COMMUNICATIONS DECENCY ACT § 230

By Paul Ehrlich

The Internet presents a unique set of problems for regulating harmful speech. Unlike traditional media, the typical arrangement of content distribution involves multiple users "logged in" to one of many servers run by an Internet Service Provider ("ISP"), or a website run by a similar entity. These users interact with one another with little or no supervision by the ISP itself. Interactions can take the form of bulletin board postings, e-mails, business transactions, and chat room discussions, to name a few.

While one would not expect harmful speech to confine itself to traditional media, certain characteristics of the Internet guarantee the prevalence of such speech in cyberspace. These features include ease of access, ability of any individual to publish, and relative anonymity. Whenever harmful speech does occur, it necessarily involves use of an ISP's servers and possibly another's website. Thus, a central question in regulating content on the Internet is the extent to which ISPs and other interactive computer services should be held liable for the torts and crimes of the individuals who use their servers.

Congress passed the Communications Decency Act ("CDA")[1] in 1996 to address the myriad problems surrounding the regulation of obscene, illegal, or otherwise tortious content found on the Internet. Many of the CDA's provisions regulating decency have been struck down by the courts as violations of the First Amendment.[2] One of the surviving elements is a congressional grant of immunity from suit to ISPs and other interactive computer services for content originating with third parties.[3]

The text of the statute relies on terms of art from the law of defamation, formally protecting interactive computer services from treatment as "publisher[s] or speaker[s]."[4] However, while defamation law recognizes a distinction between liability as a publisher and liability as a distributor,[5]

1. 47 U.S.C. § 223 (Supp. 2001).

2. *See* Reno v. ACLU, 521 U.S. 844 (1996) (holding portions of the CDA unconstitutional for its overbroad limitations on protected speech).

3. 47 U.S.C. § 230 (Supp. 2001).

4. *Id.* § 230(c)(1).

5. Publishers are presumed to have more control over material disseminated and are therefore subject to strict liability. Distributors are subject to liability under a knowl-

courts have unanimously read Section 230(c)'s grant of ISP immunity as covering both publishing and distribution liabilities.[6] In doing so, courts took Congress' desired balance between the competing interests of decency and efficiency and tipped the scales decisively towards efficiency.

The effect of these rulings has been the emergence of a comprehensive immunity from suit for ISPs so long as the suits are based on content not authored by the ISP. Whether or not Congress intended this result, ISPs and other interactive computer services have used Section 230 as a complete defense against recent suits brought by parents upset by child pornography marketed in ISP chat rooms,[7] copyright owners against eBay for facilitating sales of infringing recordings,[8] and taxpayers protesting the accessibility of pornography on public library computer terminals.[9]

After surveying the most recent of these Section 230 decisions, this Note will argue that the blanket immunity created by the courts is better than a regime of distributor liability for obscene speech, but may not be enough to combat defamatory speech. Combining immunity with a remedy that allows plaintiffs to reach the actual publisher of the defamation will best restore the balance Congress attempted to create.

I. THE PRE-CDA LANDSCAPE

Historically, the problem of harmful speech on the Internet inspired ISPs and others to limit its ill effects. For example, when a user signs a contract for Internet service, a "Terms of Service" agreement is typically included, reserving to the ISP the right to edit or remove postings that violate certain speech codes.[10] When users participate in fora like bulletin boards or chat rooms, an ISP-employed monitor can review user posts before or after they are made public. Also, the ISP can typically install a general filtering program that screens web pages for obscene words and

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edge or negligence standard. A brief discussion of the defamation categories appears in Part I.

6. *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997).

7. *See* Doe v. Am. Online, Inc., 783 So. 2d 1010 (Fla. S. Ct. 2001).

8. *See* Stoner v. Ebay, No. 305666, 2000 Extra LEXIS 156 (Cal. Super. Ct. Nov. 7, 2000).

9. *See* Kathleen R. v. City of Livermore, 87 Cal. App. 4th 684 (Cal. Ct. App. 2001).

10. The AOL Terms of Service Agreement in force circa *Zeran* gave AOL the right to remove posts and had a hold-harmless clause for their good faith efforts at editing. *See* David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 176 (1997).

phrases to keep them from the eyes of its users. In addition to centralized censoring, users have the option of installing screening programs on their own consoles.[11] Such filtering software is relatively effective, if not overzealous, at keeping obscenity from children.[12] It is not effective, however, at distinguishing defamatory speech from nondefamatory speech, or copyright-infringing content from its genuine counterpart. That responsibility inevitably falls to the bulletin board and chat room operators. The central question is whether this sometimes-nominal amount of control over content exposes the ISP to liability if some defamatory or obscene speech slips through the filter.

Prior to passage of the CDA, courts addressed this problem in the defamation context by placing the ISP in one of the traditional First Amendment categories of publisher, distributor, or common carrier. The law applies very different legal standards to these entities based on their control over the content they disseminate. Publishers, such as newspapers or book publishers, have the opportunity to exercise a great deal of control over the final content, and are therefore subject to a strict liability standard.[13] Distributors, such as booksellers, newsvendors, and libraries, merely distribute content and hence bear liability only upon a showing of knowledge or negligence.[14] Common carriers, such as the telephone companies, transmit information mechanically with no opportunity to review its content. Therefore, common carriers are not liable for the transfer of harmful data.[15]

ISPs do not fit cleanly into any single category, and courts attempting to characterize them have reached very different results. In 1991, a federal district court held in *Cubby v. CompuServe*[16] that an ISP which maintained a database containing an allegedly defamatory document would not be treated as a publisher for liability purposes.[17] Defendant CompuServe archived publications as part of its "Journalism Forum." The plaintiff claimed CompuServe ought to be held liable for republishing a libel con-

11. For a discussion of filtering technologies, see Whitney A. Kaiser, *The Use of Internet Filters in Public Schools: Double Click on the Constitution*, 34 COLUM. J.L. & SOC. PROBS. 49, 53-56 (2000) (discussing filters used by schools, though the same principles would apply to domestic uses).

12. *See id.*

13. *See, e.g.*, Cianci v. New Times Publ'g Co., 639 F.2d 54 (2d Cir. 1980).

14. *See, e.g.*, Lerman v. Flynt Distrib. Co., 745 F.2d 123 (2d Cir. 1984).

15. For a brief discussion of common carrier immunity, see Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65, 92-95 (1992).

16. 776 F. Supp. 135 (S.D.N.Y. 1991).

17. *See id.*

tained in one of the publications archived in CompuServe's database.[18] The court refused to find CompuServe a publisher, and instead likened its database service to an online library, with corresponding status as a distributor.[19] The court held CompuServe could only be liable if it knew, or had reason to know, of the defamatory statements.[20] Since the undisputed evidence demonstrated CompuServe had no such knowledge, the case was resolved via summary judgment.[21]

In 1995, however, the New York Supreme Court reached the opposite result in *Stratton Oakmont v. Prodigy Services Co.*[22] In *Stratton*, the plaintiff alleged that a popular Prodigy message board contained libelous statements. In finding Prodigy to be a publisher, the court noted Prodigy's policy of filtering offensive content from its service. The court distinguished the case from *Cubby*, finding that Prodigy held itself out as a family-friendly ISP with policies of monitoring and editing content. Therefore, the court found Prodigy to be a publisher for purposes of defamation.[23] The court reached this conclusion despite evidence that Prodigy had some two million subscribers and could not possibly screen each message manually.[24] Thus, even without knowledge of the defamatory statements, Prodigy would be strictly liable as a publisher.

These cases set up a paradoxical no-win situation: the more an ISP tried to keep obscene or harmful material away from its users, the more it would be liable for that material.[25] In order to avoid *Stratton* publisher liability, ISPs had to take a hands-off approach so they would appear to be mere distributors.[26] If, on the other hand, an ISP chose to create a family-friendly service, thereby opening itself up to publisher liability, it had a strong incentive to overfilter in an attempt to avoid litigation.[27] The post-*Stratton* regime offered ISPs and consumers the unappetizing choice between a lack of decency and a lack of free speech.

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18. *Id.* at 139.
19. *Id.* at 140.
20. *Id.*
21. *See id.*
22. No. 31063194, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995).
23. *Id.* at *13.
24. *Id.* at *8.
25. *See* Sheridan, *supra* note 10, at 158.
26. *Id.*
27. *Id.*

II. CONGRESS OVERTURNS STRATTON OAKMONT

In 1996, Congress stepped in by passing Section 230 of the CDA. It states, in relevant part:

(c) Protection for "good samaritan" blocking and screening of offensive material.

> (1) Treatment of publisher or speaker: No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
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> (2) Civil liability: No provider or user of an interactive computer service shall be held liable on account of—
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> (A) Any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
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> (B) Any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[28]

Section (c)(1) is clearly an attempt to settle the confusion about assigning defamation liability to ISPs, specifically overturning the result in *Stratton*.[29] Section (c)(2) seems directed only at promoting the use of filtering technology and editing. It was this type of "Good Samaritan" editing that opened Prodigy up to liability in 1995. Congress may also have been concerned about lawsuits from those who had their posts edited in good faith.[30]

On a broader scale, Congress acted with the twin goals of "remov[ing] disincentives for the development and utilization of blocking and filtering

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28. 47 U.S.C. § 230(c) (Supp. 2001). "Information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3) (Supp. 2001).

29. *See* S. CONF. REP. NO. 104-230, at 435 (1996) ("One of the specific purposes of this section is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own . . . .").

30. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 337 n.22 (4th Cir. 1997).

technologies,"[31] and "preserv[ing] the vibrant and competitive free market that presently exists for the Internet."[32]

III. THE COURTS INTERPRET THE CDA

While Congress tried to strike a balance between promoting decency and promoting free speech, recent court decisions interpreting Section 230 have emphatically tilted the scales in favor of free speech by removing distributor liability from ISPs entirely.

A. *Zeran* Creates Full Immunity for Interactive Computer Services

Shortly after passage of the CDA, the Court of Appeals for the Fourth Circuit handed down what has become the most influential interpretation of Section 230(c). In *Zeran v. America Online, Inc.*,[33] the court held that Section 230 constituted a complete bar to plaintiff's claims that AOL should be held liable as a distributor of defamatory statements made against the plaintiff on AOL's bulletin boards.[34]

Plaintiff Kenneth Zeran had been the target of a malicious campaign that had advertised his home phone number in connection with advertisement of tasteless t-shirts making light of the Oklahoma City bombing.[35] Zeran suffered days of threatening phone calls as a result.[36] He contacted AOL, and the message was eventually removed.[37] However, similar messages continued to reappear.[38] He again contacted AOL, and they assured him they were working to remove the posts and prevent further posts.[39] The messages continued for a week.[40] When an Oklahoma radio station picked up the story, Zeran's situation only got worse.[41] He eventually sued AOL alleging negligence in their inadequate response to his requests.[42]

Unlike the plaintiffs in *Cubby* and *Stratton*, Zeran was able to plead knowledge on the part of AOL. He argued that Section 230 only prohib-

31. 47 U.S.C. § 230(b)(4) (Supp. 2001).
32. *Id.* § 230(b)(2).
33. 129 F.3d 327 (4th Cir. 1997).
34. *Id.*
35. *Id.* at 329.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*

ited treatment as a publisher, and that he could therefore proceed against AOL under a distributor liability theory. The district court and Fourth Circuit Court of Appeals both ruled that distributor liability is a subset of publisher liability. As a result, Congress' prohibition on treating ISPs as publishers likewise foreclosed a finding of distributor liability.[43] In so holding, the courts concluded that even if AOL were to have notice of the defamatory activity, it would have no duty to remove the content.[44]

B. Recent Cases Follow the *Zeran* Analysis

Courts in recent cases have adopted the reasoning behind *Zeran* in contexts other than defamation. The Florida State Supreme Court held in *Doe v. America Online, Inc.*[45] that a mother's claims related to the advertising of child pornography videos involving her minor son were barred by Section 230(c).[46] While the defendant pornographer was convicted for his role in advertising the illegal videos in AOL chat rooms,[47] the court, following *Zeran*, ruled that AOL was immune from even distributor liability under the CDA.[48] All state criminal and civil law claims under such a distributor negligence theory are explicitly preempted by the CDA.[49]

In an unpublished opinion, the California Superior Court applied *Zeran* to the selling of copyright infringing sound recordings on eBay, a popular auction website. In *Stoner v. Ebay*,[50] plaintiff copyright owners brought claims against eBay for criminal sale of infringing sound recordings.[51] In addition, plaintiffs noted that eBay had knowledge that illegal sales occur, had the means to stop them, did not stop them, and in fact took a commission on these sales.[52]

Under the *Stoner* test, immunity would attach where: (1) the defendant is an interactive computer service; (2) the defendant is not an information content provider with respect to the disputed materials; and (3) the plaintiff must be trying to hold defendant liable for material originating with third parties.[53] The court found that eBay met these three criteria.[54]

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43. *Id.*
44. *Id.*
45. 783 So. 2d 1010 (Fla. S. Ct. 2001).
46. *Id.*
47. *Id.* at 1012 n.3.
48. *Id.* at 1017.
49. *See id.*
50. No. 305666, 2000 Extra LEXIS 156 (Cal. Super. Ct. Nov. 7, 2000).
51. *Id.* at *2.
52. *Id.*
53. *Id.* at *3-4.
54. *Id.*

Specifically, the court held that charging a fee for its service, combined with the knowledge of infringing sales, did not pull eBay out from under the aegis of federal immunity.[55]

CDA immunity has also been extended to protect a public library from a taxpayer suit brought to enjoin unfiltered Internet access for children at library terminals. In *Kathleen R. v. City of Livermore*,[56] the California Appellate Court found the library — specifically contemplated by Congress as an interactive computer service[57] — immune from all claims relating to obscene material originating on the Internet, including those of taxpayers.[58] While the court found that the library could not direct children to offensive material, it had no duty to filter offensive content.[59] In fact, where libraries have used filtering technology, they have been sued for violating the First Amendment.[60]

These recent cases demonstrate that courts interpreting § 230(c) of the CDA have erred on the side of broader immunity for providers of computer services as they grapple with the competing goals of Congress: promoting decency and the "vibrant and competitive free market"[61] of the Internet.

IV. DISCUSSION

The recent court decisions stripping liability from the CDA probably run counter to the intent of Congress. However, in evaluating whether the congressional method of liability or the court-enforced regime of immunity is better suited to deal with harmful speech on the Internet, this Note will argue that harmful speech can be separated into distinct categories that require different treatment. While immunity is a good solution to the problem of obscenity generally, the problem of defamation can only be solved either through a return to distributor liability (costly to free speech) or, more preferably, the weakening of anonymity for defamatory posters.

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55. *Id.* at *5-6.
56. 87 Cal. App. 4th 684 (Cal. Ct. App. 2001).
57. *Id.* at 692 (citing 47 U.S.C. § 230(f)(2)).
58. *Id.*
59. *Id.*
60. *See* Mainstream Loudoun v. Bd. of Trustees of Loudoun County Library, 24 F. Supp. 2d 552 (E.D. Va. 1998).
61. 47 U.S.C. § 230(b)(2) (Supp. 2001).

A. Full Immunity Is Not the Solution Congress Intended

Based on the legislative record, it appears that Congress never contemplated completely shielding ISPs from liability.[62] First, the plain text of the immunity provision does not expressly preclude distributor liability. Second, the legislative history of the CDA and the law's responsiveness to the split between *Cubby* and *Stratton* suggest that Congress intended ISPs to bear some liability for the acts of their users.

1. The Text Supports the Survival of Distributor Liability

The plain text of Section 230(c)(1) forbids treatment of interactive computer services as the "publisher or speaker" of content posted by third parties.[63] While Congress could have explicitly barred all claims against interactive computer services for all information originating with third parties, it did not do so. By taking care to specify the terms of art "publisher" and "speaker," the statute can easily be read as respecting the pre-existing defamation categories of publisher and distributor liability.

The court in *Zeran*, however, chose to interpret the term "publisher" as *encompassing* distributor liability.[64] The court cited Section 577 of the Second Restatement of Torts for the proposition that distributor liability is merely a subset of publisher liability.[65] As many have pointed out, however, including the dissent in *Doe v. America Online, Inc.*, the *Zeran* court ignored Section 581(1) of the Restatement, which better addresses the problem at hand.[66] That section states: "One who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character."[67] Clearly the Restatement recognizes a category of distributor liability separate from publisher liability. The *Zeran* court's interpretation, however, ignored this distinction.

The presence of Section 230(c)(2) further lends support to this hypothesis. Section 230(c)(2) fits within the larger goal of the CDA of pro-

62. Commentators, judicial and otherwise, have argued that Congress never contemplated full immunity. *See, e.g.*, Doe v. Am. Online, Inc., 783 So. 2d 1010, 1028 (Fla. S. Ct. 2001) ("[I]t is inconceivable that Congress intended the CDA to shield from potential liability an ISP alleged to have taken absolutely no actions to curtail illicit activities in furtherance of conduct defined as criminal, despite actual knowledge. . . .") (Lewis, J., dissenting).

63. 47 U.S.C. § 230(c)(1) (Supp. 2001).

64. Zeran v. Am. Online, Inc., 129 F.3d 327, 332-34 (4th Cir. 1997).

65. *Id.* at 332.

66. *See, e.g.*, Doe v. America Online, Inc., 783 So. 2d 1010, 1021-23 (Fla. S. Ct. 2001) (Lewis, J., dissenting) (discussing applicability of Restatement § 581).

67. RESTATEMENT (SECOND) OF TORTS § 581(1) (1977).

moting decency by encouraging action on the part of ISPs. Section 230(c)(2) removes all disincentives for using filtering software, directly immunizing interactive computer services for voluntary acts of filtering or making such technology available.[68] Some, including the *Zeran* court, speculate that this protection is aimed primarily at barring suits from those whose content was filtered.[69] It seems, however, to answer the Catch-22 presented by *Stratton* — penalizing for indecency only those who tried to maintain decency. Therefore, it would seem an incongruent result for Section 230(c)(1) to make 230(c)(2) irrelevant by removing all penalties regardless of filtering attempts or the lack thereof.

2. *An Examination of the Legislative Backdrop Militates Against Full Immunity*

The legislative history behind passage of the CDA also demonstrates that Congress did not want to give full immunity to ISPs. The CDA clearly intended to overturn the result in *Stratton*.[70] That desire, however, did not necessarily extend to overturning the court's separation of distributor and publisher liability, particularly because distributor liability was not even at issue in *Stratton*.[71] In fact, the language of the statute appears to mirror *Stratton*'s exclusive focus on publisher liability.

The two important cases that preceded passage of the CDA both recognized the distributor/publisher distinction. *Cubby* and *Stratton* both distinguished between distributor and publisher liability.[72] The former required knowledge on the part of the defendant while the latter did not. Since neither court was presented with a situation where the defendant had actual knowledge, neither actually found an ISP liable as a distributor. The

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68. 47 U.S.C. § 230(c)(2) (Supp. 2001)

No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected, or any action taken to enable or make available to information content providers or others the technical means to restrict access to material described [above].

69. *See* Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997).

70. *See supra* note 29 and accompanying text.

71. *Stratton* had little trouble finding Prodigy to be a publisher, so presumably "overturning" *Stratton* could only mean reversing the result of finding publisher liability, not the question of whether Prodigy could also have been found liable under a distributor theory. Stratton Oakmont v. Prodigy Servs. Co., No. 31063194, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995).

72. *See* Cubby v. Compuserve, Inc., 776 F.Supp. 135, 139-40 (S.D.N.Y. 1991) (discussing different standards of liability for publishers and distributors); *Stratton*, 1995 N.Y. Misc. LEXIS at *6-7 (discussing difference between publishers and distributors).

court in *Cubby* ruled simply that CompuServe was akin to a library, and thus was not a publisher.[73] Without an allegation of knowledge, CompuServe was not liable. The court in *Stratton* went the other way, ruling Prodigy to be a publisher.[74] Prodigy was thus liable without a showing of knowledge, due to its attempts at editing.[75]

The timing of the CDA is also instructive. *Stratton* was decided a year before the CDA. *Cubby*, however, was decided in 1991, five years prior to the CDA. The acquiescence by Congress to the result in *Cubby* could demonstrate a lack of concern to imposition of distributor liability. Combined with the directed language of Section 230, this legislative silence, broken only by the result in *Stratton*, provides good evidence of the desire to overrule only the imposition of publisher liability on ISPs.

This legislative history implies that Congress tried to take the middle road between full liability, a disincentive to filter, and zero liability, a lack of incentive to filter. Courts, on the other hand, have dismissed this balance and clearly favor the latter. The remainder of this Section will argue that this choice, while contrary to Congress' intent, is actually in the best interest of the public.

B. Full Immunity Better Serves the Public and the Objectives of Congress

Even though Congress was reluctant to choose the extreme result of zero liability, the courts may have come closer to the correct solution. Assessing the correctness of this approach, however, requires an examination of two very different categories of indecent speech. On one side is the diffuse problem of obscene speech, targeted by much of the rest of the CDA. On the other side is the problem of defamation and similar offenses. The two are analytically distinct because with obscenity the harm is spread over a wide range of victims, whereas with defamation the harm is concentrated in one individual. Part III.B.1 will argue that the blanket immunity created by *Zeran* seems a good fit for obscenity because market forces in response to the use of filtering technologies are sufficient to handle the spectrum of personal tastes implicated by obscene speech. Part III.B.2 will argue these market forces are not sufficient to handle the problem of defamation. Instead, it will propose two possible solutions to the defamation question: (1) a return to distributor liability; or (2) retention of *Zeran*

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73. *See Cubby*, 776 F. Supp. at 140 ("CompuServe's CIS product is in essence an electronic, for-profit library . . . .").

74. *See Stratton*, 1995 N.Y. Misc. LEXIS at *13.

75. *See id.* ("It is PRODIGY's own policies . . . which have altered the scenario and mandated the finding that it is a publisher.").

immunity plus a reduction of anonymity for the actual posters of defamatory material. This Note will conclude by arguing that this proposition of "immunity plus" could be a robust solution to Internet defamation while avoiding the significant costs to free speech inherent in distributor liability.

1. Regulation of Obscenity is Best Left to the Market

It should first be noted that obscenity in general triggers fewer lawsuits than defamation. This is because the harm from obscene speech is spread over many individuals, and collective action problems prevent much litigation. Nevertheless, cases like *Kathleen R.* would force a response on the part of ISPs in the absence of full immunity. This response would most likely come in the form of filtering software designed to reduce the amount of obscenity placed on the ISP's server. Many believe the removal of liability killed all ISP incentives to filter, thwarting Congress' goal of reducing indecency.[76] Contrary to this belief, full immunity unleashes a powerful motive to reduce indecency — the market itself.

Section 230 should merely be seen as trading a stick for a carrot. Although free from potential suits for indecency, the market will still encourage internet service providers to filter where appropriate. There are several reasons to believe this to be true. First, the bright-line rule of immunity will remove uncertainty and thereby stimulate innovation. Second, the unique characteristics of Internet speech and mobility will quickly guide the market toward equilibrium. The net result will be a general level of filtering consistent with Internet community norms.

First, the elimination of distributor liability removes the last source of uncertainty for ISPs in their attempts to self-regulate. This uncertainty was costly for several reasons. Since litigation is a fickle game, ISPs could not be sure what content would lead to successful claims. Great costs must be incurred up front to prevent litigation. This cost could be borne by the ISPs in the form of costly screening, or by the Internet in the form of suppressed speech. Furthermore, leaving liability to turn on a reasonableness test in the courts imposes a costly uncertainty. As litigation drags on for months, court definitions of reasonable conduct will become stale at Internet speed. Add to this the fact that ISPs will be defending against suits in

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76. *See, e.g.*, Annemarie Pantazis, *Zeran v. America Online, Inc.: Insulating Internet Service Providers from Defamation Liability*, 34 WAKE FOREST L. REV. 531 (1999) (advocating a return to distributor liability); Andrew J. Slitt, *The Anonymous Publisher: Defamation on the Internet After Reno v. American Civil Liberties Union and Zeran v. America Online*, 31 CONN. L. REV. 389, 420 (1998) ("[A] total isolation of ISPs from the realm of defamation law, as Section 230 of the CDA does, is poor policy.").

dozens of different jurisdictions, each with its own common law definitions of distributor liability, and the result is a morass of confusing or even conflicting regulation.[77] ISPs will have no incentive to experiment with their filtering technology. They will merely gravitate toward the lowest common denominator of speech in order to achieve certainty.

A bright-line rule saves ISPs from this downward spiral. Immunity significantly reduces the disincentives of trying newer, possibly cheaper, filtering technologies. A vibrant market in such technologies would spur ISPs to keep pace with innovation without forcing them to look over their shoulders for the courts.

The second reason why obscenity is best regulated by the market is that low costs of information and movement allow the market to reach equilibrium quickly. The low costs of communication on the Internet ensure that consumer voices will be heard. If an ISP institutes a new filtering policy that angers its users, it can expect a flood of e-mails. Furthermore, users can easily switch services, choosing ISPs with filtering policies to suit their tastes. If large, national providers are not sensitive to community tastes, small providers with more or less permissive policies can fill the void. This is even truer of interactive computer services that are websites. The barriers to movement between websites are virtually nonexistent. Section 230 also encourages the development of technologies that allow individual users to filter locally. To the extent there is market demand for a decent Internet, interactive computer services will provide it, or allow users to customize it.

The net result of these market forces will be the demise of overfiltering. No interactive computer service will remove too much speech because it will never face liability for leaving such speech alone. It may have strong *disincentives* to remove too much, however, because there are significant business reasons to avoid a reputation for censorship.[78] At equilibrium, there will be a very low amount of top-level filtering by the large services, with local filters allowing for personalized access. This may be exactly what Congress intended.

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77. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) (pointing out that states have different standards for defamation actions since defamation is an amorphous common law tort).

78. *See* Sheridan, *supra* note 10, at 176-77 ("[A] service that removes members' postings without any investigation is likely to get a bad reputation in a community whose first value is the free flow of information.").

2. *Defamation Presents Unique Problems Not Solved by Immunity Alone*

Unfortunately, the problem of defamation is wholly unlike the problem of obscenity. Obscenity is diffuse and easily addressed with personalized software. However, in cases of defamation or copyright infringement, the harm is felt most acutely by a single individual and cannot be avoided with local filtering.[79] Even if one takes precautions to choose the right ISP and filtering tools, defamation can occur on a more permissive ISP and still harm the individual. Under a distributor liability regime, if the individual notified the other ISP of the defamation, the ISP would have a duty to take reasonable steps to remove it.[80] Because the ISP would be required to internalize the individual's cost, the ISP may take steps to prevent the harm in the first place, or at least mitigate the harm. Under a regime of full immunity, the ISP has no duty to internalize these costs. The ISP will thus filter at too low a level to prevent or mitigate acute individual harm.

As a result, applying full immunity to defamatory speech seems to leave victims both without a way to reduce the amount of defamation on the Internet and without recourse against the perpetrators.[81] As such, full immunity cannot resolve problems associated with defamatory speech. However, there are two alternatives that may bridge the gap between defamation and indecency. Congress could either reinstate distributor liability for ISPs or accept full immunity but give victims better access to the sources of defamation by creating a qualified removal of anonymity for defamatory posters.

a) Distributor Liability

One way to address the problem of defamation would be a return to distributor liability for the specific problem of defamation. Congress has

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79. Presumably Zeran could have had a filter on his computer to screen all obscenity or even references to Oklahoma City but it would not have prevented him from receiving threatening phone calls.

80. *See* Sheridan, *supra* note 10, at 172-74 (stating plaintiff must show notice and failure to remove defamation).

81. There may be reasons to think the current regime of full immunity would still provide some relief to victims. Defamation may create market forces friendlier to victims. Acquiescence to acts of defamation by an ISP will probably receive a negative public response. Since the Internet allows anyone to publish, an individual who is defamed can notify the public of the ISP's bad behavior in not removing posts. This could either shame the ISP into acting in other cases or drive business to other services. If such complaints become widespread, the level of ISP action will slowly rise. While this is not a complete answer to the victims of defamation, at a minimum the market will not ignore their plight.

already employed this solution in the copyright context. The Digital Millennium Copyright Act of 1998 ("DMCA")[82] imposes distributor liability for services that fail to take steps to remove infringing material from their sites.[83] Copyright infringement and defamation are alike in that a single individual suffers the harm resulting from the activity. However, even apart from the significant differences between copyright infringement and defamation,[84] the propriety of applying distributor liability to defamation is completely dependent on its cost-effectiveness. That is, regulations must still allow businesses to turn a profit. The following four scenarios illustrate this point:

In scenario 1, interactive computer services choose not to filter much defamatory content, even with notice. This leaves them open to distributor liability, but the cost of paying tort damages to the victims is lower than net revenues. Result: the Internet remains indecent, but some of the harmed parties are compensated.

In scenario 2, interactive computer services choose not to filter, but the cost of damages exceeds revenue. Result: this situation is clearly not sustainable as the services go out of business as a result of liability.

In scenario 3, interactive computer services filter to the extent they have knowledge, but even this amount of filtering costs more than the services earn in revenue. Result: this situation is also not sustainable as the services go out of business.

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82. 17 U.S.C. § 512(c) (Supp. 2001).

83. The DMCA uses distributor liability to place the burden on the interactive computer service to remove infringing material. Services that comply with requests to remove are protected from liability in a "safe harbor" arrangement. *Id.*

84. While defamation may seem enough like copyright infringement to merit similar treatment in terms of liability, substantial differences exist. First, the market is truly incompetent in reducing the amount of infringing material online. Since it is possible to post and download perfect digital copies of copyright-protected works for free, there is a strong market incentive to evade copyright protection. High-profile examples, such as Napster, highlight the danger of removing liability from the interactive computer services. Defamation may create market forces friendlier to victims. Acquiescence to acts of defamation by an ISP will probably receive a far more negative public response than similar conduct toward copyright infringement.

Second, there is a far greater risk that attempts to squelch defamation will have a chilling effect on speech. Defamatory speech is hard to separate from non-defamatory speech. This will make it more costly to identify the statements for which suppression is appropriate. High costs in screening make it more likely that ISPs will err on the side of suppressing speech. However, speech that is close to being defamatory but turns out to be innocent is part of a valuable discourse that Congress was trying to protect. Content that exists at the boundaries of copyright is less valuable "speech" in this regard.

In scenario 4, interactive computer services filter, and the cost of filtering plus whatever damage awards they lose is less than revenue. Result: the Internet is a more decent place.

It should be clear that only scenario 4 promotes both goals of decency and the free market in a sustainable way. Scenario 1 allows the survival of ISPs but at the cost of decency. Scenario 3 allows for a decent Internet but with the loss of the services themselves. Only scenario 4 allows the survival of both the Internet and the goal of decency.

Commentators that support retention of distributor liability suggest that scenario 4 would be the natural result of such a policy.[85] However, there is little reason to expect this to be the case. While noting the incredible and constantly expanding volume of communications on the Internet, such commentators disregard the cost to ISPs of removing harmful posts.[86] Merely noting that such removal would only occur after notice is given is no answer. ISPs would be required to investigate the truth of allegedly harmful posts before removal.[87] This would be done to avoid removing protected speech. The sheer volume of posts on a service like AOL makes this a daunting task, costing untold man-hours of labor.[88]

Making the job more difficult would be the explosion in recall requests once the threat of liability became public.[89] With the knowledge that ISPs will be on the hook for any harmful content that remains on their servers after notice is given, mischievous users need only give notice to harass an ISP into retracting marginally- or nonoffensive materials. The removal of some posts will trigger demands for the removal of others.[90] An ISP could thoroughly investigate all of these requests for bad faith in order to deter users from making the requests, but this raises costs even further. The easiest way for ISPs to keep costs down, and thus stay within scenario 4, is to investigate at a low level and filter at a high level, under a "better safe than sorry" theory.[91] This overfiltering approach will inevitably place a

85. *See, e.g.*, Pantazis, *supra* note 76, at 555 ("[I]t is not altogether infeasible to require an ISP that profits from the dissemination of communication to respond to reasonable requests for deleting content and terminating accounts.").

86. *See id.* at 552 (discussing why AOL should not be held a publisher since "[i]t would be impossible for AOL to verify and review messages posted by its over nine million subscribers," but advocating that AOL should still be held liable as a distributor.)

87. Sheridan, *supra* note 10, at 176.

88. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) (finding that the screening of millions of postings for defamation was impossible and would produce a chilling effect on speech).

89. Sheridan, *supra* note 10, at 176.

90. *Id.*

91. *Id.* at 175.

heavy burden on free speech[92] since the ISPs will suppress much decent speech in an act of overzealous self-preservation. Such a result completely defeats the balance struck in scenario 4 by ensuring the decline of the "vibrant free market" of the Internet.

b) Eliminating Anonymity for Defamatory Posters

Since a major goal of Section 230 was preserving the free market of speech on the Internet, eliminating the incentive to overfilter seems a better solution. The market alone, however, is not a complete answer since it lacks incentives to reduce the amount of defamation and mechanisms to compensate victims. This is because the Internet makes it possible for many perpetrators to remain anonymous.[93] In cases like *Zeran*, the plaintiff has no recourse against the actual offender because ISP policies may prevent disclosure of identity or allow access to those who do not provide any identifying information.[94] The offending user may also operate outside the easy reach of the law, from a foreign country, for example. Even in cases where the perpetrator is identifiable, the plaintiff may still not be compensated if the offender is insolvent.

The real obstacle for victims is not the absence of distributor liability for ISPs. Rather, it is the cloak of anonymity available to bad actors.[95] Therefore, a more direct solution might be regulation that allows a victim to lift the veil and reach a culprit's identifying information. Current law rarely permits a plaintiff to reach an anonymous poster.[96] Victims of defamation should be able to obtain a declaratory judgment that the disputed content is defamatory. This judgment would then be enforced against the ISP to compel production of the poster's identity.[97] The victim could then proceed against the actual perpetrator for damages and other relief.

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92. *Id.* at 178 ("[A]nything but absolute immunity inevitably results in the chilling of some speech.").

93. *See generally* Slitt, *supra* note 76.

94. *See* Slitt, *supra* note 76, at 419 (describing AOL's negligence primarily in terms of allowing 30-day trial access to anonymous users).

95. *See id.* ("[T]he real problems are the anonymously communicated messages whose authors are not discernable.").

96. *See id.* at 416-17 (citing *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), which held that Ohio's attempt to prevent anonymous web posting was unconstitutional).

97. As one commentator has pointed out, legislating mandatory disclosure would be hard to reconcile with *McIntyre*. *See id.* at 420. Perhaps since the user lists in my example would only be available after a showing of defamation (i.e., speech not protected by the First Amendment), the Court may be willing to allow disclosure of identity.

Combined with the general immunity for ISPs, weakening the shield of anonymity will have four positive effects: 1) it will compensate many victims by holding accountable the party actually responsible for the defamation; 2) it will produce a deterrent effect on defamatory speech that distributor liability lacks; 3) it will encourage victims of defamation to mitigate damages; and 4) it will avoid the chilling effects on innocent speech that plague ISP liability.

First, allowing anonymity to be pierced in limited circumstances permits victims to recover from the "publisher or speaker" of the harmful material. Whether or not it would result in more compensation than under a distributor liability regime depends on several complex factors, including how many anonymous posters are still unreachable or are insolvent, and whether negligent ISP inaction causes a relatively large or small amount of damage.[98] In either case, holding the source of the defamation liable for all damages produces a fairer result than holding the medium of communication liable for all damages.[99]

Second, holding the source liable also produces a targeted deterrent effect.[100] Knowing they can be identified by the ISP if proven responsible, posters of defamatory material will be discouraged from publishing in the first place.[101] Anonymous posters in a distributor liability system have no such disincentive because victims will go after the deep pockets of the ISP. Even in cases where the poster is insolvent or outside the court's jurisdiction, courts could craft remedies that will deter defamatory speech.

Third, removing the ability of victims to sue ISPs also creates an incentive for them to mitigate damages. Internet users have the capability to respond quickly to negative posts. If the ISP causes additional damages by letting negative posts remain online, users can mitigate these damages by responding vigorously. The Supreme Court recognizes a higher standard of fault required for proving defamation to public figures based on superior access to response channels.[102] To the extent that Internet access is becoming pervasive, all individuals may have this heightened level of ac-

98. *See* Sheridan, *supra* note 10, at 173 (noting most defamation damages would occur before the ISP becomes responsible for removing the posting).

99. Even Congress recognized that responsibility attached primarily to the actual publisher or speaker: immunity vanishes if the ISP is in fact the information content provider. 47 U.S.C. § 230(c)(1) (Supp. 2001).

100. *See* Sheridan, *supra* note 10, at 173 (noting Zeran had no way to identify the poster and thus no way to pass along the cost).

101. *See* Slitt, *supra* note 76, at 420 ("Moreover, knowing that their identities were already retrieved and on file would discourage potential tortfeasors from acting under the cloak of anonymity.").

102. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

cess when defamed on the Internet. Users would have little incentive to mitigate the damages if they could sue the ISP for those additional damages.

Finally, and perhaps most importantly, removing both liability and anonymity would have a much smaller chilling effect on free speech. One could argue that anonymity is vital to a vibrant discourse on the Internet.[103] Even so, anonymity would only be removed if statements were proven to be defamatory or otherwise unlawful. Since that type of speech is not protected by the First Amendment outside of the Internet, discouraging its existence on the Internet is not problematic. At the very least, a specific disincentive is preferable to the broad filtering distributor liability would promote.

V. CONCLUSION

In passing Section 230 of the Communications Decency Act, Congress tried to achieve the disparate goals of combating indecency and maintaining the free marketplace of ideas. However, the distributor liability regime suggested by Section 230(c) disproportionately burdens the free market. Courts responded by removing liability, but a regime of full immunity seems a poor way of promoting decency. Only by granting immunity and simultaneously allowing injured parties to reach anonymous posters can both goals be effectively realized.

103. Andrew Slitt makes such an argument, noting the elimination of anonymity on the Internet is not an option in practical or legal terms. He goes on to say that "[t]ime and again citizens choose to cloak their voices in the protection of anonymity, or elect not to speak at all." Slitt, *supra* note 76, at 416.