Limiting Tort Liability for Online Third-party Content Under Section 230 of the Communications Act

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I. INTRODUCTION

On December 2, 1999, the New York Court of Appeals resolved a long-running dispute pitting Prodigy, one of the nation's largest online service providers (OSPs),[1] against Alexander Lunney, a teenage boy scout.[2] The lawsuit had its origins in an e-mail message sent in Lunney's name by a Prodigy account holder to a scoutmaster in Bronxville, New York.[3] The e-mail contained a subject line that read "HOW I'M GONNA' KILL U," followed by a profanity-laced message.[4] The scoutmaster alerted the police and Lunney's local scoutmaster, who confronted the boy with the e-mail and accepted his denial of authoring the message.[5] After he learned that Prodigy terminated the accounts in his name despite his claim that he was not the holder of the accounts, Lunney sued Prodigy, claiming that Prodigy was negligent in allowing the accounts to be opened in his name and was responsible for his having been defamed.[6] Lunney later amended his complaint to add claims against Prodigy based on two bulletin board messages that had been posted on the Prodigy network in Lunney's name.[7] A New York appellate court granted Prodigy's summary judgment motion based on state common law grounds, and the New York Court of Appeals affirmed.[8]

The *Lunney* decision marks another chapter in an ongoing battle over whether and when OSPs might be held liable for the third-party content posted on their networks. Potential liability arises from a number of sources. For example, an OSP, like Prodigy, that offers a chat or message board service may be liable if one of its users posts defamatory content on the service, or if the OSP, on its own initiative, blocks postings that it deems to be offensive or defamatory or that otherwise violate any terms of service for message board users. Independent of these new interactive services, an OSP could also be sued for allegedly defamatory material created by third-party content providers that the OSP itself has placed on its

1. The term "OSP" is used throughout this Article to refer to any provider of an online service, including, but not limited to, providers of access, content, and other online or Web-related services. Hence, under this definition, an OSP is meant to include Internet Service Providers (ISPs).

2. *See* Lunney v. Prodigy Servs. Co., 683 N.Y.S.2d 557 (N.Y. App. Div. 1998), *aff'd*, No. 164, 1999 N.Y. LEXIS 3746 (N.Y. Dec. 2, 1999).

3. *See Lunney*, 1999 N.Y. LEXIS 3746, at *2.

4. *Id.*

5. *See id.* at *2-3.

6. *See id.* at *3.

7. *See id.* at *3-4.

8. *See id.* at *5-6. For further discussion of the case, see *infra* Part II.A.

Web site. In fact, on several occasions, America Online (AOL) has been subject to suits involving postings by users as well as content partners.

An OSP has several lines of defense against defamation-related claims arising from the postings of third parties. First, the OSP can include language in its general terms of service (and require every user to assent to such terms) indemnifying the OSP for claims arising from uses of its services. Second, the OSP can provide special terms of service for users of its interactive services, such as its message boards and chat services, that set out appropriate uses and specifically indemnify the OSP for claims arising out of user postings. AOL and other major OSPs have both of these types of terms of service.[9]

Perhaps more importantly, OSPs have defended against such defamation claims based on a mix of federal statutory and state common law grounds. Prodigy argued successfully in *Lunney* that it was merely a "conduit" of the allegedly defamatory content and, as such, should not be treated as a publisher of that content under state common law principles applied to telephone companies.[10] More commonly, however, OSPs have relied on the federal statutory immunity created by section 230 of the Communications Act[11] for protection from defamation suits.[12] Section 230, as interpreted by courts over the last four years, provides an OSP with broad immunity from liability for harms arising from third-party content that is made available through the OSP's services. Such immunity clearly covers defamation-related claims arising from the postings of third-party users of these services.[13] As discussed below, some courts have recently held that section 230 provides immunity from *any* tort claim that would make online providers liable for information originating with a third-party, including users and commercial partners.[14]

9. *See, e.g.*, AOL, *AOL Policies* (visited Jan. 20, 2000) <http://legal.web.aol.com/aol/aolpol/index.html>; AOL, *Member Agreement* (visited Jan. 20, 2000) <http://legal.web.aol.com/aol/aolpol/memagree.html>; AOL, *Community Guidelines* (visited Jan. 20, 2000) <http://legal.web.aol.com/aol/aolpol/comguide.html>; AOL, *Privacy Policy* (visited Jan. 20, 2000) <http://legal.web.aol.com/aol/aolpol/privpol.html>.

10. *See Lunney*, 1999 N.Y. LEXIS 3746, at *7-8.

11. 47 U.S.C.A. § 230 (West 1998).

12. *See id.* Congress enacted section 230 as part of the Communications Decency Act of 1996. Section 230 was one of the few provisions to survive the Supreme Court's decision in *Reno v. ACLU*, 521 U.S. 844 (1997).

13. An OSP, of course, remains directly liable for any defamatory material that the OSP itself posts on its service (as opposed to defamatory material that a subscriber or commercial partner posts on the OSP's service).

14. A procedural advantage of the section 230 defense is that it can be raised and litigated as a preliminary defense prior to other issues raised in a case. AOL, for example, has successfully raised the defense in a motion to dismiss or for judgment on the pleadings,

This Article presents a brief overview of common law principles of defamation. It then provides background on the enactment of section 230 and describes how state and federal courts interpret section 230 as well as the implications of those interpretations. This Article concludes by arguing that section 230 has been properly interpreted by the courts and that, contrary to the claims of critics, those decisions have not created a disincentive for OSPs aggressively to monitor their sites for defamatory or otherwise harmful content.

II. BACKGROUND ON DEFAMATION LAW

A. Common Law Overview

At common law, one who repeats or otherwise republishes defamatory matter is just as responsible for the defamatory content as the original speaker.[15] Courts, however, have generally recognized three standards or types of liability for republication of defamatory material: publisher liability, distributor liability, and common carrier liability. First, an entity that exercises some degree of editorial control over the dissemination of the defamatory material will be generally liable for its publication (i.e., publisher liability).[16] A newspaper, for example, may be liable for defamation if a letter to the editor that it publishes contains false and defamatory statements. Second, an entity that distributes but does not exercise editorial control over defamatory material may only be liable if such entity knew or had reason to know of the defamation (i.e., distributor liability).[17] News vendors, bookstores, and libraries generally qualify for this standard of liability. Third, an entity that merely acts as a passive conduit for the transmission of defamatory material, such as a telephone company, is not subject to defamation liability, even if such entity knew or

as well as a summary judgment motion. An added benefit is that section 230 can form the basis for staying discovery until the immunity issue is resolved. *See* Elizabeth deGrazia Blumenfeld, Patrick J. Carome & Samir Jain, *Federal Immunity for Online Services—47 U.S.C. § 230*, J. INTERNET L., Jan. 1999, at 27.

15. *See* Cianci v. New Times Publ'g Co., 639 F.2d 54, 61 (2d Cir. 1980). Prior to 1964, defamation was generally treated as a strict liability tort. In *New York Times Co. v. Sullivan*, however, the Supreme Court established, based on the First Amendment, a minimum constitutional fault standard of "actual malice" for defamation claims involving public figures. 376 U.S. 254, 279-80 (1964). The Court has subsequently established a minimum fault standard of negligence for claims brought by private figures involving matters of public concern. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). It is still unclear what standard would apply to claims brought by private figures involving private matters. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (indicating that states are free to impose a strict liability standard in such cases).

16. *See* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991).

17. *See id.*

had reason to know of the defamation.[18] Furthermore, in the event that the conduit service could be characterized as a publisher, it is entitled to a qualified immunity from liability subject to the common law exception for malice (i.e., common carrier liability).[19] The *Lunney* court, for example, analyzed Prodigy under this common carrier framework, concluding that Prodigy was not a publisher of the allegedly defamatory content because the OSP was "merely a conduit" of that content.[20]

B. Cubby v. CompuServe *and* Stratton Oakmont v. Prodigy

For the last several years, the courts and Congress have grappled with how these liability standards apply to OSPs, particularly as OSPs republish user postings on message board services. The two seminal court cases in this area are *Cubby v. CompuServe*[21] and *Stratton Oakmont v. Prodigy*.[22] In *Cubby*, the plaintiffs claimed that CompuServe was liable for allegedly defamatory statements made about their service in *Rumorville*, a rival online electronic newsletter made available to certain CompuServe subscribers.[23] CompuServe responded that it acted as a distributor, not a publisher, of the content and could not be held liable for the statements in *Rumorville* because it "did not know and had no reason to know of the statements."[24] The federal district court in New York agreed with CompuServe and did not subject CompuServe to publisher liability because the OSP did not exercise editorial control over the postings to its service.[25] CompuServe, as the court noted, reserved the right to decline to post materials on the message board service, but once it agreed to the postings,

18. *See* Lunney v. Prodigy Servs. Co., No. 164, 1999 N.Y. LEXIS 3746, at *7-8 (N.Y. Dec. 2, 1999) (citing Anderson v. New York Tel. Co., 35 N.Y.2d 746 (1974)). In *Anderson*, a minister in a religious sect sued a telephone company for failing to stop an individual from using leased telephone equipment to carry recorded messages that allegedly defamed the minister. *See Anderson*, 35 N.Y.2d at 748-49. The New York Court of Appeals concluded that the telephone company was not a publisher and not subject to liability, even though the plaintiff had notified the phone company about the messages and the telephone company refused to stop the recordings. *See id.* at 749.

19. *See Lunney*, 1999 N.Y. LEXIS 3746, at *8 (citing *Anderson*, 35 N.Y.2d at 746). As the appellate court in *Lunney* noted, proving malice is extremely difficult. *See* Lunney v. Prodigy Servs. Co., 683 N.Y.S.2d 557, 561 (N.Y. App. Div. 1998), *aff'd*, No. 164, 1999 N.Y. LEXIS 3746 (N.Y. Dec. 2, 1999) (noting that "the defendant can be held liable only upon a showing of actual malice, that is, knowledge of the falsity of the message, a showing which a plaintiff will rarely if ever be able to make").

20. *Lunney*, 1999 N.Y. LEXIS 3746, at *8.

21. 776 F. Supp. 135 (S.D.N.Y. 1991).

22. 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995).

23. *See Cubby, Inc.*, 776 F. Supp. at 138.

24. *Id.*

25. *See id.* at 140-41.

it exercised little or no control over the contents of such postings.[26] The court concluded that CompuServe's service was "in essence an electronic, for-profit library that carries a vast number of publications," and, consequently, CompuServe must be considered a "distributor" for purposes of assessing the plaintiff's claim.[27] The court then determined that CompuServe was not liable because it did not know or have reason to know of *Rumorville's* content.[28]

In contrast, a New York state court, presented with similar facts in *Stratton Oakmont*, reached the opposite conclusion.[29] In *Stratton Oakmont*, the plaintiffs, a securities investment banking firm and its president, asserted that Prodigy was liable for allegedly defamatory statements made about the plaintiffs by an unidentified user of one of Prodigy's bulletin boards.[30] The critical issue for the court was whether Prodigy "exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper."[31] The court concluded that it did, distinguishing *Cubby* on the grounds that: (1) Prodigy "held itself out to the public and its members as controlling the content of its computer bulletin boards" (even though, as a practical matter, Prodigy could not manually review the sixty thousand or so messages posted on its service every day); and (2) Prodigy implemented this control directly through its automatic screening software (whereas in *Cubby*, the screening was done by an independent contractor).[32] The court rejected claims that its decision would have a "chilling effect" on OSP efforts to police their services, noting that such claims "incorrectly presume[] that the market will refuse to compensate a network for its increased control and the resulting increased exposure."[33]

26. *See id.* at 140. In fact, CompuServe had contracted with an independent entity to manage and control the content of the bulletin board service on which the defamatory comments at issue were posted. *See id.* at 137.

27. *Id.* at 140.

28. *See id.* at 141.

29. *See* Stratton Oakmont, Inc. v. Prodigy, 23 Media L. Rep. 1794, 1796-97 (N.Y. Sup. Ct. 1995).

30. *See id.* at 1794-95.

31. *Id.* at 1796.

32. *Id.* at 1796-97.

33. *Id.* at 1798.

III. SECTION 230 AND RELATED CASE LAW

A. Background on Section 230

The online community and Capitol Hill roundly criticized the *Stratton Oakmont* decision at a time when Congress was considering telecommunications reform legislation as well as the Communications Decency Act.[34] Lawmakers of all political stripes found common cause in opposing the decision, which they believed would discourage OSPs from monitoring their sites for objectionable content.[35] In response, Congressmen Christopher Cox and Ron Wyden introduced a floor amendment to the House version of the telecommunications bill that its authors intended to achieve two basic objectives: (1) in response to *Stratton Oakmont*, to protect OSPs that police their sites for offensive material;[36] and (2) in response to the Senate-passed Communications Decency Act (which involved government extensively in online content regulation), to promote self-regulation of online services.[37] The House approved the amendment by a vote of 420 to 4,[38] and Congress later incorporated the measure into the final version of the Communications Decency Act (and the Telecommunications Act of 1996).[39]

As enacted, section 230 contains a number of protections for AOL, Prodigy, and any other "provider or user of an interactive computer service."[40] First, providers or users of an interactive computer service

34. *See* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 62 (1996).

35. *See, e.g.*, 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Robert Goodlatte) (noting that a "New York judge recently sent the online services the message to stop policing [their services] by ruling that Prodigy was subject to a $200 million libel suit simply because it did exercise some control over profanity and indecent material").

36. *See id.* at H8470 (statement of Rep. Cox) (noting that "it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers").

37. *See id.* (statement of Rep. Cox).

> [I]t will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government.

Id.

38. *See id.*.

39. *See* S. CONF. REP. NO. 104-230, at 86-88 (1996) (including the Online Family Empowerment provisions in section 509 of the Communications Decency Act).

40. 47 U.S.C.A. § 230(c)(2) (West 1998). An "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or

cannot be considered publishers "of any information provided by another information content provider."[41] As the legislative history indicates, one specific purpose of this provision is "to overrule [*Stratton Oakmont*] and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own."[42] For example, an OSP would not be treated as the publisher of content posted on a message board or a chat room by a subscriber. Second, providers of an interactive computer service or service subscribers that use filtering software cannot be liable for any action taken in good faith to restrict access to objectionable material.[43] Hence, this provision would immunize OSPs and their users from causes of action brought by persons whose material is screened or blocked on an OSP's network.[44] Third, section 230 bars any state law causes of action that are inconsistent with the statute.[45]

Section 230, however, does not immunize OSPs from liability for content that they create and develop entirely by themselves. Moreover, even as to third-party content, the immunity conferred by the statute does not have an effect on the operation of any federal criminal statute, intellectual property law, such as the Digital Millennium Copyright Act, or the Electronic Communications Privacy Act.[46]

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system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." *Id.* § 230(f)(2). The definition appears to cover providers of access, content, and other online or Web-related services.

41. *Id.* § 230(c)(1). Section 230 defines an "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(f)(3). An information content provider can include an OSP user, a third-party content provider, or the OSP itself. The statutory definition also suggests that any given unit of information may be provided by more than one information content provider.

42. S. CONF. REP. NO. 104-230, at 194 (1996).

43. *See* 47 U.S.C.A. § 230(c)(2). This subsection also immunizes OSPs from liability for giving subscribers the technical capability to block offensive content. *See id.*

44. *See* S. CONF. REP. NO. 104-230, at 194 ("This section provides 'Good Samaritan' protections 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."); *see also* Zeran v. America Online, Inc., 958 F. Supp. 1124, 1134 n.22 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) ("[S]ubsection (c)(2) precludes holding an interactive computer service provider or user liable on account of (i) actions taken in good faith to restrict access to material that the provider or user deems objectionable, and (ii) actions taken to provide others with the technical means to restrict access to objectionable material.").

45. *See* 47 U.S.C.A. § 230(e)(3) ("Nothing in this section shall be construed to prevent any [s]tate from enforcing any [s]tate law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any [s]tate or local law that is inconsistent with this section.").

46. *See id.* § 230(e)(1) (criminal law); *id.* § (e)(2) (intellectual property law); *id.* § (e)(4) (privacy law).

B. Zeran v. AOL *and Its Progeny*

Since the enactment of section 230, the courts have been defining the precise scope of the section 230 immunity. The statute clearly immunizes OSPs from publisher liability, as well as from claims arising from efforts by OSPs and their users to restrict content on their systems. What some have suggested, however, is that the statute does not make clear whether the immunity also covers: (1) distributor liability, particularly in cases where a plaintiff notified the OSP of third-party postings of defamatory material appearing on its service and the OSP did not act to remove or block access to that material; and (2) nondefamation tort claims. Federal and state courts have thus far responded affirmatively on both issues.

The leading case in this area is *Zeran v. America Online, Inc.*,[47] particularly as the Fourth Circuit decided that case on appeal in 1997. In *Zeran*, an unidentified third party had attributed to Zeran postings on an AOL message board advertising the sale of t-shirts featuring offensive slogans relating to the Oklahoma City bombing.[48] AOL users—as well as listeners of a local radio station in Oklahoma City that had learned of the postings—soon deluged Zeran, who ran a business out of his house, with abusive phone calls.[49] AOL removed the first postings within one day but failed to block the posting of similar messages over the next week.[50] Zeran sued AOL, alleging that AOL unreasonably delayed removing defamatory messages posted by the unidentified third party, refused to post retractions of these messages, and failed to screen for similar postings thereafter.[51] AOL claimed immunity under section 230.[52] Zeran responded that section 230 immunity only extended to publisher liability not distributor liability, and once AOL received notice of the defamatory nature of the postings, it had a duty to take reasonable steps to prevent the distribution of such postings.[53] The District Court for the Eastern District of Virginia agreed with AOL, and the Fourth Circuit affirmed.[54]

The Fourth Circuit held that section 230 created "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."[55] First, the

47. 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

48. *See id.* at 329.

49. *See id.*

50. *See id.*

51. *See id.* at 328.

52. *See id.* at 329.

53. *See id.* at 330-31.

54. *See id.* at 329-30.

55. *Id.* at 330 (emphasis added). In so holding, the Fourth Circuit extended the scope of section 230 immunity beyond that articulated in the district court decision. While the district

court rejected Zeran's proposed distinction between publisher and distributor liability. In particular, the court concluded that the plaintiff's reading of section 230 conflicted with well-established principles of defamation law. Distributor liability, the court found, is "merely a subset, or a species, of publisher liability and is therefore also foreclosed by [section] 230."[56] Furthermore, Zeran's attempts to recast his complaint as a negligence claim, rather than a defamation claim, were similarly unavailing because "the terms 'publisher' and 'distributor' derive their legal significance from the context of defamation law."[57] His claim, the court concluded, was "indistinguishable from a garden variety defamation action."[58]

The court also held that Zeran's interpretation of section 230 conflicted with the basic purposes of the statute, namely to promote free speech on the Internet and encourage self-regulation of online content by OSPs.[59] The court found that if OSPs were subject to distributor liability every time they received a notification of alleged defamation, "they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not."[60] Hence, notice-based liability would have a "chilling effect on the freedom of Internet speech."[61] The court further stated that Zeran's approach would discourage OSPs from policing their sites in the first place because any efforts to monitor

court concluded that an OSP was generally immune from publisher and distributor liability, it declined to "embrace[]" AOL's contention that it would be immune "even if AOL knew of the defamatory nature of the material and made a decision not to remove it from the network based on a malicious desire to cause harm to the party defamed." Zeran v. America Online, Inc., 958 F. Supp. 1124, 1133-34 n.20 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). As the district court concluded, there was no need to consider "whether, under some set of facts, information initially placed online by a third party might be deemed to be information provided by a service provider itself, thereby rendering [section] 230(c) inapplicable." *Id.* at 1134 n.20. The Fourth Circuit's articulation of section 230 immunity would also appear to conflict with the common law approach adopted in *Lunney*, which subjects OSP immunity to a malice exception. *See* Lunney v. Prodigy Servs. Co., No. 164, 1999 N.Y. LEXIS 3746, at *8 (N.Y. Dec. 2, 1999). The lower court in *Lunney* argued this common law approach was "in complete harmony" with section 230. Lunney v. Prodigy Servs. Co., 683 N.Y.S.2d 557, 563 (N.Y. App. Div. 1998), *aff'd*, 1999 N.Y. LEXIS 3746. If there is in fact a conflict, then section 230 would preempt *Lunney*, but this Article does not attempt to address this issue.

56. *Zeran*, 129 F.3d at 332 (citing to the RESTATEMENT (SECOND) OF TORTS § 558(b) (1977)). The court noted that 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." *Id.*

57. *Id.*

58. *Id.*

59. *See id.* at 333.

60. *Id.*

61. *Id.*

their services "would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability."[62] In other words, the very act of monitoring content would give an OSP imputed knowledge of the offending content.

State and federal courts that have addressed online-related tort claims have not only embraced the basic holding of *Zeran*—that OSPs are immune from defamation claims arising from third-party content—but have also extended the reach of section 230 immunity in two important respects. First, courts have concluded that section 230 immunity generally covers *all* tort claims originating from third-party content, not merely defamation or defamation-like claims.[63] In *Doe v. America Online, Inc.*,[64] for example, the plaintiff sued AOL under various state antipornography statutes for allowing one of its subscribers to sell, on AOL's chat rooms, pictures and videotapes of sexual acts involving the subscriber, the plaintiff, and two other minor males.[65] The state court concluded that AOL could not be liable "as a distributor of child pornography" consistent with section 230.[66] Likewise, in *Acquino v. Electriciti, Inc.*,[67] a state court in California held that section 230 barred plaintiffs' state law claims against an OSP, including claims of negligence, breach of contract, and intentional infliction of emotional distress, arising from third-party postings that stated that plaintiffs were ring leaders of an international conspiracy to further ritual satanic abuse of children.[68] The underlying rationale in these cases appears to be that a plaintiff cannot place an OSP in the legal shoes of an OSP subscriber (i.e., make the OSP the "speaker" or "publisher" of subscriber content) without violating section 230.[69]

62. *Id.*; *see also Community Guidelines*, *supra* note 9.

63. *See, e.g.*, Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998) (noting that "[i]n some sort of tacit *quid pro quo* arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted"). As noted above, the *Zeran* court essentially analyzed plaintiff's negligence claim as a "garden variety defamation action." *Zeran*, 129 F.3d at 332.

64. 718 So.2d 385 (Fla. Dist. Ct. App. 1998).

65. *See id.*

66. *Id.* at 388-89 (noting that *Zeran* had rejected similar claims of distributor liability).

67. 26 Med. L. Rep. 1032 (Cal. Super. Ct. 1997).

68. *See id.* at 1032.

69. *See also* Truelove v. Mensa Int'l Ltd., Civil No. PJM 97-3463 (D. Md. 1999) (holding that section 230 barred claims against Web-hosting service, including claims of negligence and intentional infliction of emotional distress, arising from chat room postings of unidentified third-party Mensa members); Kathleen R. v. City of Livermore, Case No. V-015266-4 (Cal. Sup. Ct. 1999) (dismissing lawsuit to require library to install filters on all library computers as inconsistent with section 230).

In addition, the courts have expanded on the holding in *Zeran* by immunizing OSPs from claims arising from content provided to the OSP by its service *partners*, not merely by subscribers. In *Blumenthal v. Drudge*,[70] for example, a federal district court held that AOL was immune from suit based on the allegedly defamatory statements of the *Drudge Report*, an online gossip column that AOL made available to users.[71] In that case, AOL was far more than a mere conduit for a user's postings. Rather, AOL had entered into a contractual relationship with Drudge to publish his report, retained certain editorial rights with respect to content in his report, and aggressively promoted the report.[72] While sympathetic with the plaintiff, the court concluded that Congress had made a policy choice to provide immunity "even where the interactive service provider has an active, even aggressive role in making available content prepared by others."[73] Likewise, in *Ben Ezra, Weinstein & Co. v. America Online, Inc.*,[74] a federal district court dismissed a claim against AOL based on faulty stock information available on its service.[75] The court concluded that section 230 immunity applied because third-party companies, ComStock and Townsend, had provided the content to AOL.[76] The fact that AOL worked with the two companies to correct errors in the stock information did not "constitute *creating* or *developing* the information content" provided by the two companies.[77] The Tenth Circuit recently affirmed the district court's decision.[78]

70. 992 F. Supp. 44 (D.D.C. 1998).

71. *See id.*

72. *See id.* at 51

73. *Id.* at 52.

74. No. Civ. 97-485 LH/LFG (D.N.M. Mar. 1, 1999), *available at* (visited Jan. 16, 2000) <http://legal.web.aol.com/decisions/dldefam/ezra.html>, *aff'd*, 2000 U.S. App. LEXIS 3831 (10th Cir. 2000).

75. *See id.*

76. *See id.*

77. *Id.* at n.1 (quoting from Zeran v. America Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997)) ("[section] 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions"). As part of the effort to correct errors, AOL may have, at the direction of the content providers, deleted some stock symbols and other information from the Townsend Computers database located at the AOL facilities. As the court noted, AOL merely made the data "unavailable and did not create or develop the information displayed." *Id.*

78. *See Ben Ezra, Weinstein & Co.*, 2000 U.S. App. LEXIS 3831, at *2. The Tenth Circuit specifically noted that by deleting the faulty stock information, AOL "simply made the data unavailable and did not develop or create the stock quotation information displayed." *Id.* at *12. Hence, the Tenth Circuit concluded that AOL was merely "engaging in the editorial functions Congress sought to protect." *Id.* at *13.

C. Implications of Zeran *and Its Progeny for OSPs*

Because *Zeran* was decided relatively recently, it is premature to speculate on how it might affect any given defamation or other tort claim brought against an OSP. Even so, *Zeran* has become the standard for judging Internet-based defamation claims under section 230 and the basis for ongoing efforts by defendants to expand the reach of section 230 immunity in new directions. For example, AOL argued recently in a spamming case, dismissed on other grounds, that section 230 immunized OSPs from suits arising from their efforts to block the access of spammers to user e-mail.[79] Likewise, the public library system in Loudoun County, Virginia, unsuccessfully claimed that section 230 barred a First Amendment claim relating to the use by county libraries of filtering software on library computers to restrict public access to certain Internet content.[80]

In addition, courts have yet to identify the point at which an OSP crosses the line from merely providing third-party content, particularly content provided by its commercial partners, to "creating" or "developing" that content and thereby becoming directly liable for the publication of that content. Based on *Zeran* and subsequent court decisions, an OSP may post, promote, pay for, and edit third-party content offered on its service without subjecting itself to liability. The potential applications of section 230 immunity are very broad, particularly in light of the fact that so much content that appears on or is accessible through OSP networks is derived from other sources.[81] However, despite the broad construction of section 230 currently relied upon by the courts, OSPs should not assume that it

79. *See* America Online, Inc. v. Greatdeals.net, 49 F. Supp.2d 851, 855 (E.D. Va. 1999).

80. *See* Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 2 F. Supp.2d 783 (E.D. Va. 1998). The defendants argued that section 230 immunized them, as an interactive computer service, from any efforts to block access to objectionable material, including the installation of site-blocking software on its library computers. *See id.* at 789. The court, however, concluded that Congress "enacted [section 230] to minimize state regulation of Internet speech by encouraging *private* content providers to self-regulate against offensive material," not to "insulate government regulation of Internet speech from judicial review." *Id.* at 790.

81. For example, the statutory definition of an "information content provider" explicitly recognizes the possibility that any unit of information may be provided by more than one such provider. *See* S. CONF. REP. NO. 104-230, at 194 (1996). Arguably, because jointly-provided content is provided in part by another content provider, it is still content subject to section 230 immunity, even if that content was also provided in part by the OSP. *But cf. Ben Ezra, Weinstein & Co.*, 2000 U.S. App. LEXIS 3831, at *10 n.4 (noting that at oral argument AOL "conceded that in an appropriate situation, an interactive computer service could also act as an information content provider by participating in the creation or development of information, and thus not qualify for [section] 230 immunity").

provides complete protection from liability.[82] For this reason, in order to limit the potential liability arising out of the operation of a chat, message board, or similar interactive service—and to maintain a family-friendly environment on their network—OSPs should post and enforce terms of service that apply specifically to such service and set forth the terms for appropriate use, as well as limitations on OSP liability and broad indemnification provisions.

IV. CRITIQUE OF *ZERAN V. AOL*

A. Zeran *and Its Detractors*

While the courts have agreed with *Zeran*, several legal commentaries have criticized its broad holding, claiming that *Zeran* provides OSPs with greater immunity than originally intended by Congress.[83] First, critics point to the plain language and legislative history of section 230 to support the view that Congress enacted section 230 to immunize OSPs only from *publisher*, not *distributor*, liability.[84] They note, for example, that section 230 expressly refers to the treatment of an OSP as a publisher or speaker of third-party content; there is, in contrast, no mention of the OSP as a distributor.[85] Furthermore, *Zeran* critics argue that the legislative history suggests that Congress was responding to the decision in *Stratton Oakmont*, the New York state case that held Prodigy liable as a publisher.[86] Critics

82. In this regard, where OSP services are offered to users outside of the United States, foreign law may impose significant obligations and responsibilities on OSPs to monitor and remove certain content hosted on their servers. For example, an English court denied Demon Internet, a British OSP, an "innocent dissemination" defense under Great Britain's Defamation Act of 1996 when Demon was notified of an alleged defamatory posting but failed to remove the posting for 10 days. *See* Jamie Doward, *Demon in the Dock*, OBSERVER, Nov. 28, 1999, at 3.

83. *See, e.g.*, Ian Ballon, Zeran v. AOL*: Why the Fourth Circuit Is Wrong*, J. INTERNET L., Mar. 1998, at 6; 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 (1997) (discussing the district court decision but addressing issues also raised by the Fourth Circuit); David Wiener, *Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran?*, 39 SANTA CLARA L. REV. 905 (1999); Steven M. Cordero, Comment, *Damnum Absque Injuria:* Zeran v. AOL *and Cyberspace Defamation Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 775 (1999).

84. *See, e.g.*, Cordero, *supra* note 83, at 796; Sheridan, *supra* note 83, at 168.

85. *See, e.g.*, Cordero, *supra* note 83, at 796; Sheridan, *supra* note 83, at 162.

86. *See, e.g.*, Wiener, *supra* note 83, at 914, 929. The conference report accompanying section 230 specifically provides that "[o]ne of the specific purposes of this section 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." S. CONF. REP. NO. 104-230, at 194

note that if Congress had intended to afford OSPs immunity from distributor liability as well, it would also have overturned *Cubby v. CompuServe*, the New York state case holding that Prodigy was a distributor, not a publisher, of subscriber content.[87] Finally, critics contend that *Zeran* does not serve the central public policy goal of section 230—namely that OSPs should be encouraged to police their sites for offensive content.[88] According to this view, immunizing an OSP from all liability for third-party content, even where the OSP is advised of the defamatory nature of such content but fails to remove it expeditiously or at all, would create a disincentive for any OSP to police its service for offensive content.[89]

B. Response to Zeran*'s Detractors*

While numerous legal commentaries have questioned *Zeran*, a strong case can nonetheless be made that *Zeran* achieved precisely the result Congress desired. First, contrary to the claims of certain *Zeran* critics, the legislative history reveals Congress's dissatisfaction with the entire common law framework for analyzing OSP liability—as it applied to OSPs as both publishers *and* distributors—not just with the *Stratton Oakmont* decision, when it enacted section 230. Congressman Cox, the coauthor of section 230, expressed his displeasure with both *Cubby*[90] and *Stratton Oakmont*[91] during floor debate on the measure, concluding that the

(1996).

87. *See, e.g.*, Ballon, *supra* note 83, at 8 (stating that "[t]here is no reference in the legislative history to *Cubby*. Had legislators intended to exempt online providers from distribution liability, as well as republication liability. Congress arguably would not have limited its discussion to *Stratton Oakmont* . . . .").

88. *See* 47 U.S.C.A. § 230(b)(3)-(4) (West 1998) (noting section 230 policy goals of encouraging development and use of filtering technologies).

89. *See, e.g.*, Sheridan, *supra* note 83, at 169; Ballon, *supra* note 83, at 11-12 ("If, however, services and users were immune from any liability for third party acts of defamation they would have no legal incentive to respond to customer complaints or monitor their domains."). Critics have generally urged a more restrictive reading of section 230, unless and until Congress acts to clarify that section 230 immunity extends to distributor liability. *See, e.g.*, Wiener, *supra* note 83, at 939; Sheridan, *supra* note 83, at 178.

90. *See* 141 CONG. REC. 22,045 (1995) (statement of Rep. Cox). Representative Cox stated:

> A Federal court in New York, in a case involving CompuServe, one of our online service providers, held that CompuServe would not be liable in a defamation case because it was not the publisher or editor of the material. It just let everything come onto your computer without, in any way, trying to screen it or control it.

Id.

91. *See id.* Representative Cox continued:

> The court [in *Stratton Oakmont*] said . . . you are different than CompuServe because you are a family-friendly network. You advertise yourself as such. You

"existing legal system provide[d] a massive disincentive for the people who might best help us control the Internet to do so."[92] Hence, when Congress adopted section 230, it did not intend to split the difference between *Cubby* and *Stratton Oakmont*, but rather sought to replace the then-current legal regime with a clear policy of OSP immunity relative to third-party content, regardless of whether the OSP was acting as a publisher or distributor of such third-party content. Under such an approach, OSPs would have clear guidance that they could police their networks without fear of being held liable for content originating with subscribers and other third parties.

Second, traditional common law principles of defamation also argue for a broad reading of section 230 immunity. As the court in *Zeran* noted, distributor liability is merely a subset of publisher liability at common law.[93] Publication, the Fourth Circuit expounded, is a "necessary element in a defamation action," so that "only one who publishes can be subject to this form of tort liability."[94] Furthermore, as noted by the trial court in *Zeran*, the *Restatement (Second) of Torts* specifically treats as a publisher "[o]ne 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."[95] Hence, when Congress provided that an OSP would not be treated as a publisher or speaker of defamatory material, it was, by definition, immunizing all OSPs from any species of publisher liability, *including* distributor liability.

Third, even assuming arguendo that, as *Zeran's* critics insist, distributor liability should be considered independent of publisher liability, the plain language of section 230 suggests that Congress intended to extend OSP immunity to distributor liability. As noted above, distributor liability is knowledge-based (i.e., the defendant knows or has reason to know of the defamatory nature of the third-party content). Congress accounted for this knowledge component by immunizing OSPs from liability for their good

> employ screening and blocking software that keeps obscenity off of your network. You have people who are hired to exercise an emergency delete function to keep that kind of material away from your subscribers. You don't permit nudity on your system. You have content guidelines. You, therefore, are going to face higher, stricter liability because you tried to exercise some control over offensive material.

Id.

92. 141 CONG. REC. 22,045 (statement of Rep. Cox).

93. *See* Zeran v. America Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997).

94. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 558(b) (1977)).

95. Zeran v. America Online, Inc., 958 F. Supp. 1124, 1133 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (quoting RESTATEMENT (SECOND) OF TORTS § 577(2)).

faith efforts to police their networks.[96] Stated another way, an OSP cannot be subject to liability if it gains knowledge of defamatory content through those policing efforts. Furthermore, as the monitoring programs established by AOL and other OSPs illustrate, those policing efforts often encompass both an OSP's own screening of third-party content and an OSP's efforts to solicit and respond to notices of potential liability and complaints from independent sources.[97]

Fourth, imposing distributor liability on OSPs would undermine Congress's central public policy goals in enacting section 230. Congress approved section 230, in part, to promote OSP self-regulation of their networks[98] and to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by [f]ederal or [s]tate regulation."[99] Retaining distributor liability for OSPs would serve neither objective. As for self-regulation, the threat of litigation might discourage OSPs from monitoring their sites because, as the *Zeran* court noted, "[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."[100] As to the open nature of online services,

96. *See* 47 U.S.C.A. § 230(c)(2) (West 1998).

97. *See, e.g.*, *Community Guidelines*, *supra* note 9 (noting that AOL reserves the right to remove third-party content that does not meet its community standards, and that AOL has established a Neighborhood Watch program for reporting violations of its policies). One *Zeran* critic has suggested that section 230 immunizes an OSP from distributor liability based on knowledge of defamatory content through its own monitoring efforts, but not from distributor liability based on knowledge of defamatory content obtained independently of online screening. *See* Ballon, *supra* note 83, at 11. As noted above, however, an OSP's policing efforts can include internal and external components, so distinguishing between different types of distributor liability on this basis would be arbitrary and unworkable. Furthermore, it is difficult to believe that Congress would have intended to make such a fine distinction in the application of distributor liability without an express statement to that effect. *See Community Guidelines*, *supra* note 9.

98. *See* 47 U.S.C.A. § 230(b)(3)-(4); *see also id.* § 230(a)(3) (West 1998) (noting, among congressional findings, that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse").

99. 47 U.S.C.A. § 230(b)(2).

100. Zeran v. America Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997). It is, of course, true that Section 230 immunizes OSPs from liability for their good faith efforts to monitor their sites, but it might be difficult for a court to ascertain the precise point at which that immunity ends and distributor liability begins (i.e., whether an OSP gained knowledge of the defamatory content through its own efforts or by notice from an independent source). Application of Title II of the Digital Millennium Copyright Act of 1998 provides a cautionary tale in this respect. While the Act provides OSPs with safe harbor protections for third-party copyright infringement on their networks, it retains liability where, under certain circumstances, an OSP has actual or apparent knowledge of infringing material or activity on its network. *See* 17 U.S.C. § 512(c) (1994) . In response, eBay has avoided monitoring its

retaining distributor liability would chill online communication because, as the *Zeran* court also observed, an OSP would have a "natural incentive simply to remove messages upon notification, whether the contents were defamatory or not," to avoid potential liability.[101]

Finally, the concerns expressed by critics that *Zeran* would discourage OSPs from monitoring their networks for offensive material have clearly proven to be incorrect. AOL, for example, does not prescreen content, but it does aggressively monitor its chat areas, message boards, and other services for defamatory or otherwise offensive content.[102] AOL's terms of service clearly provide that both its content partners and its subscribers are expected to abide by AOL's community standards and that AOL reserves the right to remove content if "it does not meet those standards."[103] Moreover, AOL and other OSPs reserve the right to disclose the account information of a subscriber should that subscriber violate the OSP's terms of service.[104] In fact, OSPs have provided such information when subpoenaed by plaintiffs seeking to learn the identities of defendants who have allegedly defamed plaintiffs in various message board postings.[105] These network monitoring and information disclosure activities

site out of a concern that doing so would trigger knowledge-based liability. *See* Matt Richtel, *EBay Says Law Discourages Auction Monitoring*, N.Y. TIMES ON THE WEB *available at* (visited Jan. 22, 2000) <www.nytimes.com/library/tech/99/12/cyber/articles/10ebay.html>.

101. *Zeran*, 129 F.3d at 333.

102. *See* AOL, *Community Guidelines*, *supra* note 9 (noting AOL's Neighborhood Watch program to monitor online activity).

103. *Id.* (noting that inappropriate online content includes the transmittal or distribution of content that is "harmful, abusive, racially or ethnically offensive, vulgar, sexually explicit, or in a reasonable person's view, objectionable," as well as threatening or harassing conduct).

104. *See, e.g.*, Yahoo!, *Privacy Policy* (visited Feb. 10, 2000) <http://docs.yahoo.com/info/privacy> (noting that "Yahoo! may also disclose account information in special cases when we have reason to believe that disclosing this information is necessary to identify, contact or bring legal action against someone who may be violating Yahoo!'s Terms of Service"); *Privacy Policy*, *supra* note 9 (noting that AOL reserves the right to "release specific information about your account only to comply with valid legal process such as a search warrant, subpoena or court order, or in special cases such as a physical threat to you or others"); Motley Fool, *Registration* (visited Feb. 10, 2000) <http://www.fool.com/community/register/RegisterUS.asp> (noting that Motley Fool may disclose personal information to comply with valid legal process).

105. *See, e.g.*, Bruce P. Keller & Peter Johnson, *Online Anonymity: Who Is John Doe*, 5 ELECTRONIC COM. & L. REP. 51, 70 (2000) (discussing practice of subpoenaing OSP to obtain identity of subscriber); Michael Moss, *CEO Exposes, Sues Anonymous Online Critics*, WALL ST. J., July 7, 1999, at B1 (noting that Yahoo! responded to subpoena for records on unidentified subscriber who allegedly defamed health company executive); Benjamin Weiser, *Owens Corning Goes to Court over a Fake Internet Message*, N.Y. TIMES, Oct. 28, 1999, at B11 (noting that Yahoo! will release identifying information about subscriber if legally compelled to do so, such as "in the form of a subpoena").

by OSPs are not at all surprising. OSPs have found that it makes good business sense to police their services.[106] Indeed, in the highly competitive online services marketplace, an OSP's refusal to act responsibly in these areas could have devastating commercial consequences, particularly given the ease with which users can, through chat rooms and message boards, quickly and broadly publicize such irresponsible OSP behavior. As noted, the one thing that could possibly deter an OSP from acting in this commercially reasonable manner would be to impose distributor liability on the OSP.

V. CONCLUSION

Congress intended that section 230 promote the continued free market development of the Internet "unfettered by [f]ederal or [s]tate regulation" while also encouraging OSPs to monitor their services for objectionable online content. Section 230, as *Zeran* and subsequent courts properly construe it, has served both objectives. There continues to be explosive growth in the amount of content available on the Internet and other online services today, and the recently announced merger between Time Warner and AOL will likely accelerate that trend. Furthermore, contrary to the claims of certain legal commenters, *Zeran* and its progeny have not caused OSPs to refrain from self-regulating the content on their networks. Rather, OSPs have responded to the business imperative in this highly competitive area to act responsibly in creating and ensuring relatively safe and vibrant spaces in which online speech and e-commerce continue to flourish. In short, section 230, as interpreted by the courts, is working and should not be narrowed as certain commenters suggest. Indeed, any such narrowing—for example, removing OSP immunity from distributor liability—would merely undermine the very objectives that Congress enacted section 230 to achieve. Congress has thus far declined to revisit section 230, but in the event that it should decide at some future time to narrow section 230 immunity, the common carrier model as articulated in *Lunney* may provide one alternative that does the least amount of harm.

106. *See* Eric Bergner, *A Sense of Decency: There Are Good Reasons to Police Your Web Site's Bulletin Boards*, INDUSTRY STANDARD, July 9, 1999, *available at* (visited Feb. 10, 2000) <www.thestandard.com/articles/display/0,1449,5427,00.html>.