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I. Introduction

{1} Millions of people worldwide use online services to communicate via e-mail; to post and read messages on bulletin boards; to receive news, financial information and updated sports scores; and to gather information.[1] Nearly anyone with access to the Internet can post information without having the facts verified or the content edited, so it is extremely likely that if they post defamatory material, it can find its way around the world in a matter of minutes. Due to the anonymous nature of the Internet, the author of the defamatory material may never be discovered. Assuming the author cannot be traced, the question then becomes: Should an interactive computer service provider be held liable for the material it disseminates?

{2} This casenote argues that the courts need to strike a balance between regulating the Internet and providing relief to injured plaintiffs. It also proposes arguments that plaintiffs may adopt in an effort to persuade courts to narrow the interpretation of Section 230 of the Communications Decency Act of 1996 (CDA). Until Congress clarifies the extent of immunity granted by the CDA or the courts attempt to narrow their interpretation of the CDA, interactive computer service providers will remain immune from defamatory messages posted on its services. Part II of this casenote examines the development of traditional defamation laws, including the elements of a prima facie case and plaintiff and defendant categories. Part II also discusses early online defamation cases, the CDA and how courts have broadly interpreted the Act. Part III introduces the facts, procedural background and holding of *Blumenthal v. Drudge*.[2] Part IV considers the difficulty of applying traditional defamation laws to the Internet due to the unique nature of this new medium. It also addresses the ramifications of the *Blumenthal* holding and the implications it will have on future online defamation cases. Finally, Part V summarizes this casenote.

II. Historical Background

A. Traditional Defamation Law

1. The Elements of a Prima Facie Case

{3} Defamation is an "intentional false communication, either published or publicly spoken, that injures another's reputation or good name."[3] To prove a prima facie defamation case, a plaintiff must first show that the defendant made a defamatory statement of purported fact concerning the plaintiff.[4] A plaintiff may meet this burden by proving that a reasonable reader understood that the defamatory language referred to the plaintiff.[5] Second, the plaintiff must prove that there was "an unprivileged publication to a third party."[6] Third, the defendant must have intentionally or negligently published the defamatory statement to a third party.[7] Finally, the publication of the false statement must have harmed the plaintiff or created actionability irrespective of harm.[8]

2. Plaintiff Categories Based on Fame Determine Burden of Proof

{4} Plaintiffs in defamation suits are divided into categories including: public officials, public figures and private figures. Depending upon which category they fall within, plaintiffs must establish varying burdens of proof. For instance, if the plaintiff is a public official and the alleged defamatory statement related to his or her official conduct or fitness to hold that office, then the plaintiff has the burden of proving, by clear and convincing evidence, that the defendant acted with actual malice.[9] Actual malice is established by proving that the publication was made with knowledge of falsity or with reckless disregard for its truth or falsity.[10] Furthermore, if the plaintiff is a pervasive public figure[11] or a limited-purpose public figure[12] and the statement relates to the circumstances of his or her notoriety, then the plaintiff has the burden of proving that the defendant acted with actual malice.[13] If the plaintiff is a private figure and the statement deals with a matter of private concern, then the falsity of the statement is presumed and the defendant has the burden of rebutting the presumption by proving that the statement was substantially true.[14] Finally, if the plaintiff is a private figure and the statement deals with a matter of public concern, then the defendant is subject to liability if he knew that the statement was false, acted in reckless disregard of the truth, or acted negligently in failing to ascertain the truth.[15]

3. Defendant Categories Based on Editorial Control Exerted

{5} Defendants in defamation suits are generally divided into three categories: publishers, distributors and

common carriers.[16] Different levels of liability apply to defendants in defamation suits according to the amount of editorial control they exert. These levels of liability evolved along a sliding scale with publishers on one end, distributors somewhere in the middle and common carriers on the other end.[17]

{6} Publishers, such as newspapers, generally exert the greatest amount of editorial control over content. They are liable for the defamatory statements they publish if they acted negligently and the plaintiff can prove a prima facie case.[18] Because distributors, such as book stores, exert less editorial control than publishers, they are only liable if they deliver material they know or have reason to know is defamatory.[19] Finally, common carriers, such as telephone companies, are at the other end of the scale because they exert no control over content and act as mere conduits.[20] Common carriers are not subject to defamation liability.

4. Defenses

{7} Defendants do not have to debate how much editorial control they exerted over the material, or whether or not they knew the statement was false, if they can prove that the plaintiff consented to the statement that was published.[21] Defendants may also assert privilege as a defense. An absolute privilege provides immunity to the defendant so long as the defendant can show that he acted within the scope of that privilege.[22] Qualified privileges, assuming they are not abused,[23] also allow defendants to escape liability because they render the defamatory statement nontortious.[24] Finally, in the case of a purely private concern where the defendant must rebut the presumption of falsity, the defendant may establish truth as a complete defense.[25]

B. Applying Traditional Defamation Law to the Internet

1. Online Service Provider Success and Distributor Liability

{8} *Daniel v. Dow Jones & Co.* is one of the earliest online defamation cases.[26] In 1987, Daniel brought an action against Dow Jones alleging that he made investment decisions based on false news reports that he received from the Dow Jones News/Retrieval service offered by defendant. Dow's motion to dismiss was granted because the court found "no functional difference between defendant's service and the distribution of a moderate circulation newspaper or subscription newsletter."[27] The court concluded that Dow could not be held liable because a distributor is not liable for false statements unless a special relationship exists between the parties.[28] No "special relationship" existed between Daniel and Dow, so the company was not liable for its negligent misstatements.[29]

{9} *Cubby, Inc. v. CompuServe, Inc.* was decided four years after *Daniel* by the United States District Court for the Southern District of New York.[30] The plaintiff alleged that CompuServe published defamatory statements in a newsletter available in their journalism forum.[31] CompuServe, however, demonstrated that it was a distributor because the newsletter was written and compiled by a third party. CompuServe had no editorial control over the contents of the newsletter and it did not have an opportunity to review the contents before the newsletter was uploaded into its data bank.[32] The plaintiff also argued that CompuServe should be held vicariously liable for the actions of its agents. The court, however, found that the compilers of the newsletter were not agents of CompuServe because no direct contractual relationship existed between them and because CompuServe did not receive any fees for posting the newsletter in the journalism forum.[33] The defendant's motion for summary judgment was granted because the court concluded that "CompuServe, as a news distributor, may not be held liable if it neither knew nor had reason to know of the allegedly defamatory . . . statements."[34]

2. Publisher Liability and Editorial Control

{10}Until 1995, online service providers were successful in defeating defamation claims by arguing that they

were analogous to distributors. Then, on May 24, 1995, the Supreme Court of New York handed down its decision in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, and for the first time an online service provider was held liable as a publisher.[35]

{11} The plaintiff brought suit against Prodigy for posting allegedly defamatory material in its "Money Talk" forum, the most widely read financial computer bulletin board in the United States.[36] On a motion for partial summary judgment, the court held that Prodigy was a publisher because it "exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper."[37] The court made it clear that it was in "full agreement with Cubby" and that "computer bulletin boards should generally be regarded in the same context as bookstores."[38] However, the court believed that Prodigy's "own policies, technology and staffing decisions . . . altered the scenario and mandated the finding that it is a publisher."[39] Finally, the *Stratton* court noted that the issue of publisher liability would be preempted if Congress enacted the Communications Decency Act.[40]

{12} *Stratton* created a "Catch-22" for interactive computer service providers. If they attempted to keep defamatory or offensive material off of their bulletin boards, they were liable as a publisher. If they did not attempt to self-regulate then they would escape publisher liability. The interactive computer service that tried to self-regulate was punished for its failure, yet the interactive computer service that made no attempt to regulate escaped liability for its nonfeasance.[41] Prodigy argued that publisher liability would deter interactive computer service providers from self-regulation. The *Stratton* court, however, reasoned that finding that Prodigy was a publisher would not "compel all computer networks to abdicate control of their bulletin boards," because it "incorrectly presumes that the market will refuse to compensate a network for its increased control and the resulting increased exposure."[42]

C. Communications Decency Act of 1996

{13} Congress attempted to put the fears of online service providers at ease and addressed the issues raised in *Stratton* by enacting Section 230 of the Communications Decency Act of 1996. According to the conference report on Section 230, one of the specific purposes of the Act was to overrule the highly criticized decision in *Stratton*.[43] Section 230(c)(1) of the CDA states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[44] Congress also addressed the concerns of computer service operators by including a "Good Samaritan" clause to exempt providers from liability for "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 . . . or otherwise objectionable."[45]

D. Interpreting the Communications Decency Act

{14} *Jaisinghani v. Capital Cities/ABC, Inc.* would have been one of the first cases to interpret the newly enacted CDA.[46] Jaisinghani alleged that an online computer service that summarized an article containing allegedly defamatory statements should be held liable as a publisher.[47] The plaintiff further argued that the court should rely on *Stratton* to find that the online computer service was a publisher due to the amount of editorial control it exercised. The defendant countered that it was not a publisher because it did not create the article and was not aware the article contained allegedly defamatory material. Unfortunately, the court never addressed the merits of the case because defendant's motion for summary judgment was granted on the grounds that the statute of limitations had lapsed.[48]

{15} It was not until *Zeran v. America Online* that a court was asked to interpret the CDA.[49] In April 1996, Kenneth Zeran filed suit against America Online (AOL) alleging negligence due to the unreasonable delay in the removal of defamatory material posted on an AOL bulletin board by an unidentified third party.[50] Upon learning of the statement, Zeran contacted AOL and was informed that the posting would be removed but a

retraction would not be issued.[51] Zeran argued that AOL should be held liable as a distributor because it knew the material was defamatory. Moreover, Zeran argued that the CDA only exempted online service providers from publisher liability, but that distributor liability was left intact by the CDA. The United States Court of Appeals for the Fourth Circuit rejected his argument and concluded that distributor liability was "merely a subset, or species, of publisher liability" and was "therefore also foreclosed by § 230."[52] The court reasoned that imposing common law distributor liability on AOL amounted to treating it as a publisher. The court went on to explain that even though different standards of liability apply to distributors and publishers, "once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher."[53]

{16} The Fourth Circuit concluded that if distributor liability was left intact by the CDA, then computer service providers would be open to liability each time they received notice of a potentially defamatory statement.[54] Due to the volume of postings, investigating every claim would create an impossible burden for the providers. In addition, imposing distributor liability upon notice would reinforce "service providers' incentives to restrict speech and abstain from self-regulation."[55] Moreover, the court reasoned that "Congress' desire to promote unfettered speech on the Internet must supercede conflicting common law causes of action."[56]

{17} *Doe v. America Online* was decided shortly after *Zeran*.[57] Doe argued that Section 230 of the CDA should not apply to her case because AOL was a distributor and had knowledge of the obscene materials transmitted on its services. Relying on *Zeran*, the court rejected those claims and concluded that distributor liability was a subset of publisher liability.[58] The court concluded that holding AOL liable for material posted by one of its subscribers would undermine the purpose of the CDA.

{18} Extensively citing *Zeran*, a Florida District Court of Appeal affirmed the lower court's decision to dismiss Doe's claims.[59] However, the appellate court recognized that Doe's claim raised questions "as to the application of section 230 of the Communications Decency Act" that the court deemed "to be of great public importance."[60] The following issue was certified to the Florida Supreme Court: "Whether a computer service provider with notice of a defamatory third party posting is entitled to immunity under section 230 of the Communications Decency Act."[61] To date, the Florida Supreme Court has not ruled on the issue.

{19} It was against this backdrop that Sidney and Jacqueline Blumenthal filed suit against gossip columnist Matt Drudge and AOL for alleged defamatory statements made in the Drudge Report.

III. Statement of Case

A. *Facts and Procedural History*

{20} In early 1995, Matt Drudge (Drudge) created an electronic publication called the Drudge Report. The publication concentrated on gossip from Hollywood and Washington, D.C. From his apartment in Los Angeles, California, Drudge disseminated the column to his regular subscribers via e-mail. The Drudge Report was also available to anyone with access to the Internet on Drudge's World Wide Web site.[62]

{21} In late 1996, Drudge contracted with the publisher of *Wired* magazine to have the Drudge Report displayed in *Hotwired*, an Internet publication. Drudge received biweekly royalty payments for the duration of his six-month license agreement with *Wired*. When the license agreement with *Wired* expired in 1997, Drudge entered into a one-year license agreement with AOL thereby making the Drudge Report available to

all AOL subscribers.[63] Drudge e-mailed the new editions to AOL and then AOL posted them on its service. Drudge continued to e-mail his regular subscribers and to post new editions to his website.

{22} According to the license agreement with AOL, Drudge received a flat monthly royalty for creating, editing, updating and otherwise managing the content of the column.[64] AOL, however, reserved the right to "remove content that AOL reasonably determine[d] to violate AOL's then standard terms of service" and to require reasonable changes to content.[65]

{23} On August 10, 1997, Drudge wrote a new edition of the Drudge Report that contained alleged defamatory statements concerning Sidney and Jacqueline Blumenthal.[66] Sidney Blumenthal was an Assistant to the President of the United States and Jacqueline Jordan Blumenthal, Sidney's wife, was the Director of the President's Commission on White House Fellowships.[67] Drudge e-mailed that edition to his regular subscribers, posted it to his web site and transmitted the text without the headline to AOL.[68]

{24} Less than twenty-four hours later, Drudge received a letter from the Blumenthals' attorney. On August 11, 1997, Drudge posted a special edition of the Drudge Report on his website retracting the story and e-mailed the retraction to his regular subscribers.[69] On August 12, 1997, Drudge e-mailed the retraction to AOL which posted it for their subscribers.[70] Moreover, AOL removed the edition containing the alleged defamatory statements from its electronic archives.[71]

{25} The Blumenthals filed suit against Drudge and AOL alleging defamation. On April 22, 1998, the United States District Court for the District of Columbia held that AOL, as an interactive computer service provider, could not be held liable for making the Drudge Report available to its subscribers. The court granted AOL's motion for summary judgment on the grounds that the Blumenthals' claim was barred by the CDA.[72]

B. The Internet and a Brave New World of Free Speech

{26} In *Reno v. ACLU*, the United States Supreme Court acknowledged that "the Internet is a unique and wholly new medium of worldwide human communication," and that it is "not a physical or tangible entity." [73] The United States District Court for the District of Columbia also recognized that the Internet was very different from traditional forms of communication.[74] Specifically, the district court noted that the Internet maintains an unlimited number of information sources, has no editors or publishers controlling the distribution of the information and has shifted the focus of mass communications to the individual because "the users of the Internet are also its producers."[75]

{27} Furthermore, the district court declared that the "near instantaneous possibilities for the dissemination of information by millions of different information providers around the world" has resulted in "unprecedented challenges relating to rights of privacy and reputational rights of individuals."[76] Finally, the court conceded that "the legal rules that will govern this new medium are just beginning to take shape."[77]

C. *Section 230 of the Communications Decency Act of 1996*

{28} Section 230(b) of the CDA states that it is the policy of the United States "to promote the continued development of the Internet and other interactive computer services,"[78] in order to "preserve the vibrant and competitive free market that presently exists . . . unfettered by Federal or State regulation."[79] Section 230(c)(1) of the CDA states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[80] The district court reasoned that by enacting the CDA, Congress "effectively immunize[d] providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others."[81]

{29} The Blumenthals admitted that AOL was an interactive computer service as defined by Section 230(e)

(2) of the CDA and that Drudge was an information content provider as defined by Section 230(e)(3) of the CDA. However, the Blumenthals argued that because AOL reserved the right to edit Drudge's material that it should be held liable regardless of the CDA. The court rejected their argument for lack of factual support since the Blumenthals had affirmatively stated that "no person, other than Drudge himself, edited, checked, verified, or supervised the information that Drudge published in the Drudge Report."[82] The court concluded that because AOL fell within the definition of a provider of an interactive computer service that Section 230 of the CDA immunized AOL from publisher liability.

D. *Taking Advantage of the Benefits Without Accepting Any of the Burdens*

{30} The Blumenthals also argued that Section 230 of the CDA did not provide AOL with immunity in this case because "Drudge was not just an anonymous person who sent a message over the Internet through AOL."[83] They asserted that AOL had a contract with Drudge, paid Drudge $36,000 a year, promoted his column to its subscribers and reserved the right to remove or require reasonable changes to the content of the column.[84] The court validated the Blumenthals' argument stating that "if it were writing on a clean slate, this Court would agree with plaintiffs."[85] Since AOL exercised editorial control over the Drudge Report, the court concluded that AOL was not a "passive conduit" and although it seemed "only fair to hold AOL to the liability standards applied to a publisher or, at least . . . to a distributor," the court was bound by the CDA to grant AOL immunity.[86]

{31} The court also focused on the "Good Samaritan" section of the CDA.[87] Relying on the Fourth Circuit's interpretation of the CDA in *Zeran*, the district court agreed that Congress intended to remove any disincentives to self-regulation.[88] Congress, in fact, conferred immunity to providers of interactive computer services as an incentive for them to self-regulate.[89] The *Blumenthal* court concluded, however, that AOL "has taken advantage of all the benefits conferred by Congress . . . without accepting any of the burdens that Congress intended."[90] Specifically, the court asked, "Why should AOL be permitted to tout someone as a gossip columnist or rumor monger who will make such rumors and gossip 'instantly accessible' to AOL subscribers, and then claim immunity when that person, as might be anticipated, defames another?" [91] The court, however, was bound by the language of the CDA, previous interpretations[92] and Congress' intent, so the court granted AOL's motion for summary judgment.[93]

IV. Analysis and Implications

A. Applying Old Doctrines to a New Medium

1. The Uniqueness of the Internet

{32} The Internet is a "chaotic web of regional and national computer networks linked by telephone lines" that connect a "unified network that operates by way of a common addressing scheme."[94] It is also described as more idea than entity, dynamic, jumbled, anonymous and instantaneous.[95] Furthermore, it is argued that more ideas and information are shared on the Internet than in any other medium and that there is no better medium in which to challenge conventional First Amendment doctrines and traditional defamation laws.[96]

{33} The unique nature of the Internet presents problems and creates new legal issues particular to this new medium. For example, users remain anonymous and information is transmitted worldwide in a matter of seconds. The international aspects of the Internet were addressed by the Fourth Circuit in *Zeran*. The court commented that the Commerce Clause[97] granted Congress the authority to "act in a field whose

international character is apparent."[98] Furthermore, the Fourth Circuit noted that Section 230 of the CDA represented "the approach of Congress to a problem of national and international dimension."[99]

{34} The application of traditional legal doctrines to the Internet proves difficult for other reasons. Traditional defamation laws were written to manage printed objects, not computer networks. While courts have analogized interactive computer service providers to newspaper publishers, bookstores and common carriers, they have caused as many problems as they have attempted to solve.[100] Due to the complex and versatile nature of the Internet, no single analogy or traditional legal doctrine may prove completely satisfactory.[101] However, following the differing opinions in *Cubby* and *Stratton*, it became obvious that Congress needed to "step in" and address the issues surrounding defamation law on the Internet. Congress promulgated the CDA in an attempt to balance the direct regulation of the Internet and tort liability.[102] They further hoped to provide a desirable level of control over interactive service providers.

2. Public Officials and Actual Malice

{35} Although online defamation law attempted to apply traditional defendant categories such as publisher and distributor, there has been no debate surrounding the traditional plaintiff categories. Generally, if the plaintiff in a defamation suit is a public official and the defamatory statement related to his fitness to hold that office, then the plaintiff had the burden of proving that the defendant acted with actual malice.[103] Since both of the Blumenthals held positions at the White House, they might be considered public officials and under traditional defamation law they would have had to prove that AOL acted with actual malice in posting the Drudge Report. Considering AOL did not create, edit or verify the material, this would have been an extremely difficult burden for the Blumenthals to meet.

{36} Because the CDA does not include any language addressing this issue, determining how the courts would treat a return to the common law plaintiff categories is difficult. However, since Congress and the courts have protected online service providers in the past, it seems likely that they would continue to do so. Proving actual malice would be a difficult burden for any plaintiff to overcome. If a plaintiff could convince a court that the CDA did not immunize providers from distributor liability, then online service providers may need to revive the traditional plaintiff categories to place another hurdle in the path of the plaintiffs.

3. State Law Preemption and "Author" Liability

{37} In an attempt to circumvent the CDA, plaintiffs may file suit alleging a cause of action arising under state defamation laws. However, Section 230(d)(3) of the CDA states 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."[104] This language, if taken literally, creates an absolute immunity for online service providers that disseminate defamatory statements. Accordingly, online service providers may have a federal defense to causes of action arising under state law. Traditional defenses, such as privilege or truth, have not been raised in online defamation cases due to the absolute immunity granted by the CDA.

{38} Although Congress may have preempted state law causes of action against interactive computer service providers, it did not provide immunity to the original party who posted the defamatory material. The *Zeran* court pointed out that Congress made a policy choice "to keep government regulation of the Internet to a minimum," but that the original culpable party who posted the defamatory messages should not escape accountability.[105]

B. Traditional Defendant Categories and Applicable Liability

1. Publisher v. Distributor

{39} Defendants in traditional defamation suits fell neatly into one of three categories.[106] Courts have

attempted, perhaps unsuccessfully, to apply those categories to defendants in online defamation suits. The original debate began with the *Cubby-Stratton* line of cases prior to the enactment of the CDA.[107] In *Cubby*, CompuServe was able to convince the court that it was a distributor because the newsletter containing the allegedly defamatory material was written and compiled by a third person.[108] However, in *Stratton*, Prodigy was declared a publisher due to the amount of editorial control it exerted.[109]

{40} One of the specific purposes of the CDA was to overrule the *Stratton* decision that held an online service provider liable as a publisher simply because it tried to restrict access to questionable material that it did not create.[110] Although the CDA specifically immunized providers from publisher liability, it did not discuss distributor liability. Arguably, the deliberate omission of the word distributor meant that Congress did not intend to absolve online service providers from all liability. Unfortunately, the legislative history is mute on that issue and the first court to interpret the CDA found otherwise.[111] In *Zeran*, the United States Court of Appeals for the Fourth Circuit stated, "Congress has indeed spoken directly to the issue by employing the legally significant term 'publisher,' which has traditionally encompassed distributors and original publishers alike."[112] However, prior to *Zeran*, traditional defamation law treated publishers and distributors as two distinct beings, each held to their own standard of liability based on varying degrees of editorial control. Publisher liability was based on negligence, while distributor liability focused on knowledge.[113] Early online defamation cases also made this distinction.[114]

{41} In *Blumenthal*, the court stated that any attempt to distinguish between publishers and distributors would be unavailing because Congress did not distinguish between them in providing immunity from liability.[115] Perhaps Congress' omission of distributors was an attempt to distinguish between the two traditional categories. Perhaps Congress only intended to immunize interactive service providers for publishing information provided by a third party[116] or those that attempted to self-regulate.[117] The court reasoned that since AOL reserved the right "to exercise editorial control over those with whom it contracts and whose words it disseminates" that "it would seem only fair to hold AOL to the liability standards applied to a publisher."[118] The court decided AOL was a publisher since it reserved the right to restrict the content of the Drudge Report, and because AOL held itself out as hiring Drudge to provide "unverified instant gossip."[119] Since the court concluded AOL was a publisher, it had no reason to discuss the distinction between publishers and distributors, nor was it necessary for the court to rely on the *Zeran* court's interpretation of the CDA concerning distributor liability.

{42} When the *Blumenthal* court stated that "[a]ny attempt to distinguish between 'publisher' liability and notice-based 'distributor' liability . . . would be unavailing," the statement should have been clarified.[120] It would only have been unavailing to make the distinction in the *Blumenthal* case because the court had already determined that AOL should be held to a publisher's standard. Upon reaching that conclusion, the court should have stopped. Congress may not have addressed distributor liability, but publisher liability was specifically addressed. Section 230(c)(1) of the CDA provided immunity for interactive computer services who "publish" information provided by another information content provider. Furthermore, Section 230(c)(2)(A) of the CDA states that no provider may be held liable for "any action voluntarily taken in good faith to restrict access to or availability of material."[121] Due to the legislative history of the CDA, the language of the statute and the *Blumenthal* court's conclusion that AOL was a publisher, AOL's motion for summary judgment was granted.

{43} Both the *Zeran* court and the *Blumenthal* court reached the conclusion that online service providers are immune from suit even if they were acting as a distributor. Since traditional defamation law and early online defamation cases made the distinction between distributor and publisher liability, it is likely that Congress also made the distinction when it wrote the CDA. When Congress omitted the word "distributor" from the Act, they may have left providers open to distributor liability. However, until Congress clarifies the CDA, online defamation suits may continue to discuss this crucial distinction and plaintiffs should continue to challenge the *Zeran* and *Blumenthal* courts' interpretations of the CDA and search for a more narrow

interpretation.

2. Knowledge Cannot Equal Liability - A Burden for Providers

{44} Applying the traditional categories to defendants in online defamation cases created another problem. The CDA disregards the common law exemptions for distributor and publisher liability by immunizing all publishers regardless of knowledge or actual malice. State common law defamation suits, however, only exempted distributors from liability if they did not know or have constructive knowledge of the defamatory statements.[122] In *Zeran*, the plaintiff unsuccessfully argued that AOL should be held liable as a distributor since it had knowledge of the defamatory postings.[123] Unfortunately, the Internet does not lend itself to the common law principle that knowledge equals liability, due to the enormous volume of postings on the Internet and the burden it would create for interactive service providers if they had to investigate every claim.[124]

C. The Abandoned Argument - Employee or Agent and Vicarious Liability

{45} Interactive computer service providers cannot be treated as publishers for information posted online by an information content provider and the courts have interpreted publisher liability to encompass distributor liability.[125] In an attempt to "promote the continued development of the Internet," Congress and the courts have granted absolute immunity to interactive computer service providers.[126] In *Daniel*, the court concluded that Dow could not be held liable as a distributor because no "special relationships" existed between Daniel and Dow; therefore, Dow could not be held liable for its negligent misstatements.[127] In *Cubby*, the plaintiffs argued that CompuServe should be held vicariously liable for the actions of its agents.[128] However, since there was no direct contractual relationship and CompuServe did not receive any fees for posting the material, the court held that no agency relationship existed.[129]

{46} The Blumenthals also attempted to argue that a "special relationship" existed between AOL and Drudge. The Blumenthals sought to prove that Drudge was an employee or agent of AOL. Unfortunately, the district court found no evidence to support the argument[130] and was forced to dismiss the issue because the Blumenthals had "all but abandoned that argument."[131] The Blumenthals, however, had not abandoned that argument. They asserted that "Drudge was not just an anonymous person who sent a message over the Internet through AOL," [132] and they introduced several factors in support of their agency argument.[133] Specifically, AOL had a contract with Drudge, AOL paid Drudge $36,000 a year for his services, AOL promoted the Drudge Report as a reason to subscribe to AOL and AOL reserved the right to remove or require changes to the content.[134] The court even admitted that this argument was persuasive.[135] Nevertheless, the court overlooked the majority of the factors and chose to focus on the content of the license agreement rather than the fact that a contract existed between Drudge and AOL. After focusing on the terms of the agreement, the court felt it was bound by the CDA to grant immunity to AOL as a publisher since AOL reserved the right to require changes to the content.[136]

{47} Whether the agency argument was "abandoned" by the plaintiffs or misinterpreted by the court, it should not be ignored. The presence of a contract and the exchange of money for information should prompt future plaintiffs to develop the theory that courts must hold interactive computer service providers vicariously liable for the actions of information content providers if an agency or employment relationship existed. Future plaintiffs should also argue that, under respondeat superior, courts must hold interactive computer service providers vicariously liable for defamatory statements made by an information content provider that was acting within the scope of his employment (as was Drudge) or if the content provider was furthering the interests of the interactive computer service provider (as was Drudge).

{48} The CDA does not address the issue of vicarious liability.[137] In an effort to convince a court that interactive computer service providers should not receive absolute immunity, plaintiffs ought to argue that

vicarious liability provides the balance needed between the direct regulation of the Internet and common law tort liability. Although Section 230(c)(1) has been interpreted broadly in the past, plaintiffs might persuade a future court to narrow the interpretation of "information content provider" to include only those providers with whom the interactive computer service does not have an agency relationship or an employment contract.

V. Conclusion

{49} The *Blumenthal* court struggled with the governmental hands-off approach to Internet regulation and application of traditional defamation laws to this new medium. Although that court attempted to distinguish between publisher and distributor liability, it overlooked the possibility of invoking vicarious liability when it dismissed the Blumenthals' agency argument. However, because the court sought to hold AOL liable as a publisher, it correctly applied Section 230(c)(1). Also, since the court focused on the contents of the license agreement, it correctly applied Section 230(c)(2)(A) of the CDA and granted AOL's motion for summary judgment.

{50} Promoting the development of the Internet and preserving the vibrant nature of the Internet are valid policies worth protecting. They should, however, be weighed against the interests of citizens harmed by defamatory statements posted to the Internet and read around the world. Future courts must attempt to strike a balance between regulating the Internet and providing relief to plaintiffs. In our eagerness to promote the growth of the Internet and other new technologies, we must not ignore traditional defamation laws. Although the common law does not have all of the answers, the large discrepancy that exists between electronic and print media is difficult to justify. Congress must again address the unique attributes of the Internet and reevaluate the necessity of absolute immunity for interactive computer service providers.

{51} Should an interactive computer service be held liable for the material it disseminates? According to the CDA, an interactive computer service is not liable for material provided to it by another content provider or for voluntary actions to restrict access to objectionable material.[138] According to current interpretations of the CDA, a provider is also not liable for disseminating defamatory material as a distributor, even if it has knowledge of the defamatory nature of the material. Courts are unable to apply the traditional "knowledge equals liability" doctrine to "distributors" due to the tremendous volume of postings on the Internet. Vicarious liability and the doctrine of respondeat superior may, however, help courts strike a proper balance between competing interests. Assuming the author of the defamatory material cannot be traced, future courts should use those theories to narrow the interpretation of "information content provider" to include only those providers with whom the interactive computer service does not have an employment contract.

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[**] **NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

Sarah B. Boehm, Note, A Brave New World of Free Speech: Should Interactive Computer Service Providers

Be Held Liable for the Material They Disseminate?, 5 RICH. J.L. & TECH. 7, (Winter 1998), *at* http://www.richmond.edu/jolt/v5i2/boehm.html.

[1] *See, e.g.*, Douglas B. Luftman, *Defamation Liability for On-line Services: The Sky is Not Falling*, 65 Geo. Wash. L. Rev. 1071, 1072 (1997).

[2] 992 F. Supp. 44 (D.C. 1998).

[3] Blacks Law Dictionary 417 (6th ed. 1990).

[4] Restatement (Second) of Torts § 558(a) (1976).

[5] *See id*. § 559.

[6] *Id*. § 558(b).

[7] *See id*. § 558(c).

[8] *See id*. § 558(d).

[9] *See id*. § 580A.

[10] *See id*. § 580A(a)-(b).

[11] *See, e.g.*, Jonathan D. Hart et al., *Cyberspace Liability*, 523 PLI/Pat 123, 159 (1998) (explaining that a pervasive public figure is an individual that "achieves such fame that he becomes a public figure for all purposes and in all contexts"); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[12] *See* Hart, *supra* note 11, at 159 (explaining that a limited public figure is an individual who "voluntarily injects himself into a particular public controversy and thereby becomes a public figure for a limited range of issues").

[13] *See id*.

[14] *See id*.

[15] *See* Restatement (Second) of Torts § 580B (1976).

[16] *See* Luftman, *supra* note 1, at 1083.

[17] *See id*. at 1088.

[18] *See id*. at 1084.

[19] *See id*. at 1085; *see also* Restatement (Second) of Torts § 581 (1976).

[20] *See* Luftman, *supra* note 1, at 1083.

[21] *See* Restatement (Second) of Torts § 583 (1976).

[22] *See id*. §§ 585-592A (1976).

[23] *See id*. §§ 599-605A.

[24] *See id*. §§ 593-598A.

[25] *See id*. § 581A.

[26] 520 N.Y.S.2d 334 (N.Y. Civ. Ct. 1987).

[27] *Id*. at 337.

[28] *See id*. at 338.

[29] *Id*.

[30] 776 F.Supp. 135, 141 (S.D.N.Y. 1991).

[31] The newsletter was called Rumorville USA. *See id*. at 137.

[32] *See id*.

[33] *See id*. at 137, 143.

[34] *Id*. at 141.

[35] 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

[36] *See id*. at *1.

[37] *Id*. at *3.

[38] *Id*. at *4.

[39] *Id*.

[40] *See id*.

[41] *See generally* David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147 (1997).

[42] *Stratton*, 1995 WL 323710, at *5.

[43] *See* Sheridan, *supra* note 41 (citing S. Conf. Rep. No. 104-230, at 435 (1996)).

[44] 47 U.S.C.A. § 230(c)(1) (West Supp. 1998).

[45] *Id*. § 230(c)(2)(A).

[46] 973 F.Supp. 1450 (S.D. Fla. 1997).

[47] *See id*. at 1451.

[48] *See id*. at 1455.

[49] 129 F.3d 327 (4th Cir. 1997).

[50] *See id*. at 328.

[51] The parties dispute the date AOL removed the original posting. *See id*. at 328.

[52] *Id*. at 332.

[53] *Id*.

[54] *See id*. at 333.

[55] *Id*.

[56] *Id*. at 334; *see also* 47 U.S.C.A. § 230(d)(3) (West Supp. 1998) (stating "[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").

[57] 718 So. 2d 385. (Fla. Dist. Ct. App.1998).

[58] *See id*. at 389.

[59] *See id*.

[60] *Id*.

[61] *Id*. at 390.

[62] *See Blumenthal v. Drudge*, 992 F. Supp. 44,47 (D.C. 1998).

[63] *See id*.

[64] Drudge had no other source of income at that time. *See id*.

[65] *Id*.

[66] The alleged defamatory passage that appeared in the Drudge Report read:

The DRUDGE REPORT has learned that top GOP operatives who feel there is a double-standard of only reporting republican shame believe they are holding an ace card: New White House recruit Sidney Blumenthal has a spousal abuse past that has been effectively covered up.

The accusations are explosive.

There are court records of Blumenthal's violence against his wife, one influential republican, who demanded anonymity, tells the DRUDGE REPORT.

If they begin to use [Don] Sipple and his problems against us, the Republican Party . . . to show hypocrisy, Blumenthal would become fair game. Wasn't it Clinton who signed the Violence Against Women Act?

[There goes the budget deal honeymoon.]

One White House source, also requesting anonymity, says the Blumenthal wife-beating allegation is pure fiction that has been created by Clinton enemies. [The First Lady] would not have brought him in if he had this in his background, assures the wellplaced staffer. This story about Blumenthal has been in circulation for years.

Last month President Clinton named Sidney Blumenthal an Assistant to the President as part of the Communications Team. He's brought in to work on communications strategy, special projects themeing - a newly created position.

Every attempt to reach Blumenthal proved unsuccessful. *Id*. at 46.

[67] *See id*.

[68] The headline read, "Charge: New White House Recruit Sidney Blumenthal has Spousal Abuse Past." *Id*. at 48.

[69] *See id*.

[70] At the time, AOL had more than nine million subscribers. *See id*. at 47.

[71] *See id*. at 48.

[72] *See id*. at 53.

[73] 117 S.Ct. 2329, 2334 (1997) (quoting ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996)).

[74] *See Blumenthal v. Drudge*, 992 F. Supp. 44, 48-9 (D.C. 1998).

[75] *Id*. at 48.

[76] *Id*. at 49.

[77] *Id*.

[78] 47 U.S.C.A. § 230(b)(1) (West Supp. 1998).

[79] *Id*. § 230(b)(2).

[80] *Id*. § 230(c)(1).

[81] *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.C. 1998).

[82] *Id*. at 50.

[83] *Id*. at 51.

[84] *See id*.

[85] *Id*.

[86] *Id*.

[87] *See* 47 U.S.C.A. § 230(c)(2)(A) (West Supp.1998); *see also supra* note 45 and accompanying text.

[88] *See Zeran v. America Online, Inc*., 129 F.3d 327 (4th Cir. 1997); *Blumenthal*, 992 F. Supp. 44, 52 (D.C. 1998).

[89] *See* 47 U.S.C.A. § 230(b)(4) (West Supp. 1998).

[90] *Blumenthal*, 992 F. Supp. at 52-53.

[91] *Id*.

[92] *See, e.g., Zeran*, 129 F.3d at 331.

[93] *See Blumenthal*, 992 F. Supp. at 53.

[94] Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 Conn. L. Rev. 1137, 1139 (1996).

[95] *See id*. at 1140.

[96] *See id*. at 1137.

[97] *See* U.S. Const. art. 1, § 8, cl. 3.

[98] *Zeran v. America Online, Inc*. , 129 F.3d 327, 334 (4th Cir. 1997).

[99] *Id*.

[100] *See generally* Eric Schlachter, *Cyberspace, The Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 Hastings Comm. & Ent. L.J. 87 (1993).

[101] *See id*. (arguing for the development of a hybrid model).

[102] *See id*.

[103] *See* Restatement (Second) of Torts § 580A (1976); *see also supra* notes 9-10 and accompanying text.

[104] 47 U.S.C.A. § 230(d)(3) (West Supp. 1998).

[105] *Zeran v. America Online, Inc*., 129 F.3d 327, 330 (4th Cir. 1997).

[106] *See supra* notes 16-17 and accompanying text.

[107] *See supra* notes 30-42 and accompanying text.

[108] *See Cubby, Inc. v. Compuserve, Inc*., 776 F. Supp. 135 (S.D.N.Y. 1991).

[109] *See Stratton Oakmont, Inc. v. Prodigy Services Co*., 1995 WL 323710 (N.Y. Sup. Ct. 1995).

[110] *See generally* Sheridan, *supra* note 41.

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

[112] *Id*. at 334.

[113] *See supra* notes 18-19 and accompanying text.

[114] *See Cubby v. Compuserve, Inc*., 776 F. Supp. 135, 139-141 (S.D.N.Y. 1991); *Stratton*, 1995 WL 323710; *Daniel v. Dow Jones & Co*., 520 N.Y.S.2d 334 (N.Y. Civ. Ct. 1987).

[115] *See Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.C. 1998).

[116] *See* 47 U.S.C.A. § 230(c)(1) (West. Supp. 1998).

[117] *See id*. § 230(c)(2)(A).

[118] *Blumenthal*, 992 F. Supp. at 51.

[119] *Id*.

[120] *Id*. at 52.

[121] 47 U.S.C. § 230(c)(2)(A).

[122] *See* Restatement (Second) of Torts § 581 (1976).

[123] *See Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir. 1997).

[124] *See id*. at 333.

[125] *See* 47 U.S.C.A. § 230(c)(1) (West Supp. 1998).

[126] *Id*. § 230(b)(1).

[127] *Daniel v. Dow Jones*, 520 N.Y.S.2d 334, 338 (N.Y. Civ. Ct. 1987).

[128] *See Cubby, Inc. v. Compuserve, Inc.*, 776 F.Supp. 135, 137, 143 (S.D.N.Y. 1991).

[129] *Id*. at 143.

[130] *See Blumenthal v. Drudge*, 992 F.Supp. 44, 50 (D.C. 1998).

[131] *Id*. at 50 n. 9.

[132] *Id*. at 51.

[133] *Id*.

[134] *See id*.

[135] *See id*.; *see also supra* notes 85-86 and accompanying text.

[136] *Id*. at 53.

[137] *See* 47 U.S.C. § 230(c)(1) (West Supp. 1998).

[138] *See id*. § 230(c).
