IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

KENNETH M. ZERAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 96-1564-A
	)	
AMERICA ONLINE, INC.,	)	
	)	
Defendant.	)	
	)	

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

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

Section 230 of the 1996 Communications Decency Act ("CDA"), 47 U.S.C. § 230, prohibits tort actions that seek to treat an interactive computer service provider such as AOL as "the publisher or speaker" of content provided by others.[1/] Because holding AOL

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

liable for posted messages that are in no way attributable to AOL would treat AOL as "the publisher or speaker" of those messages, the CDA bars Plaintiff's claims.

FACTUAL AND PROCEDURAL BACKGROUND

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

According to the Complaint,[2/] on April 25, 1995, a "currently unidentified person" using the screen name "Ken ZZ03"[3/] posted on AOL's interactive computer service a message advertising "Naughty Oklahoma T-Shirts" with "grossly offensive" slogans referring to the bombing of a federal building in Oklahoma City. (Complaint ¶ 5.) The posting indicated that anyone interested in the t-shirts should contact "Ken" and provided a phone

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2/ For purposes of a Rule 12(c) motion, the allegations in the complaint are accepted as true and "construed favorably to the plaintiff." Bruce v. Riddle, 631 F.2d 272, 273 (4th Cir. 1980). By reciting Plaintiff's allegations, AOL does not concede the truth of those allegations beyond any facts already admitted in its Answer.

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

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

After being contacted by Zeran, AOL deleted the posted message. (Id. ¶ 10.) Over the next three days (from April 26 until April 28, 1995), an unidentified person (or persons) using two slightly different screen names posted three similar messages. (Id. ¶¶ 10, 15, 26.) During this period, Zeran allegedly communicated with AOL on a number of occasions in an effort to have the messages removed. (Id. ¶¶ 12-14.) Zeran claims he received additional calls about the messages from individuals who saw or heard about the postings, including three from reporters. (Id. ¶¶ 9, 11-13, 18.) The reporters are not alleged to have done any stories on the incident, apparently because Zeran informed them that he was not connected with the messages. (Id. ¶¶ 9, 11, 18.)

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

Plaintiff does not allege that any of the messages at issue remained on AOL's interactive computer service after May 1, 1995, or that any new offensive messages were posted after that date. (Id. ¶ 26.) Plaintiff does not allege that any particular message remained available on AOL's service for longer than three days.[4/] Although Plaintiff claims that he continued to receive calls about the incident until May 14, 1995, he admits that some of those calls were apologies and even offers of assistance in the event of litigation. (Id. ¶¶ 29, 34, 36-39.)

On January 4, 1996, Zeran filed suit in federal district court in Oklahoma against the owner of radio station KRXO.[5/] In that suit, he alleges that the station's broadcast in which Shannon read aloud portions of one of the posted messages constituted defamation, false light invasion of privacy, and intentional infliction of emotional distress. The suit against KRXO remains pending in Oklahoma.

On April 23, 1996, several months after suing KRXO, Plaintiff filed this separate action against AOL in the same Oklahoma district court. His complaint alleges that, upon notice that the first posting about Oklahoma City t-shirts was a hoax, AOL had a duty to

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

5/ Zeran v. Diamond Broadcasting, Inc., No. CIV-96-0008-T (W.D. Ok.).

take reasonable care not only to remove the posting, but also to notify all AOL subscribers that the posting was fraudulent, and to employ some screening mechanism to prevent further postings containing his name or telephone number. (Id. ¶¶ 42-43.) The Complaint posits these duties on the basis of a single district court decision applying the law of New York (id. ¶ 43), a state whose law does not govern this suit.

On October 16, 1996, the district court in Oklahoma entered an order granting AOL's motion to transfer the case to this Court.[6/]

ARGUMENT

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

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

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

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

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

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

Section 230 of the CDA states that

> [n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c)(1). It further provides that

> No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

Id. § 230(d)(3).

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

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

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

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

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

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

As the text of Section 230 states, Congress found that "interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" and that these services had "flourished, to the benefit of all Americans, with a minimum of government regulation." Id. §§ 230(a)(3)-(4) (emphasis added). As a result, the explicit goal of Section 230 is "to promote the continued development of . . . interactive computer services" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." Id. §§ 230(b)(1)-(2) (emphasis added). Congress recognized that a regulatory regime under which interactive computer service providers faced potential liability as publishers or speakers of content produced by

others inevitably would lead such providers to censor the content of speech on their networks to avoid the risk of liability, or even cause some providers to stop offering their services altogether. Such a course would impede the diversity and vibrancy of discourse in cyberspace. To avoid suppressing the development of interactive services in this manner, Congress granted these service providers immunity from tort liability for content provided by others.

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

The legislative history of Section 230 further confirms that Congress decided that state laws should not address the problem of tortious and harassing computer speech by making interactive computer service providers such as AOL liable for third-party content.

Legislators understood that interactive service providers could not as a practical matter edit third-party content in the same manner as do publishers of books or newspapers:

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

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

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

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

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

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

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

If Zeran had cast his claim against AOL as a defamation claim, as he did in his parallel lawsuit against radio station KRXO, it obviously would fall within the proscription of Section 230. The basic elements of any claim for defamation include that the defendant be the "publisher" of the statement that is the subject of the lawsuit and that he have "publishe[d]" it with a level of fault amounting to (at least) negligence. See Restatement (Second) of Torts, § 558 (1977). Therefore, a fortiori, had Zeran sued AOL for defamation, his claim would have been barred by Section 230's prohibition of suits seeking to treat an interactive computer service "as the publisher . . . of any information provided by another information content provider."

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

In analogous contexts, courts have routinely rejected attempts by creative litigants to evade the many protections that the law affords to defamation defendants by repackaging defamation claims in the guise of other torts. See Hustler Magazine v. Falwell, 485 U.S. 46, 56-57 (1988) (plaintiff cannot circumvent First Amendment defenses to defamation action by pleading a claim for intentional infliction of emotional distress); Moldea v. New York Times Co., 22 F.3d 310, 319 (D.C. Cir.), cert. denied, 115 S. Ct. 202 (1994) (plaintiff may not "avoid the strictures of the burdens of proof associated with defamation by resorting" to an alternative tort (quoting Moldea v. New York Times Co., 15 F.3d 1137, 1151 (D.C. Cir. 1994)). "Without such a rule, virtually any defective defamation claim . . . could be revived by pleading it as one

for [another tort]." Dworkin v. Hustler Magazine, Inc., 668 F. Supp. 1408, 1420 (C.D. Cal. 1987), aff'd, 867 F.2d 1188, cert. denied, 493 U.S. 812 (1989) (rejecting claim for intentional infliction of emotional distress). For the same reasons that courts have traditionally blocked plaintiffs from evading common law and First Amendment constraints on defamation claims through tricks of pleading, Section 230 must be construed to bar Zeran's "negligence" claim.

The conclusion that Section 230 encompasses -- and thus bars -- Plaintiff's "negligence" claim is underscored by the very case that he posits as the source of the "duty to screen" that he alleges AOL negligently failed to meet, namely Cubby, Inc. v. Compuserve Inc., 776 F. Supp. 135 (S.D.N.Y. 1991). Zeran alleges that this case, decided more than four years before enactment of Section 230 by a district court applying the common law of New York, created a duty for interactive computer services, "after due notice," to "screen incendiary, defamatory and/or bogus material" posted by third persons. (See Complaint ¶ 43.) The Court in Cubby held that Compuserve, another interactive computer service, could not be liable in tort for defamatory content posted on its system by a third party absent evidence that it knew or had reason to know of the defamatory statements. 776 F. Supp. at 140-41. Zeran leaps from this holding to the novel proposition -- unrecognized by any court in any jurisdiction -- that an interactive computer service that receives a complaint about an allegedly defamatory message posted on its system has a duty not merely to remove that message, but also to intervene to prevent any and all persons who use its service from posting any subsequent messages that repeat the alleged defamation. (Complaint ¶¶ 42-44.)

Even assuming for the sake of argument that Cubby would have supplied a basis for holding AOL liable in the absence of Section 230,[7] a tort action based upon a duty allegedly deriving from Cubby plainly is barred by Section 230's prohibition of lawsuits that treat an interactive computer provider as the "publisher" of third-party content. The entire analysis of the court in Cubby revolved around whether Compuserve could lawfully be treated as the publisher of defamatory content posted by third parties, such that it could be held liable on claims of libel, business disparagement, or unfair competition. Thus, the Cubby court stated that the central issue with respect to the libel claim was whether or not there was a sufficient factual basis to subject Compuserve, as a distributor of third-party information, to the general rule that "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." 776 F. Supp. at 139 (citations omitted, emphasis added). [8] Drawing on precedents protecting distributors of information such as news vendors, book stores and libraries

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

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

from tort liability for defamatory statements, and relying in part on First Amendment concerns, Cubby held that Compuserve could not be treated as the publisher of defamatory statements posted by third parties -- and therefore could not be held liable under any of the asserted tort theories -- if it neither knew nor had reason to know of the defamation. Id. at 140-42.

Thus, far from supporting Plaintiff's claim against AOL, Cubby is representative of a more general common law rule that a mere distributor of information supplied by third parties may not be held liable for injury caused by dissemination of that information in the absence of facts establishing that it was a publisher of the information. See, e.g., Anderson v. New York Telephone Co., 320 N.E.2d 647, 647 (N.Y. Ct. App. 1974) (adopting lower court dissenting opinion published at 345 N.Y.S.2d 740, 751 (1973)) (telephone company could not be liable for tape-recorded defamatory messages repeatedly transmitted over its network "unless it is held that . . . it 'published'" the messages); Tacket v. General Motors Corp., 836 F.2d 1042 (7th Cir. 1987) (owner of property on which someone had posted defamatory sign not liable absent a showing that the owner "'intentionally and unreasonably fail[ed] to remove' [the] sign and thereby published its contents") (emphasis added); Hellar v. Bianco, 244 P.2d 757 (Cal. Dist. Ct. App. 1952) (where defamatory writings appeared on a men's room wall, jury must decide if bartender's failure to remove the graffiti for a short time after learning of its existence constituted a publication).[9/]

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

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

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

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

Although the CDA was passed after the events described in the complaint allegedly occurred, Section 230 of the CDA applies to this case. "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law." Landgraf v. USI Film Prods., 511 U.S. 244, 114 S. Ct. 1483, 1499 (1994) (citation omitted). In fact, applying a statute to antecedent events "often serve[s] entirely benign and legitimate purposes" such as giving

"comprehensive effect to a new law Congress considers salutary." Id. at 1498. Accordingly, Congress may "expressly prescribe[]" that a statute should govern suits involving antecedent events, in which case courts must apply the statute to such suits. Id. at 1505.

Congress provided such an express prescription in Section 230. The statute states that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(d)(3). Given that Zeran's suit was filed after passage of the CDA, a straightforward interpretation of this provision requires that this Court determine whether Zeran has brought a cause of action under a state law that is inconsistent with Section 230.[10/]

Indeed, the language of Section 230(d)(3) must be read to govern even suits pending at the time the CDA was enacted. If the section were interpreted to apply only to suits filed after passage of the CDA, the clause "no liability may be imposed" would be superfluous: the statutory prohibition against bringing any cause of action would already ban all future suits -- and therefore the imposition of liability -- under state laws inconsistent with Section 230. But a court must be "deep[ly] reluctan[t] to interpret a statutory provision so as to render superfluous other provisions in the same enactment." Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990). The clause "no liability may be imposed" is most naturally given operative effect by interpreting it to prohibit damages under inconsistent state laws in suits already pending when the statute was enacted -- suits that

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

would not be covered by the statute's prohibition on future causes of action. Clearly, if Section 230 applies to suits pending at the time the CDA was enacted, it must apply to all cases filed after the date of enactment as well, even if such cases involve events occurring before enactment. Thus, Section 230 applies to Zeran's suit.

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

In Landgraf, the Supreme Court made clear that a statute may be found retroactive on the basis of "impairment of rights" only if certain types of rights are shown to be at issue. The Court observed that "[t]he largest category of cases in which [it has] applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." Id. at 1500. More generally, the Court approvingly quoted Justice Story's

statement that a statute acts retroactively if it "takes away or impairs vested rights acquired under existing laws." Id. at 1499 (emphasis added) (quoting Society for the Propagation of the Gospel v. Wheeler, 22 F.Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156)); see also id. at 1524 (Scalia, J., concurring) (describing majority opinion as having adopted a vested rights criterion); Maitland v. University of Minnesota, 43 F.3d 357, 361 n.4 (8th Cir. 1994).[11/]

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

In the absence of such a retroactive effect, "a court should 'apply the law in effect at the time it renders its decision.'" Landgraf, 114 S. Ct. at 1501 (quoting Bradley v.

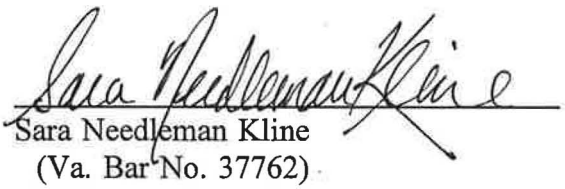
11/ To be sure, the Court noted later in its opinion in Landgraf that neither it nor Justice Story had restricted the presumption against retroactivity to cases involving vested rights. Landgraf, 114 S. Ct. at 1502 n.29. But that statement merely refers to both the Court's and Justice Story's conclusion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

Richmond School Bd., 416 U.S. 696, 711 (1974)). In this case, that law includes Section 230's grant of immunity to interactive service providers such as AOL from tort liability for content provided by others. Accordingly, Plaintiff has failed to state a claim upon which relief can be granted and his complaint should be dismissed.

CONCLUSION

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

Respectfully submitted,



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January 28, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of January 1997 caused true and correct copies of the foregoing Defendant's Motion for Judgment on the Pleadings and Memorandum in Support of Defendant's Motion for Judgment on the Pleadings to be served on the persons listed below by facsimile and by first-class mail, postage prepaid:

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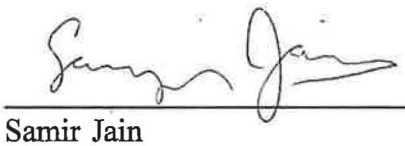

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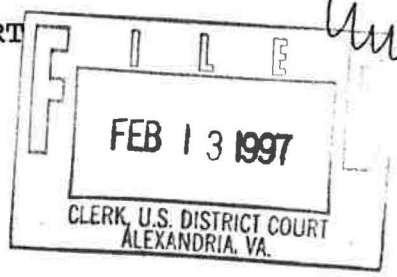
IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA



KENNETH M. ZERAN,

Plaintiff,

v.

AMERICA ONLINE, INC.,

Defendant.

CIV-96-1564-A

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

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February 12, 1997

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

KENNETH M. ZERAN, Plaintiff,	)	
v.	)	CIV-96-1564-A
AMERICA ONLINE, INC., Defendant.	)	

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

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

This case was originally filed in the United States District Court for the Western District of Oklahoma on April 23, 1996, and on October 16, 1996, the case was transferred to this district upon AOL's Motion to Transfer. At the time of the transfer, a Motion to Dismiss was pending. AOL has now withdrawn that Motion and is relying solely on its Motion for Judgment on the Pleadings and the CDA as a basis for dismissal. (AOL Mem. n. 6). The pertinent parts of the withdrawn motion are resubmitted as Exhibits A, B and C to

the affidavit of Leo Kayser,III sworn to February 7, 1997, ("Kayser Aff.") because of certain inconsistencies being taken now by AOL compared with its withdrawn motion.

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

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

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

PLAINTIFF'S COMPLAINT

FACTUAL BACKGROUND

The Complaint contains the following pertinent allegations[1]:

5. On April 25, 1995, at 14:54:35 E.D.T., unknown to

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

message for someone to contact him. He also called AOL's legal department at (703) 918-1495 and received no response.

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

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

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

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

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

LIABILITY ALLEGATIONS

Plaintiff's Complaint sets out liability allegations as well:

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

number.[2]

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

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

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

ADDITIONAL MATTERS

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

1. A copy of the May 1, 1995, letter from plaintiff to Ellen Kirsh of AOL is attached as Exhibit 1 to the Ikard Aff.

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

[3] AOL has confirmed that the postings were done by a person or persons that obtained access to AOL as a new member utilizing a false name, address, phone number and credit card number. A new membership was opened using false information with new (deceptively similar) screen names as soon as the previous membership was terminated and then a new posting followed. (Exs. 3 and 4). Because AOL allows an individual to have access to AOL before it has an opportunity to confirm basic information, AOL is unable to identify the person(s) that actually posted the bombing-related items and the only remedy AOL provides is to terminate the bogus memberships. (see Exs. 3, 4 and 5 and Ex. 6, answer to Interrogatory 3, # 15.).

2. A copy of a letter from Jane M. Church of AOL to plaintiff dated May 17, 1995, is attached as Exhibit 2 to the Ikard Aff.

3. An excerpt from AOL's answers to Plaintiff's First Interrogatories is attached as Exhibit 3 to the Ikard Aff.

4. Documents produced by AOL in response to Plaintiff's First Request for Production of Documents relating to the false screen names used by one or more persons who made the posting in question are attached as Exhibit 4 to the Ikard Aff.

5. Documents produced by AOL in response to Plaintiff's First Request for Production of Documents relating to the AOL's member policies are attached as Exhibit 5 to the Ikard Aff.

6. An excerpt from Plaintiff's answers to AOL's First Interrogatories is attached as Exhibit 6 to the Ikard Aff.

ARGUMENT

INTRODUCTION

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

Before reaching any of the other points raised in this brief,

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

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

The letter from Leo Kayser, III to Jane M. Church of AOL dated June 26, 1995[5], (Ex. D to Kayser Aff.) made it clear **months before the CDA was adopted** that the plaintiff was **not** seeking to hold AOL liable as a publisher for defamation, but rather for its negligence in failing to take reasonable steps to delete the bogus posting and keep them off AOL. (Ex. D, p. 5). Again, in reply to Ms. Church's letter to Mr. Kayser of July 13, 1995, Mr. Kayser asserted that AOL had a duty to take appropriate action after being placed on notice of "phony, derogatory and obviously potentially damaging postings relating to a specific individual at a specific phone number." such as a block on elements of the posting to keep it from reappearing. (August 4, 1995, letter, Ex. E to Kayser Aff., page 2.) From these two letters it is obvious that plaintiff's counsel (although hopefully "creative") have, rather than "repackaging" plaintiff's

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

claim, consistently taken the position articulated in the Complaint, without any regard to § 230 (which did not even exist until months later).

I.

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

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

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

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

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

The case at bar does not impose upon AOL any obligation to examine in advance any material posted on its computer bulletin board; instead, the Complaint pointedly avers that AOL's duty to

plaintiff arose only after actual notice of the offensive, bogus posting specifically identified herein.

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

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

(1) Treatment of Publisher or Speaker --

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

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

> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrain access to material described in paragraph (1).

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

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

with this section...

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

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

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

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

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

Where the standard is whether AOL knew or had reason to know, (the Complaint avers actual notice), AOL is not being treated to legal liability as a publisher or speaker, but rather as a distributor. That the CDA does not alter the Cubby, Inc. analysis, but rather embodies it and encourages use of blocking technology is discussed in Note, Establishing Legal Accountability For Anonymous Communication In Cyberspace, 96 Colum.L.Rev. 1526, 1550-1555

(1996). The distinction, which is made in Cubby, Inc., is consistent with the law in every jurisdiction in the United States. Kayser Aff. at p.4. AOL has proffered no case law in any jurisdiction to the contrary.

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

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

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

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

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

In the case at bar, it is averred that AOL should have been in a

position after notice to control the bogus postings on its sponsored bulletin board.

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

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

common law jurisdictions of the United States. See generally: Prosser and Keeton On Torts, Negligence § 33 Application of the Standard at 193-197 (5th Ed 1984). Cubby, Inc. stands for the legal standard applied to computer bulletin boards distributors to establish a duty.

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

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

AOL totally misstates the holding of Cubby, Inc. (AOL Mem. 16) when it argues:

AOL's practices (see n. 6, *supra*), when Zeran gave prompt, appropriate notice to AOL, the distributor.

A. AOL Is Not Sued as a Publisher

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

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

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

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

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

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

To subject AOL to liability for unreasonably failing to remove defamatory material that it knows is being widely disseminated and may subject it to liability for "its continued publication", does not make AOL a publisher. AOL's reliance upon Prosser and Keeton on

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

II.

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

The events which give rise to negligence liability for AOL under traditional state tort concepts occurred in April and May, 1995. The CDA was signed into law in February, 1996. Long prior to adoption of the CDA, plaintiff was setting forth the operative facts of this case and asserting his entitlement to damages from

AOL under theories of liability then cognizable. (see the Complaint and Exs. D and E to Kayser Aff.).[7] Nevertheless, AOL asserts that the CDA should be applied retrospectively to dismiss this Complaint and effectively bar all recovery by plaintiff for the injuries he suffered at the hands of AOL's negligence by the creation of an all-inclusive, safe harbor fashioned from § 230. As outlined earlier, AOL's reading of the applicability and scope of the CDA to this case is seriously flawed-in effect turning the purpose of the CDA on its head. Similarly, AOL's attempt to employ the CDA retrospectively to this case is predicated on a fundamental misapplication of the Supreme Court's recent decisions and the interpretation of those cases by the lower courts. Indeed, with the sole exception of jurisdictional or procedural matters, all of these decisions deny retrospective effect to the statutes in question.

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

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

The Landgraf case is the most recent major application of

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

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

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

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

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

In its memorandum, AOL proposes that the very creation of the bar to liability by § 230(d)(3) of the CDA ("no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section") "must be read to govern even suits pending at the time the CDA was enacted.", especially to avoid rendering the "no liability" superfluous. (AOL Mem. 18). These arguments were rejected by the Court in Landgraf.

The court observed:

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

Thus, AOL cannot argue simply that by adopting an effective date of

the litigation/liability ban Congress intended that the CDA should be applied retroactively.

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

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

Additionally, the court declined to interpret the Act's creation of new remedies as requiring retroactivity even though many of the sections of the Act were explicitly designed to reverse

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

a long list of Supreme Court decisions. Id. at 1489-90. Obviously, desiring to reverse the effect of a state court decision in Stratton Oakmont does not equate to the expression of retroactive intent by Congress on the CDA.

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

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

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

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

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

Whether § 230 of the CDA operates retroactively "comes at the

end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." Id.

The Court expressed the general guiding principle that :

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

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

participation in the consent decree proceedings" and was therefore prohibited by Landgraf. Id.

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

In Preston v. Com. of Va. ex rel. New River Community College, 31 F.3d 203 (4th Cir. 1994), the Circuit declined to give retroactive effect to the Civil Rights Act of 1991 as it relates to a private cause of action under Title IX, 20 U.S.C § 1681(a). The court was faced with deciding whether Title IX should be construed as Title VII existed at the time the events occurred or as Title VII was subsequently amended. The court determined that the 1991 amendments should not be given retroactive effect on Title IX since it "altered the legality of the employer's conduct and thus affixes **new legal consequences to past conduct.** Id. at 208. (emphasis added).

In Bohrman v. Maine Yankee Atomic Power Co., 926 F. Supp. 211 (D. Me. 1996), the court declined to give retroactive effect to amended federal regulations[9] and instead applied regulations in effect at the time students were exposed to radioactive gas during a tour of a nuclear power plant, citing Landgraf.

In a case involving the classic rule against retroactive

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

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

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

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

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

In McKamey v. Roach, 55 F.2d 1236, 140-41 (6th Cir. 1995), an amendment which added a prohibition of the interception of cordless

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

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

telephone communications was not given retroactive effect to a claim for damages for the interception of cordless phone conversations.[12]

Forfeiture of laundered funds under a new federal statute[13] was rebuffed in U.S. v. $814,254.76, in U.S. Currency, Contents of valley Nat. Bank Account No., 51 F.3d 207 (9th Cir. 1995).

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

AOL's reliance is misplaced on In Re TMI, 89 F.3d 1106 (3rd Cir. 1996) as supporting its assertion that "even a statute that has the effect of eliminating a pending tort claim does not impair a vested right" within the Landgraf policy analysis. (AOL Mem. 20).

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

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

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

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

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

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

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

progeny.[16]

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

1. plaintiff took immediate action to notify AOL of the incendiary posting and followed it up with many communications to AOL to remove the posting and avoid others from being posted (*infra*, 3-4);

2. AOL failed to take prompt action on plaintiff's request to remove the posting, refused to post a retraction or notice that the posting was false, and failed to take steps to preclude repostings (*supra*, 4-5, ¶¶ 42-45);

3. Because of the manner in which AOL solicits its new members, AOL was (and remains to this day) unable to identify those who join using bogus information; the person(s) who posted the KenZ postings changed his bogus information at least twice and used new (deceptively similar) screen names. (see Exs. 3, 4 and 5 and Ex. 6, answer to Interrogatory 3, # 15.).

4. Plaintiff's counsel asserted from the earliest time that AOL was liable as a distributor and not a publisher, establishing plaintiff's reliance on the law as it undeniably existed prior to

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

the adoption of the CDA (Exs. D and E to Kayser Aff.);

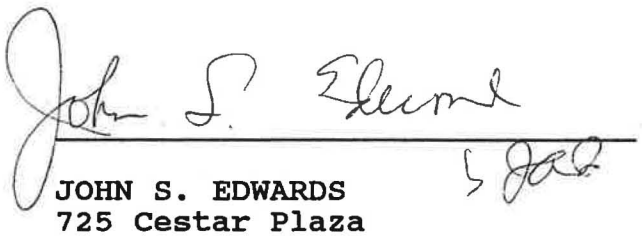
5. Before the effective date of the CDA, plaintiff instituted an action over damages arising from the Oklahoma City radio broadcast which was a direct and foreseeable result of AOL's negligence; the basic allegations in the Complaint against Diamond Broadcasting, Inc. are identical to those in the Complaint against AOL (see *supra*, n. 3).

6. All of the acts which give rise to AOL's tort liability occurred (were completed) long before the adoption of the CDA.

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

CONCLUSION

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



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument was mailed postage paid in the U.S. Mail on the 12th day of February, 1997, to:

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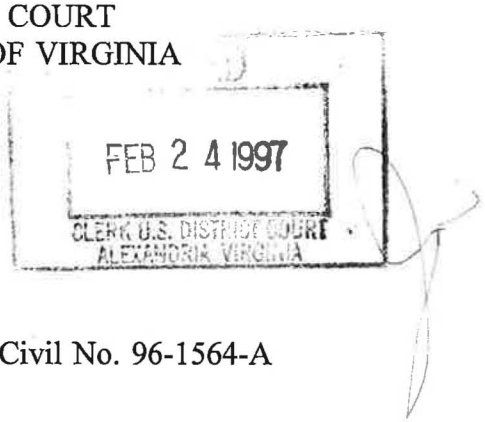
James A. Ikard

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division



KENNETH M. ZERAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 96-1564-A
	)	
AMERICA ONLINE, INC.,	)	
	)	
Defendant.	)	
	)	

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

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February 24, 1997

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

KENNETH M. ZERAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 96-1564-A
	)	
AMERICA ONLINE, INC.,	)	
	)	
Defendant.	)	
	)	

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

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

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

In its opening brief, AOL established that Plaintiff's suit, which seeks to hold AOL liable for harms resulting from allegedly defamatory messages posted by an unknown third-party, is barred by Section 230 of the CDA, because the suit impermissibly seeks to treat

AOL as the "publisher or speaker" of the messages. (Def. Mem. at 5-12.[1/]) AOL demonstrated, in particular, that the plain terms of Section 230 (id. at 6-8), as well as its legislative history and overarching policy goals (id. at 9-12), all support AOL's construction of the statute. AOL further explained that Plaintiff could not evade the bar of Section 230 merely by labeling his suit as a claim of simple negligence rather than a claim of defamation or another similar tort. (Id. at 12-17.) Plaintiff's opposition brief fails to refute AOL's construction and application of Section 230.

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

Zeran's view of the operation of Section 230 diverges from that of AOL in only one respect: whether his suit to hold AOL liable for allegedly failing to remove or block messages

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

posted on its service by a third person "treat[s] [AOL] as the publisher" of those messages. AOL demonstrated in its opening brief that holding AOL liable for the harm those third-party messages allegedly caused to Zeran would treat AOL as the publisher of the messages from at least three critical perspectives:

- Holding AOL liable for the damages allegedly caused to Plaintiff by these allegedly "defamatory and bogus" messages would put AOL in precisely the same legal position as the person who posted -- and therefore published -- the messages, thereby "treat[ing] [AOL] as the publisher" of those messages. (Def. Mem. at 8.)
- Under well-settled common law principles, liability for harm flowing from the dissemination of a defamatory statement may be imposed only upon a party who is deemed to have "published" the statement. As a result, Plaintiff's suit necessarily seeks to treat AOL as the publisher of the messages at issue. (Id. at 12-17.)
- Plaintiff's suit seeks to impose on AOL a standard of care requiring it to review and edit the content of information appearing on its system and to issue retractions for information deemed to be erroneous.[2/] These are the quintessential

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[2/] At one point in his opposition, Zeran erroneously asserts that the standard of care that he seeks to apply in this action would not treat AOL as a publisher because it "does not impose upon AOL any obligation to examine in advance any material posted on its computer bulletin board." (Pl. Opp. at 8.) This is utterly inconsistent with the position that Zeran advances throughout the remainder of his opposition. From the outset of this case, and throughout his opposition, Zeran has argued that AOL, once put on notice of the first offending message, was obligated to review in advance every subsequent message sought to be posted on its system and to block any of them that repeated any similar offending content. (Complaint ¶¶

(continued...)

duties of a publisher, and to impose them on AOL would obviously treat it as the "publisher" of the information posted on its system by third parties. (Id. at 8.)

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

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

Cubby did not even discuss, much less recognize, any cause of action that would subject an interactive computer service to liability for defamatory information transmitted by a third party without treating it as the publisher or speaker of that information. Instead, Cubby

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2/ (...continued)
43-45 (AOL "was obligated after due notice to be able to screen incendiary, defamatory and/or bogus material"); Pl. Opp. at 7, 12, 13 (AOL "must implement some screening or editing function" (emphasis added))).

recognized that interactive computer services, as mere distributors of information being transmitted by third parties, enjoy as a matter of constitutional law a special level of protection that requires an exceptional threshold showing before they can be treated as the publisher or speaker of such information. Specifically, Cubby held that the First Amendment provides a "deeply rooted" protection for distributors such as interactive service providers and that, as a result, such a provider could be held liable as the publisher or speaker of defamatory matter posted by a third party only upon a showing that it knew or should have known of the defamation. 776 F. Supp. at 139-41. Zeran's attempt to transform this special level of protection into a new-found tort action of "negligent distribution" in which liability may be imposed on an interactive computer service without treating it as a "publisher" is preposterous.

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

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

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

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

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

More fundamentally, Plaintiff is wrong in asserting that his suit against AOL for negligently failing to screen or remove defamatory information from its system is meaningfully distinguishable from a defamation suit for publishing defamatory information. (Def. Opp. at 7.) AOL's opening brief has already established that if Section 230's applicability were to turn on such superficial differences as how the claim is labeled, then it would provide no protection whatsoever for interactive computer services. (Def. Mem. at 13.) Far from rebutting this point, Zeran's brief simply confirms that his claim is, in substance, a claim for defamation. Thus, he

repeatedly asserts that the "operative facts" and "basic allegations" in his suit against AOL are "identical" to those of his defamation action against the owner of the radio station that broadcast one of the messages at issue here. (Pl. Opp. at 18 n.7, 29.)

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

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

Zeran further errs in arguing that AOL's interpretation of Section 230's "publisher or speaker" provision is inconsistent with Congress's intent, reflected in Section 230(c)(2), to remove disincentives for interactive computer services to screen out potentially harmful material posted by third persons. (See Pl. Opp. at 9-11.) AOL agrees that Congress intended to remove legal disincentives to such voluntary "Good Samaritan" actions. At the same

time, Congress plainly did not require that interactive computer services engage in reviewing and screening, a fact reflected in both its express prohibition on treating them as "publishers" and its unambiguous declaration that their development be "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).[5/] Under Plaintiff's theory, however, AOL would in fact be required, as soon as it received some form of notice that a particular message was "bogus" or "defamatory," to review for an indefinite period every subsequent message posted anywhere on its entire system and to block any of them that could possibly be similar to the original offending message.

The policy implications of Plaintiff's proposed rule that interactive service providers must engage in screening once they know or have reason to know that "libelous, defamatory or bogus material" has been posted on their systems are far-reaching and plainly contrary to Congress's intent. Plaintiff's proposed rule would actually have the perverse effect of discouraging the very sort of Good Samaritan actions that Congress intended to promote. 47 U.S.C. § 230(c)(2). If a provider knew it would incur editorial duties and become subject to potential liability once it might have reason to know that a particular posting might be offensive, the provider would have a strong incentive to keep itself ignorant of what is on its system. Thus, a provider that knew it would not be liable for a third party's content might monitor its bulletin boards and eliminate content that it perceived to be harmful as a Good Samaritan action. But

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

that provider would be significantly less likely to engage in such monitoring under Plaintiff's proposed rule: by monitoring its boards, the provider would have reason to know about offensive posts and therefore incur legal duties and potential liability it would undoubtedly rather avoid. In proposing a rule that would discourage Good Samaritan actions, it is Plaintiff, not AOL, who is attempting to "turn[] the CDA on its head." Pl. Opp. at 2.

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

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

As AOL established in its opening memorandum, although the CDA was enacted after the events described in Plaintiff's complaint allegedly occurred, Section 230 controls this

case. First, the text of Section 230 reveals that Congress expressly prescribed that the section applies to suits involving antecedent events. (Def. Mem. at 18-19.) Second, even if Section 230 contained no such express prescription, application of the statute to antecedent events will not have a "retroactive effect" under any of the three tests set out in Landgraf v. USI Film Prods., 511 U.S. 244, 114 S. Ct. 1483, 1505 (1994). (Def. Mem. at 19-21.) Accordingly, following Landgraf, this Court must apply the law in effect at the time of its decision -- namely, Section 230 -- and dismiss Plaintiff's suit.

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

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

The plain text of Section 230 discloses Congress's intent that the statute govern any suit pending or filed after enactment of the statute. Section 230 prescribes that "[n]o cause of action may be brought and no liability may be imposed under any State of local law that is inconsistent with this section." 47 U.S.C. § 230(d)(3). This language could hardly be clearer: from the date of the CDA's enactment (February 8, 1996), no action may be filed and no liability

may be imposed under any state or local law inconsistent with Section 230.[6/] Indeed, the plain meaning of the phrase "no liability may be imposed" is that Congress barred liability from being imposed even in suits that were pending when Section 230 was enacted. Therefore, a fortiori, Section 230 must also be read as controlling all new lawsuits filed after its enactment.

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

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

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

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

B. Section 230 Does Not Have "Retroactive Effect."

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

Contrary to Plaintiff's assertion that "the Landgraf court start[ed] with the general proposition that 'the presumption against retroactive legislation is deeply rooted in our

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

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

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

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

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

[8/] One case Plaintiff cites was reversed on the ground that the case did not even (continued...)

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

> The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact. Indeed, at common law a contrary rule applied to statutes that merely removed a burden on private rights by repealing a penal provision (whether criminal or civil); such repeals were understood to preclude punishment for acts antedating the repeal.

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

Landgraf, 114 S. Ct. at 1500. The reason for this difference is clear -- unlike a defendant, a prospective plaintiff generally does not reasonably rely on the absence or existence of a particular cause of action except to the extent that the plaintiff plans and files a lawsuit. Indeed, Zeran points primarily to just this type of conduct as evidence of his supposed "reliance." (Pl. Opp. at 28-29.) He does not allege (and cannot show) that any action he took other than preparing to sue AOL was in any sense dependent on an expectation of a valid claim against AOL. But as Zeran himself observes elsewhere in his opposition, new rules that affect only "the plaintiff's conduct in filing the claim" do not have a retroactive effect. (Pl. Opp. at 26.)[9/]

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

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

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

In any event, as AOL established in its opening memorandum (Def. Mem. at 19-20), the Landgraf Court concluded that under the third prong of its test, application of a statute to pre-enactment events is fair, and does not have retroactive effect, so long as it does not impair a vested right. Zeran cites no case holding that a pending tort claim (and the underlying common law rule on which it is based) are vested rights. The law is plainly to the contrary: "cases have clearly established that a person has . . . no vested interest[] in any rule of common law." Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 88 n. 32 (1978) (internal quotations omitted); New York Central R.R. Co. v. White, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit."). "Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridge[s] no vested rights of plaintiff by . . . retroactively

abolishing [plaintiff's] cause of action in tort." Hammond v. United States, 768 F.2d 8, 12 (1st Cir. 1986); see also In re TMI, 89 F.3d 1106, 1113 (3d Cir. 1996), cert. denied, No. 96-730, 1996 WL 665357 (Jan. 13, 1997) (statute that eliminates pending tort claim does not impair a vested right); Hyundai Merchant Marine Co. Ltd. v. United States, 888 F. Supp. 543, 551 (S.D.N.Y. 1995) (statute that eliminated tort claim applied to pre-enactment events because such a claim is not a vested right until reduced to final judgment), aff'd, 75 F.3d 134 (2d Cir.), cert. denied, 117 S. Ct. 51 (1996).

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

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

CONCLUSION

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

Respectfully submitted,

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February 24, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of February 1997 caused true and correct copies of the foregoing Defendant's Reply Memorandum in Further Support of Defendant's Motion for Judgment on the Pleadings to be served on the persons listed below by facsimile and by first-class mail, postage prepaid:

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