

**RE-ESTABLISHING DISTRIBUTOR LIABILITY ON THE INTERNET:
RECOGNIZING THE APPLICABILITY OF TRADITIONAL
DEFAMATION LAW TO SECTION 230 OF THE COMMUNICATIONS
DECENCY ACT OF 1996**

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ABSTRACT

Plaintiffs whose reputations have suffered irreparable injury from the distribution of defamatory statements have generally been permitted by law to recover damages from the enterprises that distributed the publications known to contain the defamatory material. However, when the enterprise that knowingly distributed the injurious content is an Internet service provider (“ISP”), present law denies that same plaintiff recovery. This perception of ISP immunity flows from a decision by the United States Court of Appeals for the Fourth Circuit in *Zeran v. America Online, Inc.*, where the Court extended certain immunities offered by the Communications Decency Act of 1996 (the “CDA”). In *Zeran*, the Fourth Circuit interpreted the CDA’s express grant of “publisher” immunity to Internet service providers as including immunity from liability as a “distributor” as well. This decision, however, has left those who suffer irreparable harm from the distribution of such material without legal recourse, even when the ISP that has distributed such material knows or has reason to know of its defamatory content.

This Article offers a comprehensive examination of this issue and a critique of the Fourth Circuit’s decision. It includes a thorough discussion of why the plain meanings of the relevant provisions of the CDA, the legislative history and purposes of those provisions, and the common law all suggest that this decision was in error. It highlights the harmful consequences of that decision. And it demonstrates that there is nothing so unique in Internet communication, nor in the technologies associated with it, that should warrant relieving ISPs from the responsibilities to reasonably protect persons from the irreparable harm to reputation that can result from an ISP’s knowing distribution of defamatory materials.

I. INTRODUCTION

Imagine that you are a well-respected business person in your community—perhaps the owner of an automobile distributorship. For many years, you have provided members of your community with outstanding service. You have actively contributed to the community by supporting civic organizations, sponsoring Little League teams, and, in short, investing years of time and many dollars in establishing a high level of good will.

Then, one day you read in your city newspaper an editorial letter stating that you are a convicted child molester. You are stunned—you know it is not true but there it is in print. You call the newspaper, but you are told there is nothing they can do about it. In a panicked state, you drive to your neighborhood newsstand to try to convince the proprietor to stop selling the papers, but he refuses. As a result, demonstrators begin congregating around your dealership. Members of the community in which you had spent years establishing good will suddenly shun you and your business. At night, vandals leave threatening messages painted on the vehicles on your lot. In sum, because of these

false and defamatory statements published in the newspaper, you have lost your established good will and are in danger of losing your business.

Under these circumstances, the law provides several remedies. First, the author of the letter may be liable for the false and defamatory statements he wrote about you.¹ Additionally, the newspaper that printed and circulated the letter may, likewise, be similarly liable.² Furthermore, because you informed the newsstand owner of the falsity of the statements in the newspapers he was distributing, even he may be liable for continuing to distribute the defamatory statements through his business.³ Although nothing can truly compensate you for the grief and humility you have experienced, the law provides at least the opportunity to obtain financial compensation for your injuries.

Now, however, change the circumstances. Suppose that instead of the letter appearing in a community newspaper, it is posted onto an Internet message board⁴ or blog.⁵ Following the posting, you inform the Internet Service Provider (“ISP”) hosting the board or blog that the information is false and defamatory, but the ISP refuses to remove the posting. And suppose that the Internet posting results in you being scorned by the community, in the same manner that occurred when it was printed in the newspaper. Whether in newsprint or online, the damage to your reputation may be beyond repair. However, although the law provided you the opportunity to sue both the newspaper and the newsstand owner for the damages their action or inaction caused you, the

¹ See generally *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (recognizing society’s interest in upholding defamation judgments). See *infra* Part II.A.1 for a discussion on first-party defamation liability.

² See *Cianci v. New Times Publ’g Co.*, 639 F.2d 54, 60 (2d Cir. 1980) (recognizing as “black letter rule,” that “one who republishes a libel is subject to liability just as if he had published it originally”); RESTATEMENT (SECOND) OF TORTS § 578 (1977) (“one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it”). See *infra* Part II.A.2, for a discussion on (re-)publisher liability.

³ See RESTATEMENT (SECOND) OF TORTS § 581(1) (1977) (“one who only delivers or transmits matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character”).

⁴ An Internet “message board” (or “forum”) is “an online discussion site where people can hold conversations in the form of posted messages.” *Internet Forum*, WIKIPEDIA, http://en.wikipedia.org/wiki/Internet_forum, (last visited Sept. 20, 2013). Early Internet forums were, effectively, the more modern equivalent of traditional bulletin boards, and allowed individuals to post messages and comment on other messages. *Id.* “From a technological standpoint, *forums* or *boards* are web applications managing user-generated content.” *Id.*

⁵ The term “blog” is “a contraction of the words *web log*.” *Blog*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Blog>, (last visited Sept. 20, 2013). It is a type of website, usually maintained by an individual with regular entries of commentary, descriptions of events, or other material such as graphics or video. *Id.* The formats for blogs vary, with many providing news or commentary on a specific topic. *Id.* An important characteristic of many blogs is the ability of readers to leave comments which may be viewed by other readers. *Id.*

law, at least according to the United States Court of Appeals for the Fourth Circuit (“Fourth Circuit”), provides you with no cause of action against the ISP.⁶

Section 230 of the Communications Decency Act (“CDA”) of 1996 (“§ 230”) contains a provision expressly immunizing ISPs from liability as a “publisher” of defamatory information provided by someone else.⁷ On its face, § 230 appears to have left “distributor” liability, as it applies to ISPs, intact. This means that prior to intervention by the Fourth Circuit, an ISP could be held liable for information it transmitted to subscribers, *if, and only if*, it “knew or had reason to know” that the information was defamatory in nature⁸—that is, courts could hold an ISP that distributed defamatory materials to the same standard that was applied to distributors of newspapers and other printed materials containing similarly defamatory materials. In *Zeran v. America Online, Inc.*,⁹ however, the Fourth Circuit interpreted § 230’s grant to ISPs of “publisher” immunity as including immunity from liability as a “distributor” as well.¹⁰

This Article will explore why the *Zeran* court’s interpretation of § 230 was in error, as well as why ISPs should not be immune from liability as a distributor of defamatory material. Because understanding basic defamation law is essential to understanding how that law should be applied to online communications, this Article begins with an overview of existing defamation law, starting with basic principles as they apply to the traditional media of newspapers, books, television, and the like.¹¹ This overview continues with an explanation of how these traditional principles have been applied to cases involving electronic databases and the Internet.¹² The overview section then moves on to a brief introduction to § 230 of the CDA,¹³ and finally, to a short overview of the *Zeran* case.¹⁴ Following the overview section, this Article continues with a discussion of why *Zeran* was wrongly decided,¹⁵ why ISPs should be subject to

⁶ See *Zeran v. America Online, Inc.*, 129 F.3d 327, 330–35 (4th Cir. 1997), *aff’g*, 958 F. Supp. 1124 (E.D. Va. 1997) (opining that the immunity for liability as a publisher of defamatory material afforded ISPs by § 230 included immunity from liability as a distributor also).

⁷ See 47 U.S.C. § 230(c)(1) (2012) (“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.”).

⁸ See RESTATEMENT (SECOND) OF TORTS § 581(1) (1977) (“[O]ne who only delivers or transmits matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.”).

⁹ 129 F.3d 327.

¹⁰ See *id.*

¹¹ See *infra* Part II.A.

¹² See *infra* Parts II.B.1–2.

¹³ See *infra* Part II.B.3.

¹⁴ See *infra* Part II.B.4.

¹⁵ See *infra* Part III.A.

distributor liability,¹⁶ and why Congressional legislation is an appropriate way to regulate Internet communications.¹⁷ Lastly, this Article concludes with a recommendation that courts outside the Fourth Circuit reject the *Zeran* decision and apply common law rules of distributor liability to relevant cases before them. In turn, Congress should likewise modify § 230 to clarify, by express terms, the limited scope of the immunity it affords ISPs.¹⁸

II. OVERVIEW OF EXISTING LAW

A. Traditional Defamation Rules Under the Common Law¹⁹

1. General Background and First-Person Liability

The traditional definition of *defamation* is “a communication to a third person which ‘tends to hold the plaintiff up to hatred, contempt, or ridicule or to cause him to be shunned or avoided.’”²⁰ Though this definition is still often repeated by the courts,²¹ more recent cases have recognized it as being too narrow,²² and now generally define defamation as “a communication that tends to damage the plaintiff’s ‘reputation,’ more or less in the popular sense—that is, to diminish the respect, good will, confidence or esteem in which he is held, or to excite adverse or unpleasant feelings about him.”²³ Furthermore, defamation has usually been construed to collectively include the common law torts of *libel* and *slander*,²⁴ both of which involve the “publication” of defamatory material.

¹⁶ See *infra* Part III.B.

¹⁷ See *infra* Part III.C.

¹⁸ See *infra* Part IV.

¹⁹ The purpose of this overview of traditional defamation law is to serve as a primer for readers unfamiliar with the basic tenants and theories of this area of law. It has been included in this Article because understanding these tenants is essential to understanding how they have been, and should be, applied to online communications. Readers familiar with traditional defamation law, however, may wish to proceed directly to Part II.B (*Defamation Law as Applied to Online Communications*), or to Part III (DISCUSSION).

²⁰ JOHN W. WADE ET AL., PROSSER, WADE AND SCHWART’S CASES AND MATERIALS ON TORTS 847 n.1 (9th ed. 1994) (citing, *Parmiter v. Coupland*, (1840) 151 Eng. Rep. 340, 342, as originally defining the tort of defamation).

²¹ *Id.*

²² *Id.* at 847 n.2.

²³ *Id.* at 847–48 n.2.

²⁴ Though it has historically been impossible to define and describe with precision the differences between these two torts, (RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977)), traditionally, *slander* has referred to defamatory communication by way of the spoken word, and *libel*, to written defamatory communication. WADE, *supra* note 20, at 864. Recent changes in communication technologies, such as radio and television, however, have required tinkering with

It is important to understand that the term “publication,” as it applies in the realm of defamation law, is a word of art. It does not refer only to printing or writing, but rather, “publication” occurs when defamatory words are communicated to someone other than the person being defamed.²⁵ Therefore, to be “published,” a statement only need be heard and understood by someone other than the party making the statement and the person who is the subject of the statement.²⁶

these traditional definitions. *See id.* at 865. The Restatement (Second) of Torts § 568 now offers the following to aid in distinguishing between libel and slander:

- (1) *Libel* consists of the publication of defamatory matter by written or printed words, or by its embodiment in physical form, or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.
- (2) *Slander* consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).
- (3) The area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander.

RESTATEMENT (SECOND) OF TORTS § 568 (1977). While a libel is commonly published by newspaper, book, magazine, letter, circular, petition, and the like, there are other methods of publishing a libel. *Id.* § 568 cmt. d. For example, “[d]efamatory pictures, caricatures, statues and effigies are libels because the defamatory publication is embodied in physical form.” *Id.* Additionally:

The wide area of dissemination, the fact that a record of the publication is made with some substantial degree of permanence and the deliberation and premeditation of the defamer are important factors for the court to consider in determining whether a particular communication is to be treated as a libel rather than a slander. The publication of defamatory matter may be made by conduct which by reason of its persistence it may be more appropriate to treat as a libel than a slander. On the other hand, the use of a mere transitory gesture commonly understood as a substitute for spoken words such as a nod of the head, a wave of the hand or a sign of the fingers is a slander rather than a libel.

Id. The Restatement offers the following illustrations:

1. A procures two men to “shadow” B. They follow him from one public place to another until the “shadowing” becomes notorious in the community. A has libeled B.
2. A makes a gesture with his fingers in the presence of B which indicates that C has the “evil eye,” a characterization that is highly disparaging in the community. A has slandered but not libeled C.
3. A prepares a wax figure recognizable as a representation of B and places it among a number of effigies of famous murderers in “The Chamber of Horrors,” where it is seen by a number of persons. A has libeled B.

Id. § 568 cmt. d, illus. 1–3.

²⁵ RESTATEMENT (SECOND) OF TORTS § 577 (1977).

²⁶ *See, e.g.,* Economopulos v. A.G. Pollard Co., 105 N.E. 896 (Mass. 1914) (finding that there was no publication of a defamatory statement, made in English, because of those who heard the statement, only the defendant spoke and understood the English language).

Because a defamation action, by definition, necessarily involves the communication of one person's views to a third person, the defendant's constitutional right to free expression under the First Amendment is implicated every time a state court entertains a defamation action. While the First Amendment places limitations on states' defamation laws, the Supreme Court of the United States ("Supreme Court") has, nonetheless, recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation,"²⁷ and has repeatedly upheld plaintiffs' rights to proceed in defamation actions.²⁸ The reason for this is probably best stated by Justice Stewart:

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. . . .

The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.²⁹

Beyond the speaker or author who originates a defamatory statement, others may also be liable. One such person or persons is the "republisher." Another is the "distributor." We look first at the republisher.

2. (Re-)Publisher Liability

It is the "black letter rule" that "one who republishes a libel is subject to liability just as if he had published it originally."³⁰ This is often true even if

²⁷ *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

²⁸ *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (finding that a reasonable fact finder could conclude that statements in reporter's column implied assertion that high school coach perjured himself in judicial proceeding, and implication that coach committed perjury was sufficiently factual to be susceptible of being proved true or false and might permit defamation recovery); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (holding that the speech or debate clause did not protect the transmittal of allegedly defamatory material in press releases and newsletters released by a senator); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (holding that a newspaper or broadcaster publishing defamatory false statements about an individual who is neither a public official nor a public figure may not claim a constitutional privilege against liability, for injury inflicted, on the ground of a privilege protecting discussion of any public issue without regard to the status of a person defamed therein).

²⁹ *Rosenblatt*, 383 U.S. at 92–93.

³⁰ *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 60 (2d Cir. 1980) (quoting *Hoover v. Peerless Publ'ns, Inc.*, 461 F. Supp. 1206, 1209 (E.D. Pa. 1978)).

the republisher attributes the libelous statement to the original publisher, and even if he expressly disavows the truth of the statement.³¹ This rule is widely recognized, and can be found in § 578 of the Restatement (Second) of Torts.³²

Such “republishing” may occur when someone verbally repeats a *slander*³³ he previously heard, or a *libel*³⁴ he read.³⁵ Likewise, it may occur when someone prints or reprints defamatory statements previously “published” verbally or in writing.³⁶ Of significance is that “[e]ach time [defamatory] material is communicated by a new person, a new publication has occurred, which is a separate basis of tort liability.”³⁷ Therefore, every person who reprints or otherwise “republishes” a defamatory statement becomes subject to liability to the same extent as if he had originally published it.³⁸

3. Distributor Liability

A third category of persons who may incur liability for a defamatory statement is the “distributor.” A distributor is one who merely engages in the “transfer of possession of a physical embodiment of the defamatory matter,” or

³¹ *Id.* at 60–61 (citing *Hoover*, 461 F. Supp. at 1209).

³² *Id.* at 61 (citing RESTATEMENT (SECOND) OF TORTS § 578 (1977) (“[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.”)).

³³ *Slander* generally refers to verbal defamation, but may consist of “the publication of defamatory matter by spoken words, transitory gestures, or by any form of communication [except those that constitute a libel].” RESTATEMENT (SECOND) OF TORTS § 568(2) (1977).

³⁴ *Libel* refers to written defamation. It “consists of the publication of defamatory matter by written or printed words, or by its embodiment in physical form or by any other form of communication which has the potentially harmful qualities characteristic of written or printed words. *Id.* § 568(1).

³⁵ *Id.* § 578 cmt. c.

³⁶ RESTATEMENT (SECOND) OF TORTS § 578 (1977).

³⁷ *Id.* § 578 cmt. b.

³⁸ *Id.* § 578 cmt. b. The Restatement provides several illustrations:

A states to B that he has heard that C is a felon. A is subject to liability to C.

A states to B that C has just told him that D, an unmarried woman, has given birth to a baby. A is subject to liability to C.

A newspaper feature syndicate supplies a defamatory article to each of its subscribing newspapers. Each paper that prints the article has published a libel for which it is separately subject to liability.

The A newspaper copies a libelous article from the B newspaper, accompanied by a statement that it was so copied. The A newspaper is subject to liability to the person defamed regardless of whether the B newspaper was privileged to publish the article.

Id. § 578 cmt. c, illus. 3–4, cmt. b, illus. 1–2 (listed in order presented).

one who “transmits” the same.³⁹ Such activities could include “selling, renting, giving or otherwise transferring or circulating a book, paper, magazine, document or phonograph record containing defamation published by a third person.”⁴⁰ The most common distributors are bookstores, newsstands, libraries and other like enterprises that are not actually engaged in the publication of books, magazines and similar materials, but who merely distribute or circulate such materials to the public.⁴¹ However, a telegraph or telephone company that “transmits” a defamatory statement by connecting a call may also be considered a distributor.⁴² There is one important distinction between publisher and distributor liability—one can be liable as a distributor “if, but *only if*, he knows or has reason to know” that the material he is distributing is defamatory in character.⁴³ Generally, a distributor, such as a newsstand, bookstore, or library, has no duty to examine, for defamatory content, the various publications being offered.⁴⁴ Only when “facts or circumstances” would suggest that a particular publication contains matter that, upon inspection, a reasonable man would recognize as defamatory, does a duty arise for a distributor to make an inspection of the materials he is distributing.⁴⁵

The reasoning for the distinction between publisher and distributor liability has its basis in the First Amendment and the public interest in assuring that publications and information are readily available for dissemination to the public. According to the Supreme Court, “the constitutional guarantees of the freedoms of speech and of the press stand in the way of imposing strict liability on distributors for the contents of the material they carry.”⁴⁶ The Court reasoned that if liability were imposed upon one who merely distributes material that turns out to contain a defamatory statement, then

³⁹ *Id.* § 581 cmt. b.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See id.*

⁴³ *Id.* § 581(1) (“[O]ne who only delivers or transmits defamatory matter published by a third person is subject to liability *if, but only if*, he knows or has reasons to know of its defamatory character.” (emphasis added)).

⁴⁴ *Id.* § 581 cmt. d–e.

⁴⁵ *Id.* For example, if a particular author or publisher has, in the past, frequently published material that is notoriously scandalous in nature, a bookstore or library may risk exposing itself to liability as a distributor of material from that author or publisher. *Id.* § 581 cmt. e. Defamatory material that happens to appear in a book by a reputable author and publisher, however, is unlikely to result in the distributor being found liable for the distribution of the defamatory statements contained within that book, unless the distributor had been given specific notice of its defamatory contents. *Id.*

⁴⁶ *Smith v. California*, 361 U.S. 147, 152–53 (1959) (striking down an ordinance imposing liability upon a bookseller for possessing an obscene book, regardless of whether the bookseller had knowledge of the book’s contents).

[e]very bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience. And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed.⁴⁷

Similarly, the Second Circuit has opined that "First Amendment guarantees have long been recognized as protecting distributors of publications. . . . Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment."⁴⁸

4. Discerning Between Publisher and Distributor Liabilities

Sometimes, discerning whether one is a distributor, liable only for defamatory content he knew or should have known about, or a publisher, liable even absent knowledge of defamatory content, is not an easy task. For example, in *Misut v. Mooney*,⁴⁹ Merlin Printing ("Merlin"), a co-defendant, was a contract printer that provided printing and related services to publishers and writers, including co-defendants Frank Mooney ("Mooney") and Main Street Press ("Main Street").⁵⁰ An action for libel was brought against the defendants resulting from a series of 15 articles and editorials that were published in Main Street's weekly newspaper.⁵¹ Defendant Merlin printed the newspaper at the request of Mooney and Main Street.⁵² While Merlin's employees "scrutinized" the material submitted by Mooney and Main Street for "nudity, profanity, and vulgarity," it had no other input into the material that it printed.⁵³ Specifically, it did not undertake any investigation to determine the truth of the material that

⁴⁷ *Id.* at 153 (quoting *The King v Ewart*, [1905] 25 NZLR 709 (CA) 729) (citation omitted). Though *Smith* involved criminal liability, the First Amendment's guarantees are equally applicable to civil defamation cases. As recognized by the Supreme Court: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil laws of libel. The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." *N.Y. Times v. Sullivan*, 376 U.S. 254, 277 (1964).

⁴⁸ *Lerman v. Flynt Distrib. Co., Inc.*, 745 F.2d 123, 139 (2d Cir. 1984) (citations omitted).

⁴⁹ 475 N.Y.S.2d 233 (Sup. Ct. 1984).

⁵⁰ *Id.* at 233.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

it printed, confirm facts, or check sources, nor did it exercise any editorial judgment.⁵⁴

At issue in *Mooney* was whether Merlin could be held liable as a publisher.⁵⁵ The court looked to a 1974 decision by the Supreme Court, where the Court had held that “so long as they do not impose liability without fault, the States may define for themselves the appropriated standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”⁵⁶ Relying on the concept that “in defamation actions liability must be based on fault,”⁵⁷ the *Mooney* court opined that if “a printer plays a *knowing* role in the publication of a libel, or acts in violation of that applicable standard of care, [then] there is a basis for liability.”⁵⁸

In applying the facts of its case to the rule articulated, however, the *Mooney* court found that the printer’s lack of editorial control over the material it printed resulted in a lack of knowledge of the defamatory content of that material,⁵⁹ and expressly discounted any notion that Merlin’s screening the materials for nudity, profanity, and vulgarity was evidence that the printer knew of the material’s defamatory content. “That the defendant Merlin may have taken steps to enforce its own standards of decency or civility, or to assure its own compliance with the obscenity laws of the state,” opined the court, “is not an indication that the defendant Merlin was in a position to test the truth of the statements submitted by an independent author.”⁶⁰ The court dismissed the complaint against Merlin,⁶¹ stating,

There would be far reaching implications from the imposition of liability on a printer in a case such as this. The resulting chilling effect could limit an author’s access to printing services; or available printers might insist on an intrusive monitoring or censorship of printed material to protect themselves from potential liability.⁶²

Similar difficulties in determining whether a party is a “publisher” or merely a “distributor” have also arisen with regards to radio and television

⁵⁴ *Id.*

⁵⁵ *See id.* (dismissing contract printer from defamation actions because contract printer had no reason to know that the material he printed, which was written and edited by someone else, contained defamatory statements).

⁵⁶ *Id.* at 235 (quoting *Gertz v. Robert Welch*, 418 U.S. 323, 347 (1974)).

⁵⁷ *Id.* (citing *Chapadeau v. Utica Observer-Dispatch*, 341 N.E.2d 569, 571 (N.Y. 1975)).

⁵⁸ *Id.* at 236 (emphasis added).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 236 n.2.

broadcasts. For example, in *Auvil v. CBS 60 Minutes*,⁶³ plaintiffs, apple growers in the state of Washington, brought suit against the television show “60 Minutes,” CBS, and three local CBS affiliate stations, following the airing of a “60 Minutes” segment containing allegedly defamatory statements concerning chemicals used to grow Washington apples.⁶⁴

Among the issues presented by the case was whether a local CBS affiliate could be held liable, as a publisher, for the programming it “rebroadcasts” to its local viewing audiences;⁶⁵ or more specifically, “whether a local broadcaster who serves as a mere conduit ‘republishes’ by relaying an unedited feed.”⁶⁶ The *Auvil* court, like the court in *Mooney*, looked to the extent to which the defendants exercised editorial control over the material it distributed.⁶⁷ The court noted that the network affiliates *could have* exercised editorial control⁶⁸—that the affiliates had “some period of time in which to review the programming and also some idea of the content”;⁶⁹ that they had been provided a telexed communique setting out the “general terms and nature of the subject matter” of the broadcast;⁷⁰ that they had the power to exercise editorial control by virtue of their contracts with CBS;⁷¹ and that each network affiliate does, in fact, at times, censor programming when it believes the content of that programming is “unsuitable for local consumptions,” although none had ever preempted “60 Minutes.”⁷²

In spite of the affiliates’ abilities to exercise editorial control and preempt the programming, the court found that, in this case, “all three [affiliates] merely served as a conduit”;⁷³ that “[i]t is undisputed that the affiliates exercised no [actual] editorial control over their broadcasts.”⁷⁴ The court observed the Restatement’s position that “[o]ne who only delivers or transmits defamatory material published by a third person is subject to liability . . . only if he knows or had reason to know of its defamatory character.”⁷⁵ Noting that the

⁶³ 800 F. Supp. 928 (E.D. Wash. 1992).

⁶⁴ *Id.* at 931.

⁶⁵ *See id.* at 930–32.

⁶⁶ *Id.* at 931.

⁶⁷ *See id.* at 931–32.

⁶⁸ *Id.* at 931.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 931–32 (quoting *Dworkin v. Hustler Magazine, Inc.*, 634 F. Supp. 727, 729 (D. Wyo. 1986)).

Restatement and similar court opinions deal primarily with liability vis-à-vis booksellers,⁷⁶ the court opined that “there is no logical basis for imposing a duty of censorship on the visual media that does not likewise attach to the print chain for distribution,”⁷⁷ and entered summary judgment in favor of the three local CBS affiliates.⁷⁸

5. Summary of Traditional Defamation Law

Prior to the questions introduced as a result of communications expanding into the computer and Internet related areas, traditional defamation rules have remained relatively static in recent years, and can be summarized as follows:⁷⁹

Defamation Defined – Defamation is “a communication that tends to damage the plaintiff’s ‘reputation,’ more or less in the popular sense—that is, to diminish the respect, good will, confidence or esteem in which he is held, or to excite adverse or unpleasant feelings about him.”⁸⁰

Publisher Liability for Defamation – A person who “publishes” a defamatory statement, either verbally or through some media such as print, radio, or television, is liable for damages to the person defamed, provided the statement is heard and understood by someone other than the person making the statement and the person who is the subject of the statement.⁸¹

⁷⁶ *Id.*

⁷⁷ *Id.* at 932 (citing *Auvil v. CBS 60 Minutes*, 140 F.R.D. 450, 451–52 (E.D. Wash. 1991)).

⁷⁸ *Id.*

⁷⁹ These rules represent only the general rules applied to defamation actions. There are more specific rules pertaining to certain factual scenarios, including, for example, matters of public concern and matters pertaining to public officials. *See, e.g.*, *Phila. Newspapers, Inc., v. Hepps*, 475 U.S. 767 (1986) (holding that where the statements are matters of public concern, the plaintiff bears the burden of showing the statements are false); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that a public official may not recover damages for a false and defamatory statement concerning his official conduct unless he proves that the statement was made with actual malice). Because understanding these specific rules is not necessary to understanding the subject matter of this Article, they will not be discussed.

⁸⁰ WADE, *supra* note 20, at 847–48 n.2.

⁸¹ *See Economopolos v. A.G. Pollard Co.*, 105 N.E. 896 (Mass. 1914) (finding that there was no publication of a defamatory statement, made in English, because of those who heard the statement, only the defendant spoke and understood the English language); *see also* RESTATEMENT (SECOND) OF TORTS §§ 568, 577 (1977) (including section comments). Some cases however, suggest that the publication of a statement that is merely *defamatory* may not be sufficient to give rise to liability—that liability may only be imposed if the statement is both *defamatory* and *false*. *See, e.g.*, *Phila. Newspapers*, 475 U.S. 767 (holding that, under the specific cir-

Republisher Liability – “One who republishes a libel is subject to liability just as if he had published it originally.”⁸²

Distributor Liability – One who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.⁸³

While these rules represent the traditional approaches to defamation actions, applying these rules in a non-traditional world—one replete with new technologies and approaches to communication—has, in recent years, required more non-traditional approaches to evaluating issues.

B. Defamation Law as Applied to Online Communications

With the advent of modern information technologies, such as computer file transfers, subscriber bulletin boards, and the Internet, new questions have surfaced: Should computer service providers be subject to liability when their members or users utilize the providers’ services to distribute defamatory materials? If so, to what standard of liability should they be held—that of publisher, liable even absent any knowledge of defamatory content, or that of distributor, liable only if the provider knew or had reasons to know the defamatory content of material being distributed by its systems? The following cases and Congressional intervention represent attempts to forge answers to these questions.

1. *Cubby, Inc. v. CompuServe, Inc.*⁸⁴

Before the Internet became a widely used resource for electronic information exchange, several computer service companies emerged which provided personal computer access to various databases and services.⁸⁵

cumstances of the case, the plaintiff bears the burden of proving the falsity of the defamatory statements).

⁸² See *Cianci v. New Times Publ’g Co.*, 639 F.2d 54, 60 (2d Cir. 1980) (quoting *Hoover v. Peerless Publ’ns, Inc.*, 461 F. Supp. 1206, 1209 (E.D. Pa. 1978)).

⁸³ RESTATEMENT (SECOND) OF TORTS § 581(1) (1977).

⁸⁴ 776 F. Supp. 135 (S.D.N.Y. 1991).

⁸⁵ Services offered by these companies generally included access to online encyclopedias, shopping, and special interest forums comprised of electronic bulletin boards, interactive online conferences, and topical databases. These computer service companies were similar to today’s ISPs in that persons with access to a personal computer equipped with a telephone modem could utilize the telephone lines to access services. The most significant difference between how these services functioned and how today’s ISPs operate is that the older services lacked interconnectivity with other service providers through a central network, such as is available today with the In-

CompuServe was one of these early online service providers, offering online services through its CompuServe Information Service (“CIS”).⁸⁶ Subscribers, who paid fees both for membership and time using the service, had access to over 150 special interests forums.⁸⁷ Among the forums available to subscribers of CIS was the Journalism Forum, which focused its content on issues of interest to the journalism industry. CompuServe had contracted with Cameron Communications, Inc. (“CCI”), an organization independent of CompuServe, to “manage, review, create, delete, edit and otherwise control the contents” of the Journalism Forum “in accordance with the editorial and technical standards and conventions of style as established by CompuServe.”⁸⁸

One of the publications available on the Journalism Forum was Rumorville, USA (“Rumorville”), which provided daily reports about broadcast journalism and journalists.⁸⁹ Rumorville was published by Don Fitzpatrick Associates (“DFA”), headed by Don Fitzpatrick, who was named as a defendant in the case.⁹⁰ There was no employment, contractual, or other direct relationship between CompuServe and either DFA or Fitzpatrick.⁹¹ Rather, DFA provided its publication to the Journalism Forum under a contract with CCI.⁹² The details of the contract included provisions that DFA “accepts total responsibility for the contents” of Rumorville⁹³ and that CCI was required to “limit access to Rumorville to those CIS subscribers who have previously made membership arrangements directly with DFA.”⁹⁴

CompuServe neither received compensation from nor paid compensation to DFA for providing Rumorville to the Journalism Forum.⁹⁵ CompuServe also did not charge its subscribers for access to the Journalism Forum, other than standard membership and online usage fees it charged all CIS subscribers regardless of what CIS services they accessed.⁹⁶ The Journalism Forum was made available to approved CIS subscribers immediately after it was uploaded

ternet. This required users to dial in to each service provider separately, and limited the user’s access to information and services to those that were available on or through the selected service provider.

⁸⁶ See *Cubby*, 776 F. Supp. at 137 (describing CompuServe and the on-line services it provided).

⁸⁷ *Id.*

⁸⁸ *Id.* (citing Aff. of Jim Cameron (April 4, 1991)).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* (citing Aff. of Jim Cameron (April 4, 1991)).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

into CompuServe's data banks—its contents were not first reviewed by CompuServe.⁹⁷ According to CompuServe, before the *Cubby* case was filed, CompuServe had never received any complaints about the content of Rumorville.⁹⁸

Plaintiffs Cubby, Inc. (“Cubby”) and Robert Blanchard operated a computer database, called “Skuttlebut,” which offered similar content as Rumorville, and was designed to compete against Rumorville.⁹⁹ They brought this action against CompuServe, claiming that Rumorville had, at least twice, carried false and defamatory remarks about Skuttlebut and Blanchard, and that CompuServe had carried those defamatory remarks on its Journalism Forum.¹⁰⁰

CompuServe moved for summary judgment, arguing that even if the statements relating to Skuttlebut and Blanchard were defamatory, CompuServe was merely a distributor of the statements, and not a publisher of them. Therefore, because CompuServe did not know or have reasons to know of the statements, it could not be held liable for distributing them.¹⁰¹ The court substantively accepted CompuServe's argument. It opined that CompuServe's CIS is “in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications.”¹⁰² The court continued its comparison between a traditional publication distributor and CompuServe's CIS, noting that though CompuServe has the right to refuse to carry a given “publication” altogether, “once it does decide to carry a publication, it will have little or no editorial control over that publication's contents.”¹⁰³ The court also noted that this lack of editorial control was particularly true in this case, as the publication in question was carried on a forum that was managed by a company unrelated to CompuServe.¹⁰⁴

The court then applied traditional defamation law to the case, stating:

First Amendment guarantees have long been recognized as protecting distributors of publications. . . . Obviously the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 138.

¹⁰⁰ *Id.* The allegedly defamatory statements included comments that Skuttlebut was a “new start-up scam”; that it was secretly accessing, “through some back door,” information first published by Rumorville; and that Blanchard had been “bounced” from his previous position at WABC. *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 140.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

rule would be an impermissible burden on the First Amendment. . . . 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 new distributor such as CompuServe than that which is applied to a public library, book store, or news stand would impose an undue burden on the free flow of information.¹⁰⁵

The court, therefore, determined that subjecting an online database service provider to liability as a publisher, which could make it liable for defamatory statements carried on its service even absent of any knowledge of the defamatory statements, was inappropriate. The court decided, instead, that the appropriate standard of evaluating liability for such providers is that of distributor liability, which focuses on “whether [the service] knew or had reason to know of the allegedly defamatory . . . statements.”¹⁰⁶

A key issue on which the *Cubby* court based its decision was that CompuServe did not exercise any editorial control over the material it was distributing,¹⁰⁷ and, therefore, was subject only to liability as a distributor, and not as a publisher. It did not opine whether its decision would have been different had CompuServe actually involved itself in the editing of the content of its Journalism Forum. This issue, however, was addressed four years later in *Stratton Oakmont v. Prodigy Services Co.*¹⁰⁸

2. *Stratton Oakmont v. Prodigy Services Co.*

The importance of the decision in *Stratton Oakmont v. Prodigy Services Co.*¹⁰⁹ lies in the fact that it was legislatively overruled by § 230 of the CDA.¹¹⁰ While *Stratton Oakmont* does not represent the law as it stands today, understanding the case is essential to understanding the purposes of § 230 of the CDA.

Prodigy Services Company (“Prodigy”) operated a computer network similar in many ways to CompuServe’s CIS. Among the services Prodigy of-

¹⁰⁵ *Id.* (quoting *Lerman v. Flynt Distribut. Co.*, 745 F.2d 123, 139 (2d Cir. 1984)) (citations omitted) (internal quotation marks omitted).

¹⁰⁶ *Id.* at 140–41.

¹⁰⁷ *See id.* at 140 (noting that “CompuServe has no more editorial control over [the publications it carries] than does a public library, book store or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be from any other distributor to do so.”).

¹⁰⁸ No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

¹⁰⁹ *Id.*

¹¹⁰ *See* discussion *infra* Part II.B.3.

ferred its more than two million subscribers¹¹¹ was special interest “bulletin boards.”¹¹² Prodigy contracted with bulletin board leaders who encouraged usage of their respective bulletin boards by participating in the discussions and undertaking promotional efforts.¹¹³ One of these bulletin boards was “Money Talk,” allegedly the “leading and most widely read financial computer bulletin board in the United States.”¹¹⁴ Money Talk members could use the bulletin board to post statements regarding financial matters, including stocks and investments.¹¹⁵

On October 23 and 25 of 1994, an unidentified bulletin board user posted defamatory statements on Prodigy’s Money Talk bulletin board about Stratton Oakmont, Inc. (“Stratton”), a securities and investment banking firm, and Stratton’s president, Daniel Porush.¹¹⁶

Among the claims brought by Plaintiffs Stratton and Porush was that Prodigy was liable *per se*, as a publisher, for the allegedly defamatory statements.¹¹⁷ The single critical issue raised was whether Prodigy could be considered a “publisher” of the defamatory statements, and therefore liable even absent knowledge of the statements.¹¹⁸ While the *CompuServe* court had refused to consider its defendant a publisher,¹¹⁹ the *Stratton Oakmont* court distinguished its case from *CompuServe*.¹²⁰ According to the *Stratton Oakmont* court, the primary difference between the two cases was that CompuServe, unlike Prodigy, did not exercise any editorial control over the content of the forum where the allegedly defamatory statements were made.¹²¹ It noted that Prodigy

¹¹¹ *Stratton Oakmont*, 1995 WL 323710, at *1.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* The posting contained the following statements: that Stratton and Porush had committed criminal and fraudulent acts in connection with an initial public offering (“IPO”) of stock for Solomon-Page Ltd; that the Solomon-Page IPO was a “major criminal fraud”; that the IPO was a “100% criminal fraud”; that Porush was a “soon to be proven criminal”; and that Stratton was a “cult of brokers who either lie for a living or get fired.” *Id.*

¹¹⁷ *See id.* (stating that claims for *per se* liable were among the ten causes of action brought).

¹¹⁸ *See id.* at *3.

¹¹⁹ *See Cubby Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991) (describing the standard for distributor liability—whether CompuServe “knew or had reason to know of the allegedly defamatory . . . statements”—as “the appropriate standard of liability to be applied to CompuServe”).

¹²⁰ *See Stratton Oakmont*, 1995 WL 323710, at *4 (describing the distinctions between how CompuServe and Prodigy operated their online services).

¹²¹ *Id.* The *Stratton Oakmont* court noted that in the *CompuServe* case, managing the forum and editing its contents were done by Cameron Communications and that CompuServe had no

operated very differently than CompuServe. First, Prodigy “held itself out to the public and its members as controlling the content of its computer bulletin boards.”¹²² Second, it had promulgated “content guidelines” in which users had been advised not to post “insulting” or “harass[ing]” notes.¹²³ Finally, Prodigy not only held itself out as controlling the content of its bulletin boards, but then did, in fact, attempt to do just that.¹²⁴

The court stated its agreement with the case law that established that computer bulletin board operators should generally be viewed as distributors,¹²⁵ much like libraries, bookstores, and television network affiliates.¹²⁶ The court continued, however, pointing to Prodigy’s own policies, technology, and staffing decisions as distinguishing its services from those of other computer bulletin board operators, and “mandated the finding that it is a publisher.”¹²⁷ The court presumed that Prodigy’s decision to regulate the contents of its bulletin boards was, at least in part, “influenced by its desire to attract a market it per-

opportunity to review the contents of the online publication before it was uploaded onto CompuServe’s CIS data banks and made available to subscribers. *Id.*

¹²² *Id.* In one marketing article, Prodigy stated:

We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate.

Id. at *2.

¹²³ *Id.* at *2. These guidelines included warnings that “notes that harass other members or are deemed to be in bad taste or grossly repugnant to community standards, or are deemed harmful to maintaining a harmonious online community, will be removed when brought to Prodigy’s attention.” *Id.* The guidelines also stated that although “Prodigy is committed to open debate and discussion on the bulletin boards, . . . this doesn’t mean that ‘anything goes.’” *Id.*

¹²⁴ *See id.* at *2–3 (discussing the steps and means Prodigy utilized to exercise editorial control over the contents of its bulletin boards). Prodigy attempted to exercise actual editorial control primarily through two means. First, Prodigy used a software screening program which automatically pre-screened and deleted all bulletin board postings which contained offensive language. *Id.* at *2. Second, Prodigy used Board Leaders to review postings and to enforce Prodigy’s standards as to content. *Id.* at *2–3. The court opined that:

[Prodigy] has virtually created an editorial staff of Board Leaders who have the ability to continually monitor incoming transmissions and in fact do spend time censoring notes. Indeed it could be said that Prodigy’s current system of automatic scanning, Guidelines and Board Leaders may have a chilling effect on freedom of communication in Cyberspace, and it appears that this chilling effect is exactly what [Prodigy] wants

Id. at *5.

¹²⁵ The *Stratton Oakmont* court specifically noted its agreement with *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) and *Auvil v. CBS 60 Minutes*, 800 F. Supp. 928 (E.D. Wash. 1992). *See Stratton Oakmont*, 1995 WL 323710, at *5. *See supra* Part II.B.1 for a discussion of *Cubby*. *See supra* Part II.A.4 for a discussion of *Auvil*.

¹²⁶ *Stratton Oakmont*, 1995 WL 323710, at *5.

¹²⁷ *Id.*

ceived to exist consisting of users seeking a ‘family-oriented’ computer service,”¹²⁸ and concluded that “Prodigy’s conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice.”¹²⁹

The *Stratton Oakmont* court seemed to be aware that any legal precedent, resulting from its decision to impose publisher liability upon a computer online services provider that exercises actual editorial control over its service’s content, might be short-lived. Looking ahead towards the upcoming Congressional votes on pending legislation, the court noted that “the issues addressed [in this opinion] may ultimately be preempted by federal law if the Communications Decency Act of 1995, several versions of which are pending in Congress, is enacted.”¹³⁰

3. Section 230 of the Communications Decency Act of 1996

Stratton Oakmont left the common law with a rather uncomfortable paradox. Its position that an ISP could be held liable as a publisher of defamatory material only if the provider had exercised editorial control over its service’s contents provided a strong incentive for ISPs to refrain from exercising such control. It meant that any internet service provider that chose to close its eyes and permit any and all communications, no matter how defamatory, obscene, or otherwise objectionable, to be communicated to others through its service was protected from liability as a publisher. For the ISP that made serious attempts to screen for and remove such materials, however, there was no such protection. In essence, those ISPs that made attempts to be more responsible in the materials it allowed to be disseminated through its services were more vulnerable to tort liability than those that made no such attempts. Congress, concerned about the disincentives to restrict access to objectionable materials that *Stratton Oakmont* and similar decisions placed upon ISPs, added § 230¹³¹ to its already pending Communications Decency Act.¹³² Section 230 provides, in relevant part:

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ The complete text of § 230 is as follows:

230. Protection for private blocking and screening of offensive material

(a) Findings – The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy – It is the policy of the United States –

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) 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;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for “good [s]amaritan” 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 restrict access to material described in paragraph (1).

(d) Obligations of interactive computer service – A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law – Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(c) Protection for “good [s]amaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker – No [p]rovider or user of an interactive computer service¹³³ shall be treated as the publisher or speaker of any information by another information content provider.¹³⁴

(2) Civil liability – No [p]rovider or user of an interactive computer service shall be liable on account of –

(2) No effect on intellectual property law – Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law – Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. 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.

(4) No effect on Communications Privacy law – Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions – As used in this section:

(1) Internet – The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service – The term “interactive computer service” means 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 and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider – The term “information content provider” means 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.

(4) Access software provider – The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

47 U.S.C. § 230 (2012).

¹³² See H.R. REP. NO. 104-458, at 194 (1996).

¹³³ An “interactive computer service” is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” 47 U.S.C. § 230(f)(2).

¹³⁴ An “information content provider” is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3) (emphasis added).

- (A) any action voluntarily taken in good faith to restrict access to or the availability of material that the provider 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 restrict access to material described in paragraph (1).¹³⁵

According to the very scant legislative history pertaining to § 230, its purpose was to provide “[G]ood Samaritan” protection for providers or users of interactive computer services for actions taken to restrict access to objectionable material.¹³⁶ Congress’s intention in passing § 230 of the CDA was to “remove the disincentives to self-regulation created by the *Stratton Oakmont* decision.”¹³⁷ It was to “encourage service providers to self[-]regulate the dissemination of offensive material over their services.”¹³⁸ With its concern that decisions like *Stratton Oakmont* would “deter service providers from blocking and screening offensive material,”¹³⁹ Congress enacted § 230 to “grant immunity to interactive computer service providers from suits arising from efforts by those providers to screen or block content.”¹⁴⁰

While § 230 expressly relieves ISPs from liability as a publisher¹⁴¹ and for exercising editorial control over its service contents,¹⁴² it is, on its face, silent regarding whether the scope of protection afforded was intended to include liability as a distributor. In what has become the seminal case relevant to this topic, as well as the focus of this Article’s inquiry, this issue was addressed by the Fourth Circuit in *Zeran v. America Online, Inc.*¹⁴³

¹³⁵ 47 U.S.C. § 230(c). See *supra* note 131 for full text of § 230.

¹³⁶ H.R. REP. NO. 104-458, at 194.

¹³⁷ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), *aff’d* 958 F. Supp. 1124 (E.D. Va. 1997).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1134 (E.D. Va. 1997), *aff’d*, 129 F.3d 327 (4th Cir. 1997).

¹⁴¹ See 47 U.S.C. § 230(c)(1) (2012).

¹⁴² See *id.* at (c)(2)(A)–(B).

¹⁴³ 129 F.3d 327.

4. *Zeran v. America Online, Inc.*

In *Zeran v. America Online, Inc.*,¹⁴⁴ Plaintiff Kenneth Zeran brought action against America Online (“AOL”) alleging that AOL (1) unreasonably delayed in removing defamatory messages posted on an AOL electronic bulletin board, (2) refused to post retractions regarding those messages, and then (3) failed to screen its service for similar postings thereafter.¹⁴⁵ According to Zeran’s complaint, on April 25, 1995, messages appeared on an AOL bulletin board advertising “Naughty Oklahoma T-Shirts,” featuring offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City.¹⁴⁶ These advertisements, posted by an anonymous person, instructed anyone interested in purchasing the shirts to contact “Ken” at Zeran’s home-business phone number.¹⁴⁷ As a result, Zeran received a high volume of angry and derogatory phone messages, which included death threats.¹⁴⁸ Because Zeran relied on his phone availability for business, he could not change his telephone number.¹⁴⁹ Zeran called AOL to report his dilemma, and was assured by a company representative that the posting would be removed from the bulletin board, but that AOL would not, as matter of policy, post a retraction.¹⁵⁰ Zeran and AOL disputed when this original posting was removed from the bulletin board.¹⁵¹

Similar additional messages were posted on each of the next five consecutive days.¹⁵² Zeran called AOL repeatedly and was assured by company representatives that the offending person’s account would soon be closed.¹⁵³ By April 30, 1995, however, Zeran was still receiving abusive phone calls, one approximately every two minutes.¹⁵⁴ Then, on May 1, an announcer for an Oklahoma City radio station, who had received a copy of the first advertisement posted on AOL, related the advertisement’s content on the air, including the name “Ken” and Zeran’s phone number.¹⁵⁵ As a result, Zeran was inundated with additional death threats and other tormenting calls from Oklahoma City

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 328.

¹⁴⁶ *Id.* at 329.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

residents.¹⁵⁶ Zeran spoke to representatives of the radio station and AOL, and finally, by May 14, after the story was exposed as a hoax by a local Oklahoma City newspaper, and the radio station made an on-air apology, the number of calls Zeran received subsided to about fifteen per day.¹⁵⁷

Zeran brought suit against AOL arguing that once he notified the company of the unidentified third-party hoax, AOL had a duty, as a distributor of the defamatory postings, to promptly remove the defamatory messages, to notify its subscribers of the falsity of those messages, and to effectively screen for future defamatory postings.¹⁵⁸ Zeran argued that, though § 230 provided ISPs immunity from publisher liability, it left distributor liability intact.¹⁵⁹ AOL, however, pled § 230 as an affirmative defense, claiming that the section's grant of immunity for publisher liability encompassed liability as a distributor also.¹⁶⁰

The *Zeran* court accepted AOL's argument that § 230 immunized it from distributor liability.¹⁶¹ The court opined that distributor liability is merely part of, and not distinct from, publisher liability—the distinction of requiring notice of the offending content of questioned material before one may be subject to liability as a distributor signifies “only that different standards of liability may be applied within the larger publisher category.”¹⁶² According to the *Zeran* court, “[t]o the extent that decisions like *Stratton* and *Cubby* utilize the terms ‘publisher’ and ‘distributor’ separately, the decisions correctly describe two different *standards of liability* . . . [they do not] suggest that distributors are not also a type of publisher.”¹⁶³

The *Zeran* court determined that Congress's purposes in enacting § 230 supported including distributor liability within the scope of the section's protection, and gave several specific reasons for reaching that determination. First, considering that “[t]he amount of information communicated via interactive computer services is . . . staggering,” and that imposing tort liability “in an area of such prolific speech” would have a chilling effect on ISPs' willingness to refrain from restricting the number and types of messages posted, “Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any restrictive efforts.”¹⁶⁴ Second, once an ISP receives a notice of a potentially defamatory posting, it “must decide whether to

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 330.

¹⁵⁹ *See id.* at 331–32.

¹⁶⁰ *Id.* at 330.

¹⁶¹ *See id.* at 330–35.

¹⁶² *Id.* at 332.

¹⁶³ *Id.* (emphasis added).

¹⁶⁴ *Id.* at 331.

publish, edit, or withdraw the posting,” and therefore, under those circumstances, the ISP is “thrust into the role of a traditional publisher.”¹⁶⁵ Third, requiring ISPs to investigate and make legal judgments regarding complaints of defamatory postings would create “an impossible burden” on ISPs, which would result in “a natural incentive simply to remove messages upon notification” without undertaking any investigation to determine whether or not the contents were defamatory.¹⁶⁶ Fourth, liability based upon notice would “deter service providers from regulating the dissemination of offensive material over their . . . services” as efforts to screen for such materials would naturally lead to discovery of potentially defamatory material thereby creating a stronger basis for liability.¹⁶⁷ Ultimately, the *Zeran* court concluded that “[b]ecause the probable effects of distributor liability on the vigor of Internet Speech and on service provider[s] self-regulation are directly contrary to § 230’s statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.”¹⁶⁸

III. DISCUSSION

When Congress passed § 230 of the Communications Decency Act, it expressly relieved ISPs from liability as publishers in two ways. First, it provided that an ISP will not be “treated as the publisher or speaker” of information not originating with the ISP.¹⁶⁹ Second, it provided that when an ISP undertakes good faith efforts to screen out “objectionable” material, an activity usually considered to be the exercise of editorial control by a publisher, then that ISP could not be held civilly liable “on account of” that action.¹⁷⁰ It did not, however, expressly state whether this grant of immunity as a publisher also included immunity from liability as a distributor of defamatory materials. The Fourth Circuit, in *Zeran v. America Online, Inc.*,¹⁷¹ had the occasion to appropriately clarify this issue. By thoroughly investigating and considering Congress’s intentions and purposes in passing § 230, as well as the development of the common law of defamation and the theoretical underpinnings, which have made liability as a “publisher” and liability as a “distributor” of defamatory materials distinctly different, the *Zeran* court had the perfect opportunity to render a proper decision, which would have been supported by each of these. The *Zeran* Court, however, failed to rise to that challenge and wrongly decided that

¹⁶⁵ *Id.* at 332.

¹⁶⁶ *Id.* at 333.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ 47 U.S.C. § 230(c)(1) (2012); *see supra* note 131 for complete text of § 230.

¹⁷⁰ 47 U.S.C. § 230(c)(2)(A); *see supra* note 131 for complete text of § 230.

¹⁷¹ 129 F.3d 327.

the immunity from publisher liability afforded to ISPs by § 230 includes immunity from liability as a distributor as well.

A. *Congress's Intention and Purpose in Promulgating § 230*

Congress's intent in passing any federal statute is of significant importance in interpreting it. Regarding § 230, however, there is, unfortunately, very little specific comment or direct legislative history to help determine what that intent may have been, particularly when asking whether Congress intended immunity for "publishers" to be inclusive of "distributors" as well. This lack of comment concerning the issue suggests that Congress did not anticipate that there would be any controversy over whether it intended the term "publisher" to encompass the term "distributor" as well.

Given the lack of substantive direct legislative history or comment concerning the issue, Congress's intent in promulgating § 230 can best be determined by reviewing four factors: (1) the plain meaning of the words of the statute, (2) the scope of protections expressly granted by the statute, (3) the scant legislative history that is available, and (4) the common law usage of the terms "publisher" and "distributor." We look first to the plain meaning of the statute.

1. The "Plain Meaning" of the Term

On its face, the statute is silent regarding distributor liability. There are some clues, however, offered by the language of § 230 that give some indication as to the intended scope of the protection it affords. First, the statute, by its own terms, specifies only that an interactive computer service provider shall not be treated as a *publisher*—it does not expressly relieve ISPs from liability as a *distributor*. The terms "publisher" and "distributor" are common terms that are distinct in their meanings. While, undoubtedly, there are some publishers who also undertake the functions of a distributor, and vice versa, it is not difficult to discern between the two functions. Any ambiguity between the terms, therefore, can only be found if one makes an extraneous inquiry. Because the "plain meaning" of the term "publisher" is clear, that plain meaning should have been applied by the *Zeran* court. According to the Supreme Court, "[i]n determining the scope of a statute, we look first to its language, giving the 'words used' their 'ordinary meaning.'"¹⁷² Put in other words, "the most basic of all canons of statutory construction [is that] statutes mean what they plainly

¹⁷² *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citation omitted) (citing *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Richards v. United States*, 369 U.S. 1, 9 (1962)).

say.”¹⁷³ This canon was explained 190 years ago by Chief Justice John J. Marshall:

The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words[,] there is no room for construction. The case must be a strong one indeed, which would justify a [C]ourt in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest.¹⁷⁴

Applying the plain meaning of the word, therefore, indicates that the term “publisher” should be construed as meaning simply “publisher” and not “publisher and distributor.”

2. Analyzing the Entire Text of § 230

In addition to the plain meaning of the word “publisher,” there are other clues within the text of § 230 that help in determining how the statute should be interpreted. First, subsection (c), which grants immunity to publishers, is titled “Protection for ‘good [s]amaritan’ blocking and screening of offensive material[s].”¹⁷⁵ This title is consistent with the scant legislative history of § 230, stating that Congress’s purpose for promulgating it was to provide “[G]ood Samaritan” protection for providers or users of interactive computer services for action taken to restrict access to objectionable material.¹⁷⁶

Stratton Oakmont had left the common law in a position whereby an Internet service provider could be held liable as a “publisher” of defamatory material if the provider had exercised editorial control over the contents of the material distributed through its services.¹⁷⁷ Because ISPs that made attempts to be more responsible by screening for and editing out objectionable materials were then more vulnerable to tort liability than those that made no such attempts, ISPs were left with a strong incentive to refrain from undertaking attempts to edit out material it considered to be obscene, lewd, violent, harassing, defamatory, or otherwise objectionable. The title to subsection (c) clearly reflects that the purpose of this subsection is, as also stated in the legislative history of § 230, to remedy that situation. Because distributors, however, by definition, do not engage in screening activities, the title to subsection (c) is, at best, meaningless and ineffective when applied to distributor liability.

¹⁷³ *Watt v. Alaska*, 451 U.S. 259, 285 (1981) (Stewart, J., dissenting).

¹⁷⁴ *United States v. Wiltberger*, 18 U.S. 76, 95–96 (1820).

¹⁷⁵ *See* 47 U.S.C. § 230(c). *See infra* note 178 for the complete text of § 230(c).

¹⁷⁶ H.R. REP. NO. 104-458, at 194 (1996).

¹⁷⁷ *See* discussion *supra* Part II.B.2.

In addition to its title, every idea and word communicated in subsection (c) is clearly consistent with furthering the purpose of protecting ISPs from liability on account of their good Samaritan attempts to screen for and eliminate objectionable material.¹⁷⁸ Because such editorial activities, absent the statute, would give rise to liability as a “publisher,” interpreting the term “publisher,” as it appears in § 230, as applying strictly to those parties who engage in such actions is likewise consistent with furthering that purpose. Interpreting the term also to include immunity from distributor liability, however, is not consistent with this purpose. For example, subsection (c)(1) provides that an ISP will not be treated as the publisher of any information provided by someone else.¹⁷⁹ By guaranteeing that an ISP will not be subject to liability as a “publisher,” subsection (c)(1) permits that ISP to proceed with undertaking any editing it deems appropriate without fear that, because it did so, it would be subject to an increased risk of liability. This clearly is consistent with the purpose of protecting ISPs from liability resulting from good Samaritan attempts to screen out objectionable materials. Similarly, subsection (c)(2)(A) provides that an ISP will not be responsible for undertaking voluntary actions to restrict access to objectionable materials,¹⁸⁰ activities which are, by common law definition, the activities of a *publisher*. In both cases, however, liability as a *distributor*, by definition, does not arise as the result of affirmatively engaging in any such activities. Therefore, neither subsections (c)(1) nor (c)(2)(A) would have any meaning, consistent with the stated purpose of the statute, if applied to distributors.

Another important interpretive clue concerning the language of § 230 is that it provides protection to ISPs who undertake *specific affirmative actions*—it makes no express reference to relieving ISPs from *failing to act* where they are otherwise obligated to do so. While subsection (c)(1) provides a general

¹⁷⁸ The text of subsection (c) is as follows:

(c) Protection for “good [s]amaritan” 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 restrict access to material described in paragraph (1).

47 U.S.C. § 230(c).

¹⁷⁹ *Id.* § 230(c)(1). See *supra* note 178 for the text of § 230(c).

¹⁸⁰ See *supra* note 178 for text of § 230(c).

statement that an interactive computer service shall not be treated as a publisher or speaker of information provided by someone else,¹⁸¹ the specific immunities discussed in subsection (2) relate either to “any action voluntarily taken in good faith” or simply “any action [under]taken.”¹⁸² There is no express or specific immunity anywhere in § 230 for failing or neglecting to undertake actions that the ISP may otherwise be required to undertake. While publisher liability arises from the affirmative act of exercising editorial control,¹⁸³ distributor liability arises when one *fails to act*. Specifically, it arises when the distributor fails to act upon his actual or constructive knowledge of the defamatory content of material published by another by removing that material from the selection of publications he offers for delivery or transmission to others.¹⁸⁴

Finally, the express language of the statute suggests that Congress intended it to be interpreted narrowly. The statute lists finite and definite actions that are to be protected.¹⁸⁵ In contrast, when Congress intends a list of actions to be more expansive than expressly stated, it will typically use a phrase such as “including, but not limited to.”¹⁸⁶ Likewise, when it intends the definition of a term to be more expansive, it uses similar language.¹⁸⁷ Section 230 contains

¹⁸¹ 47 U.S.C. § 230(c)(1). *See supra* note 178 for text of § 230(c).

¹⁸² 47 U.S.C. § 230(c)(2)(A)–(B). *See supra* note 178 for text of § 230(c).

¹⁸³ *See* *Auvil v. CBS 60 Minutes*, 800 F. Supp. 928, 931–32 (E.D. Wash. 1992) (finding television network affiliates not liable as a publisher where they exercised no editorial control over network programming they rebroadcast); *Misut v. Mooney*, 475 N.Y.S.2d 233, 236 (1984) (finding that a printer that was not “in a position to test the truth of the statements submitted by an independent author” could not be held liable as a publisher).

¹⁸⁴ *See* RESTATEMENT (SECOND) OF TORTS § 581 cmts. b–g (1977).

¹⁸⁵ *See* 47 U.S.C. § 230(c)(2) (“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 restrict access to material described in paragraph (1).”).

¹⁸⁶ *See, e.g.*, 14 U.S.C. § 468 (2012) (“The Coast Guard may expend operating expense funds for recruiting activities, *including but not limited to* advertising and entertainment, in order to . . .” (emphasis added)); 19 U.S.C. § 2411(d)(3)(B) (2012) (“Acts, policies, and practices that are unreasonable *include, but are not limited to*, any act, policy, or practice, or any combination of acts, policies, or practices, which . . . denies fair and equitable . . . opportunities for the establishment of an enterprise . . .” (emphasis added)); 23 U.S.C. § 152(g) (2012) (“The Secretary of Transportation shall submit a report . . . (*including but not limited to* any projects for pavement marking). The report *shall include, but not be limited to*, the number of projects undertaken, their distribution by cost range, road system, means and methods used, and the previous and subsequent accident experience at improved locations.” (emphasis added)).

¹⁸⁷ *See, e.g.*, 18 U.S.C. § 15 (2012) (“The term ‘obligation or other security of any foreign government’ *includes, but is not limited to*, uncanceled stamps, whether or not demonetized.” (emphasis added)); 40 U.S.C. § 612(a)(4) (2012) (“The term ‘historical, architectural, or cultural

no such language, strongly suggesting that Congress intended the statute to be interpreted narrowly.

Further support in the plain language of § 230 for interpreting the statute narrowly can be found in subsection (e),¹⁸⁸ which contains provisions expressly specifying that § 230 “shall be construed” in a manner that will neither affect any criminal statute nor any intellectual property law.¹⁸⁹ The fact that Congress included, within the express terms of § 230, provisions that specifically limit the scope of the statute is further evidence that it did not want the immunities, which the section expressly provided, to be interpreted expansively.

More importantly, however, the plain language of subsection (e)(3) provides that “[n]othing in this section shall be construed to prevent any State

significance’ *includes, but is not limited to*, buildings listed or eligible to be listed on the National Register established under section 470a of Title 16.” (emphasis added)); 40 U.S.C. § 512(a)(5) (“The term ‘commercial activities’ *includes, but is not limited to*, the operations of restaurants, food stores, craft stores, dry goods stores, financial institutions, and display facilities.” (emphasis added)); 40 U.S.C. § 512(a)(6) (“The term ‘cultural activities’ *includes, but is not limited to*, film, dramatic, dance, and musical presentations, and fine art exhibits, whether or not such activities are intended to make a profit.” (emphasis added)); 40 U.S.C. § 512(a)(7) (“The term ‘educational activities’ *includes, but is not limited to*, the operations of libraries, schools, day care centers, laboratories, and lecture and demonstration facilities.” (emphasis added)); 40 U.S.C. § 512(a)(8) (“The term ‘recreational activities’ *includes, but is not limited to*, the operations of gymnasiums and related facilities.” (emphasis added)); 22 U.S.C. § 2394(b)(1) (2012) (“‘foreign assistance’ means any tangible or intangible item provided by the United States Government to a foreign country or international organization under this chapter or any other Act, *including but not limited to* any training, service, or technical advice, any item of real, personal, or mixed property, any agricultural commodity” (emphasis added)); 22 U.S.C. § 2394(b)(2) (“‘provided by the United States Government’ *includes, but is not limited to*, foreign assistance provided by means of gift, loan, sale, credit, or guaranty.” (emphasis added)).

¹⁸⁸ The text of § 230(e) is as follows:

(e) Effect on other laws

(1) No effect on criminal law – Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law – Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law – Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. 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.

(4) No effect on Communications Privacy law – Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

47 U.S.C. § 230(e) (2012).

¹⁸⁹ See *id.* § 230(e)(1)–(2).

from enforcing any State law that is consistent with this section.”¹⁹⁰ Here, Congress is clearly showing its concern that § 230 does not inadvertently infringe, beyond the express terms of the statute, upon any state’s rights to enforce its own laws. As defamation laws, including those distinguishing distributor liability from publisher liability, are nearly exclusively states’ laws, such were most certainly within Congress’s contemplation in drafting § 230. Accordingly, because § 230’s express language does not protect the actions of a “distributor,” and because the plain language of subsection (e)(3) shows Congress’s clear intent to protect the states from an over expansive interpretation of § 230, it is clear that interpreting the immunity offered to “publishers” under the statute as including “distributors” as well is beyond the contemplation of Congress and would therefore be inappropriate.

3. The Legislative History

As previously discussed, the recorded legislative history of § 230 is very scant and does not specifically address what the scope of the term “publisher” was meant to include. What little legislative history there is shows that Congress’s purpose in passing § 230 was to provide “Good Samaritan” protection for providers or users of interactive computer services for action taken to restrict access to objectionable material.¹⁹¹ This indicates that § 230 should be interpreted consistent with this goal. Because interpreting the word “publisher” as being inclusive of distributors is, at best, meaningless with regards to this goal,¹⁹² the legislative history of § 230 offers no support for applying anything other than the plain meaning or common law definition of the term to the statute.

4. The Common Law’s Value in Interpreting § 230

The common law distinction between publisher and distributor liability is clear and well established.¹⁹³ The *Zeran* court, however, minimized the importance of this established distinction,¹⁹⁴ opining that “once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher” because it is then forced to “decide

¹⁹⁰ See *id.* § 230(e)(3).

¹⁹¹ H.R. REP. NO. 104-458, at 194 (1996).

¹⁹² See discussion *supra* Part III.2.A.

¹⁹³ See *supra* Parts II.A.2–4 for a discussion of the common law distinctions between publisher and distributor liability.

¹⁹⁴ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997), *aff’d* 958 F. Supp. 1124 (E.D. Va. 1997) (criticizing the plaintiff’s position as “attach[ing] too much importance to the presence of the distinct notice element in distributor liability”).

whether to publish, edit, or withdraw the posting.”¹⁹⁵ The *Zeran* court, therefore, fundamentally equated the burden imposed by the common law upon distributors as that imposed upon publishers, finding that a distributor, once made aware of defamatory content of material it is distributing, is effectively and ultimately a publisher of that material and thus covered by the immunity offered by § 230. The *Zeran* court, however, failed to appropriately identify exactly what it is that distinguishes publisher liability from distributor liability. While both publishers and distributors have a responsibility, under the common law, to prevent defamatory material from reaching third parties, the distinction between the two is in the circumstances, which give rise to that burden. A publisher’s potential liability arises as a result of his power to exercise editorial discretion and control over the *contents* of material he publishes.¹⁹⁶ A distributor’s potential liability arises, however, from his failure to remove *the publication itself* from distribution, when he knows or should know it has defamatory content.¹⁹⁷ While the publisher controls a material’s *content*, the distributor exercises no such control. The distributor, unlike a publisher, typically entertains no option to alter the contents of a publication—it merely decides whether or not to make that material available to others.¹⁹⁸ This well-established common law distinction should have been recognized and considered by the *Zeran* court.

¹⁹⁵ *Id.*

¹⁹⁶ See *Auvil v. CBS 60 Minutes*, 800 F. Supp. 928, 932 (E.D. Wash. 1992) (finding television network affiliates not liable as a publisher where they exercised no editorial control over network programming they rebroadcast); *Misut v. Mooney*, 475 N.Y.S.2d 233, 236 (1984) (finding that a printer that was not “in a position to test the truth of the statements submitted by an independent author” could not be held liable as a publisher).

¹⁹⁷ See RESTATEMENT (SECOND) OF TORTS § 581 and cmts. (1977).

¹⁹⁸ This, of course, is not to say that the entity being characterized as a distributor *cannot* alter a material’s contents. Sometimes a distributor has both the technological ability and legal right to do so, but because it chooses not to engage in editorial activities, remains merely a “distributor” of the materials and not a “publisher” of them. For example, in *Auvil*, 800 F. Supp. 928, discussed *supra* Part II.A.4, the court expressly observed that CBS’s contract with its local broadcasting affiliates permitted those affiliates to exercise editorial control and censor network programming before rebroadcasting that programming locally. In spite of having the *power* to exercise such control, the court noted that the local affiliates did not actually exercise that power, and therefore could only be subject to liability as a distributor and not as a publisher—and thus could be liable only if they knew or should have known of the broadcast’s defamatory character. *Auvil*, 800 F. Supp. at 931–32 (adopting the position of § 581 of the Restatement (Second) of Torts that “one who only delivers or transmits defamatory material published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory [content]”). It is, therefore, the very fact that a distributor does not edit and alter the contents of the materials he transfers or transmits—exclusive of whether he *can* do so—that permits him to maintain the characterization of a “distributor” and not a “publisher.” Thus, an ISP that merely decides whether or not to [re-]transmit someone else’s publication, and does not alter the contents of individual publications it decides to transmit, by definition is a “distributor,” regardless of the fact that it may have the technological ability and legal right to make such alterations.

Even if one believes, as the *Zeran* court did, that the common law distinction made between publishers and distributors is, in essence, a distinction without a difference, the fact is that such a distinction has been firmly made and well-established in the common law; regardless of the *Zeran* Court's efforts to minimize the differences between the two types of liability, those differences have been commonly recognized. Therefore, the *Zeran* court's refusal to consider these well-established common law differences in liability between distributors and publishers in its interpretation of § 230 was an error. As articulated by the Supreme Court: "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."¹⁹⁹ Clearly, neither § 230 nor its legislative history make reference to any "specific intent" of Congress to change the "judicially created" common law concepts of publisher and distributor liability. Because Congress gave no indication it intended to change these well-established common law concepts, § 230 must be interpreted as being consistent with the common law understanding of the term "publisher." Therefore, interpreting the well-established and well-recognized common law term "publisher" as being inclusive of the similarly well-established term "distributor" was inappropriate.

In addition, the status of the common law of defamation at the time § 230 was promulgated, as it applied to online communications, gives further indication of how § 230 should be interpreted. While § 230 effectively overruled the *Stratton Oakmont* court's decision to subject ISPs to publisher liability when they exercise editorial control over the content of the material they transmit to others, *Cubby v. CompuServe*²⁰⁰ had also previously established that, in the absence of editorial control, "the appropriate standard of [evaluating] liability" is that of distributor liability, which focuses on "whether [the service] knew or had reason to know of the allegedly defamatory . . . statements."²⁰¹ Congress was clearly contemplating the state of the common law when it passed § 230 to "remove the disincentives to self[-]regulation created by the *Stratton Oakmont* decision."²⁰² Congress's obvious awareness of the *Stratton Oakmont* decision could not have been in a vacuum—it must also have been aware of *Cubby*. Yet, in spite of this knowledge, it chose only to address expressly the "disincentives" created by *Stratton Oakmont*, and ignore, at least by its express terms, the *Cubby* decision. This apparent conscious decision by

¹⁹⁹ *Midlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot.*, 474 U.S. 494, 501 (1986); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266–67 (1979).

²⁰⁰ 776 F. Supp. 135 (S.D.N.Y. 1991).

²⁰¹ *Id.* at 140–41.

²⁰² *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), *aff'g* 958 F. Supp. 1124 (E.D. Va. 1997).

Congress not to address the issue of *Cubby* supports leaving the *Cubby* decision and distributor liability intact.

As shown, the plain meaning of the term “publisher,” the text of § 230 in its entirety, the legislative history of § 230, and the common law all support the assertion that the *Zeran* court was wrong when it interpreted Congress’s § 230 grant of immunity for publisher liability to ISPs as including immunity from liability as distributors as well. In addition to the questions of whether Congress intended to grant immunity from distributor liability to ISPs, and whether the *Zeran* Court misconstrued that intent, is the more fundamental question of whether ISPs *should* be immune from distributor liability.

B. Should § 230 Immunity From Publisher Liability Be Extended to Distributors?

Congress clearly believed that important and legitimate public interests would be served by its decision to grant *publisher* immunity to ISPs under § 230.²⁰³ Congress has not, however, outlined any public policies or interests in favor of granting immunity to ISPs from *distributor* liability. While arguments in favor of granting distributor liability to ISPs have been made by others, including the *Zeran* court, the weight of logic, precedent, and public policy favors not doing so.

1. The Uniqueness of Internet Communication

Online communication through the Internet is, as compared with print media and television, undoubtedly still a new and unique phenomenon. In spite of this newness, however, the total number of Internet users in the United States in 2009 exceeded 227 million—approximately 74% of the total population of the country.²⁰⁴ These millions of users communicate through a “decentralized, global medium of communications—or ‘cyberspace’—that links people, institutions, corporations, and governments around the world.”²⁰⁵ Each of

²⁰³ Congress’s purpose in promulgating § 230 was to provide “Good Samaritan” protection for providers or users of interactive computer services for actions taken to restrict access to objectionable material by “remov[ing] the disincentives to self[-]regulation created by the *Stratton Oakmont* decision.” See *Zeran*, 129 F.3d at 331; H.R. REP. NO. 104-458, at 194 (1996). It was to “encourage service providers to self-regulate the dissemination of offensive material over their services.” *Zeran*, 129 F.3d at 331. With its concern that decisions like *Stratton Oakmont* would “deter service providers from blocking and screening offensive material,” Congress enacted § 230 to “grant immunity to interactive computer service providers from suits arising from efforts by those providers to screen or block content.” *Id.*; *Zeran*, 958 F. Supp 1124, 1134 (E.D. Va. 1997).

²⁰⁴ *United States of America Internet Usage and Broadband Usage Report*, INTERNET WORLD STATS, <http://www.internetworldstats.com/am/us.htm> (last visited Sept. 6, 2013).

²⁰⁵ *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997).

these Internet users has the ability to communicate, almost instantaneously, to specific individuals, broader groups of people, or to the world as a whole.²⁰⁶ No single entity administers the Internet—no government, corporation, non-profit group, or educational consortium has any centralized control over all of the communication that takes place on a daily basis through this medium.²⁰⁷ Similarly, the Internet has no centralized location, control point, or communications channel.²⁰⁸

There is, however, nothing so inherently unique in the technology of the Internet that would justify not applying traditional distributor liability to online communications. Compare the processes involved in publishing and distributing a city newspaper with the processes of distributing materials online. In the physical world, when a person has written an article or opinion, that person has traditionally transmitted his or her work, usually by postal mail or other carrier,²⁰⁹ to a newspaper for publication. Similarly, an article or comment written by an ISP subscriber is transmitted, albeit electronically, to the ISP's computer systems. While the article submitted to the newspaper will likely be examined by an editor who will determine whether or not to publish and distribute it, the ISP will generally, through a series of programming commands, simply distribute the article it receives. The technology used by the ISP makes this a very quick and easy process to complete. However, even though the physical processes of printing and distributing a newspaper are more cumbersome, there is nothing intrinsic to those processes that require an article's contents to be reviewed by an editor before the article is typeset, printed, and distributed. If the newspaper were to so choose, it could simply route *all* incoming articles to its production department for publication and distribution, much like ISPs do with materials transmitted to them. Similarly, an ISP could use its technology to require every message posted to an ISP's bulletin board or generally distributed through the ISP to be reviewed by an "editor" before the contents of those messages are distributed. Therefore, while the technologies utilized by the two media are different, the scope of control over the contents of material published and distributed by those media, afforded by each one's available technology, are essentially the same.

There is, of course, one primary difference between a newspaper's ability to control the content of its newspapers and the ISP's ability to control the material that passes through its systems. While the editorial staff of a major city newspaper may have to read through and edit up to 100 articles daily to assure

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 832.

²⁰⁸ *Id.*

²⁰⁹ With the advent of e-mail and related methods of transmitting messages, even articles submitted to newspapers are, undoubtedly, being more and more frequently transmitted electronically, rather than through the mail or other form of physical delivery.

there is no defamatory content, assuring no objectionable materials pass through an ISP may require reviewing hundreds of thousands, and perhaps millions, of messages daily. Though it is clearly technologically possible to undertake this level of editorial control, it may realistically be economically unfeasible to do so. Exercising this level of editorial control, however, would only be necessary if the ISP were subject to liability as a *publisher*. Protecting itself against *distributor* liability would be much less of an economic burden.

Generally, a distributor, such as a newsstand, bookstore, or library, has no affirmative duty to examine, for defamatory content, the various publications being offered.²¹⁰ It is only when “facts or circumstances” would suggest that a particular publication contains matter which, upon inspection, a reasonable man would recognize as defamatory, that a duty arises for the distributor to make an inspection of the materials he is distributing.²¹¹ Therefore, a traditional distributor of publications need not, under ordinary circumstances, concern himself with the contents of the materials he is distributing. The reason for this has its basis in the First Amendment and the public interest in assuring that publications and information are readily available for dissemination to the public. According to the Supreme Court, “the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing [strict liability on distributors for the contents of the material they carry]”²¹² because to impose liability upon one who merely distributes material that turns out to contain a defamatory statement would force every bookseller to make himself aware of the contents of every book in his shop. Ultimately, under those circumstances, “the bookseller’s burden would become the public’s burden” because by restricting the materials he offered the public to those he had personally inspected, the material offered “might be depleted indeed.”²¹³

The same logic clearly holds true for ISPs. Though the technology is different, the principles, policy, and logic are the same. As with bookstores, forcing ISPs to refrain from transmitting any messages they have not reviewed would likely result in a virtual depletion of available online materials. Unlike bookstores, however, holding an ISP liable for failing to remove contents that it has reason to know are defamatory should have little effect on the amount of

²¹⁰ RESTATEMENT (SECOND) OF TORTS § 581 cmts. d–e (1977).

²¹¹ *Id.*

²¹² *Smith v. California*, 361 U.S. 147, 152–53 (1959), *rev’g* 327 P.2d 636 (Cal. 1958) (striking down an ordinance imposing liability upon a bookseller for possessing an obscene book, regardless of whether the bookseller had knowledge of the book’s contents).

²¹³ *Id.* at 153. Though *Smith* involved criminal liability, the First Amendment’s guarantees are equally applicable to civil defamation cases. As recognized by the Supreme Court: “What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil laws of libel. The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964), *rev’g* 144 So. 2d 25 (Ala. 1962).

online resources available to the public. While there may be a legitimate argument that imposing distributor liability upon an ISP will result in increased costs for investigating complaints, these types of costs are born by every other communications medium and should be considered among the ISP's costs of doing business.²¹⁴

2. Free Speech

Arguing in favor of granting immunity from distributor liability to ISPs, the *Zeran* court opined that imposing distributor liability upon ISPs would deter free speech on this “new and burgeoning Internet medium.”²¹⁵ Clearly, maintaining free speech on the Internet is an important goal. It cannot, however, be any more important than the goals of maintaining free speech in other media, such as newspapers, magazines, television, and radio programming. As important as the policy of encouraging free speech is, parties from each of these media have been, and continue to be, subject to liability as distributors. The “free speech” concerns related to defamation liability, as applied to more traditional media, have been addressed by the Supreme Court. In balancing First Amendment concerns with the often irreversible harm that can result from defamatory statements, the Supreme Court has recognized that “[s]ociety has a strong and pervasive interest in preventing and redressing attack upon reputation,” and has repeatedly upheld plaintiffs’ rights to proceed in defamation claims.²¹⁶ Justice Potter Stewart, in his concurring opinion in *Ros-*

²¹⁴ It is hard to imagine that bearing the financial burden of investigating complaints would significantly compromise an ISP's profitability. America Online, for example, posted fourth-quarter profits last year of \$57.3 million dollars. *AOL's Fourth-QTR. Profits Hit \$57.3 Million*, N.Y. POST, Aug. 5, 1998, at 36. In its last fiscal year AOL collected revenues of \$1.4 billion; this year they should reach \$2.5 billion. Marc Gunther, *The Internet is Mr. Case's Neighborhood*, FORTUNE, Mar. 30, 1998, at 68. Furthermore, shareholders who invested \$1,000 in AOL at the end of 1993 saw their investment increase to \$84,856 by the close of 1998. Thomas E. Weber, *Best and Worst Performing Companies: Best 5-Year Runner-Up America Online*, WALL ST. J., Feb. 25, 1999, at R7.

²¹⁵ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *aff'g* 958 F. Supp. 1124 (E.D. Va. 1997) (opining that “[t]he purpose of [§ 230] is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communication of others represented . . . simply another form of intrusive government regulation of speech . . .”).

²¹⁶ See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (finding that a “reasonable fact finder could conclude that statements in reporter’s column implied assertion that high school coach perjured himself in judicial proceeding, and implication that coach committed perjury was sufficiently factual to be susceptible of being proved true or false and might permit defamation recovery”); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (holding that “the speech or debate clause did not protect transmittal of the allegedly defamatory material in press releases and newsletters issued by a senator”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (holding that “a newspaper or broadcaster publishing defamatory falsehoods about an individual who is neither a

enblatt v. Baer,²¹⁷ discussed how “[t]he destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem.”²¹⁸ If this is so powerful a concept that it overpowers the First Amendment rights of freedom of speech and freedom of the press when applied to newspaper publishers with thousands of subscribers and newsstand owners with perhaps fewer than one hundred customers, how much more powerful is it—and how much more is the potential for “unredeemable” damage to occur—when applied to circumstances where defamatory material is made available to *millions* of Internet users? Clearly, any validity in the Supreme Court’s disfavoring a publisher’s or distributor’s First Amendment rights, in favor of protecting a person’s reputation in the sight of fewer than a hundred people, can be no less valid than a court’s doing the same to protect that person’s reputation to a potentially vastly larger audience.

3. The “Practical Application” of Imposing Distributor Liability Upon ISPs

The facts of *Zeran* suggest that, had the court held that § 230 was not intended to provide ISPs immunity from liability as a distributor, AOL would probably have been found liable. The messages attributing the offering of t-shirts featuring offensive and tasteless slogans related to the Oklahoma City bombing to *Zeran*²¹⁹ were, without a doubt, defamatory. Likewise, *Zeran*’s repeated phone conversations with AOL representatives, and their promises that the messages would be removed,²²⁰ both of which were undisputed by AOL, clearly show that AOL had knowledge of the postings and their defamatory content. Not all cases, however, are likely to have facts as easy to evaluate as *Zeran*. In many cases, it may be difficult for an ISP to readily determine whether a posting in which it has received a complaint is, in fact, actually defamatory

public official nor a public figure may not claim a constitutional privilege against liability, for injury inflicted, on the ground of a privilege protecting discussion of any public issue without regard to the status of a person defamed therein”).

²¹⁷ 383 U.S. 75 (1966).

²¹⁸ *Id.* at 92–93 (Stewart, J., concurring). Justice Stewart explained:

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty . . . The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

Id.

²¹⁹ See *Zeran v. Am. Online Inc.*, 129 F.3d at 329; see also discussion *supra* Part II.B.4.

²²⁰ See *Zeran*, 129 F.3d at 329; see also discussion *supra* Part II.B.4.

in content. Arguing against imposing distributor liability upon ISPs, the *Zeran* Court insightfully opined:

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information’s defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not.²²¹

The concern expressed by the *Zeran* court is one of practical importance. If ISPs were simply to remove every posting about which they received a complaint, so as to avoid any chance of liability, then there certainly would be a “chilling effect,” not only on the freedom of Internet speech, but also on the amount of legitimate non-defamatory materials available to Internet users. Furthermore, if ISPs merely remove every posting about which it received a complaint, there would almost certainly be an impact upon the “true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity” currently available on the Internet,²²² as anyone holding a view differing from the political, social, religious or otherwise divergent view expressed in a posting could have that posting removed merely by complaining to the ISP that it was defamatory.

The question, therefore, is whether imposing distributor liability upon ISPs would require, as a practical legal matter, ISPs to engage in such extreme measures. More directly, the inquiry is: can distributor liability be imposed upon ISPs while still preserving the free and open exchange of ideas now available to users of this unique forum? The common law development of defamation law, the power of courts to make and change law, and Congress’s inherent power to legislate all suggest that this can be done.

²²¹ See *Zeran*, 129 F.3d at 333 (internal citations omitted).

²²² In proffering § 230, Congress found the Internet offered a forum for such diverse exchanges of ideas and thoughts. 47 U.S.C. § 230(a)(3) (2012).

Courts applying common law principles in defamation actions have often been required to wrestle with tough issues. Issues such as reconciling the First Amendment rights of defendants with the public's interest in "preventing and redressing attacks upon reputation,"²²³ determining whether it is just to hold one who merely delivers or transmits defamatory material to another to the standard of care as one who actually publishes the material,²²⁴ and deciding whether scrutinizing materials for nudity, profanity, and vulgarity established editorial activities sufficient to establish a basis for publisher liability,²²⁵ are all issues courts have needed to address. Additionally, they are issues that at one time were just as novel and challenging as any issues likely to arise as a result of imposing distributor liability upon ISPs.

When considering the practicality of imposing distributor liability upon ISPs, it is essential to remember that distributor liability would only be realized when the ISP "knows or has reason to know"²²⁶ of the defamatory content of material it has transmitted. This standard implies an inquiry into reasonableness. For example, a court may conclude that a local newsstand owner has "reason to know" that a newspaper it is distributing contains defamatory content once that newsstand owner is informed of that content by a customer. Under those circumstances, the court could find it is reasonable to expect the newsstand owner to review the content of the questioned material to determine whether the contents could reasonably be considered defamatory.

Consider, however, if instead of a local newsstand owner, the defendant was the owner of a 500 store national chain of used book stores who, on a daily basis, received numerous phone calls, each complaining about defamatory content in a different book in stock at a different store. Consider then, that for many months the owner investigated each complaint, only to find that each time there was no defamatory content in the book, and that the books only contained diverse political or social views that were controversial; therefore, because the complaints virtually never turned up defamatory material, the owner of the book stores stopped investigating phone calls complaining of defamatory content in books. Under those circumstances, a court may then apply a reasonableness standard and find that a mere phone call complaining of defamatory content in a particular book is not likely to cause the owner to "know or have reason to know" of that book's actual defamatory content. Furthermore, the court could find it reasonable, under these circumstances, that the bookstore

²²³ See *Rosenblatt*, 383 U.S. at 86 (recognizing that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation").

²²⁴ See *Smith v. California*, 361 U.S. 147, 152-53 (1959) (striking down an ordinance imposing liability upon a bookseller for possessing an obscene book, regardless of whether the bookseller had knowledge of the book's contents).

²²⁵ See *Misut v. Mooney*, 475 N.Y.S.2d 233, 236 (1984).

²²⁶ RESTATEMENT (SECOND) OF TORTS § 581(1) (1977).

owner did not undertake an investigation to determine if there actually was defamatory content in the book. The same court, however, could find that if the owner received 100 phone calls related to the alleged defamatory material of a single book, or perhaps received a certified letter from a complaining person's attorney, that the owner did "have reason" to know of that book's defamatory content and that the reasonable action would have been for him to investigate the matter further.

If courts outside the Fourth Circuit reject the *Zeran* decision and permit distributor liability to be applied to ISPs, then the courts are likely to make distinctions in much the same way as the hypothetical court in the foregoing scenario did. Exactly where lines would be drawn may be different, but the fact is that those lines can, and should, be drawn—they can and should be drawn in a manner that reasonably protects individuals' reputations while still preserving the free and open exchange of ideas and thoughts among users of this new forum.

These lines could, of course, also be drawn by Congress. By legislating specific standards, Congress could eliminate some of the uncertainty that would take many years for the courts to resolve.²²⁷ In addition to legislating to clarify distinctions previously unresolved by the common law, Congress could also initiate alternate ways of resolving disputes involving defamatory content of Internet postings—ways that may allow an aggrieved party to defend satisfactorily its reputation without necessarily initiating litigation. For example, Congress could require ISPs to provide the opportunity for one who alleges he is being defamed to have his rebuttal to the alleged defamatory material electronically "attached" or "linked" to the material he alleges is defamatory. Such a scheme could closely parallel the rights a debtor has to have his comments attached to a disputed account listed on his credit report.²²⁸

While there are undoubtedly a myriad of ideas regarding how Congress could legislate to protect persons from defamatory Internet postings, there are differing views as to whether Congress should even be involved in regulating matters pertaining to Internet communication.

C. *Should Congress Regulate ISPs and Internet Communication?*

The uniqueness of the Internet and online communication—its millions of users, the international nature of its impact, and its decentralized structure²²⁹—has led some to argue that existing rules and laws should be inapplica-

²²⁷ While Congress has, on occasion, passed legislation related to the Internet, it has recognized that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4).

²²⁸ See 15 U.S.C. § 1681i(6)(B)(iv) (2012).

²²⁹ See *supra* Part III.B.1 for a discussion of the Internet's "uniqueness."

ble to it.²³⁰ Many argue that the world of online communication has emerged into its own “place”²³¹ and therefore should not be subject to the laws of other “places,” such as those of any individual country or state. According to David R. Johnson and David Post, Co-Directors of the Cyberspace Law Institute,²³² “treating [this] Cyberspace as a separate [‘]space[’] to which distinct laws apply should come naturally.”²³³ They opine that:

Cyberspace radically undermines the relationship between legally significant (online) phenomena and physical location. The rise of the global computer network is destroying the link between geographical location and: (1) the *power* of local governments to assert control over online behavior; (2) the *effects* of online behavior on individuals or things; (3) the *legitimacy* of a local sovereign’s efforts to regulate global phenomena; and (4) the ability of physical location to give *notice* of which sets of rules apply. The Net thus radically subverts the system of rule-making based on borders between physical spaces, at least with respect to the claim that Cyberspace should naturally be governed by territorially defined rules.²³⁴

Applying their view of Internet communications to defamation law, Johnson and Post argue:

Treating messages on the Net as transmissions from one place to another has created a quandary for those concerned about liability for defamation: Messages may be transmitted between countries with very different laws, and liability may be imposed on the basis of “publication” in multiple jurisdictions with varying standards. In contrast, the approach that treats the global network as a separate place would consider any allegedly defamatory message to have been published only “on the Net” (or in some distinct subsidiary area thereof)—at least until such time as distribution on paper occurs. This re-characterization makes more sense. A person who uploads a potentially defamatory statement would be more able to determine the rules applicable to his own actions. Moreover, because the Net has distinct characteristics, including an enhanced ability of the allegedly defamed person to reply, the

²³⁰ See, e.g., David R. Johnson & David Post, *Law and Borders — The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1400–02 (1996).

²³¹ *Id.* at 1378–79.

²³² See *id.* at 1367 nn.*–**.

²³³ *Id.* at 1379.

²³⁴ *Id.* at 1370.

rules of defamation developed for the Net could take into account these technological capabilities—perhaps by requiring that the opportunity for reply be taken advantage of in lieu of monetary compensation.²³⁵

While there is undoubtedly “uniqueness” in Internet communication, there is nothing so inherently unique to this medium that justifies a wholesale discounting of traditional defamation law. First, even if one concedes that the virtual world of “Cyberspace” is a unique place, when one enters that world he or she does not also leave the physical world. A person in Minnesota logging onto the Internet from his home computer does not leave Minnesota in order to gain access to the world of Cyberspace. Similarly, an ISP in Virginia whose equipment and services are being used by the user in Minnesota to communicate in Cyberspace is always present in Virginia—its equipment, personnel, management, facilities, and decision-making are always present in the physical world. Though the effects of any tortious activity of either the user in Minnesota or the ISP in Virginia may first be evident in Cyberspace, the tortious activity itself—the typing in of defamatory communications, or the decision not to remove that communication—take place in the physical world, and therefore should be subject to the laws that would otherwise control such activity.

Furthermore, the consequences of defamatory statements posted to Cyberspace frequently have consequences in the real world, even absent any conversion of that statement to hard copy. For example, a message distributed through an ISP that falsely accuses a person of being a convicted child-molester will likely cause that person’s reputation to suffer in the minds of anyone who reads that message, even if that message is never transformed from its electronic form to paper hard copy.

Second, there is nothing inherently unique in the fact that the Internet is an international medium that crosses boundaries between countries and states with different laws. One only need visit any mall or airport newsstand to see the plethora of newspapers and magazine, which are distributed internationally. Similarly, radio and television broadcasts are hardly stopped by lines drawn on a map. Communications by telephone routinely cross interstate and international borders. In each of these situations, however, liability for communicating messages with defamatory content may be imposed.

The concern regarding this international medium being subject to “territorial applied rules” is, therefore, not new or unique. Any tortious conduct that touches on multiple jurisdictions is inherently more complex to resolve than one that is confined by parties, locations, and actions to only one jurisdiction. These inter-jurisdictional issues and challenges, however, have not resulted in a suspension of justice. International treaties and common law practices

²³⁵ *Id.* at 1381–82.

have helped courts resolve such issues between parties of different countries.²³⁶ Similarly, within this country, concepts such as “minimum contacts” have controlled whether a state may exercise jurisdiction over an out-of-state defendant.²³⁷ There simply is no reason why these same principles cannot be applied to tortious conduct that is facilitated through online communications.²³⁸

IV. CONCLUSION

Courts outside the Fourth Circuit considering the issue of whether an ISP can be subject to distributor liability for knowingly permitting its computer systems to be used for distributing defamatory material should reject the *Zeran* Court’s interpretation of § 230 and should impose liability consistent with the rules applicable to defamation actions under the common law.²³⁹ This should be

²³⁶ For example, the Vienna Convention addresses what a member state must do when a foreign national is arrested within its jurisdiction. *See* Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 500 U.N.T.S. 95 (entered into force with respect to the United States of America, Dec. 24, 1969). Similarly, The Berne Convention, the Trade-Related Aspects of International Property (“TRIPS”) Agreement under the World Trade Organization, and the new WIPO Copyright Treaty each impact upon international disputes involving intellectual property. *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 6, 1886, 25 U.N.T.S. 221; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299; World Intellectual Property Organization Copyright Treaty art. 14(1), Dec. 20, 1996, 36 I.L.M. 65.

²³⁷ According to the Supreme Court, Fourteenth Amendment Due Process requires that a non-resident defendant have “minimum contacts” with the forum state before a court in that state can exercise personal jurisdiction over that defendant. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). This does not require the actual physical presence of the defendant in the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). It does, however, require some act by which “the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). A defendant “purposely avails” itself of the privileges of conducting activities in the forum state when the actions of the defendant “create a substantial connection with the forum state,” *Burger King*, 471 U.S. at 475, such that the defendant “should reasonably anticipate being haled into court there.” *World-Wide Volkswagen*, 444 U.S. at 297.

²³⁸ For example, a person in New Jersey who sends out letters to all residents of Philadelphia, Pennsylvania, claiming that the Mayor of Philadelphia has engaged in unlawful fund raising would likely be considered to have “minimum contacts” with Pennsylvania, such that he “should reasonably anticipate being haled into court there.” *See World-Wide Volkswagen*, 444 U.S. at 291, 297. Under these circumstances, a Pennsylvania court could exercise jurisdiction over that New Jersey defendant. *See id.* Similarly, there is no reason that the same standard couldn’t be applied when that same defendant engages in the same activity, but rather than use the mail to facilitate his tortious conduct, he uses the Internet.

²³⁹ To date, several courts have decidedly rejected or otherwise declined to follow the *Zeran* court’s decision. *See, e.g.,* *Barrett v. Rosenthal*, 5 Cal.Rptr.3d 416, 427 (App. 1 Dist. Oct 15, 2003); *Grace v. eBay Inc.*, 16 Cal.Rptr.3d 192, 201 (App. 2 Dist. Jul 22, 2004); *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008).

done for several reasons. First, the theories that underlie distributor liability support subjecting ISPs to that liability where they fail to remove electronic publications known to contain defamatory content. Under the common law, liability for defamation is based upon the concept of fault.²⁴⁰ An individual who originates a defamatory message may be said to be “at fault” for damaging another person’s reputation by communicating that message to a third person.²⁴¹ Similarly, a publisher is at fault when he furthers that harm by “re-publishing” the statement.²⁴² A distributor who merely delivers or transmits a publication containing defamatory material, however, is generally deemed not to be at fault for any harm caused by that defamatory content. The exception to this is that a distributor *is* deemed to be at fault *if, but only if*, he distributes material, which he knows or has reason to know is defamatory in nature.²⁴³

The reasons and rationale for subjecting distributors of traditional media to these rules²⁴⁴ lose none of their validity when they are applied to ISPs.²⁴⁵ Though it would be unreasonable to expect an ISP to screen every (re-) transmission for defamatory content, there is nothing inherent in the technology of online communications that should relieve ISPs from the obligation to remove postings from their systems once they have actual or constructive knowledge of

²⁴⁰ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (stating “so long as they do not impose liability without fault, the States may define for themselves the appropriated standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a[n] [] individual”).

²⁴¹ See *WADE ET AL.*, *supra* note 20, at 847–48 n.2; *Economopoulos v. A.G. Pollard Co.*, 105 N.E. 896, 896 (Mass. 1914) (finding that there was no publication of a defamatory statement, made in English, because of those who heard the statement, only the defendant spoke and understood the English language); see also *RESTATEMENT (SECOND) OF TORTS* §§ 568, 577 and cmts. (1977).

²⁴² *Cianci v. New York Times Publ’g Co.*, 639 F.2d 54, 60 (2d Cir. 1980) (citing *Hoover v. Peerless Publ’n, Inc.*, 461 F. Supp. 1206, 1209 (E.D. Pa. 1978)).

²⁴³ *RESTATEMENT (SECOND) OF TORTS* § 581(1) (1977).

²⁴⁴ These reasons for this are clear and sound—to impose liability upon a distributor that has no actual or constructive knowledge of a publication’s defamatory content would force an unreasonable obligation upon every bookseller, newsstand owner, local television network affiliate, etc., to limit the materials it made available to the public to those which the distributor had actually screened for defamatory content. Ultimately, because of distributors’ fear of liability, the public’s access to media such as books, newspapers, and television programming would likely become severely restricted. See *Smith v. California*, 361 U.S. 147, 152–53 (1959). The rule limiting a distributor’s liability to situations where he has actual or constructive knowledge of a publication’s defamatory content is, therefore, a sound rule—it recognizes that, though it may be unreasonable to expect a distributor to investigate every publication he offers for defamatory content, once he does have actual or constructive knowledge of such content, he has an obligation to protect third parties’ reputations by refusing to distribute that publication. Therefore, only then, is he is deemed to be at fault, along with the originator and publisher of the defamatory material, for any harm that comes to a third person’s reputation as a result of his knowingly distributing the defamatory materials.

²⁴⁵ See discussion *supra* Part III.B.1.

the defamatory nature of the posting's contents.²⁴⁶ Similarly, any concerns for free speech that such actions would raise are not new or unique to Internet communications—they have existed, have been wrestled with, and have already been addressed in the context of more traditional media.²⁴⁷ Because “the destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem,”²⁴⁸ courts, including the Supreme Court, have wisely favored protecting persons' reputations over the First Amendment rights of distributors of defamatory materials.²⁴⁹ Clearly, if it is valid to disfavor a distributor's First Amendment rights in favor of protecting a person's reputation in the sight of perhaps fewer than a hundred people who may purchase a newspaper containing defamatory content from that distributor, it is at least as valid a proposition to disfavor an ISP's First Amendment rights in favor of protecting that same person's reputation in the sight of perhaps millions of Internet users.²⁵⁰

The second reason that courts deciding this issue should reject the *Zeran* court's decision is that it was wrongly decided. The *Zeran* court determined that the immunity from liability as a publisher afforded to ISPs through § 230 included immunity from liability as a distributor as well.²⁵¹ In making this determination, however, the *Zeran* court overlooked or discounted a number of significant factors. First, the plain meaning of the term “publisher” is not difficult to discern.²⁵² It has a distinct meaning in its common usage—“publisher” means “publisher,” and not “publisher and distributor.” Second, the title and legislative history of § 230 both indicate that Congress's contemplation in promulgating it was to protect ISPs that chose to screen out obscene, lewd, violent, harassing, defamatory, or otherwise objectionable materials from being subject to liability *because of* those efforts.²⁵³ Interpreting the word simply as “publisher” is consistent with that goal. Expanding that interpretation to “publisher and distributor,” however, adds nothing towards furthering the contemplated purpose of the statute. Third, Congress, by express terms, made clear its intent that § 230 should be interpreted narrowly,²⁵⁴ and expanding the term “publisher” to encompass both “publisher and distributor” would be incon-

²⁴⁶ See discussion *supra* Part III.B.1.

²⁴⁷ See discussion *supra* Part III.B.2.

²⁴⁸ *Rosenblatt v. Baer*, 383 U.S. 75, 93 (1966) (Stewart, J., concurring).

²⁴⁹ See, e.g., *Rosenblatt*, 383 U.S. 75.

²⁵⁰ See discussion *supra* Part III.B.2.

²⁵¹ See *Zeran v. Am. Online Inc.*, 129 F.3d 327, 332–33 (4th Cir. 1997), *aff'g* 958 F. Supp. 1124 (E.D. Va. 1997).

²⁵² See discussion *supra* Part III.A.1.

²⁵³ See discussion *supra* Part III.A.2–3.

²⁵⁴ See discussion *supra* Part III.A.2.

sistent with that intent. Fourth, because the terms “publisher” and “distributor” have distinct and well-established meanings in the common law,²⁵⁵ and Congress gave no indication it intended to change those meanings,²⁵⁶ the *Zeran* court was obligated to interpret those terms consistent with their common-law meanings.²⁵⁷ Finally, though the *Zeran* court recognized that Congress passed § 230 to “remove the [publisher liability] disincentives to self[-]regulation created by the *Stratton Oakmont* decision,”²⁵⁸ it failed to recognize that Congress must also have been aware of the *Cubby v. CompuServe*²⁵⁹ decision, which imposed distributor liability upon ISPs²⁶⁰—even with knowledge of the existence of established distributor liability for ISPs, Congress chose to expressly grant ISPs immunity only from publisher liability.²⁶¹

A third consideration in support of courts rejecting the *Zeran* decision and imposing distributor liability upon ISPs is that, in doing so, there are no “practical” matters which would make imposing that liability unreasonably difficult.²⁶² There simply is nothing in the technology of online communications that would prevent ISPs from removing electronic publication which they know or have reason to know are defamatory in content,²⁶³ and there are no questions likely to be raised which would be beyond the ability of courts to resolve.²⁶⁴

For all these reasons, courts considering whether an ISP can be subject to liability as a distributor should reject *Zeran* and apply the common law rules of distributor liability to the cases before them. Additionally, Congress has the power, and should exercise that power, to eliminate the uncertainty created by

²⁵⁵ See discussion *supra* Part III.A.4.

²⁵⁶ See discussion *supra* Part III.A.4.

²⁵⁷ *Midlantic Nat'l. Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266–67 (1979); see also discussion *supra* Part III.A.4.

²⁵⁸ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), *aff'g* 958 F. Supp. 1124 (E.D. Va. 1997).

²⁵⁹ 776 F. Supp. 135 (S.D.N.Y. 1991).

²⁶⁰ *Cubby*, 776 F. Supp. at 140–41.

²⁶¹ See discussion *supra* Part III.B.2.

²⁶² See discussion *supra* Part III.B.3.

²⁶³ See discussion *supra* Part III.B.1.

²⁶⁴ See discussion *supra* Part III.C. Though courts imposing distributor liability upon ISPs will undoubtedly need to wrestle with some tough issues, such as what would give rise to an ISP's having a “reason to know” of a posting's defamatory content, it is the role of the courts to do just that. Tough issues have been at the heart of many previous decisions related to defamation cases. The mere fact that applying distributor liability to ISPs is likely to raise more issues requiring resolution is no reason to suppress the fact that all the rationales and justifications that have warranted subjecting traditional media to distributor liability apply equally to ISPs. See discussion *supra* Part III.C.

the *Zeran* court's interpretation of § 230.²⁶⁵ Just as Congress promulgated § 230 to "remove the disincentives to self[-]regulation created by the *Stratton Oakmont* decision,"²⁶⁶ it should modify § 230 to expressly exclude distributor liability from the immunities the section affords ISPs, thereby removing the confusion created by the misguided interpretation of § 230 by the *Zeran* court.

²⁶⁵ See discussion *supra* Part III.C.

²⁶⁶ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), *aff'g* 958 F. Supp. 1124 (E.D. Va. 1997).