of which the
many in the internet industry continued to feel that inter-
pursuant to their “community standards.” Nonetheless,
arbitrary with what they consider to be perfectly acceptable
determine the legitimacy of complaints, while some, such
suggests that generally UK ISPS do make some effort to
supporting these claims. Certainly, anecdotal evidence
expression.

In 2002, the UK enacted domestic legislation incorpo-
rating §4 of the European Electronic Commerce Directive
2000/31/EC, which further entrenched the awareness-based
approach to online service provider liability for third-party
content by expanding it beyond defamation, to cover all
forms of unlawful content, both civil and criminal.

By comparison, across this period in the US, §230 as ap-
plied in Zeran v. AOL went from strength to strength, both
in terms of whom it protected, from traditional online hosts,
to website hosts of third party reviews, even non-commer-
cial emailing lists and reposting of bulletin board posts, and
in terms of the legal claims it immunized. Not only defama-
tion, but also the provision of false stock information, dis-
riminatory third-party comments in breach of fair housing
laws, and even the marketing of obscene photographs of a
minor in a chatroom.

One of the very few exceptions to the scope of §230
remained intellectual property law—copyright in particu-
lar, which had its own, awareness-based regime under the
DMCA (and on which many have commented with regards to
what this may say about relative lobbying strengths viz-a-
vis Congress).

Whereas in the US there have been a whole slew of
cases in which various defendants have successfully applied
the §230 defense, the UK equivalents under the Defamation
Act 1996 and the Ecommerce Regulations 2002 have pro-
duced very few reported cases. Instead, critics of the UK’s
position claim that British ISPs, rather than risk liability,
simply remove material at the simplest complaint, and thus,
they argue, these laws provide a clear chill upon freedom of
expression.

There is an absence of conclusive academic research
supporting these claims. Certainly, anecdotal evidence
suggests that generally UK ISPS do make some effort to
determine the legitimacy of complaints, while some, such
as the UK arm of the Facebook behemoth, are notoriously
arbitrary with what they consider to be perfectly acceptable
pursuant to their “community standards.” Nonetheless,
many in the internet industry continued to feel that inter-
mediaries were being unfairly required to decide whether
material was unlawful and should be removed, with serious
consequences should they make a wrong decision. As one
former Demon staffer memorably and venomously put it
during an academic conference, “We have people to make
these decisions for us: we call them courts."

Nonetheless, little changed in the UK position until the
launch of the Libel Reform Campaign in 2009, with its mani-
ifesto Free Speech Isn’t Free. The LRC, comprised of various
interest groups led by Index on Censorship and English PEN,
called for numerous reforms of English defamation law,
some more desirable than others.

One early proposed reform was for internet interme-
diaries to be immunized from all forms of liability for third
party content. This was never going to be a popular idea
among many lawyers or Parliamentarians, who by and large
saw that §230, rather than encouraging service providers
to be proactive, simply emboldened them to shrug and do
nothing in response to claims of defamation. Further, as the
LRC may have realized had they given the specific matter
a little further legal research ahead of their initial report,
the UK’s commitments under EU law provided a framework
within which any changes here would be required to oper-
ate.

In the end, the eventual Defamation Act 2013 produced
what might be termed a very British compromise. Section
10 provides that secondary distributors, including internet
intermediaries, cannot be subject to legal action “unless the
court is satisfied that it is not reasonably practicable for an
action to be brought against [those directly responsible for
its publication]”.

Further, §5 provides a defense for “operators of web-
sites”. While the term is not defined, it would seem designed
to encompass anyone who runs a social media site, a blog
platform, a BBS or any form of website to which individu-
als can post content (as distinct from traditional, passive
mere-hosting).

As first published, the defense seemed to make little
sense, and add nothing to the pre-existing legal position.
In essence, it provides that it is a defense for the website
operator to show that the disputed content was provided by
a third party. The defense is lost where the website oper-
ator acts maliciously, or where the client has been unable
to identify the actual source of the defamatory posting,
and has notified the operator, who has failed to respond “in
accordance with any provision contained in regulations.”

As ever, God (or, depending on one’s view of the provi-
sions therein, and /or theology, the Devil) is in the details.
The Defamation (Operators of Websites) Regulations 2013
(which followed some months after the Act) set out a clear
notice and takedown procedure which, if followed, will shield
the Operator from liability. In essence, on receipt of a clear
notice which properly identifies the content complained of,
the Operator has a set period during which to respond, to
contact the source of the contested posting to see if they
wish to defend the content, and set circumstances in which
the posting must either be deleted, or may be left alone.

While in some respects (all 48 hours and five days, not
counting weekends, bank or public holidays) these time limits can rapidly begin to resemble Biblical numerology, the instructions are clear, simple, and should avoid much difficulty and expensive litigation for website operators in future. In spirit, they are not dissimilar to the reposting provisions to be found in the US DMCA under §512(g), although somewhat less complicated. Also, the §5 defense makes clear that standard content moderation practices do not constitute editing for the purposes of defamatory liability. Elsewhere, I have argued that this approach should be broadened to encompass all areas of civil law with regards to third party content online.

Though I’m very happy with the ‘third way’ approach that the UK has evolved in relation to service provider liability for third party provided defamatory content as distinctly different from §230 as applied by Zeran, to date this rule applies only in one of the UK’s three legal jurisdictions, that of England and Wales. In 2013, the responsible minister in the Northern Ireland Assembly’s arcane, power-sharing government elected not to adopt the new Defamation Act into Northern Ireland law, officially stating that he would “wait and see” how effective it proved in England and Wales. There has since been much speculation about this decision, but little progress as a series of unfortunate circumstances have once more collapsed the devolved government in Northern Ireland for the time being.

In the UK’s other jurisdiction, Scotland—where, unlike Northern Ireland, defamation law has long been markedly different than that in England—the Scottish Law Commission has, following a 2016 public consultation on defamation law reform, recently issued a draft Defamation and Malicious Publications (Scotland) Bill. Significantly, §3 provides that there are to be “no proceedings against secondary publishers”; exceptions to this general rule will only be made in respect of specific categories of secondary publisher to be determined by Scottish Ministers, granted authority to do so by §4. Distributors so identified will be subject to awareness based liability in exactly the same manner as under §1 of the Defamation Act 1996. What categories of secondary publisher may be exempted from liability and which will face liability, under what ministerial regulations, remains as of yet unspecified. Scotland could, if this model is taken forward into law, end up with a hybrid system between those with a §230 style ‘get out of jail free card’ immunity, and those subjected to something akin to the new English third-way approach. With existing EU obligations in this regard seemingly on borrowed time as the UK rushes towards the Brave New Post-Brexit World, it seems that Scotland’s options will soon be wide open. In Autumn 2017, the UK’s broad approach may be one of rejecting the §230 style of immunity, but by Autumn 2037, who knows?
‘AOL v. Zeran’: The Cyberlibertarian Hack of §230 Has Run Its Course

‘Zeran’ has been the authority for 20 years; we need a judicial opinion or legislative enactment that better balances the statutory objective with the original congressional intent to protect users from unlawful and materially harmful communicative acts online.

By Olivier Sylvain

Twenty years ago, in AOL v. Zeran, a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit held that 47 U.S.C. §230 immunized defendant AOL from liability for hosting and failing to block a user’s mendacious electronic bulletin board posts about plaintiff, even after AOL received notice of the existence of the offending posts on its servers. This was the first federal appeals court opinion to define the scope of protection under the Communications Decency Act. This reason alone made the decision and opinion significant. But the Zeran opinion was most notable for its conclusion: an online intermediary may not be held liable for third-party user-generated content, even when it knows that the content is unlawful.

This was an exceptional treatment under law. Generally, under longstanding tort principles, publishers are as liable for distributing material that they know to be unlawful as the original author. But, for the panel, the online services could not be treated in the same way; the internet is different. Without immunity, it explained, intermediaries would be exposed to “liability for each message republished by their services.” That kind of exposure “would have an obvious chilling effect.”

Each notification of objectionable content, the panel elaborated, “would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information’s defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information.” Section 230’s purpose, the Fourth Circuit observed, was to preserve the internet as an open forum for expression and commerce. Imposing intermediary liability for the bad acts of third-party users would undermine that purpose.

Twenty years later, we can safely say that the Zeran formulation has helped to foster diversity and abundance of user-generated online content. In this regard, it has given effect to one of Congress’s chief objectives for §230.

But as the Zeran approach has aged, so has its pertinence, for the worse. Many of the search engines, social media and online marketplaces that benefit from the protection today do far more than serve as “publisher[s] or speaker[s] of any information provided by another information content provider.” The largest and most popular application developers do so much more with their users’ content and data. Google, Facebook and Amazon, for example, do not just publish or edit user content. They design the ways by which their users share information; they analyze and algorithmically sort that information; and they repurpose and commercialize the data in ways that are opaque to most consumers. To talk of publisher or notice liability in this context is quaint and inapposite. It is time that courts attend to the ways in which online intermediaries design their services, rather than reflexively apply publisher liability doctrine.

The Zeran panel also understated (if not misstated) the Good Samaritan purpose of the statute. While it recognized the important statutory objective of “self regulation,” it also speculated that intermediaries would be reluctant to “screen material” because doing so “would only lead to notice” which, in turn, would “create a stronger basis for liability.” To be sure, subsequent opinions by federal courts and state courts of last resort pointedly declined to give the Good Samaritan...
language in §230(c)(2) real effect. But they cited Zeran as authority. As the first to take up the statute, the Zeran panel’s failure to elaborate the “good faith” language in ways that better achieved the self-regulation objectives of the statute was consequential.

Today, in an irony of ironies, under the Good Samaritan safe harbor, intermediaries do not gain anything from policing their users’ content. Many prominent ones do, of course. But many do not. This has been especially troublesome with regard to services that knowingly host or encourage unlawful user content, including and especially those that materially harm vulnerable people and historically subordinated groups. User-generated nonconsensual porn, advertisements that promote the trafficking of minors, and targeted advertisements that violate laws against racial discrimination in housing and employment are the most notorious examples. Legislators have proposed amendments to redress some of these developments. But it is not at all clear they will succeed; the proposals face substantial pushback from the most powerful application developers.

Now is as good a time as any to recognize the Fourth Circuit’s definitive contribution to the development of the internet generally. In light of today’s state of affairs, however, it is plain that the Zeran framework, the prevailing approach to §230 today, needs substantial retooling.

To be fair, as with most judicial opinions, the Zeran opinion was a creature of its time. In the mid- to late-1990s, writers, business leaders, futurists and cyberpunks were breathless and giddy about how the internet would transform the way in which users learn, develop relationships, govern themselves, and transact business. These early evangelists promised that the internet would upturn or unsettle existing laws, geopolitical boundaries, and government bureaucracies. Their excitement expressed itself in ways that sounded every bit like the deregulatory, free-market worldview in vogue at the time. (Compare, for example, President Bill Clinton’s pronouncement in the 1996 State of the Union Address that “the era of big government is over” with the 1994 manifesto, “Cyberspace and the American Dream,” which asserted that governments in the coming era “will be vastly smaller (perhaps by 50 percent or more) than the current one – this is an inevitable implication of the transition from the centralized power structures of the industrial age to the dispersed, decentralized institutions” of the networked world.)

Never mind that this worldview has rightfully always been received with suspicion by people and groups that have relied on zealous federal government oversight to protect them from corporate abuses and insidious forms of systemic discrimination. In retrospect, the argument for a hands-off approach to online content arose from a naïve or indulgently ideological conceit that has not born itself out. Just consider that the largest intermediaries are acquiring far reaching services in new markets and making their positions in the economy and public life indispensable. Along the way, they are pushing the limits of competition law and adjudicating in the first instance which kinds of user information to distribute.

Surely, we could be forgiven for believing that, in its failure to elaborate the Good Samaritan safe harbor, the Zeran panel was shortsighted or, worse, taken by cyber-libertarian triumphalism. Many people were.

In fact, the Zeran panel was tasked with a difficult responsibility: promoting free expression on the one hand and encouraging intermediaries’ “self regulation” of objectionable speech on the other. It was to do this through the doctrinal lens of publisher liability doctrine. Zeran argued that, while the statute identifies “publishers,” it says nothing about distributors. This distinction matters, he posited, because Congress presumably meant to keep distributor liability (or notice liability) fully applicable. The panel, however, rejected the argument, explaining that distributor liability “is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by §230.” Plaintiff’s argument failed, it explained, because “[l]iability upon notice would defeat the dual purposes advanced by §230,” creating “an impossible burden” for online services.

This holding ended the panel’s substantive analysis of the scope of immunity under §230, but should not have. Even while its conclusion may have been correct, the holding begs the question about the Good Samaritan language in §230(c)(2), a provision that invites courts to consider services’ responsiveness to block or removal requests. The provision asserts that intermediaries may not be held liable for voluntarily taking steps “in good faith to restrict access to or availability of ... objectionable” content. Relying on this protection, the panel could have determined whether, as pled by Zeran, AOL acted in good faith in its handling of the unlawful content. The outcome might have been the same, but the rule would have been narrower and more consistent with both objectives of the statute. But the panel downplayed the significance of the “good faith” “self regulation” safe harbor, privileging the interest in promoting free expression and commerce.

A narrower rule would have been more adaptable to different business models – even those of today. It would have, on the one hand, imposed the obligation on applications to act in good faith when advertising a policy against unlawful content and, on the other hand, protected applications that serve as true publishers or distributors. The problem of true passive intermediaries knowingly hosting unlawful content would remain, but at least then legislators would have a clear understanding about the right fix.

Twenty years after the Fourth Circuit panel announced it, we might expect that Zeran’s influence would wane, particularly in a market that is as dynamic as that for online applications. But the case remains an important authority...
across jurisdictions, which is a credit to the persuasiveness of Judge Harvie Wilkinson’s opinion for the panel. It remains above all an important authority on the §230 objective to maintain the robust nature of communications online by minimizing government interference. All we need now is a judicial opinion or, likelier, a legislative enactment that better balances that important statutory objective with the original congressional intention to protect users from unlawful and materially harmful communicative acts online. Only then might we achieve a healthy and robust online environment for communication for everyone.
Twenty years after it was first litigated in earnest, the U.S. Communications Decency Act’s §230 remains both obscure and vital.

By Jonathan Zittrain

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wenty years after it was first litigated in earnest, the U.S. Communications Decency Act’s §230 remains both obscure and vital. Section 230 nearly entirely eliminated the liability of Internet content platforms under state common law for bad acts, such as defamation, occasioned by their users. The platforms were free to structure their moderation and editing of comments as they pleased, without a traditional newspaper’s framework in which to undertake editing was to bear responsibility for what was published. If the New York Times included a letter to the editor that defamed someone, the Times would be vulnerable to a lawsuit (to be sure, so would the letter’s author, whose wallet size would likely make for a less tempting target). Not so for online content portals that welcome comments from anywhere—including the online version of the New York Times.

This strange medium-specific subsidy for online content platforms made good if not perfect sense in 1996. (My generally positive thinking about it from that time, including some reservations, can be found here.) The Internet was newly mainstream, and many content portals comprised the proverbial two people in a garage. To impose upon them the burdens of traditional media would presumably require tough-to-maintain gatekeeping. Comments sections, if they remained at all, would have to be carefully screened to avoid creating liability for the company. What made sense for a newspaper publishing at most five or six letters a day amidst its more carefully vetted articles truly couldn’t work for a small Internet startup processing thousands or even millions of comments or other contributions in the same interval. Over time, the reviews elicited by Yelp and TripAdvisor, the financial markets discussions on Motley Fool, the evolving articles on user-edited Wikipedia—all are arguably only possible thanks to that §230 immunity conferred in 1996.

The immunity conferred is so powerful that there’s not only a subsidy of digital over analog, but one for third-party commentary over one’s own—or that of one’s employees. Last year the notorious Gawker.com settled for $31 million after being successfully sued for publishing a two-minute extract of a private sex video. If Gawker, instead of employing a staff whose words (and video excerpts) were attributable to the company, had simply let any anonymous user post the same excerpt—and indeed worked to assure that that user’s anonymity could not be pierced—it would be immune from an identical invasion of privacy suit thanks to the CDA. From this perspective, Gawker’s mistake wasn’t to host the video, but to have its own employees be the ones to post it.

The internet environment of 2017 is a lot different than that of 1997, and some of those two-people-in-a-garage ventures are now among the most powerful and valuable companies in the world. So does it make sense to maintain §230’s immunities today?

An infant industry has grown up.

In 1997, it made sense on a number of fronts to treat the Internet differently from its analog counterparts. For example, there was debate from the earliest mainstreaming of Internet commerce about whether to make U.S. state sales tax collection apply to Internet-based faraway purchases. The fact that there was so little Internet commerce meant that there was not a lot of money foregone by failing to tax; that new companies (and, for that matter, existing ones) could try...
out e-commerce models without concerning themselves from the start with tax compliance in multiple jurisdictions; and that the whole Internet sector could gather momentum if purchasers were enticed to go online—which in turn would further entice more commerce, and other activity, online. I was among those who therefore argued in favor of the de facto moratorium on state sales tax. But that differential no longer makes sense. A single online company—Amazon—now accounts for about 5 percent of all U.S. retail sales, online or off. It's a good thing that Amazon's physical expansion has meant that it naturally has started collecting and remitting state sales tax around the country.

Perhaps the evolution of the merits of equal treatment for state sales tax provides a good model for a refined CDA: companies below a certain size or activity threshold could benefit from its immunities, while those who grow large enough to facilitate the infliction of that much more damage from defamatory and other actionable posts might also have the resources to employ a compliance department. That would militate towards at least some standard to meet in vetting or dealing with posts, perhaps akin to the light duties of booksellers or newsstands towards the wares they stock rather than the higher ones of newspapers towards the letters they publish.

Apart from the first-order drawback of an incentive to game the system by staying just under whatever size or activity threshold triggers the new responsibilities, there's also the question of noncommercial communities that can become large without having traditional corporate hierarchies that lend themselves to direct legal accountability. Some of the most important computing services in the world rely on free and open source software, even as there remains a puzzle of how software liability would work when there's no organized firm singly producing it. This puzzle has remained unsolved even today, since liability for bugs or vulnerabilities in even corporate-authored software tends to be quite minimal. That might change as the line between hardware and software continues to blur with the Internet of Things.

Even for companies suited for new, light responsibilities under a modified CDA, there might be a distinction made between damages for past acts and duties for future ones. The toughest part of the Zeran case even for those sympathetic to the CDA is that apparently AOL was repeatedly told that the scandalous advertisement purporting to be from Ken Zeran was in fact not at all related to him—and the company was in a comparatively good position to confirm that. Even then the company did nothing. It's one thing to have permitted some defamatory content to come through amidst millions of messages; it's another to be fully aware of it once it's posted, and to still not be charged with any responsibility to deal with it. A more refined CDA might underscore such a distinction, favoring the kind of knowledge of falsehood that's at the heart of the heightened New York Times v. Sullivan barrier that public figures must meet in establishing defamation by a newspaper, and also cover knowledge that might come about after publication rather than before—leading only to responsibility once the knowledge is gained and not timely acted upon.

The AI thicket.

Even massive online speech-mediating companies can only hire so many people. With thousands of staffers around the world apparently committed to reviewing complaints arising over Facebook posts, the company still relies on algorithms to sift helpful from unhelpful content. And here the distinction between pre- and post-publication becomes blurred, because services like Facebook and Twitter not only host content—as a newspaper website does by permitting comments to appear in sequence after an article—but they also help people navigate it. A post might reach ten people or a billion, depending on whether it's placed in no news feeds or many.

The CDA as it stands allows maximum flexibility for salting feeds, since no liability will attach for spreading even otherwise-actionable content far and wide. A refined CDA could take into account the fact that Facebook and others know exactly whom they've reached: perhaps a more reasonable and fitting remedy for defamation would less be to assess damages against the company for having abetted it, but rather to require a correction or other followup to go out to those who saw—and perhaps came to believe—the defamatory content. (To be sure, this solution doesn't work for other wrongs such as invasion of privacy; no correction can “uninvade” it among those who saw the content in question.)

Such corrective, rather than compensatory, remedies may be more fitting both for the wronged party and for the publisher, but it could in turn make content elision much more common. For example, in the context of traditional book publishing, including for noninteractive digital books like those within a Kindle, the CDA does not protect the publisher against the author's defamation. With a threat of liability remaining, I've worried that in addition to damages, a litigant might demand a digital retraction: a forced release of a new version of an e-book to all e-readers that omits the defamatory content.

Of course, if the challenged words are really defamatory that might be thought of as an improvement for both injured party and for the reader. But if done without notice to the reader, it smacks of propaganda, and to the extent lawsuits or threats of same can induce defendant publishers to cave—when caving doesn't entail paying out damages but rather altering the content they've stewarded—it could come to happen all too frequently, and with the wrong incentives. Similarly, an AI trained to...
avoid controversial subjects—perhaps defined as subjects that could give rise to threats of litigation—might be very much against the public interest. This would mirror some of the damaging incentives of Europe’s “right to be forgotten” as developed against search engines. Any refinement of the CDA that could inspire AI-driven content shaping runs this risk, with the perverse solace that even with today’s CDA the major content platforms are already shaping content in ways that are not understandable or reviewable outside the companies.

Related to the power of AI is the refined power to personalize content in 2017, including by jurisdiction. If a Texas court finds something defamatory under Texas law, such as maligning certain food products, it might not be defamatory under, say, Massachusetts law. Any diminution of CDA 230’s immunities might in the first order impel online platforms like Facebook to have to police away any food disparagement—even if it’s posted and read by Facebook users in food-indifferent Massachusetts. If there were to be exposure under Texas law, perhaps it should only arise if the content were shown (or continued to be shown) in Texas. This could also provide a helpful set of pressures on the substantive doctrine: Texas citizens, including legislators, might rue being excluded from certain content online that’s available in other states.

The internet’s development over the past twenty years has benefited immeasurably from the immunities conferred by §230. We’ve been lucky to have it. But any honest account must acknowledge the collateral damage it has permitted to be visited upon real people whose reputations, privacy, and dignity have been hurt in ways that defy redress. Especially as that damage becomes more systematized—now part of organized campaigns to shame people into silence online for expressing opinions that don’t fit an aggressor’s propaganda aims—platforms’ failures to moderate become more costly, both to targets of harassment and to everyone else denied exposure to honestly-held ideas.

As our technologies for sifting and disseminating content evolve, and our content intermediaries trend towards increasing power and centralization, there are narrow circumstances where a path to accountability for those intermediaries for the behavior of their users might be explored. Incrementalism gets a bad rap, but it’s right to proceed slowly if at all here, with any tweaks subject to rigorous review of how they impact the environment. The vice from the indiscriminate nature of §230’s broad immunity is somewhat balanced by a virtue of everyone knowing exactly where matters stand—line-drawing carries its own costs and distortions.