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# NOTE

## THE NEW IMMUNITY IN CYBERSPACE: THE EXPANDED REACH OF THE COMMUNICATIONS DECENCY ACT TO THE LIBELOUS “RE-POSTER”

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### TABLE OF CONTENTS

I. INTRODUCTION.....	
II. BACKGROUND .....	
A. <i>Traditional Defamation Law</i> .....	
B. <i>The First Attempts at Internet Defamation Law</i> .....	
C. <i>The Communications Decency Act of 1996 and the Importance of Section 230</i> .....	
D. <i>The Quick Progression of Internet Defamation Law after the CDA</i> .....	
1. <i>Zeran v. AOL and Service Provider Liability</i> .....	
2. <i>Blumenthal v. Drudge and Content Provider Liability</i> .....	
III. THE NEW DIRECTION OF ISP IMMUNITY: <i>BARRETT V. CLARK</i> .....	
A. <i>Facts and Procedure</i> .....	
B. <i>The Court’s Decision Allowing Re-poster Immunity</i> .....	
IV. DISCUSSION .....	
A. <i>The CDA’s Broadening Wake</i> .....	
B. <i>Individual Internet Users and ISPs Do Not Deserve the Same Protections</i> .....	
V. A PROPOSED SOLUTION .....	
A. <i>The Internet is Not Self-Regulating: A Solution is Needed</i> .....	
B. <i>The Framework of Notice Based Liability</i> .....	
1. <i>Suit can be Brought Against the Re-poster if Notice Fails</i> .....	
2. <i>Suits will only Succeed if Fact Based, and not Based Merely on Opinion</i> .....	
3. <i>Mitigating a Remedy by Retraction of the Defamatory Statement</i> .....	
VI. CONCLUSION .....	

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## I. INTRODUCTION

Under traditional libel law, someone who “carelessly or recklessly republishes or circulates” a defamatory statement may be just as guilty as the libel’s author.<sup>1</sup> After all, repeating a false statement can injure a person’s reputation to the same, or even higher, degree as did the original statement.<sup>2</sup> Additionally, someone who reiterates, by republication or otherwise, a defamatory statement is legally liable as if he was the original publisher.<sup>3</sup> In the evolving realm of cyber law, the question becomes what happens when this “last utterance” of libelous material is not re-published in a magazine or book, but is “re-posted” in an Internet news group or bulletin board. Does the rule establishing a re-publisher’s culpability still apply in cyberspace?

This note argues that courts should extend some protection from libel to the cyber world because these re-postings can cause harm. It proposes a solution to the problem that recognizes the Internet’s unique character, particularly when compared to print media, while not completely foreclosing recovery for individuals defamed on the Internet. Part II of this note provides a background on traditional defamation law. This includes an exploration of early online defamation cases and how Internet Service Providers (“ISPs”) have relied on the federal statutory immunity created by the Communications Decency Act (“CDA”), specifically section 230 of the Telecommunications Act of 1996,<sup>4</sup> for protection against defamation suits. Part III discusses *Barrett v. Clark*, a recent case of first impression, in which Judge James A. Richman of the California Superior Court ruled that a person who repeatedly re-posts libelous information originally authored and posted by another person on the Internet is protected from suit by the same federal law designed to protect Internet Service Providers.<sup>5</sup> Part IV considers how an individual Internet moderator does not deserve the protection reserved for ISPs. Part V proposes a notice based solution to the libelous re-posting problem and discusses how and why courts must strike a balance between regulating the Internet and providing relief to injured plaintiffs. This note will conclude in Part VI with a summary.

## II. BACKGROUND

### A. Traditional Defamation Law

Defamation is the act of harming someone else’s reputation by making a

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<sup>1</sup> Carl S. Kaplan, *How Is Libel Different in Cyberspace?*, N.Y. TIMES ON THE WEB, Aug. 9, 2001, at <http://www.nytimes.com/2001/08/09/technology/10CYBERLAW.html> (discussing rationale underlying *Barrett v. Clark*, No. 833021-5, 2001 WL 881259 (Cal. Super. Ct. July 25, 2001)).

<sup>2</sup> *Id.*

<sup>3</sup> *Cianci v. New Times Publ’n Co.*, 639 F.2d 54, 61 (2d Cir. 1980) (Friendly, J.) (quoting RESTATEMENT (SECOND) OF TORTS § 578 (1977)).

<sup>4</sup> See 47 U.S.C. § 230 (2000).

<sup>5</sup> See *Barrett v. Clark*, No. 833021-5, 2001 WL 881259 (Cal. Super. Ct. July 25, 2001).

false communication or statement to a third party.<sup>6</sup> This statement about and concerning the defamed person traditionally reaches the third party through a publication of the statement made by the defamer.<sup>7</sup> A statement usually is defamatory if it would have the effect of damaging the person's reputation by reducing the esteem other people hold for the defamed or their desire to mix company with the defamed.<sup>8</sup> Defamatory statements that harm an individual's reputation in the eyes of the community include accusations of untruthfulness or criminal conduct,<sup>9</sup> but crudeness and mockery usually will not suffice for actionable libel.<sup>10</sup> However, the publisher's intent is not relevant. A statement is defamatory if a third party reasonably understood it to be libelous.<sup>11</sup> Defamation suits are usually brought against publishers, distributors and common carriers.<sup>12</sup> Courts will impose varying degrees of liability depending on the amount of editorial control a defendant possessed.<sup>13</sup>

All primary publishers are wholly liable for defamation, a category that includes not only the initial defamer, but also those who publish magazines, newspapers, and books.<sup>14</sup> Primary publishers have constructive knowledge and intent to publish the author's defamatory statements because their access and editorial control provide them means by which to learn of slanderous material.<sup>15</sup> Publishers cannot claim a lack of knowledge if their failure to know the statements were libelous was due to their own negligence and the publication caused harm to the defamed party.<sup>16</sup>

Secondary publishers of defamatory content, such as libraries, bookstores,

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<sup>6</sup> Kaplan, *supra* note 1, ¶ 1.

<sup>7</sup> See Kean J. DeCarlo, Note, *Tilting At Windmills: Defamation and the Private Person in Cyberspace*, 13 GA. ST. U. L. REV. 547, 551 (1997) (noting that "[a] statement is considered published if it is communicated, either intentionally or negligently to a third party who understands the communication").

<sup>8</sup> Neil Fried, *Dodging the Communications Decency Act when Analyzing Libel Liability of On-line Services: Lunney v. Prodigy Treats Service Provider like Common Carrier Rather Than Address Retroactivity Issue*, 1 COLUM. SCI. & TECH. L. REV. 1, ¶ 10 (1999), at <http://www.stlr.org/cite.cgi?volume=1&article=1>.

<sup>9</sup> Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse In Cyberspace*, 49 DUKE L.J. 855, 868 (2000).

<sup>10</sup> Fried, *supra* note 8, ¶ 10 (noting that "Form is not important: defamatory communication can occur directly or indirectly, by question or insinuation, on the face of the statement or by context, so long as the message conveys a defamatory meaning.").

<sup>11</sup> *Id.*

<sup>12</sup> Sarah Beckett Boehm, *A Brave New World of Free Speech: Should Interactive Computer Service Providers Be Held Liable for the Material They Disseminate?*, 5 RICH. J. L. & TECH. 7, ¶ 5 (Winter 1998), at <http://law.Richmond.edu/jolt/v5i2/boehm.html>.

<sup>13</sup> *Id.*

<sup>14</sup> DeCarlo, *supra* note 7, at 552.

<sup>15</sup> See Fried, *supra* note 8, ¶ 6 (explaining that responsibility for content is the key rationale for treating publishers like the underlying author of the statement).

<sup>16</sup> See Walter Pincus, *The Internet Paradox: Libel, Slander & the First Amendment in Cyberspace*, 2 GREEN BAG 2d 279, 280 (1999).

and news vendors, are also considered distributors.<sup>17</sup> Distributors are liable only if they know or have reason to know that the information they offer is defamatory.<sup>18</sup> “This knowledge requirement stems from First Amendment concerns that it would be unreasonable to require distributors to read all the materials they disseminate and might affect the amount and types of material they are willing to make available.”<sup>19</sup> Thus, distributors can avoid liability without having to scrutinize the contents of their distributions.<sup>20</sup> The distributor’s lack of editorial control justifies this reduced liability standard.<sup>21</sup>

Common carriers, like telephone companies, merely provide the “facilities and equipment” by which a person spreads his defamatory statement.<sup>22</sup> They are “mere passive conduits,” lacking any editorial control over the content of what they sell.<sup>23</sup> Being a static intermediary, they escape liability for defamation because no implied intent to circulate that particular statement can exist.<sup>24</sup>

### B. *The First Attempts at Internet Defamation Law*

In trying to keep up with the Internet boom, defamation law has struggled to adapt to cyberspace.<sup>25</sup> Fundamental to considering cyber-defamation, courts have had to determine whether to apply to a defendant the standard of liability for a publisher or a distributor.<sup>26</sup> The courts initially attempted to analyze this new medium with existing law, paralleling “people who post statements to online chat rooms and bulletin boards, and those who write old-fashioned ‘letters to the editor.’”<sup>27</sup> Accordingly, courts initially analyzed ISP liability

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<sup>17</sup> *See id.*

<sup>18</sup> *Id.*

<sup>19</sup> Fried, *supra* note 8, ¶ 6.

<sup>20</sup> DeCarlo, *supra* note 7, at 553.

<sup>21</sup> *Id.*

<sup>22</sup> *See* Fried, *supra* note 8, ¶ 6.

<sup>23</sup> Pincus, *supra* note 16, at 280.

<sup>24</sup> *See* Fried, *supra* note 8, ¶ 6 (noting that they will escape liability for defamation “even if they had notice of the purpose to which their equipment was being put”).

<sup>25</sup> Michelle J. Kane, *Blumenthal v. Drudge* (Case Notes), 14 BERKELEY TECH L.J. 483, 487 (1999).

<sup>26</sup> Andrew J. Slitt, Note, *The Anonymous Publisher: Defamation on the Internet After Reno v. American Civil Liberties Union and Zeran v. America Online*, 31 CONN. L. REV. 389, 395 (1998).

<sup>27</sup> Kane, *supra* note 25, at 487; *see generally* Lunney v. Prodigy, 723 N.E.2d 539, 542 (N.Y. 1999), *cert. denied*, 529 U.S. 1098 (2000) (describing how bulletin board operators are more aware of messages than e-mails: “In some instances, an electronic bulletin board could be made to resemble a newspaper’s editorial page; in others it may function more like a ‘chat room’ . . . . Some electronic bulletin boards post messages instantly and automatically, others briefly delay posting so as not to become ‘chat rooms,’ while still others significantly delay posting to allow their operators an opportunity to edit the message or refuse posting altogether.”).

using the traditional standards for print media.<sup>28</sup> This was true of “the first significant online libel case,” in which a district court in New York employed the traditional analysis.<sup>29</sup>

In *Cubby, Inc. v. CompuServe, Inc.*, (“Cubby”) the court held that an ISP who offered its subscribers access to an electronic library of news publications was a mere distributor of information and was not liable for defamatory statements made in news publications absent a showing of actual knowledge.<sup>30</sup> “Analogizing CompuServe to an electronic library, the court observed that CompuServe had no more editorial control over [postings on its service] than public libraries, bookstores, or newsstands have over the publications they carry.”<sup>31</sup> Therefore, the Court applied the distributor liability standard to CompuServe and inquired whether CompuServe “knew or had reason to know of the allegedly defamatory statements.”<sup>32</sup>

Subsequent to the federal *Cubby* decision, the New York Supreme Court decided *Stratton Oakmont, Inc. v. Prodigy Servs. Co.* and concluded that an ISP could be liable as a publisher of defamatory statements if it retained editorial control over the postings contained on its site.<sup>33</sup> In the case, the plaintiffs sued Prodigy for defamatory comments made by an unidentified party on one of Prodigy’s bulletin boards.<sup>34</sup> “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.”<sup>35</sup> The court stated that generally it would treat computer bulletin boards the same as bookstores, libraries and network affiliates.<sup>36</sup> However, in contrast to *Cubby*, 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.<sup>37</sup> The key distinction being that Prodigy used editorial control over its

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<sup>28</sup> Kane, *supra* note 25, at 487.

<sup>29</sup> Fried, *supra* note 8, ¶ 19.

<sup>30</sup> 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991) (wherein Plaintiffs based their libel claim on the allegedly defamatory statements contained in the Rumorville publication that CompuServe carried as part of the Journalism Forum).

<sup>31</sup> Fried, *supra* note 8, ¶ 20.

<sup>32</sup> *Id.* ¶ 21.

<sup>33</sup> DeCarlo, *supra* note 7, at 568.

<sup>34</sup> *Id.* (explaining that the unidentified user claimed on Prodigy’s “Money Talk” computer bulletin board section that Stratton, a securities investment firm, engaged in fraudulent activity).

<sup>35</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *see Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at \*9 (Sup. Ct. May 24, 1995).

<sup>36</sup> *Stratton Oakmont, Inc.*, 1995 N.Y. Misc. LEXIS 229, at \*12.

<sup>37</sup> *See id.* (“Prodigy has virtually created an editorial staff of Board Leaders who have the ability to continually monitor incoming transmissions and in fact do spend time censoring notes.”); Fried, *supra* note 8, ¶ 24 (quoting *Stratton Oakmont, Inc.*, 1995 N.Y. Misc. LEXIS

bulletin board postings, thereby incurring greater liability that would ordinarily be the case.<sup>38</sup> Thus, the existence of editorial control in the online context made an ISP a primary publisher rather than as a distributor.<sup>39</sup>

#### C. THE COMMUNICATIONS DECENCY ACT OF 1996 AND THE IMPORTANCE OF SECTION 230

The CDA, part of the Telecommunications Act of 1996,<sup>40</sup> was designed to combat Internet pornography and remedy the *Prodigy* decision, as the online industry interpreted it. Fearing that the specter of liability created by the *Stratton Oakmont* decision would deter ISPs from monitoring offensive material, such as Internet pornography, Congress enacted section 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."<sup>41</sup> Accordingly, section 230 contains a "Good Samaritan" provision that protects an ISP from publisher liability when it uses its editorial control to monitor content.<sup>42</sup> Subsection (c)(1) of section 230 provides, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."<sup>43</sup> Congress clearly intended to protect and encourage ISPs to take active steps to monitor and remove objectionable content, not to protect them from liability when they knowingly choose not to remove it.<sup>44</sup>

#### D. The Quick Progression of Internet Defamation Law after the CDA

The CDA took effect on February 8, 1996.<sup>45</sup> "Some saw it as giving blanket immunity to Internet providers,"<sup>46</sup> while others warned that it could increase

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229 at \*3-4) ("The court acknowledged that Prodigy's control was not total, but concluded nonetheless that Prodigy had 'uniquely arrogated to itself the role of determining what [was] proper for its members to post and read on its bulletin boards.'").

<sup>38</sup> Fried, *supra* note 8, ¶ 22.

<sup>39</sup> *See id.*

<sup>40</sup> 47 U.S.C. § 230 (2000).

<sup>41</sup> *Id.* § 230(b)(4).

<sup>42</sup> *Doe v. America Online, Inc.*, 783 So.2d 1010, 1015 (Fla. 2001); 47 U.S.C. § 230(c).

<sup>43</sup> 47 U.S.C. § 230 (c)(1) (2000); *see also* 47 U.S.C. § 230(f)(3) (2000) (defining "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").

<sup>44</sup> *See* Christopher Butler, Note, *Plotting the Return of an Ancient Tort to Cyberspace: Towards a New Federal Standard of Responsibility for Defamation for Internet Service Providers*, 6 MICH. TELECOMM. TECH. L. REV. 247, 252 (2000) (discussing the "Good Samaritan" provision).

<sup>45</sup> Pincus, *supra* note 16, at 283.

<sup>46</sup> *Id.* ("Lawyers for Prodigy claimed as much when, after passage of the law, they appealed the New York State Supreme Court's decision in their case to the state Court of

“future liability and regulation costs” if it obstructed “self regulation or [was] an excuse for industry inaction.”<sup>47</sup> Soon after, the Supreme Court in *Reno v. American Civil Liberties Union* struck down a portion of the statute for violating the First Amendment. The Court said that the statute chilled “the rights of adults to communicate freely with each other,” thereby going beyond its goal of protecting children.<sup>48</sup> By finding the statute unconstitutional, the Court also recognized that the First Amendment protects print and Internet publishers equally.<sup>49</sup> It would only be a short time later that the Court would have occasion to revisit the CDA, this time in the context of defamation liability for these Internet publishers.

#### 1. *Zeran v. AOL* and Service Provider Liability

After the Oklahoma City bombing in April 1995, an unidentified person logged onto an America Online (“AOL”) bulletin board and posted a message advertising “Naughty Oklahoma T-Shirts” and other items with distasteful slogans glorifying the bombing.<sup>50</sup> Affixed to such notices were Ken Zeran’s name and telephone number.<sup>51</sup> Zeran had no knowledge of the notices, but began receiving countless telephone threats.<sup>52</sup> AOL subsequently removed the notices, but they continued to reappear.<sup>53</sup> By the final days of April, Zeran claimed he was receiving a flood of abusive calls at the approximate rate of one every two minutes.<sup>54</sup> Soon after, a radio station broadcaster in Oklahoma City received a copy of the offensive notices and encouraged listeners to call the listed phone number to express their disgust and disapproval.<sup>55</sup> This public announcement inevitably caused another cascade of threatening and abusive telephone calls to Zeran’s home, and local police were forced to keep Zeran’s home under continual protective surveillance.<sup>56</sup> Though the radio station issued apologies and the frequency of the threats slowed, the intimidating calls continued.<sup>57</sup> Zeran initiated a state law negligence action against AOL under the theory that distributors of information are liable for the distribution of

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Appeals.”).

<sup>47</sup> *Id.* (quoting Robert B. Charles & Jacob H. Zamansky, *Liability for Online Libel After Stratton-Oakmont, Inc. v. Prodigy Services Co.*, 28 CONN. L. REV. 1173, 1177 (1996)).

<sup>48</sup> Slitt, *supra* note 26, at 390; *see infra* notes 102-03.

<sup>49</sup> Slitt, *supra* note 26, at 390; *see Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (“The CDA’s ‘indecent transmission’ and ‘patently offensive display’ provisions abridge ‘the freedom of speech’ protected by the First Amendment.”).

<sup>50</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*



material which they knew or should have known was of a defamatory character.<sup>58</sup>

The Fourth Circuit held that *Zeran*'s negligence cause of action, attempting to impose distributor liability on ISP, conflicted with both the express language of the CDA and its underlying purposes.<sup>59</sup> Congress designed the CDA to immunize ISPs from lawsuits seeking to hold them liable as publishers for exercising a publisher's traditional editorial functions.<sup>60</sup> As noted by the court, Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and growing Internet medium and opted not to place liability on companies that serve as intermediaries for other parties' potentially injurious messages.<sup>61</sup> To require ISPs to screen millions of messages for defamatory content would be a practical impossibility and an undue burden, resulting in an "obvious chilling effect" on free speech.<sup>62</sup>

"Thus *Zeran* was the first opportunity for the judiciary to interpret the [CDA] in a case that involved not obscenity (the statute's target), but defamation — a branch of law not overtly contemplated by Congress during its deliberations of the [CDA]."<sup>63</sup> *Zeran* gave an ISP immunity even where it knew of the defamatory posting, an anonymous posting imposed ISP liability only if the ISP maliciously retained the posting after notice of its defamatory content.<sup>64</sup>

## 2. *Blumenthal v. Drudge* and Content Provider Liability

Since *Zeran* dealt with postings that arose on an unregulated bulletin board, the court only needed to address AOL's role as an ISP who provides the consumer with access to the Internet. As such, the court did not take into account AOL's twofold nature, that of an ISP and that of a content provider who publishes material to its members authored by itself and others.<sup>65</sup> AOL's role as content provider would provide the next instance for examination of defamation liability.

In 1997, AOL entered into a written license agreement with Matt Drudge,

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<sup>58</sup> *Id.* at 331; *see also id.* at 330 ("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.").

<sup>59</sup> *Id.* at 331.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Slitt, *supra* note 26, at 399 (The court further stated that "[n]evertheless, defamation will henceforth be affixed to the Act, as courts struggle to find an appropriate balance between the search for a remedy for Internet defamation victims and the quest to protect the First Amendment free speech rights both of those who use the Internet as well as Internet Service Providers themselves.").

<sup>64</sup> Pincus, *supra* note 16, at 285.

<sup>65</sup> Butler, *supra* note 44, at 254.



2003]

*THE NEW IMMUNITY IN CYBERSPACE*

the proprietor of an Internet publication entitled the Drudge Report.<sup>66</sup> The site was, and still is, available free of charge to anyone with Internet access and consists of links to other news sources, as well as Drudge's own personal news report.<sup>67</sup> In return for permission to post content from the Drudge Report in its subscriber-only area, AOL agreed to pay Drudge a monthly royalty fee of \$3,000.<sup>68</sup> Under the agreement, AOL reserved the rights to both remove content if it did not comport with AOL's customary service terms and to demand content changes, subject to a good faith requirement, where the statements would otherwise unfavorably impact AOL's network operations.<sup>69</sup>

The day before Sidney Blumenthal started a new job as an aide to President Clinton, the Drudge Report reported that Blumenthal allegedly had "a spousal abuse past that [had] been effectively covered up."<sup>70</sup> Blumenthal sued AOL, arguing that section 230 of the CDA should not protect Drudge because he was much more than an anonymous user, he was a contractual party to which AOL paid \$3,000 monthly for such postings.<sup>71</sup> Despite AOL's knowledge of the postings and AOL's affirmative act of paying for them, the court did not find AOL liable.<sup>72</sup> The court construed section 230(c)(1) as insulating interactive computer services from liability for any "failure to edit, withhold or restrict access to offensive material" they carry.<sup>73</sup> This result differs dramatically from cases litigated in the pre-section 230 era. It also differs from the current treatment of publishers of print material, who are accountable for the content they publish.<sup>74</sup>

III. THE NEW DIRECTION OF ISP IMMUNITY: *BARRETT V. CLARK*

A. *Facts and Procedure*

In *Barrett v. Clark*, plaintiffs Stephen J. Barrett, M.D., and Terry Polevoy, M.D., operated "Quackwatch," "a 32-year-old nonprofit organization 'to combat health-related frauds, myths, fads and fallacies.'"<sup>75</sup> The organization provided information that was generally not found through mainstream medical resources.<sup>76</sup> Quackwatch's Web site<sup>77</sup> was launched in 1996 and

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<sup>66</sup> Blumenthal v. Drudge, 992 F. Supp. 44, 47 (D.D.C. 1998).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 47, 51.

<sup>70</sup> *Id.* at 46.

<sup>71</sup> *Id.* at 51.

<sup>72</sup> *Id.* at 53.

<sup>73</sup> *Id.* at 49.

<sup>74</sup> See Kane, *supra* note 25, at 486.

<sup>75</sup> Meg James, *Internet Defamation Lawsuit Is Dismissed*, L.A. TIMES ON THE WEB, ¶ 5, July 31, 2001, available at 2001 WL 881259.

<sup>76</sup> *Id.*

<sup>77</sup> See generally Stephen Barrett, M.D., *Quackwatch Homepage*, QUACKWATCH.COM, at <http://www.quackwatch.com> (last visited Mar. 29, 2003).

contains information about fraudulent health care practices and criticisms of alternative medicine.<sup>78</sup>

Plaintiffs charged that several defendants involved in the alternative medicine movement published messages on the Internet that defamed them.<sup>79</sup> “One message, allegedly written by a defendant, Tim Bolen, stated, among other things, that Dr. Polevoy had stalked a Canadian radio producer of alternative medical programs” to prevent her from airing a show about alternative medicine.<sup>80</sup> Additionally, the message stated that the doctors were in the pay of the traditional medical establishment, and called them “quacks.”<sup>81</sup> Ilena Rosenthal, Director of the Humantics Foundation in San Diego, a center for alternative health care, and operator of a Usenet newsgroup for women who have had problems with breast implants, then reposted the Bolen message to one or more news groups.<sup>82</sup> Dr. Barrett contacted Ms. Rosenthal and informed her that the Bolen reposting contained false and defamatory information about Dr. Polevoy, and threatened suit.<sup>83</sup> Instead of withdrawing the message, Rosenthal posted messages about Dr. Barrett’s threat and claimed that Barrett was “arrogant” and a “bully” who tried to “extort” her, and attached a reposting of the Bolen statement.<sup>84</sup>

#### *B. The Court’s Decision Allowing Re-poster Immunity*

The court found for the defendants on several grounds.<sup>85</sup> Relevant to the discussion here, the court found that section 230(c)(1) of the CDA<sup>86</sup> immunized Rosenthal as a user of an ISP from liability created by a third party.<sup>87</sup> The court reasoned that Rosenthal did not author the information in the article she re-posted.<sup>88</sup> As the “user of an interactive computer service, that is, a news group, Rosenthal is not the publisher or speaker of [the] piece. Thus, she cannot be civilly liable for posting it on the Internet. She is immune.”<sup>89</sup> Judge Richman held that the original author who created and posted the libelous information on the Internet was the guilty party and could

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<sup>78</sup> Kara Platoni, *War of the Words*, EAST BAY EXPRESS, ¶ 4, Sept. 5, 2001, at <http://eastbayexpress.com/issues/2001-09-05/cityside.html>.

<sup>79</sup> Kaplan, *supra* note 1, ¶ 23.

<sup>80</sup> *Id.* ¶ 24; *see also* Platoni, *supra* note 78, ¶ 6.

<sup>81</sup> James, *supra* note 75, ¶ 6.

<sup>82</sup> Platoni, *supra* note 78, ¶ 7.

<sup>83</sup> Kaplan, *supra* note 1, ¶ 23.

<sup>84</sup> James, *supra* note 75, ¶ 6.

<sup>85</sup> *Barrett v. Clark*, No. 833021-5, 2001 WL 881259 (Cal. Super. Ct. July 25, 2001).

<sup>86</sup> 47 U.S.C. § 230 (2000) (“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.”).

<sup>87</sup> *Barrett*, 2001 WL 881259, at \*9.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

2003] *THE NEW IMMUNITY IN CYBERSPACE*

be subject to legal action and damages.<sup>90</sup> However, the “cyber talebearer is completely shielded from liability.”<sup>91</sup>

The court went on to say that even if the CDA did not immunize Rosenthal, the statements at issue, except one, were opinions rather than false factual assertions.<sup>92</sup> The court also found that the plaintiffs were public figures and under defamation law would have to prove actual malice in order to succeed in the defamation action.<sup>93</sup> Rosenthal’s only statement that was arguably defamatory was the document written by Bolen that Rosenthal re-posted on an Internet newsgroup, and Barrett and Polevoy could not prevail here because they failed to meet the standard for malice.<sup>94</sup>

#### IV. DISCUSSION

##### A. *The CDA’s Broadening Wake*

As noted, the Communications Decency Act has been interpreted to protect ISPs from being held responsible for libelous matter generated in chat rooms and on bulletin boards, and to make them immune from the bad behavior of their subscribers.<sup>95</sup> Critics argue that courts are expanding section 230’s scope beyond what Congress intended, thereby creating a gaping hole in ISP accountability.<sup>96</sup> Further complicating this mounting problem of accountability, the *Barrett* court extended CDA immunity to protect not only the ISP, but also the user of an ISP when the user fails to monitor and remove defamatory statements under their control.<sup>97</sup> This is not a responsible judicial choice.

In its primary interpretation of the language of the CDA, the *Zeran* court interpreted phrases like “offensive material” and “otherwise objectionable” material to cover defamatory material.<sup>98</sup> However, congressional intent does grant these terms such an expansive definition.<sup>99</sup> As the bill’s Senate Conference Report explains, protecting ISPs who try to regulate what children view on the Internet primarily justifies the “Good Samaritan” provisions.<sup>100</sup> If the provisions are geared toward protecting children, how the CDA came to

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<sup>90</sup> *Id.*

<sup>91</sup> Kaplan, *supra* note 1, ¶ 4.

<sup>92</sup> *See Barrett*, 2001 WL 881259, at \*7 (finding that Rosenthal’s statements were not actionable because “they do not contain provably false assertions of fact, but rather [were] expressions of subjective judgment”).

<sup>93</sup> *Id.* at \*10.

<sup>94</sup> *See id.* at \*11.

<sup>95</sup> *See supra* Part II.C.

<sup>96</sup> Kaplan, *supra* note 1, ¶ 14 (paraphrasing the comments of Ian Ballon, an attorney and editor of “E-Commerce and Internet Law (Glasser LegalWorks, 2001)”).

<sup>97</sup> *See Barrett*, 2001 WL 881259, at \*9.

<sup>98</sup> *See Zeran v. America Online, Inc.*, 958 F. Supp. 1124, 1129 (E.D. Va. 1997).

<sup>99</sup> Butler, *supra* note 44, at 255.

<sup>100</sup> *Id.* (citing S. CONF. REP. No. 104-230 at 435 (1996)).

also cover defamation is unclear. Few “parents are seriously trying to prevent their children from gaining access to defamatory content,” even if they are able to realize its defamatory nature at all.<sup>101</sup> Defamatory material is not plainly offensive, nor is it material that parents would automatically want to limit.<sup>102</sup> “[To] rule that Congress intended the CDA to address defamation liability requires resorting to a definition of offensive material that the [Supreme Court overruled in *Reno v. ACLU*].”<sup>103</sup> The vague and overly broad definitions of “indecent” and “patently offensive” material in the CDA have exacted a heavy price for free speech.<sup>104</sup>

As noted, the *Zeran* case was the first case to interpret the CDA, thereby starting the courts down a path of providing ISPs with federal immunity from suit.<sup>105</sup> Some believe that *Zeran* made a critical misinterpretation in its rejection of the case law that has traditionally recognized an important difference between distributor and publisher liability.<sup>106</sup> The court relied instead on the Restatement (Second) of Torts’ section 577 for the proposition that “the law treats as a publisher or speaker one who fails to take reasonable steps to remove defamatory statements from property under her control.”<sup>107</sup> The dissent in *Doe v. America Online* noted that *Zeran* erred by treating distributors as within the definition of publishers.<sup>108</sup> “While the general common law tort principles contained in the Restatement are, of course, still viable, the treatise has yet to incorporate the realities of the [Internet].”<sup>109</sup>

The sheer scope of the immunity established in *Zeran* is beyond what is necessary to implement the CDA’s purpose.<sup>110</sup> Given the context of the statute, Congress wished to protect and encourage the positive policing of the

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* See also *id.* at 256 (“The great irony of the granting of enhanced protection to ‘good samaritan’ information content providers is that it has survived the overturning of the restrictive provisions of the CDA that the provisions were designed to counterbalance.”).

<sup>105</sup> See *supra* Part II.D.1.

<sup>106</sup> See generally Michael H. Spencer, *Defamatory E-Mail and Employer Liability: Why Razing Zeran v. America Online is a Good Thing*, 6 RICH. J.L. & TECH. 25, ¶ 14 (2000) at <http://www.law.richmond.edu/jolt/v6i5/article4.html> (criticizing as erroneous *Zeran*’s interpretation of the CDA as eliminating ISP distributor liability).

<sup>107</sup> *Doe v. America Online, Inc.*, 783 So.2d 1010, 1020-21 (Fla. 2001) (Lewis, J., dissenting) (quoting *Zeran v. America Online*, 958 F. Supp. 1124, 1133 (E.D.Va. 1997)).

<sup>108</sup> *Id.* at 21; see also *id.* at 22 (“Thus, under the more appropriate section of the Restatement (Second) of Torts, AOL—not as a publisher, but as a distributor (‘one who only delivers or transmits defamatory matter published by a third person’)—would have potential liability where, as here, it is alleged that AOL actually knew of the illicit character of the material which it was transmitting over its Internet service.”).

<sup>109</sup> *Id.* at 1020 n.11.

<sup>110</sup> David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 150 (1997).

Internet and confer immunity to providers of interactive computer services as an incentive for them to self-regulate.<sup>111</sup> “Although, Congress wished to ‘preserve the vibrant and competitive free market that presently exists for the Internet,’ the statute should not necessarily protect system operators from all torts related to the publication of third party statements.”<sup>112</sup> The “vibrant speech” policy behind the CDA is not furthered by the immunization of an ISP user who “knowingly and willfully transmits inaccurate content on an electronic bulletin board.”<sup>113</sup> Instead, it merely creates a “disincentive” for any ISP user to monitor itself at all when re-publishing material with offensive or defamatory content, even when the ISP is notified of defamatory postings.<sup>114</sup> The immunity they would enjoy provides no discouragement for pursuing a malicious defamation. In attempting to remove deterrents for ISPs to monitor postings on their services, Congress has, in reality, removed all legal incentives for ISPs, or individuals given ISP protections, to be cognizant of the material they are re-posting or to refrain from improper behavior.

Congress “did not intend to provide a free pass to someone who acts with impunity and posts information that he or she knows to be false simply because he didn’t write it.”<sup>115</sup> *Zeran* recognized this by stopping short of absolute immunity for distributors who refuse to remove defamatory material from their networks after notice.<sup>116</sup> In fact, the court expressly noted that it was not ruling on such a factual scenario, particularly where an ISP acted with malice towards the injured party.<sup>117</sup> The court found that not only did the case not present the issue, but that Congress did not appear to have considered it.<sup>118</sup> Thus, *Zeran* should not foreclose a plaintiff from successfully suing under the CDA for the malicious posting of defamatory material or the malicious refusal to remove such material.

As the *Zeran* court limited its holding to the allegation of negligent distribution, it left open the possibility that the CDA did not immunize

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<sup>111</sup> See 47 U.S.C. § 230(b) (2000) (“It is the policy of the United States . . . 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.”).

<sup>112</sup> David Wiener, Comment, *Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran?*, 39 SANTA CLARA L. REV. 905, 929-30 (1999) (quoting from congressional findings noted in the CDA’s enactment).

<sup>113</sup> *Id.*

<sup>114</sup> Jonathan A. Friedman and Francis M. Buono, *Limiting Tort Liability for Online Third-party Content Under Section 230 of the Communications Act*, 52 FED. COMM. L.J. 647, 661 (2000).

<sup>115</sup> Kaplan, *supra* note 1, ¶ 16 (quoting Ian Ballon, attorney and editor of “E-Commerce and Internet Law (Glasser LegalWorks, 2001)”).

<sup>116</sup> Sheridan, *supra* note 110, at 167.

<sup>117</sup> *Id.* (quoting *Zeran v. America Online, Inc.*, 958 F. Supp. 1124, 1134 n.20 (E.D. Va. 1997)).

<sup>118</sup> *Zeran*, 958 F. Supp. at 1134 n.20.

distributor liability based upon other facts.<sup>119</sup> These factual scenarios could include situations where an “interactive computer service is motivated by a desire to harm the plaintiff,” or where “the service is acting with constitutional malice, i.e., with knowledge of falsity or reckless disregard of falsity.”<sup>120</sup> Under the widely followed reasoning of the *Zeran* court, the kind of intentional defamation at issue in *Barrett* should not have received automatic protection under the CDA. For instance, the *Lunney* court saw “no occasion to hypothesize whether there may be other instances in which the role of an electronic bulletin board operator would qualify it as a publisher.”<sup>121</sup>

In *Drudge*, AOL was publishing third party content and reserving the right to edit that content.<sup>122</sup> This was particularly frustrating to the court when, under the CDA, it could not impose publisher liability on AOL, even though AOL was “not a passive conduit like the telephone company” and had the right “to exercise editorial control over those with whom it [contracted] and whose words it [disseminated].”<sup>123</sup> The CDA’s underlying policy constrained the *Drudge* court, which found that Congress intended “to provide immunity from tort liability for third party content to ISPs as an incentive for the providers ‘to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted.’”<sup>124</sup> Judge Friedman clearly expressed his unhappiness with Congress’ decision, admitting that absent the CDA, the court would have found for the plaintiffs.<sup>125</sup>

The *Drudge* court noted AOL’s high level of editorial control over the content it was publishing.<sup>126</sup> An ISP user who is picking and choosing what defamatory material to re-post on its bulletin board should fall outside the scope of CDA immunity because Congress never contemplated giving individual users an incentive to self-regulate. Rather, a moderator with substantial editorial control over “a newsgroup or bulletin board service could be better equated with the traditional letters-to-the-editor column of a printed newspaper, which are normally held to a publisher standard of liability for

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<sup>119</sup> *Id.* (“In any event, there is no occasion here to consider whether, under some set of facts, information initially placed online by a third party might be deemed to be information provided by the Service Provider itself, thereby rendering § 230(c) inapplicable.”).

<sup>120</sup> Sheridan, *supra* note 110, at 170 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)).

<sup>121</sup> *Lunney v. Prodigy Servs. Co.*, 723 N.E.2d 539, 542 (N.Y. 1999).

<sup>122</sup> *Blumenthal v. Drudge*, 992 F. Supp. 44, 51 (D.D.C. 1998) (“AOL has certain editorial rights with respect to the content provided by Drudge and disseminated by AOL, including the right to require changes in content and to remove it; and it has affirmatively promoted Drudge as a new source of unverified instant gossip on AOL. Yet it takes no responsibility for any damage he may cause.”).

<sup>123</sup> Butler, *supra* note 44, at 255 (quoting *Blumenthal*, 992 F. Supp. at 51).

<sup>124</sup> *Id.* (quoting *Blumenthal*, 992 F. Supp. at 52).

<sup>125</sup> *Blumenthal*, 992 F. Supp. at 51.

<sup>126</sup> *Id.*

defamation.”<sup>127</sup>

*B. Individual Internet Users and ISPs DO NOT Deserve the Same Protections*

Under traditional state common law defamation suits, distributors are only exempted “from liability if they did not know or have constructive knowledge of the defamatory statements.”<sup>128</sup> However, this common law rule that knowledge incurs liability does not easily extend to the Internet where the sheer number of daily postings is enormous, making adequate investigation into every notice impracticable.<sup>129</sup> Consequently, Congress was sympathetic when ISPs argued that strict distributor liability would be unfair because the sheer number of daily postings would create an impossible monitoring burden and actual, full knowledge of all posting content was not feasible.<sup>130</sup>

ISPs are primarily in the business of making their facilities available to disseminate statements written by others, without knowing the content of the information, and sometimes without any opportunity to ascertain, in advance, that any defamatory matter was included in the matter published. In order for courts to hold distributors liable for defamatory statements, plaintiffs must show proof that the distributor had knowledge of those statements.<sup>131</sup> Most Internet cases address situations where the ISP was ignorant of the messages, and thus distributor liability was not at issue.<sup>132</sup> As some cases make clear, however, even defendant ISPs would concede that section 230 does not protect them where they have authored the defamatory content.<sup>133</sup>

The re-poster of prior published material is far from ignorant of the message’s content, and allowing people to re-post potentially libelous material on the Internet with impunity will spur reckless behavior. The facts in *Barrett* pose a particular danger where the defendant, Rosenthal, was the moderator of her newsgroup. In the case of newsgroups, the moderator acts as a check point through which all posting must pass.<sup>134</sup> The moderator’s responsibilities include filtering out statements that do not the further the group discussion, such as personal attacks that stoke “flame wars.”<sup>135</sup> If a defamatory message

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<sup>127</sup> Jeffrey M. Taylor, *Liability of Usenet Moderators for Defamation Published by Others: Flinging the Law of Defamation Into Cyberspace*, 47 FLA. L. REV. 247, 282 (1995).

<sup>128</sup> Boehm, *supra* note 12, ¶ 44.

<sup>129</sup> *Id.*

<sup>130</sup> See Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, FED. COMM. L.J. 51, 59 (1996).

<sup>131</sup> See *supra* Part II.A.

<sup>132</sup> See *supra* Part II.D.2 (explaining that *Drudge* would be an exception to this proposition).

<sup>133</sup> *Ezra, Weinstein, & Co. Inc. v. America Online Inc.*, 206 F.3d 980, 985 n.4 (10th Cir. 2000), *cert. denied*, 2000 U.S. LEXIS 5157 (2000).

<sup>134</sup> Michael Hadley, Note, *The Gertz Doctrine and Internet Defamation*, 84 VA. L. REV. 477, 496 (1998).

<sup>135</sup> *Id.*



makes it into a moderated newsgroup, it should not be because the moderator is starting his own private “flame wars” and using his immunity privilege to defame with impunity. The recent case of *Sabbato v. Hardy* illustrated this when the court held that if a webmaster requires an access password for anyone posting or replying to messages and the webmaster may use his discretion to refuse access to anyone, then section 230 will not necessarily protect him with an “automatic cloak of immunity.”<sup>136</sup>

David P. Miranda, a New York libel and intellectual property expert, has suggested that a defamed party suffers little injury if the libel author originally posted his statement in an “obscure corner of the Internet.”<sup>137</sup> The real injury occurs when another person finds the obscure statement and re-posts it throughout the Internet in numerous newsgroups.<sup>138</sup> As the re-poster is the one responsible for more damage and can simply walk away, this ruling allows “any number of wrongdoers to just basically take something that’s libelous, republish it, and claim immunity.”<sup>139</sup>

Congress wanted to encourage a liberal exchange of ideas, but did not intend to protect someone whose harassment was intentional.<sup>140</sup> Congress did not intend to provide a re-poster blind immunity when he knows the statement is false.<sup>141</sup> Yet, *Barrett*’s reasoning provides exactly this kind of protection to irresponsible re-posters of libel.<sup>142</sup> Thus, a re-poster evades accountability, even if they were fully aware that the statement was untrue and defamatory, and even if they acted with malice towards the defamed party.<sup>143</sup> At bottom, granting absolute immunity to someone who republishes false information without substantiation of the facts does not protect innocent users.

If courts follow *Barrett*’s precedent, dishonest people will exploit this immunity to circumvent liability that would ordinarily apply.<sup>144</sup> The ruling would allow someone to author libelous statements, either under anonymity or pseudonym, and then re-post their statements throughout the Internet in numerous newsgroups and bulletin boards, thereby effectively injuring the

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<sup>136</sup> See *Sabbato v. Hardy*, 2000 Ohio App. LEXIS 6154, at \*\*4, 6 (2000).

<sup>137</sup> Kaplan, *supra* note 1, ¶¶ 17-18 (paraphrasing Miranda’s opinion).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (quoting Christopher E. Grell, an attorney and pro se defendant in *Barrett v. Clark*, No. 833021-5, 2001 WL 881259 (Cal. Super. Ct. July 25, 2001)).

<sup>140</sup> Platoni, *supra* note 78, ¶ 15 (relaying the ideas of Christopher E. Grell, an attorney and pro se defendant in *Barrett*, 2001 WL 881259).

<sup>141</sup> Kaplan, *supra* note 1, ¶ 16 (relaying the ideas of Ian Ballon, an attorney and editor of “E-Commerce and Internet Law (Glasser LegalWorks, 2001)”).

<sup>142</sup> *Id.*; see also Matthew Schruers, *The History and Economics of ISP Liability For Third Party Content*, 88 VA. L. REV. 205, 226 n.129 (2002) (noting that “it seems curious that the [*Barrett*] court could find an individual to be an interactive computer service merely because she claims to be repeating the words of another”).

<sup>143</sup> Kaplan, *supra* note 1, ¶ 11 (relaying the ideas of Christopher E. Grell, an attorney and pro se defendant in *Barrett*, 2001 WL 881259).

<sup>144</sup> Platoni, *supra* note 78, ¶ 15.

defamed party and evading liability that should otherwise apply.<sup>145</sup> While the judge reserved a person's right to pursue the original defamer, such pursuit may prove impossible if the publisher used a pseudonym, resides abroad, or is untraceable for other reasons.<sup>146</sup> Many critics suggest that this potential for exploitation of the *Barrett* decision is the beginning of the death knell for all libel protection on the Internet.<sup>147</sup>

## V. A PROPOSED SOLUTION

### A. *The Internet is not Self-Regulating: A Solution is Needed*

Some argue that cyberspace, unlike other forums of expression, is the ultimate free speech medium, where everybody potentially has the right to vindicate themselves through the medium in which they were allegedly wronged, and by which the Internet could self-regulate.<sup>148</sup> Victims could simply submit a reply to the bulletin board on which they were defamed, thereby posting "a nearly universal and instantaneous response."<sup>149</sup> While situations certainly exist in which a defamed party can reply, this model provides no deterrent effect for malicious postings because no one is potentially accountable under the law for their actions. Replying to an untrue statement may be not be wholly effective by itself because those who read the first statement may not necessarily re-visit the same Web site to read the response, and the defamed party may already have sustained substantial injury before he could post a correction.<sup>150</sup>

The Internet's function as a "vibrant" marketplace of ideas certainly deserves protection,<sup>151</sup> but judicial interpretations of the CDA's protections, such as re-poster immunity, have virtually foreclosed recovery for plaintiffs in defamation suits, even where a defendant ISP had editorial control over the libelous material.<sup>152</sup> This tactic encourages "wild speculation without fear of liability."<sup>153</sup>

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Taylor, *supra* note 127, at 285.

<sup>149</sup> Jeremy Stone Weber, Note, *Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising From Computer Bulletin Board Speech*, 46 CASE W. RES. L. REV. 235, 262 (1995).

<sup>150</sup> Robert M. O'Neil, *The Drudge Case: A Look At Issues In Cyberspace Defamation*, 73 WASH. L. REV. 623, 632 (1998) ("This leaves aside the question of who, among the audience for the libel, would seek out that newly created page among the hundreds that go online every day.").

<sup>151</sup> See Boehm, *supra* note 12, ¶ 50.

<sup>152</sup> Barry J. Waldman, *A Unified Approach to Cyber-Libel: Defamation on the Internet, a Suggested Approach*, 6 RICH. J.L. & TECH. 9, ¶ 51 (1999), at <http://www.law.richmond.edu/jolt/v6i2/note1.html>.

<sup>153</sup> *Id.*

The varying treatment of electronic and print media that results from this approach is hard to rationalize.<sup>154</sup> A more logical method would better balance defamation law's traditional goal of protecting innocent reputations and the re-poster's newly desired safeguards.<sup>155</sup> This approach would provide for ISP self-regulation, as the CDA contemplates, as well as "substantive protection for online information distributors," but would not go so far as to shield them from flagrant wrongdoing.<sup>156</sup> Where an ISP acted with reckless disregard, plaintiffs could still recover for serious injury.<sup>157</sup> This would necessitate a movement away from *Barrett's* rigid near bar on recovery. While the bulletin boards have a unique culture unto themselves, allowing boards to "degenerate into a realm where anything goes, where any embittered and malicious speaker can lash out randomly at innocent targets," does not further any legitimate public policy.<sup>158</sup> Private individuals, therefore, need a negligence standard to have a reasonable chance of recovery and to deter future attacks.

#### B. *The Framework of Notice Based Liability*

The best solution to the problem of libel re-posting is not to invariably bar re-poster liability, as *Barrett* suggests, but rather to hold an individual responsible after they have notice that they are re-posting libel and thus distributing defamatory material. Then, re-posters could be liable for failing to promptly remove defamatory content within their knowledge and control, failing to redress the injury themselves with acknowledgement of the statement's defamatory nature, or failing to take proactive measures to prevent it from appearing in the first place.

Instead of allowing continued judicial misinterpretation, Congress should clarify its intent by enacting CDA guidelines that follow traditional common law standards of liability for distributors who are on notice of the defamatory material.<sup>159</sup> When a re-poster has actual knowledge and the material's defamatory nature is clear, distributor liability could fairly apply to a re-poster because individual users are responsible for considerably less material than an ISP.<sup>160</sup> Enforcing the requirement that Internet users must answer requests to

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<sup>154</sup> See Boehm, *supra* note 12, ¶ 50.

<sup>155</sup> Waldman, *supra* note 152, ¶ 52.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Lidsky, *supra* note 9, at 903-04 ("Although many of the new libel plaintiffs are powerful corporate Goliaths suing to punish and to deter their critics, some are not. Some are simply responding in the only way available to prevent aggressively uncivil speech, the sole purpose of which is to cause emotional and financial harm. Hence, any solution to the problems posed by these new suits must be tuned finely enough to distinguish incivility that must be tolerated for the good of public discourse from incivility that destroys public discourse.").

<sup>159</sup> Annemarie Pantazis, *Zeran v. America Online, Inc.: Insulating Internet Service Providers From Defamation Liability*, 34 WAKE FOREST L. REV. 531, 555 (1999).

<sup>160</sup> *Id.*

remove an offensive re-posting would not be unrealistic or impossible.<sup>161</sup> Each posting would need a reasonable investigation and may be affected by factors such as “the nature of the posting, the potential harm, the location of the posting, and the popularity of the site.”<sup>162</sup> However, by applying distributor liability, a minimal standard of legal responsibility, to re-posters, the Internet can be reserved for productive activities free from libel.<sup>163</sup>

Asking a bulletin board operator to make a reasonable effort to monitor the contents of their bulletin board in this way does not create an unreasonable burden. Notice based liability can entail a duty varying according to the size of the bulletin board.<sup>164</sup> Self-regulation involves much more responsibility and monitoring for large bulletin boards than for small ones.<sup>165</sup> An individual moderator does not have to actually censor postings, but must have some awareness of the activity on his bulletin board.<sup>166</sup>

A similar notice based system has been established on the Internet with regard to copyright and trademark rights under the Digital Millennium Copyright Act (“DMCA”).<sup>167</sup> Under the DMCA, an ISP who receives notice of potential copyright infringement must take particular steps to evade liability.<sup>168</sup> “First, a carrier must respond ‘expeditiously to remove, or disable access to, the material that is claimed to be infringing.’”<sup>169</sup> “Second, a service provider . . . must ‘disclose expeditiously to the copyright owner . . . information sufficient to identify the alleged direct infringer . . . to the extent such information is available to the service provider.’”<sup>170</sup>

With respect to defamation, Congress and the courts have concluded that requiring ISPs to self-regulate is overly burdensome, yet when it comes to copyright and trademark infringement, that same burden is tolerable.<sup>171</sup> Procedures similar to those used in the trademark and copyright infringement context could function equally well in the distributor liability context.<sup>172</sup> A

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*; Butler, *supra* note 44, at 263.

<sup>163</sup> Pantazis, *supra* note 159, at 555.

<sup>164</sup> Finley P. Maxson, *A Pothole On The Information Superhighway: BBS Operator Liability for Defamatory Statements*, 75 WASH. U. L.Q. 673, 695 (1997).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Pincus, *supra* note 16, at 287; Butler, *supra* note 44, at 262 (outlining in detail the steps to take under the Act to provide actual notice or awareness of facts or circumstances from which infringing activity is apparent; “[I]f the notice does comply with the Act then the ISP must respond expeditiously to remove or disable access to the material or risk liability.”).

<sup>168</sup> Pincus, *supra* note 16, at 287.

<sup>169</sup> *Id.* (quoting H.R. 2281, 104th Cong. (1998), also known as the Digital Millennium Copyright Act, then pending approval in a House-Senate conference).

<sup>170</sup> *Id.* at 288 (quoting H.R. 2281, 104th Cong. (1998), also known as the Digital Millennium Copyright Act, then pending approval in a House-Senate conference).

<sup>171</sup> *Id.* at 287-88.

<sup>172</sup> Butler, *supra* note 44, at 262.

person alleging defamation would make a “detailed factual accounting” in support of his claim that an untrue, harmful allegation was made to the detriment of his reputation.<sup>173</sup> The person alleging defamation would then swear under penalty of perjury that he made his accusation of defamation in good faith.<sup>174</sup> If the accusation does not provide the Internet user with the requisite notice or awareness of facts or circumstances from which infringing activity is apparent, the user will have an insufficient basis by which to determine the statement’s defamatory nature and the notice will legally fail, thereby precluding notice based liability.<sup>175</sup>

Under this notice based scheme, a court could find Rosenthal’s re-posting to be an “adoption” of statements originally authored by another if she “unreasonably failed to remove the statements despite having notice of their existence and a reasonable opportunity to take action. . . .”<sup>176</sup> Limited distributor liability would protect a defamed plaintiff by “motivating the proprietor to remove the message or compensating the plaintiff for the harm that results if he does not.”<sup>177</sup>

In any balancing scheme, requiring the plaintiff to, at a minimum, give notice of the defamatory statement’s falsity to the online publisher is not overly burdensome. However, this may be troublesome where a defamed party has no access to a computer or is unfamiliar with bulletin boards.<sup>178</sup> This individual would have no functional access to become aware of the statement or to reply in his defense.<sup>179</sup> In this situation, plaintiffs cannot reasonably respond to a defamatory statement made on a bulletin board or provide notice.<sup>180</sup> If a defamed person neither knows of, or is not bothered by an Internet posting, he will likely not bring suit, as there is no pressing need for vindication. It is only at the point where the defamation is so derogatory that the information makes its way to the victim through other means that the defamed party is likely to want to sue. Once that individual receives word of this derogatory posting, he would preferably find a way to give notice to the re-poster to remove the statement, as if he was Internet savvy and had happened across the posting.

#### 1. Suit Can be Brought Against the Re-Poster if Notice Fails

Some commentators maintain that Congress tried to protect free speech on the Internet from chilling threats of costly and prolonged litigation, and believe that liability for re-posting will stifle the free exchange of ideas.<sup>181</sup> By making

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Fried, *supra* note 8, ¶ 6.

<sup>177</sup> Sheridan, *supra* note 110, at 173.

<sup>178</sup> Weber, *supra* note 149, at 261-62.

<sup>179</sup> *Id.* at 262.

<sup>180</sup> *Id.*

<sup>181</sup> See Taylor, *supra* note 127, at 275 (“Defamation suits often lead to prolonged

recovery nearly impossible, this current defamation law fails to acknowledge one of its “very foundational precepts” — to provide a remedy for what is an often a very personally painful injury.<sup>182</sup> “It is as if neither the judicial nor legislative branch places value in a person’s honor or reputation.”<sup>183</sup>

Notice based liability allows for the prior unfulfilled goal of allowing plaintiffs to bring suit, and to “pursue symbolic goals” of the rehabilitation of their reputation and the ability to have one’s day in court, even if they end up with no significant monetary award.<sup>184</sup> They will have the opportunity to vindicate themselves where the re-poster completely disregarded the plaintiff’s notice and kept the defamatory material posted on their site. While some may view these suits as a tool for plaintiffs to harass their critics, “this characterization ignores the power that the Internet gives irresponsible speakers to damage the reputations of their targets. . . .”<sup>185</sup> It is perfectly legitimate for plaintiffs to seek to stop an onslaught of offensive and damaging untruths that they have already asked to be removed.<sup>186</sup> Indeed, silencing the defamer through suit may be the only way to halt the tide of disparaging remarks and may be one of the chief motivations to bring this proposed Internet libel claim.

## 2. Suits will only Succeed if Fact Based, and not Based Merely on Opinion

From a lay perspective, the term “opinion” usually includes “statements couched in loose, figurative, or vituperative language, statements that are purely subjective expressions of the speaker’s point of view, and statements that contain ‘deductions from known data or personal observation.’”<sup>187</sup> The First Amendment extends a privilege to expressions that are not objective factual assertions, either because no one could reasonably interpret these statements as uttering genuine facts or because such statements are not provably false.<sup>188</sup> These expressions receive protection because they make “an important contribution to public discourse.”<sup>189</sup> Primarily, public policy seeks

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litigation, which places burdensome expenses upon defendants who may be ruined financially even if they win in court.”).

<sup>182</sup> Waldman, *supra* note 152, ¶ 56.

<sup>183</sup> *Id.*

<sup>184</sup> Lidsky, *supra* note 9, at 865.

<sup>185</sup> *Id.* (noting “the potential benefits that defamation law may bring to Internet discourse”); see Platoni, *supra* note 78, ¶ 15 (paraphrasing Dr. Stephen Barrett’s (of Barrett v. Clark, No. 833021-5, 2001 WL 881259 (Cal. Super. Ct. July 25, 2001)) comment that “battles in the court of public opinion are rarely winnable”).

<sup>186</sup> See Platoni, *supra* note 78, ¶ 15 (quoting Dr. Stephen Barrett (of Barrett v. Clark, No. 833021-5, 2001 WL 881259 (Cal. Super. Ct. July 25, 2001)), who said, “People shouldn’t have to respond to libel by getting into a public debate.”).

<sup>187</sup> Lidsky, *supra* note 9, at 921 (quoting Diane Leenheer Zimmerman, *Curbing the High Price of Loose Talk*, 18 U.C. DAVIS L. REV. 359, 398-99 (1985)).

<sup>188</sup> *Id.* at 926.

<sup>189</sup> *Id.* at 942.

to encourage vibrant and creative public debate.<sup>190</sup> To go further and give expansive protection to expressions regarding personal matters would “unjustifiably skew the balance between protection of speech and protection of individuals from uncivil communications.”<sup>191</sup>

Judge Richman’s ruling in *Barrett* cited *Global Telemedia International v. Doe*, a case decided a short time earlier, in which critical comments made in an Internet chat room constituted non-actionable opinion because they were made during “an on-going free-wheeling and highly animated exchange” where the “postings [were] full of hyperbole, invective, short hand phrases and language not generally found in fact-based documents.”<sup>192</sup> These comments thus maintain that the language people use on the Internet is brasher than what they use elsewhere, and therefore criticisms and insults posted on the Internet should be held to a looser standard.<sup>193</sup>

While *Barrett* is correct in stating that “discourse on the boards tolerate a great deal of loose, figurative language, and readers are generally on notice that they should not put much reliance on the information posted there,” this general understanding may not apply where a posting’s language, location, or tone implies a factual basis.<sup>194</sup> This can happen when “a poster takes steps to induce reliance by suggesting that he has special expertise or insider access to information.”<sup>195</sup> Notice based liability will protect defamed parties who find themselves victimized by these types of postings.

When someone has refused to remove a posting after receiving notice, the court should not grant a blanket protection to all the postings in a particular message board.<sup>196</sup> Instead, the court should entertain a case by case investigation, considering the merits of each posting individually.<sup>197</sup> The court must consider whether the expression regards an issue of public importance

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<sup>190</sup> *Id.* at 939 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) “that meaningful public discourse consists of more than merely dry recitations of facts”).

<sup>191</sup> *Id.* at 942-3 (noting that “speech that deals only with private matters . . . makes no contribution to public discourse almost by definition”).

<sup>192</sup> *Global Telemedia Int’l, Inc. v. Doe*, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001).

<sup>193</sup> *See id.* at 1266-71.

<sup>194</sup> *See Lidsky, supra* note 9, at 943.

<sup>195</sup> *Id.* (“[A]lthough the culture of the boards and the inherently speculative nature of internet discourse will commonly signal readers that they should not interpret the statements posted as being purely factual, a poster who tries to cloak himself in an aura of factual accuracy must take the consequences when the audience does in fact rely on his posts as stating actual facts.”).

<sup>196</sup> *Id.*

<sup>197</sup> *Id. See Global Telemedia Int’l*, 132 F. Supp. 2d at 1267 (quoting *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995) (“To determine whether a statement is an opinion or fact, the Court must look at the totality of the circumstances. . . . Then, the specific context and content of the statement is examined, ‘analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation.’ Finally, the Court must determine whether the statement is ‘sufficiently factual to be proved true or false.’”).



and also whether a reasonable person could interpret the expression as asserting facts about the plaintiff.<sup>198</sup>

By dismissing complaints early in the process that are attacking expressions of opinion, courts can protect cyberspace freedom of speech without chilling free Internet discourse.<sup>199</sup> Although courts can dismiss many cases involving “rhetorical hyperbole or nonfactual speculation,” a categorical protection for statements posted on message boards is not the answer.<sup>200</sup>

### 3. Mitigating a Remedy by Retraction of the Defamatory Statement

At common law, a publisher could retract a defamatory statement in order to mitigate damages.<sup>201</sup> Retraction alone would not generally preclude publisher liability, but it was evidence that the publisher had made a good faith attempt to lessen the plaintiff’s injury.<sup>202</sup> Though a vague requirement, the retraction had to be “sufficient in light of what a reasonable person would understand as satisfactory, given the surrounding circumstances.”<sup>203</sup> Even though a publisher had no duty to retract, doing so could avert punitive damages and lessen compensatory damages.<sup>204</sup> In fact, failing to retract could be evidence of malice, which would weigh in favor of awarding punitive damages.<sup>205</sup>

Notice based liability could integrate a retraction element to help to restore an injured party’s reputation and lessen the impact of the defamatory statement. In this notice based scheme, if a court determines that the defamatory materials were not removed with reasonable timeliness, it could factor in a retraction statement occurring soon thereafter when determining damages. Using the common law as a guide, the retraction must be sufficient in light of the surrounding circumstances. When determining by how much the retraction mitigated damages, a case by case analysis of whether the particular retraction was sufficient is necessary to factor in the unique circumstances in question.<sup>206</sup> A party who makes a sufficient retraction should not be liable for punitive damages, as their retraction has demonstrated an absence of malice. A retraction doctrine will be the most useful with respect to a re-poster’s intent to defame rather than actual mitigation of damages because, admittedly, those who read the defamatory comment may never come across the posted retraction.

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<sup>198</sup> Lidsky, *supra* note 9, at 943.

<sup>199</sup> *See id.* at 944.

<sup>200</sup> *Id.* at 943.

<sup>201</sup> Waldman, *supra* note 152, ¶ 59.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *See id.*

## VI. CONCLUSION

Beginning with the early online defamation cases, the courts attempted to fit the role of the ISP into the common laws categories. “One court’s misstep in overextending the liability of one ISP to that of a publisher led Congress to sweep ISP liability into the CDA in an attempt to give ISPs more tools to regulate content they consider offensive.”<sup>207</sup> Beginning with the decision in *Zeran*, courts used the CDA’s “Good Samaritan” provision to grant immunity from defamation suits to ISPs for information content that they do not create themselves.<sup>208</sup> Following *Zeran*, courts have granted absolute immunity to ISPs on policy grounds, effectively failing to balance “an individual’s right to redress for defamation with an ISP’s practical ability to control content.”<sup>209</sup>

*Barrett v. Clark* is the first case to apply section 230’s protections to an individual person, rather than a corporate entity, like an ISP. However, the arguably valid policy concerns that would allow a balancing test to favor ISP immunity are noticeably absent in cases where an individual Internet user’s protection is at issue. ISPs deal with an enormous volume of postings that would make it impossible for them to be aware of everything they are posting or to investigate every claim of a defamatory posting.<sup>210</sup> In contrast, an individual that affirmatively re-posts a prior posting is not dealing with a large volume of postings or the ensuing unawareness of the content of the posting. They can certainly be charged with having requisite knowledge or reckless disregard of falsity when they re-post libel. To rule otherwise simply opens the door for an Internet user to republish false information under the cloak of immunity at the expense of an individual with no legal recourse.

Unfortunately, allowing completely uninhibited speech on the Internet while simultaneously protecting “the interest an individual has in her good name and reputation” is effectively impossible.<sup>211</sup> Defamatory speech is not protected speech. Plaintiffs should be able to recover for false, injurious statements, whether made online or not. Thus, courts must move away from the near ban on recovery for defamation suggested by *Barrett* in order to allow a wronged individual some opportunity to recover.

The most well reasoned solution to the libel re-posting problem would hold re-posters responsible after they have received notice of their defamatory distributions. Such a notice based liability scheme could function on the Internet without either compromising the medium’s main advantages or chilling free speech. In order to prevent a federal liability standard from having a “chilling effect” on free speech, Congress should provide a standard

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<sup>207</sup> Butler, *supra* note 44, at 248 (citing *generally* *Stratton Oakmont Inc. v. Prodigy Servs. Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995)).

<sup>208</sup> *See id.* (describing changes that make reform seem particularly apropos considering that the major provisions of the Act were overturned by the Supreme Court in *Reno v. ACLU*, 521 U.S. 844 (1997)).

<sup>209</sup> Pantazis, *supra* note 159, at 550.

<sup>210</sup> *See supra* Part IV.B.

<sup>211</sup> Butler, *supra* note 44, at 272.

2003]

*THE NEW IMMUNITY IN CYBERSPACE*

for a notification process similar to that used in the DMCA.<sup>212</sup>

As a key aspect of this notice based liability scheme, Congress should allow the defamed individual to bring suit to determine if the appropriate level of notice has been met. This would be a vast improvement for the defamed individual because, under *Barrett*, a lawsuit would be fruitless in the face of the Internet user's blanket immunity. Additionally, the charged Internet user would have the opportunity to mitigate damages resulting from a defamatory statement if they post a retraction. If it is a close call as to whether the appropriate level of notice has been met, a retraction by the Internet user could constitute a good faith attempt to lessen the libelous effects of the damaging material.<sup>213</sup>

Under the CDA's current judicial interpretation, the statute provides less protection than is needed for libel victims and more protection than is necessary for users of ISPs. Congress should amend those provisions to hold ISPs and Internet users under the same liability standard that is applied to the print media, a field bearing similar republishing functions and defamation issues. In light of the new questions constantly being raised in the realm of Internet defamation, Congress is likely to have reasons and opportunities to revisit the balance struck in the CDA in the near future. Regardless of what solution, if any, is chosen, a total isolation of Internet users from the realm of defamation law is not a well supported policy.

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<sup>212</sup> See *supra* text accompanying notes 165-172.

<sup>213</sup> Waldman, *supra* note 152, ¶ 59.