

MYSFACE AND YOUTUBE: THE NEW SAFE HAVEN  
FOR DEFAMATORY CONTENT

By

ADRIENNE T. BIDDINGS

A THESIS PRESENTED TO THE GRADUATE SCHOOL  
OF THE UNIVERSITY OF FLORIDA IN PARTIAL FULFILLMENT  
OF THE REQUIREMENTS FOR THE DEGREE OF  
MASTER OF ARTS IN MASS COMMUNICATION

UNIVERSITY OF FLORIDA

2009

© 2009 Adrienne T. Biddings

Dedicated to Willie James Evans, Jr.

## ACKNOWLEDGMENTS

I would like to thank the members of my committee Dr. Laurence Alexander, Dr. Johanna Cleary and Dean William Page for all their hard work and constructive criticism, which helped me make this research better than I possibly thought it could be. I would also like to give a special thanks to Dr. William Chamberlain for being a guiding post throughout my graduate career at the University of Florida.

## TABLE OF CONTENTS

	<u>page</u>
ACKNOWLEDGMENTS.....	4
ABSTRACT.....	7
CHAPTER	
1 PURPOSE OF RESEARCH AND METHODOLOGY .....	8
Introduction .....	8
Three Disseminator Statuses .....	9
Review of Literature .....	12
Controversy over Court Interpretation of §230 in Zeran .....	13
CDA Comparisons to DMCA.....	20
Research Questions & Methodology .....	23
2 HISTORY OF DEFAMATION LAW.....	26
Elements of Defamation Liability .....	26
Defamatory Statement.....	27
Publication.....	28
Fault.....	29
Is the Statement Actionable?.....	31
History of Defamation in Traditional Media.....	32
New York Times Co v. Sullivan.....	34
Gertz v. Robert Welch, Inc. ....	35
Liability in Cyberspace Prior to CDA .....	37
Cubby v. CompuServe .....	38
Stratton Oakmont, Inc. v. Prodigy Services Co.....	39
Conclusion.....	41
3 CASES RELATED TO DEFAMATION AND SECTION 230.....	42
Structure of Websites.....	43
YouTube.....	43
MySpace.....	45
Cases .....	48
Federal Appellate Court Cases.....	48
Zeran v. America Online Inc. ....	48
Ben Ezra, Weinstein and Company v. America Online Inc. ....	51
Batzel v. Smith .....	54
Carafano v. Metrosplash.com, Inc. ....	58
Green v. America Online.....	60
Federal District and State Court Cases.....	63
Blumenthal v. Drudge.....	64

	Parker v. Google.....	64
	Prickett v. Infousa, Inc .....	65
	Barrett v. Rosenthal.....	66
	Other Cases Involving Section 230 .....	67
	Doe v. AOL .....	67
	Schneider v. Amazon.com.....	68
	Jane Doe v. MySpace.....	69
	Anthony v. Yahoo!, Inc. ....	69
	Fair Housing v. Roommates.com.....	70
4	IMMUNITY FOR USER-GENERATED WEBSITES.....	77
	Application of Case Law to MySpace and YouTube .....	77
	YouTube.....	78
	MySpace.....	80
	Should User-generated Websites have Immunity from Publisher and Distributor	
	Liability? .....	82
	Marketplace of Ideas Theory .....	82
	Public Policy Argument .....	85
	Efficiency Argument .....	88
	Discussion and Position .....	89
5	CONCLUSION .....	94
	Summary .....	94
	Proposals for Legislation .....	97
	LIST OF REFERENCES .....	99
	BIOGRAPHICAL SKETCH .....	106

Abstract of Thesis Presented to the Graduate School of the  
University of Florida in Partial Fulfillment of the Requirements  
for the Degree of Master of Arts in Mass Communication

MYSPACE AND YOUTUBE: THE NEW SAFE HAVEN  
FOR DEFAMATORY CONTENT

By

Adrienne T. Biddings

May 2009

Chair: Laurence Alexander  
Major: Mass Communication

The Internet is an interactive medium with users having the ability to post content instantly. The purpose of this thesis is to examine the Communications Decency Act § 230 in light of new technology systems that have emerged since the act's passage in 1996, specifically this thesis aims to determine whether MySpace and YouTube are immune from liability for defamation pursuant to CDA §230.

Applying the legal research method, five U.S. Court of Appeals opinions that involved defamatory content online and CDA §230 were analyzed. Beginning with *Zeran v. AOL*, the Fourth Circuit held that Internet service providers were protected from liability for content provided by a third party under CDA §230. The Ninth Circuit extended Section 230 immunity to websites and listservs.

Applying the case law to the structure of YouTube and MySpace, this research found that user-generated websites are interactive computer services protected by Section 230. Analyzing the statute and its legislative history, it could be reasonably concluded that Congress did not intend to grant websites both publisher and distributor immunity. Nonetheless the court's ruling appears to promote sound public policy because granting are user-generated websites immunity from liability for defamation for third- party content protects and fosters speech on the Internet.

CHAPTER 1  
PURPOSE OF RESEARCH AND METHODOLOGY

**Introduction**

Imagine logging on to the Internet and discovering that someone has posted false, disparaging and sexually explicit statements about you on MySpace or DontDateHim.com. What if someone posted video taken from a cell phone camera portraying you as a drunkard in compromising positions on YouTube? What would you do? What, if anything, could you do to get your reputation back? The Internet is an infinite medium and content, once published online, usually lasts forever. You would want someone to pay for the harm done to your reputation, but who could you sue for defamation?

If this scenario had occurred in a newspaper or on television, a victim could sue the newspaper or television station and the creator of the content. But cyberspace is a totally different medium that has its' own rules. Federal legislation, namely Section 230 of the Communications Decency Act,<sup>1</sup> along with the courts' interpretation of the statute has limited the recourse for victims in defamation cases that occur online.

The public's access to the Internet has grown exponentially over the last ten years.<sup>2</sup> Now more than ever, websites compiled entirely by user-generated content, like Myspace and YouTube, have become popular and even corporate. Google bought YouTube for \$1.6 billion<sup>3</sup>

---

<sup>1</sup> 47 U.S.C. §230 (1996) [hereinafter Section 230].

<sup>2</sup> Mary Madden, *Internet Penetration and Impact*, PEW INTERNET AND AMERICAN LIFE PROJECT (2006).

<sup>3</sup> BBC News, *Google Buys YouTube for 1.65 Billion*, October 10, 2006, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/business/6034577.stm>

and NewsCorp purchased MySpace for \$580 million.<sup>4</sup> User generated, also known as consumer-generated media or user-created content (UCC), is media content that is produced by end-users, as opposed to traditional media producers such as professional writers, publishers, journalists, broadcasters and production companies.<sup>5</sup> With the pervasiveness of broadband technology, the majority of online users have the ability to possess a site or post whatever they please on another website such as YouTube and MySpace instantly, including defamatory content.

Defamation, as defined in the Restatement (Second) of Torts, “is communication that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”<sup>6</sup> Defamation is a common law tort and was regulated solely by the states until *New York Times Co. v. Sullivan*, when the Supreme Court held that public officials could only win a libel suit if they could demonstrate “actual malice,” meaning the publisher had knowledge that the information was false.<sup>7</sup> Later in *Gertz v. Robert Welch, Inc.*, the U.S. Supreme Court stated in dicta that a plaintiff could not win a defamation suit based on statements that are expressions of opinions.<sup>8</sup>

### **Three Disseminator Statuses**

In cases involving defamation, common law also established three different statuses for disseminators of information: publishers, distributors, and common carriers. Each status has a

---

<sup>4</sup> BBC News, *News Corp in \$580m Internet Buy*, July 19, 2005, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/business/4695495.stm>

<sup>5</sup> Reference.com, *Wikipedia-User-generated\_content*. [http://www.reference.com/browse/wiki/User-generated\\_content](http://www.reference.com/browse/wiki/User-generated_content) (last visited: September 22, 2007).

<sup>6</sup> RESTATEMENT (SECOND) OF TORTS §559 (1977).

<sup>7</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 262 (1964).

<sup>8</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

different standard of liability that is based on the amount of control a disseminator has over the content.

Publishers are those responsible for the creation or editing of content and are reviewed under a strict liability standard.<sup>9</sup> A publisher can be speaker, writer, newspaper, or television station. If information is found to be defamatory, the publisher of the content is liable, even if he or she was not aware of the defamatory statement. Publishers of third-party statements are treated as if the statements made were their own.<sup>10</sup> “One who repeats or otherwise republishes a defamatory matter is subject to liability as if he originally published it”<sup>11</sup> because publishers have access and editorial control over the content, and they are deemed to have constructive knowledge<sup>12</sup> and the intent to publish.<sup>13</sup>

Distributors, such as bookstores, libraries and newsvendors, are held to a less strict standard of liability. Distributors are only subject to liability if they knew or had reason to know of the defamatory material.<sup>14</sup> Distributors are not required to examine the material they disseminate, and absent knowledge of the defamatory material, they have no duty to substantiate whether the material is defamatory.<sup>15</sup>

---

<sup>9</sup> Restatement (Second) of Torts §578 (1977).

<sup>10</sup> *Id.*

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

<sup>12</sup> Black’s Law Dictionary (8th ed. 2004) (defining constructive knowledge as knowledge that a person using reasonable care or diligence should possess, and therefore knowledge of the information is given to that person by law).

<sup>13</sup> Restatement (Second) of Torts §578 (1977).

<sup>14</sup> Restatement (Second) of Torts §581, cmt. d (1977).

<sup>15</sup> *Id.*

Common carriers, such as telephone companies, are not liable for defamatory statements disseminated through the use of their services, even if they knew or had reason to know of the defamation.<sup>16</sup> Common carriers merely provide the facilities and equipment by which individuals spread defamatory content and are passive conduits, lacking any editorial control over the content.<sup>17</sup>

These three common law principles for dissemination status and liability were applied to content published on the Internet until Congress passed the Communications Decency Act (CDA) in 1996. A portion of the act was held unconstitutional in *Reno v. ACLU*,<sup>18</sup> but CDA §230<sup>19</sup> remained valid law.

Section 230 declares “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>20</sup> From the plain language of Section 230, Congress wanted to prevent interactive computer services from being held to the same standard of liability as publishers in traditional media are held for third-party content. It was believed that holding interactive service providers liable as

---

<sup>16</sup> *Anderson v. New York Tel. Co.*, 35 N.Y. 2d 746, 748-749 (1976).

<sup>17</sup> *Id.*

<sup>18</sup> *Reno v. ACLU*, 521 U.S. 844 (1997), (challenging the constitutionality of provisions of the CDA that sought to protect minors from harmful material on the Internet. The U.S. Supreme Court held that the provisions of the CDA prohibiting transmission of obscene or indecent communications by means of a telecommunications device to persons under the age of 18, or sending patently offensive communications through the use of an interactive computer service to persons under the age of 18, were content-based blanket restrictions on speech, and cannot be viewed as a type of time, place, and manner regulation. The challenged provisions were facially overbroad, which is also a violation of the First Amendment).

<sup>19</sup> 47 U.S.C. §230 (1996).

<sup>20</sup> 47 U.S.C. §230 (c)(1) (1996).

publisher could lead to interactive computer services possibly regulating content to avert possible lawsuits.<sup>21</sup>

### Review of Literature

There has been no discussion or research in scholarly literature pertaining to the user-generated websites MySpace and YouTube in reference to defamation and Section 230. Most of the literature written about YouTube and MySpace pertains to intellectual property rights<sup>22</sup> and privacy.<sup>23</sup> There has been an abundance of literature written on section 230 and Internet Service Provider (ISP) liability in defamation cases.<sup>24</sup>

---

<sup>21</sup> 47 U.S.C. § 230 (b)(4) (1996).

<sup>22</sup> See Michael Driscoll, *Will YouTube Sail into the DMCA's Safe Harbor or Sink for Internet Piracy?*, 6 J. MARSHALL REV. INTELL. PROP. L. 550 (2007).

<sup>23</sup> See Matthew Hodge, *The Fourth Amendment and Privacy Issues on the New Internet: Facebook.com and MySpace.com*, 31 S. ILL. U. L. J. 95 (2006).

<sup>24</sup> See also, e.g., Ternisha Miles, *Barret v. Rosenthal: Oh, What A Tangled Web We Weave: No Liability For Web Defamation*, 29 N.C. CENT. L.J. 267 (2007); Andrea L. Julian, *Freedom Of Libel: How An Expansive Interpretation Of 47 U.S.C. § 230 Affects The Defamation Victim In The Ninth Circuit*, 40 IDAHO L. REV. 509 (2004); Jae Hong Lee, *Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-party Content on the Internet*, 19 BERKELEY TECH. L.J. 469 (2004); Stephanie Blumstein, *The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act to the Libelous "Re-poster"*, 9 B.U.J. SCI. & TECH. L. 407 (2003); Ryan W. King, *Online Defamation: Bringing the Communications Decency Act of 1996 in Line with Sound Public Policy*, 2003 DUKE L. & TECH. REV. 24 (2003); Bryan J. Davis, *Frontiers Of Law: The Internet Ad Cyberspace: Untangling The "Publisher" Versus "Information Content Provider" Paradox Of 47 U.S.C. § 230: Toward A Rational Application Of The Communications Decency Act In Defamation Suits Against Internet Service Providers*, 32 N.M.L. REV. 75 (2002); Paul Ehrlich, *Regulating Conduct on the Internet: Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401 (2002); Brian C. McManus, *Rethinking Defamation Liability for Internet Service Providers*, 35 SUFFOLK U. L. REV. 647 (2001); Sarah B. 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, (1998); Robert M. O'Neil, *The Drudge Case: A Look At Issues In Cyberspace Defamation*, 73 WASH. L. REV. 623 (1998).

There are two major themes present when reviewing the scholarly literature on ISP defamation liability. The first discusses the court's ruling in *Zeran v. America Online, Inc (AOL)*<sup>25</sup> and the court's interpretation of Section 230. There has been debate in the literature over whether the court correctly interpreted the Congressional intent of Section 230 and the legal implications of the court's rulings. The second major theme in the literature is the comparison of Section 230 to other laws involving ISP liability, specifically the Digital Millennium Copyright Act (DMCA).

### **Controversy over Court Interpretation of §230 in *Zeran***

The majority of literature suggests that the U.S. Court of Appeals for the Fourth Circuit misinterpreted the congressional intent of Section 230 in the *Zeran v. AOL* decision in reference to distributor liability versus publisher liability. Many legal scholars conclude that this error has led to legal ramifications that Congress did not fully anticipate, and Congress should therefore amend portions of the CDA.

Shortly after the Fourth Circuit made the *Zeran* decision, AnneMarie Pantaziz, in a student Note for the *Wake Forest Law Review*, declared that the court's erroneous decision in *Zeran* will have massive repercussions by protecting almost any computer service provider who republishes content and leaving no recourse for victims of defamation.<sup>26</sup> She stated, "Section 230 was added to the CDA to protect a service provider from encountering liability based solely on its efforts to block offensive and defamatory material"<sup>27</sup> as an editor or publisher in traditional media would.

---

<sup>25</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

<sup>26</sup> Annemarie Pantaziz, Note, *Zeran v. America Online, Inc.: Insulating Internet Service Providers From Defamation Liability*, 34 WAKE FOREST L. REV. 531, 555 (1999).

<sup>27</sup> *Id.* at 546.

From her analysis of the CDA, Pantaziz stated that the plain language of the statute does leave doubt whether the statute was to also include distributor liability,<sup>28</sup> and after her analysis of the CDA's senate and house committee reports, she declared, the research does not yield the conclusion that court reached; that Congress' intent was to immunize ISPs from all form of liability.<sup>29</sup> Pantaziz suggested the courts follow the traditional common law standard of liability for distributors who are on notice of the defamatory material<sup>30</sup> or apply a modified version of traditional distributor liability to ISPs, as this would ensure the productive use of the Internet while promoting the policies underlying the CDA.<sup>31</sup>

Legal scholars since the 1997 *Zeran* decision have continued to conduct research on the court's analysis of the case. Similar to Pantaziz, Sewali Pater, a law student at Vanderbilt University, conducted a legal analysis of traditional defamation liability, *Zeran*, and Section 230. From his research he concluded the court in *Zeran* misconstrued Section 230 by applying both distributor and publisher liability to ISPs, and the legal result of this precedent has essentially given ISPs absolute immunity from defamation liability.<sup>32</sup>

Pater asserted that this creation of absolute immunity for ISPs is the "result of a misinterpretation of the CDA language and congressional intent"<sup>33</sup> because it is unlikely that Congress' intention was to make it virtually impossible for an ISP to be held liable for

---

<sup>28</sup> *Id.* at 547.

<sup>29</sup> *Id.* at 554.

<sup>30</sup> *Id.* at 555.

<sup>31</sup> *Id.*

<sup>32</sup> Sewali Pater, *Immunizing Internet Service Providers from Third Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 666 (2002).

<sup>33</sup> *Id.* at 678.

defamation over the Internet. In the attempt to uphold the policy of promoting technology, Pater notes, the “courts overlooked the adverse effect that broadly immunizing ISPs would have upon plaintiffs in defamation cases.”<sup>34</sup>

Since many publishers of defamatory statements are anonymous users, the grant of total immunity for ISPs from third-party Internet defamation, Pater wrote, results in victims of defamation being left with no one to sue and no remedy for the harms incurred.<sup>35</sup> Pater suggested that ISPs should be liable under distributor liability for failure to remove defamatory material<sup>36</sup> because distributor liability is inherently different than publisher liability, as distributors do not exert any editorial control material they distribute.<sup>37</sup>

Pater noted that ISPs share similarities with all three types of disseminators of information, and therefore concedes that ISPs do not fit properly into any one of the existing dissemination status categories. As a result, it can be “difficult for courts to determine which standard of defamation liability should be applied to ISPs in defamation cases.”<sup>38</sup> He concluded that an effective solution would be to preserve distributor liability on the Internet, giving the plaintiff a remedy without significantly impeding technology.<sup>39</sup>

Christopher Butler, a practicing attorney, in his article *Plotting the Return of an Ancient Tort to Cyberspace: Towards a New Federal Standard of Responsibility for Defamation for*

---

<sup>34</sup> *Id.* at 672.

<sup>35</sup> *Id.* at 691.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 676.

<sup>38</sup> *Id.* at 652.

<sup>39</sup> *Id.* at 689.

*Internet Service Providers*, states that Section 230 combined with the *Zeran* decision, has “transformed the internet into an almost liability-free zone for libelous content.”<sup>40</sup> From his research he concluded that Congress intended to protect and encourage ISPs to take active steps to monitor and remove objectionable and defamatory content, not to protect them from liability when they knowingly choose not to remove it.<sup>41</sup>

Butler asserted that the court in *Zeran* could have eliminated the danger of ISPs being punished for taking a hands-on approach in editing content, if the court had declared that ISPs are not liable as publishers for third-party content but may be liable as distributors.<sup>42</sup> Instead the court gave ISPs publisher and distributor immunity. Butler declared that Congress needs to create a new federal standard to correct the ambiguities in the CDA that have resulted in misinterpretation by the courts.<sup>43</sup>

He further stated, “ISPs should be considered in most instances a distributor but in certain rare cases a publisher, because this would create a liability standard that would do the least harm to the forum of free speech over the Internet.”<sup>44</sup> Butler finds it hard to rationalize the current system that gives AOL immunity from liability for distributing defamatory material while the neighborhood bookstore is not immune.<sup>45</sup>

---

<sup>40</sup> 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, 248 (2000).

<sup>41</sup> Id. at 252.

<sup>42</sup> Id. at 265.

<sup>43</sup> Id at 248.

<sup>44</sup> Id. at 272

<sup>45</sup> Id. at 265.

Similar to Butler’s argument, Emily Fritts argued that the *Zeran* court mixed up distributor liability with publisher liability with regard to ISPs<sup>46</sup> and “*Zeran* is not consistent with tradition concepts of libel law or with the legislative intent underlying Section 230.”<sup>47</sup> Fritts stated the court’s reliance on Restatement §577<sup>48</sup> is unfounded, because distributor liability is not a subset of publisher liability,<sup>49</sup> and the holding in *Zeran* failed to differentiate the basic concepts of distributor and publisher liability.<sup>50</sup>

Fritts suggested that Congress should set the record straight that the CDA was meant to overrule *Stratton Oakmont* and not *Cubby*.<sup>51</sup> Since Congress has not expressly banned distributor liability for ISPs, the decision in *Cubby* still stands and ISPs with knowledge of defamatory material, like AOL in the *Zeran* case should be held accountable.<sup>52</sup>

---

<sup>46</sup> Emily Fritts, Note, Internet Libel and the Communications Decency Act: How Courts Erroneously Interpreted Congressional Intent with Regard to Liability of Internet Service Providers, 93 KY. L.J. 765, 785 (2005).

<sup>47</sup> *Id.* at 779.

<sup>48</sup> RESTATEMENT (SECOND) OF TORTS §577 (1977). Publication of a defamatory matter through communication intentionally or by a negligent act, leaves a person defamed. One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited in his possession or under his control is subject to liability for its continued publication. *Id.*

<sup>49</sup> Fritts, *supra* note 46, at 782.

<sup>50</sup> *Id.* at 779

<sup>51</sup> *Id.* at 785. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995), (stating that an ISP can be a liable as the original publisher of defamatory statements when the ISP has editorial control over content contained on its sites); *Cubby, Inc. v. Compuserve Inc.*, 776 F. Supp. 135 (S.D. N.Y 1991) (ruling that a computer service company that provided access to electronic information was a distributor and could not be held liable for defamatory statements made in the publications without a showing of actual knowledge).

<sup>52</sup> *Id.* at 779. See also, Blumstein, The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act to the Libelous “Re-poster”, 9 B.U.J. SCI. & TECH. L. 407, 415 (2003) (arguing because of *Zeran* “even if an ISP knowingly carried defamatory material or

Joshua Masur, a lawyer who specializes in intellectual property litigation in new and traditional media, in his article for *Jurimetrics: The Journal of Law, Science and Technology*, did not conduct a legal analysis of *Zeran* like many of the previous scholars. Instead Masur conducted a legal analysis of Section 230 and *Blumenthal v. Drudge*,<sup>53</sup> a case that follows the precedent set in *Zeran*. He concluded that the ambiguities in the CDA's language and the *Zeran* ruling have created a problem of liability when ISP defendants' have multiple statuses of both content and service provider.<sup>54</sup>

Masur concluded from his research, that Section 230 does not immunize an information content provider but it is completely "silent on how to treat a defendant who is an ISP and a provider of content."<sup>55</sup> He stated the court's interpretation of Section 230 encourages any potential Internet defamation defendant to "set up some form of online service to garner itself statutory immunity afforded by the CDA."<sup>56</sup>

Although the majority of the literature suggests the Fourth Circuit misinterpreted Section 230 in *Zeran*, Francis Buono and Johnathan Friedman, attorneys in Washington, D.C. specializing in communications law and policy, declare the court in *Zeran* accurately interpreted

---

ignored a complaint, it is protected by Section 230 as long as the content was posted by a third-party").

<sup>53</sup> *Blumenthal v. Drudge*, 992 F.Supp. 44 (D.D.C. 1998) White House employees brought a defamation action against electronically-published gossip columnist Drudge and service provider, America Online. Court held that a service provider could not be held liable for making the gossip column available to its subscribers even though the service provider had contracted and paid the gossip columnist to provide the column.

<sup>54</sup> Joshua Masur, *A Most Uncommon Carrier: Online Service Provider Immunity Against Defamation Claims in Blumenthal v. Drudge*, 40 JURIMETRICS 217, 224 (2000).

<sup>55</sup> *Id.* at 224.

<sup>56</sup> *Id.* at 225

the CDA and the congressional intent of Section 230.<sup>57</sup> The authors conducted a legal analysis of the *Zeran* opinion and researched the legislative history of the CDA. From their research, they concluded that distributor liability should be considered independent of publisher liability, but the plain language of Section 230 suggests that Congress also intended to extend ISP immunity to distributor liability.<sup>58</sup>

Buono and Freidman concluded that the legislative history revealed Congress was dissatisfied with the entire common law framework for ISP liability.<sup>59</sup>

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 ISP immunity relative to third-party content, regardless of whether the ISP was acting as a publisher or distributor of such third-party content.<sup>60</sup>

The authors further declared that ISPs do not have blanket immunity in defamation suits as many critics suggest because “Section 230 does not immunize ISPs from liability for content that they create and develop entirely by themselves.”<sup>61</sup> Furthermore the *Zeran* decision has not caused ISPs to stop regulating content.<sup>62</sup>

---

<sup>57</sup> Francis Buono & Johnathan Freidman, *Limiting Tort Liability for Online Third-party Content Under Section 230 of the Communications Decency Act*, 52 FED. COMM. L.J. 647 (2000).

<sup>58</sup> *Id.* at 662

<sup>59</sup> *Id.* at 661.

<sup>60</sup> *Id.* at 662.

<sup>61</sup> *Id.* at 644.

<sup>62</sup> *Id.* at 665.

## CDA Comparisons to DMCA

A second subset of the literature on CDA §230 are analyses that compare the CDA to the Digital Millennium Copyright Act (DMCA)<sup>63</sup> and review the DMCA's usefulness in rectifying the issues surrounding the CDA. "The First Amendment has largely shaped defamation law in the United States, in the same way that the promotion of arts and sciences has shaped copyright's history, as both fields have had a tremendous impact upon the Internet, and the solutions have not always been perfect."<sup>64</sup>

In an article for the *Journal of Law and Technology*, David Hallett, a law student from California Western School of Law, conducted a comparative analysis of the history, legislative intent, and judicial interpretations of the CDA and DMCA. He concluded that Congress had very similar intentions when creating the CDA and DMCA but "failed to balance the concerns in the CDA as effectively as it did in the DMCA."<sup>65</sup> This failure, said Hallett, has led to judicial misinterpretation of Section 230, and Congress should simply change the CDA to encompass some of the provisions used in the DMCA.<sup>66</sup>

---

<sup>63</sup> Specifically 17 U.S.C. §512 (1999), which determines when an ISP will be liable for copyright infringement. Statute provides a safe harbor for ISPs for certain circumstances depending on whether there is direct infringement or contributory infringement by the ISP.

<sup>64</sup> Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Creditability?: Lessons From the DMCA Applied to Online Defamation*, 25 CARDOZO ARTS & ENT. L.J. 237, 255 (2007).

<sup>65</sup> David Hallett, *How to Destroy a Reputation and Get Away With It, The Communications Decency Act Examined: Do the Policies and Standards Set Out In the Digital Millennium Copyright Act Provide a Solution For A Person Defamed Online?*, 41 IDEA 259, 276 (2001).

<sup>66</sup> *Id.* at 279. See also Blumstein, *The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act to the Libelous "Re-poster"*, 9 B.U.J. SCI. & TECH. L. 407, 431 (2003) (proposing that Congress apply a standard for notification process similar to the one utilized in the DMCA).

From his research Hallett concluded Congress could provide for a notice and counter notification system similar to the DMCA, which would lead to ISPs not being brought into a defamation suit unless the ISP received notification and failed to act.<sup>67</sup> Hallett stated the current case law and the CDA do not protect society from online defamers, as “online defamers can continually harass whomever they choose regardless of the consequences to the defamed person.”<sup>68</sup> He asserted the DMCA created a way for ISPs to “avoid copyright liability, and still provide protection to copyright owners.”<sup>69</sup>

Olivera Mendecia and Kaiser Wahab, attorneys specializing in intellectual property and technology, suggest an amendment to Section 230, also modeled after the DMCA, called the Online Defamation Limited Liability Act (ODEFLLA).<sup>70</sup> The authors state the DMCA provides guiding points in terms of tailoring an approach to defamatory material posted online<sup>71</sup> and should be a blueprint for congress when approaching an amendment to Section 230.<sup>72</sup> After comparing the legislative history and intent of both the CDA and DMCA, the authors concluded policy makers were trying to protect the “interest of new technology and cultivate its growth and development,” but the DMCA did not create a disparity in liability between the parties as the CDA has.<sup>73</sup>

---

<sup>67</sup> Hallett, *supra* note 65, at 278.

<sup>68</sup> *Id.* at 277.

<sup>69</sup> *Id.* at 281.

<sup>70</sup> Mendecia, *supra* note 64, at 263.

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

<sup>72</sup> *Id.* at 265.

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

Matthew Schruers, in *The History and Economics of ISPs for Third-Party Content*, takes a different approach in his comparison of Section 230 and the notice-based liability system in DMCA. Schruer did an economic analysis of the different forms of defamation liability<sup>74</sup> and questioned what will happen to ISPs and society, economically, if the CDA is amended to the notice-based system found in the DMCA. Schruer stated, “[t]he ultimate question is not whether an alternative regime would be more efficient, but how modifications to the present regime could maximize its efficiency.”<sup>75</sup>

From his analysis of the different liability standards,<sup>76</sup> Schruer concluded that notice-based liability systems such as the one present in the DMCA “fails to produce efficient levels of Internet use and content monitoring.”<sup>77</sup> From his analysis, Schruers stated that allowing ISPs to regulate content themselves appears to be the most efficient model for society because creating liability for ISP will produce overregulation.<sup>78</sup> “For ISPs, returning to anything that resembles a liability system would fail to serve the public good.”<sup>79</sup>

A search of the literature found that many scholars conclude that ISPs should have some form of liability for defamatory material they disseminate. This research thesis will not discuss ISP liability but the liability of website owners for third party content. The purpose of this study

---

<sup>74</sup> Matthew Schruers, *The History and Economics of ISPs for Third-Party Content*, 88 VA. L. REV. 205 (2002).

<sup>75</sup> *Id.* at 207.

<sup>76</sup> *Id.* at 234. Using the formula of  $B < P \times L$  with the variable “B” representing the burden of prevention, “P” representing the probability of an accident and “L” indicates the ensuing loss, *id.*

<sup>77</sup> *Id.* at 260.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 261.

is to examine Section 230 in light of new technology that has emerged since the CDA's passage in 1996, specifically to determine whether the user-generated websites MySpace and YouTube are immune from liability under the statute.

### **Research Questions & Methodology**

A review of the literature found many scholars concluding that ISPs should have some form of liability for defamatory material they disseminate. This thesis will not discuss ISP liability but the liability of website owners for third-party content. Website owners have argued that Section 230 should be extended to websites when a claim involves third party content. This study sought to determine whether the law concerning liability on the Internet since should be re-evaluated, specifically to determine whether the websites MySpace and YouTube are and should be immune from liability under the Communications Decency Act of 1996.

Specifically, this thesis attempted to answer the following research questions:

- (1) Whether MySpace and YouTube are immune from liability for defamatory content published on their websites under 47 U.S.C. § 230?
- (2) Was it Congress' intent to have sites such as MySpace and YouTube immune from liability for content published on their sites under 47 U.S.C. § 230?
- (3) Should MySpace and YouTube be immune from defamation liability for defamatory content published on their websites under 47 U.S.C §230?

To answer these questions, this thesis employed legal research as the methodology. First, secondary sources from law reviews and scholarly journals were reviewed to better familiarize the researcher with the topic and the main issues. The primary sources for this research were federal appellate court opinions that applied Section 230 in claims involving defamation. The researcher chose federal appellate court cases because they have more authoritative value than federal district court cases that are merely persuasive to courts in other jurisdictions.

Furthermore, not all federal district court cases are recorded, so it would be difficult for the

researcher to retrieve all the applicable case law. But also identified federal district court and state court cases that were directly on point were analyzed to determine what these courts have concluded in regards to Section 230.

From the researcher's review of secondary materials, it was discovered that *Zeran v. America Online, Inc.* was the first federal appellate opinion to interpret Section 230. *Zeran* was first accessed using LexisNexis, and then the case was Shepardized using LexisNexis. Starting with *Zeran*, the researcher was able to find all other federal appellate court cases that involved defamation and Section 230, shepardized those cases and researched all subsequent case law.

Upon examining and interpreting the case law, the researcher attempted to establish what would likely occur if MySpace or YouTube are confronted with a defamation cause of action for content published on its websites. The websites MySpace and YouTube were chosen as test cases because they are the two largest and most popular user-generated websites and unlike Facebook, large multi-national corporations recently bought YouTube and MySpace. The researcher chose not to use Facebook, also one of the largest user-generated websites, because Facebook is very similar to MySpace and possess many of the same applications as MySpace. Therefore the researcher saw no need to do a test case with such similar websites. The reason MySpace was chosen over Facebook in this research was because anyone can view a MySpace members' homepage even without being a MySpace member versus Facebook, where an individual has to become a member to gain access of any kind to an individual's profile.

This thesis then compared and contrasted the reasoning and application of the Section 230 with relevant case law on defamatory statements made in conventional media forms such as newspapers and television. The researcher also reviewed the legislative history of the CDA, including the U.S. Senate and House reports, to determine whether it was the intent of Congress

to have these types of websites immune from defamation liability for content published on its websites. Then researcher then analyzed whether user-generated websites should be immune from defamation liability for third party content.

This first chapter of this research thesis introduced the topic followed by the literature review, methodology, and research questions. The Chapter Two will examine the law of defamation and how defamation law was applied on the Internet prior to the passage of the Communication's Decency Act. Chapter Three will review federal and state cases related to defamation and Section 230 and review legislative history of Section 230 to ascertain whether it was the intent of Congress to have user-generated websites like MySpace and YouTube immune from liability. Chapter Four will apply the case law to determine whether MySpace and YouTube are immune from defamation liability under Section 230 and will answer should user-generated websites be immune from liability from third party content posted on their sites. Chapter Five will summarize the entire thesis and offer proposals to the legislature.

## CHAPTER 2 HISTORY OF DEFAMATION LAW

Defamation is a complex legal concept that seeks to protect the interest people have in their reputation and good name.<sup>1</sup> The purpose underlying defamation law is to compensate individuals for the harm inflicted on their reputations because of defamatory falsehoods.<sup>2</sup> Defamation was historically a common law tort and was only regulated by the states until 1964. Since then, defamation law has expanded to a combination of state statutes, state common law and federal constitutional law. This chapter will examine the elements of defamation liability and review the history of defamation law in traditional media and new media before the passage of section 230 of the Communications Decency Act.<sup>3</sup>

### **Elements of Defamation Liability**

In the common law “[t]o create liability for defamation there must be (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher, and (4) the statement be either actionable irrespective of special harm or the existence the special harm caused by the publication.”<sup>4</sup> In all forms of media, including claims based upon statements made on the Internet, the plaintiff must prove all four elements to prevail in a defamation action.

---

<sup>1</sup> W. Page Keeton et al., *Prosser And Keeton On The Law Of Tort* §111, at 771 (5th ed. 1984).

<sup>2</sup> *See Phila. Newspapers v. Hepps*, 475 U.S. 767, 776 (1986); *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

<sup>3</sup> 47 U.S.C. §230 (1996) [hereinafter Section 230].

<sup>4</sup> *Restatement (Second) of Torts* §558 (1977).

## Defamatory Statement

The Restatement of Torts states “[a] communication is defamatory if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.<sup>5</sup> Communications are often defamatory because they “... expose another to hatred, ridicule or contempt.”<sup>6</sup>

A defamatory communication need not prejudice the victim in the eyes of everyone in the community; if the communication would prejudice him in the eyes of a substantial and respectable minority, the burden has been met.<sup>7</sup> Actual harm to reputation is not necessary to make the communication defamatory; if the communication would tend to cause harm to another’s reputation or deter third persons from associations or dealing with him, the statement may be defamatory.<sup>8</sup>

If the alleged defamatory statement is susceptible to only one meaning and that meaning is defamatory, the statement is defamatory as a matter of law. But where the statement is capable of having more than one meaning, one that is defamatory and another not, the question of whether the statement is defamatory is one for the jury to determine.<sup>9</sup> The Internet, especially user-generated websites, is a medium with its own lexicon and connotations, so it can often be

---

<sup>5</sup> RESTATEMENT (SECOND) OF TORTS §559 (1977). *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORT §111, at 773 (5th ed. 1984); *Kimmerele V. New York Evening Journal*, 262 N.Y. 99 (1933)

<sup>6</sup> RESTATEMENT (SECOND) OF TORTS §559, comment b (1977). *See also* *Nichols V. Item Publishers, Inc.*, 132 N.E. 2d 860 (1956) (holding a communication is defamatory when it tends to expose a person to hatred, contempt or aversion or to induce an evil or unsavory opinion of him in the minds if a substantial number of the community).

<sup>7</sup> RESTATEMENT (SECOND) OF TORTS §559, cmt. e (1977).

<sup>8</sup> RESTATEMENT (SECOND) OF TORTS §559, cmt. d (1977).

<sup>9</sup> *Romaine v. Kallinger*, 109 N.J. 282 (1988).

ambiguous whether a certain statement is defamatory so as to deter others from associating with a person.

### **Publication**

Publication in defamation is a term of art and has a more expansive meaning other than normally thought of, such as what appears in a newspaper or magazine. Publication in defamation is any “communication [of the statement] intentionally or by a negligent act to a person other than the person defamed”<sup>10</sup> This communication can be oral (slander) or written words and images (libel) or through any other means – broadcast, photography, video, etc. A publisher in defamation law is the one who communicates the statement to the third party(s) and a publisher can be a person or entity. “Any act by which the defamatory matter is intentionally or negligently communicated to a third person is publication.”<sup>11</sup>

Under common law one who delivers or transmits defamatory falsehoods published by a third person is subject to the same liability as the original publisher.<sup>12</sup> This concept, commonly known as the “republication rule,” equals liability for someone who repeats or republishes a defamatory statement made by a third party to that of the original publisher. Furthermore, the “failure to remove, intentionally or unreasonably, a statement that one knows is defamatory [that person] is liable for its continued publication, especially when publication is under his control

---

<sup>10</sup> Restatement (Second) of Torts §577 (1977).

<sup>11</sup> Restatement (Second) of Torts §577, cmt. a (1977).

<sup>12</sup> Restatement (Second) of Torts §578 (1977), *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* §113, at 799 (5<sup>th</sup> Ed. 1984). *See also* Restatement (Second) of Torts §581(1977) (stating one who broadcast defamatory matter by means of radio or television is subject to the same liability as an original publisher).

and he has the ability to remove the statement.”<sup>13</sup> Repetition of the defamatory statement is considered a publication.<sup>14</sup>

Once the content has been posted on a website, either MySpace or YouTube, the publication element has been met because the statement(s) has been communicated to a third party. Therefore if the plaintiff proves the defendant, without his consent, was responsible for the publication of the defamatory falsehoods the plaintiff has met the burden of proof.

After the plaintiff has shown publication of the defamatory matter, the plaintiff must also prove that it was published concerning him and that it was intended and understandable to third parties to refer to him.<sup>15</sup> It is essential that the recipient(s) of the defamatory matter understand and comprehend that the statement is referring to the plaintiff.<sup>16</sup> When words are not reasonably understood to refer to the plaintiff, the defamation analysis ends here and there is no defamation.<sup>17</sup> For instance, if a user posts a video or message on MySpace or YouTube and the victim knows that the post is about them but no one else knows or understands who the post pertains to, then the identification portion of the publication element has not been met.

## **Fault**

Attempting to balance the rule of republication and dissemination of content, three statuses and levels of liability were devised for defendants accused of publishing defamatory

---

<sup>13</sup>Restatement (Second) of Torts §578 (1977),.

<sup>14</sup> W. Page Keeton et al., Prosser and Keeton on the Law of Torts §113, at 799 (5<sup>th</sup> Ed. 1984).

<sup>15</sup> Restatement (Second) of Torts §613, cmt. d (1977).

<sup>16</sup> Restatement (Second) of Torts §564 (1977). *See* Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309 (1977) (holding that the communication need not refer to the plaintiff by name to be reasonably understood as referring to him).

<sup>17</sup> Arnold v. Sharpe, 296 N.C. 533 (1979); Ratner v. Young, 465 F. Supp 386 (D.V.I. 1979); Sims v. Kiro, 20 Wash. App. 229 (1978).

content: publishers, distributors and common carriers. These three statuses for defendants, and specifically where do and should Internet defendants fall in this spectrum, are the foundation for this research project and are the underpinning of this entire thesis.

As stated previously, publishers are those responsible for the creation or editing of content and are reviewed under a strict liability standard.<sup>18</sup> This means that a radio station that broadcasts defamatory statements is similarly liable as a publisher along with the person who made the statements. Likewise a newspaper that publishes defamatory falsehoods is similarly liable as the writer of the statements. If the defendant is determined to be a publisher, the plaintiff only has to show that the publisher was at least negligent or had reckless disregard of the truth or falsity of the statement.<sup>19</sup>

If the defendant is held to be a distributor of content, such as a news vendor or bookstore, there is a higher standard to determine fault. The plaintiff must show that the distributor defendant knew or had reason to know of the defamatory material.<sup>20</sup> Distributors are not required to examine the material they disseminate beforehand and they have no duty to substantiate whether the material is defamatory.<sup>21</sup>

Common carriers are not liable for defamatory statements disseminated through the use of their services, even if they knew or had reason to know of the defamation.<sup>22</sup> Because common carriers merely provide the facilities and equipment by which individuals spread

---

<sup>18</sup> RESTATEMENT (SECOND) OF TORTS §578 (1977). *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS §113, AT 810 (5<sup>TH</sup> ED. 1984).

<sup>19</sup> RESTATEMENT (SECOND) OF TORTS §580B, cmt. b (1977).

<sup>20</sup> RESTATEMENT (SECOND) OF TORTS §581(1) (1977).

<sup>21</sup> RESTATEMENT (SECOND) OF TORTS §581, cmt. d (1977).

<sup>22</sup> *Anderson v. New York Tel. Co.*, 35 N.Y. 2d 746, 748-749 (1976).

content and lack any editorial control over what content is communicated, they are considered passive conduits.<sup>23</sup>

One could argue that user-generated websites are distributors, since the website itself does not create any content but it is merely a mechanism that distributes users content. But where ISPs and websites actually fall in regards to these three statuses for disseminators has been highly debated. The court's conflicting analysis as to whether an ISP or website is a publisher or distributor led to the enactment of Section 230.

### **Is the Statement Actionable?**

Under common law, “[o]ne who is liable for a defamatory communication is liable for the proved, actual harm caused to the reputation of the person defamed.”<sup>24</sup> But many statements that harm reputation are not defamatory, and a defamatory statement may be actionable without any proof that it *actually* harmed the plaintiff's reputation. Whether publication of the defamatory statements requires proof of actual harm depends on whether the defamatory communication was slander or libel.

If a slanderous statement alleges that a person has committed a crime, has a loathsome disease, imputes unchastity or tends to injure a person in his business or trade, the plaintiff need not prove any damages.<sup>25</sup> Statements of this type have a general tendency to have the effect of causing material damage to another's reputation, so proof of the statements themselves

---

<sup>23</sup> *Id.*

<sup>24</sup> RESTATEMENT (SECOND) OF TORTS §621(1977)

<sup>25</sup> Matherson v. Marchello, 100 A.D.2d 233 (1984); RESTATEMENT (SECOND) OF TORTS §570(1977).

established the existence of damage.<sup>26</sup> All other slanderous statements are only actionable if the plaintiff has specific and distinct proof, with detailed dollar figures, of damage done to their reputation. In the case of libel, most states only require the plaintiff to prove the basic elements of defamation for the published statements to be actionable and the plaintiff need not prove any out-of-pocket damages as a result of the harm done to his reputation.<sup>27</sup>

When defamatory content is posted on the Internet, it is generally held to be libel because of the Internet's ability to reduplicate content and reach mass audiences like that of television and newspapers, which libel law applied to.<sup>28</sup> Therefore, in a cause of action against YouTube or Myspace, the plaintiff would not have to prove any out of pocket losses as a result of the harm to their reputation, only the basic elements of defamation. The main element this research thesis focused on was fault, specifically the standard of liability for Internet defendants.

### **History of Defamation in Traditional Media**

Before there can be discussion of defamation online, there must be an overview of the legal history of defamation in traditional media. Under common law, one who broadcasts defamatory matter by means of radio or television or reprints defamatory content was subject to the same liability as the original publisher.<sup>29</sup> Therefore, when a person was defamed in broadcast or in print, the owner of the broadcast station or newspaper was also liable as well as the person who wrote the defamatory content. But First Amendment issues arose when dealing with the

---

<sup>26</sup> *Id.* See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §112, AT 789 (5<sup>TH</sup> ED. 1984).

<sup>27</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §112, AT 795 (5<sup>TH</sup> ED. 1984).

<sup>28</sup> Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyber Space*, 49 DUKE L.J. 855, 859 n.7 (2000).

<sup>29</sup> RESTATEMENT (SECOND) OF TORTS §581(1977).

media and attempting to control certain speech. The courts have had to reconcile the law of defamation with the freedom of the press.

Before 1964, defamation weighed more heavily in the legal balance than the First Amendment. Defamation, like many other common-law torts, was not subject to constitutional analysis. In fact, the Supreme Court compared libel to obscenity and fighting words — categories of expression that were outside the First Amendment and received no First Amendment protection.<sup>30</sup> In fact, the Supreme Court had held numerous times that the Constitution did not protect libelous publication.<sup>31</sup> The landscape of defamation law dramatically changed when the U.S. Supreme Court issued its decision in *New York Times Co. v. Sullivan* and later in *Gertz v. Robert Welch*. Even though elements added to defamation law from these two cases might not particularly occur when dealing with lawsuits involving user-generated websites, a comprehensive analysis of defamation law cannot take place without a discussion of those cases.

---

<sup>30</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942)(stating “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”). *See also* *Philadelphia Newspapers Inc. v. Hepps*, 475 U.S. 767, 785 (1986) (Stevens, J. dissenting). Stevens wrote: “deliberate, malicious character assignments is not protected by the First Amendment of the United States Constitution.”

<sup>31</sup> *See, e.g.*, *Koninsberg v. State Bar of California*, 366 U.S. 36, 49 (1961); *Times Film Corp. v. City of Chicago*, 365 U.S. 48 (1960); *Roth v. United States*, 354 U.S. 476, 486-487 (1957), *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Near v. Minnesota*, 283 U.S. 697, 715 (1931).

## **New York Times Co v. Sullivan**

In *New York Times Co. v. Sullivan*,<sup>32</sup> plaintiff, a city commissioner in Montgomery, Alabama, sued the New York Times for publishing an editorial advertisement protesting the city's abuses against African-Americans during several civil rights demonstrations.<sup>33</sup> The plaintiff alleged that the statements in the editorial defamed him because individuals would not want to be associated with a person who was party to such abuses,<sup>34</sup> although none of the statements made in the published editorial ad mentioned the plaintiff by name.<sup>35</sup>

The U.S. Supreme Court held that public officials could only recover damages in a libel suit if they could demonstrate "actual malice," meaning the publisher had knowledge that the information was false or should have known that the information was false.<sup>36</sup> The Court declared that "[t]he constitutional protections for speech and press limit a State's power to award damages in a defamation action brought by a public official against critics of his official conduct."<sup>37</sup> The Supreme Court firmly concluded that laws that fail to "...provide the safeguards for freedom of speech and the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct" run afoul of the constitution.<sup>38</sup>

---

<sup>32</sup> NY Times Co. v. Sullivan, 376 U.S. 254 (1964)

<sup>33</sup> *Id.* at 256.

<sup>34</sup> *Id.* at 260.

<sup>35</sup> *Id.* at 258.

<sup>36</sup> *Id.* at 279-280.

<sup>37</sup> *Id.* at 283.

<sup>38</sup> *Id.* at 264.

As a result of *New York Times v. Sullivan*, a higher fault standard was added to publishers of defamatory falsehoods when a public official attempts to bring a defamation action: the public official must prove that the statement was made with "actual malice." The First Amendment of the Constitution requires the plaintiff to prove that the person making the statement knew the statement to be false, or they issued the statement with reckless disregard as to its truth. The Supreme Court extended the rule for public official defamation plaintiffs to public figures in the consolidated cases of *Curtis Publishing Co. v. Butts* and *The Associated Press v. Walker*.<sup>39</sup>

### **Gertz v. Robert Welch, Inc.**

Ten years after *New York Times*, the Supreme Court had to again balance defamation and free speech. In *Gertz v. Robert Welch, Inc.*,<sup>40</sup> the U.S. Supreme Court had to address whether a newspaper or broadcaster could claim a constitutional privilege under *New York Times v. Sullivan* against liability for injury to an individual who is neither a public official nor a public figure but was involved in an issue of public concern and general interest.<sup>41</sup>

In *Gertz*, the plaintiff, a lawyer in a high profile case, brought a libel suit against the publisher of a magazine article that labeled him a Communist and alleged he participated in

---

<sup>39</sup> *Curtis Publishing Co. v. Butts and Associated Press v. Walker*, 388 U.S. 130, 162 (1967) (holding that the State cannot, consistently with First and Fourteenth Amendments, award damages to a public figure involved in issues in which the public has a justified and important interest in for defamatory falsehood relating to his conduct unless verdict is based on actual malice).

<sup>40</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323(1974).

<sup>41</sup> *Id.* at 332. The Court had previously stated in *Rosenbloom v. Metromedia, Inc.* 403 U.S. 29, 44 (1971) that "all discussion and communication involving matters of general concern warrant protection from liability for defamation accorded by the rule enunciated in *New York Times v. Sullivan*." Therefore a private person involved in a matter of general interest and public concern had to satisfy the requirements of *New York Times* in order to recover damages, *id.* at 333.

Marxist activities.<sup>42</sup> The plaintiff claimed that the false statements published by the magazine injured his reputation as a lawyer and citizen.<sup>43</sup>

The Court held that newspapers or broadcasters who publish defamatory falsehoods about an individual who is neither a public official nor public figure may not claim First Amendment protection against liability for the injury inflicted in a defamation suit, even if the statement involves an issue of public concern or general interest.<sup>44</sup> The Court stated that the states themselves could define the standard of liability for a publisher or broadcaster whose defamation injures a private individual, as long as the state did not impose liability without any kind fault standard on the media.<sup>45</sup>

The Court reasoned that private individuals are “more vulnerable to injury and the state’s interest in protecting them is correspondingly greater” than that of a public official or figure.<sup>46</sup> Private defamation plaintiffs who establish the liability of a publisher or broadcaster without proof of actual malice may recover such damages as are sufficient to compensate for actual injury.<sup>47</sup> The Court further held in dicta, that a plaintiff could not win a defamation suit based on statements that are merely expressions of opinions.<sup>48</sup>

---

<sup>42</sup> *Id.* at 326.

<sup>43</sup> *Id.* at 327.

<sup>44</sup> *Id.* at 343.

<sup>45</sup> *Id.* at 347.

<sup>46</sup> *Id.* at 344.

<sup>47</sup> *Id.* at 349.

<sup>48</sup> *Id.* at 339-340. *See also* *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. en banc 1984).

*New York Times* and *Gertz* both demonstrate that not only is the status of the defendant important when determining the level of liability but determining the status of the plaintiff will also dictate the degree of fault he or she must now prove. If the plaintiff is a public official, public figure or limited-purpose public figure, the plaintiff must establish with clear and convincing evidence that the defendant publisher acted with actual malice. If the plaintiff is merely a private person, in most states the plaintiff must only show that the defendant publisher acted negligently in its publication of the statements. If the private person wants to recover punitive damages, he or she must show evidence of actual malice unless the defamatory statement involved matters that were purely of private concern with no public interest.<sup>49</sup> The *New York Times* and *Gertz* standard have been extended and now apply to all defamation cases even with non-media defendants. Therefore if a public official or figure did bring a defamation action against MySpace or YouTube, *New York Times* and *Gertz* would apply.

### **Liability in Cyberspace Prior to CDA**

Before the passage of section 230 of the Communications Decency Act, courts did not differentiate between providers of electronic information and traditional providers of information for the purposes of defamation, especially in regards to fault liability. All forms of communication were viewed the same way in determining whether the defendant was a publisher, distributor or common carrier. Then this new medium called the Internet came along and the courts seemingly attempted to treat the Internet the same way as traditional media in defamation cases. The only norm that developed dealing specifically with this new medium was the notion that defamatory content on the Internet was generally held by the courts to be libel because of its ability to reduplicate content and reach mass audiences like that of radio, television

---

<sup>49</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

and newspapers.<sup>50</sup> However, there were two prominent cases, *Cubby v. CompuServe* and *Stratton Oakmont, Inc. v. Prodigy Services Co.*, which dealt with neither public officials nor public figures, and had conflicting outcomes in regards to the status of the Internet defendants in the libel actions that led Congress to address the issue of standard of liability for Internet defendants when an individual is defamed online.

### **Cubby v. CompuServe**

In *Cubby v. CompuServe*,<sup>51</sup> CompuServe was an online database where subscribers had access to information made available by CompuServe including special interest forums and bulletin boards.<sup>52</sup> The plaintiff, Cubby, alleged that CompuServe published defamatory material in an online newsletter, “Rumorville,” which was available through CompuServe’s journalism forum.<sup>53</sup> CompuServe claimed the newsletter was written and published by a third party, Don Fitzpatrick Associates, and CompuServe had no editorial control over the content before it was posted on the site.<sup>54</sup>

Cubby argued that CompuServe was the publisher of the content and should be a publisher standard of liability.<sup>55</sup> CompuServe conversely argued that it was not a publisher but a distributor.<sup>56</sup> The U.S. District Court for the Southern District of New York held that

---

<sup>50</sup> Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyber Space*, 49 DUKE L.J. 855, 850 n.7 (2000).

<sup>51</sup> *Cubby v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y 1991).

<sup>52</sup> *Id.* at 137.

<sup>53</sup> *Id.* at 138.

<sup>54</sup> *Id.* at 137.

<sup>55</sup> *Id.* at 139.

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

CompuServe was not a publisher but a distributor and should only be held liable if they knew or had reason to know of the defamatory content.<sup>57</sup> The court stated that CompuServe could not be a publisher because it had “little or no editorial control over the publication’s contents,” once CompuServe decided to put the newsletter in its database.<sup>58</sup>

The court declared that a computerized database is comparable to a newsvendor and thus a lower standard of liability applies than that of a publisher.<sup>59</sup> Since the plaintiff presented no evidence that CompuServe knew or had reason to know of the allegedly defamatory material, the court found that CompuServe, as a distributor, could not be held liable for the Rumorville statements “it neither knew or had reason to know of.”<sup>60</sup>

### **Stratton Oakmont, Inc. v. Prodigy Services Co**

In *Stratton Oakmont, Inc. v. Prodigy Services Co*,<sup>61</sup> Stratton alleged that Prodigy, a computer network with more than two million subscribers, defamed them through statements posted on Prodigy’s “Money Talk” bulletin board.<sup>62</sup> According to the complaint, an unidentified user posted that Stratton, a securities investment firm, committed criminal and fraudulent acts in connection with a public offering.<sup>63</sup> Prodigy argued it was not a publisher because it did not review messages or content before the messages were posted, and following *Cubby*, should only

---

<sup>57</sup> *Id.* at 140

<sup>58</sup> *Id.*

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

<sup>60</sup> *Id.* at 141.

<sup>61</sup> *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1995).

<sup>62</sup> *Id.* at 3.

<sup>63</sup> *Id.* at 1.

be liable if they knew or had reason to know of the statements.<sup>64</sup> Stratton asserted that Prodigy should be held liable as the publisher of the content because Prodigy “held itself out as an online service that exercised editorial control over its content.”<sup>65</sup>

The Supreme Court of New York held that Prodigy was a publisher and therefore liable for the statements.<sup>66</sup> The court stated that Prodigy “held itself out to the public and its members as controlling the content of its computer bulletin boards”<sup>67</sup> even though they may not have in this particular instance.<sup>68</sup> Prodigy established community guidelines as to what type of content could be on its website and utilized screening software to remove content that it found offensive.<sup>69</sup> The court held that Prodigy’s policies, screening software and staff monitoring of the boards relegated it into publisher status.<sup>70</sup>

As a result of *Stratton-Oakmont*, if a service provider “attempted to keep defamatory or offensive material off their bulletin boards, they were liable as a publisher. If they did not attempt to self-regulate then they would escape publisher liability.”<sup>71</sup>

Certain members of Congress, seemingly upset with the inconsistent outcomes from *Cubby* and *Stratton Oakmont* in regards to the fault standard of liability on the Internet, passed

---

<sup>64</sup> *Id.* at 8.

<sup>65</sup> *Id.* at 3.

<sup>66</sup> *Id.* at 9.

<sup>67</sup> *Id.* at 10.

<sup>68</sup> *Id.* at 8.

<sup>69</sup> *Id.* at 10.

<sup>70</sup> *Id.* at 13.

<sup>71</sup> Sarah B. 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, 12 (1999).

Section 230 to address the problem of liability for content published on the Internet. From the plain language of Section 230, Congress wanted to prevent interactive computer services from being held to the same standard of liability that publishers in traditional media are held for third-party content.<sup>72</sup> But whether courts have adhered to that intent has been questioned for over a decade.

### **Conclusion**

Defamation is a very complex legal concept with multiple elements for the plaintiff to prove to be successful in a defamation cause of action. Before the passage of Section 230 there was no clear-cut criterion for the standard of liability on the Internet and where the Internet defendant fell among the three statuses was dependent on the jurisdiction in which the plaintiff brought the case. This was not ideal for a medium such as the Internet that traverses local and state boundaries. The passage of Section 230 was suppose to result in a normative rule for the courts to apply when confronted with an online defamation case. Section 230 states that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>73</sup>

The Chapter Three will review the cases involving defamation and Section 230 and addresses how the courts have applied Section 230 to defamation liability on the Internet. The Chapter Two will also examine the legislative history of Section 230 in order to understand the congressional intent of the statute and whether the courts have properly applied Section 230 the way Congress intended it to operate.

---

<sup>72</sup> 47 U.S.C. §230 (c)(1) (1996).

<sup>73</sup> 47 U.S.C. §230 (c)(1) (1996) (emphasis added).

## CHAPTER 3 CASES RELATED TO DEFAMATION AND SECTION 230

Legal scholars and lawyers use case law and precedent to determine what will be the likely outcome in future cases that have similar facts. Courts may reverse their own precedent at anytime, but under the doctrine of stare decisis,<sup>1</sup> courts, follow the law and holdings from previous cases when faced with new cases that involve the same questions of facts and law.

The Chapter Two analyzed the basic elements of defamation law and the difficulties the courts have in applying traditional law to the Internet. These difficulties and conflicting outcomes resulted in Congress including section 230 to the Communications Decency Act of 1996. The purpose of this chapter is to examine the case law involving online defamation and Section 230. This case law will be used in the preceding chapter to determine whether the websites MySpace and YouTube are immune from liability under the statute. This chapter will also review the legislative history of Section 230.

YouTube and MySpace are two of the largest user-generated websites on the Internet. YouTube is a video sharing website where [YouTube] members can upload, view, and share video clips while non-members may only view videos.<sup>2</sup> In 2008 it was reported that since its inception, more than 84 million people have viewed almost 4.3 billion videos on YouTube.<sup>3</sup> MySpace is a social networking site that allows members to create personal profiles, networks of

---

<sup>1</sup> BLACK'S LAW DICTIONARY (8th ed. 2004), (defining stare decisis as the doctrine of precedent, where court's follow earlier judicial decisions when the same points arise again in litigation).

<sup>2</sup> YouTube, *About YouTube*, <http://www.youtube.com/t/about> (last visited: November 5, 2008)(defining members as users who have signed up and agreed to follow YouTube's Terms of Use).

<sup>3</sup> Andrew Lipsman, *Number of Online Videos Viewed in the U.S. Jumps 13 Percent in March to 11.5 Billion*, ComScore: Press Release, March 12, 2008, <http://www.comscore.com/press/release.asp?press=2223>.

friends, blogs, groups, and share photos, music and videos.<sup>4</sup> In 2006 MySpace surpassed 100 million accounts,<sup>5</sup> and it was reported in 2008 that MySpace had more than 115 million users.<sup>6</sup> With the pervasiveness of broadband technology, online users now have the ability to control a site and post whatever they please on YouTube and MySpace instantly, even defamatory content.

7

### **Structure of Websites**

Before a discussion can begin involving the applicable case law and whether YouTube and MySpace have Section 230 immunity, there must be an understanding of the structure of YouTube and MySpace and the means by which content is published on the websites. Similar to any legal action, one must know the facts and what the case involves before they can apply the appropriate law.

#### **YouTube**

YouTube is an “online video streaming service that allows anyone to view and share videos that have been uploaded by [YouTube] members.”<sup>8</sup> When new users want to become members, they must agree to abide by YouTube’s “Terms of Use” before they can upload

---

<sup>4</sup> MySpace.com, *MySpace Terms of Use Agreement*, April 11, 2007, <http://www.myspace.com/Modules/Common/Pages/TermsConditions.aspx>.

<sup>5</sup> Pete Cashmore, *MySpace Hits 100 Million Accounts*, Mashable: Social Networking News, August 9, 2006, <http://mashable.com/2006/08/09/myspace-hits-100-million-accounts/>.

<sup>6</sup> Michael Arrington, Tech Crunch, *Facebook No Longer the Second Largest Social Network*, June 12, 2008, <http://www.techcrunch.com/2008/06/12/facebook-no-longer-the-second-largest-social-network/>.

<sup>7</sup> Organization for Economic Co-Operative and Development, *Total Broadband Subscribers by Country*, June 2008, <http://www.oecd.org/sti/ict/broadband> (reporting that there are over 75 million broadband users in the United States).

<sup>8</sup> YouTube LLC, *What is YouTube?*, <http://www.google.com/support/youtube/bin/answer.py?answer=55749&topic=10509> (last visited: November 3, 2008).

videos. Once a user becomes a member, he or she can upload video to the website, comment and rate other videos posted on YouTube.<sup>9</sup> Once a video has been uploaded onto YouTube, the uploader grants YouTube a license to distribute and modify the uploaded material for any purpose, including advertisements and commercial usage.<sup>10</sup> The license terminates when the uploader removes the video from their personal YouTube account, thereby deleting the video from the entire YouTube website.<sup>11</sup> According to YouTube's "Community Guidelines," members can only upload videos with the permission of the copyright holder and/or the persons depicted.<sup>12</sup> Objectionable and harmful content such as pornography, defamation, and materials that harass or encourage criminal conduct are prohibited.<sup>13</sup>

YouTube's members rate videos they like or dislike, and YouTube reviews highly rated videos for consideration in the "Featured Videos" section of the home page<sup>14</sup> and the "Featured" section of the "Videos by Category" page.<sup>15</sup> The "Videos by Category" page categorizes videos into specific groups, such as sports, news and comedy.<sup>16</sup> YouTube also takes suggestions from

---

<sup>9</sup> *Id.*

<sup>10</sup> YouTube, LLC, *Terms of Use*, <http://www.youtube.com/t/terms> (last visited: November 3, 2008).

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

<sup>12</sup> YouTube, LLC, *YouTube Community Guidelines*, [www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines) (last visited: November 3, 2008).

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

<sup>14</sup> YouTube, LLC, *How Do Videos Get Featured?*, <http://www.google.com/support/youtube/bin/answer.py?answer=55751&topic=10509> (last visited: November 3, 2008).

<sup>15</sup> *Id.*

<sup>16</sup> YouTube. *Catergories*, <http://youtube.com/categories> (last visited: November 18, 2008).

members about well-liked videos and scans the site for videos of interest to promote on its homepage.<sup>17</sup>

The popularity of YouTube has led to YouTube celebrities, individuals who have become popular and attracted publicity due to the content of their YouTube videos.<sup>18</sup> For example, Shmuel Tennenhaus, an aspiring comedian and creator of the popular YouTube “Ask a Jew” series, has received multiple offers from competing companies for the exclusive right to distribute his series.<sup>19</sup> Beginning in May 2007, YouTube started inviting some of its most viewed uploaders to become “YouTube Partners.” This status allows uploaders to earn revenue from advertisements placed next to videos.<sup>20</sup>

## **MySpace**

“MySpace is a [free] social networking service that allows its members to create unique personal profiles online, in order to find and communicate with old and new friends.”<sup>21</sup> MySpace members have their own webpages where they can share and receive messages from friends, manage a blog, or advertise personal work.<sup>22</sup> Members are also allowed to upload video and

---

<sup>17</sup> *Id.*

<sup>18</sup> Jason Feifer, *Video Makers Find a Vast and Eager Audience*, Telegram.com, June 11, 2006, <http://www.telegram.com/apps/pbcs.dll/article?AID=/20060611/NEWS/606110552/1011/FEATURES>.

<sup>19</sup> Bob Tedeschi, *New Hot Properties: YouTube Celebrities*, N.Y. Times, February 26, 2007, <http://www.nytimes.com/2007/02/26/technology/26ecom.html#>.

<sup>20</sup> The YouTube Blog, *YouTube Elevates Most Popular Users to Partners*, May 3, 2007, <http://youtube.com/blog?entry=4b3PkL8HQcw>.

<sup>21</sup> MySpace.com, *MySpace Terms of Use Agreement*, April 11, 2007, <http://www.myspace.com/Modules/Common/Pages/TermsConditions.aspx>.

<sup>22</sup> MySpace, *About Us*, <http://www.myspace.com/index.cfm?fuseaction=misc.aboutus>, (last visited: November 5, 2008).

audio to their MySpace pages.<sup>23</sup> MySpace operates solely on revenues generated by advertising as its user model possesses no paid-for features for the end user.

MySpace members create profiles from a list of predetermined questions provided by MySpace and subsequently designs their MySpace page with colors and graphics according to their personal style.<sup>24</sup> According to MySpace's "Terms of Use," member profiles are not to include personal telephone numbers, street addresses, last names or any objectionable subject matter.<sup>25</sup> After becoming a member, users can invite other members to be their "friend," and once members are friends the parties have access to each other's page, write comments on the others' pages, conduct conversations, and share pictures and videos through MySpace.<sup>26</sup> Only user's friends may leave comments for all viewers to read. MySpace users have the option to delete any comment or to require that all comments be approved before posting.<sup>27</sup> Non members of MySpace are not allowed to post comments, view pictures, or explore the members webpage. Non-members may only view the contents of a member's homepage.

MySpace members are responsible for any content they post on their personal page and any content members post on other members' pages. MySpace states that it maintains no control

---

<sup>23</sup> MySpace, *How do I upload music to my page?*, <http://www.myspace.com/index.cfm?fuseaction=misc.faq&Category=1&Question=47>, (last visited: November 5, 2008).

<sup>24</sup> MySpace.com, *How Do I Add Color Graphics & Sound to My Profile Page?*, <http://www.myspace.com/index.cfm?fuseaction=misc.faq&Category=4&Question=7> (last visited: November 5, 2008).

<sup>25</sup> Myspace.com, *supra* note 21.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

over the content posted, and MySpace does not review content published *prior* to posting.<sup>28</sup> If a member believes that another member is violating MySpace's "Terms of Use" or "Community Guidelines," there is a system available for members to notify MySpace.<sup>29</sup> But MySpace asserts in its "Term of Use" that MySpace assumes no responsibility for monitoring the website for inappropriate content or conduct, has no obligation to modify or remove any inappropriate content, and assumes no responsibility for the member who posted the content.<sup>30</sup>

If MySpace believes that the content violates any of MySpace's "Terms of Use" or "Community Guidelines," it can prohibit its posting and have the content removed. If a user's account is deleted, every comment left on other profiles by that user will be deleted.<sup>31</sup>

MySpace reserves the right to reject, refuse to post or remove any posting (including private messages) by members, or to re-strict, suspend, or terminate member's access to all or any part of MySpace at any time, for any reason, with or with-out prior notice, and without liability.<sup>32</sup>

According to MySpace's "Terms of Use," once a member posts any content on MySpace, the member grants MySpace a limited license to "use, modify, publicly perform, publicly

---

<sup>28</sup> *Id.* (Empahsis added).

<sup>29</sup> MySpace, Where do I Report Abuse and Inappropriate Content?, <http://www.myspace.com/index.cfm?fuseaction=misc.faq&Category=3&Question=27> (last visited: November 5, 2008).

<sup>30</sup> MySpace.com, MySpace Terms of Use Agreement, April 11, 2007, <http://www.myspace.com/Modules/Common/Pages/TermsConditions.aspx>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

display, reproduce, and distribute the content through any of MySpace's services."<sup>33</sup> MySpace will delete fake profiles if the victim verifies their identity and points out the profile via e-mail.<sup>34</sup>

## **Cases**

Through the use of MySpace and YouTube services, online users have a number of ways to post defamatory content, especially since YouTube and MySpace do not review content before it is posted. To determine whether YouTube and MySpace could be liable for defamatory comments, the applicable case law must be examined. There are no U.S. Supreme Court cases that address the issues of defamation online and Section 230.

### **Federal Appellate Court Cases**

There are five U.S. appellate court decisions that directly address Section 230 and defamatory content online. The facts and law the court applies in these appellate court cases are covered in more detail than the other cases that will be discussed later in this chapter because federal appellate courts carry more authoritative weight than federal district court and state cases. *Zeran v. America Online* is the seminal case involving Section 230 and online defamatory content. The other four cases dealt with issues that *Zeran* either left unanswered or that did not exist when *Zeran* was decided, such as when can an Internet Service Provider be a content provider and what liability do websites and listservs have under Section 230.

#### **Zeran v. America Online Inc.**

The U.S. Court of Appeals for the Fourth Circuit decided *Zeran v. America Online, Inc.* one year after Section 230 was passed. The Fourth Circuit held that an Internet Service Provider

---

<sup>33</sup> *Id.*

<sup>34</sup> MySpace, MySpace Frequently Asked Questions, <http://www.myspace.com/Modules/Help/Pages/HelpCenter.aspx?Category=2&Question=26> (last visited: February 15, 2009).

(ISP)<sup>35</sup> was not liable as a publisher or a distributor for published content provided by a third party.<sup>36</sup> The facts of the case began on April 25, 1995, when an unidentified person posted on an America Online (AOL) bulletin board a message advertising t-shirts with offensive slogans<sup>37</sup> relating to the Oklahoma City bombing.<sup>38</sup> The postings stated that anyone interested should contact Ken Zeran, and listed Zeran's home telephone number.<sup>39</sup> The court noted that Zeran was bombarded with angry and disparaging phone calls including death threats.<sup>40</sup>

Zeran contacted AOL and informed AOL that someone posted false information advertising t-shirts and listed his phone number. AOL informed Zeran that it would remove the posted material but would not post a retraction.<sup>41</sup> The following day another ad was posted on the bulletin board with similar content and directed interested buyers to call Zeran. A radio station in Oklahoma City became aware of the posting and urged listeners to call Zeran at his home telephone number.<sup>42</sup> Zeran again contacted AOL, which informed Zeran that the individual account would be closed.<sup>43</sup>

---

<sup>35</sup> *Batzel v. Smith*, 333 F.3d 1018, 1029 n.12 (9th Cir. 2003) (defining an ISP as a service that provides its subscribers with access to the Internet).

<sup>36</sup> *Zeran v. America Online Inc.*, 129 F.3d 327, 330, 332 (4th Cir. 1997).

<sup>37</sup> *Zeran v. America Online, Inc.* 958 F.Supp. 1124,1126 (E.D. Va. 1997). The advertised T-shirts contained slogans that glorified the Oklahoma City Bombings, *id.*

<sup>38</sup> *Zeran*, 129 F.3d at 329.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

Zeran filed suit against AOL<sup>44</sup> but did not bring an action against the person who posted the message on the bulletin board because AOL could not identify the original poster.<sup>45</sup> In his complaint, Zeran argued that Section 230 only eliminated publisher liability, and an interactive computer service could be liable as a distributor.<sup>46</sup> Zeran claimed AOL was a distributor of the content, had actual knowledge of the defamatory messages, and was negligent in removing the material.<sup>47</sup> AOL maintained that Zeran's suit was barred under Section 230 and moved for summary judgment. The U.S District Court for the Eastern District of Virginia granted AOL's summary judgment motion, and Zeran appealed.<sup>48</sup>

The Fourth Circuit held that Section 230 preempts any cause of action that attempts to hold AOL, an ISP, accountable as a publisher.<sup>49</sup> Section 230 states "no provider of an interactive computer service shall be treated as a publisher."<sup>50</sup> The court stated, "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions, such as deciding whether to publish, withdraw, postpone or alter content, are barred."<sup>51</sup> The court asserted that Congress' intent in Section 230 was to promote free speech and if ISPs could be liable as publishers for every comment that they posted, it would lead to ISPs restricting

---

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 330, n.1.

<sup>46</sup> *Id.* at 331.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 329-30.

<sup>49</sup> *Id.* at 330.

<sup>50</sup> *Id.* (quoting 47 U.S.C. §230 (c)(1)).

<sup>51</sup> *Id.* at 330-31. (Emphasis added).

speech.<sup>52</sup> The court noted that “faced with potential liability for each message published by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted.”<sup>53</sup>

In response to Zeran’s argument that AOL was a distributor because AOL had actual knowledge of the content and was negligent in removing it, the court determined an interactive computer service could not be liable as a distributor because distributor liability is a subpart of publisher liability.<sup>54</sup> The court stated that publication is an essential element to any defamation action and “both negligent communication of a defamatory statement and failure to remove such a statement when first communicated by another party. . . constitute publication.”<sup>55</sup> The court further noted that mere notice of defamatory content does not convert a publisher into a distributor.<sup>56</sup> The Fourth Circuit subsequently upheld the district court’s grant of summary judgment.<sup>57</sup>

### **Ben Ezra, Weinstein and Company v. America Online Inc.**

The next U.S. appellate court opinion to arise involving defamatory content online and Section 230 occurred in 2000. The U.S. Court of Appeals for the Tenth Circuit held that communication and interaction regarding content between a service provider and a third party

---

<sup>52</sup> *Id.* at 331.

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

<sup>54</sup> *Id.* at 332.

<sup>55</sup> *Id.* at 332.

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

<sup>57</sup> *Id.* at 335. *See also* Francis Buono & Johnathan Freidman, Limiting Tort Liability for Online Third-party Content Under Section 230 of the Communications Decency Act, 52 FED. COMM. L.J. 647 (2000) (stating the Fourth Circuit in *Zeran* accurately interpreted the CDA and the congressional intent of section 230).

does not automatically give rise to a service provider becoming an information content provider.<sup>58</sup> America Online (AOL) provided stock quotes using information provided by two independent companies, S&P ComStock and Townsend Analytics, Ltd.<sup>59</sup> Ben Ezra, Weinstein and Company (Ben Ezra), which designs and manufactures corporate finance computer software, sued AOL for defamation, alleging AOL published inaccurate information regarding the company's stock price and share volume.<sup>60</sup> Ben Ezra further alleged that AOL failed to exercise reasonable care in the "manipulation, alteration and change of the stock information."<sup>61</sup>

AOL filed a motion for summary judgment, asserting that Section 230 provided immunity for AOL.<sup>62</sup> The U.S. District Court for the District of New Mexico concluded AOL "never produced or created any of the allegedly inaccurate information" and granted AOL's motion.<sup>63</sup>

Ben Ezra's issue on appeal was whether, as a matter of law, the district court erred in concluding that AOL was immune from liability under Section 230.<sup>64</sup> Ben Ezra argued that AOL worked so closely with ComStock and Townsend that AOL was operating as an information content provider.<sup>65</sup> Ben Ezra asserted AOL was involved in the creation and

---

<sup>58</sup> Ben Ezra, Weinstein and Company v. America Online Inc., 206 F.3d 980, 985 (10th Cir. 2000).

<sup>59</sup> *Id.* at 983.

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

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

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

<sup>63</sup> *Id.* at 984.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 985.

development of the information with ComStock and Townsend by correcting ComStock and Townsend's errors and making certain information available.<sup>66</sup>

The Tenth Circuit determined AOL was immune from suit under Section 230 and the district court had properly granted AOL's motion for summary judgment.<sup>67</sup> The Tenth Circuit declared that, Ben Ezra could not prove that AOL did no more than have mere communication with Comstock & Townsend, and "mere communication" between the parties, without more evidence, does not give rise to AOL becoming an information content provider as defined under Section 230 (f)(3).<sup>68</sup> Though AOL may have engaged in some editorial functions by deleting data, correcting errors or making certain information available, this behavior was the exact activity that Section 230 intended to protect.<sup>69</sup>

The court declared that, "[C]ongress clearly enacted Section 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."<sup>70</sup> The court asserted that section 230 clearly states an interactive service provider will not be treated as the publisher of content provided by another information content provider.<sup>71</sup> The court held that since Ben Ezra presented no evidence that AOL was "responsible in whole or

---

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 986.

<sup>68</sup> *Id.* at 985. See also *Blumenthal v. Drudge*, 992 F.Supp. 44 (D.D.C. 1998) (holding that an interactive computer service could not be liable for making an defamatory gossip column available to its subscribers without evidence that the service provider had some role in writing, editing, creating or developing the information).

<sup>69</sup> *Id.* at 986.

<sup>70</sup> *Id.* See *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (referring to 47 U.S.C. §230 (b)(1) the court stated Congress wanted to encourage service providers to engage in self-regulation of offensive material and remove the disincentives of publisher liability).

<sup>71</sup> *Id.* (citing 47 U.S.C. §230(c)(1)).

in part for the creation and development” of the inaccurate information, the district court’s grant of summary judgment was appropriate.<sup>72</sup>

### **Batzel v. Smith**

Unlike *Zeran* and *Ben Ezra*, the next U.S. appellate opinion involving defamatory content and Section 230 did not involve an ISP but dealt with liability of websites and listservs. In *Batzel v. Smith*, the U.S. Court of Appeals for the Ninth Circuit declared that websites or listservs are protected by Section 230 immunity.<sup>73</sup>

Plaintiff Elaine Batzel (Batzel) employed defendant Robert Smith (Smith) as a handyman at her vacation home.<sup>74</sup> Smith on several occasions allegedly overheard Batzel stating she was the “granddaughter of one of Adolf Hitler’s right hand men.”<sup>75</sup> Smith also alleged that Batzel told him that some of the paintings she owned, which to him looked old and European, were inherited.<sup>76</sup> Smith subsequently looked for websites specializing in stolen artwork and found the Museum Security Network (Network). He sent an email to the Network stating that he believed his employer was in possession of artwork that had been stolen during WWII from Jewish people.<sup>77</sup>

After receiving Smith’s email, Tom Cremers, who maintained the Museum Security Network website and listserv, published Smith’s email on the website and listserv after making

---

<sup>72</sup> *Id.* at 986. *See* 47 U.S.C. §230 (f)(3).

<sup>73</sup> *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

<sup>74</sup> *Id.* at 1020.

<sup>75</sup> *Id.* at 1020.

<sup>76</sup> *Id.* at 1021.

<sup>77</sup> *Id.*

some changes to the wording.<sup>78</sup> Smith, upon seeing the posted email, contacted one of the listserv's subscribers claiming he had no idea that his email would be disseminated.<sup>79</sup>

Several months later, Batzel discovered the statements and complained to Cremers.<sup>80</sup> She refuted Smith's statements and declared that she was not related to any Nazis; nor did she inherit any of her art.<sup>81</sup> Batzel filed a defamation complaint against Smith, Cremers and the Network, stating her professional and social reputation had suffered because of the defamatory claims.<sup>82</sup> She also asserted that Cremers and the Network were the publisher of Smith's email.<sup>83</sup>

The U.S. District Court for the Central District of California ruled that Cremers and the Network were not Internet service providers and therefore not immune from suit.<sup>84</sup> The district court stated that only services that provide access to the Internet are covered under Section 230.<sup>85</sup>

The Ninth Circuit reviewed two issues on appeal: under what circumstances is a moderator of a listserv or operator of a website liable for posting a defamatory email that was

---

<sup>78</sup> *Id.* at 1022.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1027, n. 9.

<sup>84</sup> *Id.* at 1026.

<sup>85</sup> *Id.* at 1030.

authored by a third party,<sup>86</sup> and whether Smith's email was provided to an interactive computer service in the manner that Section 230 was intended to cover.<sup>87</sup>

The Ninth Circuit reversed the district court's ruling and held that Cremers and the Network were not information content providers. The court analyzed Batzel's case under California's Anti-SLAPP Statute because Cremers asserted that the complaint was a strategic attempt to contravene his First Amendment right.<sup>88</sup> The court declared that for Batzel to withstand the anti-SLAPP motion she had to demonstrate the probability of success based on the facts of her case and the prevailing laws, namely Section 230.<sup>89</sup>

The court held that under Section 230(f)(2), an interactive computer service is any service or system that allows "multiple users to access a computer server" and ISPs are only a type of interactive computer service.<sup>90</sup> Citing Section 230 (c)(1), the court stated Section 230 provides immunity to providers and *users* of interactive computer services, and the Network and the listserv would also be immune from liability because the website and listserv had to use an interactive computer service to access the Internet.<sup>91</sup>

The court further determined that Cremers was not an information content provider as defined under section 230(f)(3) because he did no more than "select and make minor alterations"

---

<sup>86</sup> *Id.* at 1020.

<sup>87</sup> *Id.* at 1032.

<sup>88</sup> *Id.* at 1024. *See* *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 839 (9<sup>th</sup> Cir. 2001). "The anti-SLAPP statute was enacted to allow for early dismissal of meritless first amendment cases aimed at chilling expression through litigation." *Id.*

<sup>89</sup> *Id.* at 1026.

<sup>90</sup> *Id.* at 1030.

<sup>91</sup> *Id.* at 1031.

to Smith's email.<sup>92</sup> Section 230 (f)(3) states an information content provider is "responsible, in whole or in part, for the creation and development of the information. . . ." <sup>93</sup> The court noted that the development of content requires more than editing and selecting content for publication.<sup>94</sup> The court stated what actions by an interactive computer service did not give rise to a website being considered an information content provider but did not affirmatively state what actions would make an interactive computer service an information content provider.

On the second issue, the court stated Cremers may be immune from liability if it was reasonable for him to assume that the provider of the information intended the information to be published on the Internet.<sup>95</sup> If information provided by a third party is not intended to be published on the Internet, the publisher of the content would not have Section 230 immunity.<sup>96</sup> The court stated that "congressional objectives in passing Section 230 are not furthered by providing immunity in instances where posted material was clearly not meant for publication."<sup>97</sup> The Ninth Circuit declared, however, that it was reasonable for Cremers to conclude that the email was meant for publication is an issue of fact for the trial court to decide, and it remanded the issue to the district court.<sup>98</sup>

---

<sup>92</sup> *Id.*

<sup>93</sup> *Id. See*, 47 U.S.C. §230 (f)(3).

<sup>94</sup> *Id.* at 1031. *See* Ben Ezra, Weinstein and Company v. America Online Inc., 206 F.3d 980, 986 (10th Cir. 2000).

<sup>95</sup> *Id.* at 1035.

<sup>96</sup> *Id.* at 1033.

<sup>97</sup> *Id.* at 1034.

<sup>98</sup> *Id.* at 1035.

Cremers moved for summary judgment when the case went back to the district court on remand.<sup>99</sup> The district court granted the motion under the doctrine of res judicata<sup>100</sup> because Batzel had filed a similar lawsuit in the Western District of North Carolina that had been dismissed. Therefore she could not relitigate the same claims in another court.<sup>101</sup>

### **Carafano v. Metrosplash.com, Inc.**

Later in 2005, the U.S. Court of Appeals for the Ninth Circuit issued another opinion regarding Section 230 and defamatory content. The court declared that interactive computer services are immune from liability under Section 230 provided that a third party was the provider of the “essential published content.”<sup>102</sup> The facts of that case started on October 23, 1999, when an unknown person created an online personal profile of Christianne Carafano, a popular actress, on Matchmaker.com.<sup>103</sup> The unidentified person used pictures of Carafano that were available on the Internet and stated in the profile that Carafano was looking for a man with a “strong sexual appetite.”<sup>104</sup> Carafano began to receive an excessive number of calls, many explicit and sexual in nature, in response to the online profile.<sup>105</sup>

---

<sup>99</sup> Batzel v. Smith, 372 F. Supp.2d 546, 547(C.D. Cal 2005).

<sup>100</sup> BLACK’S LAW DICTIONARY (8th ed. 2004) (defining res judicata as an issue that has been definitively settled by a previous judicial decision, it’s an affirmative defense barring from relitigating the same claim).

<sup>101</sup> *Id.* at 556.

<sup>102</sup> Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003).

<sup>103</sup> *Id.* at 1121.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1121-22.

On November 6, 1999, Carafano's personal assistant learned of the false profile and contacted Matchmaker.com, asking personnel at the website to remove the online profile.<sup>106</sup> A Matchmaker.com employee informed Carafano's personal assistant that she could not have the profile removed because the assistant did not create it.<sup>107</sup> Matchmaker.com blocked the profile from public access two days later and deleted the profile on November 9, 1999.<sup>108</sup>

Carafano filed a complaint against Matchmaker.com and its corporate owners for defamation, invasion of privacy, negligence, and misappropriation of the right of publicity.<sup>109</sup> The U.S. District Court for the Central District of California ruled that Matchmaker.com was not immune under Section 230 because Matchmaker.com provided part of the profile content. However the court rejected Carafano's defamation, negligence, and misappropriation claims.<sup>110</sup> The district court also rejected Carafano's invasion of privacy claim because Carafano was a public figure and Matchmaker.com did not disclose her address with reckless disregard for her privacy.<sup>111</sup>

The issue on appeal was whether Carafano's claims were barred pursuant to Section 230. The Ninth Circuit reversed the district court's decision, holding that Carafano's claims were

---

<sup>106</sup> *Id.* at 1122.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Carafano v. Metrosplash.com Inc., 207 F. Supp. 2d 1055, 1072 (C.D. Cal. 2002). The district court stated that because Carafano was a "general purpose public figure," Carafano had to prove actual malice to win her defamation claim, *id.* at 1072. Since she did not prove that Matchmaker.com acted with actual malice, she could not recover for misappropriation of right of publicity, *id.* at 1069. The district court also stated that Carafano's negligence claim is dependent on her defamation a claim, thus the negligence claim was also dismissed, *id.* at 1075.

<sup>111</sup> Carafano, 339 F.3d at 1122.

barred because Matchmaker.com did not “create or develop the information at issue” and was therefore immune under Section 230.<sup>112</sup>

The Ninth Circuit held an interactive computer service to be immune from liability under Section 230 as long as it did not operate as an information content provider for the *particular content at issue*.<sup>113</sup> The court noted that even though a portion of the content was devised in response to Matchmaker.com’s online questionnaire and profile, the primary content involved in this case was provided by a third party.<sup>114</sup> The court stated as long as a third party provided the “essential published content” under Section 230, the service provider is immune in spite of a selection process or editing.<sup>115</sup> The court declared that Section 230 bars claims unless the service provider created or developed the primary content.<sup>116</sup>

### **Green v. America Online**

*Green v. America Online (AOL)* presented issues that had already been addressed in *Zeran* and *Ben Ezra*. However, because the U.S. Court of Appeals for the Third Circuit had never been presented with a case involving Section 230 and defamatory content, that court decided to address the issue. The Third Circuit concluded that a court holding a service provider liable for negligently failing to police its network would be treating the service provider as a publisher, a holding that cannot be sustained under Section 230.<sup>117</sup>

---

<sup>112</sup> *Id.* at 1124.

<sup>113</sup> *Id.* at 1123 (emphasis added).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1124. *See Doe v. Freindfinder Network, Inc.*, 540 F.Supp.2d 288, 295 (D.N.H. 2008)

<sup>116</sup> *Id.* at 1125. *See Ben Ezra, Weinstein and Company v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

<sup>117</sup> *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3rd Cir. 2003).

Plaintiff John Green alleged that unidentified users, which the court labeled John Doe # 1 and John Doe #2, transmitted harmful messages to him and others using AOL's service.<sup>118</sup> Green alleged that John Doe #1 sent him a virus through AOL's chat rooms, and when AOL was notified, AOL officials took no action to stop John Doe #1.<sup>119</sup> Green also alleged that John Doe #1 and John Doe # 2 defamed Green in AOL's chat rooms by stating to others that Green had instant messaging users for gay sex and that Green was bi-sexual.<sup>120</sup> Green notified AOL of the actions of John Doe #1 and John Doe #2 but claimed that AOL did nothing to stop it.<sup>121</sup>

Green filed a complaint against the two John Does for defamation and AOL because the content was sent over AOL's server and AOL allegedly failed to take necessary action against the two John Does.<sup>122</sup> AOL filed a motion to dismiss Green's complaint, claiming AOL was statutorily immune from liability for third party content under section 230. The U.S. District Court for District of New Jersey granted AOL's motion to dismiss.<sup>123</sup>

Noting that the case was one of first impression for the Third Circuit, the court stated that the issue on appeal was whether AOL was statutorily immune from liability for content provided by a third party.<sup>124</sup> Secondly, the court inquired into whether holding AOL liable for failure to regulate and monitor its site would be analogous to making AOL a publisher of the

---

<sup>118</sup> *Id.* at 468.

<sup>119</sup> *Id.* at 469.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 468.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

content.<sup>125</sup> Green argued that AOL waived its immunity within the terms of AOL’s community guidelines and membership agreement. Green claimed that AOL’s community guidelines outline standards for conduct and “contains promises to protect Green from other subscribers.”<sup>126</sup>

The Third Circuit, in its plenary review<sup>127</sup> of the district court ruling, affirmed the lower court’s order to dismiss the complaint.<sup>128</sup> The court concluded AOL was immune from liability for the actions of John Doe #1 and #2 under Section 230. AOL was an interactive computer service and another information content provider produced the content at issue. Therefore, AOL could not be liable under Section 230 for that particular content.<sup>129</sup>

The court declared that if AOL were held liable for negligently failing to police its network, the court would be treating AOL as the publisher of the content.<sup>130</sup> The court stated, “decisions relating to the monitoring, screening and deletion of content from its network are actions quintessentially related to a publisher’s role.”<sup>131</sup> The Third Circuit also noted that Section 230 provides immunity to interactive computer services as a publisher or speaker of information provided by a third party.<sup>132</sup>

---

<sup>125</sup> *Id.* at 470.

<sup>126</sup> *Id.* at 471.

<sup>127</sup> *Id.* at 470, (citing *Weston v. Pennsylvania*, 251 F.3d 420, 425 (3d Cir. 2001). Court looks at complaint in the light most favorable to the non-moving party and therefore accepts all allegations in the complaint as being true, *id.*

<sup>128</sup> *Id.* at 473.

<sup>129</sup> *Id.* at 470.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 471.

<sup>132</sup> *Id.* at 471, (citing 47 U.S.C. §230 (c)(1)).

In response to Green's argument that AOL's membership agreement waived AOL's Section 230 immunity, the court stated that the language of AOL's membership agreement does not waive its Section 230 immunity and is noticeably analogous to Section 230 because it stated that AOL would not accept responsibility for third party content and "expressly disclaimed liability for its failure to remove content or any delays in removing content."<sup>133</sup>

From these five cases it can be determined that Section 230 protects interactive computer services from "publisher" and "distributor" liability for content provided by third parties. Section 230 immunity not only protects ISPs, but Section 230 protection is extended to websites and listervs. Any interactive computer service engaging in editing, deleting or selection of third party content does not make the service an information content provider and lose its Section 230 immunity. To lose Section 230 immunity, there must be evidence that the interactive computer service was directly involved in the creation and development of the content at issue. By giving an interactive content provider publisher and distributor immunity for most third party content, it seemingly gives these defendants immunity for the content provided by another even if they know or have reason to know the statements are defamatory.

### **Federal District and State Court Cases**

There are also federal district and state court cases that have addressed the issue of defamation online and Section 230. These cases resolve issues that were not addressed in the five major appellate court cases. These cases also need to be reviewed to determine whether in these jurisdictions a plaintiff may have a cause of action against a provider or user of an interactive computer service. State and federal district court cases have less authoritative value outside of the particular state or district, but they may be persuasive to courts in other areas.

---

<sup>133</sup> *Id.* at 471.

### **Blumenthal v. Drudge**

In *Blumenthal v. Drudge*,<sup>134</sup> Sidney Blumenthal sued AOL for defamation concerning statements made in the online newsletter, the “Drudge Report,” alleging that Blumenthal was a wife beater.<sup>135</sup> AOL had an exclusive licensing agreement with Matt Drudge whereby he would write and publish the Drudge Report articles, which would be made available exclusively to AOL customers, and he would receive a \$3,000 monthly payment.<sup>136</sup>

The U.S. District Court for the District of Columbia ruled that even though AOL had a contract with Drudge to publish the material, AOL was nothing more than the provider of an interactive computer service on which the Drudge Report was carried.<sup>137</sup> Since AOL had no editorial control over the statements before the third party published them, AOL was immune from liability for the statements.<sup>138</sup>

### **Parker v. Google**

Gordon Roy Parker filed suit against Google for defamation, invasion of privacy and negligence because Google archived defamatory messages posted on a bulletin board and continued to archive the content, thereby making the content available to users even though Google was on notice that the statements were defamatory.<sup>139</sup> The U.S. District Court for the Eastern District of Pennsylvania ruled that Google was immune under Section 230 because the

---

<sup>134</sup> *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.C.C. 1998).

<sup>135</sup> *Id.* at 46.

<sup>136</sup> *Id.* at 47.

<sup>137</sup> *Id.* at 50 - 51.

<sup>138</sup> *Id.* at 50.

<sup>139</sup> *Parker v. Google, Inc.*, 422 F. Supp.2d 492, 500 (E.D.Pa. 2006).

tortious acts were done by a third party.<sup>140</sup> The court ruled that Google cannot be held liable under Section 230 for *any* cause of action for merely archiving, caching (keeping a copy of a page or image already accessed) and providing access to content created by a third party.<sup>141</sup>

### **Prickett v. Infousa, Inc**

In *Prickett v. Infousa*,<sup>142</sup> the plaintiffs sued a website for defamation, invasion on privacy and trespassing after an anonymous user listed their names, addresses and telephone numbers under the Adult Entertainment section of its website.<sup>143</sup> Because of this listing, the plaintiffs were continuously harassed in their community.<sup>144</sup> The plaintiffs argued that the website was an information content provider even though the content was created by a third party because the third party was prompted to select certain content through the website's information gathering system.<sup>145</sup>

The U.S. District Court for the Eastern District of Texas held the website's status as an interactive content provider did not change to an information content provider just because some of the content was created in response to the website's prompts.<sup>146</sup> "The selection of content was

---

<sup>140</sup> *Id.* at 500.

<sup>141</sup> *Id.* at 501 (emphasis added).

<sup>142</sup> *Prickett v. Infousa, Inc.*, 561 F.Supp. 2d 646 (E.D. Tex 2006).

<sup>143</sup> *Id.* at 648.

<sup>144</sup> *Id.* at 647.

<sup>145</sup> *Id.* at 651. *See also* *Doe v. Freindfinder Network, Inc.*, 540 F.Supp.2d 288, 295 (D.N.H. 2008)( stating that the defendants cannot be liable for the dissemination of lascivious content because the website allows users to select from a menu of sexual responses).

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

left exclusively to the user,” the court concluded.<sup>147</sup> The website also was immune from liability even though it failed to verify the accuracy of the listing because this would amount to an attempt to hold the website liable as a publisher.<sup>148</sup>

### **Barrett v. Rosenthal**

In *Barrett v. Rosenthal*,<sup>149</sup> two doctors brought a defamation action against Ilena Rosenthal for distributing e-mails and duplicating on message boards articles she found labeling the doctors as quacks and disturbed.<sup>150</sup> The doctors further alleged that Rosenthal continued to publish and pass around the comments even after she was informed that the statements were defamatory.<sup>151</sup>

The Supreme Court of California affirmed the position posited in *Zeran* that distributor liability is a subset of publisher liability and thus providers or users of an interactive computer service are immune for disseminating content that they knew was defamatory.<sup>152</sup> The salient portion of this holding was the court’s decision to allow Rosenthal to be treated as a “user” for purposes of Section 230 because she used the Internet to gain access to the newsgroups. The court stated that Rosenthal had immunity from liability under Section 230 because she took the comments from another article, even though she actively sent the emails and placed the content

---

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

<sup>148</sup> *Id.*

<sup>149</sup> *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006).

<sup>150</sup> *Id.* at 514.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 525.

on her message board.<sup>153</sup> The court stated the doctors were therefore limited to pursue lawsuits against the originator of the alleged defamatory statements.<sup>154</sup>

### **Other Cases Involving Section 230**

There is another line of cases that does not involve defamation but they do address issues involving Section 230 and potential liability for an interactive computer service. Even though these cases do not directly address online defamation, a court may rely on these rulings if they are in the same jurisdiction when an online defamation case is brought against an interactive computer service.

#### **Doe v. AOL**

Plaintiff Doe sued AOL on behalf of her minor son who was sexually molested, and the abuser used AOL chat rooms to market videos and photographs of the sex acts.<sup>155</sup> The plaintiff sued AOL for emotional distress for violating Florida criminal statutes against child pornography and negligence for failing to stop the individual from transmitting child pornography when AOL knew that he was marketing illegal material.<sup>156</sup> The plaintiffs alleged that Section 230 did not apply because the incidents occurred before the statute was passed and the statute was in direct conflict with Florida law.<sup>157</sup>

The Supreme Court of Florida held that even though Florida's law conflicted with Section 230, Section 230 preempted state causes of action involving interactive computer

---

<sup>153</sup> *Id.* at 528-29.

<sup>154</sup> *Id.* at 529.

<sup>155</sup> *Doe v. America Online, Inc.*, 783 So.2d 1010, 1011 (Fla. 2001).

<sup>156</sup> *Id.* at 1012.

<sup>157</sup> *Id.* at 1015.

services.<sup>158</sup> The court also held that Section 230 applies to all suits filed after the enactment of the statute regardless of when the allegations occurred.<sup>159</sup> Therefore Doe's state claim was disallowed because AOL was immune from liability under Section 230.<sup>160</sup>

### **Schneider v. Amazon.com**

Jerome Schneider authored books that were for sale on Amazon.com, and Amazon posted visitors' comments about Schneider and his books that were negative and alleged Schneider was a felon.<sup>161</sup> Schneider filed suit against Amazon for negligent misrepresentation, tortious interference and breach of contract.<sup>162</sup> The Washington Court of Appeals ruled that Section 230 was not limited to tort claims because the statute provided immunity from all civil liability related to publication of third party content.<sup>163</sup> The court further held that there was no difference between a website and an ISP in regards to Section 230 because the statute provides protection to users and providers of interactive computer services.<sup>164</sup> As a provider of interactive computer services, Amazon was immune from civil liability by reason of Section 230.<sup>165</sup>

---

<sup>158</sup> *Id.* at 1015-16. *See generally* Doe v. Freindfinder Network, Inc., 540 F.Supp.2d 288 (D.N.H. 2008); Universal Comm'n Sys., v. Lycos, Inc. 478 F.3d 413, 418 (1st Cir. 2007); Kathleen R. V. City of Livermore, 104 Cal.Rptr.2d 772 ( Cal. Ct. App 2001).

<sup>159</sup> *Id.* at 1018.

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

<sup>161</sup> Schneider v. Amazon.com, Inc., 31 P.3d 37, 38 (Wash. Ct. App. 2001).

<sup>162</sup> *Id.* at 39.

<sup>163</sup> *Id.* at 42. *See also* Gentry v. eBay, Inc., 121 Cal.Rptr.2d 703 (Cal. Ct. App 2002).

<sup>164</sup> *Id.* at 41.

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

### **Jane Doe v. MySpace**

Jane Doe was sexually assaulted by an individual she met on MySpace when she was 14, and her parents on her behalf filed suit against MySpace for negligence, gross negligence, fraud and negligent misrepresentation.<sup>166</sup> Doe argued that MySpace knew sexual predators used the site to communicate with minors and it failed to react appropriately.<sup>167</sup> She further argued that Section 230 immunity did not apply because her claims against MySpace have nothing to do with the content that was published on MySpace.<sup>168</sup>

The U.S. District Court for the Western District of Texas held that Section 230 immunity was not limited to cases involving defamation and defamation related claims.<sup>169</sup> Any cause of action that "...attempts to hold an interactive computer service liable for its publication of third party content or harms flowing from the dissemination of that content" is barred.<sup>170</sup> Since MySpace is an interactive computer service and the claims were based on harms flowing from content disseminated through MySpace, the suit filed by Doe against MySpace was dismissed.

### **Anthony v. Yahoo!, Inc.**

Robert Anthony sued Yahoo! for allegedly creating and sending false dating profiles on its dating services to prevent the members from ending their subscriptions.<sup>171</sup> In direct contrast to *Schneider v. Amazon* and *Doe v. MySpace*, the U.S. District Court for the Northern District of

---

<sup>166</sup> Doe v. MySpace, Inc., 474 F.Supp. 2d 843 (W.D. Tex. 2007).

<sup>167</sup> *Id.* at 849.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 849.

<sup>170</sup> *Id.*

<sup>171</sup> Anthony v. Yahoo! Inc., 421 F.Supp. 2d 1257, 1259 (N.D. Cal. 2006).

California ruled that Section 230 did not bar fraud, negligent misrepresentation and unfair trade practice claims.<sup>172</sup> The court stated, “the CDA only entitles Yahoo! not to be the publisher or speaker of the profiles. It does not absolve Yahoo! from liability for any accompanying misrepresentations.”<sup>173</sup>

### **Fair Housing v. Roommates.com**

Roommates.com was sued for creating a website that solicited and enforced housing preferences by asking subscribers to provide personal information about themselves, such as race, sex and sexual orientation, so they could be matched with potential roommates.<sup>174</sup> The Fair Housing Council alleged that Roommates.com violated the Fair Housing Act by forcing users to reveal information about themselves in order to secure housing, which Roommates.com could not lawfully do offline.<sup>175</sup> Roommates.com argued that they were immune from civil liability under Section 230 because third party users created the content.<sup>176</sup>

The U.S. Court of Appeals for the Ninth Circuit ruled that Section 230 immunity did not apply to a website that solicits content or forces subscribers to answer question that are illegal.<sup>177</sup> If a website helps develop unlawful content and contributes materially to the illegal conduct,

---

<sup>172</sup> *Id.* at 1263.

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

<sup>174</sup> Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).

<sup>175</sup> *Id.* at 1161.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1162.

then Section 230 immunity does not apply.<sup>178</sup> The court stated that “Roommates.com was responsible at least in part for each subscriber’s profile page because every such page is a collaborative effort between Roommate and the subscriber.”<sup>179</sup> In clarifying and balancing previous rulings, the court stated that an interactive computer service would still have Section 230 immunity for merely performing editorial functions of a publisher but a website operator who edits in such a manner that transforms an innocent statement into an unlawful or defamatory one would not be immune<sup>180</sup> “The Communications Decency Act was not meant to create a lawless no-man’s-land on the Internet.”<sup>181</sup>

These cases show that Section 230 has been interpreted in a number of ways by the courts and without a United States Supreme Court opinion on the issue, the outcome of a case may be determined by which district or circuit the case is heard in. The next section explores the legislative history and congressional intent of Section 230 to help clarify to what degree the courts has correctly applied Section 230.

### **Legislative History of Section 230**

By examining the legislative history of Section 230, it is possible to determine what Congress intended to accomplish in its passage of the statute. The legislative history of Section 230 was fully examined to ascertain if the courts have properly applied the statute in the way it was intended in cases regarding online defamation and Section 230. By reviewing the plain language of the statute, what is written in the House and Senate Reports and in the statements

---

<sup>178</sup> *Id.* at 1168. The term development refers not only to augmenting or adding to the content generally but materially contributing to its unlawfulness, *id.*

<sup>179</sup> *Id.* at 1167.

<sup>180</sup> *Id.* at 1169.

<sup>181</sup> *Id.* at 1164.

made by Congressional members during the floor debate will be used to determine what Congress was attempting to accomplish when it passed Section 230. This review of legislative history aided the researcher in the next chapter when determining what should be occurring when the courts are faced with a defamation action involving third party content online.

During the process of drafting the Telecommunications Act of 1996,<sup>182</sup> the Communications Decency Act, a common name for Title V of the Telecommunications Act of 1996, was born out of the perceived threat that pornographic content on the Internet would be readily available and highly accessible to children. Congress was also seemingly upset with the inconsistent outcomes in regards to liability on the Internet, and therefore added Section 230 to the CDA to address the problem. Section 230 states that “no provider or user of an interactive computer service shall be treated as the *publisher or speaker* of any provided content by another content provider.”<sup>183</sup> Congress reasoned that immunizing Internet service providers and users from “primary publisher” liability would protect providers and users who tried but failed to identify and remove offensive material.<sup>184</sup>

Traditional defamation law recognized a distinction between publisher and distributor liability.<sup>185</sup> Even the courts in *Cubby* and *Stratton-Oakmont* each recognized the difference between publisher and distributor liability. Furthermore, the plain language of Section 230 states “publisher or speaker would not be liable...”<sup>186</sup> Nowhere in the statute does it say a “distributor”

---

<sup>182</sup> Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat. 56 (1996).

<sup>183</sup> 47 U.S.C. §230(c)(1) (1996) (emphasis added).

<sup>184</sup> 47 U.S.C. §230(b)(4) (1996).

<sup>185</sup> See RESTATEMENT (SECOND) OF TORTS §578 (1977); RESTATEMENT (SECOND) OF TORTS §581(1) (1977).

<sup>186</sup> 47 U.S.C. §230(c) (1996).

of content. Both the House of Representatives and Senate Conference reports explicitly state “[O]ne of the purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”<sup>187</sup> The plain language of the statute and the House & Senate report both speak of publisher liability. The Senate and House Reports mainly discuss *Stratton-Oakmont v. Prodigy*, which held an interactive service liable as a publisher, and not *Cubby v. CompuServe*.<sup>188</sup>

“When Congress uses terms that have accumulated meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.”<sup>189</sup> In applying Section 230, however, the courts have read the statute as covering both publisher and distributor liability.<sup>190</sup> The courts have determined that Congress intended to have Section 230 encompass both publisher and distributor liability, which basically gives full immunity to interactive service providers for third-party content published on their sites.

---

<sup>187</sup> S. REP. NO. 104-230, at 194 (1996) (CONF. REP), *See also* H.R. REP. NO. 104-458, at 194 (1996) (CONF. REP.).

<sup>188</sup> *See* 141 CONG. REC. H8469 (1995) (statements of Rep. Cox and Rep. Wyden).

<sup>189</sup> *NLRB v. Amax Coal Co.*, 453 US 322, 329 (1981), *See also*, *Perrin v. United States*, 444 US 37, 42 (1979).

<sup>190</sup> Paul Ehrlich, *Regulating Conduct on the Internet: Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401, 402 (2002). *See Zeran v. America Online Inc.*, 129 F.3d 327, 330, 332 (4th Cir. 1997), *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003), *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003).

During the floor debate, Congressman Chris Cox , a main proponent of Section 230 and co-author of the statute, voiced his discontentment with both *Cubby* and *Stratton-Oakmont*.<sup>191</sup> He declared that the legal system provided no deterrent for service providers to help control odious content on the Internet.<sup>192</sup> The comments of Representative Cox are pertinent but do not indicate that distributors were to be excluded from statutory protection. So it could be argued that Congress removed the burden on distributors so that if an interactive service provider gains knowledge of defamatory content through monitoring and screening of its websites, the distributor would not be subject to liability under Section 230 (c)(3).<sup>193</sup> Thus by having knowledge of the inappropriate content, through any means even screening, would be protected under the statute. This argument is plausible but it may be hard to argue that Congress wanted to protect everyone who knew or had reason to know that they possessed inappropriate content provided by a third party.

The entire legislative history of Section 230 is very sparse compared to other sections of this legislation, but for the court to firmly declare that Congress intended to include distributor liability in Section 230 may be a stretch. The plain language of many portions of the statute and the majority of the congressional reports and floor debates clearly pertains to publisher

---

<sup>191</sup> 141 CONG. REC. 22,045(1995)(Statement of Rep. Cox) (“Mr. Chairman, our amendment will do two basic things: First, 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. It will protect them from taking on liability such as occurred in the Prodigy.”)

<sup>192</sup> *Id.*

<sup>193</sup> Francis Buono & Johnathan Freidman, Limiting Tort Liability for Online Third-party Content Under Section 230 of the Communications Decency Act, 52 FED. COMM. L.J. 647, 662 (2000).

liability.<sup>194</sup> Section 230 (b)(4) states that one of the purposes of the statute is “to remove disincentives for the development and utilization of blocking and filtering technologies.”<sup>195</sup>

There may be many reasons why the legislative history of Section 230 is meager, one being that it was added to appease certain Congressional members without considering the total consequences that certain words or phrases would have in the legal community. Nonetheless, the courts must use what is there and should not reach its own conclusions as to what they think Congress meant to do.

The language in the statute and statements from the conference reports both relate to *Stratton-Oakmont*, where the service provider was held liable as a publisher for trying to block offensive content. If Congress wanted to grant distributor immunity, it would have declared so in the statute, as it did with publisher immunity.<sup>196</sup> Based on these omissions, the court beginning in *Zeran* appears to have misinterpreted what Congress intended in its promulgation of Section 230. The result of the courts waiving publisher and distributor liability has effectively given all interactive computer services immunity for third party content. The statute does not directly address websites or user-generated websites and nothing in the language of the statute, the Senate and House Reports or floor debate declare that a user-generated website be treated any differently. Presumptively, it can be assumed that user-generated websites were not mentioned is because they did not exist at the time Section 230 was passed in 1996.

---

<sup>194</sup> See also, 47 U.S.C. 230 (1996), S. REP. NO. 104-230, at 194 (1996) (CONF. REP), H.R. REP. NO. 104-458, at 194 (1996) (CONF. REP.).

<sup>195</sup> 47 U.S.C. 230 (b)(4) (1996).

<sup>196</sup> Jae Hong Lee, *Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 474 (2004).

After the reviewing the case law concerning Section 230 and defamation in this chapter, Chapter Four will apply that case law to MySpace and YouTube to determine what would likely occur if a defamation lawsuit regarding third party content is brought against either company. Even though Congress may not have intended to grant publisher and distributor immunity to interactive computer services, the Chapter Five will also discuss whether websites made up entirely of user-generated content should be immune from liability under section 230. Websites with user-generated content are becoming more profitable, and becoming investment opportunities for powerful corporations. Should these multi-billion dollar companies be able to shield themselves from liability when their counterparts in traditional media cannot? Does the fact that the defamation occurred over the Internet make the harm any different than if it occurred in a newspaper or on television?

## CHAPTER 4 IMMUNITY FOR USER-GENERATED WEBSITES

One of the foundations of this research thesis was to apply Section 230 to new technology that has emerged since the Communication Decency Act's passage in 1996, specifically to determine whether user-generated websites MySpace and YouTube are immune from defamation liability under the statute. Chapter Three included a discussion of the results from the research of cases involving defamation online and Section 230, along with the courts' interpretations of these rulings. In this chapter those results were analyzed and applied to YouTube and MySpace to answer what would be the likely outcome if the courts were presented with a defamation action against MySpace or YouTube for defamatory content placed on those website.

This chapter will explore what should be the outcome when the court is confronted with this type of defamation action: why user-generated websites should or should not have both publisher and distributor immunity? After exploring the different arguments for and against user-generated websites having both publisher and distributor immunity, this chapter will conclude by reviewing the entire thesis, take a position on what future outcomes in cases of this nature should be and offer proposals for state or federal legislatures to consider.

### **Application of Case Law to MySpace and YouTube**

In the last chapter we review the case law that would be applicable to MySpace and YouTube if a defamation action was brought and the courts, under the doctrine of stare decisis, should follow earlier judicial decisions when the same points arise again in litigation in their jurisdiction.<sup>1</sup> But it must be emphasized that courts *do not* have to follow precedent set by

---

<sup>1</sup> BLACK'S LAW DICTIONARY (8th ed. 2004) (defining constructive knowledge as knowledge that a person using reasonable care or diligence should possess, and therefore knowledge of the information is given to that person by law).

previous case law. If the courts apply the laws to the facts concerning how content is posted on YouTube and MySpace and follow the applicable case law presented in the last chapter, litigation involving defamatory content posted on YouTube or MySpace should reveal the following conclusions.

## **YouTube**

YouTube would be an interactive computer service because YouTube allows multiple users to access a computer server. According to *Batzel*, websites that allow multiple users to access a computer server are types of an interactive computer service and could be protected by Section 230 immunity for content provided by third parties.<sup>2</sup>

The Ninth Circuit in *Batzel* also stated that Section 230(c)(1) provides immunity to “users” of interactive computer services.<sup>3</sup> The court stated that users are those who must access an interactive computer service to access the Internet.<sup>4</sup> Since YouTube must use an interactive computer service to access the Internet, YouTube would also be a “user” of an interactive computer service and have Section 230 immunity. Consequently, if a YouTube member uploads content that is found to be defamatory, YouTube would not be liable for that content even though it was published through YouTube’s website.

The U.S. Court of Appeals for the Third Circuit in *Green* held that “terms of use,” which outline standards for conduct, do not waive an interactive computer service’s Section 230 immunity.<sup>5</sup> Therefore, YouTube’s maintenance of community guidelines and restrictions on

---

<sup>2</sup> *Batzel v. Smith*, 333 F.3d 1018, 1030 (9th Cir. 2003).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003)

terms of use<sup>6</sup> would not waive YouTube's Section 230 immunity or create any additional liability.

YouTube's right to modify or delete any content<sup>7</sup> does not put YouTube into a publisher's role or make YouTube a provider of content. The court in *Ben Ezra* and *Batzel* held that there must be evidence that the interactive computer service was responsible in whole or in part for the creation and development of the content because the development of content requires more than editing and selecting content for publication.<sup>8</sup> According to *Zeran*, even if YouTube were considered to be the publisher of the third party content, Section 230 prohibits an interactive computer service from liability as a publisher.<sup>9</sup>

The research does not effectively yield a conclusion with regard to liability for defamatory content provided by "YouTube Partners." YouTube partners are popular YouTube uploaders who get proceeds from advertisements placed next to their videos.<sup>10</sup> The court would have to determine how closely YouTube was involved in developing the content. If the court relied on *Drudge*, YouTube would not be liable for any content published on its site by a YouTube partner even though YouTube has a agreement for the user to create videos. But if the court relies on *Fair Housing* and it could be proved that YouTube directly solicited or

---

<sup>6</sup> YouTube, LLC, *YouTube Community Guidelines*, [www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines) (last visited: November 3, 2008).

<sup>7</sup> YouTube, LLC, *Terms of Use*, <http://www.youtube.com/t/terms> (last visited: November 3, 2008).

<sup>8</sup> *Ben Ezra, Weinstein and Company v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

<sup>9</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

<sup>10</sup> The YouTube Blog, *YouTube Elevates Most Popular Users to Partners*, May 3, 2007, <http://youtube.com/blog?entry=4b3PkL8HQcw>.

encouraged the defamatory content from the YouTube partner, then it may be possible for YouTube to lose its Section 230 immunity.

## **MySpace**

MySpace is classified as a website and the court in *Doe v. MySpace* held that MySpace is a type of interactive computer service<sup>11</sup> and would have Section 230 immunity. Therefore, MySpace would be protected by Section 230 for content, including content on blogs, the comments section and videos, posted on a MySpace page by another MySpace member.

MySpace members' profiles are created in response to the questions and content provided and created by MySpace,<sup>12</sup> however, according to the Ninth Circuit in *Carafano* and the district court in *Prickett*, as long as the "essential content" that is entered into the profile is provided by a third party, the user or provider of an interactive computer service still has section 230 immunity.<sup>13</sup> Therefore if someone creates a false MySpace profile that is defamatory to another person, MySpace would not be liable under Section 230 because MySpace did not create the "essential content" that is at issue the user did. As stated above, the courts in *Batzel* and *Ben Ezra* held that the development of content requires more than editing and selecting content for publication.<sup>14</sup> Therefore MySpace's right to modify, edit, reproduce, or delete content<sup>15</sup> would not make MySpace an information content provider.

---

<sup>11</sup> *Batzel*, 333 F.3d at 1030. *See also* *Doe v. MySpace*, 474 F. Supp. 2d 843, 846 (W. D. Tex. 2007) (holding that MySpace meets the statutory definition of an interactive computer service under section 230(f)(3)).

<sup>12</sup> MySpace.com, *How Do I Add Color Graphics & Sound to My Profile Page?*, <http://www.myspace.com/index.cfm?fuseaction=misc.faq&Category=4&Question=7> (last visited: November 5, 2008).

<sup>13</sup> *Carafano v. Metrosplach.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003); *Prickett v. Infousa, Inc.*, 561 F.Supp. 2d 646, 651 (E.D. Tex 2006).

<sup>14</sup> *Batzel*, 333 F.3d at 1031; *Ben Ezra*, 206 F. 3d at 986.

The notification process that allows MySpace members to report when another member is posting harmful content, a breach of MySpace's community guideline or terms of use,<sup>16</sup> would not change MySpace's liability or make MySpace negligent as a distributor. In traditional media, a distributor of content becomes liable when he or she becomes aware of the harmful content and is negligent in removing it.<sup>17</sup> But according to *Zeran, Rosenthal and Green*, Section 230 not only grants interactive service providers immunity from publisher liability for third party content but also distributor liability.<sup>18</sup> Since MySpace is an interactive computer service, it would not be liable as a distributor for third party content even if MySpace was aware of the defamatory content. Because MySpace falls within the category of interactive service providers protected by Section 230 all civil claims arising from third party content would be barred.

If the courts follow precedent case law, it is reasonable to conclude that YouTube and MySpace will not be subject to liability unless, as the court stated in *Ben Ezra* and *Carafano*, the website created or developed the content at issue. Since the creation and development of content is the antithesis of a site relying on user-generated content, it is likely that YouTube and MySpace will not be accountable for the tortious acts of their users. Without users, user-generated sites would not exist, but Section 230 allows these website creators to shield themselves from all civil liability. But other sites such as *dontdatehimgirl.com*, *juicycampus.com* or *rateyourteacher.com*, which actively encourage and solicit disparaging comments, may lose

---

<sup>15</sup> MySpace.com, *MySpace Terms of Use Agreement*, April 11, 2007, <http://www.myspace.com/Modules/Common/Pages/TermsConditions.aspx>.

<sup>16</sup> MySpace, *Where do I Report Abuse and Inappropriate Content?*, <http://www.myspace.com/index.cfm?fuseaction=misc.faq&Category=3&Question=27> (last visited: November 5, 2008).

<sup>17</sup> RESTATEMENT (SECOND) OF TORTS §581(1) (1977).

<sup>18</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 330, 332 (4th Cir. 1997).

their Section 230 immunity if the court applies the *Fair Housing* holding because those sites actively solicit unlawful content.

Many proponents of Section 230 favor victims commencing an action against the individual who posted the content,<sup>19</sup> but as in *Zeran, Green, Carafano, Parker, Prickett and Schneider*, these individuals are anonymous or cannot easily be found. Therefore, victims whose reputations are harmed through user-generated websites are left with no effective recourse.

### **Should User-generated Websites have Immunity from Publisher and Distributor Liability?**

Due to the sometimes anonymous nature of the Internet, the creator of defamatory content may never be found. The courts have determined that all websites are basically not liable for any third party content except if they directly and knowingly solicit unlawful content. The question then becomes should user-generated sites be held liable for the content it disseminates?

There are three arguments that have been made in many of the court cases and academic literature regarding Section 230 and defamation liability when defamatory content is published on online. These arguments are used to address whether the user-generated websites MySpace and YouTube should have some form of liability for third party content published on its website.

### **Marketplace of Ideas Theory**

The first argument that favors applying publisher and distributor liability is based on First Amendment theory, namely the marketplace of ideas. The marketplace of ideas theory was developed by Justice Oliver Wendell Holmes and holds that the free exchange of ideas fosters the search for truth. We should allow as many ideas as possible into the marketplace, even those

---

<sup>19</sup> Francis Buono & Johnathan Freidman, Limiting Tort Liability for Online Third-party Content Under Section 230 of the Communications Decency Act, 52 FED. COMM. L.J. 647, (2000) (stating the Fourth Circuit in *Zeran* accurately interpreted the CDA and the congressional intent of section 230).

some may consider bad or illegal, and the prevailing idea and truth will eventually emerge.<sup>20</sup>

Justice Learned Hand stated, “the First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.”<sup>21</sup> Hindering the marketplace of ideas is disadvantageous to society and hinders speech.

Under this theory, if we hold websites liable, it will hinder the development of free speech on the Internet and lead to a chilling of free speech. Congress explicitly stated that the policy behind Section 230 was to “preserve the vibrant and competitive free market that exists on the Internet.”<sup>22</sup> If a website had the threat of a potential liability for every message republished by its services, it “may choose to restrict the kinds and amount of communication it disseminates, leading to an obvious chilling effect.”<sup>23</sup> Imposing distributor or publisher liability will dissuade websites from taking steps to screen or remove offensive content from their pages. Website owners will no longer have the incentive to experiment with new filtering technologies to protect users.<sup>24</sup> If a website is simply going to be held liable once it gains knowledge about the defamatory content, it may begin suppressing speech before the speech gets to that level.

---

<sup>20</sup> Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963)(stating the marketplace of ideas and freedom of expression is not only good for each individual but society as a whole because it is the “best process for advancing knowledge and discovering truth”).

<sup>21</sup> *United States v. Associated Press*, 52 F.Supp. 362, 372 (D.C.S.D.N.Y. 1943).

<sup>22</sup> 47 U.S.C. 230 (b)(1) (1996).

<sup>23</sup> Andrea L. Julian, *Freedom Of Libel: How An Expansive Interpretation Of 47 U.S.C. § 230 Affects The Defamation Victim In The Ninth Circuit*, 40 IDAHO L. REV. 509, 515 (2004).

<sup>24</sup> Paul Ehrlich, *Regulating Conduct on the Internet: Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401, 413 (2002).

“They [websites] will merely gravitate toward the lowest common denominator of regulating speech in order to achieve certainty.”<sup>25</sup>

The court in *Zeran* recognized the reality of this type of tort-based liability stating that holding an interactive service provider liable for third-party content would simply be “another form of intrusive government regulation of speech.”<sup>26</sup> The drafters of Section 230 understood the power of the Internet when they wrote: “[t]he Internet and other interactive services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and a myriad avenues for intellectual activity.”<sup>27</sup> The anonymous nature of the Internet also removes the classifications and stigma of race, class, gender, nationality, religion, education, or economic circumstances that may hamper communication.<sup>28</sup> Everyone has equal footing on the Internet with the ability to reach the same amount of people, no matter who you are or what you’ve done. The Internet has become an outlet for many different viewpoints and individuals have become more open and willing to express their opinions in a medium that may not bring humiliation or embarrassment to their everyday lives.

Defamation suits can threaten and test the vitality of First Amendment rights on the Internet. Websites may begin to screen content before it is even posted and if they think it is inappropriate. Speech not even rising to the level of defamation might be censored. Former Supreme Court Justice Hugo Black wrote passionately that no law meant no law and that all libel

---

<sup>25</sup> *Id.*

<sup>26</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

<sup>27</sup> 47 U.S.C. 230 (a)(3)(1996).

<sup>28</sup> Ryan Martin, *Freezing the Net: Rejecting the One Size Fits All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuit*, 75 U. CIN. L. REV. 1217, 1220 (2007).

laws violated the First Amendment.<sup>29</sup> Furthermore in *Bridges v. California*, the United States Supreme Court declared that “[i]t is a prized American privilege to speak one’s mind, although not always with perfect good taste...”<sup>30</sup> Therefore not holding websites liable aids free speech, even speech that is libelous.

### **Public Policy Argument**

Many legal scholars who have criticized the courts’ interpretation of Section 230 state that the courts’ rationales are not sound public policy. “Sound policy requires that we consider long-run effects and all people, not simply short-run effects and a few people.”<sup>31</sup> The public policy argument presupposes that Congress and society at large would want victims of defamation to have some recovery mechanism for harm that is caused to their reputations.<sup>32</sup> The courts’ interpretation of Section 230 do not effectively protect society from online defamation because “online defamers can continually harass whomever they choose regardless of the consequences to the defamed person.”<sup>33</sup>

---

<sup>29</sup> *Rosenblatt v. Baer*, 338 U.S. 75, 95 (1966) (J. Black, concurring in part and dissenting in part). Black wrote: The only sure way to protect speech and press against these threats is to recognize that libel laws are abridgments of speech and press and therefore are barred in both federal and state courts by the First and Fourteenth Amendments. I repeat what I said in the New York Times case that 'An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.

<sup>30</sup> *Bridges v. California*, 314 U.S. 252, 270 (1941).

<sup>31</sup> Lawrence Reed, *Seven Principles of Sound Public Policy*, Mackinac Center for Public Policy, June 2006, available at: <http://www.mackinac.org/archives/2002/sp2002-01.pdf>.

<sup>32</sup> Annemarie Pantaziz, Note, *Zeran v. America Online, Inc.: Insulating Internet Service Providers From Defamation Liability*, 34 WAKE FOREST L. REV. 531, 554-5(1999).

<sup>33</sup> David Hallett, *How to Destroy a Reputation and Get Away With It, The Communications Decency Act Examined: Do the Policies and Standards Set Out In the Digital Millennium Copyright Act Provide a Solution For A Person Defamed Online?*, 41 IDEA 259, (2001).

In the attempt to uphold the policy of promoting technology and a marketplace of ideas, the courts have not addressed the harmful consequences that immunizing interactive service providers would have upon victims who are defamed on the Internet.<sup>34</sup> The courts' broad interpretation of interactive computer service provider and the narrow interpretation of information content provider allow user-generated websites to recklessly disseminate defamatory material without recourse.<sup>35</sup> If user-generated websites like MySpace, juicycampus.com or dontdatehomegirl.com know that they are immune from liability for content posted by their users, they will take no effort to control inappropriate and defamatory content. These websites will have no incentive to find the originator of the content and can seemingly pass the blame onto the third party users even though their website was the means by which the content was disseminated. Thus Section 230 basically "encourages reckless dissemination of harmful content",<sup>36</sup>

People defamed on the Internet are likely to have more harm done to their reputation than in traditional media because of the number of people who could potentially view the content. Once the material hits the Internet, it may not be fleeting like in other media.<sup>37</sup> Under the public policy argument, victims of online defamation should have some right of recourse. What recourse a victim receives is up for debate, but in most instances victims want monetary compensation. The courts should at least apply distributor liability because it would not be

---

<sup>34</sup> Sewali Pater, *Immunizing Internet Service Providers from Third Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 672 (2002).

<sup>35</sup> Andrea L. Julian, *Freedom Of Libel: How An Expansive Interpretation Of 47 U.S.C. § 230 Affects The Defamation Victim In The Ninth Circuit*, 40 IDAHO L. REV. 509, 530 (2004).

<sup>36</sup> *Id.*

<sup>37</sup> Ryan W. King, *Online Defamation: Bringing the Communications Decency Act of 1996 in Line with Sound Public Policy*, 2003 DUKE L. & TECH. REV. 24, (2003).

contrary to the congressional intent of Section 230 to hold a website liable for failing to remove material that it *knows* is defamatory.<sup>38</sup> If distributor liability is applied and a website is hit with monetary damages, it may force websites to remove content that the website knows is defamatory, like in *Zeran*.

If user-generated websites are never held responsible for third-party content, which is virtually all of their material online, then most plaintiffs are left without a remedy.<sup>39</sup> Particularly in cases in which the website had some control over what was published or distributed, the website should be held responsible if they know or have reason to know that content is defamatory. “In order to foster the ideals of tort liability, to return injured plaintiffs to their pre-injury capacity, the Communications Decency Act must be either judicially or legislatively altered to allow distributor liability.”<sup>40</sup> It may never be fully determined what the best outcome is for all the different stakeholders in the Section 230 debate. But subscribing to the public policy rationale, if all the parties were at the bargaining table at the time of the legislation’s inception, they may not have wanted the present outcome where victims of online defamation are left with little or no remedy.

---

<sup>38</sup> Annemarie Pantaziz, Note, *Zeran v. America Online, Inc.: Insulating Internet Service Providers From Defamation Liability*, 34 WAKE FOREST L. REV. 531, 554 (1999)(emphasis added). See generally Andrea L. Julian, *Freedom Of Libel: How An Expansive Interpretation Of 47 U.S.C. § 230 Affects The Defamation Victim In The Ninth Circuit*, 40 IDAHO L. REV. 509, 517 (2004) (stating the blanket immunity provided by section 230 poses a problem when a interactive service provider is afforded immunity based on the service provider’s treatment as a publisher, regardless of the service provider’s knowledge or control over the defamatory content both prior to and subsequent to dissemination).

<sup>39</sup> Pater, *supra* note 34, at 653.

<sup>40</sup> David Hallett, *How to Destroy a Reputation and Get Away With It, The Communications Decency Act Examined: Do the Policies and Standards Set Out In the Digital Millennium Copyright Act Provide a Solution For A Person Defamed Online?*, 41 IDEA 259 (2001).

## Efficiency Argument

The final argument concerning whether user-generated websites should be immune from defamation liability for third party content is an efficiency argument. This argument is based on the proposition that it would be inefficient to hold websites responsible for every possible harmful statement that is published.<sup>41</sup> Over 84 million people have viewed almost 4.3 billion videos on YouTube,<sup>42</sup> and MySpace has more than 115 million users.<sup>43</sup> Due to the vast number of posts on these sites,<sup>44</sup> it would not be economical to expect the website to review all the content that is uploaded. It would create a huge burden on the owners of MySpace and YouTube if they had to investigate every claim.<sup>45</sup> Conversely, user-generated websites, especially MySpace and YouTube, would have to spend massive sums of money upfront on screening and filtering software in order to prevent litigation.<sup>46</sup> Bearing in mind the massive number of users worldwide, it might be impossible for these websites to examine each and every piece of material

---

<sup>41</sup> Sarah B. 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, 44 (1998).

<sup>42</sup> Andrew Lipsman, *Number of Online Videos Viewed in the U.S. Jumps 13 Percent in March to 11.5 Billion*, ComScore: Press Release, March 12, 2008, <http://www.comscore.com/press/release.asp?press=2223>.

<sup>43</sup> Michael Arrington, Tech Crunch, *Facebook No Longer the Second Largest Social Network*, June 12, 2008, <http://www.techcrunch.com/2008/06/12/facebook-no-longer-the-second-largest-social-network/>.

<sup>44</sup> *Id.* See also, Tim Weber, *Now on YouTube: Google's Gambler*, BBC News, October 10, 2006, <http://news.bbc.co.uk/2/hi/business/6036023.stm> (reporting that in 2006 YouTube had over 72 million users), Pete Cashmore, *MySpace Hits 100 Million Accounts*, Mashable: Social Networking News, August 9, 2006, <http://mashable.com/2006/08/09/myspace-hits-100-million-accounts/> (stating that in July of 2006, MySpace surpassed 100 million accounts).

<sup>45</sup> Boehm, *supra* note 41, at 44.

<sup>46</sup> Paul Ehrlich, *Regulating Conduct on the Internet: Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401, 412 (2002).

uploaded for defamatory and offensive content.<sup>47</sup> Holding websites liable for every defamatory upload or post would put many websites out of business because the website would have to spend an exorbitant amount of money to keep legally trained individuals on staff to review all content posted to determine if its defamatory or purchase filtering software advanced enough to detect content that is inappropriate.

So in order to avoid paying large damage awards, websites might voluntarily shut down, which would be disadvantageous to society.<sup>48</sup> It would not be efficient and equitable to hold websites liable for third-party content, because the additional cost would be borne by the website in the form of costly filtering technology and monitoring services. Though such cost could be enormous, it would not surpass the toll that liability would take on society at large in the suppression of speech.<sup>49</sup>

Justice Brennan poignantly stated in *New York Times v. Sullivan*, that “order cannot be secured merely through fear of punishment for its infraction; it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate...”<sup>50</sup>

### **Discussion and Position**

After conducting this research and exploring the different arguments, the researcher concludes that user-generated websites, such as MySpace and YouTube, should not be liable as distributors or publishers for third-party content published on their websites. The Fourth Circuit

---

<sup>47</sup> Andrea L. Julian, *Freedom Of Libel: How An Expansive Interpretation Of 47 U.S.C. § 230 Affects The Defamation Victim In The Ninth Circuit*, 40 IDAHO L. REV. 509, 515 (2004).

<sup>48</sup> Sewali Pater, *Immunizing Internet Service Providers from Third Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 688 (2002).

<sup>49</sup> Ehrlich, *supra* note 46, at 412.

<sup>50</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

in *Zeran* got it right when it declared holding an interactive service provider liable as a publisher or distributor would “produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability.”<sup>51</sup> Websites, which have been held to be a type of interact computer service, are and should be entitled to this same immunity like that of ISPs.

The researcher maintains that distributor liability is not apart of publisher liability and wholly separate, and the Fourth Circuit in *Zeran* and other courts in subsequent cases are incorrect in their contrary conclusion.<sup>52</sup> Websites like MySpace and YouTube cannot be considered common carriers because they are not passive conduits and do engage in monitoring, editing and deletion of content. They are and should be classified as distributors, but in order to keep the Internet flourishing and used to its greatest capacity, websites, especially user-generated, should be immune from publisher and distributor liability for content provided by another content provider. “Immunity significantly reduces the disincentives of trying newer, possibly cheaper, filtering technologies and allows websites to effectively keep pace with innovation without forcing them to look over their shoulders for the court.”<sup>53</sup> The Internet is a vibrant marketplace of ideas and is a forum for exchange of information of controversial topics and views. Now almost anyone has the ability to share their beliefs and viewpoints and have millions of people access these new and different opinions.

---

<sup>51</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997)

<sup>52</sup> *Zeran*, 129 F.3d at 332 (stating that distributor liability is a subpart of publisher liability. Court further stated that publication was an essential element to any defamation action and “both negligent communication of a defamatory statement and failure to remove such a statement when first communicated by another party. . . constitute publication”).

<sup>53</sup> Ehrlich, *supra* note 46, at 413.

Holding user-generated websites liable, even for distributor liability, would not be in the best interest of the Internet or society. Any person whose feelings are hurt by the comments or video posted, would just contact the website personnel about the content. Once the website is notified about the possible defamatory content, the knowledge requirement of distributor liability is met and failure to remove could result in legal responsibility. Websites may begin to remove offensive content just to avoid litigation, no matter if the material rises to the legal level of defamation.

What's more, how would the website or its personnel know if a particular statement or video is defamatory? Judges have a hard enough time determining and parsing through all the legal elements of defamation. It is unacceptable to lay that task on some website personnel. Website operators could very well become the evaluators and gatekeepers of what is good or bad speech, something the courts even have trouble doing on a consistent basis. What is considered a defamatory statement in one community may not be all that repugnant in another. Alternatively, the website might have to pay attorneys or employ individuals with legal backgrounds to keep up with the ever changing law of defamation and examine the content to determine whether it rises to defamation, further adding to websites operating cost.

In the end, most websites, especially websites that are only earning a marginal profit, will not waste money and energy conducting an effective assessment of the speech; instead they will most likely remove the content. Speech that may not even be defamatory, albeit tasteless or controversial, will be chilled. This type of censorship is a slippery slope toward prior restraint of content, a notion that is unacceptable. Without this immunity for third-party material, individuals who are defamed would not seek the person who actually wrote or uploaded the content. Instead

defamation victims would seek the deepest pocket available for recourse, which in many cases the website and its owners.

In this ever changing world of technology, the Ninth Circuit's ruling in *Fair Housing* can be viewed as a step to protect victims and society against websites that knowingly solicit unlawful third party content. But since no court in the Ninth Circuit has applied the rationale in the *Fair Housing* to a case directly involving defamation and third party content online, it would be a stretch to declare how the court will rule in instances where there has been solicitation or encouragement of unlawful content. However, the decision in *Fair Housing* should remain isolated to that particular case and should not be applied any further to defamation cases.

If the courts continued to apply *Fair Housing* to online defamation cases, the courts would not only be evaluating the defamatory content but also the level to which the website *knowingly* solicited unlawful content. What would be the requisite level of solicitation or encouragement that would be necessary to give rise to transforming the website into the creator of the content? If the words or text, "create and upload something defamatory" don't appear, what words or phrases are perfectly essential in the case? Would it have to be a selection of limited choices that forces the user to select certain content like in *Fair Housing* or would the user have the freedom to upload any content he pleased? One of the main purposes and benefits of our common law system is predictable outcomes that allow people to understand when something is or is not breaking the law. Following *Fair Housing*, an examination websites' editorial choices it makes will add another wrinkle to an area of law that already is very unpredictable.

In this country, no one sues the person who created the megaphone that allows one to spread their slanderous statements over a wider audience than he would if he had just merely

spoken the words. So why should a website owner be punished because technology allows third party users to spread content over a wider audience than normally is available? Just as the user of that megaphone is the wrongdoer, so is the person who created and uploaded that content on the site. No matter the provocation or solicitation, the user made the choice and should accordingly be punished, not the creator of the device. As stated previously, the Internet is a completely different medium than traditional media and thus should not be regulated in the same manner as traditional media.

The fact that the defamation occurred over the Internet does not make the harm to the person's reputation any different than if it occurred in a newspaper or on television. But in traditional media, owners, news directors and operators have more control over content before it is disseminated. The structure of their business and business model is totally different because most content is reviewed before the public views it. In addition, those who make defamatory statements in print or broadcast are most likely employees of a media outlet. The most salient factor that makes the Internet different than traditional media, as stated above, is the chilling effect that potential liability could have on society.

## CHAPTER 5 CONCLUSION

### Summary

This research thesis set out to examine the Communications Decency Act § 230 in light of new technology systems that have emerged since the act's passage in 1996. Specifically, this study sought to determine whether MySpace and YouTube are immune from liability for defamation pursuant to Communications Decency Act §230. Applying the legal research method, court cases that related to defamation and Section 230 were analyzed to determine what the likely outcome would be if MySpace or YouTube were defendants in a defamation claim based upon content posted by one of its users.

Defamation is a complex tort rooted in common law. There are many elements to defamation law, but the crux of this research involved the fault element, the status of the defendant, and the standard of liability for a user-generated website. Before the passage of Section 230 there was no clear-cut criterion for the standard of liability on the Internet and where the Internet defendant fell among the three statuses depended on the jurisdiction in which the plaintiff brought the case. The passage of Section 230 was suppose to result in a normative rule for the courts to apply when confronted with an online defamation case.

Five U.S. Circuit Court of Appeals decisions regarding defamatory content online and CDA §230 were analyzed beginning with *Zeran v. AOL*. In *Zeran v. AOL*, the Fourth Circuit held that Internet service providers were protected from publisher and distributor liability for content provided by a third party under CDA §230. The Ninth Circuit extended Section 230 immunity to websites and listervs. The other four appellate court cases addressed how an interactive computer service could lose its Section 230 immunity and subsequently be held liable for third party content. Other federal district court and state court cases were also reviewed and

covered issues that were not addressed by the courts in previous rulings. From the overall evaluation of the case law, the courts have held that all interactive computer services do not have liability for third party content.

There was also a review of the legislative history of Section 230 to determine if Congress intended to grant immunity from publisher and distributor liability because the statute only referred to publisher liability. After analyzing the legislative history it appears that the courts have misinterpreted what Congress intended in its promulgation of Section 230. The plain language of many portions of the statute and the majority of the congressional reports and floor debates pertain to publisher liability and rarely mentions liability as a distributor.

Applying the applicable case law to the structure of YouTube and MySpace, it was determined that YouTube and MySpace are interactive computer services protected by Section 230. If the courts follow the precedent case law, it would be reasonable to conclude that YouTube or MySpace would not be subject to liability unless, as the court stated in *Ben Ezra* and *Carafano*, the website created or developed the content at issue.

Nonetheless, user-generated websites, such as MySpace and YouTube, should not be liable as distributors or publishers for third-party content published on their websites. Holding user-generated websites liable, even for distributor liability, would not be in the best interest of the Internet or society. Holding user-generated websites liable as publishers or distributors will place a huge burden on these websites to review every piece of content that is posted. With potential liability hanging over their heads, websites may began to remove content from their sites and subsequently chill speech.

Overall this thesis attempted to answer the following research questions:

- **Whether MySpace and YouTube are immune from liability for defamatory content published on their websites under 47 U.S.C. § 230?** If the courts follow precedent, it

would be reasonable to conclude that YouTube or MySpace will not be subject to liability for the tortious acts of their users unless, as the court stated in *Ben Ezra* and *Carafano*, YouTube or MySpace created or developed the content at issue. Since the creation and development of content is the exact opposite of how user-generated websites conduct business, it is unlikely that YouTube or MySpace will be held accountable for content posted on their sites, even if they know that the content posted is defamatory.

- **Was it Congress' intent to have sites such as MySpace and YouTube immune from liability for content published on their sites under 47 U.S.C. § 230?** The statute does not directly address websites or user-generated websites and nothing in the language of the statute, the Senate and House Reports or floor debate declare how a user-generated website should be treated. However, from the research it is reasonable to assume that Congress did not intend to provide websites immunity from liability as a distributor. The plain language of many portions of the statute and the majority of the congressional reports and floor debates clearly pertains to publisher liability.
- **Should MySpace and YouTube be immune from defamation liability for defamatory content published on their websites under 47 U.S.C §230?** MySpace and YouTube should be immune from defamation liability for defamatory content published on their websites. In order to keep the Internet flourishing and used to its greatest capacity, websites, especially user-generated, should be immune from publisher and distributor liability for content provided by another content provider. Websites, such as MySpace and YouTube, that give users the ability to post their experiences and viewpoints uncensored, should not have the threat of liability over their heads for content it did not create.

It does not seem that Congress intended to include distributor liability in its promulgation of section 230, but the courts got it right as websites, especially user-generated websites, should not be liable as a publisher or distributor of third party content. The Fourth Circuit may have been engaged in what many call “judicial activism” and by going beyond the confines of the legislation, but the precedent set by *Zeran* is the best end result for the Internet and society. The outcome may be appropriate for society but is not a perfect result and Congress should promulgate legislation to protect victims whose reputations are defamed online by their fellow users. This paper will end by offering a proposal to the legislature to help combat the issues of online defamation, especially in the context of user-generated websites.

## Proposals for Legislation

Even though user-generated websites, such as MySpace and YouTube, should have immunity from defamatory third party content posted on their websites, society still needs to be protected from online defamers and victims should have some recourse when their reputation has been harmed. Therefore the government could pass legislation demanding websites to require registration, of at least an email address, before a user can post a comment. MySpace and YouTube currently require its users to register with at least an email address before the user can post any content. Upon registration, the website must maintain, utilize or have access to software that allows them to keep records or trace its users' ISP address. These records should not be sold to potential advertisers or for commercial purposes but simply to track whom the user is.

If a website, such as MySpace or YouTube is going to profit from its role as a conduit for massive volumes of information, it should at least be responsible for keeping records of those who are using the services.<sup>1</sup> With new technology and software being created every day websites owners have the ability, when necessary, to track down perpetrators' IP addresses, names and locations. Whether this information has to be saved on the website's main server or the website merely has the ability to access the information will be dependent on the website. If the website fails to get or maintain members' information, they may be levied a fine.

But before an alleged victim contacts the website operator and demands the release of the alleged defamer's name, the potential lawsuit must be at least a prima facie case against the defendant. The plaintiff would file the suit against the unknown defendant, John Doe, then request a subpoena for deposition and production of records related to the issue of identity of the

---

<sup>1</sup> Annemarie Pantaziz, Note, *Zeran v. America Online, Inc.: Insulating Internet Service Providers From Defamation Liability*, 34 WAKE FOREST L. REV. 531, 555 (1999)

alleged defamer under Federal Rules of Civil Procedure 30(b)(2).<sup>2</sup> Under rule 30(b)(2), a plaintiff can subpoena information related to a case from a non-party before the other party has been served or answered.<sup>3</sup> The victim plaintiff should only request documents from the website related to the issue of identity of the alleged defendant and nothing else until the defendant has been served with process.

If the lawsuit cannot surpass this, then the lawsuit had no merit and the website should not have to release their member's name and information. If the lawsuit passes the prima facie standard and upon proper request of the victim, the court should order the website to give the victim the user's information and the victim can re-file the suit against the creator of the content. At this point, the traditional common law analysis and burdens of a defamation action would be in effect between the victim and the creator of the content.

Obviously it would be hard for Congress to mandate what every website can or cannot do, especially if the website is maintained outside the U.S. However, by mandating websites keep records of its members and users, it would hopefully deter users from posting defamatory content, because possible creators of this type of content would know that their whereabouts could be traced and they could suffer tort liability for their actions.

---

<sup>2</sup> Fed. R. Civ. P. 30(b)(2).

<sup>3</sup> *Id.*

## LIST OF REFERENCES

17 U.S.C. §512 (1999).

47 U.S.C. §230 (1996).

141 CONG. REC. H8469 (1995) (statements of Rep. Cox and Rep. Wyden).

141 CONG. REC. H22,045 (1995)(Statement of Rep. Cox).

Andrea L. Julian, *Freedom Of Libel: How An Expansive Interpretation Of 47 U.S.C. § 230 Affects The Defamation Victim In The Ninth Circuit*, 40 IDAHO L. REV. 509 (2004).

Anderson v. New York Tel. Co., 35 N.Y. 2d 746, 748-749 (1976).

Andrew Lipsman, *Number of Online Videos Viewed in the U.S. Jumps 13 Percent in March to 11.5 Billion*, ComScore: Press Release, March 12, 2008, <http://www.comscore.com/press/release.asp?press=2223>.

Anthony v. Yahoo! Inc., 421 F.Supp. 2d 1257 (N.D. Cal. 2006).

Annemarie Pantaziz, Note, *Zeran v. America Online, Inc.: Insulating Internet Service Providers From Defamation Liability*, 34 WAKE FOREST L. REV. 531-555 (1999).

Arnold v. Sharpe, 296 N.C. 533 (1979).

Barrett v. Rosenthal, 146 P.3d 510 (Cal. 2006).

Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003).

BBC News, *Google Buys YouTube for 1.65 Billion*, October 10, 2006, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/business/6034577.stm>

BBC NEWS, *News Corp in \$580m Internet Buy*, July 19, 2005, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/business/4695495.stm>

Ben Ezra, Weinstein and Company v. America Online Inc., 206 F.3d 980 (10th Cir. 2000).

BLACK'S LAW DICTIONARY (8th ed. 2004).

Blumenthal v. Drudge, 992 F.Supp. 44 (D.D.C. 1998).

Brian C. McManus, *Rethinking Defamation Liability for Internet Service Providers*, 35 SUFFOLK U. L. REV. 647 (2001).

Bridges v. California, 314 U.S. 252, 270 (1941).

Bob Tedeschi, *New Hot Properties: YouTube Celebrities*, N.Y. Times, February 26, 2007, <http://www.nytimes.com/2007/02/26/technology/26ecom.html#>.

Bryan J. Davis, *Frontiers Of Law: The Internet Ad Cyberspace: Untangling The "Publisher" Versus "Information Content Provider" Paradox Of 47 U.S.C. § 230: Toward A Rational Application Of The Communications Decency Act In Defamation Suits Against Internet Service Providers*, 32 N.M.L. REV. 75 (2002).

Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003).

Carafano v. Metrosplash.com Inc., 207 F. Supp. 2d 1055 (C.D. Cal. 2002).

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942).

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 -272 (2000).

Cubby, Inc. v. Compuserve Inc., 776 F. Supp. 135 (S.D. N.Y 1991).

Curtis Publishing Co. V. Butts and Associated Press v. Walker, 388 U.S. 130, 162 (1967).

David Hallett, *How to Destroy a Reputation and Get Away With It, The Communications Decency Act Examined: Do the Policies and Standards Set Out In the Digital Millennium Copyright Act Provide a Solution For A Person Defamed Online?*, 41 IDEA 259- 281 (2001).

Doe v. America Online, Inc., 783 So.2d 1010 (Fla. 2001).

Doe v. Freindfinder Network, Inc., 540 F.Supp.2d 288 (D.N.H. 2008).

Doe v. MySpace, Inc., 474 F.Supp. 2d 843 (W.D. Tex. 2007).

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

Emily Fritts, Note, *Internet Libel and the Communications Decency Act: How Courts Erroneously Interpreted Congressional Intent with Regard to Liability of Internet Service Providers*, 93 KY. L.J. 765 -785 (2005).

Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).

Francis Buono & Johnathan Freidman, *Limiting Tort Liability for Online Third-party Content Under Section 230 of the Communications Decency Act*, 52 FED. COMM. L.J. 647 -665 (2000).

Gentry v. eBay, Inc., 121 Cal.Rptr.2d 703 (Cal. Ct . App 2002).

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

Green v. America Online (AOL), 318 F.3d 465 (3rd Cir. 2003).

H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.).

Jae Hong Lee, *Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-party Content on the Internet*, 19 BERKELEY TECH. L.J. 469 (2004).

Jason Feifer, *Video Makers Find a Vast and Eager Audience*, Telegram.com, June 11, 2006, <http://www.telegram.com/apps/pbcs.dll/article?AID=/20060611/NEWS/606110552/1011/FEATURES>.

Joshua Masur, *A Most Uncommon Carrier: Online Service Provider Immunity Against Defamation Claims in Blumenthal v. Drudge*, 40 JURIMETRICS 217- 225 (2000).

Kathleen R. V. City of Livermore, 104 Cal.Rptr.2d 772 ( Cal. Ct. App 2001).

Kimmerle V. New York Evening Journal, 262 N.Y. 99 (1933).

Koninsberg v. State Bar of California, 366 U.S. 36, 49 (1961).

Lawrence Reed, *Seven Principles of Sound Public Policy*, Mackinac Center for Public Policy, June 2006, available at: <http://www.mackinac.org/archives/2002/sp2002-01.pdf>.

Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyber Space*, 49 DUKE L.J. 855, 859 n.7 (2000).

Mary Madden, *Internet Penetration and Impact*, PEW INTERNET AND AMERICAN LIFE PROJECT (2006).

Matherson v. Marchello, 100 A.D.2d 233 (1984).

Matthew Hodge, *The Fourth Amendment and Privacy Issues on the New Internet: Facebook.com and MySpace.com*, 31 S. ILL. U. L. J. 95 (2006).

Matthew Schruers, *The History and Economics of ISPs for Third-Party Content*, 88 VA. L. REV. 205 -261 (2002).

Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 839 (9<sup>th</sup> Cir. 2001).

Michael Arrington, Tech Crunch, *Facebook No Longer the Second Largest Social Network*, June 12, 2008, <http://www.techcrunch.com/2008/06/12/facebook-no-longer-the-second-largest-social-network/>.

Michael Driscoll, *Will YouTube Sail into the DMCA's Safe Harbor or Sink for Internet Piracy?*, 6 J. MARSHALL REV. INTELL. PROP. L. 550 (2007).

MySpace, *About Us*, <http://www.myspace.com/index.cfm?fuseaction=misc.aboutus>, (last visited: November 5, 2008).

MySpace.com, *How Do I Add Color Graphics & Sound to My Profile Page?*, <http://www.myspace.com/index.cfm?fuseaction=misc.faq&Category=4&Question=7> (last visited: November 5, 2008).

MySpace, *How do I upload music to my page?*, <http://www.myspace.com/index.cfm?fuseaction=misc.faq&Category=1&Question=47>, (last visited: November 5, 2008).

MySpace, *MySpace Frequently Asked Questions*, <http://www.myspace.com/Modules/Help/Pages/HelpCenter.aspx?Category=2&Question=26> (last visited: February 15, 2009).

MySpace.com, *MySpace Terms of Use Agreement*, April 11, 2007, <http://www.myspace.com/Modules/Common/Pages/TermsConditions.aspx>.

MySpace, *Where do I Report Abuse and Inappropriate Content?*, <http://www.myspace.com/index.cfm?fuseaction=misc.faq&Category=3&Question=27> (last visited: November 5, 2008).

NLRB v. Amax Coal Co., 453 US 322, 329 (1981), *See also*, Perrin v. United States, 444 US 37, 42 (1979).

Near v. Minnesota, 283 U.S. 697, 715 (1931).

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Nichols v. Item Publishers, Inc., 132 N.E. 2d 860 (1956).

Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Creditability?: Lessons From the DMCA Applied to Online Defamation*, 25 CARDOZO ARTS & ENT. L.J. 237-265 (2007).

Ollman v. Evans, 750 F.2d 970 (D.C. Cir. en banc 1984).

Organization for Economic Co-Operative and Development, *Total Broadband Subscribers by Country*, June 2008, <http://www.oecd.org/sti/ict/broadband> (reporting that there are over 75 million broadband users in the United States).

Parker v. Google, Inc., 422 F. Supp.2d 492 (E.D.Pa. 2006).

Paul Ehrlich, *Regulating Conduct on the Internet: Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401 (2002)

Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309 (1977).

Pete Cashmore, *MySpace Hits 100 Million Accounts*, Mashable: Social Networking News, August 9, 2006, <http://mashable.com/2006/08/09/myspace-hits-100-million-accounts>.

Phila. Newspapers v. Hepps, 475 U.S. 767, 776(1986).

Prickett v. Infousa, Inc., 561 F.Supp. 2d 646 (E.D. Tex 2006).

Ratner v. Young, 465 F. Supp 386 (D.V.I. 1979).

Reference.com, *Wikipedia-User-generated\_content*.  
[http://www.reference.com/browse/wiki/User-generated\\_content](http://www.reference.com/browse/wiki/User-generated_content) (last visited: September 22, 2007).

Reno v. ACLU, 521 U.S. 844 (1997).

RESTATEMENT (SECOND) OF TORTS §558 (1977).

RESTATEMENT (SECOND) OF TORTS §559 (1977).

RESTATEMENT (SECOND) OF TORTS §564 (1977).

RESTATEMENT (SECOND) OF TORTS §570(1977).

RESTATEMENT (SECOND) OF TORTS §577 (1977).

RESTATEMENT (SECOND) OF TORTS §578 (1977).

RESTATEMENT (SECOND) OF TORTS §580B, cmt. b (1977).

RESTATEMENT (SECOND) OF TORTS §581(1977).

RESTATEMENT (SECOND) OF TORTS §613, cmt. d (1977).

RESTATEMENT (SECOND) OF TORTS §621(1977).

Robert M. O'Neil, *The Drudge Case: A Look At Issues In Cyberspace Defamation*, 73 WASH. L. REV. 623 (1998).

Romaine v. Kallinger, 109 N.J. 282 (1988).

Rosenblatt v. Baer, 383 U.S. 75, 95 (1966).

Roth v. United States, 354 U.S. 476, 486-487(1957).

Ryan W. King, *Online Defamation: Bringing the Communications Decency Act of 1996 in Line with Sound Public Policy*, 2003 DUKE L. & TECH. REV. 24 (2003).

Ryan Martin, *Freezing the Net: Rejecting the One Size Fits All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuit*, 75 U. CIN. L. REV. 1217, 1220 (2007).

S. REP. NO. 104-230, at 194 (1996) (Conf. Rep).

Sarah B. 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 (1998).

Sims v. Kiro, 20 Wash. App. 229 (1978).

Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1995).

Stephanie Blumstein, *The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act to the Libelous "Re-poster"*, 9 B.U.J. SCI. & TECH. L. 407-415 (2003).

Sewali Pater, *Immunizing Internet Service Providers from Third Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647 - 691 (2002).

Schneider v. Amazon.com, Inc., 31 P.3d 37 (Wash. Ct. App. 2001).

Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat. 56 (1996).

Ternisha Miles, *Barret v. Rosenthal: Oh, What A Tangled Web We Weave: No Liability For Web Defamation*, 29 N.C. CENT. L.J. 267 (2007).

The YouTube Blog, *YouTube Elevates Most Popular Users to Partners*, May 3, 2007, <http://youtube.com/blog?entry=4b3PkL8HQcw>.

Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

Tim Weber, *Now on YouTube: Google's Gambler*, BBC News, October 10, 2006, <http://news.bbc.co.uk/2/hi/business/6036023.stm> (reporting that in 2006 YouTube had over 72 million users).

Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976).

Times Film Corp. v. City of Chicago, 365 U.S. 48 (1960).

United States v. Associated Press, 52 F.Supp. 362, 372 (D.C.S.D.N.Y. 1943).

Universal Comm'n Sys., v. Lycos, Inc. 478 F.3d 413, 418 (1st Cir. 2007).

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORT §111, at 771-773 (5th ed. 1984).

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §112, at 789,795 (5<sup>H</sup> ED. 1984).

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §113, at 799,810 (5<sup>TH</sup> ED. 1984).

YouTube, LLC, *About YouTube*, <http://www.youtube.com/t/about> (last visited: November 5, 2008).

YouTube. *Catergories*, <http://youtube.com/categories> (last visited: November 18, 2008).

YouTube, LLC, *How Do Videos Get Featured?*, <http://www.google.com/support/youtube/bin/answer.py?answer=55751&topic=10509> (last visited: November 3, 2008).

YouTube, LLC, *Terms of Use*, <http://www.youtube.com/t/terms>. (last visited: November 3, 2008).

YouTube LLC, *What is YouTube?*, <http://www.google.com/support/youtube/bin/answer.py?answer=55749&topic=10509> (last visited: November 3, 2008).

YouTube, LLC, *YouTube Community Guidelines*, [www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines) (last visited: November 3, 2008).

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

Zeran v. America Online, Inc. 958 F.Supp. 1124,1126 (E.D. Va. 1997).

## BIOGRAPHICAL SKETCH

Adrienne Biddings is originally from Wilmington, North Carolina and received her Bachelors in Communications from the University of Miami in 2005. In May 2009, she received her Juris Doctor degree from the University of Florida Levin College of Law and a Master in Mass Communication from the University of Florida School of Journalism and Communication. Upon graduation, she became a staff attorney for the Institute of Public Representation in Washington, D.C.