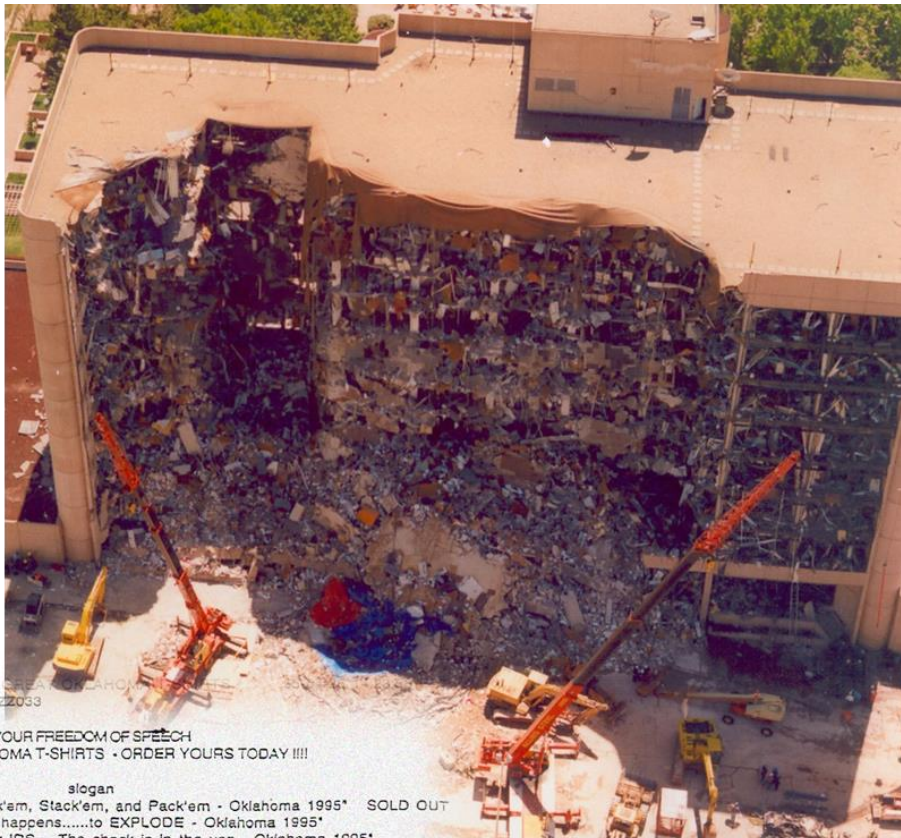


Zeran v. America Online



Subject: ### BREAK LAHO
From: KEN Z2033

EXERCISE YOUR FREEDOM OF SPEECH
NEW OKLAHOMA T-SHIRTS - ORDER YOURS TODAY !!!!

Item#	slogan
#520	*'Rack'em, Stack'em, and Pack'em - Oklahoma 1995' SOLD OUT
#522	*'Shit happens.....to EXPLODE - Oklahoma 1995'
#524	*'Dear IRS.....The check is in the van - Oklahoma 1995'
#568	*'Visit Oklahoma...It's a BLAST !!!'
#569	*'Putting the kids to bed.....Oklahoma 1995' ONLY SMALLS LEFT
#583	*'McVeigh for President 1996'

NEW ITEMS
#633 - *'2nd floor ladies apparel, 1st floor dead babies - Oklahoma 1995'
#637 - *'Forgot the rescue, let the maggots take over - Oklahoma 1995'
#651 - *'Finally, a day care center that keeps the kids quiet - Oklahoma 1995'

*** I WILL BE DONATING \$1 FROM EVERY SHIRT TO THE VICTIMS

- > \$14.95 each plus \$2.00 shipping/handling
- > Shirts are a white cotton 50/50 blend with black ink.
- > SIZES: Small, Medium, Large, X-Large, XX-Large
- > Please order by number and size
- > All orders are shipped out same day

Please call (206) 362-
Ask for Ken
Due to high demand please call back if busy

Edited by Eric Goldman & Jeff Kosseff

Acknowledgements

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Table of Contents

About the Book vi

Advertisements Posted to AOL’s Michigan Military Movement Forum

The Essays

Commemorating the 20th Anniversary of Internet Law’s Most Important Judicial Decision
Eric Goldman and Jeff Kosseff 6

‘Zeran v. AOL’ and Its Inconsistent Legacy
Ian C. Ballon 8

Section 230 Keeps Platforms for Defamation and Threats Highly Profitable
Ann Bartow 11

Policy Architecture and Internet Freedom
Jerry Berman 14

Sex, Scandal and Intermediary Liability: Imagining Life Without ‘Zeran v. AOL’
Hillary Brill 18

How the Scam Artists at Stratton Oakmont Made ‘Zeran’ Possible and Unwittingly Saved
the Internet
Robert J. Butler 21

Serendipity and Internet Law: How the ‘Zeran v. AOL’ Landmark Almost Wasn’t
Patrick J. Carome and Cary A. Glynn 24

20 Years of Protecting Intermediaries: Legacy of ‘Zeran’ Remains a Critical Protection for
Freedom of Expression Online
Cindy Cohn and Jamie Williams 32

How the Supreme Court Ignored the Lesson of ‘Zeran’ and Screwed Up Copyright Law on
the Internet
Roger Allan Ford 36

Moral Hazard on Stilts: ‘Zeran’s’ Legacy
Mary Anne Franks 39

The Possible Redundancy of §230
Brian L. Frye 41

The First Hard Case: ‘Zeran v. AOL’ and What It Can Teach Us About Today’s Hard Cases
Cathy Gellis 44

Who Cyber-Attacked Ken Zeran, and Why? Eric Goldman	46
No ESC James Grimmelmann	49
The Satellite Has No Conscience: §230 in a World of ‘Alternative Facts’ Laura A. Heymann.....	52
The Non-Inevitable Breadth of the ‘Zeran’ Decision Samir C. Jain.....	55
The Judge Who Shaped the Internet Jeff Kosseff.....	57
Zeran’s Failed Lawsuit Against an Oklahoma Radio Station Robert D. Nelon.....	61
The Chilling Effect Claims in ‘Zeran v. AOL’ Jonathon W. Penney.....	64
‘Zeran v. America Online’ and the Development of Trolling Culture Aaron Schwabach	68
‘Zeran v. AOL’: The Anti-Circumvention Tool Maria Crimi Speth.....	71
The UK’s Broad Rejection of the §230 Model Gavin Sutter	74
‘AOL v. Zeran’: The Cyberlibertarian Hack of §230 Has Run Its Course Olivier Sylvain	78
CDA 230 Then and Now: Does Intermediary Immunity Keep the Rest of Us Healthy? Jonathan Zittrain	81

The Case Materials

Zeran v. AOL (W.D. Ok) Complaint.....	86
Zeran v. AOL (W.D. Ok) Order on Motion to Transfer.....	101

Zeran v. AOL (E.D. Va) Memorandum in Support of Defendant's Motion For Judgment on the Pleadings	105
Zeran v. AOL (E.D. Va) Brief in Opposition to Defendant's Motion For Judgment on the Pleadings	117
Zeran v. AOL (E.D. Va) Reply Memorandum in Further Support of Defendant's Motion for Judgment on the Pleadings	134
Zeran v. AOL (E.D. Va) Court Hearing Transcript	145
Opinion in Zerán v. AOL (E.D. Va)	161
Zeran v. AOL (4th Cir.) Brief of the Appellant	171
Zeran v. AOL (4th Cir.) Brief of the Appellee.....	187
Zeran v. AOL (4th Cir.) Opinion	207
Zeran's Petition for a Writ of Certiorari	216
Opposition of America Online, Inc. to Petition for a Writ of Certiorari	231
Zeran's Reply to Opposition to Petition for a Writ of Certiorari.....	244
Zeran v. Diamond Broadcasting, Inc. (W.D. Ok) Opinion	250
Zeran v. Diamond Broadcasting, Inc. (10th Cir.) Opinion.....	254

About This Book

Because the field of Internet Law is relatively young, most people don't think much about its history. That's a shame, because Internet Law's history is filled with many colorful characters and pivotal moments. Furthermore, many key figures in Internet Law are still alive, making it possible to capture their first-hand perspectives.

In 2017, the co-editors collaborated on a retrospective of one of the key historical milestones in Internet Law: the Fourth Circuit Court of Appeals' ruling in *Zeran v. America Online*. This ruling was the first appellate ruling to interpret 47 U.S.C. § 230 (Section 230), which had passed just the prior year. As we now know, Section 230 has become one of the most important laws about technology ever passed by Congress; and much of that influence is directly attributable to the *Zeran* opinion's broad interpretation of Section 230. Together, the 1996 Section 230 law, plus the 1997 *Zeran* ruling, sparked the Web 2.0 revolution and the ascendance of user-generated content services that dominate the modern Internet.

This makes *Zeran* case one of the most significant Internet Law rulings of all time. To recognize the twentieth anniversary of the *Zeran* ruling, the co-editors recruited two dozen experts to share their perspectives on the *Zeran* ruling. Their contributions were so rich and insightful that we wanted to collect those essays into a single resource so that they could continue to spark discussion, debate, and understanding. This ebook presents these essays as they were initially published on Law.com in November 2017—without any updates, even though some of the information in the essays is out-of-date. In their original form, the essays provide a fabulous snapshot of that moment in history.

To further enhance the reader's understanding of the case, we also collected some primary source materials about the case. Some of these documents have never before been available in electronic form. The source materials facilitate a better understanding of the opinion and its historical context. They also comprise a nice case study of litigation over new technologies. What did the lawyers do right? What did the lawyers do wrong? These materials can facilitate many pedagogical insights.

It's virtually impossible to read these materials and not be amazed by the *Zeran* opinion's implications. We're still hotly debating the merits and problems with the opinion today, and we hope the materials in this ebook will enhance that debate.

Prof. Eric Goldman
Prof. Jeff Kosseff
July 2020

**Advertisements Posted to
AOL's Michigan Military Movement
Forum**

Subj: ### GREAT OKLAHOMA T-SHIRTS
From: KEN ZZ033

95-04-26 14:23:58 EDT

EXERCISE YOUR FREEDOM OF SPEECH
NEW OKLAHOMA T-SHIRTS • ORDER YOURS TODAY !!!!

Item#	slogan
#520	- "Rack'em, Stack'em, and Pack'em - Oklahoma 1995" SOLD OUT
#522	- "Shit happens.....to EXPLODE - Oklahoma 1995"
#524	- "Dear IRS.....The check is in the van - Oklahoma 1995"
#568	- "Visit Oklahoma...It's a BLAST !!!"
#569	- "Putting the kids to bed.....Oklahoma 1995" ONLY SMALLS LEFT
#583	- "McVelgh for President 1996"

NEW ITEMS

#633 - "2nd floor ladies apparel, 1st floor dead babies - Oklahoma 1995"
#637 - "Forget the rescue, let the maggots take over - Oklahoma 1995"
#651 - "Finally, a day care center that keeps the kids quiet - Oklahoma 1995"

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- > \$14.95 each plus \$2.00 shipping/handling
- > Shirts are a white cotton 50/50 blend with black ink.
- > SIZES: Small, Medium, Large, X-Large, XX-Large
- > Please order by number and size
- > All orders are shipped out same day

Please call (206) 362-XXXXXXXXXX
Ask for Ken
Due to high demand please call back if busy

Subj: Something found on AOL.
Date: 95-04-29 14:34:08 EDT
From: Eckica
To: MS1077

Sent on: America Online (using WAOL 2.0)
Mark, please find below something found on AOL.

Thanks,
Eck (Hollywood) Prater

Subj: NAUGHTY OKLAHOMA T-SHIRTS
Date: 95-04-25 14:54:35 EDT
From: Ken 2203

SIX GREAT OKLAHOMA T-SHIRTS !!!!!
ORDER YOURS TODAY !!!!!

Item#	Slogan
#520	"Rack'em, Stack'em, and Pack'em - Oklahoma 1995"
#522	"Shit happens.....to EXPLODE - Oklahoma 1995"
#524	"Dear IRS.....The check is in the van - Oklahoma 1995"
#568	"Visit Oklahoma...It's a BLAST !!!"
#569	"Putting the kids to bed.....Oklahoma 1995"
#583	"McVeigh for President 1996"

\$14.95 each plus \$2.00 shipping/handling
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SIZES: Small, Medium, Large, X-Large, XX-Large
Please order by number and size:
All orders are shipped out same day

NAUGHTY OKLAHOMA ITEMS
WE HAVE SEVERAL NEW ITEMS IN STOCK
T-SHIRTS, KEY CHAINS, & BUMPER STICKERS

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(206) 362-5000 (Ask for Ken)

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#522	- "Shit happens.....to EXPLODE - Oklahoma 1995"
#524	- "Dear IRS.....The check is in the van. - Oklahoma 1995"
#568	- "Visit Oklahoma...It's a BLAST !!!" ***** OUT OF STOCK
#569	- "Putting the kids to bed.....Oklahoma 1995" ***** OUT OF STOCK
#583	- "McVeigh for President 1996"
#633	- "2nd floor ladies apparel, 1st floor dead babies - Oklahoma 1995"
#637	- "Forget the rescue team, let the maggots take over - Oklahoma 1995"
#651	- "Finally, a day care center that keeps the kids quiet - Oklahoma 1995"

NEW ITEMS:

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#909 - "My other car is a Ryder van - Oklahoma 1995" (\$2.25 @)
#908 - "Free Tim McVeigh - Hero of the USA" (\$2.25 @)
#993 - "Kids in the hall...and in the basement ~~and~~ on the roof" (\$2.25@)
#904 - Key chains shaped like Oklahoma toe tags (\$3.95@ plus ship).

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Ask for Ken
Due to high demand please call back if busy

Essays

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

By Eric Goldman and Jeff Kosseff

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.

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 decades, some of these 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.

Jeff Kosseff is an assistant professor of cybersecurity law at the United States Naval Academy. Eric Goldman is a Professor of Law at Santa Clara University School of Law in the Silicon Valley.

‘Zeran v. AOL’ and Its Inconsistent Legacy

By Ian C. Ballon

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 years 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*, _ F. App’x _, 2017 WL 2445063 (9th Cir. 2017).

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 keystrokes, 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.

Ian C. Ballon is an Internet litigator and co-chair of Greenberg Traurig’s Global Intellectual Property & Technology Practice Group. He also serves as Executive Director of Stanford Law School’s Center for e-commerce and is the author of the five-volume legal treatise, E-Commerce & Internet Law: Treatise with Forms 2d Edition (Thomson Reuters West, www.ian-ballon.net). The opinions expressed in this article are solely those of the author.

Section 230 Keeps Platforms for Defamation and Threats Highly Profitable

By Ann Bartow

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 hoaxer.

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, histrionic claims that without §230 successful and creative online companies like Google, Facebook and Twitter would not exist or could not thrive are unsupportable.

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

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 Internet.

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 policy makers 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 Exon 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 Exon 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 (RCA) 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 Plesser 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 Exon 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 Exon 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 Exon 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.

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Sex, Scandal and Intermediary Liability: Imagining Life Without ‘Zeran v. AOL’

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 Baze.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 Baze.com upon notification of its pornographic content. The end user license agreement prohibited pornography and Baze.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.

Under the act, Avi faced up to five years in prison and thousands of dollars in fines. Specifically, §67 establishes liability for anyone who “publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct,” even without knowledge or intent. Moreover, §85 of the act imposes liability not only on the person who engaged in the violation of the act but also on the person in charge of and responsible to the company.

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 Baze.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 Baze.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 potentially 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 U.S.C. §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. Zerán*, 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.

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How the Scam Artists at Stratton Oakmont Made ‘Zeran’ Possible and Unwittingly Saved the Internet

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. I 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.

Robert J. Butler is a member of the law firm Fletcher, Herald & Hildreth. He represented Prodigy Services Company in the negotiations on the Communications Decency Act and the Good Samaritan Provision.

Serendipity and Internet Law: How the ‘Zeran v. AOL’ Landmark Almost Wasn’t

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.

Subj: ### GREAT OKLAHOMA T-SHIRTS
From: KEN ZZ033

95-04-26 14:23:58 EDT

EXERCISE YOUR FREEDOM OF SPEECH
NEW OKLAHOMA T-SHIRTS - ORDER YOURS TODAY !!!!

Item#	slogan
#520	- "Rack'em, Stack'em, and Pack'em - Oklahoma 1995" SOLD OUT
#522	- "Shit happens.....to EXPLODE - Oklahoma 1995"
#524	- "Dear IRS.....The check is in the van - Oklahoma 1995"
#568	- "Visit Oklahoma...It's a BLAST !!!"
#569	- "Putting the kids to bed.....Oklahoma 1995" ONLY SMALLS LEFT
#583	- "McVeigh for President 1996"

NEW ITEMS

#633 - "2nd floor ladies apparel, 1st floor dead babies - Oklahoma 1995"
#637 - "Forget the rescue, let the maggots take over - Oklahoma 1995"
#651 - "Finally, a day care center that keeps the kids quiet - Oklahoma 1995"

*** I WILL BE DONATING \$1 FROM EVERY SHIRT TO THE VICTIMS

- > \$14.95 each plus \$2.00 shipping/handling
- > Shirts are a white cotton 50/50 blend with black ink.
- > SIZES: Small, Medium, Large, X-Large, XX-Large
- > Please order by number and size
- > All orders are shipped out same day

Please call (206) 362-
Ask for Ken
Due to high demand please call back if busy

Figure 1: Copy of Bulletin Board Posting Attached to Zeran's Complaint

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 ad appeared, someone emailed one of the ads to Mark Shannon, then the co-host of a popular morning radio show ("Shannon & Spinozi") on KRXXO-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 Ninth Circuit. Instead, he sued AOL in federal court in Oklahoma City, the same place where, three months earlier, he had sued Diamond Broadcasting, owner of KRXO-FM. Perhaps his lawyers initially sued Diamond/KRXO in Oklahoma City because they were concerned about whether it could be successfully hauled into court in Seattle, and then chose the same venue for the suit against AOL as a matter of efficiency. Or, perhaps, they expected jurors from Oklahoma would most readily sympathize with a plaintiff who had been victimized by a grotesque stunt that mocked the unspeakable tragedy that 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.

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 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. And, under the heading “Recent Developments in the Law of Cybertorts,” they contrasted the 1991 decision by a federal district judge in *Cubby v. Compuserve* with the 1995 decision by a New York state trial judge in *Stratton-Oakmont v. Prodigy*. They only got around to discussing §230 in a two-paragraph argument headed “The Future of Cybertorts,” in which they described the new federal law, stated that it “supports” *Cubby* and “eviscerates” *Stratton-Oakmont*, and noted that “henceforth” it would “protect services such as AOL.” Had AOL's defense continued along these lines, perhaps AOL would have prevailed on state law grounds. In those circumstances, the first judicial construction of §230 would have been left to a different case in a different court.

After the case traveled east, serendipity struck even in the way Wilmer, Cutler & Pickering, where the senior co-author of this article (Patrick Carome) had been practicing media law for nearly a decade, became involved. Neither Carome nor Wilmer had previously done work for AOL, even though it was an up-and-coming new-media company in Vienna, Virginia, not far from Wilmer's main office in Washington, D.C. A month or two before the transfer, however, Carome learned that an in-house lawyer at his client The Washington Post, Elizabeth Blumenfeld, was about to switch jobs and join AOL's fast-growing legal department. Carome asked Blumenfeld to keep an eye out for opportunities for AOL to retain him and his firm. Soon after she got to AOL, Blumenfeld called Carome about a case that was being transferred to the Eastern District of Virginia, for which AOL needed to select new counsel: *Zeran v. AOL*.

The process AOL used to select new counsel for the case was an in-writing “beauty contest.” The in-house lawyers, Randall Boe and Blumenfeld, asked Wilmer and two other Washington law firms known for their significant media litigation practices to each submit a written proposal setting out a strategy for defending the case and an estimate of fees. Carome and two of his colleagues, John Payton and Samir Jain, dove into the exercise. Even though AOL had already used its one shot at a motion to dismiss under Federal Rule 12(b)(6), and even though its 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 hewn 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—but 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 Appeals. The majority's decision closely tracked *Zeran*'s reasoning and block-quoted 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.

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20 Years of Protecting Intermediaries: Legacy of ‘Zeran’ Remains a Critical Protection for Freedom of Expression Online

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 ugly—*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 rightfully 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 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 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 newspapers' 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.

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How the Supreme Court Ignored the Lesson of ‘Zeran’ and Screwed Up Copyright Law on the Internet

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.

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Moral Hazard on Stilts: ‘Zeran’s’ Legacy

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 hoaxer 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

[1] David Lukmire, *Can the Courts Tame the Communications Decency Act?: The Reverberations of ‘Zeran v. America Online,’* 66 N.Y.U. ANN. SURV. AM. L. 371, 403 (2010)

[2] *Id.*

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 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.

[3] DAVID NIOSE, *FIGHTING BACK THE RIGHT: RECLAIMING AMERICA FROM THE ATTACK ON REASON* (2014), 45

[4] ASTRA TAYLOR, *THE PEOPLE’S PLATFORM: TAKING BACK POWER AND CULTURE IN THE DIGITAL AGE* (2014) 221.

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.

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The Possible Redundancy of §230

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 “publisher” 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.

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The First Hard Case: ‘Zeran v. AOL’ and What It Can Teach Us About Today’s Hard Cases

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 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 argue, 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.

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Who Cyber-Attacked Ken Zeran, and Why?

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 KRXO 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 reconfirmed 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.

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No ESC

By James Grimmelman

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 Godel’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 be 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.

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The Satellite Has No Conscience: §230 in a World of ‘Alternative Facts’

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 KRXO 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 had he 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.

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The Non-Inevitable Breadth of the ‘Zeran’ Decision

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 had 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.

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The Judge Who Shaped the Internet

By Jeff Koseff

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’s 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.

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Zeran's Failed Lawsuit Against an Oklahoma Radio Station

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. After discovery, KRXO moved for summary judgment.

The court granted the summary judgment motion (19 F. Supp.2d 1249 (W.D. Okla. 1997)). 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 KRXXO'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 KRXXO 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 KRXXO.

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 KRXXO 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 KRXXO. 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 disapprobation 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 affirmance of summary judgment in favor of KRXXO 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 KRXXO 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.

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The Chilling Effect Claims in ‘Zeran v. AOL’

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 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 counterfactuals— 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 notice- 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 liability- on-notice schemes rejected in *Zeran* because they would likely lead to a “chill” on internet speech, the DMCA provides 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. Google, 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, complied with 75 percent of DMCA notices. WordPress reports removal in 61percent of cases. Those rates are not necessarily a problem by themselves, though when combined with studies that have documented substantial percentages 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 reason 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 online 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, responses 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 statement 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.

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‘Zeran v. America Online’ and the Development of Trolling Culture

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,

KRXO, 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 KRXO.

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 only surprise is 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.

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‘Zeran v. AOL’: The Anti-Circumvention Tool

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.

[W]e 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.

Jones v. Dirty World Entm’t Recordings, 965 F. Supp. 2d 818, 821 (E.D. Ky. 2013), rev’d and vacated, 755 F.3d 398 (6th Cir. 2014).

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.

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The UK's Broad Rejection of the §230 Model

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 defendant should have been aware until actual notice had been received. Godfrey had complained several times about the defamation, but Demon had failed to remove it until the system automatically deleted the post in question some ten days after it was first made. This actual notice would, Morland ruled, render the defense unavailable to Demon at full trial. The ISP consequently settled the case, paying Godfrey a reported £15,000 in damages and a further £485,000 costs.

In 2002, the UK enacted domestic legislation incorporating §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 applied 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-commercial emailing lists and reposting of bulletin board posts, and in terms of the legal claims it immunized. Not only defamation, but also the provision of false stock information, discriminatory 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 particular, 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-avis 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 produced 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 intermediaries 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 manifesto *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 intermediaries 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 operate.

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 websites”. 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 individuals 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 operator 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 provisions 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 thirdway 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?

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‘AOL v. Zeran’: The Cyberlibertarian Hack of §230 Has Run Its Course

By Olivier Sylvain

Twenty years ago, in *Zeran v. AOL*, 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 cyberprofs 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 cyberlibertarian 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 advertizing 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.

Oliver Sylvain is an associate professor at Fordham University School of Law.

CDA 230 Then and Now: Does Intermediary Immunity Keep the Rest of Us Healthy?

By Jonathan Zittrain

Twenty 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 follow-up 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.

Jonathan Zittrain is the George Bemis Professor of International Law at Harvard Law School, Director of the Harvard Law School Library and co-founder of the Berkman Klein Center for Internet & Society. Other works may be found at <http://www.jz.org>.

Case Materials

Editors' Note: Many of the case materials in this ebook have been reformatted to allow for easier viewing on electronic devices. Footnotes have been altered to appear within the text as smaller, indented paragraphs, beginning with their corresponding footnote numbers in brackets [#]

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
NO. CIV-96-0598-T
April 23, 1996

KENNETH M. ZERAN,
Plaintiff,

v.

AMERICA ONLINE, INC.,
Defendant.

COMPLAINT

Plaintiff, by his attorneys, for his complaint against defendant, states:

PARTIES

1. Plaintiff is a citizen of the State of Washington and resides in Seattle, Washington, and is currently involved in publishing specialized monthly publications in the Puget Sound area. Over the past twenty-five years plaintiff has been a producer of film and television, including World Cup Soccer, the Pan American Games, the Royal Ascot in England, the National Basketball Association World Championship, the "N.F.L. Report," "Sports Spectacular" for CBS, the Goodwill Games for Turner Broadcasting, the New York Mets, Major League Baseball, the National Hockey League, and the United States Military Academy.

He developed the industry's first double-system editor for video, film, and audio which has been used in facilities throughout the world.

He is a major gallery-exhibited artist, commissioned in 1976 for the American Bicentennial for a multi-city exhibit titled "Family Portrait," and has completed many portraits including Salvador Dali, Andy Warhol, Pablo Picasso, Marcel Duchamp, LeRoy Neiman, Sir Noel Coward, Anne Baxter, Jessica Tandy and Hume Cronyn. His commercial photography includes the World Series, and the 1984 Los Angeles Summer Olympics and Sarajevo Winter Olympics, National Basketball Association, fashion and advertising. He is a published interviewer for Interview Magazine and has conducted interviews with Margaret Meade, George Plimpton, Howard Cosell, Jimmy "the Greek" Snyder, Roone Arledge, Lamar Hunt and others for an anthology entitled "Good Sports."

Plaintiff currently operates out of his home in Seattle and has never subscribed to America Online electronic data and information service ("AOL").

Plaintiff has a publicized telephone number to maintain contacts with the many businesses with whom he must communicate, in particular with over 200 apartment owners that have listings in a monthly publication prepared and disseminated by plaintiff relating to currently available apartments for rent in the Puget Sound area.

Due to the necessity of maintaining such communications, plaintiff was unable to suspend or alter his telephone number after the events described below began to transpire.

2. Defendant, America Online, Inc., ("AOL"), is, on information and belief, a corporation organized and existing under the laws of the State of Delaware, with offices located at Vienna, Virginia.

JURISDICTION AND VENUE

3. This Court has jurisdiction of these parties pursuant to 28 U.S.C. § 1332, due to the diversity of citizenship of the parties and the amount in controversy exceeds \$50,000 exclusive of interest.

4. Venue is proper for this case pursuant to 28 U.S.C. § 1391(2) and (3) in that a substantial part of the events and omissions giving rise to plaintiff's claim occurred in this District and

defendant AOL is subject to personal jurisdiction in this District by reason of its commercial activities in this District.

FACTUAL BACKGROUND

5. On April 25, 1995, at 14: 54: 35 E. D. T., unknown to plaintiff, a currently unidentified person posted on AOL an “advertisement” for “Naughty Oklahoma T-Shirts” which listed the notice to be “From: Ken ZZ03” giving plaintiff’s Seattle business phone. The t-shirts all related to the tragic bombing of the Murrah Federal Building in Oklahoma City on April 19, 1995, and were all grossly offensive, in extreme bad taste, and intentionally designed to shock and dismay those reading the posting. Disregarding the offensive nature of the product offered in the posting, it was not a legitimate business listing. It was a vicious, cruel hoax designed to generate outrage at the purported seller in all those who read it or heard about it. A copy of the original AOL posting for the items for sale is attached as Exhibit “A”.

6. On April 25, 1995, plaintiff received a phone call from Jeff Hudson, a reporter for the “Army Times” who informed him about the AOL “Oklahoma Disaster” t-shirts attributable to plaintiff. Mr. Hudson informed plaintiff that the AOL posting appeared on the “Michigan Military Movement” on AOL and included plaintiff’s telephone number. Plaintiff informed Mr. Hudson that he had not posted the “advertisement” and would contact AOL.

7. Plaintiff called the 800 operator and received AOL’s 800 number (1-800-827-6364), called it and was referred to the legal department. At 4:45 P.M. P.D.T., plaintiff called 703-556-3730 and spoke with Jeanelle Stell in the AOL legal department. Plaintiff informed her that he had not made the posting, was not a member of AOL and did not use the INTERNET. Ms. Stell assured plaintiff that the posting would be removed, but despite plaintiff’s desperate request, she stated that as a matter of policy, AOL would not post a retraction or alert subscriber’s that the AOL posting was bogus and fraudulent and had nothing to do with plaintiff.

8. As a result of this bogus posting, plaintiff’s phone became almost useless to his regular business due to the volume of calls he began receiving, most of which were extremely derogatory in nature, and included death threats and other exceedingly intimidating messages.

9. On April 26, 1995, plaintiff received a call from Griff Palmer, the INTERNET writer for the DAILY OKLAHOMAN newspaper in Oklahoma City, to inquire as to what plaintiff was doing. Plaintiff told him that he had already contacted AOL to have this material removed and that he had nothing to do with it. After making inquiries, Mr. Palmer called plaintiff back and informed him that since Mr. Palmer had verified plaintiff’s disclaimer, no story would be appearing concerning the AOL posting.

10. According to AOL, the original Ken ZZ03 posting was purportedly deleted on April 26, 1995. However, on April 26, 1995, at 14:23:58 E.D.T. a new posting under “Ken ZZ033” (a new AOL “screen name”) was placed on AOL with new items for sale, indicating that some of the t-shirts appearing on the April 25th posting had “SOLD OUT ” announcing that “I will be donating \$1 from every shirt to the victims,” and directing callers to “Ask for Ken. Due to high demand please call back if busy.” Plaintiff’s business phone number was again prominently featured. A copy of the second AOL posting is attached as Exhibit “B”.

11. Plaintiff received another call, also on April 26, 1995, from Jeff Green of the Oakland Press in Pontiac, Michigan, to whom he explained that he had nothing whatsoever to do with the bogus posting. Mr. Green then faxed a hard copy of the AOL posting to him (*see* Ex. B), which reflects that as of late afternoon, April 26, 1995, AOL had failed to remove or block the bogus posting of Oklahoma City bombing items which identified plaintiff as the seller with his Seattle phone number listed.

12. With the calls continuing and gathering frequency, on April 27, 1995, plaintiff telephoned AOL's legal department at 2:27 P.M. P.D.T. and got a recording. He then called the 800 number and spoke to a "Pamela R." and again requested removal of the posting to take out any reference of KENZ and his phone number. "Pamela R." was at Ext. 488, which plaintiff had requested so he could follow up.

13. On April 28, 1995, with no relief and the angered calls continuing, plaintiff called AOL yet again. First, he called the legal department at 11:26 A.M. P.D.T. and got a recording and called another number at the legal department, (703) 918-1495 at 11:27 A.M. P.D.T. and left a message for someone to call him regarding the situation. He then called (703) 556-3730 at 11:39 A.M. P.D.T. and again left a message for someone to call him. At 11:40 A.M. P.D.T. plaintiff called AOL corporate offices (703) 448-8700 and spoke with "Jeannean" in Public Relations, briefly reiterating the situation, and told her it was extremely important that someone at AOL call him as soon as possible regarding the matter. No one from AOL responded, So at 2:39 P.M. P. D. T., plaintiff called AOL's legal department once again at (703) 556-3730 and got another recording and left Ms. Stell another message for someone to contact him, He also called AOL's legal department at (703) 918-1495 and received no response.

14. He then called "Pamela R." again at approximately 3:30 P.M. P.D.T., 1-800-877-6364, Ext. 488, to follow up on the earlier call. She said two accounts had been connected from area code (617) and were associated with the situation, but neither account was related. She suggested that plaintiff call the police because of the seriousness of the situation.

15. On April 28, 1995, at 16:57:52 E.D.T. another AOL posting appeared under "Ken Z033" for "Naughty Oklahoma Items," with additional "Out of Stock" items listed and new items for sale, and again announcing that "I will be donating \$1 from every shirt to the victims," and again directing callers to "Ask for Ken Due to high demand please call back if busy." Plaintiff's business phone number was again prominently featured.

A copy of the third AOL posting is attached as Exhibit "C".

16. Plaintiff then called the FBI in Seattle at 4:10 P.M. P.D.T. and spoke to agent Randy Jeanette, who took a report. Plaintiff called "Pamela R." at AOL and asked again for AOL to delete the message and "unplug" the account. She said the "screen name" had been reported to the Terms service Staff and that the account would probably be closed and that the "person in charge" of the posting will remove it, hopefully soon.

17. As of April 29, 1995, the problem was still not resolved, Plaintiff's life was totally disrupted, his business was effectively halted, he had not been able to sleep for several days and he was emotionally drained.

18. On April 30, there were more KEN Z listings on AOL and calls coming in every two minutes to plaintiff's phone. He received a telephone call from the television show "Hard Copy"'s Gary Bastmajian wanting to do a story. "Hard Copy" was informed that the postings were bogus, the FBI had been called in and plaintiff did not want his name associated with the matter in public. On May 1, 1995 calls continued.
19. Unbeknownst to plaintiff, at 14: 34 E.D.T. on April 29, 1995, "Eck (Hollywood) Crater" had E-mailed to "MS101.7" with the notation "Mark, please find something found on AOL," believed by plaintiff to be Mark Shannon at KRXO, the AOL posting of 4-25-95 14:54:35 E.D.T. on "Six Great Oklahoma T-shirts." (i.e. Ex. A) ("Eck" E-mail attached as Exhibit "D").
20. On May 1, 1995, KRXO in Oklahoma City performed a devastating radio broadcast on the Shannon and Spinozi show. Mark 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," incited the audience to call plaintiff and gave plaintiff's business phone number over the air.
21. Subsequently, plaintiff was bombarded with death threats and other forms of recrimination as well as violent language from Oklahoma City.
22. Plaintiff called KRXO at 11:28 A.M. P.D.T. and asked for the head of programming. Plaintiff was told that the head of programming was Vance Harrison, who would be back in a half-hour, Plaintiff told this person who answered that the story was untrue and that he had no connection to the AOL postings, Plaintiff was told to call back.
23. At 12:16 P.M. P.D.T., plaintiff called back and spoke to Vance Harrison for about ten minutes, again relating to them that he had nothing to do with the AOL posting and that the story was untrue. Plaintiff requested an immediate retraction. Mr. Harrison faxed to plaintiff the hard copy of the source of KRXO's information (Ex. D).
24. Again, at 11:06 A.M. P.D.T. plaintiff called the AOL's legal department and could not reach anyone. Plaintiff was also receiving calls from grieving people in Oklahoma City, some of whom had lost loved ones and they did not believe plaintiff's protestations that he had nothing to do with the postings. Plaintiff was also receiving death threats from Oklahoma City callers as well.
25. Also on May 1, 1995, plaintiff sent a letter by registered mail to Ms. Ellen Kirsh, counsel to AOL, which letter was also faxed at 2:26 P.M. P.D.T. He received no immediate response. One caller, called Mark, who was convinced plaintiff was not responsible for the posting, faxed him another hard copy on May 1, 1995 (Ex. C).
26. Additionally, on May 1st plaintiff received by fax from Griff Palmer a copy of an April 28th 17:00:26 E.D.T. AOL posting with a Ken Z033 screen name (Ex. C has a Ken Z033 screen name with a 16:57:52 E.D.T. posting time), indicating that it had been downloaded from AOL by Palmer between 4:00 and 4:45 P.M. that day. Mr. Palmer also downloaded a Ken Z033 posting for computers for sale which had been posted at 11:29:32 E.D.T. on April 29, 1995. A copy of this fax is attached as Exhibit "E".

27. By May 2, 1995, plaintiff had received no relief and was still getting little sleep. Secret Service agent Ron Peters of Portland, Oregon, contacted him. Mr. Peters had been contacted from headquarters in Washington, D.C. A thorough interview was conducted, and he advised plaintiff to arrange for local police protection. He also advised plaintiff to have the media run stories to defuse the situation.
28. At 12:10 P.M. P.D.T., plaintiff called AOL's legal department to speak to Ellen Kirshe. Plaintiff spoke with Jane Church who said she would discuss the matter on behalf of Ms. Kirshe. Ms. Church said she was not aware of the faxed letter of May 1, 1995, and plaintiff faxed another copy. During this conversation which lasted 25 minutes, all of the same information previously conveyed to AOL was repeated, Ms. Church again promised the postings would be removed relating to KENZ033 etc.
29. On May 3, 1995, when the calls continued, plaintiff called the local Lake Forest Park Police, who initiated a case #95-47103. Officer Blackman said the police would institute increased surveillance of plaintiff's home.
30. On May 4, 1995, Officer Blackman called and said he had spoken with Jane Church of AOL who informed Blackman that everything had been purged the night of May 3, 1995, and a "system check" had been done.
31. On the advice of the Secret Service, plaintiff contacted Griff Palmer at the DAILY OKLAHOMAN newspaper and began efforts to run a story telling of these events. The FBI called plaintiff and told him the matter was assigned to the Secret service.
32. Radio station KRXO ran an on-air apology, but it was done in a "joking way."
33. At 1:28 P.M. P.D.T., plaintiff again called Jane Church who arranged a twenty-minute conference call with Peter Hippalier, Scott——, and Jean Stevens. Again they said all material would be removed. Again plaintiff gave them all the information about the posting repeating its "handle."
34. On May 6, 1995, the phone calls continued and plaintiff again called the local police, who continued their increased protective surveillance of his home.
35. On May 7, 1995, the DAILY OKLAHOMAN published the Sunday edition story, attached as Exhibit "F".
36. On May 8, 1995, the telephone calls continued. However, some were apologies from people in Oklahoma City.
37. On May 9, 1995, the telephone calls continued, although some callers who had called before offered assistance in the event of litigation if plaintiff could not obtain satisfaction from the offending media.
38. On May 11, 1995, plaintiff was still having trouble sleeping. The telephone calls also continued. On May 12, 1995, plaintiff made an appointment for May 15, 1995, with his doctor,

because of his lack of sleep and emotional exhaustion. The calls continued, albeit on a reduced basis.

39. On May 13, 1995, calls continued to diminish and on May 14, 1995, calls were down to about 15 that day.

40. On May 15, 1995, plaintiff saw his doctor who prescribed tranquilizers. From May 16 to June 1, 1995, the tranquilizers made plaintiff ineffective at work, but provided him much needed sleep.

FIRST CLAIM

41. Plaintiff incorporates paragraphs 1 through 40 above as if fully set forth herein.

42. Defendant AOL, as of 4:45 P.M. P.D.T., April 25, 1996, upon being notified by plaintiff that the incendiary defamatory and bogus posting using plaintiff's first name, "Ken," and using plaintiff's telephone number was in fact a hoax, had a duty to plaintiff to take reasonable care to remove the posting promptly, to notify its subscribers that the posting was bogus by placing a notice on its service, including appending such an alert to the original posting and any subsequent postings, and to execute safeguards to prevent a reporting of plaintiff's name and telephone number.

43. Defendant AOL, on information and belief, even though it was on constructive notice by reason of the law enunciated in Cubby, Inc. v. CompuServe, Inc, et al., 776 F. Supp. 1525 (S.D. N.Y. 1991), that it was obligated after due notice to be able to screen incendiary, defamatory and/or bogus material posted on its computer bulletin board service, as of April 25, 1995, had failed to implement an effective screening capability upon receipt of due notice.

44. On information and belief, the technology was available to defendant AOL to have had in place, as of April 25, 1995, the capability to screen out postings based upon a name and/or telephone number and/or key words or phrases.

45. Defendant AOL, therefore, failed to meet the proper standard of care reasonably expected of a substantial commercial operator of a computer bulletin board in its failure to have in place and readily available appropriate screening capability.

46. Defendant AOL is liable to plaintiff for all consequential damages proximately caused by defendant's negligence in addressing expeditiously and effectively the risk of injury to plaintiff by the incendiary, defamatory and bogus posting.

47. Plaintiff in fact was damaged by defendant's negligence regarding the incendiary, defamatory and bogus postings after due notice given by plaintiff to defendant demanding their removal in an amount in excess of \$50,000 by reason of emotional distress, physical pain and suffering and injury to reputation, collectively.

SECOND CLAIM

48. Plaintiff incorporates paragraphs 1 through 47 above as if fully set forth herein.

49. Defendant's conduct was grossly negligent and in such complete indifference to the rights of plaintiff and the public at large so as to constitute malice and justify an award of punitive damages pursuant to Oklahoma law, 23 O.S. §9, and general common law principles in an amount sufficient to punish the defendant and deter it and other similar commercial operators of computer bulletins boards.

WHEREFORE, plaintiff prays judgment against the defendant herein for actual damages in excess of \$50,000 as well as for punitive damages in an amount sufficient to achieve the purpose of such an award.

JURY TRIAL DEMANDED
ATTORNEY'S LIEN CLAIMED

List of Exhibits

THE NATIONAL ARCHIVE

TO: NAUGHTY OKLAHOMA T-SHIRTS
FROM: 95-04-25 14:54:35 EDT
SUBJECT: Ken Z203

SIX GREAT OKLAHOMA T-SHIRTS !!!!!
ORDER YOURS TODAY !!!!!

- | Item # | Slogan |
|--------|--|
| #320 | "Rack'em, Stack'em, and Pack'em - Oklahoma 1996" |
| #322 | "Shit happens.....to EXPLODE - Oklahoma 1996" |
| #324 | "Dear IRS.....The check is in the van - Oklahoma 1996" |
| #328 | "Visit Oklahoma...It's a BLAST !!" |
| #359 | "Putting the kids to bed.....Oklahoma 1996" |
| #383 | "McVeigh for President 1996" |

\$14.95 each plus \$2.00 shipping/handling
Shirts are a white cotton 50/50 blend with black ink.
SIZES: Small, Medium, Large, X-Large, XX-Large
Please order by number and size:
All orders are shipped out same day

Please call ~~(206) 362-5000~~
Ask for Ken

EXHIBIT A

REPRODUCTION
THE NATIONAL ARCHIVES AT PHILADEL

Subj: ### GREAT OKLAHOMA T-SHIRTS 95-04-26 14:23:58 EDT
From: KEN ZZ033

EXERCISE YOUR FREEDOM OF SPEECH
NEW OKLAHOMA T-SHIRTS • ORDER YOURS TODAY !!!!

Item#	slogan
#520	- "Rack'em, Stack'em, and Pack'em - Oklahoma 1995" SOLD OUT
#522	- "Shit happens.....to EXPLODE - Oklahoma 1995"
#524	- "Dear IRS.....The check is in the van - Oklahoma 1995"
#568	- "Visit Oklahoma...It's a BLAST !!!"
#569	- "Putting the kids to bed.....Oklahoma 1995" ONLY SMALLS LEFT
#583	- "McVeigh for President 1996"

NEW ITEMS

#633 - "2nd floor ladies apparel, 1st floor dead babies - Oklahoma 1995"
#637 - "Forget the rescue, let the maggots take over - Oklahoma 1995"
#651 - "Finally, a day care center that keeps the kids quiet - Oklahoma 1995"

*** I WILL BE DONATING \$1 FROM EVERY SHIRT TO THE VICTIMS ***

- > \$14.95 each plus \$2.00 shipping/handling
- > Shirts are a white cotton 50/50 blend with black ink.
- > SIZES: Small, Medium, Large, X-Large, XX-Large
- > Please order by number and size
- > All orders are shipped out same day

Please call (206) 362-5000
Ask for Ken
Due to high demand please call back if busy

EXHIBIT B

NAUGHTY OKLAHOMA ITEMS
WE HAVE SEVERAL NEW ITEMS IN STOCK
T-SHIRTS, KEY CHAINS, & BUMPER STICKERS

ORDER TODAY - MAKES A GREAT GIFT
(206) 362-5000 (Ask for Ken)

Item#	slogan
#520	- "Rack'em, Stack'em, and Pack'em - Oklahoma 1995" OUT OF STOCK
#522	- "Shit happens.....to EXPLODE - Oklahoma 1995"
#524	- "Dear IRS.....The check is in the van. - Oklahoma 1995"
#568	- "Visit Oklahoma...It's a BLAST !!!" ***** OUT OF STOCK
#569	- "Putting the kids to bed....Oklahoma 1995" ***** OUT OF STOCK
#583	- "McVeigh for President 1996"
#633	- "2nd floor ladies apparel, 1st floor dead babies - Oklahoma 1995"
#637	- "Forget the rescue team, let the maggots take over - Oklahoma 1995"
#651	- "Finally, a day care center that keeps the kids quiet - Oklahoma 1995"

NEW ITEMS:

Bumper stickers & Key chains

#909 - "My other car is a Ryder van - Oklahoma 1995" (\$2.25 @)
#908 - "Free Tim McVeigh - Hero of the USA" (\$2.25 @)
#993 - "Kids in the hall...and in the basement ~~and~~ on the roof" (\$2.25 @)
#904 - Key chains shaped like Oklahoma toe tags (\$3.95 @ plus ship).

*** I WILL BE DONATING 75 cents FROM EVERY SALE TO THE VICTIMS ***

ORDERING INFO:

-> Shirts are \$14.95 each plus \$2.00 shipping/handling
-> Shirts are a white cotton 50/50 blend with black ink.
-> SIZES: Small, Medium, Large, X-Large, XX-Large
-> Please order by number and size
-> All orders are shipped out same day

Please call (206) 362-5000

Ask for Ken

Due to high demand please call back if busy

Posted on the 2/28/95 classified section

5-1-1995

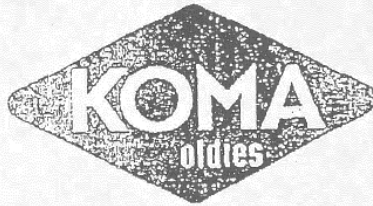
America Online

Page 1

EXHIBIT C

YOU ARE RECEIVING A FAX FROM

OKLAHOMA'S MOST
POWERFUL RADIO COMBO



92.5 FM • AM 1520

TO: Ken

FROM: Vance Harrison Jr.

DATE: 5-1-95 PAGE 1 OF 2

MESSAGE: _____

IF YOU HAVE TROUBLE RECEIVING THIS FACSIMILE CALL (405) 794-4000
KOMA/KRXX RADIO, PO BOX 6000, OKLAHOMA CITY, OK 73153
(405) 794-4000/FAX# (405) 793-0514

EXHIBIT D

Subject: Something found on AOL.
Date: 95-04-29 14:34:08 EDT
From: Eckica
To: MS1017

Sent on: America Online (using WAOL 2.0)
Mark, please find below something found on AOL.

Thanks,
Eck (Hollywood) Prater

Subject: NAUGHTY OKLAHOMA T-SHIRTS
Date: 95-04-25 14:54:35 EDT
From: Ken Z203

SIX GREAT OKLAHOMA T-SHIRTS !!!!!
ORDER YOURS TODAY !!!!!

Item#	Slogan
#520	"Rack'em, Stack'em, and Pack'em - Oklahoma 1995"
#522	"Shit happens.....to EXPLODE - Oklahoma 1995"
#524	"Dear IRS.....The check is in the van - Oklahoma 1995"
#568	"Visit Oklahoma...It's a BLAST !!!"
#569	"Puttting the kids to bed.....Oklahoma 1995"
#583	"McVeigh for President 1996"

\$14.95 each plus \$2.00 shipping/handling
Shirts are a white cotton 50/50 blend with black ink.
SIZES: Small, Medium, Large, X-Large, XX-Large
Please order by number and size:
All orders are shipped out same day

Please call ~~(206) 362-5000~~
Ask for Ken

Ken @ ↑ his
number says

Wrong #

Someone has played
a sick joke on
I'ds not even

America

Post-it Fax Note 7672

To Ken

Company

Location

Fax # (206) 362-5036

Telephone #

Comments

All enclosed items downloaded from AOL between 4 p.m. & 4:45 p.m. 5-1-95.

No. of Pages 5

Today's Date

Time

From Gr. Palmer

5-1-95 16:45 CDT

Company The Daily Oklahoman

Location Dept. Charge

Fax #

(405) 475-3694

Original Disposition:

Destroy

Return

Call for pickup

 Changed 5/01/95 at ***** By GP Lines 193
 Story #17041 Topic KEN Keyword KEN
 Basket GP Desk GP Author GP
 Expires at 0:00

LN# TEXT
 1 <A1>(a,acute)<ml><-><EF><EF><EF><EF><#1>Subj: ### CHEAPEST PENTIUM 75mhz
 2 Date: 95-04-29 11:29:32 EDT
 3 From: KEN Z033
 4
 5 I AM DOWN TO ONLY 3 OF THESE LEFT !!!!!!!!!!!!!!!
 6
 7 BRAND NEW IN THE BOX !!!!!!!
 8
 9 Packard Bell 418CD multimedia computer (desktop)
 10 75mhz Pentium with ZIF socket
 11 8 mb RAM expandable to 136MB
 12 1.08 G19 EIDE Hard Drive
 13 3.5" Floppy Drive
 14 Enhanced Local Bus IDE
 15 PCI Local Bus High-Res Graphics 1280x1024 with 1MB VRAM
 16 Five PCI/ISA card slots
 17 Dual (2) Double-speed CD-ROM Drives with 16-bit Sound Blaster-compatible card and speakers
 18 14.4 data/fax modem (voice mail/answering machine capable)
 19 KB and Mouse included
 20
 21 Software Bundle includes:
 22 Packard Bell Navigator, Negarace, Microsoft Best of Entertainment Pack, 3-D Body Adventure,
 23 3-D, Dinosaur Adventure, Space Adventure, Undersea Adventure, Speed, Kid's Zoo, New Grouler
 24 Encyclopedia, U.S. Atlas, World Atlas, Sports Illustrated 1994, Sports Almanac, MS Works, MS
 25 Productivity Pack, MS Money, Action! SE and Clipmedia, MS Windows, Multimedia Pack for
 26 Windows, MS-DOS FaxWorks, Prodigy
 27
 28 Communications Package:
 29 America Online, CompuServe, Internet Access Software, Reuters Money Network for Windows,
 30 Prodigy, Imagination Network
 31
 32 New in factory sealed box, \$899 plus shipping
 33
 34 Price and Payment Information:
 35 Quoted prices are C.O.D. (cashier's check or money order). For a 3%
 36 additional charge we do accept all major credit cards (MC, Visa, Amex, Discover). All
 37 products are subject to limited availability, and prices are subject to change based on
 38 quantity available.
 39
 40 NO EMATT. PIRASR

EXHIBIT E

Online T-Shirt Scam Jolts Seattle Man

By Mark A. Hutchison
Staff Writer

Ken is an easygoing fellow who claims to have no enemies.

But he's made a few thousand — maybe tens of thousands — enemies worldwide since the Oklahoma City bombing.

What's frustrating is that the anger and threats being hurled at him aren't justified. They're due to a heartless computer hacker using technology to transform Ken from a docile Seattle real estate agent into a nervous figure forever looking over his shoulder.

"I'm a victim here," he said. "A target."

Because he fears for his life, Ken, 48, has requested his last name not

be used. His nightmare began April 25 when he received a message on his telephone answering machine asking: "Are you the guy selling the T-shirts?"

Dismissing it as a wrong number, he didn't realize that call would be the first of 400 he's received since.

On April 26, there were more calls, many from the news media, asking if the information in an ad listed on America Online, a computer information service, was correct. Unaware of the ad, Ken found it.

It listed his name and phone number as a source to order T-shirts, bumper stickers and key chains with tacky sayings con-

cerning the bombing. There are 13 different, tasteless references to the bombing which killed more than 160 people.

"I will be donating 75 cents from every sale to the victims," the ad also reads.

"Every threat you can imagine was left for me," Ken said. "I tried to explain to callers, but most hung up."

Because the phone number listed in the ad is his business number, Ken doesn't want to have it disconnected. But there hasn't been much time for business.

Especially since Monday, when Oklahoma City radio station KRXO mentioned the ad during its morning show and asked listeners

to call the number and express their disdain. Calls from Oklahoma upset Ken the most.

"It's the ultimate abuse and that station had no right to give that information out without at least checking with me first," Ken said.

"The station incited an audience that was grieving, and they've turned their anger toward me."

When the station learned the information was inaccurate, a retraction was made and an apology given to Ken.

Ken said he's been interviewed by the Secret Service, which is investigating the source of the ad and thinks it originated in Boston. America Online officials also are looking for the author.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
NO. CIV-96-0598-T
October 16, 1996

KENNETH M. ZERAN,
Plaintiff,

v.

AMERICA ONLINE, INC.
Defendant.

ORDER

Defendant America Online, Inc. (“AOL”) has filed a motion seeking the dismissal of this case because it fails to state a claim under Oklahoma law and venue is improper. In the alternative, AOL asks the court to transfer the action to the Eastern District of Virginia, pursuant to 28 U.S.C. § 1404(a), for the convenience of the parties and in the interest of justice. The court concludes the transfer request should be granted. The reasons for its decision follow.¹

[1] The court's decision to transfer the action, moots the plaintiff's motion to consolidate.

Plaintiff Kenneth M. Zeran, a Washington resident, who resides in Seattle, instituted this action against AOL asserting negligence claims and seeking compensatory and punitive damages. In his complaint, the plaintiff alleges that he was the victim of a hoax committed by an unknown individual (“prankster”) in late April, 1995, several days after the bombing of the Murrah Building. On April 25, 1995 the prankster posted an offensive advertisement for “Naughty Oklahoma T-Shirts” on an AOL bulletin board, listing “KEN Z033” as the seller with the plaintiff's Seattle business telephone number. Zeran, who does not subscribe to AOL, called the defendant in Virginia on April 25, upon learning of the advertisement. He demanded that the posting be deleted, which the defendant agreed to do. AOL did not, however, agree to post a retraction or to alert its subscribers that the advertisement was fraudulent. The plaintiff received numerous derogatory telephone calls and was contacted by a reporter from the Daily Oklahoman who, after verifying the plaintiff's lack of involvement in the posting, informed the plaintiff a story would not be written regarding it. The next day, a second advertisement appeared, which again offered offensive bombing souvenirs for sale and listed the plaintiff's business telephone number. The plaintiff called AOL on April 27 and 28, requesting that the posting be deleted. After a third bulletin, similar to the others, was posted on April 28, AOL agreed with the plaintiff to close the account the prankster was using as quickly as possible.

A copy of the advertisement was obtained by an Oklahoma City KRXO disc jockey on May 1, 1995, who read it, along with the plaintiff's phone number, over the air and encouraged listeners to call the plaintiff. The plaintiff then received threatening phone calls from Oklahoma City. He faxed a letter to AOL's counsel in Virginia and also sent it by registered mail. He spoke again with someone from AOL's legal department on May 2, who agreed to remove all postings relating to “KEN Z033.” On May 4 the plaintiff was informed that AOL had purged all matters from its Internet system.

The Daily Oklahoman subsequently ran a story recounting the events, at the plaintiff's suggestion, and KRXO also ran an on-air apology, whose sincerity the plaintiff questioned. Eventually the phone calls diminished, but the plaintiff asserts that as a result of the defendant's negligence, he suffered emotional distress and injury to his reputation.

The plaintiff's claims against defendant AOL are premised on its alleged breach of its duty to exercise reasonable care to remove the defamatory posting and notify its subscribers that it was bogus, and to execute safeguards to prevent a reporting of the plaintiff's name and telephone number. The plaintiff also contends that, before the incident occurred, AOL had a duty to employ available technology to screen defamatory or bogus material posted on its bulletin board service.

The defendant contends that the complaint fails to state a claim as AOL is a distributor of information, not a publisher, and had no duty to protect the plaintiff from any harm he may have sustained. The complaint also should be dismissed, the defendant asserts, because venue is improper as AOL does not reside in Oklahoma and a substantial part of the events and omissions giving rise to the plaintiff's claim did not occur in this district.

In support of its motion, AOL states that during the late April/early May 1995 period the plaintiff remained in Seattle and any injuries he suffered also occurred there. Throughout the same time frame, all acts performed or omitted by AOL occurred in the state of Virginia, the defendant argues; the plaintiff sustained no losses in Oklahoma and the defendant neither committed any act nor failed to do any act in the state. The only events which occurred here, AOL contends, were: (1) publication of a news story in the Daily Oklahoman which recounted the prank; (2) the broadcasting of the plaintiffs telephone number by KRXXO and the station's subsequent retraction; and (3) phone calls to the plaintiff that originated from Oklahoma.

The initial issue is whether venue is proper in the Western District of Oklahoma. Because jurisdiction in this action is based on diversity of citizenship, venue is governed by 28 U.S.C. § 1391(a). Contrary to the plaintiff's assertion, venue is not appropriate under §1391(a)(2), as the bulk of events giving rise to the plaintiff's claims against AOL did not occur in this state. Whether it is correct under §1391(a)(1), depends on where AOL "resides."² For venue purposes, a corporate defendant is deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. 28 U.S.C. § 1391(c). In its reply brief, AOL tacitly admits it is subject to personal jurisdiction in this district, as it has qualified to do business in Oklahoma and has opened a service center at Shepherd Mall.

[2] As the plaintiff notes in his response brief, he mistakenly alleges in the complaint that venue is appropriate pursuant to 28 U.S.C. §§ 1391(a)(2) and (3). His intent was to cite (a)(1), rather than (a)(3), as Subsection (a)(3) is clearly inapplicable.

Although the action was properly brought here, the court still must determine whether it should be transferred to another forum pursuant to 28 U.S.C. § 1404(a). The statute is intended to prevent the waste of time, energy and money, and to protect litigants, witnesses and the public against unnecessary inconvenience and expense. Van Dusen v. Barrack, 376 U.S. 612, 616 (1964). AOL, as the moving party, has the burden of establishing that the existing forum is inconvenient, Scheidt v. Klein, 956 F.2d 963, 965 (10th Cir. 1992); Chrysler Credit Corp. v. County Chrysler, Inc., 928 F.2d 1509, 1515 (10th Cir. 1991), and the plaintiff's choice of forum is given considerable weight. Texas Eastern Transmission Com. v. Marine Office-Appleton & Cox Corp., 579 F.2d 561, 567 (10th Cir. 1978).

AOL asserts that a change of venue is warranted because the books, records and other tangible things relevant to the plaintiff's claims are kept at its national headquarters, located in Vienna, Virginia. The personnel knowledgeable about the events that transpired during the relevant time frame and who will be witnesses in the case, including the individuals the plaintiff identifies in his complaint as those with whom he communicated during AOL's efforts to purge its network of the offensive posting,³ are employed at the defendant's headquarters and reside nearby, AOL asserts.⁴ The computer network equipment and its purported deficiencies, which, in part, form the basis of the plaintiff's claims, also are located in Virginia, the defendant argues.

[3] These individuals include: Jeanelle Stell, Pamela R., Jeannean, Ellen Kirsh, Jane Church, Peter Hippalier, Jean Stevens and Scott.

[4] AOL attached a list of its anticipated witnesses who reside in Virginia to its reply brief. The defendant identifies those individuals it no longer employs and whose attendance at either a deposition or trial must be compelled.

This is in sharp contrast, the defendant maintains, to the dearth of evidence located in Oklahoma. None of the books, records or computer network equipment pertinent to the issues is in this state; none of AOL's nonparty witnesses are located here; and the plaintiff, himself, resides, not in Oklahoma, but in Seattle, Washington. The defendant recognizes that disc jockey Mark Shannon is located in this state, but asserts that his testimony is peripheral to the core issues. AOL also acknowledges that the plaintiff's physician resides in Seattle, but notes that it would be no more inconvenient for him to fly to Washington than to come to Oklahoma City. The expense involved in bringing AOL, its people and equipment to Oklahoma City is, the defendant asserts, much greater than the cost to the plaintiff, if he has to travel to Virginia.

The plaintiff does not respond to the defendant's transfer argument, but asks the court to defer a decision on the issue, stating that the court should consolidate this lawsuit with that filed by the plaintiff against Diamond Broadcasting, Inc. for purposes of discovery and then reconsider a transfer based upon "what transpires in discovery and after ruling on the certain-to-be-filed Motions for Summary Judgment." Plaintiff's Brief, p. 15.

The court is not persuaded by this argument, but concludes that the defendant has met its burden of demonstrating that the Eastern District of Virginia, Alexandria Division, is clearly a more convenient forum for the parties and witnesses. Oklahoma has only a negligible connection to the plaintiff's claims against AOL and most of the witnesses and other sources of proof are located in Virginia. The balance is strongly in favor of the movant, thus justifying disturbing the plaintiff's choice of forum. Because of this conclusion, the court will not address the remaining issue of whether the complaint states a claim, as that should be resolved by the transferee forum.⁵

[5] To the extent possible, the parties should coordinate their discovery efforts in the separate actions filed by the plaintiff and not duplicate discovery.

Accordingly, the defendant's motion to dismiss or, in the alternative, to transfer is granted. This action is transferred to the Eastern District of Virginia, Alexandria Division.

IT IS SO ORDERED this 16th of October, 1996.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division
Civil No. 96-1564-A
January 28, 1997

KENNETH M. ZERAN,

Plaintiff,

v.

AMERICA ONLINE, INC.,

Defendant.

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR JUDGMENT ON THE
PLEADINGS

Plaintiff Kenneth Zeran filed this action against defendant America Online, Inc. (“AOL”) seeking to recover damages allegedly resulting from messages posted on AOL’s interactive computer service by an unknown third party. As this Memorandum demonstrates, Zeran’s Complaint fails as a matter of law to state a claim upon which relief can be granted. AOL is therefore entitled to judgment on the pleadings. Fed. R. Civ. P. 12(c).

Section 230 of the 1996 Communications Decency Act (“CDA”), 47 U.S.C. § 230, prohibits tort actions that seek to treat an interactive computer service provider such as AOL as “the publisher or speaker” of content provided by others.¹ Because holding AOL liable for posted messages that are in no way attributable to AOL would treat AOL as “the publisher or speaker” of those messages, the CDA bars Plaintiff’s claims.

[1] Although two lower courts have enjoined enforcement of portions of the CDA pending appeal to the Supreme Court, Section 230 of the CDA is unaffected by those proceedings. ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa.) (enjoining enforcement of Sections 223(a) and (d) of the CDA), *prob. juris. noted*, 117 S. Ct. 554 (1996); Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996) (enjoining enforcement of Section 223(d) of the CDA).

FACTUAL AND PROCEDURAL BACKGROUND

AOL operates an interactive computer service over which millions of subscribers, who pay a fee to AOL, disseminate and receive information by means of computer modem connections to AOL’s computer network. Much of the information transmitted over AOL’s service originates with AOL subscribers. AOL subscribers may transmit information over AOL’s service through a variety of methods, including electronic mail messages (which are private electronic communications addressed to specific recipients) and bulletin board postings (which are messages generally available for review by other subscribers).

According to the Complaint, on April 25, 1995, a “currently unidentified person” using the screen name “Ken ZZ03”² posted on AOL’s interactive computer service a message advertising “Naughty Oklahoma T-Shirts” with “grossly offensive” slogans referring to the bombing of a federal building in Oklahoma City. (Complaint ¶ 5.) The posting indicated that anyone interested in the t-shirts should contact “Ken” and provided a phone number that allegedly belonged to Plaintiff’s business. (*Id.* ¶ 5, Ex. A.) After Zeran learned of the message from a reporter’s phone call, Zeran allegedly informed AOL that the posting was a hoax and asked that it be removed. (*Id.* ¶¶ 6-7.) Zeran allegedly began receiving “derogatory” and threatening phone calls as a result of the posted message. (*Id.* ¶ 8.)

[2] A “screen name” is a unique set of characters (letters or numbers) that identifies a person or entity that originates a message or posting transmitted via an interactive computer service or the internet. AOL permits each of the subscribers to its service to have as many as five different screen names of no more than ten characters each. It is commonplace for an AOL subscriber’s screen names(s) to be different from his or her real name.

After being contacted by Zeran, AOL deleted the posted message. (*Id.* ¶ 10.) Over the next three days (from April 26 until April 28, 1995), an unidentified person (or persons) using two slightly different screen names posted three similar messages. (*Id.* ¶¶ 10, 15, 26.) During this period, Zeran allegedly communicated with AOL on a number of occasions in an effort to have the messages removed. (*Id.* ¶¶ 12-14.) Zeran claims he received additional calls about the

messages from individuals who saw or heard about the postings, including three from reporters. (Id. ¶¶ 9, 11-13, 18.) The reporters are not alleged to have done any stories on the incident, apparently because Zeran informed them that he was not connected with the messages. (Id. ¶¶ 9, 11, 18.)

On May 1, 1995, a person using the name “Eck (Hollywood) Prater” purportedly sent a copy of one of the posted messages by electronic mail to Mark Shannon, a radio broadcaster on KRXXO in Oklahoma City. (Id. ¶ 19, Ex. D.) That day, KRXXO allegedly aired a broadcast in which Shannon read out parts of the message, “incited the audience to call plaintiff and gave plaintiff’s business phone number over the air.” (Id. ¶ 20.) As a result of the broadcast, Plaintiff allegedly “was bombarded with death threats and other forms of recrimination as well as violent language from Oklahoma City.” (Id. ¶ 21; see also Id. ¶ 24.)

Plaintiff does not allege that any of the messages at issue remained on AOL’s interactive computer service after May 1, 1995, or that any new offensive messages were posted after that date. (Id. ¶ 26.) Plaintiff does not allege that any particular message remained available on AOL’s service for longer than three days.³ Although Plaintiff claims that he continued to receive calls about the incident until May 14, 1995, he admits that some of those calls were apologies and even offers of assistance in the event of litigation. (Id. ¶¶ 29, 34, 36-39.)

[3] According to the Complaint, the first offensive t-shirt message was posted on April 25, 1995, and deleted a day later. (Complaint ¶¶ 5, 10.) The second and third such messages appear to have been posted on April 26, 1995, and April 28, 1995; respectively. (Id. ¶¶ 10, 15 & Exs. B, C.) The Complaint makes no allegation about how long these messages remained available on AOL. The Complaint alleges that the fourth (and apparently final) such message was posted at approximately 5:00 p.m. on April 28, 1995 (a Friday) and was still available on AOL’s service on the afternoon of May, 1 1995 (a Monday, three days later). (Id. ¶ 26 & Ex. E)

On January 4, 1996, Zeran filed suit in federal district court in Oklahoma against the owner of radio station KRXXO.⁴ In that suit, he alleges that the station’s broadcast in which Shannon read aloud portions of one of the posted messages constituted defamation, false light invasion of privacy, and intentional infliction of emotional distress. The suit against KRXXO remains pending in Oklahoma.

[4] Zeran v. Diamond Broadcasting, Inc., No. CIV-96-0008-T (W.D. Ok.).

On April 23, 1996, several months after suing KRXXO, Plaintiff filed this separate action against AOL in the same Oklahoma district court. His complaint alleges that, upon notice that the first posting about Oklahoma City t-shirts was a hoax, AOL had a duty to take reasonable care not only to remove the posting, but also to notify all AOL subscribers that the posting was fraudulent, and to employ some screening mechanisms to prevent further postings containing his name or telephone number. (Id. ¶¶ 42-43.) The Complaint posits these duties on the basis of a single district court decision applying the law of New York (Id. ¶ 43), a state whose law does not govern this suit.

On October 16, 1996, the district court in Oklahoma entered an order granting AOL’s motion to transfer the case to this Court.⁵

[5] While this action was pending in the Oklahoma federal court, AOL also filed a motion to dismiss Zeran's complaint. That motion has never been ruled on, and AOL hereby withdraws it in favor of this one.

ARGUMENT

I. SECTION 230 OF THE CDA IMMUNIZES INTERACTIVE SERVICE PROVIDERS SUCH AS AOL FROM TORT LIABILITY FOR CONTENT PROVIDED BY THIRD PARTIES.

Interactive computer services -- which enable people to communicate with one another with unprecedented speed and ease through the internet and related types of electronic networks and services -- are rapidly revolutionizing the way in which people and businesses share and receive information and interact with one another. One of the great challenges presented by this revolution is to develop legal rules to govern this new and dynamic medium of communication, including rules specifying who may be held liable for defamatory or harassing content disseminated over an interactive computer network. A year ago, Congress responded to this challenge with enactment of the CDA.

One of the CDA's key provisions, Section 230, addressed and eliminated uncertainties in the law governing whether providers of interactive computer services, such as AOL, can be held liable for tortious content that other persons or entities create and cause to be disseminated by means of such services. Congress determined in Section 230 that providers of such services are immune from liability for harms caused by the dissemination of such information. Congress took this action because it recognized that saddling interactive computer services with liability in these circumstances would be inconsistent with the vigorous and vibrant development of this new and important means of communication.

Plaintiff's action seeks to impose on AOL liability for allegedly tortious messages created and posted on AOL's interactive computer service by a third party. The action is therefore barred by Section 230 of the CDA and should be dismissed as a matter of law.

A. The Plain Terms of Section 230 Bar Plaintiff's Suit.

Section 230 of the CDA states that:

[n]o provider . . . 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).

It further provides that:

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.

Id. § 230(d)(3).

These provisions operate in the present case to bar Plaintiffs action. First, as a threshold matter, AOL clearly is a “provider . . . of an interactive computer service” within the meaning of Section 230(c)(1). The statute defines an “interactive computer service” to include “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.” Id. § 230(e)(2). AOL’s electronic information service, which presently and at the time of the events alleged in the complaint enabled millions of AOL subscribers to access AOL’s computerized information service and the internet through modem connections to computer servers, plainly falls within this definition.

Second, the messages about which Plaintiff complains are “information provided by another information content provider” within the meaning of Section 230(c)(1). The statute defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” Id. § 230(e)(3). As the complaint alleges, the messages at issue here were created and placed upon AOL’s interactive computer service not by AOL, but by an “unidentified person” using the screen names “Ken ZZ03,” “Ken ZZ033,” and “Ken Z033.” (Complaint ¶¶ 5, 10, 15.) Accordingly, as happens with the hundreds of thousands of messages that AOL’s subscribers post every day on AOL’s service, AOL’s role in this instance was merely that of a distributor of someone else’s information. The unidentified person was the “information content provider” of the postings, and those postings were “information provided by another information content provider” -- that is, information from an information content provider other than AOL.

Third, Zeran's suit, which attempts to impose on AOL damages that allegedly were caused by messages posted on AOL’s system by another person, seeks to have this Court “treat[]” AOL “as the publisher or speaker” of those messages. Although the suit is couched as a claim that AOL was “negligent” in failing to delete and/or block the messages quickly enough after being notified that the initial message was a hoax, imposing liability on AOL for such an alleged failure to block dissemination would be no different from treating it as the publisher of those messages. Indeed, the duties Plaintiff seeks to impose on AOL -- to screen messages (i.e., edit content) and to retract those that are inaccurate -- are precisely the tasks that a publisher undertakes. Moreover, as demonstrated by Plaintiff’s related suit against the radio station -- which affirmatively published one of the messages by having an announcer read it over the air -- the damages sought here are exactly the same as those that could be sought in a tort action against a publisher of defamatory content. In every respect, imposing liability upon AOL for these messages would treat AOL as if it had actually been the originator and publisher (or speaker) of the messages -- precisely the treatment of an “interactive computer service” provider that the statute was designed to proscribe.

Accordingly, even if applicable state or local law would otherwise permit a negligence action of this sort (which AOL does not concede), Section 230 expressly prohibits it because it constitutes a cause of action “under [a] state or local law that is inconsistent with this section.” 47 U.S.C. § 230(d)(3).

B. Construing Section 230 as Barring Plaintiff’s Suit Is Consistent with the Broader Purposes of that Section.

As both the statutory language and legislative history demonstrate, Congress enacted Section 230 to foster robust and vibrant discourse over computer networks, at least in part by removing tort liability from the distributor of third-party electronic content -- the interactive service provider -- and thereby eliminating incentives those providers would otherwise have to censor such content. At the same time, Congress recognized that defamation and other forms of harassment are serious problems for this rapidly emerging medium of communication. Congress made the key policy judgment that the best way to address these problems was to strengthen enforcement of existing laws against the actual sources of such unlawful content, not to impose liability on those who simply distribute the content.

As the text of Section 230 states, Congress found that “interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity” and that these services had “flourished, to the benefit of all Americans, with a minimum of government regulation.” *Id.* §§ 230(a)(3)-(4) (emphasis added). As a result, the explicit goal of Section 230 is “to promote the continued development of . . . interactive computer services” and “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” *Id.* §§ 230(b)(1)-(2) (emphasis added). Congress recognized that a regulatory regime under which interactive computer service providers faced potential liability as publishers or speakers of content produced by others inevitably would lead such providers to censor the content of speech on their networks to avoid the risk of liability, or even cause some providers to stop offering their services altogether. Such a course would impede the diversity and vibrancy of discourse in cyberspace. To avoid suppressing the development of interactive services in this manner, Congress granted these service providers immunity from tort liability for content provided by others.

At the same time, recognizing the need to deter and punish truly tortious speech, Congress made the correlative choice to emphasize enforcement of the laws against the actual wrongdoer -- the person who was responsible for the tortious content. Congress expressly sought “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.” *Id.* § 230(b)(5). Thus, Congress made the policy decision to deter harassment and tortious speech via computers not by punishing the intermediary or distributor and thereby dampening the free flow of communication over interactive computers services, but by putting the focus on the culpable developer and publisher of the unlawful content. As a result of this deliberate legislative choice, Plaintiff’s remedies, if any, lie not with AOL, but with the person who wrote and posted the messages at issue and with the radio station KRXO which allegedly broadcast one of the messages on the air.

The legislative history of Section 230 further confirms that Congress decided that state laws should not address the problem of tortious and harassing computer speech by making interactive computer service providers such as AOL liable for third-party content. Legislators understood that interactive service providers could not as a practical matter edit third-party content in the same manner as do publishers of books or newspapers:

There is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming into them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong. [Section 230] will cure that problem

141 Cong. Rec. H8471 (statement of Rep. Goodlatte) (Aug. 4, 1995). In order to relieve interactive service providers from any duty they might have to edit third-party content, Congress enacted Section 230 and exempted them from tort liability for such content.

Congress's intention to immunize interactive service providers such as AOL from liability for third-party content is further demonstrated by the legislation's conference report, which states that one of the purposes of Section 230 was to overturn the only case in which such a service provider had ever been found liable for content provided by others. In Stratton-Oakmont, Inc. v. Prodigy Services Co., 1995 WL 323710, at 1, 5 (N.Y. Sup. Ct. May 24, 1995), a district court had concluded that the interactive service provider Prodigy could be liable for an allegedly libelous message posted by an unidentified bulletin board user. The court had decided to treat Prodigy as a publisher of the message because Prodigy had held itself out to the public as a family-oriented service and exercised editorial control by, for example, screening all messages before they were posted on its bulletin boards and blocking those it deemed offensive. See id. at 3-4.

Section 230 overruled this decision. As the Conference report stated:

One of the specific purposes of [Section 230] is to overrule Stratton-Oakmont v. Prodigy and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.

H.R. Conf. Rep. No. 104-458, at 194 (1996). Indeed, Congress was so intent on protecting interactive service providers from liability for third party content that it enacted a provision specifically designed to address the Prodigy situation. See 47 U.S.C. § 230(c)(2) (“No provider . . . of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be . . . harassing, or otherwise objectionable.”).

C. Plaintiff Cannot Circumvent the Bar of Section 230 By Characterizing His Suit as a Claim of Simple Negligence.

If Zeran had cast his claim against AOL as a defamation claim, as he did in his parallel lawsuit against radio station KRXXO, it obviously would fall within the proscription of Section 230. The basic elements of any claim for defamation include that the defendant be the

“publisher” of the statement that is the subject of the lawsuit and that he have “publishe[d]” it with a level of fault amounting to (at least) negligence. See Restatement (Second) of Torts, § 558 (1977). Therefore, a fortiori, had Zeran sued AOL for defamation, his claim would have been barred by Section 230’s prohibition of suits seeking to treat an interactive computer service “as the publisher . . . of any information provided by another information content provider.”

Perhaps recognizing the futility of a straightforward defamation action in the face of section 230, Zeran has pleaded his claim against AOL as sounding in simple “negligence,” not defamation. Zeran asserts that AOL should be liable on the theory that it was “negligent” in permitting a third-party’s allegedly false messages to be disseminated over its service once it knew they were a hoax. However, Section 230’s prohibition of lawsuits that seek to treat interactive computer services as publishers of third-party content would be rendered meaningless if it could be avoided simply by the sleight of hand of recasting a claim for negligently “publishing” a third-party’s false message (i.e., a defamation claim) as a claim for negligently failing to prevent that same message from being blocked or deleted with sufficient speed. As a practical matter, the claims are indistinguishable. If Section 230 were construed in a manner that would permit Zeran’s “negligence” claim to survive, then virtually every claim that is barred by Section 230 could be restated in the same fashion. Congress obviously did not intend for the protections it created in Section 230 to be so easily eviscerated.

In analogous contexts, courts have routinely rejected attempts by creative litigants to evade the many protections that the law affords to defamation defendants by repackaging defamation claims in the guise of other torts. See Hustler Magazine v. Falwell, 485 U.S. 46, 56-57 (1988) (plaintiff cannot circumvent First Amendment defenses to defamation action by pleading a claim for intentional infliction of emotional distress); Moldea v. New York Times Co., 22 F.3d 310, 319 (D.C. Cir.), cert. denied, 115 S. Ct. 202 (1994) (plaintiff may not “avoid the strictures of the burdens of proof associated with defamation by resorting” to an alternative tort) (quoting Moldea v. New York Times Co., 15 F.3d 1137, 1151 (D.C. Cir. 1994)). “Without such a rule, virtually any defective defamation claim . . . could be revived by pleading it as one for [another tort].” Dworkin v. Hustler Magazine, Inc., 668 F. Supp. 1408, 1420 (C.D. Cal. 1987), aff’d, 867 F.2d 1188, cert. denied, 493 U.S. 812 (1989) (rejecting claim for intentional infliction of emotional distress). For the same reasons that courts have traditionally blocked plaintiffs from evading common law and First Amendment constraints on defamation claims through tricks of pleading, Section 230 must be construed to bar Zeran’s “negligence” claim.

The conclusion that Section 230 encompasses -- and thus bars -- Plaintiff’s “negligence” claim is underscored by the very case that he posits as the source of the “duty to screen” that he alleges AOL negligently failed to meet, namely Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991). Zeran alleges that this case, decided more than four years before enactment of Section 230 by a district court applying the common law of New York, created a duty for interactive computer services, “after due notice,” to “screen incendiary, defamatory and/or bogus material” posted by third persons. (See Complaint ¶ 43.) The Court in Cubby held that CompuServe, another interactive computer service, could not be liable in tort for defamatory content posted on its system by a third party absent evidence that it knew or had reason to know of the defamatory statements. 776 F. Supp. at 140-41. Zeran leaps from this holding to the novel proposition -- unrecognized by any court in any jurisdiction -- that an interactive computer service that receives a complaint about an allegedly defamatory message posted on its system has

a duty not merely to remove that message, but also to intervene to prevent any and all persons who use its service from posting any subsequent messages that repeat the alleged defamation. (Complaint ¶¶ 42-44.)

Even assuming for the sake of argument that Cubby would have supplied a basis for holding AOL liable in the absence of Section 230,⁶ a tort action based upon a duty allegedly deriving from Cubby plainly is barred by Section 230's prohibition of lawsuits that treat an interactive computer provider as the "publisher" of third-party content. The entire analysis of the court in Cubby revolved around whether Compuserve could lawfully be treated as the publisher of defamatory content posted by third parties, such that it could be held liable on claims of libel, business disparagement, or unfair competition. Thus, the Cubby court stated that the central issue with respect to the libel claim was whether or not there was a sufficient factual basis to subject Compuserve, as a distributor of third-party information, to the general rule that "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." 776 F. Supp. at 139 (citations omitted, emphasis added).⁷ Drawing on precedents protecting distributors of information such as news vendors, book stores and libraries from tort liability for defamatory statements, and relying in part on First Amendment concerns, Cubby held that Compuserve could not be treated as the publisher of defamatory statements posted by third parties -- and therefore could not be held liable under any of the asserted tort theories -- if it neither knew nor had reason to know of the defamation. Id. at 140-42.

[6] Even in the absence of Section 230, and even if this suit were governed by New York common law (which it is not), the Cubby decision still would not support holding AOL liable. Cubby at most suggests (in dicta) that an interactive computer service may be liable for a defamatory message posted by a third person if the service knows, or has reason to know, about the particular message and the fact that it is defamatory. Nothing in Cubby supports Plaintiff's central proposition that an interactive computer service was obligated -- even under the pre-Section 230 law of New York -- to create and deploy screening technology that would automatically detect and block new messages that the service does not know about but that are similar to an earlier message that had generated a complaint. Likewise, nothing in Cubby provides any basis for arguing that an interactive computer service that deletes allegedly defamatory postings within a matter of hours or a few days -- as AOL did here -- can be held liable for damages allegedly caused during the short time that the postings were available on line.

[7] Similarly, the determinative issue concerning Cubby's business disparagement claim was whether Compuserve could be treated as having made "a knowing publication of false matter derogatory to plaintiff's business." Id. at 141 (citation omitted, emphasis added). Likewise, for the unfair competition claim, the issue was whether Compuserve had "intentionally uttered" an injurious falsehood. Id. at 142 (citations omitted, emphasis added).

Thus, far from supporting Plaintiff's claim against AOL, Cubby is representative of a more general common law rule that a mere distributor of information supplied by third parties may not be held liable for injury caused by dissemination of that information in the absence of facts establishing that it was a publisher of the information. See e.g., Anderson v. New York Telephone Co., 320 N.E.2d 647,647 (N.Y. Ct. App. 1974) (adopting lower court dissenting opinion published at 345 N.Y.S.2d 740, 751 (1973)) (telephone company could not be liable for tape-recorded defamatory messages repeatedly transmitted over its network "unless it is held that . . . it 'published'" the messages); Tacket v. General Motors Corp., 836 F.2d 1042 (7th Cir. 1987) (owner of property on which someone had posted defamatory sign not liable absent a showing that the owner "intentionally and unreasonably fail[ed] to remove' [the]

sign and thereby published its contents”) (emphasis added); Hellar v. Bianco, 244 P.2d 757 (Cal. Dist. Ct. App. 1952) (where defamatory writings appeared on a men’s room wall, jury must decide if bartender’s failure to remove the graffiti for a short time after learning of its existence constituted a publication).⁸

[8] Accord Restatement (Second) of Torts, § 577(2) (1977) (“One who intentionally and unreasonably fails to remove defamatory material that he knows to be exhibited on [his property] is subject to liability for its continued publication.”); Id. § 581, ill. 4 (telegraph company without reason to know message is defamatory “is not liable for publishing a libel” (emphasis added)); Prosser and Keeton on the Law of Torts, § 113, at 803 (5th ed. 1984) (describing libraries, news vendors, and other disseminators as “secondary publishers”).

In this case, however, the express terms of Section 230 obviate any need for a Cubby-type inquiry into whether there is a factual basis to treat AOL as a “publisher” of the messages at issue. Even assuming (for the sake of argument) that application of Cubby in this case would support the conclusion that AOL should be liable for Plaintiff’s alleged injury, such liability necessarily would be based on the premise that AOL was the “publisher” of the messages at issue. Section 230 expressly bars claims that seek to treat an interactive computer service as the “publisher or speaker” of third-party information and therefore immunizes AOL from such liability.

In sum, no matter how Plaintiff chooses to label his suit, holding AOL liable in this case would place it in the same legal position as the actual speaker or publisher of these messages. Because section 230 prohibits such a result, Plaintiff has failed to state a claim upon which relief may be granted.

II. SECTION 230 OF THE CDA REQUIRES DISMISSAL OF PLAINTIFF’S SUIT EVEN THOUGH THE EVENTS AT ISSUE PRE-DATE ENACTMENT OF THE STATUTE.

Although the CDA was passed after the events described in the complaint allegedly occurred, Section 230 of the CDA applies to this case. “A statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment or upsets expectations based in prior law.” Landgraf v. USI Film Prods., 511 U.S. 244, 114 S. Ct. 1483, 1499 (1994) (citation omitted). In fact, applying a statute to antecedent events “often serve[s] entirely benign and legitimate purposes” such as giving “comprehensive effect to a new law Congress considers salutary.” Id. at 1498. Accordingly, Congress may “expressly prescribe[.]” that a statute should govern suits involving antecedent events, in which case courts must apply the statute to such suits. Id. at 1505.

Congress provided such an express prescription in Section 230. The statute states that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(d)(3). Given that Zeran’s suit was filed after passage of the CDA, a straightforward interpretation of this provision requires that this Court determine whether Zeran has brought a cause of action under a state law that is inconsistent with Section 230.⁹

[9] The CDA was signed into law (and became immediately effective) on February 8, 1996. Pub. L. No. 104-104, 110 Stat. 56. Plaintiff did not commence this lawsuit until April 23, 1996.

Indeed, the language of Section 230(d)(3) must be read to govern even suits pending at the time the CDA was enacted. If the section were interpreted to apply only to suits filed after passage of the CDA, the clause “no liability may be imposed” would be superfluous: the statutory prohibition against bringing any cause of action would already ban all future suits -- and therefore the imposition of liability -- under state laws inconsistent with Section 230. But a court must be “deep[ly] reluctan[t] to interpret a statutory provision so as to render superfluous other provisions in the same enactment.” Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990). The clause “no liability may be imposed” is most naturally given operative effect by interpreting it to prohibit damages under inconsistent state laws in suits already pending when the statute was enacted -- suits that would not be covered by the statute’s prohibition on future causes of action. Clearly, if Section 230 applies to suits pending at the time the CDA was enacted, it must apply to all cases filed after the date of enactment as well, even if such cases involve events occurring before enactment. Thus, Section 230 applies to Zeran’s suit.

Even if this Court were to conclude (contrary to the foregoing analysis) that Congress did not expressly provide that Section 230 should apply to suits arising from conduct occurring before passage of the CDA, the statute would still apply to this case because it would not have a “retroactive effect.” A statute has “retroactive effect” only if “it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” Landgraf, 114 S. Ct. at 1505. Clearly, Section 230 does not meet either the second or third prongs of this test because it neither “increase[s] [any] party’s liability” nor “impose[s] new duties” on anyone. Thus, Zeran could escape applicability of Section 230 only under the first prong of the Landgraf test, which turns on whether application of the statute would “impair” his preexisting “rights” in April 1995.

In Landgraf, the Supreme Court made clear that a statute may be found retroactive on the basis of “impairment of rights” only if certain types of rights are shown to be at issue. The Court observed that “[t]he largest category of cases in which [it has] applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.” Id. at 1500. More generally, the Court approvingly quoted Justice Story’s statement that a statute acts retroactively if it “takes away or impairs vested rights acquired under existing laws.” Id. at 1499 (emphasis added) (quoting Society for the Propagation of the Gospel v. Wheeler, 22 F.Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156)); See also Id. at 1524 (Scalia, J, concurring) (describing majority opinion as having adopted a vested rights criterion); Maitland v. University of Minnesota, 43 F.3d 357, 361 n.4 (8th Cir. 1994).¹⁰

[10] To be sure, the Court noted later in its opinion in Landgraf that neither it nor Justice Story had restricted the presumption against retroactivity to cases involving vested rights. Landgraf, 114 S. Ct. at 1502 n. 29. But that statement merely refers to both the Court’s and Justice Story’s conclusion that a statute could also be found to have a retroactive effect under two other prongs of analysis -- if the statute imposed new duties or increased a party’s obligations with respect to past transactions. See id. at 1499, 1505. As discussed above, neither of those conditions applies to this case.

Section 230 of the CDA does not impair any vested right possessed by Zeran. At most, the statute removes Zeran’s opportunity to rely on a rule of liability for interactive service

providers that had been accepted by only a single trial court under the law of a state in which Zeran did not live. Zeran had no vested right in such a rule. Indeed, even a statute that has the effect of eliminating a pending tort claim does not impair a vested right. See In re TMI, 89 F.3d 1106, 1113 (3d Cir. 1996), cert. denied, No. 96-730, 1996 WL 665357 (Jan. 13, 1997) (citing cases). A fortiori, a person has no vested right in a rule of liability it may invoke in some future tort action, especially when that rule has not yet been accepted either generally or in the jurisdiction whose law governs the action. Thus, Section 230 did not impair any vested right possessed by Zeran, and it therefore does not have retroactive effect.

In the absence of such a retroactive effect, “a court should ‘apply the law in effect at the time it renders its decision.’” Landgraf, 114 S. Ct. at 1501 (quoting Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974)). In this case, that law includes Section 230’s grant of immunity to interactive service providers such as AOL from tort liability for content provided by others. Accordingly, Plaintiff has failed to state a claim upon which relief can be granted and his complaint should be dismissed.

CONCLUSION

For the foregoing reasons, AOL respectfully requests this court to grant judgment on the pleadings in its favor and to dismiss Plaintiff’s suit with prejudice.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division
Civil No. 96-1564-A
February 12, 1997

KENNETH M. ZERAN,

Plaintiff,

v.

AMERICA ONLINE, INC.,

Defendant.

BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION FOR JUDGMENT ON THE
PLEADINGS

Defendant America Online, Inc. ("AOL") has filed a Motion for Judgment on the Pleadings under Rule 12(c), Fed.R.Civ.P., on the basis that the communications Decency Act ("CDA"), 47 U.S.C § 230, signed into law on February 8, 1996, bars the imposition of any liability against AOL for events which occurred in April and May, 1995.

This case was originally filed in the United States District Court for the Western District of Oklahoma on April 23, 1996, and on October 16, 1996, the case was transferred to this district upon AOL's Motion to Transfer. At the time of the transfer, a Motion to Dismiss was pending. AOL has now withdrawn that Motion and is relying solely on its Motion for Judgment on the Pleadings and the CDA as a basis for dismissal. (AOL Mem. n. 6). The pertinent parts of the withdrawn motion are resubmitted as Exhibits A, Band C to the affidavit of Leo Kayser, III sworn to February 7, 1997, ("Kayser Aff.") because of certain inconsistencies being taken now by AOL compared with its withdrawn motion.

AOL now limits its grounds for judgment on the pleadings to an erroneous argument that § 230 of the CDA effectively overrules that part of Cubby, Inc. v. CompuServe, Inc., 776 F.Supp. 135 (S.D.N.Y. 1991), upon which plaintiff relies in asserting that AOL is subject to the legal standard applied to libraries, book stores, newsstands or other distributors of published material.

This brief will demonstrate that AOL has literally turned the CDA on its head to argue an expansive safe harbor for AOL under the CDA and has similarly turned retroactivity/retrospectivity law inside out to argue that the CDA should be given retrospective effect.

Because plaintiff is required by the nature of the arguments outlined in AOL's brief to rely upon matters outside the Complaint (as outlined below), this Motion should be converted into a Motion for Summary Judgment pursuant to Rule 12(c).

PLAINTIFF'S COMPLAINT

FACTUAL BACKGROUND

The Complaint contains the following pertinent allegations¹:

[1] Paragraphs 5, 7, 10, 12, 13, 14, 15, 25, 28, and 33 were verified as true by plaintiff in his answers to AOL's Interrogatories, Interrogatories 1, attached as Exhibit 6 to the Affidavit of James A. Ikard.

5. On April 25, 1995, at 14:54:35 E.D.T., unknown to message for someone to contact him. He also called AOL's legal department at (703) 918-1495 and received no response.

14. He then called "Pamela R." again at approximately 3:30 P.M. P.D.T., [April 28, 1995] 1-800-877-6364, Ext. 488, to follow up on the earlier call. She said two accounts had been connected from area code (617) and were associated with the situation, but neither account was related. She suggested that plaintiff call the police because of the seriousness of the situation.

15. On April 28, 1995, at 16: 57: 52 EDT another AOL posting appeared under “Ken Z033” for “Naughty Oklahoma Items,” with additional “Out of Stock” items listed and new items for sale, and again announcing that “I will be donating \$1 from every shirt to the victims,” and again directing callers to “Ask for Ken Due to high demand please call back if busy.” Plaintiff’s business phone number was again prominently featured.

25. [After the KRXO broadcast] Also on May 1, 1995, plaintiff sent a letter by registered mail to Ms. Ellen Kirsh, counsel to AOL, which letter was also faxed at 2:26 P.M. P.D.T. He received no immediate response. . .

28. At 12:10 P.M. P.D.T. [May 2, 1995], plaintiff called AOL’s legal department to speak to Ellen Kirsh. Plaintiff spoke with Jane Church who said she would discuss the matter on behalf of Ms. Kirsh. Ms. Church said she was not aware of the faxed letter of May 1, 1995, and plaintiff faxed another copy. During this conversation which lasted 25 minutes, all of the same information previously conveyed to AOL was repeated. Ms. Church again promised the postings would be removed relating to KENZ033 etc.

33. At 1:28 P.M. P.D.T., [May 5, 1995] plaintiff again called Jane Church who arranged a twenty minute conference call with Peter Hippalier, Scott---, and Jean Stevens. Again they said all material would be removed. Again plaintiff gave them all the information about the posting repeating its “handle.”

LIABILITY ALLEGATIONS

Plaintiff’s Complaint sets out liability allegations as well:

42. Defendant AOL, as of 4:45 P.M. P.D.T., April 25, 1996, upon being notified by plaintiff that the incendiary, defamatory and bogus posting using plaintiff’s first name, “Ken,” and using plaintiff’s telephone number was in fact a hoax, had a duty to plaintiff to take reasonable care to remove the posting promptly, to notify its subscribers that the posting was bogus by placing a notice on its service, including appending such an alert to the original posting and any subsequent postings, and to execute safeguards to prevent a reporting of plaintiff’s name and telephone number.²

[2] As noted below, AOL did delete the posting (although long overdue) and canceled the bogus membership (see fn. 3, infra). However, the only “content” AOL was required to screen for was plaintiff’s phone number. Had AOL been able to prescreen attempts to repost bombing-related items using plaintiff’s phone number, there would have been only one posting and it would have been deleted within hours of the original posting.

43. Defendant AOL, on information and belief, even though it was on constructive notice by reason of the law enunciated in Cubby, Inc. v. CompuServe, Inc. et al., 776 F.Supp. 1525 (S.D.N.Y. 1991), that it was obligated after due notice to be able to screen incendiary, defamatory and/or bogus material posted on its computer bulletin board service, as of April 25, 1995, had failed to implement an effective screening capability upon receipt of due notice.³

[3] AOL has confirmed that the postings were done by a person or persons that obtained access to AOL as a new member utilizing a false name, address, phone number and credit card number. A new membership was opened using false information with new (deceptively similar) screen names

as soon as the previous membership was terminated and then a new posting followed. (Exs. 3 and 4). Because AOL allows an individual to have access to AOL before it has an opportunity to confirm basic information, AOL is unable to identify the person(s) that actually posted the bombing-related items and the only remedy AOL provides is to terminate the bogus memberships. (see Exs. 3, 4 and 5 and Ex. 6, answer to Interrogatory 3, # 15.).

44. On information and belief, the technology was available to defendant AOL to have had in place, as of April 25, 1995, the capability to screen out postings based upon a name and/or telephone number and/or key words or phrases.

45. Defendant AOL, therefore, failed to meet the proper standard of care reasonably expected of a substantial commercial operator of a computer bulletin board in its failure to have in place and readily available appropriate screening capability.

ADDITIONAL MATTERS

In addition to the letters attached to the Kayser affidavit, the following undisputed facts bear on the pending Motion:

1. A copy of the May 1, 1995, letter from plaintiff to Ellen Kirsh of AOL is attached as Exhibit 1 to the Ikard Aff.
2. A copy of a letter from Jane M. Church of AOL to plaintiff dated May 17, 1995, is attached as Exhibit 2 to the Ikard Aff.
3. An excerpt from AOL's answers to Plaintiff's First Interrogatories is attached as Exhibit 3 to the Ikard Aff.
4. Documents produced by AOL in response to Plaintiff's First Request for Production of Documents relating to the false screen names used by one or more persons who made the posting in question are attached as Exhibit 4 to the Ikard Aff.
5. Documents produced by AOL in response to Plaintiff's First Request for Production of Documents relating to the AOL's member policies are attached as Exhibit 5 to the Ikard Aff.
6. An excerpt from Plaintiff's answers to AOL's First Interrogatories is attached as Exhibit 6 to the Ikard Aff.

ARGUMENT

INTRODUCTION

Reduced to its simplest terms AOL's legal argument is (1) the anonymous bogus AOL member was a "content provider" and the ads for bombing-related items on AOL's bulletin board⁴ was "information" within the meaning of the CDA, (2) the CDA provides that an interactive computer service cannot be liable as a publisher for any information provided by another content provider, (3) the CDA bars plaintiff's negligence claims as the functional equivalent of prohibited publisher liability, and (4) the CDA should be given retrospective effect to apply to events that occurred before its effective date.

[4] This case involves postings sponsored on AOL's bulletin boards ("BBS", messages generally available for review by other subscribers. AOL Mem. 2), not electronic mail messages ("E-mail," a private electronic communication addressed to specific recipients. AOL Mem. 2).

Before reaching any of the other points raised in this brief, plaintiff must address one particularly troubling assertion in the brief. AOL is disingenuous in the extreme in its insinuation that "Perhaps recognizing the futility of a straightforward defamation action in the face of section 230, Zeran has pleaded his claim against AOL as sounding in simple negligence, not defamation" and that the court should do as other courts have "routinely rejected attempts by creative litigants to evade the many protections that the law affords to defamation defendants by repackaging defamation claims in the guise of other torts." (AOL Mem. 13).

The letter from Leo Kayser, III to Jane M. Church of AOL dated June 26, 1995⁵, (Ex. D to Kayser Aff.) made it clear **months before the CDA was adopted** that the plaintiff was **not** seeking to hold AOL liable as a publisher for defamation, but rather for its negligence in failing to take reasonable steps to delete the bogus posting and keep them off AOL. (Ex. D, p. 5). Again, in reply to Ms. Church's letter to Mr. Kayser of July 13, 1995, Mr. Kayser asserted that AOL had a duty to take appropriate action after being placed on notice of "phony, derogatory and obviously potentially damaging postings relating to a specific individual at a specific phone number." such as a block on elements of the posting to keep it from reappearing. (August 4, 1995, letter, Ex. E to Kayser Aff., p. 2). From these two letters it is obvious that plaintiff's counsel (although hopefully "creative") have, rather than "repackaging" plaintiff's claim, consistently taken the position articulated in the Complaint, without any regard to § 230 (which did not even exist until months later).

[5] This letter contains a lengthy description of events all which ended up almost *verbatim* in the Complaint filed against first, Diamond Broadcasting (see Ex. B to AOL's Brief in Support of Its Rule 12 Motion to Dismiss Or In the Alternative, To Transfer) and then AOL itself.

I.

SECTION 230 OF THE CDA DOES NOT ALTER THE CUBBY, INC. ANALYSIS

The complaint makes it clear that the duty of AOL to Zeran arises only after AOL had received actual notice of the bogus and manifestly injurious posting. Cubby, Inc., supra, at 139-141. In Cubby, Inc. CompuServe acknowledged that as a distributor rather than a publisher, it would have been liable for a defamatory statement if it had known of such statements:

CompuServe further contends that, as a distributor of Rumorville, it cannot be held liable on the libel claim because it neither knew nor had reason to know of the allegedly defamatory statements. Id. at 139. (Emphasis added.)

The Complaint does not aver that AOL is a publisher, but rather alleges facts which set forth a claim under the standard of a distributor, a standard which is met when the distributor has actual knowledge prior to its duty's arising. As the Cubby, Inc. court stated:

The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment, made applicable to the states through the Fourteenth Amendment. Id. at 139. (Emphasis added.)

The case at bar does not impose upon AOL any obligation to examine in advance any material posted on its computer bulletin board; instead, the Complaint pointedly avers that AOL's duty to plaintiff arose only after actual notice of the offensive, bogus posting specifically identified herein.

Contrary to the arguments proffered by AOL, the CDA expressly encourages AOL and other commercial operators of computer bulletin boards to use blocking and screening techniques. Section 230(c) provides in pertinent as follows:

(c) Protection for Good Samaritan' Blocking and Screening of Offensive Material --

(1) Treatment of Publisher or Speaker -- 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.

(2) Civil Liability -- No provider or user of an interactive computer service shall be held liable on account of --

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrain access to material described in paragraph (1).

The CDA expressly provides under subsection (d) Effect on other Laws:

(3) State Law -- Nothing in this subsection shall be construed to prevent any State from enforcing any state law that is consistent with this section. . .

What Section 230(c) does is, as acknowledged by AOL itself in its withdrawn Brief, (Exhibit A, pp.17-18, Kayser Aff., p. 3), confirm the law enunciated in Cubby, Inc. It eliminated the risk that a cyberspace distributor might be treated legally as a publisher and be exposed to **strict liability** as a publisher for false or defamatory subject matter.⁶

[6] In short, Congress clearly was concerned that the unintended effect of Prodigy would be to **compel** interactive computer services to do nothing about online content; instead, the CDA was adopted to encourage each interactive computer service to “edit content” **without prior notice**-but not be required to run the risk that by so doing it would become strictly liable. The very title of the subsection “Protection of Good Samaritan’ Blocking and Screening of Offensive Material” (emphasis added) confirms this. Contrary to AOL’s argument, § 230 of the CDA was adopted to protect action taken by a provider such as AOL **not** reward AOL for its inaction (either by failing to take technical steps before or technical fixes after) once it was notified of defamatory content. It is for this reason that earlier in this brief plaintiff contended that AOL was standing the CDA on its head.

Section 203(c) overrules Stratton-Oakmont, Inc. v. Prodigy Service Co., 1995 WL 323710 (Sup. Ct. N.Y. May 24, 1995), as correctly pointed out by AOL (Mem. 11), where a court held that a cyberspace distributor, in part because it was pre-screening some content for distasteful words, was held to be a publisher and strictly liable for false information published on one of its bulletin boards. No prior notice to Prodigy of the alleged false information had been given to Prodigy by Stratton Oakmont or anyone else. Section 230(c)(2) expressly provides a “safe harbor” for cyberspace distributors to edit without being held to such strict publishers’ liability.

AOL is in error in arguing (AOL Mem. 8) that “Zeran's suit, which attempts to impose on AOL damages that allegedly were caused by messages posted on AOL's system by another person, seeks to have this Court ‘treat’ AOL ‘as the publisher or speaker’” of those messages. The law makes a material distinction between the strict liability applied to a publisher and the standard of liability imposed on a cyberspace distributor, which is the analogous standard for a public library, book store or newsstand, a standard that requires actual knowledge of the offending material and only thereafter that a reasonable effort be made to remove such material and prevent its being put back. Accord Cubby, Inc., *supra* at 140:

Technology is rapidly transforming the information industry. A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information. Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorville statements.

Where the standard is whether AOL knew or had reason to know, (the Complaint avers actual notice), AOL is not being treated to legal liability as a publisher or speaker, but rather as a distributor. That the CDA does not alter the Cubby, Inc. analysis, but rather embodies it and encourages use of blocking technology is discussed in Establishing Legal Accountability For Anonymous Communication In Cyberspace, 96 Colum.L.Rev. 1526, 1550-1555 (1996). The distinction, which is made in Cubby, Inc., is consistent with the law in every jurisdiction in the United States. Kayser Aff. at p. 4. AOL has proffered no case law in any jurisdiction to the contrary.

Contrary to AOL's assertion that plaintiff's damages are the same as if AOL were a publisher, (AOL Mem. 8), it is AOL's own negligent conduct in failing to take appropriate or sufficient remedial action after having received notice of the bogus postings which proximately caused the injury to plaintiff. In the same manner, AOL is not being held liable for the messages themselves as it argues, but rather for failure to take appropriate action to block the posting after actual notice.

While AOL does not concede that applicable state or local laws would otherwise permit Zeran's negligence action, defendant has withdrawn its challenge to the actual negligence claim. It now only asserts as an affirmative defense § 230(c), which is not applicable for the reasons stated above.

AOL's generalized policy argument overlooks Section 502 amending Section 223 (47 U.S.C. § 223) of the CDA:

(e) In addition to any other defenses available by law:

(1) No person shall be held to have violated subsection (a) and (b) solely for providing access or connection to or form a facility, system or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication. (Emphasis added.)

In the case at bar, it is averred that AOL should have been in a position after notice to control the bogus postings on its sponsored bulletin board.

Treating AOL as a cyberspace distributor, with the standard of its conduct measured by analogy to libraries, newsstands, bookstores and the like, is entirely consistent with the CDA. The CDA does not exempt cyberspace distributors from traditional liability standards imposed on distributors. Robust and vibrant discourse over computer networks are unaffected. Operators of BBS such as AOL must take action only after actual and specific notice has been given and AOL is expressly exempted from publisher liability once it does implement some screening or editing function ("Blocking" and "Screening") to comply with the notice.

Nor does Zeran seek government regulation. His claim sounds in common law negligence, which is respected in every common law jurisdiction in the United States. The negligence of a distributor is actionable in every jurisdiction. The importance of Congress' decision to let state law continue to impose traditional liability standards on cyberspace distributors is highlighted since AOL is unable to identify the poster of material on its BBSs when they use fictitious/bogus screen names. No remedy whatsoever would exist for persons injured by the poster of such material, if AOL, after notice, had no responsibility to delete and block reposting of defamatory, bogus material such as has occurred in the case at bar. Congress surely did not leave Zeran alone to chase a "culpable developer and publisher of the unlawful content" who cannot be identified by name, address or phone number and located because of common law jurisdictions of the United States. See generally: Prosser and Keeton On Torts,

Negligence § 33 Application of the Standard at 193-197 (5th Ed 1984). Cubby, Inc. stands for the legal standard applied to computer bulletin boards distributors to establish a duty.

What makes the case at bar significant is that it will be the first time that a jury will be able to listen to all the evidence and decide what is the appropriate standard of care that AOL and other commercial BBS sponsors should meet to prevent injury after receiving notice that a bogus defamatory posting is occurring and may recur. Thus, while AOL is correct in asserting that Cubby, Inc. does not address the standard of care applicable to AOL's BBSs, plaintiff's complaint avers what that standard is, and if AOL disagrees, as apparently it does, this is the factual dispute that plaintiff intends to place before the jury, and in fact has a Seventh Amendment constitutional right to do so.

In Cubby, Inc. the court held there was not a sufficient factual basis to hold CompuServe to a standard of a distributor since it was undisputed that CompuServe had no knowledge, nor should it have known, of the defamatory nature of the posting in question. In the case at bar, at least for purposes of this motion, no factual dispute exists that for purposes of distributorship liability, AOL had actual notice of the bogus, defamatory posting as of April 25, 1995.

AOL totally misstates the holding of Cubby, Inc. (AOL Mem. 16) when it argues: "AOL's practices (see n. 6, supra), when Zeran gave prompt, appropriate notice to AOL, the distributor."

A. AOL Is Not Sued as a Publisher

AOL is correct when it asserts that it is not being sued as a publisher for defamation based upon a strict liability standard directed at the content. The issue for a claim against a distributor, is what is the appropriate standard of care to prevent distribution of libelous, defamatory or bogus material which is obviously injurious after receiving notice that the distributor is distributing such material?

All of the cases cited by AOL (AOL Mem. 13-14) are claims made against publishers, in which the standard of liability as to a publisher cannot be circumvented by a proffered cause of action different from libel or defamation such as intentional infliction of emotional distress or false light averments. Zeran is not engaging in any such sophistry. His complaint asserts a common law negligence claim against AOL as a distributor, not a publisher and the issue is whether the distributor, once it has a duty to Zeran based upon notice of its distribution of bogus, defamatory material, exercised reasonable care to prevent further injury to plaintiff Zeran.

The issue of standard of care is one generally left to a jury in a negligence case, once the Court determines that a duty arises. The question of whether duty arises is based upon the question of foreseeability. Once actual notice is given to a distributor, foreseeability is established. This is very old settled law in all

Thus, far from supporting Plaintiff's claim against AOL, Cubby is representative of a more general common law rule that a mere distributor of information supplied by third parties may not be held liable for injury caused by dissemination of that information in the absence of facts establishing that it was a publisher of the information.

Cubby is in fact representative of the general common law rule, which the Cubby court expressly states in its opinion, that a mere distributor of information supplied by third parties may not be held liable for injury caused by dissemination of that information in the absence of facts establishing that it, as a distributor, knew or should have known of the defamatory nature of the posting. Cubby, Inc., supra at 140.

The cases cited by AOL (AOL Mem. 16) in fact support plaintiff's legal position for holding that AOL, after learning of the bogus, defamatory and inflammatory posting from plaintiff Zeran, had a duty to remove same effectively. It is actually sophistry to argue, as AOL does, that a distributor held to be responsible for bogus and defamatory material because it had actual knowledge of it, and still failed to take adequate reasonable precautions, and thus may be deemed to have "published" it, is converted itself from a distributor to a publisher. The same is true for the Restatement (Second) of Torts, § 577(2) (1977), upon which AOL relies.

To subject AOL to liability for unreasonably failing to remove defamatory material that it knows is being widely disseminated and may subject it to liability for "its continued publication," does not make AOL a publisher. AOL's reliance upon Prosser and Keeton on the Law of Torts, §113, at 803 (5th Ed. 1984) is the best support yet for the general common law support for the Cubby court. Libraries, news vendors and other disseminators are not "publishers." Libraries, news vendors and other disseminators such as BBS operators in cyberspace are potentially "secondary publishers," an entirely distinct category from a publisher, and Section 230(c)(2) encourages them to be responsible and quick to edit and block defamatory and other objectionable matter, even at their own initiative and discretion, without subjecting themselves to the status of a publisher. Under Section 230 of the CDA AOL remains, notwithstanding its decision to block or edit specific postings -- a mere distributor -- without the threat that the reasoning in Stratton-Oakmont, supra, had imposed prior to enactment of the CDA. If the court agrees that the Section 230(c) does not bar plaintiff's negligence action against AOL in its capacity as a distributor, it need not go to the second part of this Memorandum of Law, which discusses the law on the issue of retroactivity, since the CDA was enacted well after the facts giving rise to plaintiff's claims.

II.

THE CDA DOES NOT HAVE RETROSPECTIVE EFFECT ON THE EVENTS WHICH GIVE RISE TO AOL'S STATE TORT LIABILITY.

The events which give rise to negligence liability for AOL under traditional state tort concepts occurred in April and May, 1995. The CDA was signed into law in February, 1996. Long prior to adoption of the CDA, plaintiff was setting forth the operative facts of this case and asserting his entitlement to damages from AOL under theories of liability then cognizable. (See the Complaint and Exs. D and E to Kayser Aff.).⁷ Nevertheless, AOL asserts that the CDA should be applied retrospectively to dismiss this Complaint and effectively bar all recovery by plaintiff for the injuries he suffered at the hands of AOL's negligence by the creation of an all-inclusive, safe harbor fashioned from § 230. As outlined earlier, AOL's reading of the applicability and scope of the CDA to this case is seriously flawed-in effect turning the purpose of the CDA on its head. Similarly, AOL's attempt to employ the CDA retrospectively to this case is predicated on a fundamental misapplication of the Supreme Court's recent decisions and the interpretation of

those cases by the lower courts. Indeed, with the sole exception of jurisdictional or procedural matters, all of these decisions deny retrospective effect to the statutes in question.

[7] As noted above in footnote 5, plaintiff sued Diamond Broadcasting in January, 1996, (**before** the effective date of the CDA), setting forth operative facts identical to those in the plaintiff's complaint against AOL.

The starting point on any retroactivity/retrospectivity analysis is whether the purported application of the statute is truly retroactive:

The terms 'retroactive' and 'retrospective' are synonymous in judicial usage. . . . They describe acts which operate on transactions which have occurred or rights and obligations which existed before passage of the act. 2 N. Singer, Sutherland on Statutory Construction § 41.01, p. 337 (5th rev. ed. 1993) cited in Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 1498 n. 23 (1994).

The Landgraf case is the most recent major application of retroactivity to an existing statute. In Landgraf and its companion case, Rivers v. Roadway Exp., Inc., 114 S.Ct. 1510 (1994), the Court considered whether two sections of the Civil Rights Act of 1991 should be given retroactive effect to a decision on appeal.

The initial inquiry is whether Congress has provided for such a retroactive effect. The court observed:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. Id. at 1505.

In Landgraf the court meticulously reviews the legislative history and statutory language of the Civil Rights Act and determines that Congressional intent to apply the new provisions retroactively is not justified. Id. at 1489-96.

In its memorandum, AOL proposes that the very creation of the bar to liability by § 230(d)(3) of the CDA ("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") "must be read to govern even suits pending at the time the CDA was enacted," especially to avoid rendering the "no liability" superfluous. AOL Mem. 18. These arguments were rejected by the Court in Landgraf.

The court observed:

A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date. Id. at 1491.

Thus, AOL cannot argue simply that by adopting an effective date of the litigation/ liability ban Congress intended that the CDA should be applied retroactively.

Next, the court rejected the argument that retroactivity was required to avoid making some language in the Act superfluous. *Id.* at 1494. AOL's tautology is comparable—Congress would not have barred liability (“no liability may be imposed”) unless it intended to effect events that preceded the effective date of the CDA because it would otherwise render the bar “superfluous.” Of course, Congress easily could have, as it did in the Civil Rights Act of 1991, adopt the change in policy and decline to give it retroactive effect -- meaning that the effective date does not render the bar “superfluous” -- it merely reflects Congressional will.

The Landgraf Court noted that Congress had ample opportunity to make express provision for retroactive effect of the Civil Rights Act. (“an important and easily expressed message concerning the Act's effect on pending cases”) *Id.* at 1495. AOL does not argue that Congress has specifically provided for retroactive effect of § 230 of the CDA—and Congress undoubtedly could have done so.⁸

[8] e.g. The Antiterrorism and Effective Death Penalty Act did provide express retroactivity for capital cases in § 107(a) which “shall apply to cases pending on or after the date of enactment of this Act,” but predicated this upon establishment by a state of a procedure to ensure the appointment of qualified counsel to represent indigent petitioners in state post-conviction proceedings. See Bennett v. Angelone, 92 F.3d 1336, 1342 (4th Cir. 1996).

Additionally, the court declined to interpret the Act's creation of new remedies as requiring retroactivity even though many of the sections of the Act were explicitly designed to reverse a long list of Supreme Court decisions. *Id.* at 1489-90. Obviously, desiring to reverse the effect of a state court decision in Stratton-Oakmont does not equate to the expression of retroactive intent by Congress on the CDA.

Finally, in the absence of express Congressional intent or through application of the rules of statutory interpretation retroactivity is not found, then other rules must be looked to:

When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. *Id.* at 1505.

These principles mandate that the CDA not be given retroactive effect.

The Landgraf court starts with the general proposition that “the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.” *Id.* at 1497.

While it is true that “[a] statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute’s enactment . . . or upsets expectations based in prior law,” the court must “ask whether the new provision attaches new legal consequences to events completed before its enactment.” Id. at 1499.

Whether § 230 of the CDA operates retroactively “comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.” Id.

The Court expressed the general guiding principle that:

But while the constitutional impediments to retroactive civil legislation are now modest, prospectivity remains the appropriate default rule. Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate. Id. at 1501.

Since Landgraf was decided, the courts have uniformly declined to give retroactive effect to federal statutes. In Maitland v. University of Minnesota, 43 F.3d 357, 361-3 (4th Cir. 1994), the court reversed, declining to give retroactive effect to § 108 of the Civil Rights Act of 1991 which prohibited an employee from challenging a litigated or consent judgment or order. The court noted that “Had Maitland known that the law would change and that he might be barred by subsequent legislation from bringing a lawsuit to challenge actions taken under the consent decree, it is probable that he would have taken a much more active role in the Rajender case.” Id. at 363. The court found that § 108 was “attaching ‘new legal consequences’ to Maitland’s limited participation in the consent decree proceedings” and was therefore prohibited by Landgraf. Id.

In Rafferty v. City of Youngstown, 54 F.3d 278, 290 ft. 1 (6th Cir. 1995), the Court followed Maitland, supra, and refused to prohibit certain police officers from challenging conduct which was also covered by a consent decree.

In Preston v. Com. of Va. ex rel. New River Community College, 31 F.3d 203 (4th Cir. 1994), the Circuit declined to give retroactive effect to the Civil Rights Act of 1991 as it relates to a private cause of action under Title IX, 20 U.S.C § 1681(a). The court was faced with deciding whether Title IX should be construed as Title VII existed at the time the events occurred or as Title VII was subsequently amended. The court determined that the 1991 amendments should not be given retroactive effect on Title IX since it “altered the legality of the

employer's conduct and thus affixes **new legal consequences to past conduct.**" Id. at 208. (emphasis added).

In Bohrman v. Maine Yankee Atomic Power Co., 926 F. Supp. 211 (D. Me. 1996), the court declined to give retroactive effect to amended federal regulations⁹ and instead applied regulations in effect at the time students were exposed to radioactive gas during a tour of a nuclear power plant, citing Landgraf.

[9] Plaintiff sought to take advantage of the amended regulations which made the duty owed to a member of the public uniform regardless of whether the person is in a restricted area. Id. at 218; see 219 n. 6 for impact of ruling on applicable exposure limits.

In a case involving the classic rule against retroactive impact on contracts, the court in Appalachian States Low-Level Radioactive Waste Com'n v. O'Leary, 932 F.Supp. 646, 654 (M.D. Pa. 1995), declined to give retroactive effect to regulations relating to rebates of certain surcharges for disposal of low-level nuclear wastes.¹⁰

[10] The Secretary of DOE imposed a three year requirement for a contract to qualify for a full rebate. The plaintiff's contract was for less than three years and DOE proposed to pay a *pro rata* amount. Id. at 651.

In Travenol Laboratories, Inc. v. U.S., 936 F.Supp. 1020, 11024 (CIT 1996), the court declined retroactive effect to a NAFTA provision on the amount of interest due on excess deposits of estimated duties, citing Landgraf.¹¹

[11] If the NAFTA amendments were enforced to declarations made before the effective date, the government would be required to pay interest on excess tariffs when before NAFTA it did not. Id. at 1022-23.

The Prison Litigation Reform Act § 803(d) which limited attorney's fees in prison cases was denied retroactive effect in Cooper v. Casey, 97 F.3d 914, 921 (7th Cir. 1996) since it would attach new consequences to completed conduct.

In U.S. v. Bacon, 82 F.3d 822, 824 (9th Cir. 1996), the court refused to apply Washington's four year extinguishment provision in its Fraudulent Conveyances Act retroactively since the Act imposed an additional element for a fraudulent transfer claim and impermissibly "changes the elements of a cause of action."

In McKamey v. Roach, 55 F.2d 1236, 140-41 (6th Cir. 1995), an amendment which added a prohibition of the interception of cordless telephone communications was not given retroactive effect to a claim for damages for the interception of cordless phone conversations.¹²

[12] Under the prior act in effect at the time the events transpired, interception of cordless phone conversations as radio waves were not prohibited. Id. at 1240-41.

Forfeiture of laundered funds under a new federal statute¹³ was rebuffed in U.S. v. \$814,254.76, in U.S. Currency, Contents of Valley Nat. Bank Account No., 51 F.3d 207 (9th Cir. 1995).

[13] Under the old forfeiture statute, 18 U.S.C. § 981, funds seized could be forfeited only if they were “involved in” money laundering “traceable” to the transactions. The amended statute, adopted after the seizure of the funds, permits the forfeiture of money even if not directly traceable to laundered funds so long as the account previously contained funds involved in or traceable to illegal activity. Id. at 208.

Numerous courts have denied retroactivity to the Antiterrorism and Effective Death Penalty Act because of the profound legal consequences on federal habeas proceedings from attaching new legal consequences to a completed event. Lindh v. Murphy, 96 F.3d 856, 862 (7th Cir. 1996), Burns v. Parke, 95 F.3d 465, 468 (7th Cir. 1996), and Boria v. Keane, 90 F.3d 36, 37-8 (2nd Cir. 1996).¹⁴

[14] Since Virginia had not established the required system before the petitioner’s state post-conviction proceedings were instituted, § 107 of the Act was deemed not to apply; the court deferred a decision on the retroactive effect to the other sections of the Act. Bennett v. Angelone, 92 F.3d at 1342-43, n. 3; see also n. 8, supra.

AOL's reliance is misplaced on In Re TMI, 89 F.3d 1106 (3rd Cir. 1996) as supporting its assertion that “even a statute that has the effect of eliminating a pending tort claim does not impair a vested right” within the Landgraf policy analysis. (AOL Mem. 20). TMI involved the application of a statute of limitations retroactively to comport with express language in the statute as to jurisdiction and, as a result, choice of law (which applied Pennsylvania's limitations to Mississippi suits) for the Three Mile Island cases. Id. at 1115 n. 8. The court did hold that a pending tort claim is not a vested right for purposes of “heightened scrutiny” due process review.¹⁵ It does not follow that a pending tort claim has no status in the Landgraf analysis which focuses on the fundamental fairness of retroactivity. Moreover, it is well settled that a new statute of limitations generally does not even constitute retroactive application since it does not relate to the conduct of the defendant, but rather the plaintiff’s conduct in filing the claim. Forest v. U.S. Postal Service, 97 F.3d 137, 140 (6th Cir. 1996). For example, in Forest the court retroactively applied the 90 day statute of limitations in the 1991 Civil Rights Act instead of the prior 30 day statute for a claim. Id. Additionally, Forest recounts that many other decisions have imposed the new 90 day statute for cases arising under the Age Discrimination in Employment Act involving conduct that predated the 1991 Act. Id. at 140-41.

[15] As noted above, the Landgraf court based its analytic framework on the observation that “constitutional impediments to retroactive civil legislation are now modest.” Landgraf at 1501. Thus, it should come as no surprise that depriving a plaintiff of the right to file suit because the statute of limitations had run does not violate due process. Nevertheless, this retroactive application of limitations (assuming it is deemed to be truly retroactive) might well not pass muster under the focus of the Landgraf test—the “potential unfairness of retroactive application.” Id. at 1501.

AOL has argued that plaintiff’s right to damages for its negligence is not the type of “right” entitled to protection from retroactive application of the CDA. (AOL Mem. 19-20). AOL seizes on the mention of the paradigm for declining retroactivity—contracts or “vested” rights. While Landgraf does refer to those as the well-recognized category of contracts/vested rights, Landgraf emphasizes the that “[a]ny test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity.” Landgraf at 1499. Indeed, Landgraf emphasizes the linchpin of any retroactivity

analysis is that “familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.” Id.

In Landgraf the court invoked the unfairness of imposing “an important new legal burden” to the conduct in question, that the introduction of compensatory damages that would have “an impact on private parties’ planning,” and as creating a new cause of action “its impact on parties’ rights is especially pronounced.” AOL appears to argue that retroactively (i.e. after all of the seminal events have been completed) effecting the elements of causes of action (or completely eliminating all available causes of action) is different if the party is a plaintiff than if it is a defendant—a one way street over which only defendants may travel. The Landgraf court makes no such distinction and neither do its progeny.¹⁶

[16] e.g. Rafferty, supra, and Maitland, supra, which declined to deprive plaintiffs of their claim by retroactive effect of § 108 of the Civil Rights Act of 1991; U.S. v. Bacon, supra, where the court refused to apply a four year statute of repose retroactively because it “impermissibly changes the elements of a cause of action.” Many of these cases invoke concern over retroactively attaching new consequences to completed conduct.

Moreover, Landgraf focuses on the “potential unfairness of retroactive application” Id. at 1501. Based upon the facts of this case it would be extremely unfair to dismiss plaintiff’s claims under the retroactive imposition of § 230. These include:

1. Plaintiff took immediate action to notify AOL of the incendiary posting and followed it up with many communications to AOL to remove the posting and avoid others from being posted (infra, 3-4);
2. AOL failed to take prompt action on plaintiff’s request to remove the posting, refused to post a retraction or notice that the posting was false, and failed to take steps to preclude repostings (supra, 4-5, ¶¶ 42-45);
3. Because of the manner in which AOL solicits its new members, AOL was (and remains to this day) unable to identify those who join using bogus information; the person(s) who posted the KenZ postings changed his bogus information at least twice and used new (deceptively similar) screen names. (See Exs. 3, 4 and 5 and Ex. 6, answer to Interrogatory 3, #15);
4. Plaintiff’s counsel asserted from the earliest time that AOL was liable as a distributor and not a publisher, establishing plaintiff’s reliance on the law as it undeniably existed prior to the adoption of the CDA (Exs. D and E to Kayser Aff.);
5. Before the effective date of the CDA, plaintiff instituted an action over damages arising from the Oklahoma City radio broadcast which was a direct and foreseeable result of AOL’s negligence; the basic allegations in the Complaint against Diamond Broadcasting, Inc. are identical to those in the Complaint against AOL (see supra, n. 3);
6. All of the acts which give rise to AOL’s tort liability occurred (were completed) long before the adoption of the CDA.

In light of the above, especially the lack of express Congressional intent, application of § 230 of the CDA to the plaintiff's claims would be unfair, would impose new burdens on plaintiff's claims, change the elements of plaintiff's causes of action, deprive plaintiff of any remedy for AOL's negligence which directly and foreseeably injured plaintiff.

CONCLUSION

For the reasons outlined in this brief, AOL's Motion should be overruled. AOL seeks to use the CDA in a manner Congress did not envision and for purposes directly contrary to the expressed purpose of § 230 (i.e. protecting action, not inaction, since AOL did not need § 230's protection from the Prodigy case if it did nothing!), and seeks to abrogate well-recognized state tort liability for distributors. Moreover, even if the CDA does apply to plaintiff's type of claim, it may not be applied retroactively under the prevailing case law.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division
Civil No. 96-1564-A
February 24, 1997

KENNETH M. ZERAN,

Plaintiff,

v.

AMERICA ONLINE, INC.,

Defendant.

REPLY MEMORANDUM IN FURTHER SUPPORT OF
DEFENDANT'S MOTION FOR JUDGMENT ON THE
PLEADINGS

Plaintiff's Brief in Opposition to Defendant America Online, Inc.'s ("AOL") motion for judgment on the pleadings fails to undercut the two basic points AOL established in its opening brief: plaintiff's suit seeks to treat AOL as the "publisher or speaker" of third-party information in contravention of Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230, and Section 230 applies in this case even though the events in question pre-date its enactment. Accordingly, Plaintiff's suit should be dismissed.

I. PLAINTIFF'S SUIT SEEKS TO TREAT AOL AS A PUBLISHER OF THIRD PARTY CONTENT AND IS THEREFORE BARRED BY SECTION 230 OF THE CDA.

In its opening brief, AOL established that Plaintiff's suit, which seeks to hold AOL liable for harms resulting from allegedly defamatory messages posted by an unknown third-party, is barred by Section 230 of the CDA, because the suit impermissibly seeks to treat AOL as the "publisher or speaker" of the messages. Def. Mem. at 5-12.¹ AOL demonstrated, in particular, that the plain terms of Section 230 (*Id.* at 6-8), as well as its legislative history and overarching policy goals (*Id.* at 9-12), all support AOL's construction of the statute. AOL further explained that Plaintiff could not evade the bar of Section 230 merely by labeling his suit as a claim of simple negligence rather than a claim of defamation or another similar tort. *Id.* at 12-17. Plaintiff's opposition brief fails to refute AOL's construction and application of Section 230.

[1] In this Reply Memorandum, we cite AOL's "Memorandum in Support of Defendant's Motion for Judgment on the Pleadings" as "Def. Mem." and Plaintiff's "Brief in Opposition to Defendant's Motion for Judgment on the Pleadings" as "Pl. Opp."

Despite his weak rhetoric that AOL has turned Section 230 "on its head," (Pl. Opp. at 2, 10 n.6), Zeran does not contest the basic foundations of AOL's argument. Thus, he does not dispute two key elements that make Section 230 control this case, namely (a) that AOL is a "provider of an interactive computer service" within the meaning of Section 230(c)(1) (see Def. Mem. at 7), and (b) that the messages over which Plaintiff has sued were "provided by another information content provider" as defined in Section 230(e)(3). See *id.* Moreover, he concedes both that Section 230 provides a "'safe harbor' for cyberspace distributors" (Pl. Opp. at 10) and that Section 230 bars any civil cause of action against a distributor if the imposition of liability in that action would treat the distributor as the publisher or speaker of a message posted by a third party. *Id.*

Zeran's view of the operation of Section 230 diverges from that of AOL in only one respect: whether his suit to hold AOL liable for allegedly failing to remove or block messages posted on its service by a third person "treat[s] [AOL] as the publisher" of those messages. AOL demonstrated in its opening brief that holding AOL liable for the harm those third-party messages allegedly caused to Zeran would treat AOL as the publisher of the messages from at least three critical perspectives:

- Holding AOL liable for the damages allegedly caused to Plaintiff by these allegedly "defamatory and bogus" messages would put AOL in precisely the same legal

position as the person who posted -- and therefore published -- the messages, thereby “treat[ing] [AOL] as the publisher” of those messages. Def. Mem. at 8.

- Under well-settled common law principles, liability for harm flowing from the dissemination of a defamatory statement may be imposed only upon a party who is deemed to have “published” the statement. As a result, Plaintiff’s suit necessarily seeks to treat AOL as the publisher of the messages at issue. Id. at 12-17.
- Plaintiff’s suit seeks to impose on AOL a standard of care requiring it to review and edit the content of information appearing on its system and to issue retractions for information deemed to be erroneous.² These are quintessential duties of a publisher, and to impose them on AOL would obviously treat it as the “publisher” of the information posted on its system by third parties. Id. at 8.

[2] At one point in his opposition, Zeran erroneously asserts that the standard of care that he seeks to apply in this action would not treat AOL as a publisher because it “does not impose upon AOL any obligation to examine in advance any material posted on its computer bulletin board.” Pl. Opp. At 8. This is utterly inconsistent with the position that Zeran advances throughout the remainder of his opposition. From the outset of this case, and throughout his opposition, Zeran has argued that AOL, once put on notice of the first offending message, was obligated to review in advance every subsequent message sought to be posted on its system and to block any of them that repeated any similar offending content. Complaint ¶¶ 43-45 (AOL “was obligated after due notice to be able to screen incendiary, defamatory and/or bogus material”); Pl. Opp. At 7, 12, 13 (AOL “must implement some screening or editing function” (emphasis added)).

A. Distributors Cannot Be Liable for Harms Caused by Third Party Content Without Being Deemed Publishers of that.

Rather than confronting the foregoing arguments and the plain meaning of Section 230, Zeran bases his opposition to AOL’s motion principally on Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991), a case decided by a district court in New York several years before enactment of Section 230. Zeran erroneously argues that Cubby ruled that an interactive computer service provider may be liable for harm caused by defamatory information that a third party transmits over its service without treating the provider as the publisher of the information. Pl. Opp. at 8, 11, 15-16. He builds this argument upon the demonstrably false premise that Cubby recognized a special cause of action -- wholly distinct from defamation or other causes of action applicable to those who “publish” false information -- for “negligent distribution” of defamatory information. Id. Zeran’s interpretation of Cubby is totally wrong.

Cubby did not even discuss, much less recognize, any cause of action that would subject an interactive computer service to liability for defamatory information transmitted by a third party without treating it as the publisher or speaker of that information. Instead, Cubby recognized that interactive computer services, as mere distributors of information being transmitted by third parties, enjoy as a matter of constitutional law a special level of protection that requires an exceptional threshold showing before they can be treated as the publisher or speaker of such information. Specifically, Cubby held that the First Amendment provides a “deeply rooted” protection for distributors such as interactive service providers and that, as a result, such a provider could be held liable as the publisher or speaker of defamatory matter posted by a third party only upon a showing that it knew or should have known of the

defamation. 776 F. Supp. at 139-41. Zeran's attempt to transform this special level of protection into a new-found tort action of "negligent distribution" in which liability may be imposed on an interactive computer service without treating it as a "publisher" is preposterous.

The plaintiff in Cubby sought to hold CompuServe liable under three different tort theories, each of which plainly would have treated CompuServe as the publisher or speaker of allegedly defamatory information posted by a third party. Cubby's primary claim was for defamation, a tort whose most basic element is the requirement that the defendant have "published" the information in question. Restatement (Second) of Torts, § 558 (1977). In discussing this claim, the Cubby court framed the issue as being whether there was a factual basis for treating CompuServe as though it had "originally published" defamatory messages posted by a third party. 776 F. Supp. at 139 (citation omitted, emphasis added). Similarly, in considering the two other tort claims presented in Cubby -- business disparagement and unfair competition -- the Court said that no liability could be imposed absent a showing that CompuServe had made a "knowing publication of false matter," and that CompuServe had "intentionally uttered" an injurious falsehood. Id. at 141, 142 (emphasis added).

Because holding CompuServe liable under each of the claims presented in Cubby would by definition have treated CompuServe as a publisher of third-party content, Cubby cannot possibly be interpreted as having invented a cause of action against interactive computer service providers that would subject them to liability for third-party content without treating them as the publishers of such content. Rather, as set out in AOL's opening brief (Def. Mem. at 15-16), Cubby is representative of a more general common law rule under which a distributor cannot be liable for harm caused by dissemination of third-party information in the absence of facts establishing that it was a publisher of that information.³ Accordingly, Cubby, lends absolutely no support to, but instead highlights the fatal flaws in, Zeran's claim that his suit does not seek to treat AOL as the "publisher or speaker" of the messages at issue in this case.⁴

[3] Zeran's opposition completely ignores the cases cited by AOL on this point, yet at the same time asserts that his unfounded interpretation of Cubby "is consistent with the law in every jurisdiction in the United States." Pl.Opp. at 12. Astonishingly, Zeran's sole support for this breathtaking assertion is the ipse dixit of his own lawyer. See id.; Kayser Aff. ¶ 5.

[4] Zeran also errs in arguing that AOL's interpretation of Section 230 is somehow inconsistent with a brief filed by AOL's predecessor counsel before this was transferred to this Court. The only supposed inconsistency to which Plaintiff points -- that the brief supporting AOL's now-withdrawn motion to dismiss "acknowledged" that Section 230(c) "confirm[ed] the law enunciated in Cubby" (Pl. Opp. At 10) -- is in fact consistent with AOL's position here. AOL simply observed in that earlier brief that Section 230 "supports the decision in Cubby It will, henceforth, protect services such as AOL from being treated as the publisher of information posted on the net by others." Pl. Opp., Ex. A, at 17-18. This statement is fully consistent with AOL's present position that Section 230, like the Cubby decision itself, extends special protections to interactive computer services. In any event, even if this Court finds that there is any inconsistency, nothing bars AOL from refining its legal theory during the progress of this case. See Tenneco Chemicals, Inc. v. William T. Burnett & Co., 691 F.2d 658, 664 (4th Cir. 1983).

Much of the remainder of Zeran's argument revolves around his contention that his suit does not seek to treat AOL as the "publisher or speaker" of the allegedly defamatory messages because his suit is not for defamation -- which he apparently concedes would be barred by Section 230 -- but for simple negligence, which he contends is unaffected by Section 230.

Zeran's argument on this point goes immediately off track when he asserts, without citation to any authority, that Section 230 was designed to immunize interactive computer services from the "strict liability" to which publishers are held in defamation cases but to leave them unprotected from negligence suits. Pl. Opp. at 10-11. This construction of Section 230 is plainly wrong because defamation itself is not a "strict liability" tort. To be held liable for defamation, a party must have published allegedly defamatory information with a level of fault amounting to at least negligence. See Restatement (Second) of Torts, §§ 558, 580A, 580B; see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 346-47 (1974) (First Amendment generally requires showing of fault before defendant can be liable for defamation). It is therefore absurd to contend, as Plaintiff does, that Congress enacted Section 230 to "protect" interactive computer services by shielding them from "strict liability" but not "negligence liability."

More fundamentally, Plaintiff is wrong in asserting that his suit against AOL for negligently failing to screen or remove defamatory information from its system is meaningfully distinguishable from a defamation suit for publishing defamatory information. Def. Opp. at 7. AOL's opening brief has already established that if Section 230's applicability were to turn on such superficial differences as how the claim is labeled, then it would provide no protection whatsoever for interactive computer services. Def. Mem. at 13. Far from rebutting this point, Zeran's brief simply confirms that his claim is, in substance, a claim for defamation. Thus, he repeatedly asserts that the "operative facts" and "basic allegations" in his suit against AOL are "identical" to those of his defamation action against the owner of the radio station that broadcast one of the messages at issue here. Pl. Opp. At 18 n. 7, 29.

Ultimately, Zeran's strained efforts to draw a distinction between his suit and a suit for defamation, and to characterize his suit as one that does not seek to treat AOL as a publisher of the allegedly defamatory messages, collapse of their own weight. Thus, by the end of his discussion of how Section 230 operates, he concedes that his theory of liability would (1) result in AOL being "deemed to have 'published'" the allegedly defamatory material (Pl. Opp. at 16); (2) subject AOL "to liability for '[the messages] continued publication'" (Id.); and (3) treat AOL as a "secondary publisher," a category that Zeran suggests, without authority, is "entirely distinct" from (rather than a subset of) the category of "publisher." Id. at 17. AOL submits that these three concessions -- which Zeran remarkably makes in the course of accusing AOL of "sophistry" -- are each sufficient to establish that Zeran's suit seeks impermissibly to "treat [AOL] as the publisher or speaker" of the messages at issue.

B. AOL's Interpretation of Section 230 Is In Harmony With the Purposes of That Section.

Zeran further errs in arguing that AOL's interpretation of Section 230's "publisher or speaker" provision is inconsistent with Congress's intent, reflected in Section 230(c)(2), to remove disincentives for interactive computer services to screen out potentially harmful material posted by third persons. See Pl. Opp. at 9-11. AOL agrees that Congress intended to remove legal disincentives to such voluntary "Good Samaritan" actions. At the same time, Congress plainly did not require that interactive computer services engage in reviewing and screening, a fact reflected in both its express prohibition on treating them as "publishers" and its unambiguous declaration that their development be "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).⁵ Under Plaintiff's theory, however, AOL would in fact be required, as

soon as it received some form of notice that a particular message was “bogus” or “defamatory,” to review for an indefinite period every subsequent message posted anywhere on its entire system and to block any of them that could possibly be similar to the original offending message.

[5] Plaintiff’s suggestion that the government regulation with which Congress was concerned did not include state tort law (Pl. Opp. At 13) is demonstrably false. Even he concedes that one of the purposes of Section 230 was to overrule Stratton-Oakmont, Inc. v. Prodigy Service Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (Pl. Opp. At 10), a case that was decided on the basis of New York common law. In any event, Section 230(d)(3) prohibits any action brought under “any [inconsistent] State or local law,” which clearly included state common law.

The policy implications of Plaintiff’s proposed rule that interactive service providers must engage in screening once they know or have reason to know that “libelous, defamatory or bogus material” has been posted on their systems are far-reaching and plainly contrary to Congress’s intent. Plaintiff’s proposed rule would actually have the perverse effect of discouraging the very sort of Good Samaritan actions that Congress intended to promote. 47 U.S.C. § 230(c)(2). If a provider knew it would incur editorial duties and become subject to potential liability once it might have reason to know that a particular posting might be offensive, the provider would have a strong incentive to keep itself ignorant of what is on its system. Thus, a provider that knew it would not be liable for a third party’s content might monitor its bulletin boards and eliminate content that it perceived to be harmful as a Good Samaritan action. But that provider would be significantly less likely to engage in such monitoring under Plaintiff’s proposed rule: by monitoring its boards, the provider would have reason to know about offensive posts and therefore incur legal duties and potential liability it would undoubtedly rather avoid. In proposing a rule that would discourage Good Samaritan actions, it is Plaintiff, not AOL, who is attempting to “turn[] the CDA on its head.” Pl. Opp. at 2.

Plaintiff finally asserts that, under AOL’s interpretation of Section 230, he would have no remedy for his alleged damage. As he puts it, “Congress surely did not leave Zeran alone to chase” the prankster who posted these messages. Pl. Opp. at 13. As AOL pointed out in its opening memorandum, however, Congress did not “leave Zeran alone.” Rather, it expressly sought “to ensure vigorous enforcement of Federal criminal laws to deter and punish” the type of conduct engaged in by the person who posted the messages in this case. 47 U.S.C. § 230(b)(5). Indeed, Plaintiff’s own Complaint demonstrates that he was far from “alone” in chasing the prankster in this case -- the Secret Service, the FBI, and the local police were all involved. Complaint ¶¶ 16, 27, 29-31, 34. No legal regime can ever guarantee that every victim of wrongful conduct will be able to find the wrongdoer and recover his alleged damages. But that fact cannot justify treating AOL as the publisher of third-party content in direct contravention of Section 230.

II. SECTION 230 REQUIRES DISMISSAL OF THIS CASE EVEN THOUGH THE EVENTS AT ISSUE OCCURRED BEFORE IT WAS ENACTED.

As AOL established in its opening memorandum, although the CDA was enacted after the events described in Plaintiff’s complaint allegedly occurred, Section 230 controls this case. First, the text of Section 230 reveals that Congress expressly prescribed that the section applies to suits involving antecedent events. Def. Mem. at 18-19. Second, even if Section 230

contained no such express prescription, application of the statute to antecedent events will not have a “retroactive effect” under any of the three tests set out in Landgraf v. USI Film Prods., 511 U.S. 244, 114 S. Ct. 1483, 1505 (1994). Def. Mem. at 19-21. Accordingly, following Landgraf, this Court must apply the law in effect at the time of its decision -- namely, Section 230 -- and dismiss Plaintiff’s suit.

Zeran acknowledges that Landgraf provides the framework for analyzing whether Section 230 controls this case. Pl. Opp. at 18-19. He further concedes that Congress may expressly prescribe that a statute apply to antecedent events and that, even in the absence of such a prescription, a statute will apply to a suit involving events pre-dating its enactment unless the statute has a “retroactive effect” as defined in Landgraf. Id. at 19, 21. Zeran argues, however, that Congress did not provide the requisite express prescription (Id. at 19-21) and that Section 230 does have a retroactive effect. Id. at 21-29. He is wrong on both counts.

A. Congress Expressly Prescribed that Section 230 Applies to Events Pre-Dating Its Enactment

The plain text of Section 230 discloses Congress’s intent that the statute govern any suit pending or filed after enactment of the statute. Section 230 prescribes that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(d)(3). This language could hardly be clearer: from the date of the CDA’s enactment (February 8, 1996), no action may be filed and no liability may be imposed under any state or local law inconsistent with Section 230.⁶ Indeed, the plain meaning of the phrase “no liability may be imposed” is that Congress barred liability from being imposed even in suits that were pending when Section 230 was enacted. Therefore, a fortiori, Section 230 must also be read as controlling all new lawsuits filed after its enactment.

[6] AOL does not, as Zeran erroneously suggests, argue that “by adopting an effective date. . . Congress intended that the CDA should be applied retroactively.” (Pl. Opp. at 20.) In fact, Section 230 does not even have an explicit effective date and therefore simply went into effect on the date of its enactment. See Lyons v. Ohio Adult Parole Authority, 1997 WL 20401, No. 96-3489, at 4 (6th Cir. Jan. 22, 1997).

As AOL established in its opening brief, acceptance of Plaintiff’s argument that Section 230 forbids only suits involving post-enactment events would not only defy the plain meaning of Section 230(d)(3), but would also violate the canon that a statute should not be interpreted in a manner that renders part of its language superfluous. Specifically, AOL showed that unless Section 230 is interpreted to apply to suits that were pending when the statute was enacted (suits that necessarily would have involved pre-enactment events), the clause “no liability may be imposed” would be superfluous. See Def. Mem. at 18-19.

Rather than attempting to confront this argument and offer an alternative interpretation of Section 230(d)(3), Zeran erroneously contends that Landgraf “rejected the argument that retroactivity was required to avoid making some language in the [Civil Rights] Act superfluous” and that AOL’s argument is somehow “comparable.” Pl. Opp. at 20. This simply begs the question. To be sure, Landgraf did reject an argument that failing to apply the Civil Rights Act to antecedent events would render a portion of that Act superfluous, because it found the language at issue would still have a purpose even if that Act was applied only prospectively. See Landgraf,

114 S. Ct. at 1493. But the Landgraf Court did not reach this conclusion by abandoning the canon that statutes should be read so as to give effect to all provisions. Indeed, the very fact that the Court went through a lengthy analysis of the Civil Rights Act to determine whether purely prospective application would render statutory language superfluous demonstrates just the opposite -- the Court believed that an analysis of particular statutory language in light of this canon can help determine if Congress has expressly prescribed that a statute should apply to antecedent events.

B. Section 230 Does Not Have “Retroactive Effect.”

Even if this Court were to conclude (contrary to the foregoing analysis) that Congress did not expressly provide that Section 230 applies to events pre-dating its enactment, the statute would still control this case because it does not have a “retroactive effect.”⁷ See Def. Mem. at 19-21. Zeran disputes this conclusion on the ground that the law embodies a “presumption against retroactive legislation” and that considerations of fairness preclude such retroactive application in this case. Pl. Opp. at 21-29. Zeran’s analysis is incorrect.

[7] Under Landgraf, “‘retroactive effect’ is a term of legal art, which does not describe all applications of a statute to preexisting causes of action or pending proceedings. The definition of ‘retroactive effect’ in this context is more narrow than that. . . .” Hunter v. United States, 101 F.3d 1565, 1570 (11th Cir. 1996). Thus, the fact that a statute applies retrospectively – to events occurring before enactment of the statute – does not necessarily mean it has a “retroactive effect.”

Contrary to Plaintiff’s assertion that “the Landgraf court start[ed] with the general proposition that ‘the presumption against retroactive legislation is deeply rooted in our jurisprudence’” (Pl. Opp. at 21), the Court actually sought to reconcile two longstanding principles that had appeared to be in some tension. As it explained, “[a]lthough we have long embraced a presumption against statutory retroactivity, for just as long we have recognized that, in many situations, a court should ‘apply the law in effect at the time it renders its decision,’ even though that law was enacted after the events that gave rise to the suit.” Landgraf, 114 S. Ct. at 1501 (citation omitted). The Court observed that the “familiar considerations of notice, reasonable reliance, and settled expectations offer sound guidance” in attempting to resolve any tension between these principles. Id. at 1499. After surveying how past cases had applied these considerations when analyzing whether a statute should be applied to antecedent events, the Supreme Court concluded that a court should apply the law in effect at the time of decision -- even in cases involving events pre-dating the enactment of a statute -- if doing so does not have “retroactive effect.” The Court further held that application of a statute to pre-enactment events does not have “retroactive effect” unless it would “impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” Id. at 1505.

Rather than deal with this three-prong test, Zeran initially asserts that “[s]ince Landgraf was decided, the courts have uniformly declined to give retroactive effect to federal statutes.” (Pl. Opp. at 22.) This claim is patently untrue. In fact, in one of the cases Plaintiff himself cites as an example of a court declining to apply a statute to antecedent events, the court actually concluded that such application was appropriate under Landgraf. See Lindh v. Murphy, 96 F.3d 856, 863-67 (7th Cir. 1996), cert. granted in part, 117 S. Ct. 726 (1997). Moreover, this Court itself relied on Landgraf to conclude that a statute concerning the revival of expired

patents should apply in a case involving events pre-dating the enactment of the statute. See Centigram Communications Corp. v. Lehman, 862 F. Supp. 113, 118-19 (E.D. Va. 1994) (Ellis, J.), appeal dismissed per agmt. of the parties, 47 F.3d 1180 (Fed. Cir. 1995); See also Kolster v. INS, 101 F.3d 785, 788-90 (1st Cir. 1996) (statutory preclusion of judicial review could be applied under Landgraf in case involving pre-enactment events); Forest v. U.S. Postal Service, 97 F.3d 137, 140 (6th Cir. 1996) (applying statute of limitations to case involving conduct predating enactment of statute).

Plaintiff next cites a laundry list of cases discussing retroactivity in the context of statutes other than the CDA. Pl. Opp. at 22-25. Plaintiff merely summarizes the holdings of the cases and generally fails to explain the relevance of any of them to the analysis of Section 230. An examination of these cases demonstrates that they offer Plaintiff no help. For example, while the court in Preston v. Com. of Va. ex rel. New River Community College, 31 F.3d 203 (4th Cir. 1994), did decline to apply a particular section of the Civil Rights Act to antecedent events, it did so on the ground that such application would unfairly increase the liability of the defendant employer. See id. at 208. Clearly, Section 230 increases no party's liability. Plaintiff's citation to United States v. Bacon, 82 F.3d 822 (9th Cir. 1996), is similarly unhelpful. Although the court in that case refused to apply a statute extinguishing fraudulent conveyance claims based on antecedent events, the claims at issue were intended to protect a creditor's vested contractual or property rights. See id. at 824. As discussed below, Section 230 does not impair any comparable vested right. Plaintiff's other citations are similarly inapposite.⁸

[8] One case Plaintiff cites was reversed on the ground that the case did not even raise a retroactivity issue. See Appalachian States Low-Level Radioactive Waste Commission v. O'Leary, 93 F.3d 103, 113 (3rd Cir. 1996). Another case involved a situation in which an attorney had vested right in fees for services already performed. See Cooper v. Casey, 97 F.3d 914, 921 (7th Cir. 1996). The remaining cases on which Plaintiff relies dealt with statutes that increased a defendant's liability, a situation that clearly does not apply to this case. See Burris v. Parke, 95 F.3d 465, 468 (7th Cir. 1996); Boria v. Keane, 90 F.3d 36, 37-38 (2nd Cir. 1996); McKamey v. Roach, 55 F.3d 1236, 1240-41 (6th Cir. 1995); United States v. \$814,254.76, in U.S. Currency, 51 F.3d 207, 209-11 (9th Cir. 1995); Travenol Laboratories, Inc. v. United States, 936 F. Supp. 1020, 1024 (Ct. Int'l Trade 1996); Bohrman v. Maine Yankee Atomic Power Co., 926 F. Supp. 211 (D. Me. 1996).

Plaintiff next pays lip service to the three-prong test established in Landgraf. See Pl. Opp. at 25-27. He fails, however, to show how application of Section 230 in a case involving pre-enactment events would have a "retroactive effect" under any of those three prongs. The first two prongs of this test clearly do not apply in this case -- Section 230 neither "increase[s] a party's liability for past conduct" nor "imposes new duties" on anyone. Plaintiff complains that these prongs of the test generally operate to favor defendants seeking to avoid liability rather than plaintiffs seeking to impose liability. See Pl. Opp. at 27. Far from being untoward or unfair, however, this differential impact follows inevitably from the very considerations of fair notice and reasonable reliance that Zeran invokes. Retroactivity law has long endorsed such differential treatment:

The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact. Indeed, at common law a contrary rule applied to statutes that merely removed a burden on

private rights by repealing a penal provision (whether criminal or civil); such repeals were understood to preclude punishment for acts antedating the repeal.

Landgraf, 114 S. Ct. at 1500. The reason for this difference is clear -- unlike a defendant, a prospective plaintiff generally does not reasonably rely on the absence or existence of a particular cause of action except to the extent that the plaintiff plans and files a lawsuit. Indeed, Zeran points primarily to just this type of conduct as evidence of his supposed “reliance.” Pl. Opp. at 28-29. He does not allege (and cannot show) that any action he took other than preparing to sue AOL was in any sense dependent on an expectation of a valid claim against AOL. But as Zeran himself observes elsewhere in his opposition, new rules that affect only “the plaintiff’s conduct in filing the claim” do not have a retroactive effect. Pl. Opp. at 26.⁹

[9] Zeran points to three cases in which courts declined to apply a statute to antecedent events where such application would have eliminated a claim that otherwise could have brought. (Pl. Opp. at 28 n. 16.) In one of these, United States v. Bacon, the statute would have impaired the plaintiff’s vested rights, a condition that is inapplicable here. See supra at 15. In the other two, Maitland v. University of Minnesota, 43 F.3d 357, 361-63 (8th Cir. 1994), and Rafferty v. City of Youngstown, 54 F.3d 278, 281 n. 1 (6th Cir.), cert. denied, 116 S. Ct. 338 (1995), the plaintiff had expressly relied on the pre-existing law by participating in judicial proceedings under the assumption that such participation would not affect his right to bring a subsequent suit. Zeran has not, and cannot, shown any similar reliance in this case.

When Zeran finally reaches the only prong of the Landgraf analysis that even arguably might apply to Section 230 -- namely the test of whether application of a statute to pre-enactment events would “impair rights a party possessed when he acted” -- he completely misses the mark. AOL demonstrated in its opening memorandum both (a) that this prong of the test for a retroactive effect may be met only if the statute impairs a “vested right” (Def. Mem. at 19-20); and (b) that the elimination of a potential or even pending tort claim does not impair a vested right. Id. at 20.

Zeran's principal response is to suggest -- without citation to any authority -- that even if a pending tort claim is not a vested right, “[i]t does not follow that a pending tort claim has no status in the Landgraf analysis which focuses on the fundamental fairness of retroactivity.” Pl. Opp. at 26. Even taken on its own terms, Zeran's argument fails. Zeran did not even have a pending tort claim at the time Section 230 was enacted. Moreover, Zeran simply could not reasonably rely on, or have settled expectations about, the existence of a common law “rule” that he purports to draw from dicta in a single district court decision applying the law of a jurisdiction that does not even govern this case. The absence of any unfairness to Zeran is further underscored by his concession that this is a case of first impression in which a jury will have to determine the appropriate standard of care for interactive service providers “for the first time.” Pl. Opp. at 15.

In any event, as AOL established in its opening memorandum (Def. Mem. at 19-20), the Landgraf Court concluded that under the third prong of its test, application of a statute to pre-enactment events is fair, and does not have retroactive effect, so long as it does not impair a vested right. Zeran cites no case holding that a pending tort claim (and the underlying common law rule on which it is based) are vested rights. The law is plainly to the contrary: “cases have

clearly established that a person has . . . no vested interest[] in any rule of common law.” Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 88 n. 32 (1978) (internal quotations omitted); New York Central RR. Co. v. White, 243 U.S. 188, 198 (1917) (“No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.”). “Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridge[s] no vested rights of plaintiff by . . . retroactively abolishing [plaintiff’s] cause of action in tort.” Hammond v. United States, 768 F.2d 8, 12 (1st Cir. 1986); see also In re TMI, 89 F.3d 1106, 1113 (3d Cir. 1996), cert. denied, No. 96-730, 1996 WL 665357 (Jan. 13, 1997) (statute that eliminates pending tort claim does not impair a vested right); Hyundai Merchant Marine Co. Ltd. v. United States, 888 F. Supp. 543, 551 (S.D.N.Y. 1995) (statute that eliminated tort claim applied to pre-enactment events because such a claim is not a vested right until reduced to final judgment), aff’d, 75 F.3d 134 (2d Cir.), cert. denied, 117 S. Ct. 51 (1996).

In sum, applying Section 230 to this case would neither deprive Plaintiff of any vested right nor treat him unfairly in any other respect, and it therefore does not have retroactive effect. Accordingly, under the principles set out in Landgraf, Section 230 -- the law in effect at the time of decision -- controls this case.¹⁰

[10] Plaintiff attaches an assortment of documents to his opposition and erroneously asserts that they convert AOL’s motion for judgment on the pleadings into a motion for summary judgment. Pl. Opp. at 2. Plaintiff’s attachments do not alter the nature of AOL’s motion because they contain no facts outside of the pleadings that are at all germane to the issues raised by AOL’s motion. Moreover, Plaintiff has utterly failed to comply with Local Rule 10(F)(2), under which a brief opposing a motion for summary judgment must include a “specifically captioned section listing all material facts as to which it is contended that there exists a genuine issue necessary to be litigated.” While AOL disputes the truth of many of the facts asserted by Plaintiff (including many of those in the attachments to his opposition), for purposes of this motion it treats all allegations in the Complaint as true.

CONCLUSION

For the foregoing reasons, as well as for the reasons set out in AOL’s opening memorandum, AOL respectfully requests this Court to grant judgment on the pleadings in its favor and to dismiss Plaintiff’s suit with prejudice.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division
Civil No. 96-1564-A
April 14, 1997

REPORTER'S TRANSCRIPT

KENNETH M. ZERAN,

Plaintiff,

v.

AMERICA ONLINE, INC.,

Defendant.

THE HONORABLE T.S. ELLIS, III
Presiding

HEARING ON MOTIONS
Wednesday, February 28, 1996

APPEARANCES:

JOHN EDWARDS, ESQ. and LEO KAYSER, ESQ.
For the Plaintiff

SARA KLINE, ESQ. and PATRICK CAROME, ESQ.
For the Defendant

PROCEEDINGS

(Court called to order at 2:41 p.m.)

THE CLERK: Civil Action 96-1564, Kenneth Zeran versus America Online, Incorporated. Counsel, please note your appearances.

THE COURT: All right, who is here on behalf of the plaintiff?

ATTORNEY EDWARDS: Your Honor, I am John Edwards. I am a member of the Bar of this Court. With me is Leo Leo Kayser, for whom I would like to make a motion that he be admitted for purposes of this case. He is a member of the Bar of the State of New York, the Second Circuit, the District of Columbia, and the United States District Court. I would offer his admission for purposes of this case.

THE COURT: The motion pro hac to have Mr. Kayser appear on behalf of the defendant is granted. We are glad to have you here, Mr. Kayser.

ATTORNEY KAYSER: Thank you, your Honor.

THE COURT: Who is here for the defendant?

ATTORNEY KLINE: Your Honor, Sara Kline, and I would like to introduce Patrick Carome, for whom the motion has already been granted.

THE COURT: All right. Who will argue today?

ATTORNEY CAROME: I will, your Honor, Patrick Carome for America Online.

THE COURT: We are glad to have you here, Mr. Carome.

You may be seated. I will tell you where I stand. First of all, let me be clear, Mr. Edwards, fax filings are not permitted. I found pages missing in the filings. And fax filings, however, aren't permitted in the courthouse. You will have to comply.

"Local counsel" typically means local. Roanoke is not terribly local, but I am going to permit it. But if there is a hardship that results, it will fall on the plaintiff. In the future, you may not file anything by fax.

RECAPITULATION BY THE COURT

THE COURT: The matter is before the Court on the defendant's motion to dismiss or motion for judgment on the pleadings. The motion is based on the application of the Communications Decency Act, which the defendant contends is applicable to the facts of this case.

This case comes here on transfer from the Western District of Oklahoma, and the issues raised

involve the application of Section 230 of the Communications Decency Act and also on whether, even if applicable, the allegation of a negligence cause of action in some way avoids the application of the statute.

Mr. Carome, let me hear from you first. You might -- and I think you should focus to some extent, although you may argue whatever issues you think need emphasis, but you should focus on those two, principally, namely the application of the statute and whether the statute, even if applicable, would stand in the way of a negligence suit.

ATTORNEY CAROME: Thank you, your Honor.

ARGUMENT BY THE DEFENDANT

ATTORNEY CAROME: I believe that the briefs have crystallized two issues. The first issue is whether or not Mr. Zeran's suit is one to treat America Online as the publisher or speaker on information posted on America Online interacted on by a third person. The Section 230 of the Communications Decency Act mainly prohibits any treatment of America Online as the publisher or speaker of such third-party --

THE COURT: He says -- you ought to focus on what he said. He says this doesn't speak to them as a publisher or speaker. It seeks to hold them as a distributor.

ATTORNEY CAROME: I think there are three respects, your Honor, in which Mr. Zeran's suit treats America Online as the publisher of third-party content.

First, such a suit, regardless of how it is labeled, seeks to put America Online in precisely the same legal position as the original publisher of these messages could be put in a defamation suit or any other suit for harm arising out of this content.

The original publisher is obviously the publisher. To treat America Online legally identically in terms of damages imposed, would be to treat America Online as the publisher of the third-party content.

Secondly, it is well-settled under the common law throughout this country that liability for harm caused by defamatory statements -- and that's what we have here, we have allegedly defamatory, bogus statements that suits for such harms are only properly brought against parties who are treated as publishers.

Here, clearly, to hold America Online responsible for damages caused by third-party posted messages would do exactly what your typical defamation suit would do.

Thirdly, the duties that Mr. Zeran's suit seeks to impose on America Online are the quintessential activities of a publisher. He seeks to have America Online, whenever there is any defamatory message posted on the system by a third party, be under a duty, once told of that situation, first to publish some form of reaction or notice --

THE COURT: Let me ask you this: Does the Communications Decency Act bar any action against an electronic type, like AOL, if the facts were that on one of their bulletin boards, some libelous or some defamatory words were published, and they were advised that they were false and defamatory, and they knew they were false and defamatory, and they didn't remove them?

ATTORNEY CAROME: Yes. The Communications Decency Act bars such liability. Liability in that circumstance treats America Online as the publisher of that content.

THE COURT: Treats them as a publisher?

ATTORNEY CAROME: Yes.

THE COURT: So they would be liable.

ATTORNEY CAROME: They would not be liable, because to hold them liable in those circumstances would treat them as a publisher, which is barred by Section 230.

THE COURT: Even after they are told that it is defamatory and they know that it's defamatory, let's say there are documents and admissions, and they nonetheless do it?

ATTORNEY CAROME: That is exactly right. That is exactly what Congress has provided.

THE COURT: Now, where do you see that in either the language or in any of the history of the statute?

ATTORNEY CAROME: Well, your Honor, as I indicated, to impose liabilities in those circumstances, your Honor, would mean that every time there was a complaint against America Online, someone brings to its attention a complaint about content on its system, it would have to essentially have a legion of investigators on hand to investigate that complaint, just as a newspaper would.

THE COURT: But a newspaper does have responsibility.

ATTORNEY CAROME: That is absolutely right. And a newspaper is -- when you sue a newspaper for the content in the newspaper, you have treated that newspaper as the publisher of that content. And when -- and that's perfectly permissible as to a newspaper. However, a suit --

THE COURT: If you substituted a newspaper for America Online in the hypothetical I gave you, there probably would be liability.

ATTORNEY CAROME: Absolutely, your Honor. It is very clear that section 230 was intended to eliminate liability for entities such as America Online. The act provides for --

THE COURT: Now, let's suppose that instead of something appearing on America Online about some or one of their subscribers, that America Online decided for one reason or another to defame somebody and started putting stuff on. Is there any liability?

ATTORNEY CAROME: Yes, there potentially would be liability, your Honor, because --

THE COURT: Why?

ATTORNEY CAROME: That would not be Section 230 states that no provider or user of an interactive computer service -- that is, America Online shall be treated as the publisher or speaker of any information provided by another --

THE COURT: Is this received by another?

ATTORNEY CAROME: -- by another contact [sic] provider. This is a circumstance of your hypothetical which would not have been information provided by another information content provider.

THE COURT: All right, address briefly the application of the Act, in view of the Act. I understand your argument that the Act would -- or construing the Act not to cover events prior to the effective date of the Act, would render, would render meaningless the statement that no liability would be imposed.

ATTORNEY CAROME: Yes. Your Honor, are you asking me to address what the plaintiff refers to as the retroactivity issue?

THE COURT: Yes.

ATTORNEY CAROME: Under the leading case here, which obviously is the Supreme Court's decision in *Landgraf*, it specifies a two-part analysis in determining the --

THE COURT: start with the language of the statute. This statute now became effective --

ATTORNEY CAROME: On February 8, 1996.

THE COURT: And these events all took place prior to the effective date, although the suit was filed, of course, long after the effective date, and the statute itself, 230, states that no cause of action may be brought -- and you say that's the end of the matter, because this was a cause of action brought afterwards.

But then you go on to say that the fact that no liability may be imposed underscores the fact that the activities don't have to occur after the effective date of the statute, or that language would be meaningless.

ATTORNEY CAROME: That is absolutely correct, your Honor.

THE COURT: And then you go through the *Landgraf* -- why is there any -- are there any decisions considering this?

It would seem that the *Stratton-Oakmont* [phonetic] case --

ATTORNEY CAROME: The *Stratton-Oakmont* case, which predated --

THE COURT: The *Prodigy* case.

ATTORNEY CAROME: That's correct, your Honor.

THE COURT: There is no authority, I take it, considering whether Section 230(c) should apply to cases brought after the effective date of the act, but involving activities that occurred prior to the act.

ATTORNEY CAROME: Yes. There is, as a matter of fact, there is a point --

THE COURT: Let's go back for a moment -- because it's late in the afternoon, and you'll have an opportunity for rebuttal because you have the burden.

There is obviously, you say, a creative litigant. That's meant to be pejorative. It is complimentary, that is how the law regards it in this country, that is, creative lawyers and excessively creative lawyers and judges

But in any event, they are framing it as a negligence claim. And your response to that I understand, but give me some authority where there has been, this particular point has been raised; in other words, where there has been some immunity for publishing and the effort to circumvent that has been to frame it in negligence terms. Is that the *Molday* [phonetic] case?

ATTORNEY CAROME: The cases that we discussed at pages 13 and 14 of our main brief, including *Hustler v. Falwell* and the *Molday* case, are examples of cases where plaintiffs have sought to avoid the protections of publisher liability by trying to plead a case as negligence, or negligent infliction of emotional distress.

The courts in those cases have uniformly recognized that when a plaintiff --

THE COURT: Just a moment. You are going to have to be quiet at counsel table. I can hear it up here.

Go ahead.

ATTORNEY CAROME: Thank you, your Honor.

The cases recognize that if the protection is against defamation liability, which defamation liability is a cause of action for the negligent publishing of false and harmful information, if that tort could -- and the protections also that go with it could be avoided simply by pleading just a

straight negligence case or a negligent infliction of emotional distress case, then every single defamation would easily be converted into a straight negligence action, with none of the panoply of protection that this Court has recognized for that sort of publishing liability.

If that could be done in this case, that simply by relabeling the cause of action as one for simple negligence and cause for negligent distribution, then there would be no protection in Section 230 for, for precisely this sort of situation.

Congress clearly intended to remove from interactive service providers --

THE COURT: That is a conclusion that is something I have to determine.

Let me ask you this: Plaintiffs obviously, plaintiff obviously relies quite heavily on the *Cubby* case, the duty to screen case. Surely that case, having been decided in '91, would have found some mention or reference in the legislative history or argument in the Congress. Did you find that?

ATTORNEY CAROME: There is no reference, your Honor, in the legislative history, as far as I know, of the *Cubby* case. The legislative history says that the, one of the purposes of the statute is to overturn *Prodigy* and similar cases.

Prodigy is the only other case that I am aware of, and it has been cited to the Court, in which an online service provider has been held liable for the tortious content put on its service by a third party.

Congress certainly was intending to remove the burden of such liability from online services when they are acting in this intermediary capacity, as in this case.

And speaking of *Cubby*, there is no possible way to draw out of *Cubby* this notion of a tort of negligent distribution. In fact, I am not aware of any case which holds --

THE COURT: All right, tell me about *Cubby*. It's New York Law.

ATTORNEY CAROME: *Cubby* was New York Law.

There were three causes of action that were plead. Mr. Kayser was counsel for *Cubby*, as I understand it.

The first cause of action was for defamation, and the Court framed -- which defamation treats the defendant as a publisher, because publication is one of the first and foremost elements of any defamation claim.

The Court said in that case that the question that the *Cubby* case presented was whether or not the rule that one who repeats a defamatory statement is liable as if he originally published it, should apply in the circumstances.

Cubby, there were also tort for -- I am going to forget for this disparagement, and there is another similar tort in each of the three torts.

The *Cubby* Court made clear that CompuServe, the defendant in that case, could be held liable if there were facts establishing that it was the publisher.

What Mr. Kayser has done, through his creativity, is to suggest that a special protection which the *Cubby* Court applied for computer contributors, namely the protection rooted in the First Amendment, for, that no defamation liability can be imposed, or other liabilities for third-party contact can be imposed on a distributor, absent knowledge or reason to know of the defamation. That simply was a special protection rooted in the Constitution for a distributor.

But it was a -- if that protection was overcome in any case, it was only to apply to the defamation tort, which would treat the defendant as a publisher, as quintessentially the defamation tort, which was the leading tort at issue in the *Cubby v. CompuServe* case.

It just completely stands *Cubby* on its head to read out of it some new tort of negligent distribution.

That isn't the case tort which treat intermediaries as responsible for the harm caused by a third person's speech, or by defamation torts which treat the intermediary as the publisher. And for that reason, this notion of a negligent distribution basis for, as liable that, that can't change the application of Section 230 to this case.

And if it could, Section 230 would have absolutely no meaning, which clearly you say is a conclusion. But I think one cannot draw anything from both the legislative history and, even more importantly, the findings and policy that are expressly stated in Section 230, that Congress clearly intended to remove from interactive service providers the risk of liability when they are acting -- the risk of liability for the content posted on their service by third parties.

It is clear, for example, from Section 230, Part (b), which is the policy statement, it is the policy of the United States to promote the continued development of the Internet and other interactive computer services, and other acts of intermedia, to provide the computer, that presently exist for the Internet and other interactive computer services undeterred by federal or state legislation. Here, and lastly Congress doesn't -- Congress does not ignore the fact that there was a serious issue, a serious policy issue concerning harmful content that is transmitted over the Internet or interactive service providers.

That is why in the last of the policy statements of Section 230, Congress reaches out and says that it is the policy of the United States to insure vigorous enforcement of federal criminal laws to deter and punish -- to deter and punish trafficking in obscenity, stalking and harassment by means of computer.

Here, Congress made a fundamental choice -- this is a very exciting, still in infancy, technology, that is revolutionizing the way computers are communicating in the United States and the world.

Congress did want to remove from the participants, the intermediary participants, in that revolution the risk of liability for third-party content.

And Congress coincidentally also said, and indicated by this last policy statement, that the way to deal with this problem of harm caused by third-party content is to go after the harassers and the stalkers and the others who are posting harmful content directly, but to not burden the Internet and the interactive service providers with liability for third-party content.

THE COURT: All right, thank you.

Mr. Kayser?

ARGUMENT BY THE PLAINTIFF

ATTORNEY KAYSER: May it please the Court, I would like to address the Court on the substantive issues with respect to Section 230. And I don't know if the Court permits, but if it does, Mr. Edwards would talk about the retroactivity issue to the Court.

The legislative history of Section 230 is best summarized in this conference agreement, which is not in either brief, but which I have a copy here and I would like to read.

THE COURT: It must be some sign of its relevance that it's not in either brief.

ATTORNEY KAYSER: I didn't have it, your Honor, before.

The conference agreement adopts the House provision with my modification as a new Section 230 of the Communications Act. This section provides good Samaritan protection from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material.

THE COURT: Doesn't that just say that if you do take steps to screen, you wouldn't be held responsible --

ATTORNEY KAYSER: Exactly.

THE COURT: For doing it negligently?

It doesn't say you have to take screening efforts. It says if you do, you wouldn't be penalized for trying to do it.

ATTORNEY KAYSER: That is exactly it, that is correct. It was done in the wake of the *Cubby* case and the *Stratton-Oakmont* case.

The next sentence is one of the specific purposes of this section to overrule the *Stratton-Oakmont* against *Prodigy* and any other similar decisions, which have treated such providers and users as publishers and speakers of content.

That is not -- this is not their own, because they restricted access to objectionable material. This provision was adopted knowing about the *Cubby, Inc. v. CompuServe* case, which is also cited with approval, where *Stratton-Oakmont* applied the provision that if you had knowledge, then you would be deemed a publisher if you actually took action.

What this legislation did was to encourage the service provider to take action after notice, or before if they chose to; but in either event would not be deemed to be a publisher or speaker, as *Stratton-Oakmont* had so held.

And other than that, that is what Section 230 does.

THE COURT: I don't think there is any disagreement from the defendant on that.

ATTORNEY KAYSER: Well, the defendant goes further and says that Section 230 does more than that, and says that any content at any time, provided exempted by, I think, America Online itself, for example, no matter what, how damaging it might be, and it does not limit it to defamation.

This case is not just a defamation case.

The telephone number of the plaintiff was used. If that telephone number had been blocked out -- it actually goes directly to a direct privacy issue -- then these phone calls that have threatened his life couldn't have happened in the wake of what did occur here. And in fact, the action, part of the action that was asked to be taken, to actually block out and screen his phone calls --

THE COURT: The only claim made here is the negligence claim. There is no claim made here other than negligence. It may be that you are saying something other than damage, but the only claim made is negligence.

ATTORNEY KAYSER: That is correct. And the claim is limited simply to the fact that they should have -- that America Online should have known that they should have had a compilation team in place, standard of care, they had a duty.

They already know they had a duty to take care of situations which may arise with respect to incendiary, dangerous information that could have threatened someone's life in this case, or appear to threaten someone's life, where there were death threats, where they would be in a position to do something with that content, glean it out in some way, after notice.

Nothing had to be done before that. Section 230 requires notice to do that, and not deem them the publisher. This is a duty imposed upon them in the capacity as distributor.

The cases that the defendant cites to claim that this is publisher liability that is being sought, are some common law cases, for example, a bartender who didn't remove graffiti in a bathroom after notice, things of that nature, which then deemed it to be a publication of -- that is out of the common law court.

It was not in the context of construing a statute which modifies the common law. And the old adage that statute should be strictly construed when it comes to modification of common law doctrine, wasn't being applied in that case.

So, a court would not be looking at the effect of negligence -- just common law negligence is what we are talking about here, your Honor -- as to whether or not there would be some other operation that had to be taken into account, some other term to be used to do justice in the case.

So, those cases did not have something to look at in terms of doing justice, in terms of assessing or attaching responsibility.

There were a couple other points in terms of assistance to the Court in the construction of Section 230. There is another section to the statute, which is cited in the brief of the plaintiff, in position, which is Section 223.

There was no response to this argument that was in the defendant's brief, and I think for good reason.

It expressly provides that when a service provider is in a position to control content, and is -- presumably, if it is brought to its attention it should be in such control, could be in such control, then liability can attach.

And so there is clearly not a blanket exemption for whatever content can be on the system at any time, with no exceptions, which is basically the argument that is being advanced by the defendant.

This basically concludes my presentation to the Court on this issue, your Honor.

THE COURT: All right. Thank you, Mr. Kayser.

Mr. Edwards?

FURTHER ARGUMENT BY THE PLAINTIFF

ATTORNEY EDWARDS: On the question of retroactivity, the parting point for the analysis of whether a statute is retroactive or not is the landmark *Landgraf* case, which is a 1994 case, I believe. And there, the Supreme Court basically enunciated construction that there is a strong presumption of prospective application of statutes, just like case law, of course, have retroactive application.

But this is a strong presumption of prospective application because of the fairness doctrine, basically. And it's only when Congress establishes a clear expression of legislative intent that it be retroactive, and only when also it doesn't conflict with the Constitution, such as protection -- protected rights of the Constitution, that then could the courts say that a substantive law would have retroactive application.

Now, the rule with regard to procedure matters is somewhat different, because there can be an implication in case of statute of limitations and other procedural matters that don't apply in this particular case.

The defendant in this case hangs its hat on Section 230 language, which says 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.

That has nothing whatsoever to do with retroactivity. That has to do with the supremacy clause, the preemption of state and local laws that differ, that are inconsistent from this section. That's all that had to do with it. It has nothing whatsoever to do with proactive or prospective.

THE COURT: Would the common law principle that you are seeking to have applied here, that is negligence, be a state or local law?

ATTORNEY EDWARDS: The common law would be --

THE COURT: A law, if it is inconsistent, would apply, wouldn't it?

ATTORNEY EDWARDS: If it were inconsistent after the Act becomes effective. But in this case, the Act, I am saying, does not even apply to Section 230. The Communications Decency Act does not apply to the facts of this case, because it didn't go into effect until some eight months or so after the events which occurred here.

If the Court rules that the Communications Decency Act is not retroactive in application, then Section 230 and all these other arguments simply don't apply at all.

In effect, I guess, in some ways we are getting the cart before the horse. The question could well be: Does it have retroactive application?

And if the answer is "No," as we contend it is only prospective, then that decides the case.

You can also turn it the other way around and say Section 230 does not limit the negligence claim that has been brought here, because of distribution liability, and that's in the analysis as well. You can do it either way.

You can do it, is what I am saying, in the *Landgraf* case, where there was -- that, of course, was an interpretation of the 1991 act, amendment to Title 7.

And from the language in the statute, it said that the amendment would have application to pending cases, and even there the Court said it was not retroactive.

Here, there is nothing like that at all.

There is nothing in this Communications Decency Act that would suggest that Congress had any intention to make it retroactive at all.

Since it didn't go into effect until February 1996, and the acts that the cause of action grew out of in this case were in April or May of 1995, it is clear that we have a statute here that has no application whatsoever to this case. Nor is there any reason to upset the common law in this case with regard to distribution liability.

As I mentioned earlier, it is only in the cases, I believe, that were cited by the defendant in his brief, where there was retroactive application, that was a procedural and jurisdictional matter, and not subjective matter.

I think the *Landgraf* case actually bases the burden of proving, of arguing that a statute has retroactive application by looking to clear language in the statute, and there is none in this case to suggest that Congress intended for it to have retroactive application.

I would be happy to answer any questions. Otherwise, I would close my argument. Basically, since there is no expression of legislative intent to make it retroactive, it can't be retroactive.

THE COURT: Mr. Carome?

ATTORNEY CAROME: Thank you, your Honor.

ARGUMENT BY THE DEFENDANT

THE COURT: What about Section 223?

ATTORNEY CAROME: Section 223 does not alter the analysis at all. First, I will point out that Section 230 itself -- excuse me -- specifically says that it has no effect on -- I am referring to Section 230(d)(1) -- no 4 effect on criminal law. It says:

"Nothing in this section shall be construed to impair the enforcement of Section 223 of this Act ..."

What I submit, your Honor, is that Section 223 is an extremely narrow criminal statute directed at particular obscene and indecent communications, and that I don't agree with Mr. Kayser's treatment of it.

But in any event, even if there is some tension between the treatment of an interactive service provider in 223 and the provision that there can be no treatment of an interactive service provider

as a provider of third-party content, that tension was perhaps recognized by Congress and it specifically said that there would be -- that Section 223 would override the effect of Section 230, perhaps, but only in that very limited criminal circumstance.

And so to suggest that 223 suggests some sort of different treatment of an interactive service provider, which we certainly do not intend to suggest that it does, is irrelevant to an interpretation of Section 230, because Section 230 specifically says that it has nothing to do with Section 223 liability.

THE COURT: Address very briefly, then, the *Landgraf* argument.

ATTORNEY CAROME: There are two steps to the *Landgraf* argument. First, you look to see whether Congress has expressly provided for the temporal reach of the statute.

Our position is, and I think it is clear, that the statutory language, no cause of action may be brought and no liability brought that is inconsistent with this section.

That language is, could not be any clearer, that it prohibits the imposition in any case from that day forward that's inconsistent with Section 230. To achieve Mr. Zeran's construction, you have to read into that provision an exception which would say, "Except for cases where the cause of action had already accrued before enactment of this action, no cause may be brought and no liability be imposed." Obviously, there is no such exception in the language of the statute. I would invite the Court's attention to a case that I didn't frankly notice when we did our reply brief, and that I feel helps us substantially on this expressed language point, which is the *Lynn v. Murphy* case, which says -- which is a case that Mr. Zeran incorrectly cited as going the other way.

That case held that when there is language in a statute that is of a prohibition in nature and clearly nothing is more clearly a prohibition, "no liability is imposed" -- then that such language should apply to all cases brought after that date.

Similarly, *Lynn* says that normally when the language of a statute speaks to the power of a court -- and here, clearly, the language that "no liability may be imposed" -- speaks to the power of a court, that such language also is properly and expressly understood as applying to all cases from that date forward.

Alternatively, even if you didn't agree with the proposition that the statute was expressed on this point, you would still have to then go through the *Landgraf* analysis as to whether or not, applying Section 230 to preenactment events, would have a retroactive effect.

And that is a term of art, that's not at all the way opposing counsel has used that term. *Landgraf* says a statute does not operate retroactively merely because it is applied in a case arising from preenactment conduct. Rather, you have to look at the effect of the statute. And there is a three-part test.

"Does the statute increase a party's liability for past conduct?" is first.

Second, “does it impose new duties with respect to transactions already completed?”

Or third, “does it impair rights a party possess when he acted?”

The first two tests clearly have no applicability here. Section 230 does not increase a party’s liabilities for past conduct, nor does it impose new duties on anyone.

So, the only question under *Landgraf* then is whether -- and this is as to whether there is a retroactive effect -- is whether application of Section 230 to preenactment conduct would impair rights a party possessed when he acted.

I submit that it is clear that this statute and its application to preenactment events clearly doesn’t do that. It’s clear that Mr. Zeran took no action whatsoever in reliance on some assumed right to sue America Online.

In these circumstances, the rug was not pulled out from under him in any respect, other than that he went and hired an attorney and prepared a lawsuit.

Clearly, that’s not an impairment of a right a party possessed when he acted. In addition, the notion that there is some settled right here that any parties had to sue an online provider in these circumstances is a complete fallacy. Neither of my respected opposing counsel has suggested a single case, other than *Cubby* -- which I say they have completely misconstrued -- that posed an action of negligent distribution to an online service provider.

And that’s not surprising, because we are still in a state where this is the infancy of this communications medium, and the law is just barely beginning to address it.

So, the notion there are settled rights the parties have in that context, I would submit is clearly wrong.

Lastly, the Supreme Court in *Landgraf* indicated that this question of impairment of rights a party possessed when he acted is not -- that also is a term of art, which has in mind vested rights. And there is a long line of cases which we have cited at pages 18 and 19 of our reply brief, which states it is well-settled that a prospective or even a pending tort action does not constitute a vested right.

If the Court has no further questions, I will conclude.

THE COURT: Well, it’s page 20, and not 18 and 19.

ATTORNEY CAROME: I’m sorry.

THE COURT: It’s an interesting point. It is somewhat novel. I am going to write on the subject fairly promptly and I will take the matter under advisement.

I thank counsel for their cooperation. I will write on it chiefly because it is novel.

All right, I thank counsel. You may call the last matter.

(Court adjourned in *Zeran v. America Online*)

Kenneth M. Zeran v. America Online, Inc.
United States District Court
E.D. Virginia, Alexandria Division, 1997
958 F.Supp. 1124

Memorandum Opinion

ELLIS, District Judge.

Plaintiff Kenneth M. Zeran (“Zeran”) was the victim of a malicious hoax perpetrated via the Internet¹ services of defendant America Online, Inc. (“AOL”). An unknown person or persons, acting without Zeran’s knowledge or authority, affixed Zeran’s name and telephone number to a series of notices on AOL’s electronic “bulletin board” advertising t-shirts and other items with slogans glorifying the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma in which 168 people were killed. Predictably, Zeran received numerous disturbing and threatening telephone calls from people outraged with the posted notice. He now sues, claiming AOL was negligent in allowing these notices to remain and reappear on AOL’s “bulletin board” despite having received notice and complaints from Zeran following the appearance of the first advertisement.

AOL seeks a threshold dismissal of the claim, pursuant to Rule 12(c), Fed.R.Civ.P., on the basis of the immunity that the Communications Decency Act of 1996 (“the CDA”), confers on Internet providers with respect to the information appearing on their services from third party sources. Zeran responds by asserting that the CDA does not bar his claim, or, in the alternative, that it is inapplicable to his claim. Thus, the questions presented are:

- (1) Whether the CDA preempts a state law negligence claim against an interactive computer service provider for that provider’s allegedly careless dissemination of defamatory statements; and
- (2) Whether the CDA applies to causes of action brought after its effective date, but arising out of events occurring before that date.

I.

AOL’s interactive computer services provide a variety of methods to transmit information, including both private communications such as electronic mail, and public communications. One means of public communication is an AOL “bulletin board,” which allows AOL subscribers to post messages for review by AOL’s other subscribers. At 2:54 p.m. on April 25, 1995, a notice appeared on AOL’s bulletin board authored by an unknown person or persons identified only as “Ken ZZ03” and titled “Naughty Oklahoma T-Shirts.” The notice advertised t-shirts with vulgar

and offensive slogans related to the Oklahoma City tragedy. Readers were invited to call “Ken,” Zeran’s first name, at Zeran’s telephone number. This posting was made without Zeran’s knowledge or authority and it is undisputed that he has never been involved in any way with the sale of the advertised t-shirts. Indeed, Zeran has never subscribed to AOL’s Internet services.

This posting of the bogus notice on AOL’s bulletin board, an act within the capacity of even novice Internet users, had its intended pernicious effect. Zeran was inundated with calls, most of which were derogatory and some of which included death threats and intimidation. On April 25, 1995, the day the notice first appeared, Zeran also received a call from a reporter investigating the advertisement of the tasteless t-shirts. Zeran informed the reporter that he was neither responsible for, nor associated with, the advertisement, and that he planned to contact AOL to demand prompt removal of the notice and a retraction. Zeran did precisely this that same day, and an AOL representative assured him that the offending notice would be removed. As a matter of policy, however, AOL declined to post a retraction on its network. To his dismay, Zeran continued to be inundated with offensive and threatening telephone calls. Unable to suspend or change his telephone number due to business necessity, Zeran was forced to tolerate the harassment and threats occasioned by the hoax.

It appears that while the first notice was deleted from AOL by April 26, 1995, a new notice appeared on the network that same date under a slightly modified identifier of “Ken ZZ033.” This second notice declared that some t-shirts from the prior day’s notice had “SOLD OUT,” and announced that several new slogans were now available. The second notice also announced that one dollar from every sale would be donated to the victims of the bombing. And, as with the first notice, this notice ended by listing Zeran’s first name and telephone number.

Zeran learned of the second notice when he received a telephone call on April 26, 1995, from a reporter who faxed him a printed copy of the April 26 AOL posting. Again the barrage of threatening and angry phone calls began. And Zeran once again called AOL to demand that AOL delete the notice and take steps to block further bogus messages using his name and phone number. In response, an AOL operator advised him that steps were being taken to delete the notice and terminate the account that was posting the notices. The operator also suggested to Zeran that he call the police and report this incident. Zeran accepted this suggestion and called the FBI in Seattle to report the situation. Despite AOL’s assurance that the notice would be promptly deleted, various similarly offensive notices continued to appear through May 1, 1995. These notices, like those posted earlier, purported to be authored by “Ken Z033” and advertised offensive Oklahoma City bombing paraphernalia, including bumper stickers, keychains, and t-shirts, and even computer software and hardware packages.

Zeran claims that in the final days of April he received a flood of abusive telephone calls, one approximately every two minutes. To make matters worse, a copy of the April 25 notice was brought to the attention of Mark Shannon, a broadcaster at radio station KRXX in Oklahoma City. On May 1, 1995, Shannon read the slogans from the notice on the air and encouraged listeners to call “Ken” at Zeran’s telephone number to register their disgust and disapproval. This predictably resulted in yet another cascade of threatening, intimidating, any angry telephone calls to Zeran. So threatening and abusive were some callers that local police kept Zeran’s house under protective surveillance. Although an Oklahoma City newspaper ran a story exposing the t-

shirt advertisements as a hoax and the radio station broadcast an apology, this brought Zeran little relief. He received some apologies and offers of assistance from earlier callers, but the deluge of threatening and abusive telephone calls persisted. Not until May 15, 1995, did the threatening and abusive telephone calls subside to approximately fifteen per day.

Zeran filed suit on January 4, 1996, against radio station KRXXO in the United States District Court for the Western District of Oklahoma. In April 1996, he filed this separate action against AOL in the same court, alleging that AOL was negligent in failing to respond adequately to the bogus notices on its bulletin board after being made aware of their malicious and fraudulent nature. In response, AOL filed a motion to dismiss for failure to state a claim, pursuant to Rule 12(b)(6), Fed.R.Civ.P., or, in the alternative, to transfer the action, pursuant to 28 U.S.C. § 1404(a), from Oklahoma to this district, where AOL maintains its headquarters. By Order dated October 16, 1996, the United States District Court for the Western District of Oklahoma granted the motion to transfer, but deferred the motion to dismiss, stating that the issue of whether the complaint states a claim “should be resolved by the transferee forum.” On December 13, 1996, AOL answered Zeran’s complaint, and now withdraws its motion to dismiss in favor of the instant motion for judgment on the pleadings, pursuant to Rule 12(c), Fed.R.Civ.P.

II.

Judgment on the pleadings, pursuant to Rule 12(c), Fed.R.Civ.P., authorizes resolution of a matter where no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. See *Republic Ins. Co. v. Culberston*, 717 F.Supp. 415, 418 (E.D.Va.1989). In evaluating a Rule 12(c) motion, the pleadings are viewed in the light most favorable to the non-moving party, and all reasonable inferences are drawn in favor of that party. *Madonna v. United States*, 878 F.2d 62, 65 (2nd Cir.1989; see also *Bruce v. Riddle*, 631 F.2d 272, 274 (4th Cir.1980). A Rule 12(c) dismissal is warranted where the pleadings, construed favorably to the non-movant, make clear that a “plaintiff could prove no set of facts in support of his claim which would entitle him to relief.” *Bruce*, 631 F.2d at 274. Thus, AOL contends that even assuming the truth of Zeran’s pleadings and viewing those pleadings in the light most favorable to him, Zeran cannot recover from AOL.

III.

Zeran sues AOL for negligence, under the theory that distributors of information are liable for the distribution of material which they knew or should have known was of a defamatory character. See *Cubby, Inc. v. CompuServe Inc.*, 776 F.Supp. 135, 141 (S.D.N.Y.1991) (holding that defendant could not be liable for distributing defamatory statements unless it knew or had reason to know of statements). AOL does not contend for the purposes of this motion that Zeran has not alleged the elements of distributor liability. Instead, AOL contends that this state tort action is preempted by the enactment of the CDA.

The CDA was signed into law and became effective on February 8, 1996. Section 230 of the CDA, titled “Protection for private blocking and screening of offensive material,” represents an initial federal effort to define the appropriate scope of federal regulation of the Internet. See 47

U.S.C. § 230. The CDA does not provide a statutory basis for Zeran’s claim, nor does Zeran rely on it for that purpose. Zeran’s alleged cause of action is pursuant to a duty he claims state law imposes on distributors to refrain from distributing material they knew or should have known was defamatory. Thus, the question presented is whether the CDA preempts any state common law cause of action Zeran may have against AOL resulting from its role in the malicious hoax perpetrated via AOL’s electronic bulletin board.

The preemption of state law causes of action is mandated, in certain circumstances, by the Supremacy Clause of the United States Constitution, which directs that “the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.” U.S. Const. Art. VI § 2; *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819). Preemption analysis under the Supremacy Clause properly begins with “the basic assumption that Congress did not intend to displace state law.” *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981). With this caveat in mind, there are two circumstances in which preemption of a state law cause of action is appropriate, namely, (i) where Congress specifically intends to displace state law in a particular field, and (ii) where state law directly conflicts with federal law.

A.

The Supreme Court has observed that “preemption fundamentally is a question of congressional intent.” *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990) (citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299, 108 S.Ct. 1145, 1150, 99 L.Ed.2d 316 (1988)). Congress’ intent to preempt a particular field can be expressed or implied. Express preemption occurs where Congress “defines explicitly the extent to which its enactments preempt state law,” *English*, 496 U.S. at 78, 110 S.Ct. at 2275, whereas intent to preempt is implied where a scheme of federal regulation is so pervasive that it leaves no room within which a state may act. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947); *Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1412 (4th Cir.1994).

The focus of the inquiry for express preemption is the-statutory language. A familiar example of statutory language reflecting Congress’ preemption intention can be found in § 514(a) of the Employee Retirement Income Security Act (“ERISA”), which provides, in relevant part, that

provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a). The ERISA statute further directs that “State law” superseded by ERISA pursuant to § 514(a) includes “all laws, decision, rules, regulations, or other State action having the effect of law, of any State.” 29 U.S.C. § 1144(c)(1). And finally, the ERISA statute explicitly exempts certain state laws from preemption, including state laws regulating insurance, banking, or securities, and state criminal laws. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 103 S.Ct.

2890, 2896-97, 77 L.Ed.2d 490 (1983) (citing 29 U.S.C. § 1144(b)). Thus, ERISA explicitly defines the extent to which Congress intended federal preemption of state law.

The CDA, in sharp contrast to ERISA and other similar provisions, contains no explicit expression of congressional intent with respect to the scope of preemption. Section 230 of the CDA section addresses the provision's effect on state law, providing that:

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

47 U.S.C. § 230(d)(3). This provision does not reflect congressional intent to preempt state law remedies for defamatory material on an interactive computer service. To the contrary, § 230(d)(3) reflects Congress' clear and unambiguous intent to retain state law remedies except in the event of a conflict between those remedies and the CDA.

This conclusion is supported by the second prong of the intentional preemption inquiry, namely the search for implied preemption. Congressional intent to occupy a field exclusively, and thereby preempt state law, can be implied where Congress has regulated "so pervasively in the field as not to leave any room within which a state may act." *Feikema*, 16 F.3d at 1412. In other words, where the dominance of federal intervention in a field is such that any state law addressing the field would duplicate or be in direct conflict with federal law, Congress' is held to have intended to preempt the field. As a threshold matter, it is worth noting that where, as here, Congress has clearly expressed an intent not to preempt the field, the Congressional intent inquiry should ordinarily end. In other words, implied preemption through pervasive occupation of a field is merely a means of determining congressional intent with respect to pre-emption, an exercise unnecessary where, as here, that intent is otherwise clearly expressed. But, nonetheless, that exercise points to the same result.

The purposes and objectives of the CSA support the conclusion that Congress did not intend to occupy the field of liability for providers of online interactive computer services to the exclusion of state law. Section 230's language and legislative history of reflect that Congress' purpose in enacting that section was not to preclude any state regulation of the Internet, but rather to eliminate obstacles to the private development of blocking and filtering technologies capable of restricting inappropriate online content. This purpose belies any congressional intent to bring about, through the CDA, exclusive federal regulation of the Internet. Accordingly, the CDA reflects no congressional intent, express or implied, to preempt all state law causes of action concerning interactive computer services.

B.

Yet, even where Congress does not intend to occupy a field exclusively, the Supremacy Clause commands preemption of state laws to the extent that such laws directly conflict with federal law. Direct conflicts requiring preemption exist:

- (1) Where it is impossible for a private party to comply with both federal and state law, *see, e.g., Florida Lime and Avacado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210 [1217-18], 10 L.Ed.2d 248 (1963);
- (2) Where state law conflicts with the express language of the federal statute, *see, e.g., Mobil Oil v. Virginia Gasoline Marketers*, 34 F.3d 220, 226 (4th Cir.1994), *cert. denied*, 513 U.S. 1148, 115 S.Ct. 1097, 130 L.Ed.2d 1065 (1995) (“Federal law may preclude state law that is inconsistent with ... the federal law.”); and
- (3) Where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *English*, 496 U.S. at 79 [110 S.Ct. at 2275] (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399 [404], 85 L.Ed 581 (1941)).

These theories of direct conflict preemption will be addressed in turn.

1. Impossibility of Compliance with State and Federal Law

The first type of direct conflict arises where compliance with both federal and state regulations is “a physical impossibility.” *Florida Lime and Avacado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217-18, 10 L.Ed.2d 248 (1963) (explaining that a federal law prohibiting the sale of avocados with an oil content over 7% would preempt a state law prohibiting the sale of avocados with an oil content under 8% because compliance with both requirements would be impossible). This is not such a case; this is not a case where a party is subjected to contradictory federal and state duties, as in the hypothetical discussed in *Florida Lime*. Nothing in the CDA imposes a duty on AOL that would conflict with a state law duty to avoid negligent distribution of defamatory material. Put another way, an interactive computer service provider, like AOL, can comply with the CDA even if it is subjected to state liability for negligent distribution of defamatory material.

2. Conflict with the Language of the CDA

Preemption is also required where state law conflicts with the express language of a federal statute. In this case, Zeran seeks to hold AOL liable for its alleged negligence in allowing the bogus notices to remain and reappear after learning of their fraudulent nature from Zeran. This theory of liability derives chiefly from *Cubby*, a case decided over four years before the passage of the CDA. *Cubby*, 776 F.Supp. at 135. In *Cubby*, the district court concluded that the defendant interactive computer service, CompuServe, was a distributor for the purposes of defamation liability, and thus was liable only if it “knew or had reason to know of the alleged defamatory ... statements.” *Id.* at 141. This “reason to know” standard is consistent with the standard of liability for entities such as news vendors, book stores, and libraries who, while not charged with a duty to review the materials they distribute, are liable if they distribute materials they know or have reason to know contain defamatory statements. Thus, Zeran contends that on learning of the fake notice on the AOL bulletin board advertising the tasteless T-shirts, AOL had a duty to take reasonable steps to prevent the distribution of this posting. Zeran further contends that the scope of this reasonable duty, and whether AOL complied with it, are questions for a jury.

AOL responds by contending that a state cause of action for distributor liability is preempted because it directly conflicts with the language of § 230 of the CDA. Specifically, AOL points to § 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.

Zeran does not contest that AOL is an interactive computer service as defined by the CDA and it is clear that AOL meets the statutory definition of such a service. Nor does Zeran claim that the bogus notices were anything but “information provided by another information content provider.” Thus, the preemption issue reduces to the question whether a state cause of action for negligent distribution of defamatory material directly conflicts with the CDA’s prohibition against treating an Internet provider as a “publisher or speaker”. Put another way, the question is whether imposing common law distributor liability on AOL amounts to treating it as a publisher or speaker. If so, the state claim is preempted.

The key to answering this question lies in understanding the true nature of so-called distributor liability and its relationship to publisher liability. At the heart of Zeran’s argument is the premise that distributor liability is a common law tort concept different from, and unrelated to, publisher liability. This is not so; distributor liability, or more precisely, liability for knowingly or negligently distributing defamatory material, is merely a species or type of liability for publishing defamatory material. This relationship is apparent from the Restatement (Second) of Tort § 577 definition of “publication” of defamatory material, which states:

- (1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.
- (2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.

Thus, a publisher is not merely one who intentionally communicates defamatory information. Instead, the law also treats as a publisher or speaker one who fails to take reasonable steps to remove defamatory statements from property under her control. Illustrative of this point is *Tackett v. General Motors Corp.*, 836 F.2d 1042, 1046 (7th Cir.1987), where the Seventh Circuit considered the liability of an employer who, for approximately eight months, failed to remove an allegedly defamatory sign painted by an unknown third party on the wall of the workplace. In discussing defendant’s possible liability, the panel, citing § 577(2) of the Restatement (Second) of Torts, stated that to find defendant liable, a jury must conclude that defendant “‘intentionally and unreasonably’ fail[ed] to remove this sign and thereby published its contents.” 836 F.2d at 1047 (emphasis added). Thus, failure to remove defamatory material provided by a third party was deemed to constitute a form of “publication.” Similarly, distributor liability applies where certain parties, such as news vendors or interactive computer services, will be held to have “published” material provided by third parties because they fail to take reasonable steps to

prevent the dissemination of that defamatory information. Properly understood, therefore, distributor liability treats a distributor as a “publisher” of third party statements where that distributor knew or had reason to know that the statements were defamatory. It follows that Zeran’s attempt to impose distributor liability on AOL is, in effect, an attempt to have AOL treated as the publisher of the defamatory material. This treatment is contrary to § 230(c)(1) of the CDA and, thus, Zeran’s claim for negligent distribution of the notice is preempted.

3. Conflict with the Purposes and Objectives of the CDA

An alternative basis for preemption exists if subjecting AOL to state law distributor liability would stand “as an obstacle to the accomplishment of the full purposes and objectives of Congress” in passing § 230 of the CDA. *See, e.g., English*, 496 U.S. at 79, 110 S.Ct. at 2275. Section 230 itself provides some insight into Congress’ purposes and objectives in passing that provision, stating, in part, that

It is the policy of the United States:

...

- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; [and]
- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material....

47 U.S.C. § 230(b). The scant legislative history reflects that the “disincentive” Congress specifically had in mind was liability of the sort described in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (Sup.Ct.N.Y. May 24, 1995). There, Prodigy, an interactive computer service provider, was held to have published the defamatory statements of a third party in part because Prodigy had voluntarily engaged in some content screening and editing and therefore knew or should have known of the statements. Congress, concerned that such rulings would induce interactive computer services to refrain from editing or blocking content, chose to grant immunity to interactive computer service providers from suits arising from efforts by those providers to screen or block content. Thus, 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 either by the interactive computer service provider itself or by the families and schools receiving information via the Internet. If this objective is frustrated by the imposition of distributor liability on Internet providers, then preemption is warranted. Closely examined, distributor liability has just this effect.

Internet providers subjected to distributor liability are less likely to undertake any editing or blocking efforts because such efforts can provide the basis for liability. For example, distributors of information may be held to have “reason to know” of the defamatory nature of statements made by a third party where that party “notoriously persists” in posting scandalous items. *See*,

e.g., Restatement (Second) of Torts § 581 cmt. d. An Internet provider's content editing policy might well generate a record of subscribers who "notoriously persist" in posting objectionable material. Such a record might well provide the basis for liability if objectionable content from a subscriber known to have posted such content in the past should slip through the editing process. Similarly, an Internet provider maintaining a hot-line or other procedure by which subscribers might report objectionable content in the provider's interactive computer system would expose itself to actual knowledge of the defamatory nature of certain postings and, thereby, expose itself to liability should the posting remain or reappear. Of course, in either example, an Internet provider can easily escape liability on this basis by refraining from blocking or reviewing any online content. This would eliminate any basis for inferring the provider's "reason to know" that a particular subscriber frequently publishes objectionable material. Similarly, by eliminating the hot-line or indeed any means for subscribers to report objectionable material, an Internet provider effectively eliminates any actual knowledge of the defamatory nature of information provided by third parties. Clearly, then, distributor liability discourages Internet providers from engaging in efforts to review online content and delete objectionable material, precisely the effort Congress sought to promote in enacting the CDA. Indeed, the most effective means by which an Internet provider could avoid the inference of a "reason to know" of objectionable material on its service would be to distance itself from any control over or knowledge of online content provided by third parties. This effect frustrates the purpose of the CDA and, thus, compels preemption of state law claims for distributor liability against interactive computer service providers. *See, e.g., English*, 496 U.S. at 79, 110 S.Ct. at 2275.

In sum, although the CDA does not preempt all state law causes of action concerning interactive computer services, it does preempt Zeran's claim. This is so because his "negligence" cause of action conflicts with both the express language and the purposes of the CDA.

IV.

Zeran contends that even if the CDA preempts a state law cause of action for negligent distribution of defamatory statements, it cannot have that effect here without violating the stricture against retroactive application of statutes. The CDA was signed into law and became immediately effective on February 8, 1996, over nine months after the posting of the bogus notices that form the basis of Zeran's claims against AOL. Yet, Zeran did not file this complaint until April 1996, two months after the CDA went into effect. This, then, is a case brought after a statute's enactment but based on facts that occurred prior to its enactment. In these circumstances, a statute may not have a "retroactive effect" absent a clear expression of congressional intent with respect to such retroactivity. *See Landgraf v. USI Film Products*, 511 U.S. 244, 280-81, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229 (1994). Thus, a court must first determine whether Congress has clearly expressed the statute's intended temporal reach. If so, the judicial inquiry is complete and Congress' clear intent must be implemented. *Id.* If, on the other hand, the statute has no express Congressional command with respect to its temporal application, courts must undertake a second inquiry to determine whether the application of the statute will result in a prohibited "retroactive effect." *Id.* In this case, the first step is dispositive, Congress has made its intent manifest.

Section 230 clearly reflects Congress' intent to apply the CDA to all suits filed after its enactment, notwithstanding when the operative facts arose. Thus, in § 230(d)(3), the CDA provides, in pertinent part, that

[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

This subsection does not generally refer to conflicting state laws having “no effect” or being “preempted.” To the contrary, it specifically provides that “[n]o causes of action may be brought.” And such clear statutory language cannot reasonably be construed to mean that only some causes of action may be brought, namely those concerning events arising before the enactment of the CDA. Thus, while Congress has expressed its intent with respect to retroactivity more directly in other circumstances, Subsection (d)(3) constitutes an adequately clear statement of Congress' intent to apply § 230 of the CDA to claims that are filed after the enactment of the CDA. Accordingly, § 230 of the CDA applies to Zeran's claim and, as discussed above, preempts his state law negligence cause of action.

In sum, the CDA preempts a negligence cause of action against an interactive computer service provider arising from that provider's distribution of allegedly defamatory material provided via its electronic bulletin board. This preemption is applicable to Zeran's cause of action, brought after the enactment of the CDA, even though the events giving rise to his claim were completed before the CDA became effective. Thus, Zeran can prove no set of facts entitling him to relief against AOL, and AOL's motion for judgment on the pleadings, pursuant to Rule 12(c), Fed.R.Civ.P., must be granted.

An appropriate Order will enter.

RECORD NO. 97-1523

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

KENNETH M. ZERAN,
Plaintiff-Appellant,

v.

AMERICA ONLINE, INC.,
Defendant-Appellee.

BRIEF OF APPELLANT

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA
DIVISION*

The appellant KENNETH M. ZERAN (“Zeran”) by counsel, hereby submits his Brief of Appellant in appealing the Order dated March 21, 1997, of the United States District Court for the Eastern District of Virginia, Alexandria Division (J.A. 66)¹ granting Appellee AMERICA ONLINE, INC.’s (“AOL”) motion for judgment on the pleadings, pursuant to Rule 12(c) of the Fed.R.Civ.P. and dismissing plaintiff’s complaint on the issues cited below.

[1] J.A. refers to the respective pages of the Joint Appendix.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Subject matter jurisdiction in the District Court was founded on 28 U.S.C. § 1332, Diversity. Zeran is a citizen of the State of Washington. AOL is a corporation organized under the laws of the State of Delaware with its principal offices located in the Commonwealth of Virginia. The amount in controversy is in excess of \$50,000. Appellate jurisdiction of this Court is founded on 28 U.S.C. § 1291, appeals from all final decisions of the district courts. The Notice of Appeal was filed on April 3, 1997, from the Order of Dismissal filed March 21, 1997 and entered March 25, 1997.

STATEMENT OF THE ISSUES

1. WHETHER THE LOWER COURT ERRED IN HOLDING THAT SECTION 230 OF THE COMMUNICATIONS DECENCY ACT OF 1996 (“THE CDA”) APPLIES RETROACTIVELY TO EVENTS GIVING RISE TO CLAIMS BEFORE ITS ENACTMENT.
2. WHETHER THE LOWER COURT ERRED IN HOLDING THAT SECTION 230 OF THE CDA EXEMPTING COMPUTER SERVICE PROVIDERS FROM “PUBLISHER OR SPEAKER” LIABILITY WHEN EXERCISING REMEDIAL SCREENING OR BLOCKING PROCEDURES ALSO EXEMPTS SUCH PROVIDERS FROM STATE COMMON LAW NEGLIGENCE LIABILITY ATTACHING TO DISTRIBUTORS WHEN SECTION 230 DOES NOT EXPRESSLY MENTION SERVICE PROVIDERS IN THEIR CAPACITY AS DISTRIBUTORS.

STATEMENT OF THE CASE

1. Nature of the Case

The plaintiff-appellant, Kenneth M. Zeran, operating out of his home where he lives with his aged parents, publicized his telephone number in connection with various businesses he maintained, such as the listing of apartments in the Seattle area. On April 25, 1995, in the wake of the Oklahoma City bombing on April 19, 1995, an unidentified person posted on defendant-appellee AOL’s “Michigan Military Movement” bulletin board an “advertisement” for “Naughty Oklahoma T-Shirts,” which listed the notice to be “From: Ken ZZ03,” giving Zeran’s Seattle business telephone. The listing was a vicious, cruel hoax designed to generate outrage at the purported seller in all those who read it or heard about it.

When Zeran was notified of the posting the same day, he notified AOL both by telephone and later by letter, requesting that the posting be deleted and that appropriate notice be placed on the same bulletin board that the posting was bogus. Nevertheless, the posting remained on and/or was reposted with slightly different screen names, always using Zeran's telephone number, for at least a week. As a result of AOL's failure to delete expeditiously the posting and/or prevent the reposting due to AOL's failure to take adequate blocking measures, Zeran's telephone was tied up with harassing telephone calls, death threats, and he suffered the further dissemination of the bogus posting attributed to him through a radio broadcast in Oklahoma City on May 1, 1995.

Zeran sued AOL for negligence as a distributor for failure to exercise a reasonable standard of care to protect Zeran from the foreseeable consequences of the bogus posting. Zeran averred in his complaint that AOL owed a duty of care as a substantial commercial operator of a computer bulletin board, after receiving actual notice of the offending posting, to take appropriate remedial action, such as screening out the incendiary, defamatory and/or bogus material as well as his telephone number posted on its computer bulletin board service. The complaint expressly averred that AOL was on constructive notice by reason of the law enunciated in Cubby, Inc. v. CompuServe, Inc. et al., 776 F.Supp. 135 (S.D.N.Y. 1991), that it was obligated after due notice to be able to screen incendiary, defamatory and/or bogus material, a standard applied to interactive computer services providers in their capacity as distributors of information as determined in Cubby, Inc.

2. Course of Proceedings

The complaint was filed in April 1996 in the United States District Court for the Western District of Oklahoma. Discovery ensued. AOL moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Fed.R.Civ.P. and/or transfer the action to the United States District Court for the Eastern District of Virginia. The motion to transfer was granted and the motion to dismiss reserved for the transferee court and the case was then transferred on October 28, 1996. Discovery continued. AOL next moved on January 28, 1997, pursuant to Rule 12(c) of the Fed.R.Civ.P., for judgment on the pleadings and concurrently withdrew its motion to dismiss pursuant to Rule 12(b)(6) of the Fed.R.Civ.P. Oral argument was held on the motion on February 28, 1997, after which, that day, the lower court stayed discovery, and then granted AOL's motion on March 21, 1997. This appeal followed.

3. Disposition of the Court Below

The lower court granted AOL's motion for judgment on the pleadings dismissing the complaint on the grounds that § 230 of the CDA which confers immunity from liability for content carried by a provider of an interactive computer service in its capacity "as the publisher or speaker" of any information provided by another should be construed to extend to such provider in its capacity as a distributor. The lower court further held that § 230 of the CDA was retroactive in its application to events arising before its enactment and expressly stated effective date.

STATEMENT OF THE FACTS

The facts in the case for purposes of this review are not in dispute, since they are based upon the averments in the complaint, ¶¶ 5-40 (J.A. 6-15) and are fairly presented by the lower court in its opinion (J.A. 67-72), which Zeran expressly incorporates herein by reference for purposes of brevity. Only by way of emphasis, the facts establish that AOL had actual notice of the damaging bogus posting on its computer bulletin board through the direct notification by Zeran, himself, to AOL's personnel, both oral and by letter. Complaint ¶¶ 7, 12, 13, 14, 16, 25, 28 and 33 (J.A. 2-14). Thus, the “should have known standard” is not before this Court. Secondly, Zeran was not a member of AOL and had no standing or ability to protect himself as to the bogus advertisement using his first name and telephone number (J. A. 69). Thirdly, for purposes of this appeal, the averments that AOL had the capability or should have had the capability of screening and blocking the bogus posting, after having received actual notice, are deemed true. Complaint ¶¶ 42-45 (J.A. 15-16).

That the Complaint fairly states a claim for negligence based upon the standard applied to a distributor (as compared to a publisher) of content is not at issue. Opinion (J.A. 73-74). The sole issue is whether § 230 of the CDA provides immunity from liability to an interactive computer service provider for its negligence as a distributor, after it has received actual notice of the offending subject matter appearing on its service.

SUMMARY OF THE ARGUMENTS

1. Section 230 of the CDA does not apply retroactively to the events predating its enactment which gave rise to the cause of action in this case. The strong presumption against retroactivity is not overcome by any “clear statement” of Congressional intent to apply the Act retroactively, as required by Landgraf v. USI Film Products, 511 U.S. 244, 128 L.Ed.2d 229, 114 S.Ct. 1483 (1994). The language in § 230(d)(3), relied upon by the lower court, was not intended to relate to the effective date of the Act, but to the “effect on State law,” i.e., the CDA’s preemption of “inconsistent” State and local law theories of recovery.

2. Since Cubby, Inc. v. CompuServe, Inc. et al., 776 F.Supp. 135 (S.D.N.Y. 1991), interactive computer services have been considered distributors of content, and not publishers of such content, with no duty to screen or block defamatory or otherwise injurious content unless placed upon notice. After notice, however, a duty did arise to take appropriate remedial action, if possible.

In a subsequent case, Stratton-Oakmont v. Prodigy Services Co. Inc., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), a New York State court held that an interactive computer service which did engage in screening, blocking, or editing of content on its system assumed the role of a publisher and was not merely a distributor requiring prior notice.

Section 230 of the CDA, as expressly stated in its legislative history, was enacted to provide immunity from publisher liability to interactive computer services, which in their normal course of operations attempted to screen, block or edit out potentially offensive subject matter. Section 230 of the CDA does not by its language exempt interactive computer service providers from their duties as distributors who, after being put on notice of defamatory or otherwise injurious content, must take appropriate remedial measures to prevent or lessen the injury.

The lower court erred in equating publisher liability with distributor liability for purposes of § 230 of the CDA. Not only does § 230 not use the word distributor or in any way indicate the intent of Congress to overrule Cubby, Inc., but also the lower court violated one of the most fundamental rules of statutory construction: namely, statutes are to be narrowly construed when their effect is to abrogate common law principles.

ARGUMENT

1. **THE LOWER COURT ERRED IN HOLDING THAT SECTION 230 OF THE CDA APPLIES RETROACTIVELY TO EVENTS GIVING RISE TO CLAIMS BEFORE ITS ENACTMENT.**

Standard of Review: The lower court’s holding on retroactivity was a pure legal conclusion involving statutory construction reviewable de novo on appeal. Tangier Sound Waterman’s Ass’n v. Pruitt, 4 F.3d 264, 266 (4th Cir. 1993). In re Knightsbridge Dev. Co., Inc., 884 F.2d 145, 147 (4th Cir. 1989) (fn. 3).

The facts giving rise to this suit all occurred in April and May 1995, well before the CDA was signed into law and became effective on or about February 8, 1996. This suit was filed in April 1996.

The rules for determining whether a particular Act applies retroactively to facts predating the effective date of the statute are set forth in Landgraf v. USI Film Products, 511 U.S. 244, 128 L.Ed.2d 229, 114 S.Ct. 1483 (1994). There, the Supreme Court held that Section 102 of the Civil Rights Act of 1991, creating a right to recover compensatory and punitive damages and providing for jury trial, did not apply to cases pending on appeal when the 1991 Act was enacted. The Court followed the well-established principle of statutory construction that statutes are presumed to apply only prospectively, and not retrospectively.

“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries old within our Republic. ... For this reason, the 'principle' that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.” [Citation omitted]. 128 L.Ed.2d at 252.

The Court went on to note that “the anti-retroactivity principle finds expression in several provisions of our Constitution.” Id. at 252-53. In particular, the Supreme Court noted:

“The Ex Post Facto clause flatly prohibits the retroactive application of penal legislation. Article I, § 10, cl. 1 prohibits states from passing another type of retroactive legislation, laws ‘impairing the Obligation of Contracts’ the Fifth Amendment’s Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a ‘public use’ and upon payment of ‘just compensation.’ The prohibitions on ‘Bills of Attainder’ in Art I, § 9-10, prohibit legislatures from singling out disfavored persons and meting out

some punishment for past conduct. [Citation omitted.] The Due Process clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." [Citation omitted.] 128 L.Ed.2d at 253. See also Richmond v. J.A. Croson Co., 488 U.S. 469, 513-514, 102 L.Ed.2d 854, 109 S.Ct. 706 (1989) ("Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct.").

Because of the strong presumption against retroactive application of statutes, the Court in Landgraf imposed a "requirement that Congress first make its intention clear" before a statute will be applied retroactively to conduct predating the effective date of enactment. 128 L.Ed.2d at 254.

This rule of construction, presuming the prospective application of a statute only absent clear evidence of a contrary Congressional intent, was joined in by five justices. Three Justices, in a concurring opinion by Justice Scalia, would have held that the presumption against retroactive application should apply absent a "clear statement" to the contrary in the statute itself, an even higher standard than intent derived from legislative history.

"I of course agree with the Court that there exists a judicial presumption, of great antiquity, that a legislative enactment affecting substantive rights does not apply retroactively absent clear statement to the contrary." 128 L.Ed.2d at 266.

But, the "clear statement" must be in the text of the statute, and not merely in legislative history. See generally Kaiser Aluminum & Chemical Corp v. Bonjorno, 494 U.S. 827, 840, 108 L.Ed.2d 842, 110 S.Ct. 1570 (1990) (Scalia, J. concurring).

The issue in Landgraf did not involve abolition of a substantive cause of action, as in this case, but new procedural remedies to vindicate existing substantive rights. Nevertheless, the Court denied retroactive application to conduct predating the effective date of the statute because Congress expressed no clear intent to apply the Act retroactively.

In the present case, there is no expression of intention, much less "clear statement," in either the statute itself or the legislative history, to suggest that the CDA should be applied to facts giving rise to a cause of action which predate its enactment. Retroactive application of the statute in this case would, under AOL's theory of the scope of the CDA, abolish the substantive cause of action relied upon by Zeran to vindicate the wrongs and injuries he has suffered.

The lower court erroneously relied upon the language in Subsection (3) of § 230(d) of the CDA which provides:

"(3) State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be

imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(d)(3).

Subsection (3) is only one part of § 230(d) dealing with “**Effect on other laws.**” The subject of this section does not touch on the time the Act becomes effective; it deals exclusively with the concept of preemption, i.e., which laws are and which are not affected by the Act. Section 230(d) has four subsections which, respectively, clarify that the CDA has no effect on criminal law (Subsection (1)), intellectual property (Subsection (2)), and communications privacy law (Subsection (4)), but that “inconsistent” stale laws are affected, i.e., preempted (Subsection (3)). Thus, § 230(d)(3) merely establishes that the statute preempts inconsistent state laws. It does not and was not intended to establish an effective date for the Act, much less provide for retroactive application of the Act. Indeed, the lower court correctly cited § 230(d)(3) as commanding preemption of directly conflicting state and local law (J.A. 81, fn.16).

This subsection cannot do “double duty” in also establishing retroactive application of the statute, as the lower court erroneously held (see J.A. 92). The sole purpose of § 230(d)(3) of the CDA is to require preemption of “inconsistent” state laws. To further burden this sparse language in an attempt to establish a “clear statement” of Congressional intent to apply the statute retroactively to facts predating its enactment imposes a heavier than warranted interpretation on the text. Indeed, the plain language of this section suggests no temporal application of the statute, nor can the language be stretched to apply to conduct predating the enactment of the statute.

The lower court acknowledged that “Congress has expressed its intent with respect to retroactivity more directly in other circumstances.” (J.A. 92). Indeed, if Subsection (3) is to be read to contain any effective date, which it does not, it is ambiguous at best. It contains two parallel clauses referring to two different events in the stages of a trial: bringing of the “cause of action” and imposition of “liability.” But these different stages are treated the same in the sentence; they are used merely to emphasize that no state theory of recovery may be “inconsistent” with the CDA. They are obviously not intended to affect any time frame, including the effective date of the Act. Rather, in the context of the section, they both relate to theories of recovery, not to stages of a trial, and describe the “effect” of the CDA on “inconsistent” state or local theories of recovery. As evidenced by the first sentence in Subsection (3), dealing with “consistent” state law, the sole subject matter of Subsection (3) is the relationship between stale and federal law, not the time when the Act becomes effective.

An examination of the lower court’s analysis shows the confusion and inconsistency created when these two events are treated as somehow establishing any time period for the effective date of the Act. The lower court held that the CDA applies to “all suits filed after its enactment, notwithstanding when the operative facts arose,” because § 230(d)(3) states “[n]o cause of action may be brought,” but found it a “close question” as to whether the Act applies retroactive to pending cases under the “no liability may be imposed” clause. If it is a close question as to pending cases, it is necessarily a close question as to cases filed after its enactment involving preenactment operative facts because the two clauses arc parallel and in the same posture in the context of the sentence.

Moreover, if this sentence includes a time for the effective date of the Act, it is ambiguous as to whether the Act applies to pending cases or only newly filed cases. If it applies

to pending cases under the “no liability imposed” clause, it necessarily would cover newly filed cases under the “[n]o cause of action may be brought” clause, thereby rendering redundant and unnecessary this latter clause. Courts should not construe statutory language as redundant, and this ambiguity is not the “clear statement” of retroactive intent required to apply the Act to past events.

Given the purpose and express subject matter of § 230(d) (effect on other laws), the purpose and subject of Subsection (3) (effect on State law), it is obvious Congress never intended this section to deal with the effective date of the Act. Moreover, in view of the ambiguity and confusion created in treating this subsection as relating to time, it is obvious that Congress never intended for this subsection to direct that the Act apply retroactively. In fact, this section was not intended to create an effective date of the Act at all. Thus, there is hardly in this section the “clear statement” of Congressional intent required for retroactive application of the Act.

Accordingly, the lower court erred in engrafting a retroactivity clause on Subsection 230(d)(3) which it intended solely to preempt inconsistent state and local laws.

Congress knows how to express its intentions clearly when it wants to apply an Act retroactively, especially after Landgraf. It did not do so here and, indeed, referenced no effective date or any other temporal language in § 230 whatsoever. Had congress wanted to do so, it could well have said the CDA applies to causes of action filed after its effective date or to pending cases, as it wished. It did neither.

Retroactive application of the statute would surely result in a prohibited “retroactive effect” in this case. As the lower court noted, a retroactive effect exists where a statute “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” (J.A. 91 (quoting from Landgraf, 114 S.Ct. at 1505)).

In Miller v. Florida, 482 U.S. 423, 430, 96 L.Ed.2d 351, 107 S.Ct. 2446 (1987), the Supreme Court held that a law was retrospective if it “changes the legal consequences completed before its effective date.” In short, a prohibited retroactive effect exists where a substantive right is changed after the events giving rise to the claim.

Serious Constitutional due process principles are implicated by retroactive changes in substantive laws. See Landgraf, 128 L.Ed. 2d at 265, fn. 37 (Retroactive modification of damage remedy is less harmful than “retroactive changes in the principles of liability,” [citation omitted]). Thus, courts have long followed “the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment.” Landgraf, 128 L.Ed.2d at 260 (emphasis added).

Clearly, under AOL’s interpretation of the scope of publisher immunity for interactive computer service providers in § 230, the CDA’s preemption of “inconsistent” state laws would abolish the right of action relied upon by Zeran in this case. Thus, retroactive application of the CDA would “impair rights” of Zeran to seek and obtain relief in the courts.

While acknowledging this, the lower Court stated that whether a not-as-yet filed tort claim constitutes a right protected from retroactive impairment is “unsettled.” In fact, there is no

distinction between a not yet filed claim and a pending claim in terms of the right to be protected against retroactive impairment. And as noted above, § 230(d)(3) puts both in the same posture requiring the same treatment for one as for the other. It does not allow for inconsistent treatment as between the two, which the lower court has done in this case.

In Maitland v. University of Minnesota, 43 F. 3d 357 (8th Cir. 1994), the court reversed the lower court and ruled that Section 108 of the Civil Rights Act of 1991, passed to overrule part of a Supreme Court decision, was not retroactive because it would “impair rights a party possessed when he acted.” Id. at 362 (quoting Landgraf, 114 S.Ct. at 1505). The new law prohibited an employee from challenging an employment practice if he had the opportunity to object to a consent order resolving the employment practice. Since it abolished a right he had prior to the law being enacted, the court refused to give it retroactive effect. At the time the Act went into effect the employee had not yet filed his claim in court. This is identical to the present suit. Under AOL’s theory of the CDA, the CDA would abolish a cause of action relied upon by Zeran to recover in this case.

Likewise, in United States Fidelity & Guarantee Co. v. United States Ex. rel Struthers Wells Co., 209 U.S. 306, 314-315, 52 L.Ed. 804, 28 S.Ct. 537 (1908), cited with approval in Landgraf, the Court held that a statute restricting subcontractor’s rights to recover damages from prime contractors was prospective in its application in the absence of “clear, strong and imperative” language from Congress favoring retroactivity.”

The lower Court’s reliance upon In re TMI, 89 F. 3rd 1106, 1113 (3rd Cir. 1996) that it is unsettled as to whether a not yet filed tort claim is protected from retroactive impairment is misplaced. That case involved application of a statute of limitations retroactively. Statutes of limitations are procedural only, and not substantive. No cause of action was impaired, only the time for bringing such claim.

AOL’s argument below that since only one case, Cubby Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991), supports Zeran’s substantive law claim against AOL, he therefore does not have a right worthy of protection is also misplaced. If Zeran has a right of action, he has a right that deserves protection and that should not be “impaired” by retroactive application of substantive law.

In fact, well before the CDA was enacted, Zeran asserted his claim against AOL. By letter dated June 26, 1995 (J.A. 43), and again by letter dated August 4, 1995 (J.A. 55), Zeran asserted his claim against AOL. Zeran was relying upon the substantive law as it existed at that time in seeking redress of wrongs which had been done to him by AOL.

Indeed, the potential for disruption and unfairness is seen in this very case if the CDA were applied retroactively to abolish a cause of action relied upon to redress a serious wrong. The rationale for a “clear statement” of such Congressional intention before applying a statute retroactively is to “ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.” 128 L.Ed.2d 254. Congress clearly did not indicate it weighed the benefits of retroactivity against the disruption and unfairness of retroactivity in passing the CDA. Clearly, the disruption and unfairness outweighs any benefit or need for retroactive effect.

Since Landgraf's high standard for proving retroactivity, the courts have uniformly held that federal statutes involving the change of substantive rights have not been given retroactive application. See e.g. Maitland v. University of Minnesota, *supra*, 43 F.3rd 357, 361-3 (8th Cir. 1994) (§ 108 of the Civil Rights Act of 1991 attaches "new legal consequences"); Rafferty v. City of Youngstown, 54 F.3rd 278, 290 (fn. 1) (6th Cir. 1995); Preston v. Commonwealth of Virginia Ex. rel New River Community College, 31 F.3rd 203, 208 (4th Cir. 1994) (declining to apply retroactively private cause of action under Title IX of the Civil Rights Act of 1991 because it "altered the legality of the employer's conduct and thus affixes new legal consequences to past conduct."); Bohrman v. Maine Yankee Atomic Power Co., 926 F.Supp. 211 (D.Me. 1996) (declining to give retroactive effect to regulations regarding exposure to radioactive gas); Appalachian States Low-level Radioactive Waste Commission v. O'Leary, 932 F.Supp. 646, 654 (N.D.Pa 1995); Travenol Laboratories Inc. v. U.S., 936 F.Supp. 1020, 11024 (CIT. 1996); Cooper v. Casey, 97 F.3rd 914, 921 (7th Cir. 1996); U.S. v. Bacon, 82 F. 3rd 822, 824 (9th Cir. 1996); McKamey v. Roach, 55 F. 3rd 1236, 140-41 (6th Cir. 1995).

The retroactive effect of the CDA would abolish, according to AOL's theory of the CDA, a substantive legal right upon which Zeran relies in this case. There is more compelling reason against retroactivity in this case than in Landgraf, which only involved a statute providing for additional remedies to an existing substantive right. If the additional remedies of a jury trial and compensatory and punitive damages were held not to apply retroactively in Landgraf, *a fortiori* abolition of a common law substantive right of action in the present case should not be accomplished retroactively by statute. Zeran has relied upon this substantive right to vindicate the wrongs done to him and the injuries suffered by him, and retroactive abolition of this right after the fact would create a harsh unfairness.

Thus, because the CDA does not apply to conduct predating its effective date, the lower Court's decision should be reversed and the case remanded.

2. THE LOWER COURT ERRED IN HOLDING THAT SECTION 230 OF THE CDA EXEMPTS COMPUTER SERVICE PROVIDERS FROM STATE COMMON LAW NEGLIGENCE LIABILITY AS DISTRIBUTORS

Standard of Review: The lower court's holding was a pure legal conclusion involving statutory construction reviewable *de novo* on appeal. Tangier Sound Waterman's Ass'n v. Pruitt, 4 F.3d 264, 266 (4th Cir. 1993). In re Knightsbridge Dev. Co., Inc., 884 F.2d 145, 147 (4th Cir. 1989) (fn. 3).

A. Background Prior to Enactment of Section 230 of the CDA.

Since 1991 with the seminal decision of Cubby, Inc. v. CompuServe, Inc., et al., 776 F.Supp. 135 (S.D.N.Y. 1991), computer service providers have under common law principles been treated as distributors of content in contrast to publishers. The impact of this decision was to absolve such providers from any legal duty to screen, block or otherwise edit in the course of postings or transmissions any of the content that might appear on their systems in the absence of notice. On the other hand, *with notice*, such providers still had a duty to persons who foreseeably could be injured due to content posted on their systems on the analogous basis of a bookstore, news vendor, or library.

In Cubby, Inc., the defendant CompuServe acknowledged that as a distributor rather than a publisher, it would have been liable for a defamatory statement if it had known of such statements:

“CompuServe further contends that, as a distributor of Rumorville, it cannot be held liable on the libel claim because it neither knew nor had reason to know of the allegedly defamatory statements.”

The scienter standard as applied to distributors of content is compelled by the First Amendment as noted by the Cubby, Inc. court:

“The requirement that a distributor must have knowledge of the content of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment, made applicable to the states through the Fourteenth Amendment.” Id. at 139. (Emphasis added) (Citing Smith v. California, 361 U.S. 147 (1959)).

Then, in 1995 Stratton-Oakmont Inc. v. Prodigy Service Co., Inc., 1995 WL 323710 (Sup. Ct. N.Y. May 24, 1995) was decided, in which that court held that a cyberspace distributor, in part because it was prescreening some content for distasteful words, was held to be a publisher and, thus, strictly liable for false information published on one of its bulletin boards. No prior notice to Prodigy of the allegedly false information had been given by Stratton-Oakmont or anyone else.

B. Section 230 of the CDA

Section 230(c) reads as follows:

“(c) Protection for Good Samaritan Blocking and Screening of Offensive Material --

(1) Treatment of Publisher or Speaker

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.

(2) Civil Liability – No provider or user of an interactive computer service shall be held liable on account of --

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrain access to material described in paragraph 1.”

The CDA expressly provides under Subsection (d), **Effect on Other Laws:**

“(3) State Law – Nothing in this subsection shall be construed to prevent any State from enforcing any state law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(d)(3).

The legislative history on § 230 of the CDA demonstrates expressly that the purpose of § 230 was to overrule Stratton-Oakmont v. Prodigy Service Co., Inc., *supra*, and encourage computer services providers to edit, screen out or block offensive content without risk of exposure to liability as a publisher. Specifically, the Conference Report on § 230 stated:

“One of the specific purposes of [Section 230] is to overrule Stratton-Oakmont v. Prodigy and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.” (Emphasis added.) H.R. Conf. Rep. No. 104-458, at 194 (1996).

The heading for § 230(c) quoted above, makes it express that the purpose of the statute is to provide protection for “Good Samaritan Blocking and Screening” consistent with the overruling of Stratton-Oakmont. Nothing in § 230(c) overrules the actual notice standard for distributorship liability enunciated in Cubby, Inc.

Nor is distributorship liability inconsistent with § 230(c). In fact it is entirely consistent. The Cubby, Inc. court and the other cases cited therein upon which Cubby Inc. relies, such as Smith v. California, *supra*; Lerman v. Chucklebarry Publishing, Inc., 521 F.Supp. 228, 235-237 (S.D.N.Y. 1981); and Lerman v. Flynt Distributing Co., 745 F.2d 123, 139-141 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985), all are solicitous of protecting First Amendment rights and the free flow of information unless there is scienter of the content by the distributor as to the offending aspect of such content. Lewis v. Time, Inc., 83 F.R.D. 455 (E.D. Cal. 1979), *aff'd* 110 F.2d 549 (9th Cir. 1983), wherein Restatement 2d Torts, § 581 is first summarized, held as follows:

“[O]ne who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.”

Next, the court quotes from Comment “d” to § 581 of the Restatement 2d Torts:

“[A] news dealer is not liable for defamatory statements appearing in the newspaper or magazines that he sells if he neither knew nor has reason to know of the defamatory article. The dealer is under

no duty to examine the various publications that he offers for sale to ascertain whether they contain any defamatory items. Unless there are specialized circumstances that should warn the dealer that a particular publication is defamatory, he is under no duty to ascertain its innocent or defamatory character.” Accord, Dworkin v. Hustler Magazine, Inc., 634 F.Supp. 727, 729 (D.Wyo. 1986).

What is particularly clear from this line of cases and authorities is the distinction made between the status of a publisher and the status of a distributor. Furthermore, however, in the case at bar the “reason to know” standard based upon editing, screening or blocking, as involved in Stratton-Oakmont and expressly overruled by § 230(c) of the CDA, was not before the lower court.

C. The Erroneous Reasoning of the Lower Court

Much of the lower court’s analysis is not at issue. For instance, the central proposition of the complaint is accepted: namely, that distributors of defamatory material are liable if the distributors had actual knowledge of the defamatory nature of the material. Opinion (J. A. 74). The “had reason to know” or “should have known standard” was not before the Court in the case at bar. Since the complaint avers actual notice, and to the extent the lower court focused on such issue, it erred. Nor is the choice of law issues pertinent here, as the lower court notes, because the law is standardized in the United States by First Amendment considerations, and, otherwise, negligence is a generally accepted cause of action in all jurisdictions involved herein. Opinion (J.A. 74). Furthermore, as the lower court noted, “AOL does not contend for purposes of this motion that Zeran has not alleged the elements of distributor liability.” Opinion (J.A. 74).

Nor does Zeran argue, nor did he argue below, that if § 230 of the CDA exempted distributors from liability as well as publishers, that such exemption would preempt state law. Rather, plaintiff contends that § 230 of the CDA does not exempt computer service providers from liability for their negligently carrying defamatory or other injurious content on their systems as distributors when the legal standard of actual notice for distributor liability is met. Opinion (J.A. 74-75). If § 230 of the CDA does not exempt distributors from liability under state common law standards, the issue of federal preemption is moot; since state law would not conflict with § 230 of the CDA. Opinion (J.A. 76, fn. 9). See also Opinion (J.A. 76-81). In fact, the lower court notes that:

“Nothing in the CDA imposes a duty on AOL that would conflict with a state law duty to avoid negligent distribution of defamatory material.” Opinion (J.A. 81-82).

The lower court also notes, apparently with approval, that Zeran contends the standard of care, which is averred in the complaint (¶¶42-45 J.A. 15-16), and whether AOL met such standard of care are questions for the jury. Opinion (J.A. 83).

Finally, the lower court poses the crux of the issue before this Court:

“Thus, the preemption issue reduces to the question whether a state cause of action for negligent distribution of defamatory material

directly conflicts with the CDA's prohibition against treating an Internet provider as a 'publisher or speaker.' Put another way, the question is whether imposing common law distributor liability on AOL amounts to treating it as a publisher or speaker. If so, the state claim is preempted." Opinion (J.A. 83-84). (Emphasis added.)

While one may quibble with the term "Internet provider," since in the case at bar the specific posting was on an AOL proprietary bulletin board as the lower court noted in other parts of its opinion, this distinction does not go to the issue before this Court. However, for the lower court to limit the nature of the injurious material to "defamation" is too narrow. The furnishing of Zeran's telephone number itself may not have been defamatory, but it was the nexus by which his privacy was invaded, the death threats were made and all of the other harassing behavior was suffered. Furthermore, the narrow perception of the lower court of the nature of the complaint as sounding solely in defamation seems to have been one of the logical requirements for the lower court to have reached its erroneous legal conclusion that distributor liability is equivalent to publisher liability for purposes of § 230 of the CDA.

Distributor liability is different from publisher liability, although the two are not unrelated, nor did Zeran so argue below. The lower court, however, erred by construing a distributor to be a publisher, as that term is used in § 230 of the CDA, because in some instances "liability for knowingly or negligently distributing defamation material, is merely a species or type of liability for publishing defamatory material."

First, § 230 of the CDA was enacted in the context of legislatively overruling Stratton-Oakmont v. Prodigy Services Co., Inc., *supra*, which had extended publisher liability to computer service providers who were engaged in screening, editing or blocking. Stratton-Oakmont v. Prodigy Services Co., Inc., *supra*, itself, relied upon Cubby, Inc. v. CompuServe, Inc. et al., *supra*, which had distinguished the difference between publisher liability and distributor liability in the context of computer service providers. Cubby, Inc. at 141-142. For the lower court to have added distributor liability to the scope of the statutory exemption from liability in the face of narrower language "publisher or speaker" liability was error. Newport News Shipbuilding and Dry Dock v. Howard, 904 F.2d 206, 209 (4th Cir. 1990). If Congress had wanted to absolve computer service providers from distributor liability, as envisioned in Cubby, Inc., § 230 of the CDA could have expressly exempted from liability interactive computer services from distributing "any information provided by another information content provider."

The district court, literally reading § 230 of the CDA, should not have read in "distributor" to be a "publisher." As stated in U.S. v. Harvey, 814 F.2d 905, 913 (4th Cir. 1987), on rehearing in part In re Forfeiture Hearing As to Caplin & Drysdale Chartered, 837 F.2d 637 (4th Cir. 1988), *aff'd*. 488 U.S. 940 (1989).

"Statutory construction properly begins with examination of the literal language of a statute, United States v. Turkette, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981), and it properly ends there unless the language is ambiguous, Id., or would, as literally read, contravene a clearly expressed legislative intention, Rossello v. United States, 46 U.S. 16, 20, 104 S.Ct. 296,

299, 78 L.Ed.2d 17 (1983).” Accord. U.S. v. Southern Management Corp., 955 F.2d 914, 920 (4th Cir. 1992) (dictum)(where it was stated: “If the words convey clear meaning, courts may not sift through secondary indices of intent to discover alternative meaning.”).

This is exactly how the lower court erred in finding that distributors, for purposes of liability for distributing defamatory subject matter, are considered to be “publishers.” See Prosser and Keaton on the Law of Torts, §113, at 803 (5th ed. 1984) describing libraries, news vendors and other disseminators as “secondary publishers.” That there is a relationship in some instances between “publisher” liability and distributor liability in defamation cases does not make “publisher” and “distributor” liability equivalent.

Secondly, the lower court erred in liberally construing a statute to abrogate additional portions of the common law beyond its express language. A central doctrine of statutory construction is to construe narrowly the reach of any statute which would abrogate the common law. U.S. v. Texas, 507 U.S. 529, 534 (1993):

“Just as longstanding is the principle that ‘[s]tatutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.’ Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952); Astoria Federal Savings & Loan Assn. v. Solimino, 501 U.S. 104, 108, 111 S.Ct. 2166, 2169-2170, 115 L.Ed.2d 96 (1991). In such cases, Congress does not write upon a clean slate. Astoria, supra, at 108, 111 S.Ct., at 2169-2170. In order to abrogate a common-law principle, the statute must ‘speak directly’ to the question addressed by the common law.” Mobil Oil Corp. v. Higginbotham, supra, 436 U.S., at 625, 98 S.Ct. at 2015; Milwaukee v. Illinois, 451 U.S. 304, 315, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981).

Thirdly, the lower court further erred in extending the exemption of liability to an interactive computer service as a distributor when the express exemption only applied to it as a publisher or speaker, since correct statutory interpretation would have been to have held that inclusion of those exemptions mentioned implies exclusion of other exemptions. While this Court has frequently held that the doctrine of expressio unius est exclusio alterius should be applied with great caution and is recognized as unreliable, Director, Etc. v. Bethlehem Mines Corp., 669 F.2d 187, 197 (4th Cir. 1982), in the context of abrogation of common law principles, it is a context in which such doctrine is appropriately applied.

Finally, the lower court also errs in its construction of § 230(c)(2) of the CDA. Section 230(c)(2) provides a safe harbor to computer service providers who edit, block or delete from being deemed “publishers” as Prodigy Service Co., Inc. was so defined in Stratton-Oakmont, supra. Opinion (J.A. 88). However, the case at bar in no way frustrates this legislative objective.

Zeran is not claiming AOL is liable because it edited, screened or blocked offensive subject matter, but rather because it failed to do so.

Section 230(c)(2) facilitates exactly the type of remedy Zeran was seeking to have AOL perform; namely, to screen, block or edit the offending material posted with Zeran's home telephone number. The claim asserted in the complaint is entirely consistent with the objectives of § 230(c)(2) of the CDA. Since §§ 230(c)(1) and (2) exempt computer service providers from exactly the concern the lower court erroneously considers still at issue, despite the rectifying legislation, the lower court has completely misread the statute, its purpose and its effect. Opinion (J.A. 86-89). In fact, if the lower court were limiting itself to the facts of the case at bar, instead of its hypotheticals which also are taken care of by § 230(c) of the CDA, it would be focused only on those cases where an injured party has notified specifically the computer service provider as distributor of the specific offending subject matter and expressly requested relief. As pointed out earlier, the case does not involve a “reason to know” standard, but rather an actual notification standard. Sections 230(c)(1) and (2) exempt distributors from the Stratton-Oakmont, supra, “reason to know” standard which connected a distributor to the legal position of a publisher because of its blocking, editing or screening activity.

The lower court’s opinion results in the absurd position that Congress has enacted legislation that utterly vitiates any remedy an injured party has against a computer service provider, which is distributing defamatory or other objectionable matter which can foreseeably injure someone, after such provider is given express notice of the situation, has or should have had the ability to prevent or mitigate the injury, but, nevertheless has failed to respond adequately to such notice. Congress enacted no such legislation. What Congress did was make it easier for computer service providers to respond to notices without subjecting themselves to increased exposure by deeming them “publishers.”

CONCLUSION

The decision of the lower court should be reversed and the case remanded for completion of discovery and trial.

RECORD NO. 97-1523

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

KENNETH M. ZERAN,
Plaintiff-Appellant,

v.

AMERICA ONLINE, INC.,
Defendant-Appellee.

BRIEF OF APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA
DIVISION*

STATEMENT OF JURISDICTION

Appellee America Online, Inc. (“AOL”) hereby adopts and incorporates by reference the “Statement of Subject Matter and Appellate Jurisdiction” set out in the brief of Appellant Kenneth M. Zeran (“Zeran”). (See Brief of Appellant (“Zeran Br.”) at 1-2.)

STATEMENT OF ISSUES

1. Whether the District Court correctly concluded that 47 U.S.C. § 230, which prohibits treating providers of interactive computer services such as AOL as the “publisher or speaker” of third-party content, bars Plaintiff’s claims against AOL for allegedly failing to prevent the dissemination of messages created and posted on AOL’s system by a third party?

2. Whether 47 U.S.C. § 230 governs this action, which was filed after the statute’s enactment but which involves events that allegedly occurred before enactment, when (a) the statute expressly prescribes that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section” and (b) Plaintiff can show no reliance on pre-existing law?

STATEMENT OF THE CASE

Plaintiff Zeran filed this action against Defendant AOL claiming that AOL was liable in tort for damages allegedly resulting from its allegedly negligent failure to “screen” or “block” allegedly defamatory messages posted on its system by an unknown third party. (Joint Appendix 15-16 (“J.A.”).) AOL moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) on the ground that Zeran’s action was barred by 47 U.S.C. § 230. (J.A. 36-37.) The District Court granted AOL’s motion and dismissed Zeran’s Complaint, holding that his suit sought to treat AOL as the “publisher or speaker” of third-party content in contravention of Section 230 and that Section 230 applied even though the events alleged in the Complaint occurred before the statute’s enactment. (J.A. 66-94.)

STATEMENT OF FACTS

AOL operates an interactive computer service over which millions of subscribers disseminate and receive information by means of computer modem connections to AOL’s computer network. Much of the information transmitted over AOL’s service originates with AOL subscribers, who may transmit information over AOL’s service through a variety of methods, including electronic mail (private electronic communications addressed to specific recipients) and message boards (topical fora in which subscribers may post messages that are then generally available for review by other subscribers). (Dist. Ct. Op., J.A. 68-69.)

According to the Complaint, on April 25, 1995, a “currently unidentified person” using the screen name “Ken ZZ03” posted on an AOL message board a message advertising “Naughty Oklahoma T-Shirts” with “grossly offensive” slogans referring to the bombing of the federal building in Oklahoma City. (Complaint ¶ 5, J.A. 6-7.) The message indicated that anyone interested in the t-shirts should contact “Ken” and listed a phone number that belonged to

Zeran's business. (Id. ¶ 5, Ex. A; J.A. 6-7, 18.) After Zeran learned of the message from a reporter's phone call, he allegedly informed AOL that the posting was a hoax and asked that it be removed. (Id. ¶¶ 6-7, J.A. 7.) Zeran allegedly began receiving "derogatory" and threatening phone calls as a result of the posted message. (Id. ¶ 8, J.A. 7.)

Shortly after being contacted by Zeran, AOL deleted the posted message. (Id. ¶ 10, J.A. 8.) But over the next three days (April 26 to April 28, 1995), an unidentified person (or persons) using two slightly different screen names posted three similar messages. (Id. ¶¶ 10, 15, 26; J.A. 8, 10, 12.) During this period, Zeran allegedly telephoned AOL on a number of occasions to request removal of the messages. (Id. ¶¶ 12-14, J.A. 8-10.) He allegedly continued to receive unwanted calls about the messages. (Id. ¶¶ 9, 11-13, 18; J.A. 7-11.)

On May 1, 1995, someone sent by electronic mail a copy of one of the posted messages to Mark Shannon, an announcer for radio station KRXO in Oklahoma City. (Id. ¶ 19, Ex. D; J.A. 11, 21-22.) That day, KRXO allegedly aired a broadcast in which Shannon read out parts of the message, "incited the audience to call plaintiff and gave plaintiff's business phone number over the air." (Id. ¶ 20, J.A. 11.) As a result of the broadcast, Zeran allegedly "was bombarded with death threats and other forms of recrimination as well as violent language from Oklahoma City." (Id. ¶ 21, J.A. 11; see also Id. ¶ 24, J.A. 12.)

Zeran does not allege that any of the messages at issue remained on AOL's interactive computer service after May 1, 1995, or that any new offensive messages were posted after that date. (Id. ¶ 26, J.A. 12.) In addition, he does not allege that any particular message remained available on AOL's service for longer than three days. Although Zeran claims he continued to receive calls related to the message until May 14, 1995, he admits that some of those calls were apologies and even offers of assistance in the event of litigation. (Id. ¶¶ 29, 34, 36-39; J.A. 13-14.)

On January 4, 1996, Zeran filed suit in federal district court in Oklahoma against the owner of radio station KRXO. (Dist. Ct. Op., J.A. 72.) In that suit, he alleges that the station's broadcast in which Shannon read aloud portions of one of the posted messages constituted defamation, false light invasion of privacy, and intentional infliction of emotional distress. The suit against KRXO remains pending in Oklahoma.

On April 23, 1996, several months after suing KRXO and two months after enactment of 47 U.S.C. § 230, Zeran filed this separate action against AOL in the same Oklahoma district court. This suit seeks recovery for alleged reputational injury and emotional distress caused by the "incendiary, defamatory, and bogus postings." (Id. ¶ 47, J.A. 16.) Zeran alleges that, upon notice that the first message about Oklahoma City t-shirts was a hoax, AOL had a duty to take reasonable care not only to remove that message, but also to notify all AOL subscribers that it was fraudulent, and to employ some screening mechanism to prevent the posting of any subsequent messages containing Zeran's name or telephone number. (Id. ¶¶ 42-43, J.A. 15.) Zeran posits these duties on the basis of his interpretation of a single district court decision applying the law of New York (Id. ¶ 43, J.A. 15), a state whose law does not govern this suit. According to Zeran, AOL's alleged failure to fulfill these purported duties constituted a tort of "negligent distribution." (Zeran Br. at 3.)

On October 16, 1996, the district court in Oklahoma entered an order granting AOL's motion to transfer the case to the federal District Court for the Eastern District of Virginia. After filing its Answer (J.A. 25-33), AOL moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) on the ground that 47 U.S.C. § 230, which prohibits treating interactive service providers such as AOL as the "publisher or speaker" of third-party content, barred Zeran's action. (J.A. 36-37.)

On March 21, 1997, the District Court granted AOL's motion and dismissed the Complaint. (J.A. at 66-94.) The court held that Section 230 preempted Zeran's claim. (J.A. 82-90.) It concluded that Zeran's cause of action for "negligent distribution" necessarily sought to treat AOL as the "publisher" of the allegedly harmful t-shirt messages because "liability for knowingly or negligently distributing defamatory material[] is merely a species or type of liability for publishing defamatory material." (*Id.* at 84-86.) The District Court also rejected Zeran's argument that applying Section 230 to his suit would have an impermissible retroactive effect. (*Id.* at 90-93.) In particular, it found that Section 230's command that "[n]o cause of action may be brought" under inconsistent state law "clearly reflects Congress' intent to apply [Section 230] to all suits filed after its enactment, notwithstanding when the operative facts arose." (*Id.* at 92.)

SUMMARY OF ARGUMENT

Operation of Section 230: The District Court correctly held that Section 230 bars Zeran's suit. Section 230 provides that "[n]o provider of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" and further that "[n]o cause of action may be brought and no liability may be imposed" under any inconsistent state law. 47 U.S.C. §§ 230(c)(1), (d)(3). Zeran does not contest that AOL is the provider of an "interactive computer service" and that the messages at issue were "information provided by another information content provider." He contends only that his suit does not seek to treat AOL as the "publisher or speaker" of the third-party messages. But it clearly would do so in at least three different ways: (1) by putting AOL in the same legal position as the person who posted and thereby published the messages; (2) by imposing liability on AOL that, under well-settled common law principles, may be imposed only on a party who is deemed to have "published" harmful material; and (3) by requiring AOL to satisfy a standard of care that would compel it to undertake the quintessential duties of a traditional publisher.

Section 230's preamble and legislative history support the District Court's ruling. They show that Congress intended to permit interactive computer services to develop unfettered by federal or state regulation and to deter harmful online speech through enforcement of laws against the originators of the speech, rather than by imposing liability on providers of interactive computer services, who are merely intermediaries. They also demonstrate Congress's goal of removing disincentives for these providers to monitor for, and limit access to, harmful third-party material -- a goal that would be undermined by making them liable for injuries caused by third-party material whenever it could be said that they had "knowledge" or "notice" of such material.

Zeran cannot evade Section 230 by characterizing his suit as a claim for "negligent distribution." Regardless of how it is labeled, Zeran's suit is, in essence, a defamation or related tort action that by definition treats AOL as the "publisher or speaker" of the allegedly false third-party

messages. Zeran's heavy reliance on Cubby v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991), a case decided years before enactment of Section 230 under New York law, is entirely misplaced. Indeed, Cubby itself stands for the proposition that an interactive computer service may not be held liable for harmful third-party content without being treated as the "publisher or speaker" of the content. At bottom, as the District Court properly recognized, Zeran's notion of "distributor liability" is simply a species of "publisher liability" that treats the defendant as "the publisher" of third-party content in violation of Section 230.

Section 230's Temporal Reach: Section 230 governs this case even though the events at issue allegedly occurred before its enactment. Under Landgraf v. USI Film Prods., 511 U.S. 244 (1994), Section 230 must be applied to cases involving pre-enactment events if Congress expressly prescribed that result. Congress did precisely that in Section 230 by providing that "[n]o cause of action may be brought and no liability may be imposed" under any inconsistent state law. 47 U.S.C. § 230(d)(3). This language clearly controls all suits filed after the enactment of Section 230, including Zeran's.

Even if Congress's intent were not clear, Section 230 would nonetheless control this case, because application of the statute to bar Zeran's claim does not have a "retroactive effect" as defined in Landgraf. The presumption against statutory retroactivity serves to protect a party from the unfairness of changing the legal consequences of actions that he took in reliance on then-existing legal rules. But Zeran does not (and cannot) claim that his actions at the time of the events at issue were taken in reliance on pre-Section 230 law. The only action Zeran claims he took in reliance on pre-existing law -- namely planning to sue AOL -- is irrelevant to the retroactivity inquiry. Moreover, even if Zeran could show that pre-existing law would have supplied him with a cause of action against AOL, it is well settled that a statute that simply deprives a would-be plaintiff of an unfiled cause of action does not impair any "vested right" and therefore does not, under the basic Landgraf test, have a "retroactive effect." Accordingly, Section 230 controls this case and bars Zeran's claim.

ARGUMENT

Standard of Review: The questions of how Section 230 operates and whether it applies to this case are both questions of law that this Court reviews de novo. See Alexander S. v. Boyd, 113 F.3d 1373, 1381 (4th Cir. 1997).

I. THE DISTRICT COURT CORRECTLY RULED THAT SECTION 230 BARS ZERAN'S SUIT BECAUSE IT SEEKS TO TREAT AOL AS THE "PUBLISHER OR SPEAKER" OF INFORMATION PROVIDED BY A THIRD PARTY.

Interactive computer services -- which enable people to communicate with one another with unprecedented speed and efficiency through the Internet and related electronic networks -- are rapidly revolutionizing how people and businesses share and receive information. "The Internet is a unique and wholly new medium of worldwide human communication." Reno v. American Civil Liberties Union, No. 96-511, 1997 WL 348012, at 4 (U.S. June 26, 1997) (quotation omitted). Unlike traditional media such as television, radio, newspapers, and books, where content typically flows from a single, centralized "publisher," information and content on

interactive computer services is created and disseminated by millions of individual subscribers. One of the great challenges of this revolution is to develop legal rules to govern this new medium that recognize this fundamental distinction between traditional media and interactive services. In February 1996, Congress enacted the Communications Decency Act of 1996 (“CDA”) as a response to this challenge.

Section 230 of the CDA, 47 U.S.C. § 230, was designed to eliminate uncertainties in the law governing whether providers of interactive computer services, such as AOL, could be liable for harms resulting from the dissemination of tortious content that other persons or entities create and transmit using such services. As we show below, Congress determined in Section 230 that providers of such services are immune from such liability. Congress made this decision because it recognized that saddling interactive computer services with liability for harm caused by third-party communications would be inconsistent with the vigorous and vibrant development of this new and important medium of communication.

Zeran’s lawsuit seeks to impose on AOL liability for allegedly tortious messages that a third party created and posted on AOL’s interactive computer service. The District Court correctly ruled that his action is barred by Section 230.

A. Section 230’s Plain Terms Bar Zeran’s Suit.

The District Court’s conclusion that Section 230 bars Zeran’s suit is compelled by the plain terms of the statute. Section 230(c)(1) states:

“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.”

Section 230(d)(3) further provides that

“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.”

Zeran has conceded most aspects of Section 230’s operation and application to the present case. He acknowledges that Section 230 “was enacted to provide immunity from publisher liability to interactive computer services.” (Zeran Br. at 7.) Likewise, he accepts the District Court’s eminently correct holding (See J.A. 80-82) that Section 230, by virtue of both the Supremacy Clause of the United States Constitution and the plain language of Section 230(d)(3), preempts and precludes any cause of action based on state law that is inconsistent with the express prohibition set out in Section 230(c)(1). (Zeran Br. 26.)

Zeran also has not contested that the threshold requirements for Section 230(c)(1) immunity are met here. Specifically, he does not -- and cannot -- challenge the District Court’s conclusion that AOL is a “provider . . . of an interactive computer service” within the meaning of Section 230(c)(1); (J.A. 83.) Nor does he question the District Court’s conclusion that the bulletin board messages that are the subject of his suit were “information provided by another information content provider” within the meaning of Section 230(c)(1); (J.A. 83.) As the Complaint alleges,

the messages at issue here were created and placed on AOL's service not by AOL, but by an "unidentified person." (Complaint ¶¶ 5, 10, 15; J.A. 6-8, 10.)

Zeran's view of the scope of Section 230 differs from that of the District Court on only one issue: whether holding AOL liable for allegedly failing to remove or block defamatory messages posted on its service by a third person, as Zeran seeks to do, would "treat [AOL] as the publisher or speaker" of these messages within the meaning of Section 230(c)(1). The District Court correctly ruled that Zeran's suit would do just this.

Zeran's effort to impose liability on AOL for the harm these messages allegedly caused would treat AOL as the "publisher or speaker" of the messages in at least three important ways. First, it would put AOL in precisely the same legal position as the person who posted -- and thereby "published" -- the messages on AOL's service. In cyberspace, each individual speaker is a "publisher" in his or her own right. Reno, 1997 WL 348012 at 6. Obviously, if Zeran had been able to identify the "publisher" of these messages, he could have sued that person for precisely the same relief sought here from AOL. To permit Zeran simply to substitute AOL as the defendant in a suit for this same relief would thus "treat [AOL] as the publisher or speaker" of the messages.

Second, under well-settled common law principles, liability for harm flowing from the dissemination of defamatory or otherwise tortious material may be imposed only on a party who is deemed to have "published" the material. Basic hornbook law provides that an entity may be liable for harm caused by a defamatory statement if and only if the entity "published" the statement. The essential elements of any defamation action include both "an unprivileged publication to a third party" and "fault amounting to at least negligence on the part of the publisher." Restatement (Second) of Torts § 558 (1977) (emphasis added). Similarly, other tort actions arising out of the dissemination of harmful information, such as the torts of injurious falsehood or invasion of privacy, can be brought only against defendants who are deemed to have "published" the information. See id. § 623A (tort of injurious falsehood applies only to "one who publishes a false statement harmful to the interests of another") (emphasis added); §§ 652D & 652E (invasion of privacy actions based on revelation of private facts or placing person in false light require showing that defendant gave "publicity" to allegedly harmful information). Accordingly, under basic common law concepts, holding AOL liable for dissemination of the messages at issue here would treat AOL as the "publisher or speaker" of those messages.

Third, Zeran's suit explicitly seeks to impose on AOL a standard of care that would require AOL "to screen, block, or edit" the content of information appearing on its system and to issue retractions after being notified of an error. (Zeran Br. at 31; Complaint ¶¶ 42-45, J.A. 15-16.) These are the quintessential duties in which traditional publishers -- such as newspapers and magazines -- engage with respect to their own content and content supplied by third parties (such as letters to the editor, advertisements, etc.). Adoption of a legal standard that would require AOL to perform these functions with respect to third-party content effectively would compel AOL to act like a traditional publisher of that content, and in this sense as well would treat AOL as a "publisher" of that content.

B. The Legislative Intent of Section 230 Confirms that Congress Intended to Bar Suits Such as Zeran's.

Section 230's preamble and legislative history strongly support the District Court's construction of the statute's "publisher or speaker" prohibition. The preamble and history both demonstrate that Congress enacted Section 230 to foster robust discourse over interactive computer services by ensuring that the intermediaries of such discourse -- service providers such as AOL -- are not held liable for harm caused by third-party content.

Section 230's preamble announces a congressional finding that "interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" and that these services have "flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. §§ 230(a)(3)-(4) (emphasis added). The preamble also declares that it is "the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* §§ 230(b)(2) (emphasis added). Viewed in the context of the whole of Section 230, these declarations reflect Congress's view that a legal regime under which interactive computer service providers could face tort liability for dissemination of content produced by others inevitably would hurt the development of an emerging communications medium that obviously holds great promise for the Nation.

At the same time, Section 230's preamble reflects that Congress recognized the need to deter and punish truly harmful online speech and chose to do so by strengthening enforcement of federal criminal laws against the actual wrongdoers who originate such speech. The preamble declares that it is the "policy of the United States . . . to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." *Id.* § 230(b)(5). Thus, Congress made the policy decision to deter tortious online speech not by punishing the intermediary, but by strengthening the enforcement of legal remedies against the culpable source of the unlawful content.

The legislative history of Section 230 further confirms Congress's intent to immunize interactive computer services from liability for dissemination of third parties' tortious online speech. Debate on the bill on the House floor revealed a congressional understanding that interactive service providers should not be responsible for harmful third-party content because the nature of the medium makes it impossible for them to review and edit third-party content:

There is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming into them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong. [Section 230] will cure that problem

141 Cong. Rec. H8471 (Aug. 4, 1995) (statement of Rep. Goodlatte). Accordingly, Section 230 was intended to provide online services “a reasonable way to . . . help them self-regulate themselves without penalty of law.” Id. at H8470 (statement of Rep. Barton) (emphasis added).

Congress’s intention to immunize interactive service providers from liability for third-party content is further demonstrated by the CDA’s conference report, which states that one of the purposes of Section 230 was to overrule the only reported case in which an interactive service provider had ever been found potentially liable for tortious third-party content. In Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at 1, 5 (N.Y. Sup. Ct. May 24, 1995), a state trial court had concluded that Prodigy, which is another interactive service provider, could be liable for an allegedly defamatory message posted by an unidentified bulletin board user. The court decided to treat Prodigy as a publisher of the message because Prodigy had held itself out to the public as a family-oriented service and attempted to exercise editorial control over third-party content. See id. at 3-4. As the Conference Report stated:

One of the specific purposes of [Section 230] is to overrule Stratton-Oakmont v. Prodigy and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.

H.R. Conf. Rep. No. 104-458, at 194 (1996). Courts must, of course, construe the terms of a federal statute in a manner that both accords with the plain meaning of its terms and also advances the purposes of the statute as expressed in its enacted findings and statements of policy and legislative history. See, e.g., Crandon v. United States, 494 U.S. 152, 158 (1990) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy”). Here, the only way to meet these twin objectives is to conclude that Section 230’s “publisher or speaker” prohibition operates to immunize online services from tort liability arising out of harmful content originating with third parties.

The rule of law advocated by Zeran -- that an interactive computer service should be liable for injury caused by a series of false third-party messages once it is somehow “on notice” that one of its millions of users has posted such a message (Zeran Br. at 21, 25-26, 32) -- would undermine the purposes of Section 230. Such a rule would run directly counter to the express statutory policy that such services be “unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2). Moreover, as the District Court accurately discerned (J.A. 86-90), it would also have the perverse effect of undermining the statute’s clear objective to remove disincentives for interactive computer services voluntarily to engage in “Good Samaritan” activities designed to “restrict access to or availability of material that they consider to be “objectionable.” 47 U.S.C. § 230(c)(2)(A).

For example, under the legal regime advocated by Zeran, an online service that might otherwise voluntarily provide an “800” number telephone line for receipt of complaints concerning online content -- as AOL is alleged to have done in the present case (Complaint ¶¶ 7, 12; J.A. 7-9) -- would be discouraged from doing so because complaints received on that line might create a basis for claiming -- as Zeran does here -- that the service had been put on notice of the presence of harmful material on its system. In much the same way, Zeran’s proposed regime would also discourage online services from making voluntary “Good Samaritan” efforts to monitor their systems for the purpose of detecting content they find to be inappropriate, because the very act of monitoring might create a basis for claiming that the service “knew or should have known” about any allegedly harmful material that was not immediately removed. Such results would frustrate Congress’s intent.

C. Zeran Cannot Circumvent the Bar of Section 230 by Characterizing His Suit as a Claim of “Negligence” or “Negligent Distribution.”

If Zeran had cast his suit against AOL as a defamation claim, as he did with his parallel (and still ongoing) lawsuit against radio station KRXO and as would be most consistent with his own repeated assertions that the messages at issue were “defamatory,” it obviously would have fallen within the proscription of Section 230. As set out above, the basic elements of any claim for defamation include that the defendant be the “publisher” of the allegedly defamatory material and that he have “publishe[d]” it with a level of fault amounting to (at least) negligence. (See *supra* at 12.) Therefore, *a fortiori*, if Zeran had sued AOL for defamation, his claim would have been barred by Section 230’s “publisher or speaker” prohibition. Similarly, had Zeran tried to cast his suit as a claim for “injurious falsehood” or “invasion of privacy,” Section 230 would have barred the suit because those torts also, by definition, treat the defendant as the “publisher” of the allegedly harmful material. (See *supra* at 12-13.)

Zeran does not argue that a defamation (or injurious falsehood or invasion of privacy) suit against AOL could escape the bar of Section 230. Instead, he contends that his suit does not really rest on a theory of defamation liability, but rather on a supposedly distinct theory that AOL was “negligent” in permitting a third party’s allegedly false messages to be available on its system after it was notified of the first message and told it was a hoax. (Complaint ¶¶ 42-45, J.A. 15-16; Zeran Br. at 26.) Zeran contends that holding AOL liable on such a theory avoids the bar of Section 230 by treating AOL as a “distributor” -- but not a “publisher” -- of the allegedly false messages. (Zeran Br. at 21-22, 24-28.) As the District Court properly held, this attempt by Zeran to semanticize a way around Section 230’s prohibition is totally without merit.

First, Section 230 would be rendered meaningless if it could be avoided by the sleight of hand of recasting a claim for “negligently publishing” a third party’s false message (i.e., a defamation claim) as a claim for negligently allowing the offending messages to appear on its system. As a practical matter, the claims are indistinguishable. If Section 230 were construed so as to permit Zeran’s “negligence” claim to survive, then virtually any claim that is barred by Section 230 could be restated in the same fashion. Congress obviously did not intend for the protections it created in Section 230 to be so easily eviscerated.

In analogous contexts, courts have routinely rejected attempts by creative plaintiffs to evade the many protections that the law affords to defamation defendants by repackaging defamation claims in the guise of other torts, including invasion of privacy. See Hustler Magazine v. Falwell, 485 U.S. 46, 56-57 (1988) (plaintiff cannot circumvent First Amendment defenses to defamation action by pleading a claim for intentional infliction of emotional distress); Time, Inc. v. Hill, 385 U.S. 374, 390 (1967) (applying First Amendment defamation standards to invasion of privacy); Moldea v. New York Times Co., 22 F.3d 310, 319 (D.C. Cir.), cert. denied, 513 U.S. 875 (1994) (plaintiff may not “avoid the strictures of the burdens of proof associated with defamation by resorting” to invasion of privacy (quotations omitted)). “Without such a rule, virtually any defective defamation claim . . . could be revived by pleading it as one for [another tort].” Dworkin v. Hustler Magazine, Inc., 668 F. Supp. 1408, 1420 (C.D. Cal. 1987), aff’d, 867 F.2d 1188, cert. denied, 493 U.S. 812 (1989). For the same reasons that courts have traditionally blocked plaintiffs from evading common law and First Amendment constraints on defamation claims through tricks of pleading, Section 230 must be construed to bar Zeran’s “negligent distribution” claim.

Second, no matter how Zeran labels his claim, its essence is that AOL (a) failed to act with sufficient speed in removing certain defamatory messages that it knew were exhibited on its system and/or (b) failed to screen for and block subsequent messages that were similar to the original message. The clear import and effect of both of these components of Zeran’s claim is to treat AOL as the “publisher” of the allegedly harmful messages. The “failure to remove” component of Zeran’s claim falls squarely within the classic common law definition of “publication.” The Restatement (Second) of Torts, in defining “[w]hat constitutes publication,” characterizes a defendant’s “fail[ure] to remove” a statement from property he controls as constituting “publication” of the statement by the defendant:

(1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.

(2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.

Restatement § 577 (emphasis added). Thus, under traditional common law principles, holding AOL liable for failing to remove from its property (i.e., its interactive system) messages that it knew to be false and injurious would treat AOL as the “publisher” of those messages.

The “failure to screen” component of Zeran’s claim also fundamentally seeks to treat AOL as a “publisher” of third-party content. As already noted, “screening” in this medium is just another term for editing, and editing is a quintessential function of a “publisher.” (See supra at 21.) Moreover, in Stratton-Oakmont, a case that Congress explicitly overruled when it enacted Section 230, the very fact that Prodigy had a practice of advance screening of bulletin board messages led the court to treat Prodigy as a “publisher” and hold that it could be liable for defamation if it performed such screening negligently. By enacting a provision barring treatment

of interactive computer services as “publishers or speakers” of third-party content and overruling Stratton-Oakmont, Congress obviously precluded liability for “negligently failing to screen.”

Third, the conclusion that Section 230 encompasses -- and thus bars -- Plaintiff’s “negligence” claim is underscored by the very case on which Zeran most heavily relies, Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991). Zeran identifies this supposedly “seminal” case as the singular source of the duties to remove and to screen that he alleges AOL negligently failed to fulfill. (See Complaint ¶ 43, J.A. 15; Zeran Br. at 6-7, 21, 24, 28.) He erroneously argues that Cubby, which was decided more than four years before enactment of Section 230 by a district court applying New York common law, ruled that an interactive computer service may be liable for harm caused by defamatory information that a third party transmits over the service without being treated as the “publisher or speaker” of the information. (Id. at 21, 28.) He builds this argument upon the demonstrably false premise that Cubby recognized a special cause of action -- wholly distinct from defamation or other causes of action applicable to those who “publish” false or injurious information -- for “negligent distribution” of such information. (Id.) Zeran’s interpretation of Cubby is totally wrong.

Cubby did not even discuss, much less recognize, any cause of action that would subject an interactive computer service to liability for harmful third-party information without treating it as the “publisher or speaker” of that information. The plaintiff in Cubby sought to hold CompuServe, another interactive service provider, liable under three tort theories, each of which would have treated CompuServe as the publisher or speaker of allegedly false information posted by a third party. Cubby’s primary claim was for defamation, a tort that may be committed only by the “publisher” of false information. (See supra at 12.) In discussing this claim, the Cubby court framed the issue as being whether there was a factual basis for treating CompuServe as if it had “originally published” a third-party’s defamatory statements. 776 F. Supp. at 139 (citation omitted, emphasis added). Similarly, in considering Cubby’s two other tort claims -- business disparagement and unfair competition -- the court said that no liability could be imposed absent a showing that CompuServe had made a “knowing publication of false matter” or that CompuServe had “intentionally uttered” an injurious falsehood. Id. at 141, 142 (emphasis added). Thus, Cubby simply cannot be interpreted as having created a new cause of action for “negligent distribution” that would impose liability on an interactive computer service without treating it as a “publisher or speaker.”

Instead, drawing on precedents protecting distributors of information such as news vendors, book stores and libraries from tort liability, Cubby held that interactive computer services enjoy special constitutional protection that requires an exceptional threshold showing before they can be treated as the publisher or speaker of such information. Specifically, Cubby held that the First Amendment provides a “deeply rooted” protection for distributors such as interactive service providers and that, as a result, such a provider may be held liable as the publisher or speaker of defamatory third-party content only if it “knew or should have known” of the defamation. 776 F. Supp. at 139-41. Zeran’s attempt to transform this special protection into a new-found tort action of “negligent distribution” in which liability may be imposed on an interactive computer service without treating it as a “publisher or speaker” is preposterous.

Far from supporting Zeran's thesis, Cubby is representative of a more general common law rule that a mere distributor of third-party information may not be held liable for injury caused by dissemination of that information absent facts establishing that it was a publisher of the information. See, e.g., Tacket v. General Motors Corp., 836 F.2d 1042, 1047 (7th Cir. 1987) (owner of property on which someone had posted defamatory sign not liable absent a showing that the owner "'intentionally and unreasonably fail[ed] to remove' [the] sign and thereby published its contents") (emphasis added); Anderson v. New York Telephone Co., 320 N.E.2d 647 (N.Y. Ct. App. 1974) (adopting lower court dissenting opinion published at 345 N.Y.S.2d 740, 751 (1973)) (telephone company could not be liable for tape-recorded defamatory messages repeatedly transmitted over its network "unless it is held that . . . it 'published'" the messages); Hellar v. Bianco, 244 P.2d 757, 759 (Cal. Dist. Ct. App. 1952) (where unknown person wrote defamatory statements on a men's room wall, jury must decide whether "publication by [bar owner] could be sufficiently inferred" because bartender failed to remove the graffiti for a short time after learning of its existence).

Ultimately, Zeran's argument boils down to the proposition that "[d]istributor liability is different from publisher liability." (Zeran Br. at 28.) But, as the foregoing analysis demonstrates, the District Court got it just right when it ruled that "distributor liability, or more precisely, liability for knowingly or negligently distributing defamatory material, is merely a species or type of liability for publishing defamatory material." (J.A. 84.) Even the authorities Zeran cites support this view. Thus, Section 581 of the Restatement (Second) of Torts, on which Zeran heavily relies in arguing that "distributor liability" is not a subset of "publisher liability" (Zeran Br. at 24), is itself an explication of the fault requirement for the tort of defamation -- a tort that by definition can apply only to a defendant who is the "publisher" of the allegedly false material. Zeran's semantic hair-splitting reaches its nadir when he argues that his suit seeks to treat AOL not as a "publisher" but as a "secondary publisher." (Zeran Br. at 29 (citing Prosser and Keeton on the Law of Torts, § 113, at 803 (5th ed. 1984)).) This is nonsense: "secondary publishers" are obviously a type of "publisher," and a suit that treats AOL as a "secondary publisher" of third-party content necessarily treats it as a "publisher" of that content.

Finally, Zeran's reliance on a canon of statutory construction that "favor[s] the retention of long-established and familiar [common law] principles, except when a statutory purpose to the contrary is evident" is entirely misplaced. (Zeran Br. at 30 (quoting United States v. Texas, 507 U.S. 529, 534 (1993)).) In the first place, even assuming a State's common law would permit a lawsuit (such as Zeran's) that would treat an interactive computer service as the "publisher" of third-party content, Congress has unambiguously abrogated that common law by prohibiting any cause of action "under any State . . . law that is inconsistent with this section." 47 U.S.C. § 230(d)(3); See Texas, 507 U.S. at 534. Reliance on this canon here to overcome AOL's claim of immunity therefore would impermissibly "defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure." Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (canon does not govern "when a statutory purpose to the contrary is evident").

In any event, this canon of construction is inapplicable because, even if a State's common law would permit a suit in these circumstances against an interactive computer service, no "long-established and familiar" common law rule to this effect could be said to exist. Texas, 507 U.S.

at 534; Isbrandtsen, 343 U.S. at 783. Interactive computer services are themselves part of a “wholly new medium,” Reno, 1997 WL 348012, at 4 (quotation omitted), and the legal rules applicable to them before Section 230 was enacted were largely unsettled. At the time that Section 230 was enacted, no decisions by any court in any of the jurisdictions whose law might be applicable here (Virginia, Washington, or Oklahoma) had even considered the question of an online service’s liability for injurious third-party content. Indeed, Zeran himself has identified only Cubby -- a single 1991 decision by a district court in New York that was never subject to appellate review and has been followed by no other state -- as supporting his cause of action, and, as we have already shown, even Cubby does not support his claim. Accordingly, Section 230 could not have abrogated a “long-established and familiar” common law principle.

II. SECTION 230 REQUIRES DISMISSAL OF THIS CASE EVEN THOUGH THE EVENTS ALLEGED IN THE COMPLAINT PRE-DATE ITS ENACTMENT.

As of the date of its enactment, February 8, 1996, Section 230 expressly provided that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” This clear language led the District Court to hold that Section 230 applies to this case, which was filed two months after the statute’s enactment. Zeran tries to evade Congress’s clear command by erroneously arguing that Section 230 cannot apply in a case involving events that predate its enactment. (Zeran Br. at 8-20.)

As the Supreme Court has explained, “[a] statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment or upsets expectations based in prior law.” Landgraf v. USI Film Prods., 511 U.S. 244, 269 (1994) (citation omitted). In fact, applying a statute to antecedent events “often serve[s] entirely benign and legitimate purposes” such as giving “comprehensive effect to a new law Congress considers salutary.” Id. at 267-68. Accordingly, “[t]he conclusion that a particular rule operates ‘retroactively’ comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.” Id. at 280

The Court in Landgraf specified a two-part framework for analyzing the temporal reach of a statute. The first step is to “ascertain whether Congress expressly prescribed the reach of the statute.” Alexander S. v. Boyd, 113 F.3d 1373, 1387 (4th Cir. 1997). If so, the court is “bound by Congress’s directive.” Id. If not, a second inquiry must be made: “Absent an express directive from Congress, we must apply a newly enacted statute to pending cases unless doing so would give the statute ‘retroactive effect.’” Alexander, 113 F.3d at 1387; Landgraf, 511 U.S. at 280 (“When . . . the statute contains no such express command, the court must determine whether the new statute would have retroactive effect.”). Under Landgraf, “‘retroactive effect’ . . . does not describe all applications of a statute to preexisting causes of action or pending proceedings.” Hunter v. United States, 101 F.3d 1565, 1570 (11th Cir. 1996), cert. denied, 117 S. Ct. 1695 (1997). Rather, “[t]he definition of ‘retroactive effect’ in this context is more narrow than that,” and a court must engage in a “process of judgment” to determine whether application of a statute would have a “retroactive effect.” Id.

In this case, as the District Court correctly held, Congress expressly prescribed that Section 230 govern any suit filed after its enactment. Moreover, even if this Court were to conclude that Section 230 does not disclose Congress's intent as to its temporal reach, Section 230 still governs Zeran's suit because its application here does not have a "retroactive effect" within the meaning of Landgraf.

A. The District Court Correctly Ruled That Congress Expressly Prescribed that Section 230 Applies in Cases Involving Pre-Enactment Events.

Congress expressly provided that Section 230 govern any suit brought after its enactment, including those, such as the present case, in which the conduct at issue occurred before its enactment. Section 230 provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(d)(3). Congress could not have expressed its intent more clearly: from the date of Section 230's enactment (February 8, 1996), no action may be filed and no liability may be imposed under any state or local law inconsistent with Section 230. See Wright v. Morris, 111 F.3d 414, 418 (6th Cir. 1997) (statute that provides "[n]o action shall be brought with respect to prison conditions" until a prisoner has exhausted administrative remedies "expressly governs the bringing of new actions"); Abdul-Wadood v. Nathan, 91 F.3d 1023, 1025 (7th Cir. 1996) (statute providing that "[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action" if he has brought three previous frivolous actions or appeals "governs bringing new actions"). Given that Zeran's suit was filed after passage of the CDA, a straightforward interpretation of this provision requires the application of Section 230 to this case.

Indeed, given that Zeran filed suit after Section 230 was enacted, applying the statute to this case is really prospective in nature. Because Section 230 specifically prohibits the bringing of a cause of action and the imposition of liability, "the statute [would be] applied to conduct that occur[red] after the statute's enactment -- plaintiff's filing of the complaint -- not the defendant's allegedly unlawful acts." Vernon v. Cassadaga Valley Cent. Sch. Dist., 49 F.3d 886, 889-90 (2d Cir. 1995); St. Louis v. Texas Worker's Compensation Comm'n, 65 F.3d 43, 46 (5th Cir. 1995) (statute applied prospectively because it was "applied to conduct that occurred after the statute's enactment -- the plaintiff's filing of the complaint -- not to the allegedly discriminatory acts of the defendant").

Furthermore, the language of Section 230(d)(3) must be read to govern even suits that were pending when Section 230 was enacted, so, a fortiori, it applies to cases (like Zeran's) filed after the statute's enactment. If the section were interpreted to apply only to suits involving events occurring after its enactment as Zeran asserts, the clause "no liability may be imposed" would be superfluous: the statutory prohibition against bringing any cause of action would already ban all future suits -- and therefore the imposition of liability -- under state laws inconsistent with Section 230. But a court must be "deep[ly] reluctan[t] to interpret a statutory provision so as to render superfluous other provisions in the same enactment." Pennsylvania Dept. of Pub. Welfare v. Davenport, 495 U.S. 552, 562 (1990). The clause "no liability may be imposed" is most naturally given operative effect by interpreting it to prohibit damages under inconsistent state laws in suits already pending when the statute was enacted -- suits that would not be covered by the statute's prohibition on bringing new causes of action. See Wright, 111 F.3d at 418 (statute

that provides “[n]o action shall be brought with respect to prison conditions” until a prisoner has exhausted administrative remedies governs only newly-filed cases, not “the disposition of pending cases”); Abdul-Wadood, 91 F.3d at 1025 (same analysis of statute providing that “[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action”). Clearly, because Section 230 applies to suits that were pending when it was enacted (suits that necessarily would involve pre-enactment events), it must also apply to all cases, including Zeran’s, that are filed after its enactment as well.

Zeran’s own explanation of the interaction between the “no cause of action may be brought” and “no liability may be imposed” provisions is incoherent. He initially posits that the two phrases “refer[] to two different events in the stages of a trial” (without offering any reason why Congress would need to refer to two different stages in a trial). (Zeran Br. at 13.) Two sentences later, he inexplicably asserts that the two phrases “both relate to theories of recovery, not to stages of a trial.” (Id.) Zeran finally complains that interpreting the phrase “no liability may be imposed” as foreclosing pending cases would render redundant the phrase “no cause of action may be brought.” (Id. at 14.) In fact, however, Zeran’s interpretation would create the redundancy. His only explanation for why Congress included both clauses is that “they are used merely to emphasize that no state theory of recovery may be ‘inconsistent’ with the CDA.” (Id. at 13.) But the theory that Congress included a similar provision twice for “emphasis” could be used to explain away all statutory redundancies and would make meaningless the canon against construing statutory language as redundant.

B. Application of Section 230 to Bar Zeran’s Suit Does Not Have “Retroactive Effect.”

Even if this Court were to conclude (contrary to the foregoing analysis) that Congress did not expressly provide that Section 230 applies to cases involving events pre-dating its enactment, the statute still would control this case because its application to Zeran’s claim does not have a “retroactive effect.” In its analysis of retroactivity, “[t]he Landgraf Court sought to harmonize two potentially conflicting principles.” Martin v. Bissonette, No. 96-1856, 1997 WL 280602, at 6 (1st Cir. May 29, 1997). As the Supreme Court explained, “[a]lthough we have long embraced a presumption against statutory retroactivity, for just as long we have recognized that, in many situations, a court should ‘apply the law in effect at the time it renders its decision,’ even though that law was enacted after the events that gave rise to the suit.” Landgraf, 511 U.S. at 273 (citation omitted). The Court observed that the “familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance” in attempting to resolve any tension between these principles. Id. at 270. After surveying how past cases had applied these considerations when analyzing whether a statute should be applied to antecedent events, the Supreme Court concluded that a court should apply the law in effect at the time of decision -- even in cases involving events pre-dating the enactment of a statute -- if doing so does not have “retroactive effect.” Id. at 277, 280.

A law has retroactive effect only when its application to pre-enactment events would be unfair because a party has relied upon the pre-existing law in planning his or her conduct. As the Landgraf Court explained, “[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.” Landgraf, 511 U.S. at 265. Accordingly, “[c]ourts refrain from applying a statute

retroactively to avoid the unfairness that results from imposing new burdens on people's conduct after they have engaged in that conduct." Chow v. INS, 113 F.3d 659, 665 (7th Cir. 1997). In other words, the presumption against retroactivity is designed to avoid the unfairness of changing the legal rules when a person has engaged in conduct with an expectation of the probable legal consequences.

Zeran, however, can point to no action in connection with the events described in the Complaint that he planned or took in reliance on existing law. Clearly, his alleged actions in responding to the messages on AOL's system by complaining to AOL were not premised in any way on existing legal rules. Indeed, he cannot even claim that he filed suit in reliance on pre-Section 230 law because the statute was enacted before he brought suit. The only "reliance interest" Zeran claims -- or can claim -- is that he "relied upon [a] substantive right [that he believes Cubby created] to vindicate the wrongs done to him and the injuries suffered by him." (Zeran Br. at 20; Id. at 16 (applying Section 230 "would abolish the right of action relied upon by Zeran in this case")). Thus, Zeran asserts not that he relied in any way on pre-Section 230 law in planning his conduct, but only that he has relied on his understanding of that law as the basis for this suit. The unfairness to which Zeran points is not any change in the consequences of his own past actions, but an alleged unfairness of not having a claim against AOL.

But that is not the type of "reliance" or "unfairness" the presumption against retroactivity protects. The issue is not whether it is fair or unfair for Zeran to have no claim against AOL. After all, if Section 230 had not been enacted but an appellate court on review of Cubby had made clear that there is no common law action for "negligent distribution," Zeran would still be in the same "unfair" situation he faces today, but the law is clear that rules announced in a judicial decision "should normally be applied to a case pending when the . . . decision [comes] down." Landgraf, 511 U.S. at 278 n. 32. Moreover, courts often apply statutes to suits involving pre-enactment events even though the effect is to eliminate the claim upon which the plaintiff was relying to seek redress for alleged wrongs. As Justice Scalia observed in Landgraf, the general rule is that a statute eliminating jurisdiction is applied to cases involving pre-enactment events, even though doing so "can deny a litigant a forum for his claim entirely." Landgraf, 511 U.S. at 292-93 (Scalia, J., concurring). Similarly, courts routinely apply changes in statutes of limitations retroactively even when the result is to eliminate the plaintiff's claim. See, e.g., St. Louis v. Texas Worker's Compensation Comm'n, 65 F.3d 43, 46 (5th Cir. 1995), cert. denied, 116 S. Ct. 2563 (1996); Vernon, 49 F.3d at 889-90.

As courts have explained, retroactivity is implicated not by a statute's effect on "the secondary conduct of the plaintiffs, the filing of their suit," but only by an effect on the "primary conduct" of the parties that is at issue in the suit. Vernon, 49 F.3d at 890; Alexander S., 113 F.3d at 1387 ("The application of a new statute that affects only secondary, rather than primary, conduct does not give rise to concerns about retroactivity."). Accordingly, Zeran's secondary conduct concerning litigation decisions does not reflect any cognizable reliance interest. The presumption against retroactivity protects only against the unfairness that results when a person has planned his primary conduct in reliance on existing law but then finds the legal consequences of his or her conduct altered because the law has changed. See Chow, 113 F.3d at 665 ("Unfairness results because people rely on the existing legal provisions in planning and conducting their affairs.").

Zeran can point to no such reliance or consequent unfairness. Thus, not surprisingly, he cannot meet the tests courts have set out for determining whether a statute has retroactive effect.

As this Court has recognized and Zeran acknowledges (Zeran Br. at 15), under Landgraf, “application of a new statute to a pending case has a retroactive effect only when ‘it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.’” Alexander S., 113 F.3d at 1387 (quoting Landgraf, 511 U.S. at 280). Clearly, Section 230 does not meet either the second or third prongs of this test: it neither “increase[s][any] party’s liability” nor “impose[s] new duties” on anyone. Thus, Zeran could escape applicability of Section 230 only under the first prong, which turns on whether application of the statute would “impair” his pre-existing “rights . . . when he acted.”

Zeran claims he had a “right protected from retroactive impairment” in his unfiled tort claim against AOL. (Zeran Br. at 16.) But, as discussed above, Zeran can point to no action (other than preparing to file this suit) he took in reliance on the existence of such a claim. Applying Section 230 in this case could not “impair rights [Zeran] possessed when he acted,” because there is no relevant conduct that was based on any such rights. Moreover, Zeran simply could not reasonably rely on, or have settled expectations about, the existence of a supposed common law “rule” that he purports to draw from dicta in a single district court decision (Cubby) that applied the law of a jurisdiction that does not even govern this case. Here, Congress did not suddenly abrogate a well-established rule of common law. (See supra at 26.) Instead, it established certain protections for the emerging online services industry so that its development would not be hindered by the legal uncertainty created by a few isolated lower court rulings.

In any event, even if Zeran could point to a well-established common law rule, the “cases have clearly established that a person has . . . no vested interest[] in any rule of the common law.” Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 n. 32 (1978) (internal quotations omitted); New York Central R.R. Co. v. White, 243 U.S. 188, 198 (1917) (“No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.”). “Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridge[s] no vested rights of the plaintiff by . . . retroactively abolishing [plaintiff’s] cause of action in tort.” Hammond v. United States, 786 F.2d 8, 12 (1st Cir. 1986); see also In re TMI, 89 F.3d 1106, 1113 (3d Cir. 1996), cert. denied, 117 S. Ct. 739 (1997) (statute that eliminates pending tort claim does not impair a vested right); Hyundai Merchant Marine Co. v. United States, 888 F. Supp. 543, 551 (S.D.N.Y. 1995) (statute that eliminates tort claim applied to pre-enactment events because such a claim is not a vested right until reduced to final judgment), aff’d, 75 F.3d 134 (2d Cir.), cert. denied, 117 S. Ct. 51 (1996); ABF Capital Mgmt. v. Askin Capital Mgmt., L.P., 957 F. Supp. 1308, 1320-21 (S.D.N.Y. 1997) (statute that prohibited reliance on securities fraud as basis for RICO claim could be applied to “cases where the allegedly fraudulent conduct took place prior to enactment, but the suit is brought after enactment” without retroactive effect).

Zeran relies primarily on Maitland v. University of Minnesota, 43 F.3d 357 (8th Cir. 1994), for his assertion that he had a vested right in his unfiled tort claim. (Zeran Br. at 17.) Maitland, however, only highlights the absence of any relevant reliance by Zeran. Maitland, a plaintiff with

a prospective cause of action for employment discrimination, participated in a limited way in consent decree hearings involving other discrimination claims against his employer. When he did so, “the law did not even hint that [his involvement in the consent decree proceeding] would jeopardize his cause of action.” Id. at 362. Congress subsequently passed a statute providing that anyone with an opportunity to present objections to a consent order resolving a claim of employment discrimination could not challenge any action taken within the scope of that order -- a statute that, if applied to Maitland, would bar his cause of action. Id. at 361. The court found that the statute should not extinguish Maitland’s claim because he had “reasonably relied” on the preexisting law and would have acted differently had he known the law would change. Id. at 363. Clearly, in sharp contrast to Maitland, Zeran can point to no actions predating the enactment of Section 230 that he took in reliance on pre-existing law and that he would have changed had he known Section 230 would be enacted.

Zeran appears to suggest that whenever a statute changes a “substantive right,” it has a prohibited retroactive effect. (Zeran Br. at 15-16.) However, “merely characterizing a statute as procedural or substantive is not dispositive in determining whether a newly enacted statute should apply to pending actions.” Chow, 113 F.3d at 665 (internal quotation omitted). Zeran erroneously relies on language in Landgraf stating that certain prior cases did not “displace the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment.” Landgraf, 511 U.S. at 278. But, as the Court makes clear, “the traditional presumption” to which it refers is that a statute does not govern pre-enactment events “[i]f the statute would operate retroactively,” that is, if it would have retroactive effect. Id. at 280 (emphasis added). Thus, to say that courts apply “the traditional presumption” to statutes affecting substantive rights begs the key question -- whether the statute has a “retroactive effect” and therefore cannot be applied to pre-enactment events.

Not surprisingly, then, Zeran’s sweeping claim that since Landgraf, “the courts have uniformly held that federal statutes involving the change of substantive rights have not been given retroactive application” (Zeran Br. at 19) is simply wrong. See, e.g., United States v. Olin Corp., 107 F.3d 1506, 1512-14 (11th Cir. 1997) (applying substantive provisions of CERCLA under Landgraf framework to case involving pre-enactment events); Deck v. Peter Romein’s Sons, Inc., 109 F.3d 383, 386-90 (7th Cir. 1997) (applying statute eliminating private right of action to case involving pre-enactment events); Kolster v. INS, 101 F.3d 785, 788-90 (1st Cir. 1996) (statutory preclusion of judicial review could be applied under Landgraf in case involving pre-enactment events); Centigram Communications Corp. v. Lehman, 862 F. Supp. 113, 118-19 (E.D. Va. 1994) (applying Landgraf to conclude that a statute concerning the revival of expired patents should apply in a case involving events pre-dating its enactment), appeal dismissed per agmt. of the parties, 47 F.3d 1180 (Fed. Cir. 1995). Nor are any of the cases in Zeran’s laundry list of cites (Zeran Br. at 19-20) relevant to the present situation.

In the absence of a retroactive effect, “a court should ‘apply the law in effect at the time it renders its decision.’” Landgraf, 511 U.S. at 273 (quoting Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974)). In this case, that law includes Section 230’s grant of immunity to interactive service providers such as AOL from tort liability for third-party content. Accordingly, Zeran has failed to state a claim upon which relief can be granted and his Complaint must be dismissed.

CONCLUSION

For the foregoing reasons, the District Court's decision granting AOL judgment on the pleadings and dismissing Zeran's suit should be affirmed.

Kenneth M. Zeran v. America Online, Incorporated
United States Court of Appeals, Fourth Circuit, 1997
129 F.3d 327

Opinion

WILKINSON Chief Judge:

Kenneth Zeran brought this action against America Online, Inc. (“AOL”), arguing that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter. The district court granted judgment for AOL on the grounds that the Communications Decency Act of 1996 (“CDA”)—47 U.S.C. § 230—bars Zeran’s claims. Zeran appeals, arguing that § 230 leaves intact liability for interactive computer service providers who possess notice of defamatory material posted through their services. He also contends that § 230 does not apply here because his claims arise from AOL’s alleged negligence prior to the CDA’s enactment. Section 230, however, plainly immunizes computer service providers like AOL from liability for information that originates with third parties. Furthermore, Congress clearly expressed its intent that § 230 apply to lawsuits, like Zeran’s, instituted after the CDA’s enactment. Accordingly, we affirm the judgment of the district court.

I.

“The Internet is an international network of interconnected computers,” currently used by approximately 40 million people worldwide. *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 2334, 138 L.Ed.2d 874 (1997). One of the many means by which individuals access the Internet is through an interactive computer service. These services offer not only a connection to the Internet as a whole, but also allow their subscribers to access information communicated and stored only on each computer service’s individual proprietary network. *Id.* AOL is just such an interactive computer service. Much of the information transmitted over its network originates with the company’s millions of subscribers. They may transmit information privately via electronic mail, or they may communicate publicly by posting messages on AOL bulletin boards, where the messages may be read by any AOL subscriber.

The instant case comes before us on a motion for judgment on the pleadings, see Fed.R.Civ.P. 12(c), so we accept the facts alleged in the complaint as true. *Bruce v. Riddle*, 631 F.2d 272, 273 (4th Cir.1980). On April 25, 1995, an unidentified person posted a message on an AOL bulletin board advertising “Naughty Oklahoma T-Shirts.” The posting described the sale of shirts featuring offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Those interested in purchasing the shirts were instructed to call “Ken” at Zeran’s home phone number in Seattle, Washington. As a result of this anonymously perpetrated prank, Zeran received a high volume of calls, comprised primarily of angry and derogatory messages, but also including death threats. Zeran could not change his

phone number because he relied on its availability to the public in running his business out of his home. Later that day, Zeran called AOL and informed a company representative of his predicament. The employee assured Zeran that the posting would be removed from AOL's bulletin board but explained that as a matter of policy AOL would not post a retraction. The parties dispute the date that AOL removed this original posting from its bulletin board.

On April 26, the next day, an unknown person posted another message advertising additional shirts with new tasteless slogans related to the Oklahoma City bombing. Again, interested buyers were told to call Zeran's phone number, to ask for "Ken," and to "please call back if busy" due to high demand. The angry, threatening phone calls intensified. Over the next four days, an unidentified party continued to post messages on AOL's bulletin board, advertising additional items including bumper stickers and key chains with still more offensive slogans. During this time period, Zeran called AOL repeatedly and was told by company representatives that the individual account from which the messages were posted would soon be closed. Zeran also reported his case to Seattle FBI agents. By April 30, Zeran was receiving an abusive phone call approximately every two minutes.

Meanwhile, an announcer for Oklahoma City radio station KRXO received a copy of the first AOL posting. On May 1, the announcer related the message's contents on the air, attributed them to "Ken" at Zeran's phone number, and urged the listening audience to call the number. After this radio broadcast, Zeran was inundated with death threats and other violent calls from Oklahoma City residents. Over the next few days, Zeran talked to both KRXO and AOL representatives. He also spoke to his local police, who subsequently surveilled his home to protect his safety. By May 14, after an Oklahoma City newspaper published a story exposing the shirt advertisements as a hoax and after KRXO made an on-air apology, the number of calls to Zeran's residence finally subsided to fifteen per day.

Zeran first filed suit on January 4, 1996, against radio station KRXO in the United States District Court for the Western District of Oklahoma. On April 23, 1996, he filed this separate suit against AOL in the same court. Zeran did not bring any action against the party who posted the offensive messages. After Zeran's suit against AOL was transferred to the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a), AOL answered Zeran's complaint and interposed 47 U.S.C. § 230 as an affirmative defense. AOL then moved for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). The district court granted AOL's motion, and Zeran filed this appeal.

II.

A.

Because §230 was successfully advanced by AOL in the district court as a defense to Zeran's claims, we shall briefly examine its operation here. Zeran seeks to hold AOL liable for defamatory speech initiated by a third party. He argued to the district court that once he notified AOL of the unidentified third party's hoax, AOL had a duty to remove the defamatory posting promptly, to notify its subscribers of the message's false nature, and to effectively screen future defamatory material. Section 230 entered this litigation as an affirmative defense pled by AOL.

The company claimed that Congress immunized interactive computer service providers from claims based on information posted by a third party. The relevant portion of § 230 states: “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). 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. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role. Thus, 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.

The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” *Id.* § 230(a)(3). It also found that the Internet and interactive computer services “have flourished, to the benefit of all Americans, *with a minimum of government regulation.*” *Id.* § 230(a)(4) (emphasis added). Congress further stated that it is “the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*” *Id.* § 230(b)(2) (emphasis added).

None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. While Congress acted to keep government regulation of the Internet to a minimum, it also found it to be the policy of the United States “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.” *Id.* § 230(b)(5). Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.

Congress’ purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. *See Reno v. ACLU*, 521 U.S. at 117 S.Ct. at 2334 (noting that at time of district court trial, “commercial online services had almost 12 million individual subscribers”). The amount of information communicated via interactive computer services is therefore staggering. 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. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. In this respect, § 230 responded to a New York state court decision, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995). There, the plaintiffs sued Prodigy—an interactive computer service like AOL—for defamatory comments made by an unidentified party on one of Prodigy’s bulletin boards. The court held Prodigy to the strict liability standard normally applied to original publishers of defamatory statements, rejecting Prodigy’s claims that it should be held only to the lower “knowledge” standard usually reserved for distributors. The court reasoned that Prodigy acted more like an original publisher than a distributor both because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.

Congress enacted § 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision. Under that court’s holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230’s broad immunity “to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.” 47 U.S.C. § 230(b)(4). In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.

B.

Zeran argues, however, that the § 230 immunity eliminates only publisher liability, leaving distributor liability intact. Publishers can be held liable for defamatory statements contained in their works even absent proof that they had specific knowledge of the statement’s inclusion. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 113, at 810 (5th ed.1984). According to Zeran, interactive computer service providers like AOL are normally considered instead to be distributors, like traditional news vendors or book sellers. Distributors cannot be held liable for defamatory statements contained in the materials they distribute unless it is proven at a minimum that they have actual knowledge of the defamatory statements upon which liability is predicated. *Id.* at 811 (explaining that distributors are not liable “in the absence of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published”). Zeran contends that he provided AOL with sufficient notice of the defamatory statements appearing on the company’s bulletin board. This notice is significant, says Zeran, because AOL could be held liable as a distributor only if it acquired knowledge of the defamatory statements’ existence.

Because of the difference between these two forms of liability, Zeran contends that the term “distributor” carries a legally distinct meaning from the term “publisher.” Accordingly, he asserts that Congress’ use of only the term “publisher” in § 230 indicates a purpose to immunize service providers only from publisher liability. He argues that distributors are left unprotected by § 230 and, therefore, his suit should be permitted to proceed against AOL. We disagree. Assuming

arguendo that Zeran has satisfied the requirements for imposition of distributor liability, this theory of liability is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230.

The terms “publisher” and “distributor” derive their legal significance from the context of defamation law. Although Zeran attempts to artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action. Because the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of tort liability. Restatement (Second) of Torts § 558(b) (1977); Keeton et al., *supra*, § 113, at 802. Publication does not only describe the choice by an author to include certain information. In addition, both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party—each alleged by Zeran here under a negligence label—constitute publication. Restatement (Second) of Torts § 577; *see also Tacket v. General Motors Corp.*, 836 F.2d 1042, 1046-47 (7th Cir. 1987). In fact, every repetition of a defamatory statement is considered a publication. Keeton et al., *supra*, § 113, at 799.

In this case, AOL is legally considered to be a publisher. “[E]very one who takes part in the publication ... is charged with publication.” *Id.* Even distributors are considered to be publishers for purposes of defamation law:

Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the books, newspapers, magazines, and information available to others as to be regarded as publishers. They are intentionally making the contents available to others, sometimes without knowing all of the contents—including the defamatory content—and sometimes without any opportunity to ascertain, in advance, that any defamatory matter was to be included in the matter published.

Id. at 803. AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230’s immunity.

Zeran contends that decisions like *Stratton Oakmont* and *Cubby, Inc. v. CompuServe Inc.*, 776 F.Supp. 135 (S.D.N.Y. 1991), recognize a legal distinction between publishers and distributors. He misapprehends, however, the significance of that distinction for the legal issue we consider here. It is undoubtedly true that mere conduits, or distributors, are subject to a different standard of liability. As explained above, distributors must at a minimum have knowledge of the existence of a defamatory statement as a prerequisite to liability. But this distinction signifies only that different standards of liability may be applied *within* the larger publisher category, depending on the specific type of publisher concerned. *See* Keeton et al., *supra*, § 113, at 799–800 (explaining that every party involved is charged with publication, although degrees of legal responsibility differ). To the extent that decisions like *Stratton* and *Cubby* utilize the terms “publisher” and “distributor” separately, the decisions correctly describe two different standards of liability. *Stratton* and *Cubby* do not, however, suggest that distributors are not also a type of publisher for purposes of defamation law.

Zeran simply attaches too much importance to the presence of the distinct notice element in distributor liability. 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 computer service provider must decide whether to publish, edit, or withdraw the posting. In this respect, Zeran seeks to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability—the publisher role.

Our view that Zeran’s complaint treats AOL as a publisher is reinforced because AOL is cast in the same position as the party who originally posted the offensive messages. According to Zeran’s logic, AOL is legally at fault because it communicated to third parties an allegedly defamatory statement. This is precisely the theory under which the original poster of the offensive messages would be found liable. If the original party is considered a publisher of the offensive messages, Zeran certainly cannot attach liability to AOL under the same theory without conceding that AOL too must be treated as a publisher of the statements.

Zeran next contends that interpreting § 230 to impose liability on service providers with knowledge of defamatory content on their services is consistent with the statutory purposes outlined in Part IIA. Zeran fails, however, to understand the practical implications of notice liability in the interactive computer service context. Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA. Like the strict liability imposed by the *Stratton Oakmont* court, liability upon notice reinforces service providers’ incentives to restrict speech and abstain from self-regulation.

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification 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. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. *Cf. Auvil v. CBS 60 minutes*, 800 F.Supp. 928, 931 (E.D.Wash.1992) (recognizing that it is unrealistic for network affiliates to “monitor incoming transmissions and exercise on-the-spot discretionary calls”). Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 106 S.Ct. 1558, 1564, 89 L.Ed.2d 783 (1986) (recognizing that fears of unjustified liability produce a chilling effect antithetical to First Amendment’s protection of speech). Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.

Similarly, notice-based liability would deter service providers from regulating the dissemination of offensive material over their own services. Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves

to further possible lawsuits, service providers would likely eschew any attempts at self-regulation.

More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits. Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply “notify” the relevant service provider, claiming the information to be legally defamatory. In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability. Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230’s statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.

Zeran finally contends that the interpretive canon favoring retention of common law principles unless Congress speaks directly to the issue counsels a restrictive reading of the § 230 immunity here. *See United States v. Texas*, 507 U.S. 529, 534, 113 S.Ct. 1631, 1634-35, 123 L.Ed.2d 245 (1993). This interpretive canon does not persuade us to reach a different result. Here, Congress has indeed spoken directly to the issue by employing the legally significant term “publisher,” which has traditionally encompassed distributors and original publishers alike.

The decision cited by Zeran, *United States v. Texas*, also recognized that abrogation of common law principles is appropriate when a contrary statutory purpose is evident. *Id.* This is consistent with the Court’s earlier cautions against courts’ application of the canon with excessive zeal: “‘The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure.’” *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952) (quoting *Jamison v. Encarnacion*, 281 U.S. 635, 640, 50 S.Ct. 440, 442, 74 L.Ed 1082 (1930)); *cf. Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 110-11, 111 S.Ct. 2166, 2170-71, 115 L.Ed.2d 96 (1991) (statute need not expressly delimit manner in which common law principle is abrogated). Zeran’s argument flies in the face of this warning. As explained above, interpreting § 230 to leave distributor liability in effect would defeat the two primary purposes of the statute and would certainly “lessen the scope plainly intended” by Congress’ use of the term “publisher.”

Section 230 represents the approach of Congress to a problem of national and international dimension. The Supreme Court underscored this point in *Reno v. ACLU*, finding that the Internet allows “tens of millions of people to communicate with one another and to access vast amounts of information from around the world.[It] is ‘a unique and wholly new medium of worldwide human communication.’” 521 U.S. at -, 117 S.Ct. at 2334 (citation omitted). Application of the canon invoked by Zeran here would significantly lessen Congress’ power, derived from the Commerce Clause, to act in a field whose international character is apparent. While Congress allowed for the enforcement of “any State law that is consistent with [§ 230],” 47 U.S.C. § 230(d)(3), it is equally plain that Congress’ desire to promote unfettered speech on the Internet must supersede conflicting common law causes of action. Section 230(d)(3) continues: “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.” With respect to federal-state preemption, the Court has advised: “[W]hen Congress has ‘unmistakably ... ordained,’ that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. The result is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977) (citations omitted). Here, Congress’ command is explicitly stated. Its exercise of its commerce power is clear and counteracts the caution counseled by the interpretive canon favoring retention of common law principles.

III.

The CDA was signed into law and became effective on February 8, 1996. Zeran did not file his complaint until April 23, 1996. Zeran contends that even if § 230 does bar the type of claim he brings here, it cannot be applied retroactively to bar an action arising from AOL’s alleged misconduct prior to the CDA’s enactment. We disagree. Section 230 applies by its plain terms to complaints brought after the CDA became effective. As noted in Part IIB, the statute provides, in part: “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(d)(3).

Initially, it is doubtful that a retroactivity issue is even presented here. Retroactivity concerns arise when a statute applies to conduct predating its enactment. Section 230 does not directly regulate the activities of interactive computer service providers like AOL. Instead, § 230 is addressed only to the bringing of a cause of action. Here, Zeran did not file his complaint until over two months after § 230’s immunity became effective. Thus, the statute’s application in this litigation is in fact prospective. *See St. Louis v. Texas Worker’s Compensation Comm’n* 65 F.3d 43, 46 (5th Cir.1995) (holding “issue is not technically one of retroactivity” when statute applies to “filing of the complaint”), *cert. denied*, 518 U.S. 1024, 116 S.Ct. 2563, 135 L.Ed.2d 1080 (1996); *Vernon v. Cassadaga Valley Central Sch. Dist.*, 49 F.3d 886, 889 (2d Cir.1995) (same).

Even if this were a case implicating the application of a federal statute to pre-enactment events, the Supreme Court’s *Landgraf* framework would nevertheless require § 230’s application to Zeran’s claims. *Landgraf* instructs us first “to determine whether Congress has expressly prescribed the statute’s proper reach.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229 (1994). This case can be resolved at this first step. In § 230(d)(3), 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. Other circuits have interpreted similar statutory language to clearly express Congress’ intent that the relevant statutes apply to bar new actions under statutorily specified conditions. *See Wright v. Morris*, 111 F.3d 414, 418 (6th Cir.1997) (holding language “No action shall be brought ...,” 42 U.S.C. § 1997e(a), to “expressly govern[] the bringing of new actions”), *cert. denied*, 522 U.S. 906, 118 S.Ct. 263, 139 L.Ed.2d 190 (1997); *Abdul-Wadood v. Nathan*, 91 F.3d 1023, 1025 (7th Cir.1996) (holding language “In no event shall a prisoner bring a civil action or appeal a judgment ...,” 28 U.S.C. § 1915(g), to govern the bringing of new actions or filing of new appeals).

If we were to find a directive as plain as § 230(d)(3) to be ambiguous as to Congress' intent, we would be announcing a new superclear-statement condition for the retroactive operation of statutes. Such a jurisprudential shift would be both unwise and contrary to the Court's admonitions in *Landgraf*: "Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary." 511 U.S. at 267-68, 114 S.Ct. at 1498. Here, Congress decided that free speech on the Internet and self-regulation of offensive speech were so important that § 230 should be given immediate, comprehensive effect.

There finally is a significant contrast between statutes that impose new liabilities for already-completed conduct and statutes that govern litigants' access to courts. For example, courts often apply intervening statutes that restrict a court's jurisdiction. *See Landgraf*, 511 U.S. at 274, 114 S.Ct. at 1501-02. Section 230 neither imposes any new liability on Zeran nor takes away any rights acquired under prior law. No person has a vested right in a nonfinal tort judgment, much less an unfiled tort claim. *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir.1986). Furthermore, Zeran cannot point to any action he took in reliance on the law prior to § 230's enactment. Because § 230 has no untoward retroactive effect, even the presumption against statutory retroactivity absent an express directive from Congress is of no help to Zeran here.

IV.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

No. 971488

**In The
Supreme Court of the United States**

October Term, 1998

KENNETH M. ZERAN

Petitioner,

vs.

AMERICA ONLINE, INC.

Respondent.

*On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit*

PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

Did the Court of Appeals misconstrue and misapply Section 230 of the Communications Decency Act to immunize America Online, Inc. from liability for its negligence and to apply the Act in such a way as to bar Petitioner's recovery for acts which significantly predated the adoption of the Act?

Petitioner KENNETH ZERAN respectfully prays that based upon significant questions as to the construction and application of Section 230 of the Communications Decency Act (the "CDA") stated in the Questions Presented herein this Court grant a writ of *certiorari* to review the decision of the United States Court of Appeals for the Fourth Circuit which affirmed entry by the United States District Court for the Eastern District of Virginia of judgment on the pleadings dismissing ZERAN's pending action under Rule 12(c) of the Fed.R.Civ.P.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Fourth Circuit denying Petitioner's motion for rehearing with suggestion for *en banc* review without opinion has not been reported but is reproduced in the Appendix. (App. A-19) The Order of the United States Court of Appeals for the Fourth Circuit affirming the United States District Court for the Eastern District of Virginia was reported at 129 F.3d 327 (4th Cir. 1997) (App. A).

The Order of the United States District Court for the Eastern District of Virginia dismissing the action was reported at 958 F.Supp. 1124 (E.D. Va. 1997).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on November 12, 1997. The Order of the Court of Appeals denying Petitioner's timely motion for rehearing with suggestion for *en banc* review was dated and entered December 9, 1997. (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 230 of the Communications Decency Act reads as follows:

Section 230. PROTECTION FOR PRIVATE BLOCKING AND
SCREENING OF OFFENSIVE MATERIAL.

(b) It is the policy of the United States --

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking and harassment by means of a computer.

(c) Protection for 'good samaritan' blocking and screening of offensive material.

(1) Treatment of publisher or speaker

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.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of:

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene lewd lascivious filthy, excessively violent, harassing or otherwise objectionable whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 of this title chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other criminal statute.

.....

(3) State Law

Nothing in this section shall be construed to prevent any state from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

47 U.S.C. § 223 provides:

Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications

(a) Prohibited general purposes

Whoever –

(1) in interstate or foreign communications

.

(C) makes a telephone call or utilizes a telecommunication device, whether or not the conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communication.

.

shall be fined under Title 18, or imprisoned not more than two years, or both.

STATEMENT OF THE CASE

Two fundamental questions are presented by this case:

(1) whether Section 230(c) of the CDA, 47 U.S.C. § 230(c), can be properly construed to immunize proprietary computer online service providers (“OSPs”) from state common law negligence liability, by absolving them from any legal duty to injured parties in their capacity as distributors of defamatory, fraudulent, harassing, or otherwise injurious subject matter after receiving actual notice that such subject matter was being posted on their own proprietary bulletin boards, and (2) whether the CDA which became effective February 6, 1996, was properly invoked to bar a claim which arose during April and May of 1995, but which was not filed until after the effective date of the CDA.

For purposes of this Petition it is accepted that Respondent AMERICA ONLINE, INC. (“AOL”) failed to use reasonable care to expeditiously delete the offending posting, prevent its reposting or post an appropriate notice itself of the bogus nature of the subject matter.

A. Procedural Background and The Complaint

ZERAN filed his complaint on April 23, 1996, in the United States District Court for the Western District of Oklahoma.¹ Discovery ensued. Respondent AOL moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Fed.R.Civ.P. and/or to transfer the action to the United States District Court for the Eastern District of Virginia. The motion to transfer was granted and the motion to dismiss reserved for the transferee court and the case was then

transferred on October 28, 1996. Discovery continued. Respondent next moved pursuant to Rule 12(c) of the Fed.R.Civ.P. for judgment on the pleadings and concurrently withdrew its Motion to dismiss pursuant to Rule 12(b)(6) of the Fed.R.Civ.P. Oral argument was held on the motion on February 28, 1997, after which the District Court stayed discovery. The court granted AOL's motion on March 21, 1997.

[1] On January 4, 1996, before the effective date of the CDA, alleging facts identical to those contained in the AOL Complaint, plaintiff sued an Oklahoma City radio station that broadcast the original AOL posting. (cf. Ex. A and Ex. B to AOL's Brief in Support of Its Rule 12 Motion to Dismiss or, In The Alternative, To Transfer).

ZERAN's complaint averred that ZERAN, an accomplished artist, photographer, filmmaker, and interviewer, operating out of his home in Seattle, Washington, publicized his telephone in connection with various businesses.

On April 25, 1995, in the wake of the unprecedented terrorist act in the April 19th bombing of the Murrah building in Oklahoma City, an unidentified AOL user posted on AOL bulletin boards the availability for sale "Naughty Oklahoma T-Shirts" which listed the notice to be "From: Ken ZZ03"² giving ZERAN's Seattle business phone. ZERAN, never having been an AOL member, first discovered the existence of the posting from a journalist that had located it on the bulletin board of the Michigan Military Movement. The listing was a vicious, cruel hoax designed to generate outrage at the purported seller in all those who read it or heard about it.³

[2] "Ken ZZ03" is a "screen name" utilized by AOL members, the true identity of the member being generally known only to AOL. AOL maintains a database with the name, addresses, phone numbers and credit card numbers of each member searchable by screen name. In the case of the person posting the "Naughty Oklahoma T-Shirts," he was able to provide false information to AOL so as to avoid detection, because AOL did not verify member information before allowing the new member to go online utilizing one of the trial memberships that AOL disseminated by the millions through direct mail, in magazines and books and loaded 011 to the hard disks of new computers. AOL's trial memberships offering free hours of Online time are so ubiquitous that the court and its staff have undoubtedly received more than one. In the case of Ken Z033, after that membership he fraudulently obtained was terminated, he used at least two more AOL memberships with bogus information and similar screen names (Ken ZZ033 and Ken Z033) to post increasingly offensive items for sale.

[3] At a time when bodies were still being dug out of the rubble of the Murrah bombing and funerals for victims were being conducted by the dozens, the "naughty" t-shirts included the slogans "Rack'em, Stack'em and Pack'em-Oklahoma 1995," "Putting the Kids to bed . . . Oklahoma 1995" and "McVeigh for President 1996." Subsequent bogus postings added "Forget the rescue let the maggots take over-Oklahoma 1995" and "Finally a day care center that can keep the kids quiet-Oklahoma 1995." *Zeran*, 958 F.Supp. at 1127 n. 5.

When ZERAN was notified of the posting, that same day he notified AOL both by telephone and later by letter, requesting that the posting be deleted and that appropriate notice be placed on AOL that the posting was bogus.⁴ AOL declined to post any such notice on its system and the posting remained on and/or was reposted with slightly different screen names, always using ZERAN's telephone number, for at least a week. As a result of AOL's failure to expeditiously delete the posting and/or prevent the repeated further postings by failing to take adequate electronic blocking measures⁵, ZERAN's telephone was tied up with obscene, harassing telephone calls and he endured the further dissemination of the bogus posting

attributed to him through a radio broadcast on an Oklahoma City station on May 1, 1995, which generated extremely violent, aggressive phone calls including numerous death threats.

[4] Since he was not an AOL member, Petitioner had no capability to respond to these postings with his own disclaimers of his innocence placed throughout the AOL system. Since he was not an AOL member, Petitioner is in a very different position from AOL members and AOL's refusal to post such disclaimers was a breach of its duty of care to Petitioner.

[5] Petitioner alleged that readily available internal computer procedures and/or computer programs existed which would have allowed AOL to block any further attempts to place more postings on AOL using Petitioner's phone number. With a blocking program in effect, any such Ken Z postings would have been intercepted by AOL before they appeared on AOL's service. Liability for negligence in adopting blocking measures is one of Petitioner's distributor theories.

ZERAN sued AOL for negligence as a distributor for failure to exercise a reasonable standard of care to protect ZERAN from the foreseeable consequences of the bogus posting. ZERAN averred in his complaint that AOL owed a duty of care as a substantial commercial operator of *its* own computer bulletin board, after receiving actual notice of the offending posting, to take appropriate remedial action such as screening out the incendiary and/or bogus material as well as his telephone number posted on its computer bulletin board service. The complaint expressly averred that AOL was on constructive notice by reason of the law enunciated in *Cubby, Inc. v. CompuServe, Inc. et al.* 776 F. Supp. 135 (S.D.N.Y. 1991) that it was obligated after due notice to be able to screen incendiary, defamatory and/or bogus material a standard applied to interactive computer services providers in their capacity as distributors of information as determined in *Cubby, Inc.*⁶

[6] Both courts below insisted on casting Petitioner's claim as a defamation claim (e.g. "Although Zeran artfully attempts to plead his claims as ones of negligence...", 129 F.3d at 332), despite Petitioner's specific allegations of fault-based acts which breached common law duties of care imposed on AOL. Moreover, the "artfully" comment which implies some last-minute attempt to plead around § 230, ignores the specific rebuttal to similar assertions by AOL, including letters from Petitioner's counsel to AOL asserting distributor negligence months before the CDA was adopted. (*see* Brief in Opposition to Defendant's Motion for Judgment on the Pleadings at 6-8, especially Exs. D, June 26, 1995, letter and E, August 4, 1995, letter to the Affidavit of Leo Kayser, III).

With the significant exception of the court's characterization of this case as one involving the Internet⁷, the facts were fairly presented by the District Court. By way of emphasis the facts establish that AOL had actual notice of the damaging bogus posting on its proprietary computer bulletin board through the direct notification by ZERAN himself to AOL's personnel, both oral and by letter. Secondly ZERAN was not a member of AOL and had no standing or ability to protect himself as to the bogus posting using his first name, distinctive initial and telephone number. Thirdly, the averments that AOL had the capability or should have had the capability of screening and blocking the bogus posting, after having received actual notice, is deemed true.

[7] As more fully discussed below, this case involves a private, proprietary, member-only OSP with many features unique to AOL and strict rules governing member online conduct—a stark contrast to the free-for-all nature of the Internet characterized by the court. 958 F.Supp. at 1126, ft. 1. Indeed, the use of OSPs such as AOL as a gateway to the Internet (no one can get into AOL from the Internet except AOL members) is completely irrelevant to the events of this case.

That the complaint fairly states a claim for negligence based upon the standard applied to a distributor (as compared with a publisher) of content is not at issue. 958 F. Supp. 1124 (E.D. Va.), *affd.* 129 F.3d 327 (4th Cir. 1997).

The District Court in granting AOL's motion for judgment on the pleadings equated publisher liability with distributor liability for purposes of § 230(c) of the CDA, even though § 230(c) does not use the word distributor or in any way indicate the intent of Congress to overrule *Cubby, Inc.* *supra*, which held computer service providers to be treated as distributors and not as publishers for purposes of liability with respect to injurious content posted on their proprietary systems. The import of *Cubby, Inc.* was to absolve such providers from any legal duty to screen, block or otherwise edit in the course of postings or transmissions any of the content that might appear on their systems in the absence of notice. On the other hand, **with notice**, such providers still had a duty to persons who foreseeably could be injured due to content posted on their systems on the analogous basis of a bookstore, news vendor, or library.

B. Background Prior to Enactment of Section 230 of the CDA

The scienter standard as applied to distributors of content is compelled by the First Amendment as noted by the *Cubby, Inc.* court:

The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment, made applicable to the states through the Fourteenth Amendment." *Id.* at 139. (Emphasis added, citing *Smith v. California*, 361 U.S. 147 (1959)).

Then, in 1995 *Stratton-Oakmont Inc. v. Prodigy Service Co., Inc.*, 1995 WL 323710 (Sup. Ct. N.Y. May 24, 1995) was decided, in which that court held that a cyberspace distributor, in part, because it was prescreening some content for distasteful words, was held to be a publisher and, thus, strictly liable for false information published on one of its bulletin boards. Unlike, ZERAN, no notice had been given to Prodigy of the allegedly false information by Stratton-Oakmont or anyone else.

The legislative history on § 230 of the CDA demonstrates expressly that the purpose of § 230, was to overrule *Stratton-Oakmont*, *supra*, and encourage computer services providers to edit, screen out or block offensive content without risk of exposure to liability as a publisher. Specifically, the Conference Report on Section 230 stated:

One of the specific purposes of [Section 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users **as publishers or speakers of content** that is not their own **because they have restricted access to objectionable material.** (Emphasis added.)

H.R. Conf. Rep. No. 104-458, at 194 (1996). The headings for § 230 and § 230(c) quoted above, make it express that the purpose of the statute is to provide protection for "private blocking and

screening of offensive material” and for “Good Samaritan Blocking and Screening” consistent with the overruling of *Stratton-Oakmont*. Nothing in § 230(c) overrules the actual notice standard for distributorship liability enunciated in *Cubby, Inc.*

C. Decisions of the District Court and Fourth Circuit

The District Court rested its decision on two grounds concluding that the term “publisher or speaker” which is not defined in the CDA or its legislative history, encompasses distributors, such as AOL. Secondly, the trial court determined that the Congressional intent of promoting content monitoring would be undermined unless distribution liability was deemed preempted.

The Fourth Circuit adopted the District Court’s conclusions, but went well beyond the statute and legislative history in finding a broad objective to promote free speech in a provision of the CDA crafted to encourage content screening and blocking of certain content.

D. The Lower Courts Have Misconstrued The Statute

Both the District Court and the Court of Appeals exaggerated the burden placed on OSPs like AOL which would arise from imposing distributor liability on them based upon Petitioner's claim. Whereas because of the many transmissions daily it would be virtually impossible for either an Internet Service Provider (“ISP”) or major OSP to screen them in advance (consistent with the duty of a publisher), because of the availability of electronic means such as blocking programs (alleged in the Complaint), proprietary OSP's like AOL can meet the demands of distributor liability (need to act arises only after notice) regardless of the volume of their system traffic. This distinction supports § 230(c) as having been designed by Congress to impact only **publishers** and to avoid the *Prodigy* case results—a distinction that escaped both the District Court and the Court of Appeals.

Moreover, both Courts’ construction of an impossibility of meeting the duty of a distributor in addition to having incorrectly supplied a intent for Congress that is patently missing from the Act itself (i.e. Congress was aware of the publisher and distributor dichotomy from *Stratton-Oakmont* and *Cubby, Inc.* and could have easily added “distributor” in § 230(c)(1), but did not do so) the Circuit Court also necessarily pronounces the policy behind § 230 as being a futile goal.

1. Section 230(c)(1)

Although the term publisher is not defined in the statute, legislative history shows that Congress was concerned about publisher liability as imposed in *Stratton-Oakmont* supra, wherein the court there expressly distinguished between publishers, on the one hand, and distributors, such as AOL. It was this narrow definition, and not a broader definition taken from the Restatement of Torts relied upon by the lower courts, that Congress intended to incorporate in the CDA. Secondly, the policy of promoting online content screening would be furthered not undermined if § 230(c) were construed to allow distributor liability because of the effect of subsection (2) of the Good Samaritan

exemption which the Fourth Circuit failed to address. The intent of Congress was to codify the standard set forth in *Cubby, Inc.*

The Fourth Circuit also engaged in a sweeping policy declaration, divorced from any specific reference to § 230 or legislative history that:

If computer service providers were subject to distributor liability, they would face liability each time they receive notice of a potentially defamatory statement -- from any party, concerning any message.⁸

[8] Contrary to the Circuit Court's assertion of the burden on OSPs by treating AOL as a distributor, AOL asserted itself to be a distributor and not a publisher (*see* ¶ 2.7. to Addendum to Plaintiff's Petition for Rehearing and Suggestion for Hearing En Banc) and AOL had already specifically reserved the right to itself to police its service and terminate memberships for improper conduct in violation of detailed Terms of Service and Rules of the Road. (¶ 8.2, *Id.*).

In making this analysis as a matter of policy, the Fourth Circuit has manifestly departed from any accepted rule of judicial construction and invaded the province of the legislature in its rationale for affirming the District Court on such reasoning. The construction of § 230 of the CDA does not represent a faithful interpretation of congressional intent. Section 230 was plainly intended to encourage interactive computer services to restrict access to injurious content.⁹ Under the rule announced below, computer service providers would be completely immune from any liability, and therefore would have no incentive to respond to notification by parties, especially non-AOL members, being injured by posted content-especially those posted anonymously because of AOL's corporate policy of allowing prospective “members” to go online before their identity is confirmed.

[9] In a floor colloquy between the House authors, Congressman Cox stated:

Currently, however, there is a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content. These providers face the risk of increased liability if they police their systems. . . The Cox-Wyden amendment removes the liability of providers such as Prodigy who currently make a good faith effort to edit the smut from their systems. 141 Congo Rec. H 8460, 8471 (August 5, 1995).

Contrary to the clear purpose of the CDA, the effect of the Circuit's decision is to reward OSPs like AOL that do absolutely nothing the proverbial “Bad Samaritan.”

2. Section 230(d)(3)

Congress has expressly limited the impact of the CDA on existing state laws by providing that only those state laws inconsistent with the other subparts of the section are unenforceable. Congress provided specific restrictions on liability of an “interactive computer service” to either “actions taken in good faith to restrict access to the availability” of certain material (§ 230(c)(2)(A)) or “any action taken to enable or make available to information content providers or others technical means to restrict access to material described in paragraph (1).” § 230(c)(2)(B). Given these limitations on the immunity provided by the CDA, imposing liability

on AOL for its negligence under traditional state tort principles is not inconsistent with the purpose of the Act.

E. The Petitioner's Claims Were Not Barred Even Though the Petitioner's Suit Was Filed After the Effective Date of the CDA.

The events which give rise to negligence liability for AOL under traditional state tort concepts occurred in April and early May, 1995. The CDA was signed into law in February, 1996. Long prior to adoption of the CDA, plaintiff was setting forth the operative facts of this case and asserting his entitlement to damages from AOL under theories of liability then cognizable.

The issue before this Court is the impact of both *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994) and *Hughes Aircraft Co. v. US. ex rei. Schumer*, 117 S.Ct. 1871 (1997) and whether the Court will further extend its retroactivity jurisprudence. In *Landgraf* and its companion case, *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 114 S.Ct. 1510 (1994), the Court considered whether two sections of the Civil Rights Act of 1991 should be given retroactive effect to a decision on appeal. The initial inquiry is whether Congress has provided for such a retroactive effect. The court observed:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. *Id.* at 1505.¹⁰

[10] AOL does not argue that Congress has specifically provided for retroactive effect of § 230 of the CDA—and Congress undoubtedly could have done so.

In *Landgraf* the court meticulously reviewed the legislative history and statutory language of the Civil Rights Act and determined that Congressional intent to apply the new provisions retroactively was not justified. *Id.* at 1489-96. In *Landgraf* the court noted:

A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date. *Id.* at 1491.

In the absence of express Congressional intent or through application of the rules of statutory interpretation if retroactivity is not found, then other rules must be looked to:

When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our

traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. *Id.* at 1505.

In *Hughes Aircraft*, the Court cautioned that:

Landgraf does not purport to define the outer limit of impermissible retroactivity. Rather, our opinion in *Landgraf*, like that of Justice Story, merely described that any such effect constituted a sufficient, rather than a necessary, condition for invoking the presumption against retroactivity . . . and made no suggestion that Justice Story's formulation was the exclusive definition of presumptively impermissible retroactive legislation. *Hughes Aircraft*, 117 S.Ct. at 1876.

The Circuit Court appears to hold that retroactively (i.e. after all of the seminal events have been completed) effecting the elements of causes of action (or completely eliminating all available causes of action) is different if the party is a plaintiff than if it is a defendant—a one-way street over which only defendants may travel. Nothing in *Landgraf* as explicated by *Hughes Aircraft* so limits the rights free from retroactive denial to only defendants or would not extend the protection of the law for plaintiffs to events which predated the adoption of the legislation. The focus of the *Landgraf/Hughes Aircraft* analysis is the “potential unfairness of retroactive application.”¹¹ *Landgraf*, 114 S.Ct. at 1501. The Court of Appeals quite simply “attached new consequences to a completed act.” *Id.*

[11] "i.e. whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf* at 1505. Arguably if the *Landgraf* examples were the outer limits of retroactivity; Petitioner's rights were sufficiently "impaired" to meet even this restrictive standard.

It would be manifestly unfair under these circumstances to deprive Petitioner of well-established state tort remedies against AOL for its negligence in taking no action or long-overdue action when finally goaded by the FBI, Secret Service and local police -- turning Section 230's Title literally on its head -- offering protection for refusing to block and refusing to screen the incendiary Ken Z postings.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE ERROR OF THE COURT BELOW ADVERSELY IMPACTS THE PUBLIC INTEREST AND SAFETY AND THIS CASE PRESENTS THE COURT THE FIRST OPPORTUNITY TO INTERPRET THE LIMITS OF THE IMMUNITY GRANTED ONLINE SERVICE PROVIDERS BY THE CDA.

The Petitioner's petition for a writ of certiorari should be granted because of the major distinctive features of this case: (1) it involves a proprietary private member-only online service not the Internet; (2) it involves civil not criminal liability; (3) it involves federal law overriding state tort law, an area traditionally left to the states, expressly recognized by § 230(d)(3); (4) it is the first case interpreting Section 230(c) and the interplay between sections 230(c) and 230(d), (5) it is of great public importance and interest, and (6) the consequence of the decision below is to encourage criminal conduct.

(1) Despite repeated references to the Internet in both decisions below, this case involves a very different type of “Interactive computer service”: to go online one has to become a member; provide name address, phone number, and credit card number' agree to a specified code of online conduct (“Terms of Service” and “Rules of the Road”), the violation of which subject the member to termination etc. These significant differences impact directly on the public policy question of imposing distributor liability on an OSP such as AOL.

(2) This Court has previously reviewed the criminal provisions of the CDA (47 U.S.C. § 223) in *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329 (1997), which focused on the Internet. The Court affirmed the lower court's conclusion that provisions banning indecent" communications violated the First Amendment, but left the prohibitions relating to obscene communications intact. 117 S.Ct. at 2350. The Court has not yet considered the CDA's impact on civil tort liability, an area of growing public impact and concern.

(3) The District Court preempted a traditional area of state interest, tort law, because it conflicted with a supposed extension of the language of § 230(c) to a distributor (which is, of course, not in the section itself) and the purpose discerned in the CDA itself by the Court. *Zeran*, 958 F.Supp. at 1133-335.

Eschewing the traditional preemption analysis used below, the Court of Appeals opinion found a purpose of the CDA was to “eliminate the threat that tort-based lawsuits pose to freedom of speech,” which necessitated the extension of publisher immunity to distributors. Of course nothing in § 230(c) refers to any such concern, nor does any of extent legislative history. In point of fact, the titles to sections 230 and 230(c) reflect Congressional concern to the contrary as does the CDA-**limitations** on speech by encouraging a provider of an interactive computer service to “restrict access to or the availability of material that the provider or user considers to be obscene . . . harassing, or otherwise objectionable, **whether or not such material is constitutionally protected**” (§ 230(c)(2)(A)) (emphasis supplied), and protecting “any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).” § 230(c)(2)(B).

Moreover, the Court of Appeals' determination that instead “of subjecting themselves to possible lawsuits, service providers would likely eschew any attempts at self-regulation” (129 F.3d at 333), ignores the immunity provided even distributors for “any action voluntarily taken in good faith to restrict access or availability of material” under § 230(c)(2)(A).

(4) No case involving the CDA has yet reached this stage and this Petition presents the Court with an opportunity to determine these novel issues of public significance.

(5) This case has already been the subject of a number of commentaries. e.g. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 Albany L.Rev. 147 (1997), (criticizing the District Court decision)¹²; Ballon, *Defamation and Preemption Under the Telecommunications Act of 1996: Why The Fourth Circuit's Ruling in Zeran v. America Online, Inc. is Wrong*, (in press) *Journal of Internet Law* March 1998.¹³

[12] The author asserts that imposing liability on the provider is likely the only way to protect a defamed plaintiff, observing:

This is particularly applicable to Zeran. AOL after all controlled its own servers, and Zeran had no ability to remove the defamatory messages himself. Furthermore, since neither Zeran nor AOL could identify the person who posted the messages, Zeran could neither motivate that person to remove them nor sue him for damages. *Id.* at 173.

[13] As the title suggests, the author is highly critical of both the decisions below. This article will also be contained in the author's treatise, *The Law of the Internet* (Glasser Legal Works 1998).

Additionally, it raises the specter of a totally innocent individual being victimized because of corporate policies (recruiting new members with trial memberships without verifying their identity refusing to notify its members that the posting is bogus not adopting available blocking technology to stop repeated postings, etc.) deprived of any remedy against the party that originally posted (anonymously) and stripped of any relief against the OSP responsible for the original posting (by not verifying identity and letting the culprit online), for continuing injuries (by not alerting its members) and for subsequent postings (by not blocking them). The term "Kafkaesque" was made for this case. With total impunity for its acts,¹⁴ the public, especially AOL non-members unable to defend themselves, are at the mercy of an AOL with no interest in carrying out the true purposes of § 230.

[14] AOL contended at the District Court that AOL would be immune from liability even if "AOL knew of the defamatory nature of the material and made a decision not to remove it from the network based upon a malicious desire to cause harm to the party defamed." *Zeran*, 958 F.Supp. at 1133 n. 20.

(6) Because AOL's corporate policy allows individuals to go online with assurance of escaping detection¹⁵ interpreting sections 230(c) and (d)(3) to immunize AOL for this negligent act (intentionally undertaken) contradicts a specific Congressional purpose expressed in sections 230(b)(5) and (d)(1)-indeed, it encourages anonymous computer crime, crime committed in such a way as to incite many others (understandably incensed at the purveyor of the "naughty" t-shirts) to violate 47 U.S.C. § 223(a)(1)(C) by making threatening, harassing phone calls.

[15] The worst fate for such a criminal is to have the bogus membership canceled. Of course, as happened here, a new trial membership with yet a new identity can be established within minutes and the crime spree resumed.

The Court should grant certiorari to review these matters of great importance and resolve these issues of first impression concerning § 230 of the CDA.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' APPLICATION OF THE CDA TO RETROACTIVELY BAR PETITIONER'S STATE TORT CLAIM CONFLICTS WITH THE COURT'S RECENT RETROACTIVITY JURISPRUDENCE.

The Court should grant certiorari to extend its recent decisions in *Landgraf and Hughes Aircraft* to address the rights of tort plaintiffs such as Petitioner to recover for completed acts of negligence committed before the effective date of legislation like the CDA, especially where the petitioner clearly manifested reliance upon the law existing at the time of the completed events which gave rise to liability and took affirmative steps to pursue his available remedies **and** the CDA contains no clear intention to apply retroactively.

There can be no doubt that Petitioner repeatedly manifested his reliance upon settled case law long before the adoption of the CDA and applying § 230(c) retroactively would render it extremely unfair to dismiss plaintiff's claims.¹⁶

[16] The Circuit Court's opinion is clearly incorrect when the court stated:

Furthermore, Zeran cannot point to any action he took in reliance on the law prior to prior to § 230's enactment. 129 F.3d at 335.

All of this material was presented to the District Court to rebut an argument by AOL that Petitioner's crafty lawyers had concocted a new negligence theory to avoid the CDA and that such the court should reject such attempts by "creative litigants."

These include:

1. Plaintiff took immediate action to notify AOL of the incendiary posting and followed it up with many communications to AOL to remove the posting and avoid others from being posted (Complaint ¶¶ 7, 12, 13, 14, 24, 25, 28, and 33);
2. AOL failed to take prompt action on plaintiff's request to remove the posting, refused to post a retraction or notice that the posting was false, and failed to take steps to preclude repostings (Complaint, ¶¶ 42-45);
3. Because of the negligent manner in which AOL solicits its new members, AOL (and the FBI and Secret Service too) was, and remains to this day, unable to identify the AOL member who joined using bogus information that triggered hundreds of criminal, harassing phone calls; the person(s) who posted the Ken Z postings changed his bogus information at least twice and used new (deceptively similar) screen names. (see Exs. 3, 4 and 5 and Ex. 6, Answer to Interrogatory 3, #15, all attached to Petitioner's Brief in Opposition to Defendant's Motion for Judgment on the Pleadings);
4. Plaintiff's counsel asserted from the earliest time that AOL was liable as a distributor and not a publisher, establishing plaintiff's reliance on the law as it undeniably existed prior to

the adoption of the CDA. (Ex. D and E to Kayser Aff. attached to Petitioner's Brief in Opposition to Defendant's Motion for Judgment on the Pleadings);

5. Before the effective date of the CDA, plaintiff instituted an action for damages arising from an Oklahoma City radio broadcast which was a direct and foreseeable result of AOL's negligence; the basic allegations in the Complaint against Diamond Broadcasting, Inc. are identical to those in the Complaint against AOL. (*see* footnote 1, *supra*);

6. All of the acts which give rise to AOL's tort liability occurred (were completed) long before the adoption of the CDA.

The Court should determine that the "potential unfairness of retroactive application" under *Landgraf and Hughes Aircraft* precludes the elimination of Petitioner's sole remedy by the Court of Appeal's interpretation of retroactivity principles.

CONCLUSION

This case presents novel questions of exceptional importance for the Court and this country and its future. Only by addressing these questions can the rights of its citizens and the Petitioner be vindicated. The Court faces a "Y" in the road on the information superhighway. The choices made by the Court will lead us in one direction or the other. Such a weighty choice deserves the full consideration by the Court. The writ should be granted.

DATED: March 9, 1998

No. 971488

**In The
Supreme Court of the United States**

October Term, 1998

KENNETH M. ZERAN

Petitioner,

vs.

AMERICA ONLINE, INC.

Respondent.

*On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit*

**OPPOSITION OF AMERICA ONLINE, INC.
TO PETITION FOR A WRIT OF CERTIORARI**

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied settled rules of statutory construction in determining that 47 U.S.C. § 230(c)(1), which commands 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,” barred Petitioner’s cause of action, which sought to hold Respondent America Online, Inc., a provider of an interactive computer service, liable for allegedly defamatory messages provided by a third party.

2. Whether the Court of Appeals properly applied settled law concerning the temporal reach of federal statutes in concluding that 47 U.S.C. § 230(d)(3), which provides in relevant part that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section,” required application of 47 U.S.C. § 230(c)(1) to Petitioner’s cause of action, which Petitioner did not file until after the statute was enacted and became effective.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent America Online, Inc. states as follows:

America Online, Inc. has no parent companies. The following entities are non-wholly owned subsidiaries of America Online, Inc.: AOL America Online (Deutschland) GmbH; AOL Bertelsmann Management GmbH; AOL Bertelsmann Online Europe GmbH; AOL Bertelsmann Online France S.N.C.; AOL Bertelsmann Online GmbH & Co KG; AOL Bertelsmann Online Limited; AOL Bertelsmann Online Services; AOL Bertelsmann Online (UK Management) Limited; AOL Holding GmbH; AOL (Japan) Inc.; CIS Holding BV; CompuServe Interactive Services (Deutschland) GmbH & Co. KG; CompuServe Interactive Services France SNC; CompuServe Interactive Services Management Deutschland GmbH; CompuServe Interactive Services Nederland CV; CompuServe Interactive Services Schweiz GmbH; CompuServe Management BV; CSi CompuServe Interactive Services UK Digital City, Inc.; Digital Marketing Services, Inc.; and Thrive J.V.

Respondent America Online, Inc (“AOL”), defendant below, respectfully opposes the Petition for a Writ of Certiorari for the reasons set forth herein.

STATUTORY PROVISIONS INVOLVED

The statute at issue in this case is section 509 of the Telecommunications Act of 1996, now codified at 47 U.S.C.A § 230 (West Supp. 1997) (“Section 230”). Because Petitioner failed to set out the statute in full in his Petition, the entire text of the statute is reprinted in the Appendix to this Opposition.

COUNTERSTATEMENT

1. America Online, Inc. AOL operates an interactive computer service over which millions of subscribers disseminate and receive information by means of computer modem connections to AOL’s computer network. Pet. App. A-3. Much of the information transmitted

over AOL's service originates with AOL subscribers, who may transmit information over AOL's service through a variety of methods, including electronic mail (private electronic communications addressed to specific recipients) and message boards (online areas where subscribers may post messages that are then generally available for review by other subscribers). *Id.*

2. The Complaint. According to the Complaint,¹ on April 25, 1995, an unidentified person using the screen name "Ken ZZ03"² posted on an AOL message board a message advertising "Naughty Oklahoma T-Shirts" with offensive slogans referring to the bombing of the federal building in Oklahoma City. *Id.* The message indicated that anyone interested in the t-shirts should contact "Ken" and listed a phone number that belonged to Zeran's business, which he operated out of his home. *Id.* Zeran allegedly began receiving derogatory and threatening phone calls as a result of the posted message. *Id.* After Zeran learned of the message from the phone calls, he allegedly informed AOL that the posting was a hoax and asked that it be removed. *Id.* at A-3 to A-4.

[1] Because the courts below adjudicated this case on the basis of AOL's motion for judgment on the pleadings, the allegations in the complaint were accepted as true. By reciting Zeran's allegations, AOL does not concede their truth.

[2] A "screen name" is a unique set of characters (letters or numbers) that identifies a person or entity that originates a message or posting transmitted via an interactive computer service or the Internet. AOL permits each of its subscribers to have as many as five different screen names of no more than ten characters each. It is commonplace for an AOL subscriber's screen name(s) to be different from his or her real name.

Shortly after being contacted by Zeran, AOL deleted the posted message. *Id.* at A-24. But over the next several days, an unidentified person using two slightly different screen names posted three similar messages. *Id.* at A-24 to A-25. During this period, Zeran allegedly telephoned AOL on a number of occasions to request removal of the messages. *Id.* He allegedly continued to receive unwanted calls about the messages. *Id.*

On May 1, 1995, someone sent a copy of one of the posted messages to an announcer for radio station KRXO in Oklahoma City. *Id.* at A-4. That day, KRXO allegedly aired a broadcast in which the announcer read out parts of the message, gave Zeran's business phone number over the air, and encouraged listeners to call the number. *Id.* As a result of the broadcast, Zeran allegedly received death threats and other calls with violent language from Oklahoma City. *Id.*

On January 4, 1996, Zeran filed suit in federal district court in Oklahoma against the owner of radio station KRXO. *Id.* at A-5. In that suit, he alleged that the station's broadcast in which the announcer read aloud portions of one of the posted messages constituted defamation, false light invasion of privacy, and intentional infliction of emotional distress. The district court in that case recently granted summary judgment in favor of KRXO's owner on each count of Zeran's complaint.³

[3] *Zeran v. Diamond Broad, Inc.*, No. CIV-96-0008-T (W.D. Okla. Dec. 29, 1997), appeal docketed, Nos. 98-6092, 98-6094 (10th Cir. Mar. 6, 1998).

On April 23, 1996, several months after suing KRXO's owner and two months after enactment of 47 U.S.C. § 230, Zeran filed this separate action against AOL in the same Oklahoma district court. *Id.*⁴ This suit sought recovery for alleged reputational injury and emotional distress caused by the allegedly defamatory messages. Zeran alleged that, upon notice that the first of the messages was a hoax, AOL had a duty to take reasonable care not only to remove that message, but also to employ some electronic screening mechanism to prevent the posting of any subsequent messages containing Zeran's first name or telephone number. *Id.* at A-24, A-26.

[4] Zeran's suit against AOL was subsequently transferred to the district court for the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a). *See* Pet. App. A-5.

After filing its Answer, AOL moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) on the ground that 47 U.S.C. § 230(c)(1), which prohibits treating interactive service providers such as AOL as the "publisher or speaker" of third-party content, barred Zeran's action. *Id.* at A-26.

3. The Decisions Below. On March 21, 1997, the District Court granted AOL's motion for judgment on the pleadings. *Id.* at A-21 to A-46. On appeal, the United States Court of Appeals for the Fourth Circuit affirmed. *Id.* at A-1 to A-18. The Court of Appeals held that Section 230(c)(1) precluded suits that "would make service providers liable for information originating with a third-party user of the service." *Id.* at A-6 to A-16. The court specifically rejected Zeran's claim that Section 230(c)(1) did not apply to "distributors" of information, holding that under the general common-law meaning of "publisher," distributor liability is "merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230." *Id.* at A-10.

The courts below also rebuffed Zeran's argument that applying Section 230 to his suit would have an impermissible retroactive effect. *Id.* at A-16 to A-18. Applying this Court's familiar *Landgraf* test,⁵ the Court of Appeals found that Section 230's command that "[n]o cause of action may be brought" under inconsistent state law "applies by its plain terms to complaints brought after [Section 230] became effective," regardless of when the underlying events occurred. *Id.* at A-16.

[5] *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

SUMMARY OF ARGUMENT

None of the reasons that this Court typically considers as favoring the exercise of its discretionary jurisdiction is present here, and there are multiple reasons that affirmatively militate against granting the Petition. First and foremost, rather than being in conflict with any other decision, the decision below is the *first* (and so far *only*) decision by any appellate court construing 47 U.S.C. § 230, and the Court of Appeals reached the same result as *all* of the reported decisions to date by the few trial courts that have construed the relevant provisions of this statute.

Moreover, while this case concerns the relatively new medium of interactive computer services, the Petition itself presents no legal issue of national importance that would warrant the exercise of certiorari jurisdiction in the absence of a conflict with other decisions. The Petition presents nothing more than ordinary issues of statutory construction of the sort that the courts of appeals resolve every day. And these issues are narrow in scope, as illustrated by the fact that, in the more than two years since the statute was enacted, there have been only three other cases in which trial courts have construed 47 U.S.C. § 230(c)(1), and only one other case in which a trial court has determined the statute’s temporal reach.

Nor does anything about the nature of the decision below warrant further review by this Court. The Court of Appeals faithfully adhered to well-settled principles of statutory construction and reached a decision that accords fully not only with the plain language of the statute, but also with Congress’s policy objectives as explicitly stated in the statute’s “[f]indings” and “[p]olicy” preamble. Petitioner’s disagreement with the decision below is, at bottom, a disagreement with the basic policy choice that Congress expressed in the statute. That is not a proper basis for granting further review of the decision.

ARGUMENT

I. THE COURT OF APPEALS’ RULING THAT 47 U.S.C. § 230(c)(1) BARRED PETITIONER’S CLAIM DOES NOT MERIT FURTHER REVIEW.

Congress enacted 47 U.S.C. § 230 in order to eliminate uncertainties in the law governing whether providers of interactive computer services, such as AOL, could be liable for harms resulting from the dissemination of tortious content that other persons or entities create and transmit using such services.⁶ In Section 230(c)(1), Congress provided:

[6] Section 230 is part of the Communications Decency Act (“CDA”), two provisions of which this Court struck down on First Amendment grounds last Term. *Reno v. ACLU*, 117 S. Ct. 2329 (1997) (holding 47 U.S.C. § 223(d) and most of 47 U.S.C. § 223(a) unconstitutional). The invalidation of these other CDA sections did not affect Section 230. *See* 47 U.S.C. § 608 (“If any provision of this [Act] ... is held invalid, the remainder of the [Act] ... shall not be affected thereby.”); *Reno*, 117 S. Ct. at 2350-51 (holding that portion of Section 223 not implicated by First Amendment ruling remains intact).

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. (emphasis added)

The court below ruled that this provision bars the imposition of liability on AOL for injury allegedly caused by a third party’s defamatory or otherwise tortious messages. Specifically, it held that making AOL liable would impermissibly treat AOL (which Petitioner concedes is a “provider of an interactive computer service,” Pet. App. A-6 n.18) as the “publisher or speaker” of the allegedly tortious messages (which Petitioner concedes are “information provided by another information content provider,” *Id.*).

The Court of Appeals’ construction of the term “publisher or speaker” as used in Section 230(c)(1) was based on well-established principles of statutory interpretation and is fully

consistent with the decision of every other court that has construed the term. This holding does not merit further review by this Court.

A. The Decision Below Does Not Conflict With the Ruling of Any Other Court.

As even Petitioner acknowledges, the Court of Appeals' decision raises no conflict with any decision in any court. The decision below was the first—and thus far only—appellate decision involving the interpretation of Section 230. In Petitioner's words, this “is the first case interpreting Section 230(c) and the interplay between Sections 230(c) and 230(d),” and accordingly, “[n]o case involving [Section 230] has yet reached this stage.” Pet. at 17, 19. Thus, by definition, the decision raises no conflict with another decision of a federal court of appeals or state court of last resort. Sup. Ct. R 10(a).⁷

[7] Ironically, Petitioner repeatedly touts the absence of other appellate decisions construing Section 230 as if that were a reason to grant the Petition. *See, e.g.*, Pet. at 17 (“This case presents the Court the first opportunity to interpret the limits of the immunity granted online service providers.” (emphasis added)); *id.* at 21 (“The Court should grant certiorari to ... resolve these issues of first impression concerning § 230 of the CDA” (emphasis added)). This fundamentally misapprehends this Court's approach to certiorari review, which generally disfavors review of issues for which there has been little or no fermentation in the lower courts. *See, e.g., McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (concluding that, particularly given the absence of conflict, certiorari should be denied to allow “further study” of the issue in lower courts).

The decision below does not even conflict with any decision in the federal or state trial courts. In fact, we are aware of only three other decisions concerning the interpretation of Section 230(c)(1), all of which reached the same conclusion as the courts below in this case. *See Blumenthal v. Drudge*, No. CIV. A. 97-1968 PLF, 1998 WL 195979, at 3-5 (D.D.C. Apr. 22, 1998) (Section 230(c)(1) “effectively immunizes] providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others”); *Doe v. America Online, Inc.*, No. CIV. CL 97-631 AE, 1997 WL 374223, at 2-3 (Fl. Cir. Ct. June 26, 1997) (“Making AOL liable for [a third-party's] chat room communications would treat AOL as the ‘publisher or speaker’ of those communications” in violation of Section 230(c)(1).); *Aquino v. Electriciti Inc*, 26 Media L. Rep. (BNA) 1032, 1032 (Cal. Super. Ct. Sept. 23, 1997) (dismissing tort claims on the basis of Section 230(c)(1)).⁸ Thus, far from creating a conflict that might require this Court's attention, the decision below simply exemplifies the unanimity of the lower courts in their interpretation of Section 230(c)(1).

[8] The only other case of which we are aware in which a court has construed any of Section 230's operative provisions is *Mainstream Loudoun v. Loudoun County Library*, No. CIV. A. 97-2049-A, 1998 WL 164330 (E.D. Va. Apr. 7, 1998). In that case, the United States District Court for the Eastern District of Virginia, the same court that issued the original decision in this case, held that another part of Section 230 -- namely 47 U.S.C. § 230(c)(2) -- does not bar a suit against a public library challenging on constitutional grounds the library's content-based restrictions on Internet access. The court in that case appropriately looked to the decision of the Court of Appeals in this case for guidance concerning the overarching purposes of Section 230. The district court decision in *Mainstream Loudoun*, interpreting a different provision of Section 230, does not conflict with the decision of the Court of Appeals below.

B. The Court of Appeals' Decision Was a Correct and Straightforward Application of Settled Principles of Statutory Interpretation.

The sole legal issue Petitioner raises with respect to the operation of Section 230(c)(1) is the meaning of the term “publisher or speaker.” The Court of Appeals, relying on settled principles of statutory construction, determined that holding AOL liable for third-party content would treat it as the “publisher” of that content in contravention of Section 230(c)(1). Petitioner’s contention that the Court of Appeals committed an error on this point does not warrant further review.

Because Section 230 does not contain an explicit definition of the term “publisher,” the court below properly turned to the common law to determine its meaning. *See, e.g., Gilbert v. United States*, 370 U.S. 650, 655 (1962) (“[I]n the absence of anything to the contrary it is fair to assume that Congress uses a] word in [a] statute in its common-law sense.”). As the Court of Appeals explained, under the common law, “both the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party—each alleged by Zeran here under a negligence label—constitute publication.” Pet. App. A-10 (citing Restatement (Second) of Torts § 558(b) (1977)); *see also* Restatement § 577 (“One who intentionally and unreasonably *fails to remove* defamatory matter that he *knows to be exhibited* on land or chattels in his possession or under his control is subject to liability for its *continued publication.*” (emphasis added)). Accordingly, in the context of torts such as defamation, distributors are merely a type of publisher: “Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the ... information available to others as to be regarded as publishers.” W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 803 (5th ed. 1984). Indeed, basic hornbook law provides that an entity may be liable for harm caused by a defamatory statement if and only if the entity “published” the statement. Restatement (Second) of Torts § 558 (1977) (essential elements of any defamation action include both “an unprivileged *publication* to a third party” and “fault amounting at least to negligence on the part *of the publisher*” (emphasis added)).

In the face of this unequivocal common law background, Petitioner essentially concedes that holding a distributor such as AOL liable for third-party content would treat it as a “publisher” under the common law usage of the term. *See* Pet. at 12. He claims, however, that Congress intended to implement a “narrow definition” of the term that did not include distributors, a definition that he alleges is embodied in two earlier trial court decisions, *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) and *Stratton-Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). Pet. at 12. The court below considered and rejected this argument, correctly concluding that neither *Stratton-Oakmont* nor *Cubby* supports the proposition that holding a distributor liable for disseminating defamatory content would not treat the distributor as the “publisher” of that content.⁹

[9] The courts in both *Blumenthal* and *Doe* expressly considered and rejected the very same argument that Petitioner raises here. *See Blumenthal*, 1998 WL 195979, at 7 (“Any attempt to distinguish between ‘publisher’ liability and notice-based ‘distributor’ liability and to argue that Section 230 was only intended to immunize the former would be unavailing.”); *Doe*, 1997 WL 374223, at 3 (“[T]o hold AOL liable for negligently ‘distributing’ [third-party content]... would treat AOL as the ‘publisher or speaker’ of those statements.”).

As the Court of Appeals observed, although both *Stratton-Oakmont* and *Cubby* recognized a legal distinction between publishers and distributors, “this distinction signifies only

that different standards of liability may be applied *within* the larger publisher category, depending on the specific type of publisher concerned.” Pet. App. A-11. In particular, those decisions merely identified the well-established constitutional and common law principle that the First Amendment provides a “deeply rooted” protection for distributors such as interactive service providers and that, as a result, such a provider may be held liable as the publisher of defamatory third-party content only if it “knew or should have known” of the defamation. *Cubby*, 776 F. Supp. at 139-41 (citing *Smith v. California*, 361 U.S. 147, 152-53 (1959)); *Stratton-Oakmont*, 1995 WL 323710 at 3. But while those decisions describe the different standards of liability for publishers and distributors, they “do not... suggest that distributors are not also a type of publisher for purposes of defamation law.” Pet. App. at A-11 to A-12.

Having applied well-established principles of statutory interpretation to determine that holding AOL liable would treat it as a “publisher” in contravention of Section 230(c)(1), the Court of Appeals confirmed its conclusion by analyzing whether such a meaning was consistent with and would further the purposes of Section 230. Pet. App. at A-12 to A-14. This approach, far from being a “manifest[] depart[ure] from any accepted rule of judicial construction and [an] inva[sion of] the province of the legislature,” Pet. at 13, was again the method required by accepted principles of statutory interpretation. *See, e.g., Crandon v. United States*, 494 U.S. 152, 158 (1990) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.”).

Determining the purposes of Section 230 was a straightforward task: Congress explicitly stated its goals in the “Findings” and “Policy” statement set out in the preamble of the statute. 47 U.S.C. §§ 230(a)-(b). These introductory sections—which Petitioner almost completely ignores -- are the type of clear and reliable evidence of Congress’ purposes and goals on which this Court routinely relies.¹⁰ The preamble announces, *inter alia*, congressional findings that “interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity” and that these services have “flourished, to the benefit of all Americans, *with a minimum of government regulation.*” 47 U.S.C. §§ 230(a)(3)-(4) (emphasis added). The preamble further declares that it is “the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*” *Id.* § 230(b)(2) (emphasis added). Viewed in the context of the whole of Section 230, these declarations reflect Congress’s view that a legal regime under which interactive computer service providers could face tort liability for dissemination of content produced by others inevitably would hurt the development of an emerging communications medium that obviously holds great promise.

[10] *See, e.g., United States v. Smith*, 499 U.S. 160, 177 (1991); *Friedman v. Rogers*, 440 U.S. 1, 13 n.12 (1979); *Tilton v. Richardson*, 403 U.S. 672, 678 (1971); *American Trucking Ass’n v. United States*, 364 U.S. 1, 6 (1960).

At the same time, Section 230’s preamble reflects that Congress recognized the need to deter and punish truly harmful online speech and chose to do so by strengthening enforcement of federal criminal laws against the actual wrongdoers who originate such speech. The preamble declares that it is the “policy of the United States... to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of

computer.” *Id.* § 230(b)(5). Thus, Congress made the policy decision to deter tortious online speech not by punishing the intermediary -- as Petitioner’s suit would do-but by strengthening the enforcement of legal remedies against the culpable source of the unlawful content.

Having recited these congressional purposes, the court below correctly found that the rule of law advocated by Petitioner-that an interactive computer service should be liable for injury caused by a series of false third-party messages once it is notified that one of its millions of users has posted one such message-would undermine Congress’ goals. Such a rule would run directly counter to the express statutory policy that such services be “unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2). Moreover, as the Court of Appeals accurately discerned, Pet. App. A-13 to A-14, it would also have the perverse effect of undermining the statute’s clear objective to remove disincentives for interactive computer services voluntarily to engage in self-regulatory activities designed to restrict the availability of material that they consider to be objectionable. As the Court of Appeals explained, under the rule advocated by Petitioner, “[a]ny efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to further possible lawsuits, service providers would likely eschew any attempts at self-regulation.” Pet. App. A-13 to A-14.

Furthermore, as the Court of Appeals recognized, notice-based liability would have a chilling effect on speech over interactive services, contrary to Congress’ intent that these services continue to flourish as “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” 47 U.S.C. § 230(a)(4). Under Petitioner’s theory, once a service provider received notice of a possibly tortious message, it would face potential liability and have to make 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.” Pet. App. A-13. Even assuming that were practical given the sheer number of postings on interactive computer services, such a rule would result in the suppression of speech: “Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not.” *Id.* Such results would frustrate Congress’ intent.

II. THE COURT OF APPEALS’ HOLDING THAT 47 U.S.C. § 230 APPLIES TO THIS CASE EVEN THOUGH THE EVENTS ALLEGED IN THE COMPLAINT PRE-DATE ITS ENACTMENT DOES NOT MERIT FURTHER REVIEW.

Petitioner also challenges the Court of Appeals’ application of this Court’s *Landgraf* test for determining whether Section 230 governs this case, which, though it involves events pre-dating the enactment of Section 230, was filed after the date of enactment. The court below held that Section 230 applies in these circumstances based on the plain meaning of the second sentence of Section 230(d)(3), which provides:

“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 Court of Appeals' decision on this point does not merit further review for at least three reasons. First, this ruling represents the first and (so far) only appellate decision concerning this issue and is identical to the trial court ruling in the only other case in which this issue has been decided. Second, the decision raises no issue of national importance, particularly given that in the more than two years Section 230 has been law, this case is one of only two of which we are aware that have raised any issue concerning the temporal reach of Section 230. Third, the court below, following this Court's precedents, applied the undisputedly appropriate legal framework to reach the correct result.

A. The Decision Below Is Not in Conflict with the Decision of Any Other Court.

As with the Court of Appeals' construction of Section 230(c)(1), its decision concerning the temporal reach of Section 230 creates no conflict with the decision of any other court. Aside from the present case, the issue has not been decided in any federal court of appeals or state court of last resort. Indeed, the only other decision to date concerning Section 230's temporal reach was a decision last year by a state trial-level court, *Doe v. America Online, Inc.*, No. CIV. CL 97-631 AE, 1997 WL 374223 (Fla. Cir. Ct June 26, 1997). Citing the federal district court's carefully-reasoned decision in this case, that court also ruled that the plain language of Section 230(d)(3) required applying the statute to all cases brought after its enactment, regardless of when the underlying events occurred. *See id.* at 4. Accordingly, this case presents no conflict for this Court to resolve.

B. Section 230's Temporal Reach Is Not an Issue of National Importance.

The question of whether Section 230 controls cases filed after the statute was enacted and became effective but involving some events that predate enactment is particularly unworthy of further review because, even assuming *arguendo* that the decision were wrong, its implications are extremely narrow. Indeed, there is every reason to believe that the Court of Appeals' ruling on this issue will be significant to no one other than the Petitioner himself and, at most, a small handful of other current or prospective plaintiffs. *See generally Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 & n. 2 (1955) (certiorari is inappropriate where "the question [is] of importance merely to the litigants and [does] not present an issue of immediate public significance").

As already noted, since Section 230 was enacted and became effective on February 8, 1996, this case and *Doe v. America Online*, which also involved only one plaintiff, are the only cases of which we are aware in which any court has considered whether Section 230 applies to all cases filed after it was enacted, regardless of when the events at issue took place.¹¹ We are not aware of any other case that has been filed against AOL or any other interactive computer service in which this issue has arisen or may arise.

[11] One other case now pending in a state court may present the related, but distinct, question of whether Section 230 controls a case that was already pending when the statute was enacted. *Lurmev v. Prodigy Servs. Co.*, No. 21886/94 (N.Y. Sup. Ct. Jan. 13, 1998), appeal docketed, No. 97-07342 (N.Y. App. Div. Jan. 29, 1998). In that case, the New York trial court denied defendant Prodigy's motion for summary judgment on solely State procedural grounds, without even construing any part of Section 230, much less determining its temporal reach. *Id.*

Moreover, given that Section 230 has been law for more than two years, few, if any, additional cases are likely to be filed that will implicate the applicability of Section 230 to preenactment events. Indeed, even assuming that other possible plaintiffs have a potential claim implicating application of Section 230 and arising out of facts that predate its enactment, their claims are likely to be barred on other threshold grounds such as statutes of limitations, which are often two years or less for torts such as defamation.¹²

[12] For example, all but six states (Arkansas, Massachusetts, New Hampshire, New Mexico, Rhode Island, and Vermont) have a statute of limitations period for defamation actions that is two years or less. See Robert D. Sack & Sandra S. Baron, *Libel, Slander, and Related Problems* 835 (2d ed. 1994 & Supp. 1997).

Finally, the decision below concerning the temporal reach of Section 230 is unlikely to have any significant ramification outside the limited context of cases in which Section 230 is raised as a defense. As discussed in greater detail in the next section, the decision below broke no new ground, but rather applied well-settled retroactivity jurisprudence to the particular language of 47 U.S.C. § 230(d)(3). Because the Court of Appeals' analysis was primarily based on the statute's plain language, its ruling will have little or no relevance to cases involving other statutes.

Given the extremely circumscribed impact of the decision below, this case does not present any important question of federal law and does not warrant further review by this Court.

C. The Decision Below, Rather Than Conflicting With This Court's Retroactivity Jurisprudence, Simply Involved a Straightforward Application of the Analytical Framework Articulated in This Court's Prior Decisions.

Although Petitioner claims that the decision below somehow conflicts with this Court's retroactivity decisions, the Court of Appeals faithfully applied this Court's framework for analyzing the temporal reach of federal statutes and correctly concluded that, under that framework, Section 230 governs Petitioner's claim. Moreover, Petitioner's entire retroactivity attack on the opinion below concerns a single paragraph in the decision that was not even necessary to the court's decision, further obviating any need for further review of this case.

In both *Landgraf* and *Hughes Aircraft Co. v. United States ex rel Schumer*, 117 S. Ct. 1871 (1997), this Court held that the first step in a retroactivity analysis is "to determine whether Congress has expressly prescribed the statute's proper reach," in which case that prescription governs. *Landgraf*, 511 U.S. at 280. Despite Petitioner's inexplicable assertion that AOL does not rely on this step of the analysis, Pet. at 15 n. 10, the Court of Appeals properly concluded that "[t]his case can be resolved at this first step." Pet. App. A-17. Petitioner's utter failure even to address this step of the analysis is reason enough to deny certiorari on the issue of Section 230's temporal reach.

Section 230(d)(3) expressly provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(d)(3). This clear language led the Court of Appeals to hold that "Section 230 applies by its plain terms to complaints brought after the CDA became effective," even if the

events at issue occurred before the statute's enactment. Pet. App. A-16. Congress could not have expressed its intent more clearly: from the date of Section 230's enactment (February 8, 1996), *no* action may be filed and *no* liability may be imposed under any State or local law inconsistent with Section 230, regardless of when the underlying events occurred. Congress' "use of... absolute language" left no room for courts to determine whether the statute should apply only to some cases filed after its enactment. *Lind v. Murphy*, 117 S. Ct. 2059, 2064 n.4 (1997). Thus, because Petitioner's suit was filed after enactment of Section 230, a straightforward interpretation of Section 230(d)(3) requires the application of Section 230 to this case.

Indeed, as the Court of Appeals noted, "it is doubtful that a retroactivity issue is even presented here." Pet. App. A-16. Section 230(d)(3) addresses only conduct related to litigation -- the bringing of a lawsuit and the imposition of liability. Because Petitioner did not file his complaint until after Section 230 was enacted and became effective, "the statute's application in this litigation is in fact prospective." *Id.*; *see also Vernon v. Cassadaga Valley Cent Sch Dist*, 49 F.3d 886, 889-90 (2d Cir. 1995) (statute applied prospectively because it "applied to conduct that occur[red] after the statute's enactment -- plaintiff's filing of the complaint -- not the defendant's allegedly unlawful acts."); *St. Louis v. Texas Worker's Compensaton Comm'n*, 65 F.3d 43, 46 (5th Cir. 1995) (same).

Although the Court of Appeals recognized that its conclusion that Congress had clearly expressed its intent that Section 230 apply to all suits brought after its enactment resolved Petitioner's retroactivity claim, it briefly noted that Petitioner's argument would in any case also fail under the second prong of the *Landgraf* test. Pet. App. A-18. Petitioner's *entire* argument on retroactivity is directed to this brief discussion by the Court of Appeals. *See* Pet. at 14-17, 21-23. But, given the Court of Appeals' ruling as to the clear intent of the statute, its examination of the second prong of the *Landgraf* test was not even necessary for its decision. Thus, even if this Court believed that the court below had erred in its application of the second step of the *Landgraf* framework, this case would not present a suitable vehicle for review of that issue.

In any case, the Court of Appeals was correct when it determined that, even in the absence of clear Congressional intent, Section 230 would apply to this case because doing so would not have an impermissible retroactive effect. *Landgraf*, 511 U.S. at 280. A law has retroactive effect only when its application to pre-enactment events would be unfair because a party has relied upon the preexisting law in planning his or her conduct. As the *Landgraf* Court explained, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 511 U.S. at 265. In other words, the presumption against retroactivity is designed to avoid the unfairness of changing the legal rules when a person has engaged in conduct with an expectation of the probable legal consequences.

As the Court of Appeals concluded, however, "Zeran cannot point to any action he took in reliance on the law prior to § 230's enactment." Pet. App. A-18. Clearly, his alleged actions in responding to the messages on AOL's system by complaining to AOL were not premised in any way on existing legal rules. Indeed, he cannot even claim that he filed suit against AOL in reliance on pre-Section 230 law because the statute was enacted before he brought suit. The only "reliance interest" Petitioner claims-or can claim-is that he relied on his understanding of that

law as the basis for this suit.¹³ The unfairness to which Petitioner points is not any change in the consequences of his own past actions, but an alleged unfairness of not having a claim against AOL.

[13] Petitioner's list of the six ways he "repeatedly manifested his reliance upon settled case law" only demonstrates his lack of any cognizable reliance. Pet. at 21-23. The second item on his list concerns actions taken by AOL, not Petitioner. The third and sixth are merely factual statements that the original party who posted the messages remains unidentified and that the events at issue occurred prior to enactment of Section 230. Nothing in the Complaint indicates that Petitioner's notification of AOL when he first learned of the postings was based in any way on reliance on any rule of law. The remaining two items on Petitioner's list concern litigation decisions (such as bringing suit) that would apply in any case raising retroactivity issues and therefore cannot be the type of conduct that the presumption against retroactivity protects.

But that is not the type of "reliance" or "unfairness" the presumption against retroactivity protects. After all, courts often apply statutes to suits involving pre-enactment events even though the effect is to eliminate the claim upon which the plaintiff was relying to seek redress for alleged wrongs. As Justice Scalia observed in *Landgraf*, the general rule is that a statute eliminating jurisdiction is applied to cases involving pre-enactment events, even though doing so "can deny a litigant a forum for his claim entirely." *Landgraf*, 511 U.S. at 292-93 (Scalia, J., concurring).

Thus, the decision below concerning whether Section 230 applied to this case raises no significant legal issue worthy of review. The Court of Appeals unquestionably applied the appropriate legal test and reached the correct result.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: May 21, 1998

No. 971488

**In The
Supreme Court of the United States**

October Term, 1998

KENNETH M. ZERAN

Petitioner,

vs.

AMERICA ONLINE, INC.

Respondent.

*On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit*

**REPLY OF KENNETH ZERAN TO OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

QUESTIONS PRESENTED

Did the Court of Appeals misconstrue and misapply Section 230 of the Communications Decency Act to immunize America Online, Inc. from liability for its negligence and to apply the Act in such a way as to bar Petitioner's recovery for acts which significantly predated the adoption of the Act?

Petitioner Kenneth M. Zeran ("ZERAN") respectfully submits his reply to the Opposition of America Online, Inc. ("AOL") to the Petition for a Writ of Certiorari filed by ZERAN. ("AOL Opp."). Primarily, AOL argues that this case is not worthy of review by the Court because of the very nature of its precedent-setting, landmark status (AOL Opp. 7-9) and because the retroactive application of § 230 of the Communications Decency Act (47 U.S.C. § 230, "CDA") is not of national importance. (AOL Opp. 17-19). Additionally, AOL asserts at length that the court below correctly decided the case. (AOL Opp. 9-17, 19-23)

I. This Case is Worthy of Certiorari

Since the exercise of the Court's certiorari is admittedly not subject to a mechanical formula and involves an often complex and variable set of recognized factors¹, ZERAN submits that, when considered on the whole and contrary to AOL's opposition, this case is appropriate for the Court's review by certiorari. These factors include:

[1] These factors are outlined in Stem, Gressman, Shapiro and Geller, *Supreme Court Practice* §§ 4.11-4.17 (7th ed. 1993) ("Supreme Court Practice") and in publications of many of the Court's former and present Justices. e.g. Rehnquist, *Oral Advocacy: A Disappearing Act*, 35 Mercer L. Rev. 1015 (1984).

A. The Effects of the CDA on Petitioner's Claims

1. The Courts Below Misconstrued the CDA

While the Court does not routinely grant certiorari solely because the courts below committed error², AOL asserts as a ground for denial of certiorari that the decisions below were correct.

[2] *Supreme Court Practice, supra*, § 4.17.

In advancing this argument, AOL has reproduced the fundamental flaw in the decisions below- that because the CDA does not include or define "distributor," congressional intent must be deduced from reference to the common law of defamation for § 230(c) and from generalized statements of congressional intent for § 230(d)(3). (AOL Opp. 10-13).

First, this ignores the language of the CDA itself which contains the terms "publisher or speaker" and pointedly omits "distributor." The court should not have supplied language (equating publisher and distributor) Congress chose to omit.

Second, the opinion elevates the generalized statements of congressional findings and intent (§§ 230(a) and (b), (AOL Opp.12-13) over the specific title of §230(c) “Protection for ‘Good Samaritan’ Blocking and Screening of Offensive Material.” Congress adopted §§ 230(c)(1) and (2) for a specific purpose—to encourage action by an interactive computer service³ to police its service without fear of publisher or speaker liability. Instead, the opinion rewards inaction in blocking and screening offensive material by a distributor. In fact—each of AOL’s arguments defeat the undisputed purpose of 230(c).

[3] As it relates to this appeal, AOL is a private, proprietary, member-only on-line service provider (“OSP”) where members provide name, address, phone number, and credit card number and agree to a specified code of online conduct (“Terms of Service” and “Rules of the Road”), the violation of which subject the member to termination.

Third, the opinion pointedly ignores expressions of specific congressional intent with regard to §§ 230(c) and (d)(3), both in the legislative history⁴ and comments on the floor of Congress by its authors⁵ and the context of *Stratton-Oakmont Inc. v. Prodigy Service Co., Inc.*, 1995 WL 323710 (Sup. Ct. N.Y. May 24, 1995) (publisher liability imposed because of policing efforts) and *Cubby, Inc. v. CompuServe, Inc. et al.*, 776 F.Supp. 135 (S.D-N.Y. 1991) (OSP distributor must be placed on notice of the contents of a publication before liability can be imposed for electronic distribution of publication). Congress could easily have cited *Cubby, Inc.* in the Conference Report and the authors could have invoked *Cubby, Inc.* in debate as an example of impediments to achieving the purposes of § 230(c), but did neither. The court should not have repealed *Cubby, Inc.* when Congress chose not to do so.

[4] The Conference Report on Section 230 stated:

One of the specific purposes of [Section 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. (Emphasis added.) H.R. Conf. Rep. No. 104-458, at 194 (1996)

[5] In a floor colloquy between the House authors, Congressman Cox stated:

Currently, however, there is a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content. These providers face the risk of increased liability if they police their systems ... The Cox-Wyden amendment removes the liability of providers such as Prodigy who currently make a good faith effort to edit the smut from their systems. 141 Cong. Rec. H. 8460, 8471 (August 5, 1995).

Finally, the court should not have extended § 230(d)(3) to preempt state-based tort liability under the generalized statements of congressional intent without more definitive language, especially when Congress specifically chose to allow the continuation of distributor liability. Maintenance of ZERAN’s distributor claims was not inconsistent with § 230(c) and the court erred in holding that it was barred.

2. This Case Squarely Presents an Important Issue of Federal Law with Significant Practical Consequences.

Paradoxically, on one hand AOL characterizes this case as not deserving of certiorari because it does not create a split in the courts (AOL Opp. 7- 8), and on the other, counsels the court to await further study in the lower courts. (AOL Op. ft. 7). Of course, after this due study, should a court refuse to follow the Fourth Circuit opinion, AOL will undoubtedly be back before this Court seeking certiorari, extolling the public importance of resolving the reach of the CDA.

Rather than being a basis for denying certiorari, the landmark status of this case presents an important question of first impression, a ground for granting certiorari the Court has acknowledged countless times. Moreover, as demonstrated by AOL's citation of trailing cases (AOL Opp. 8-9) that have uniformly relied on the lower court decisions in this case⁶, the reach of the CDA presented in this appeal will undoubtedly spawn recurring litigation.⁷

[6] e.g. In *Blumenthal v. Drudge*, 1998 WL 195979 (D.D.C April 22, 1998), the court found "The court in *Zeran* has provided a complete answer to plaintiffs' primary argument, an answer grounded in the statutory language and intent of Section 230."

[7] The in press article cited by Petitioner (Pet. 19) has now been published, Ballon, *Defamation and Preemption Under the Telecommunications Act of 1996: Why The Fourth Circuit's Ruling in Zeran v. America Online, Inc. is Wrong*, Journal of Internet Law, March 1998, 6-13.

Also, in addition to the obvious effect the decisions below are having on burgeoning OSP litigation, the impact of this case transcends the fate of ZERAN -- it potentially reaches into the lives of millions of Americans and renders them vulnerable to computer-based crime without a remedy.⁸ And as the presence of computers grow more ubiquitous in our everyday life, the fallout of the lower court opinions will be magnified.

[8] In *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 Albany L. Rev. 147 (1997), the author asserts that imposing liability on the provider is likely the only way to protect a defamed plaintiff, observing:

This is particularly applicable to *Zeran*. AOL after all controlled its own servers, and *Zeran* had no ability to remove the defamatory messages himself. Furthermore, since neither *Zeran* nor AOL could identify the person who posted the messages, *Zeran* could neither motivate that person to remove them nor sue him for damages. *Id.* at 173.

The Court has an opportunity to revitalize Congress' expressed standards of conduct for the coming millennium. The Court should not await "percolation" in the courts below of an erroneous construction of a federal statute which would bar access to both state and federal courts for persons injured as a result of the negligence of proprietary, private OSP's like AOL. Rather, it should decide this important, unsettled question of federal statutory law of broad public interest and safety.

3. This Case Has No Other Impediments to the Grant of Certiorari.

None of the traditional bases for denial of certiorari exist -- the decision is not grounded on unique facts and there are no seriously disputed facts⁹; the case comes to the Court from a grant of judgment on the pleadings, a well-worn path to the Court; there are no procedural defects or any likelihood that the dispute might be rendered moot or that the Court might decide

another case in the interim which would justify a granted, vacated and remand treatment. In short, the case has none of the shortcomings which, can result in a denial of certiorari.

[9] However, AOL repeats the mistake committed by the Circuit Court that “Shortly after being contacted by Zeran, AOL deleted the messages.” (AOL Opp.2). To the contrary, the Complaint does not allege that AOL deleted the posting, but only that on April 28, 1995. ZERAN was told by an AOL service representative that it would be deleted (§ 16, Complaint) and that he received the same promise on May 2, 1995. (§ 28).

B. The Retroactivity of the CDA

1. The Circuit Court’s Retroactive Application of the CDA to ZERAN’s Claim Conflicts with the Court’s Latest Retroactivity Cases.

AOL asserts that the Circuit Court’s opinion is consistent with *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994) and *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 117 S.Ct. 1871. (AOL Opp. 19-23). In essence, AOL would characterize the denial of any remedy to ZERAN for injuries suffered prior to the enactment of the CDA arising from completed conduct which occurred (and all elements of liability had ripened) long prior to the CDA as not being “unfair” under *Landgraf*. (AOL Opp. 21).¹⁰ Of course, were AOL to be deprived of a defense to such liability, it would immediately urge that it was “unfair” to “attach new consequences to a completed act.” *Landgraf*, 114 S.Ct. at 1501.

[10] AOL acknowledges that the “presumption against retroactivity is designed to avoid the unfairness of changing the legal rules when a person has engaged in conduct with an expectation of the probable legal consequences,” but asserts that ZERAN failed to sufficiently establish his reliance. (AOL Opp. 22). However, it is undisputed that both AOL and ZERAN considered AOL a distributor, not a publisher, and entitled to notice. AOL’s reliance upon the settled state of law pre-CDA was also established in the pleadings. The application of the CDA to bar ZERAN’S recovery undoubtedly has retrospective effect.

AOL also claims that a statute eliminating jurisdiction can be applied to pre-enactment events, so as to “deny a litigant a forum for his claim entirely,” citing Justice Scalia concurring in *Landgraf*. (AOL Opp. 23). However, the Court recently held in *Hughes Aircraft Co.* that jurisdictional statutes effect only where a suit may be brought not whether it may be brought at all. 117 S.Ct. at 1878. Nothing in the majority opinion in *Landgraf* or *Hughes Aircraft Co.* would allow the CDA to be exempt from the general presumption against retroactivity so as to deprive ZERAN of any forum in which to bring his claims.

The retroactive application of the CDA, especially when Congress knows exactly how to retroactively apply litigation barriers and chose not to do so in the CDA, creates not only “potential” unfairness, but concrete, actual unfairness to Zeran and others similarly harmed.

The Court should grant certiorari on the retroactivity issue because the opinion below conflicts with this Court’s retroactivity jurisprudence.

CONCLUSION

Because this appeal presents important issues of federal law with significant practical consequences, manifestly represents the first of many recurring cases, presents profound questions for our country's expanding on-line future, and offers the Court the opportunity to choose which road on the information superhighway we shall travel, the Court should grant the Petition for a Writ of Certiorari and afford this case the full consideration of the Court.

DATED: May 28, 1998

Kenneth M. Zeran v. Diamond Broadcasting, Inc.
United States District Court, W.D. Oklahoma, 1997.
19 F.Supp.2d 1249.

ORDER

RALPH G. THOMPSON, District Judge.

Plaintiff Kenneth M. Zeran instituted this action against defendant Diamond Broadcasting Inc. d/b/a KRXO Radio (“KRXO”), asserting defamation, false light invasion of privacy, intentional infliction of emotional distress and punitive damages claims. KRXO has filed a motion for summary judgment, which the court concludes should be granted. The rationale for the court’s decision follows a summary of the undisputed facts.

The defendant owns and operates radio station KRXO in Oklahoma; its signal covers the Oklahoma City metropolitan area and can be heard a maximum radius of approximately seventy-five miles. In 1995, KRXO aired “Shannon and Spinozi,” a weekday morning “drive time” talk show from 5:30 a.m. until 9:00 a.m. The show’s hosts, Mark Shannon and Ron Benton, did not report the news during their morning program, but occasionally commented about news items. During this time period, the plaintiff resided in Seattle, Washington, where he was engaged in several business projects or ventures, including publishing *The Apartment Special*, a free guide which listed apartments available for rent in the Seattle area. He officed and had a business telephone in a room in his parent’s home, where he lived.

Beginning on April 25, 1995, advertisements bearing the plaintiff’s business phone number and the name “Ken ZZ03,” or some variation of it, appeared as postings on American Online (“AOL”). The ads were for t-shirts and other items that made offensive references to the bombing of the A.P. Murrah Building in Oklahoma City. Interested buyers were told to call and “Ask for Ken.” The plaintiff neither subscribed to AOL nor posted the message but, because of the advertisements, began to receive nasty, threatening phone calls.

On April 29, 1995, an AOL subscriber using the screen name “EckieA” and identifying himself as “Eck” (Hollywood) Prater, e-mailed a copy of the April 25 AOL posting to Mark Shannon, who first saw it either late on April 30 or early in the morning on May 1. Shannon, who did not know Prater, tried unsuccessfully to e-mail Ken ZZ03 through AOL. The response he received indicated that Ken ZZ03 was not an AOL member or was no longer using that screen name. Shannon did not try and call the phone number listed on the advertisement because it was before normal business hours.

On May 1, 1995, during the morning broadcast, Shannon commented on the ad being on AOL and read portions of the posting on the air, including the slogans purportedly displayed on the t-shirts. He urged listeners to call the plaintiff’s telephone number, which he read repeatedly on the air, and let the seller know what Oklahomans thought of him. He also engaged in a dialogue

with his co-host, Spanoza, about the posting. Shannon attested that he believed that the ad was real, that someone actually was selling the t-shirts.

Although the plaintiff had already received numerous calls prior to May 1, 1997, as a result of the broadcast the calls increased. Following the broadcast, the plaintiff also received death threats. The plaintiff called KRXO on May 1, 1995 and advised the station's general manager, Vance Harrison, Jr., that he had nothing to do with the AOL posting and requested that the station broadcast a retraction. Harrison told the plaintiff that KRXO would state on the air that the person at the phone number given out during the morning show had claimed he was not connected to the t-shirt sales. This was announced twice during the May 1, 1995 afternoon drive time show and once the next morning during the Shannon and Spinozi show.

The plaintiff does not know of anyone who knows him or knows of him by the name Ken Zeran, who saw the AOL postings, heard the May 1 broadcast on KRXO, or associated him with "Ken Z" or the phone number on the AOL advertisements. He "admits that he cannot identify by name anyone who thinks less of him today than they did before the postings." Plaintiff's brief, p. 16.

On April 28, 1995, the plaintiff contacted the FBI about the advertisements and phone calls and subsequently notified the local police department. As a result of the postings and KRXO broadcast, the plaintiff suffered sleep deprivation and anxiety. He saw his family physician once and was prescribed an anxiety drug/sleeping pills. The plaintiff was unable to identify any specific interferences with his businesses or projects that were caused by the AOL postings and the KRXO broadcast. The plaintiff instituted this action against the defendant, claiming KXRO defamed him, invaded his privacy and intentionally inflicted emotional distress upon him.

Slander is a false and unprivileged publication which (1) charges a person with a crime; (2) accuses him of having an infectious, contagious or loathsome disease or (4) being impotent or promiscuous; (3) maligns him with respect to his office, profession, trade or business, or (5) by its natural consequences, causes actual damage. Okla.Stat. tit. 12, § 1442 (1991). The only possible category into which the KXRO broadcast can fall is § 1442(5), which constitutes slander per quod.

KRXO contends it is entitled to summary judgment on the plaintiff's defamation claim because the plaintiff has not shown the special damages required to sustain a slander per quo claim; the broadcast was not "of and concerning" the plaintiff, there was no actual injury to the plaintiff's reputation; the plaintiff can prove no false statement of fact and he cannot establish fault. Assuming that the plaintiff has demonstrated the requisite "special damages," the evidence is insufficient to establish any injury to his reputation. "In an action for libel, recovery is sought primarily for the injury to one's reputation. The focus of the action is on the effect of the publication on what others may think of the person." *Colbert v. World Pub. Co.*, 747 P.2d 286, 289 (Okla.1987). As explained by the Oklahoma Supreme Court, "[t]he tort of defamation, which has been somewhat limited by the United States Supreme Court, protects individuals' reputations." *Guinn v. Church of Christ*, 775 P.2d 766, 778 n. 44 (Okla.1989). In the absence of any proof that the plaintiff's reputation was impaired, his defamation claim cannot be sustained.

In *Colbert*, 747 P.2d at 290, the Oklahoma Supreme Court specified the elements of a false light invasion of privacy claim:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Id. (quoting *McCormack v. Oklahoma Pub. Co.*, 613 P.2d 737, 740 (Okla.1980)). Mere negligence is not sufficient to establish the requisite fault necessary to hold a defendant liable for false light invasion of privacy—the defendant must have “had a high degree of awareness of probable falsity or in fact entertained serious doubts as to the truth of the publication.” *Colbert*, 747 P.2d at 291. While the defendant’s employees acted negligently, there is no proof that they knew that the ads were fictitious or acted “recklessly,” as that term is defined by the controlling authorities. Cf. *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) (in a libel action involving a public figure, “failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard”). The plaintiffs own expert attested, in essence, that the defendant’s conduct did not satisfy the level of culpability necessary to impose liability: “Mark Shannon and Ron Benton were extremely negligent and violated standards of professional conduct when hosting the Shannon and Spinozi Show on May 1, 1995” and “failed to perform at a minimally acceptable level of professionalism.” Plaintiff’s Exhibit M, Affidavit of Jay Black. Mr. Black notably avoided using the term “reckless.” KRXO is, therefore, entitled to summary judgment on the plaintiff’s false light invasion of privacy claim.

An evidentiary deficiency also bars the plaintiff’s claim for intentional infliction of emotional distress. In *Eddy v. Brown*, 715 P.2d 74, 76 (Okla.1986), the Oklahoma Supreme Court noted that Oklahoma recognizes intentional infliction of emotional distress as an independent tort, which is governed by the narrow standards of the Restatement (Second) of Torts § 46 (1977). Section 46 provides in pertinent part:

One who by extreme or outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Comment d to § 46 specifies that liability for the tort does not extend “to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.”

The trial court is given the initial responsibility under Oklahoma law “to determine whether the defendant’s conduct may reasonably be regarded as sufficiently extreme and outrageous to meet

the § 46 standards. Only when it is found that reasonable men would differ in an assessment of this critical issue may the tort-of-outrage claim be submitted to a jury.” *Eddy*, 715 P.2d at 76-77. To establish a prima facie case of intentional infliction of emotional distress, a plaintiff must demonstrate:

(1) that the tortfeasor acted intentionally or recklessly; (2) that the tortfeasor’s conduct was extreme and outrageous; (3) that plaintiff actually experienced emotional distress; and (4) that the emotional distress was severe.

Katzer v. Baldor Elec. Co., 969 F.2d 935, 939 (10th Cir.1992). *Accord Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1558 (10th Cir.1995)

The plaintiff has failed to submit evidence sufficient to prove that KXRO’s disc jockeys acted intentionally or recklessly or behaved in an extreme or outrageous manner towards him. *See Daemi v. Church’s Fried Chicken, Inc.*, 931 F.2d 1379, 1387-89 (10th Cir.1991). “Nothing short of [e]xtraordinary transgressions of the bounds of civility’ will give rise to liability for intentional infliction of emotional distress.” *Starr*, 54 F.3d at 1558 (quoting *Merrick v. Northern Natural Gas Co.*, 911 F.2d 426, 432 (10 Cir.1990)). While the court sympathizes with the plaintiff and acknowledges and does not intend to belittle the distress and discomfort he experienced, the evidence he has submitted fails to show that the level of distress was sufficiently severe to make it actionable as a matter of law. Therefore, the defendant also is entitled to summary judgment on the plaintiff’s intentional infliction of emotional distress claim. *Id.*

Accordingly, the defendant’s motion for summary judgment is granted.

Kenneth M. Zeran v. Diamond Broadcasting, Inc.
United States Court of Appeals, Tenth Circuit, 2000.
203 F.3d 714.

Opinion

KIMBALL, District Judge.

Plaintiff–Appellant Kenneth Zeran (“Plaintiff”) appeals from an order of the district court granting Defendant–Appellee Diamond Broadcasting, Inc. (“Defendant”) summary judgment. Defendant cross appeals the district court’s denial of Defendant’s application for costs. After a background section, each matter is considered in turn.

Plaintiff has also appealed the district court’s denial of Plaintiff’s motion for a new trial and requested certification of two questions to the Oklahoma Supreme Court. These subsidiary matters are addressed in connection with the primary legal issues to which they pertain.

BACKGROUND

Plaintiff was the victim of a malicious hoax. In the immediate aftermath of the bombing of the Alfred P. Murrah Federal Building in downtown Oklahoma City, a posting appeared on an Internet bulletin board announcing the availability for sale of “Naughty Oklahoma T Shirts,” bearing such slogans, to repeat only the least offensive, as “Rack’em, Stack’em and Pack’em—Oklahoma 1995” and “Visit Oklahoma—it’s a Blast.” Another slogan crudely referenced the children who died in the bombing. The posting was made by someone using the screen name “Ken ZZ03” and indicated that the shirts could be ordered by telephone. The number provided was Plaintiff’s business telephone number.

Plaintiff had nothing to do with the posting. Plaintiff lives in Seattle, Washington, and is an accomplished artist, photographer, and film maker. America Online (“AOL”), an Internet service provider, provided the unique screen name “Ken ZZ03” to an individual who opened up a trial AOL membership. AOL maintains a database with the names, addresses, phone numbers, and credit card numbers of its members, searchable by screen name. However, AOL does not verify member information before allowing a new member to go online utilizing a trial membership, which AOL disseminates by the tens of thousands. The true identity of Ken ZZ03 remains unknown, as the account was opened with false information.

Ken ZZ03 opened up at least two more AOL membership accounts with false information, adopting similar screen names (Ken ZZ033 and Ken Z033) and posting increasingly offensive items for sale, always providing Plaintiff’s telephone number.

The first posting appeared on April 25, 1995, six days after the bombing. On that same day, Plaintiff began receiving phone calls, which he described as “negative,” “unpleasant,” and “nasty and threatening.” The additional postings were made on April 26, 1995, and on April 28, 1995.

Upon learning of the postings, Plaintiff, who is not an AOL member, notified AOL that he was not involved and asked AOL to delete the postings, place notices on AOL that the postings were false, and take steps to prevent his phone number from appearing in any future postings. AOL declined to help and the postings remained on the Internet for at least a week.

Defendant owns KRXXO, a classic-rock radio station in Oklahoma City. On April 29, 1995, an AOL member sent an e-mail containing a copy of the original, April 25th posting to one of KRXXO’s on-air personalities, Mark (“Shannon”) Fullerton, who, together with Ron (“Spinozi”) Benton, hosted the “Shannon & Spinozi Show,” a drive-time morning show, which usually consisted of light-hearted commentary, humor, and games. In the aftermath of the bombing, and continuing for a period of four to six weeks thereafter, however, the show had become a forum for discussion of the bombing and expression of the emotions it aroused. Its tone was serious and somber.

Shannon first saw the e-mail either late in the evening on the day it was sent or early the next morning, May 1, 1995. Shannon was an AOL member and had given his screen name out over the air to enable his listeners to send messages to him. He did not know the person who sent the posting.

Before beginning his shift on May 1, Shannon unsuccessfully attempted to e-mail Ken ZZ03 through AOL, but received a pop-up message informing him that the addressee was not a known AOL member. He did not attempt to call the telephone number on the posting, purportedly because it was before business hours.

Shannon then went on air, discussing the posting, reading the slogans, and reading Plaintiff’s telephone number. Shannon urged his listeners to call Ken ZZ03 and tell Ken ZZ03 what they thought of him for offering such products. On that day, Plaintiff received approximately 80 angry, obscenity-laced calls from the Oklahoma City area, including death threats. Plaintiff described it as the worst day of his life and, shortly thereafter, involved law enforcement. The anxiety Plaintiff felt as a result eventually led him to visit his family physician, who treated Plaintiff by prescribing an anti-anxiety drug.

Although most of the callers hung up before Plaintiff had an opportunity to speak, Plaintiff was able to learn that the posting had been mentioned on KRXXO. Plaintiff called KRXXO and asked that KRXXO broadcast a retraction, which it did.

Plaintiff does not know of anyone who knows him by the name Kenneth Zeran who saw the AOL postings, heard the broadcast, or associated him with “Ken Z” or the phone number on the AOL postings.

DISCUSSION

A. Defendant's Motion for Summary Judgment.

Based on the broadcast, Plaintiff asserted claims of defamation, false light invasion of privacy, and intentional infliction of emotional distress. The district court granted Defendant's motion for summary judgment on all claims. "We review the granting of summary judgment *de novo*, applying the same legal standard used by the district court under Fed.R.Civ.P. 56(c)." *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1510 (10th Cir.1996).

I. Defamation.

Defamation through an oral communication, or slander, is defined by statute in Oklahoma as a false and unprivileged communication that (1) charges a person with a crime; (2) accuses him of having an infectious, contagious, or loathsome disease; (3) maligns him with respect to his office, profession, trade, or business; (4) imputes to him impotence or want of chastity; or (5) by its natural consequences, causes actual damages. *Okla. Stat. tit. 12, § 1442 (1991)*.

The district court correctly determined that the only subdivision possibly applicable to the broadcast is the last one, slander *per quod*. Evidence of special damages was consequently required. *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1046 (10th Cir.1990) (applying Oklahoma law and affirming dismissal of defamation *per quod* claim when plaintiff failed to allege special damages); *Krebsbach v. Henley*, 725 P.2d 852, 856 (Okla.1986) (affirming grant of summary judgment against plaintiff alleging defamation *per quod* when uncontroverted facts were insufficient to support inference that plaintiff had suffered special damages).

The district court questioned whether the medical expenses incurred by Plaintiff were sufficient to establish the required special damages, but granted summary judgment on the ground that the evidence was insufficient to establish an injury to Plaintiff's reputation. We affirm on both grounds.

Emotional distress is not a form of special damages, and Plaintiff's *de minimis* medical expenses, consisting of one visit to his physician and one prescription drug purchase, are insufficient to support the cause of action. Under the principle of *de minimis non curat lex*, the *de minimis* doctrine, the law does not care for, or take notice of, very small or trifling matters. *Conway v. Watt*, 717 F.2d 512, 516 (10th Cir.1983).

Although Plaintiff suffered an injury, the district court correctly found that Plaintiff did not suffer an injury to his reputation, which is the essence of an action for defamation. In understanding Oklahoma law in this regard, *Colbert v. World Publishing Co.*, 747 P.2d 286 (Okla.1987), is instructive. In *Colbert*, the defendant newspaper published the plaintiff's photograph in connection with an article reporting the death of a local school teacher who had previously been convicted of a gruesome murder and was reported to be mentally ill. *Id.* at 287. The plaintiff was teased and ridiculed as a consequence, but no one believed that he was a murderer or mentally ill.

In distinguishing an action for defamation from an action for false light invasion of privacy, the Oklahoma Supreme Court explained that in the former, "recovery is sought primarily for the

injury to one’s reputation,” that is, “what others may think of the person,” while in the latter, the “interest to be vindicated is the injury to the person’s own feelings.” *Id.* at 289.

Plaintiff’s defamation claim fails because Plaintiff has not shown that any person thinks less of him, Kenneth Zeran, as a result of the broadcast. As the district court found, there was no evidence that anyone who called his number in response to the postings or the broadcast even knew his last name. In other words, under the facts of this case, there was an insufficient link between Plaintiff’s business telephone number and Plaintiff himself for Plaintiff to have sustained damage to his reputation.

For this reason, we deny Plaintiff’s motion to certify to the Oklahoma Supreme Court the question of whether a previously anonymous person can be given a negative reputation for which he can recover in defamation. The question is not determinative here because there is no evidence that a negative reputation for Plaintiff was created by the broadcast.

2. False Light Invasion of Privacy.

Oklahoma has recognized false light invasion of privacy as formulated in the Restatement (Second) of Torts § 652E (1977), which provides:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if:

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

McCormack v. Oklahoma Publishing Co., 613 P.2d 737, 740 (Okla.1980); *Colbert*, 747 P.2d at 290. Mere negligence is insufficient to establish the requisite fault necessary to hold a defendant liable—the defendant must have “had a high degree of awareness of probable falsity or in fact entertained serious doubts as to the truth of the publication.” *Colbert*, 747 P.2d at 291.

The district court granted summary judgment to Defendant on this claim on the ground that Plaintiff had failed to offer proof that Defendant’s employees either knew the postings were fictitious or acted recklessly, as that term is defined by the controlling authorities. The district court was influenced by the fact that Plaintiff’s own expert found that they did not satisfy the level of culpability necessary to impose liability, opining only that “Mark Shannon and Ron Benton were extremely negligent and violated standards of professional conduct when hosting the Shannon and Spinozi Show on May 1, 1995.” We affirm on the same basis.

Plaintiff first asserts that the district court erred in interpreting Oklahoma law to require evidence of recklessness, arguing that, given the facts of this case, the Oklahoma Supreme Court would no longer apply the *Colbert* recklessness standard and would instead follow other states that have permitted recovery under a negligence theory in false light media cases involving private

individuals and matters of public concern. In the alternative, Plaintiff seeks certification to the Oklahoma Supreme Court of the question of whether the recklessness standard applies here.

In *Colbert*, the Oklahoma Supreme Court surveyed and rejected the arguments for a negligence standard in false light cases stating that it was “committed” to “a standard of knowing or reckless conduct to afford recovery to those who suffer mental anguish by reason of a false light invasion of privacy.” 747 P.2d at 292. Plaintiff has cited no authority subsequent to *Colbert* that justifies Plaintiff’s prediction that the Oklahoma Supreme Court would retreat from the *Colbert* requirements. Accordingly, we decline to certify the question at issue and uphold the district court’s application of the recklessness requirement.

Plaintiff next argues that even if knowing or reckless conduct is required, the conduct of Shannon and Spinozi, in accepting the posting at face value and failing to verify its authenticity, is sufficient to avoid summary judgment, notwithstanding Plaintiff’s expert’s failure to use the term “reckless” in describing their actions. Plaintiff also assigns error to the district court’s refusal to accept a new affidavit from Plaintiff’s expert, submitted in connection with Plaintiff’s motion for a new trial filed pursuant to Rule 59(e) of the *Federal Rules of Civil Procedure*.

In order to establish reckless disregard, Plaintiff must demonstrate actual knowledge of probable falsity. “The only extent that an investigation enters into the consideration of the premises is if the investigation is made and through it, actual knowledge is imparted.” *Jurkowski v. Crawley*, 637 P.2d 56, 60 (Okla.1981).

Plaintiff’s expert’s affidavit, regardless of its content, is not relevant for the same reason. Plaintiff’s expert could not possibly have had personal knowledge concerning the relevant question, namely, whether Shannon and Spinozi had an actual, subjective awareness that what they were repeating on the air was probably false. For this reason, we find that the district court did not abuse its discretion in denying Plaintiff’s motion for a new trial and affirm the district court’s dismissal of the claim.

3. Intentional Infliction of Emotional Distress.

Oklahoma recognizes intentional infliction of emotional distress (“IIED”) as formulated in the Restatement (Second) of Torts § 46(1) (1965), which provides:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

The district court granted summary judgment against Plaintiff on the ground that Plaintiff failed to present evidence sufficient to show that KRXXO behaved in an extreme and outrageous way toward him and on the ground that Plaintiff failed to demonstrate that he suffered severe emotional distress as a result. We affirm on the same grounds.

“It is the trial court’s responsibility initially to determine whether the defendant’s conduct may reasonably be regarded as sufficiently extreme and outrageous to meet the § 46 standards.” *Eddy*

v. Brown, 715 P.2d 74, 76 (Okla.1986). The conduct must be beyond all bounds of human decency or such as is regarded as utterly intolerable in a civilized community. *Id.* at 77.

The conduct on which Plaintiff's claim is based—the commentary of a radio talk show host concerning an offensive advertisement that appeared on the Internet, even if that host failed to first verify that the information contained in the advertisement was accurate—does not compare to the kinds of conduct that have sustained IIED claims. We find the present case to be controlled by *Jordan v. World Pub. Co.*, 872 P.2d 946 (Okla.Ct.App.1994), in which the plaintiff, a public figure, sought recovery for negligent infliction of emotional distress when a newspaper published an offensive letter to the editor falsely attributed to him.

Like Plaintiff here, the plaintiff in *Jordan* alleged that the defendant failed to verify the authorship of the letter before publishing it. The Court of Appeals of Oklahoma upheld the trial court's dismissal of the claim on the ground that the First Amendment required the plaintiff to establish at least the same level of intent to recover for the infliction of emotional harm as is necessary to find defamation, or the protection provided by the First Amendment "could be circumvented merely by labeling a lawsuit as negligent action rather than one for libel." *Id.* at 948.

Notwithstanding Plaintiff's status as a private figure, the same principle applies here. *Colbert* requires private figures to demonstrate actual knowledge of probable falsity in order to recover from an act of negligent publishing. To allow recovery on a lesser showing of culpability for the same act under a different cause of action would erode the protections *Colbert* affords.

It is also the trial court's initial responsibility to determine whether the distress allegedly suffered by the plaintiff is severe emotional distress. *Joffe v. Vaughn*, 873 P.2d 299, 302 n. 6 (Okla.Ct.App.1993). "In other words, the distress must be of such character that 'no reasonable person could be expected to endure it.'" *Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1389 (10th Cir.1991) (*quoting* Restatement (Second) of Torts, *supra*, § 46 cmt j) (applying Oklahoma law). Again, we concur with the district court in his finding that the evidence Plaintiff submitted fails to show that the level of distress he suffered was sufficiently severe to be actionable.

In *Daemi*, this Court upheld the district court's finding, made at the conclusion of a bench trial, that the plaintiff's evidence failed to support an IIED claim. Such evidence showed that the defendant's conduct made the plaintiff "literally sick to his stomach" and caused the plaintiff to seek treatment from a doctor on at least one occasion. 931 F.2d at 1389. Plaintiff suffered similar symptoms, and, without minimizing the distress Plaintiff endured, we agree that it was not sufficiently severe.

In this regard, we are not influenced by the fact that Plaintiff did not seek professional treatment and did not discuss his distress with those closest to him. This Court recognizes that there are differences in the manner in which individuals cope. This Court is more influenced by the lack of evidence showing that the distress interfered with Plaintiff's ability to conduct his daily life affairs.

B. Defendant's Application for Costs.

Defendant appeals an order of the district court denying it costs as a prevailing party under Rule 54(d)(1) of the *Federal Rules of Civil Procedure*. The district court denied Defendant's application on the grounds, as explained in the order, that, "while the court felt compelled under the applicable law to find in the defendant's favor, it did not condone the behavior of the defendant's employees."

"A district court's denial of costs to the prevailing party is reviewed under an abuse of discretion standard." *AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1526 (1997). Defendant argues that the district court abused its discretion by denying costs as a penalty not for improper behavior as a litigant, but for non-actionable behavior giving rise to the litigation.

Rule 54(d)(1) provides in relevant part that costs "shall be allowed as of course to the prevailing party unless the court otherwise directs." The allowance or disallowance of costs to a prevailing party is within the sound discretion of the district court. *Homestake Mining Co. v. Mid-Continent Exploration Co.*, 282 F.2d 787, 804 (10th Cir.1960). However, this discretion is limited in two ways. "First, it is well established that Rule 54 creates a presumption that the district court will award costs to the prevailing party." *Cantrell v. IBEW Local 2021*, 69 F.3d 456, 458-59 (10th Cir.1995). Second, the district court must provide a valid reason for not awarding costs. *Id.* at 459. The district court's stated reason for denying costs was, essentially, that although Defendant's behavior was not legally actionable, it was sufficiently distasteful to warrant the denial of litigation costs.

While this Court has discussed various circumstances in which a district court may properly exercise its discretion to deny costs, including when the prevailing party was only partially successful, when damages were only nominal, when costs were unreasonably high or unnecessary, when recovery was insignificant, or when the issues were close or difficult, *see, e.g., Cantrell*, 69 F.3d at 459, this Court has never attempted to create an exclusive list of valid reasons. Nor has this Court stated that misconduct outside the litigation process is not a justifiable reason for denying costs.

However, case law from other jurisdictions points to the conclusion that a district court may not deny costs on the ground that the district court personally disapproves of the conduct upon which the plaintiff's unsuccessful claim was based. *See, e.g., Zenith Insur. Co. v. Breslaw*, 108 F.3d 205, 207 (9th Cir.1997) ("[D]enial of Rule 54(d) costs operates to punish the prevailing party for some impropriety *during the course of the litigation*." (emphasis added)); *White & White, Inc. v. American Hosp. Supply Corp.*, 786 F.2d 728, 730 (6th Cir.1986) (stating that the district court may deny costs "where the prevailing party should be penalized for unnecessarily prolonging trial or for injecting unmeritorious issues"); *Popeli Bros., Inc. v. Schick Elec., Inc.*, 516 F.2d 772, 775 (7th Cir.1975) ("[T]he denial of costs to the prevailing party or the assessment of partial costs against him is in the nature of a penalty *for some defection on his part in the course of the litigation ...*" (emphasis added) (quoting *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F.2d 1, 11 (7th Cir.1949), *cert. denied* 338 U.S. 948, 70 S.Ct. 486, 94 L.Ed. 584 (1950))); *Smith v. Southeastern Penn. Transp. Auth.*, 47 F.3d 97, 99 (3d Cir.1995) (quoting *Chicago Sugar*). In *Chicago Sugar*, the Seventh Circuit went even further, strongly implying that extra-judicial misconduct cannot be the basis for a district court's denial of costs to the prevailing party: "[T]he penalty of denial or apportionment of costs under Rule 54(d) should be imposed *only for acts or*

omissions on the part of the prevailing party in the actual course of the litigation” Chicago Sugar, 176 F.2d at 11 (emphasis added).

Accordingly, we now hold 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. In denying Defendant costs on that basis, the district court abused its discretion.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court’s grant of summary judgment in favor of Defendant and we REVERSE and REMAND the district court’s denial of costs to Defendant, with instructions to determine, consistent with this order, whether Defendant should receive its costs.