Hastings Communications and Entertainment Law Journal

Volume 30 | Number 1 Article 3

1-1-2007

The California Supreme Court's Decision in Barrett v. Rosenthal: How the Court's Decision Could Further Hamper Efforts to Restrict Defamation on the Internet

Joshua Azriel

The California Supreme Court's Decision in *Barrett v. Rosenthal*: How the Court's Decision Could Further Hamper Efforts to Restrict Defamation on the Internet

by
JOSHUA AZRIEL*

I. Introduction

In 1996, Congress passed into law the Telecommunications Act.[1] The law was aimed at deregulating the telecommunications industry, including ownership restrictions.[2] One part of the law, the Communications Decency Act (CDA), exempted Internet Service Providers (ISPs) and other "users" of an interactive computer service from being held liable for any posted materials from third party

* Assistant Proffessor for the Department of Communications at Kennesaw State University. B.A., Kalamazoo College. M.A., Political Science, University of Florida. Ph.D., Journalism and Mass Communication, University of Florida.

1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).
2. 47 U.S.C. § 161 (2000).

"users" that were excessively violent, harassing, or defamatory.[3] In an effort to promote self-regulation of the Internet, Congress wanted ISPs and other "users" to be immune from liability if third parties posted offensive messages.[4]

Congress's goal in passing the CDA was to provide a legal framework for the Internet to flourish in several areas, including political discourse, cultural development, intellectual development, and entertainment.[5] It opposed a law that restricted Internet growth; instead Congress tried to preserve the "free market nature" of the online communication medium.[6] Congress did not want ISPs bogged down by an avalanche of lawsuits related to questionable speech practices by third parties. Lawmakers feared the potential for chilled online speech from the 1995 *Stratton Oakmont* decision in New York.[7] In the decision, the New York Supreme Court held Prodigy Services liable for defamatory material that was posted on its "Money Talk" electronic bulletin board.[8] The court held that the ISP was the publisher of the web site and responsible for the content the Money Talk editorial staff posted.[9]

Congress responded to the *Stratton Oakmont* decision by passing section 230 of the CDA. The 1996 Senate-House Conference Report stated that one of the goals of the law was to overrule *Stratton Oakmont*.[10] Congress wanted ISPs to be exempt from liability for

3. 47 U.S.C. § 230(c)(2) (2000) states: "No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

4. 47 U.S.C. § 230(c)(2).

5. 47 U.S.C. § 230(a)(3) states: "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." Section (a)(4) states: "The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." Section (a)(5) states: "Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services."

6. 47 U.S.C. § 230(b) states: "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 . . . ."

7. Stratton Oakmont v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995).

8. *Id.* at 18.

9. *Id.* at 13.

10. H.R. Conf. Rep. No. 104-458 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124.

objectionable material written by unknown third parties.[11] It did not want ISPs and other "users" to be treated as publishers or speakers of content that was not their own.[12]

Federal courts have upheld Congress's authority to exempt ISPs from liability when defamatory or threatening statements are made on their servers.[13] They have ruled that the CDA exempts ISPs but not the actual perpetrators of any threatening or defamatory online materials. Several decisions have affirmed Congress's decision to exempt ISPs from liability when they make a "good faith" effort to restrict access to defamatory or other offensive material.[14]

While the law exempts ISPs as distributors of information, it also excuses "users" of interactive computer services from being held liable when they also make available online material that is harassing or defamatory.[15] By exempting "users," the legal distinction of who is a publisher of materials versus who is a distributor is important. Companies such as America Online or Microsoft are typically distributors because they make information provided by third parties available to subscribers of their interactive computer services. According to the CDA, these ISPs are distributors of information.[16] The law exempts a distributor from being held liable for any defamatory information posted on its online information services as long as it makes a "good faith" effort to restrict it.[17]

In November 2006, the Supreme Court of California issued a ruling involving a private user who reposted defamatory online material.[18] In *Barrett v. Rosenthal*, California's highest court overturned a court of appeal ruling that defendant Ilena Rosenthal, a

11. *Id.* at 194. The Conference Report stated: "One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and "users" as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computers services."

12. *Id.* at 194.

13. *See* Zeran v. America Online, 129 F.3d 327 (4th Cir. 1997); Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998); Green v. America Online, 318 F.3d 465 (3rd Cir. 2003).

14. 47 U.S.C. § 230(c)(2) (2000).

15. *Id.*

16. *Id.* § 230(c)(1) states: "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."

17. *Id.* § 230(c)(2).

18. Barrett v. Rosenthal, 40 Cal.4th 33 (2006).

member of an online news group, defamed the plaintiffs, Dr. Stephen Barrett and Dr. Timothy Polevoy.[19] The California Supreme Court ruled that Rosenthal did not violate section 230 of the CDA, which states providers or "users" will not be considered publishers or speakers of any information provided by another information content provider.[20]

The *Barrett* decision by the California Supreme Court leaves three unresolved questions which this article will try to answer. First, how does the CDA apply to conspiracies between two "users" of the Internet where one is an unknown publisher and the other poses as a distributor of offensive material? Second, according to federal law, is an individual third party user of defamatory material virtually the same as an ISP and, therefore, not held responsible for the defamatory information? Finally, does the *Barrett* decision make online defamation more likely? This article will attempt to answer these questions by providing a detailed analysis of the *Barrett* decision.

Part II of this article reviews several perspectives on the controversy surrounding offensive content on the Internet and the implementation of the CDA. The article, in Part III, will review the *Stratton Oakmont* decision which spurred Congress to pass the CDA that, in part, exempts ISPs and other "users" from culpability for any posted online offensive content. Part IV analyzes the California Supreme Court's *Barrett* decision. This article, in Part V, will then review three federal court cases—*Zeran v. AOL*, *Blumenthal v. Drudge*, and *Green v. AOL*—where the CDA was upheld and the courts reiterated Congress's explicit intent in the law.[21] The conclusion will provide the answers to the unresolved issues that arose from *Barrett*.

II. The Internet and Offensive Speech

As early as 1999, Stanford Law Professor Lawrence Lessig opposed the idea of applying traditional American laws to cyberspace. He attempted to show how the Internet's technological characteristics promote free speech. In 1999, Lessig stated that, with the anonymity of cyberspace and its continuing growth, traditional

19. *Id.* at 63.

20. *Id.*

21. *See* Zeran v. America Online, 129 F.3d 327 (4th Cir. 1997); Blumenthal v. Drudge, 992 F. Supp. 44; *Green*, 318 F.3d 465 (D.D.C. 1998).

legal norms do not function as well in the arena of "controversial speech."[22] He said the Internet makes controversial speech likely and easy due to relative anonymity, decentralized distribution, access at multiple points, and the lack of physical ties to a specific geography.[23] Essentially, there is no way to always identify the owner of Internet content. The technology that makes the Internet possible also allows "users" to encrypt who they are and how to locate them: "The architecture of cyberspace is the real protector of speech there; it is the real 'First Amendment' in cyberspace . . ."[24]

Like Lessig, John Cronan, in 2002, described the Internet as a global communication forum. It is not simply a place for posting web sites, but one including chat rooms and instant messaging services.[25] Cronan said it is possible that the communicator of an offensive message could be literally anywhere on the planet where there is a telephone or high-speed connection.[26] The receiver of the message would not know who communicated it or even where the sender is located.

More recently, in 2006, Jonathan Zittrain, professor of Internet Governance and Regulation at Oxford University, stated that when significant numbers of consumers were online via ISPs, they enjoyed a significant amount of power and freedom to post information to the public at large or at least to other subscribers of their ISPs.[27] The ability to communicate with someone anywhere in the world also included the danger of disseminating defamatory messages.[28] Zittrain said the Internet made it easy for unidentifiable individuals to post these messages.[29] As in *Stratton Oakmont*, victims turn to third party distributors for culpability.[30] Zittrain argued that holding ISPs responsible as publishers of offensive material would create an atmosphere for chilling speech.[31] He maintained that ISPs successfully urged Congress to exempt them from the CDA.[32] The

22. LAWRENCE LESSING, CODE AND OTHER LAWS OF CYBERSPACE 166 (1999).

23. *Id.*

24. *Id.* at 166-67.

25. John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 450 (2002).

26. *Id.* at 460.

27. Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 257 (2006).

28. *Id.*

29. *Id.*

30. *Id.* at 258.

31. *Id.* at 262.

32. *Id.*

CDA gave ISPs the option to act as gatekeepers of information without incurring any penalties if they chose not to screen for the information.[33]

That same year, professors Doug Lichtman and Eric Posner at the University of Chicago argued that ISPs should be held accountable when their customers initiate dangerous cyber codes that can harm other "users'" computers with viruses or some other anti-security measures.[34] They stated that in the "offline world," where a business agreement between two parties could lead to an offensive act committed by one party, the second party could still be held accountable.[35] Lichtman and Posner argued that ISPs are in a good position to reduce the number and severity of online harmful acts.[36] While ISPs may be immune from liability, the authors stated that Internet providers should be recruited to help enforce the law against individuals who would initiate viruses on their online communication platforms against other "users."[37] According to Lichtman and Posner, "Service providers control the gateway through which Internet pests enter and reenter the system. As such, service providers can help to stop these pests before they spread and to identify the individuals who originate malicious code in the first place. ISPs should be required by law to engage in these precautions."[38]

David Myers, professor of law at Valparaiso University, stated in 2006 that the Internet makes "cyber targeting" common.[39] "Cyber targeting" refers to the use of the Internet by students and young adults in targeting one another with e-mail messages and even using entire web sites devoted to publicly humiliating the individual with vulgar and often sexual content.[40] Myers said these types of actions can lead to potential legal actions, including lawsuits based on defamation and invasion of privacy.[41] He supported a federal law that remedies the increasing number of online defamatory incidents.[42] Citing the *Zeran* case and using an example from a colleague at the

33. *Id.* at 263.

34. Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221, 222 (2006).

35. *Id.* at 223.

36. *Id.*

37. *Id.* at 224-25.

38. *Id.* at 225.

39. David Myers, *Defamation and the Quiescent Anarchy of the Internet: A Case Study of Cyber Targeting*, 110 PENN ST. L. REV. 667, 667 (2006).

40. *Id.*

41. *Id.* at 668.

42. *Id.*

Washington Post, Myers said that if the newspaper publishes a story that defames someone, it is liable for that product.[43] Yet if the same story appears on *washingtonpost.com*, the company would not be liable under section 230 of the CDA.[44] Myers pointed out there is a double standard in the law. An ISP is not considered a publisher of an online defamatory article; but a newspaper would be considered a publisher for the print version of the same article. A possible solution that Myers suggested is that section 230 of the CDA would grant immunity to an ISP if it did not know about any offensive material, but the ISP would be liable if it created the material.[45]

III. *Stratton Oakmont* Decision

In *Stratton Oakmont Inc. v. Prodigy Services Co.*,[46] the New York Supreme Court held Prodigy Services liable as a publisher of defamatory material. An unidentified user of Prodigy's "Money Talk" electronic bulletin board accused Stratton Oakmont Inc., a securities investment firm, and its president, Daniel Porush, of committing criminal and fraudulent acts regarding the sale of stock.[47] Stratton Oakmont sued Prodigy and Money Talk's editor, Charles Epstein, for libel. The court agreed with Stratton Oakmont, ruling that Prodigy was responsible for Epstein's editorial decisions by citing the ISP as the publisher of the libelous postings.[48] Prodigy's editorial staff, including Epstein, monitored and edited online postings to the electronic bulletin board.[49]

The court said, "Computer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates. It is PRODIGY's own policies, technology and staffing decisions which have altered the scenario and mandated the finding that it is a publisher."[50] As a publisher, Prodigy was responsible for

43. *Id.* at 672.

44. *Id.*

45. *Id.* at 677.

46. Stratton Oakmont v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 299, *1 (N.Y. Sup. Ct. May 24, 1995).

47. *Id.* at *1-2. The unidentified posted comment stated that the public stock offering for Solomon-Page Ltd. was "major criminal fraud" and "100% criminal fraud." The comment further stated that the decisions of Stratton Oakmont's President, Daniel Porush, were "soon to be proven criminal" and that his company was a "cult of brokers who either lie for a living or get fired."

48. *Id.* at *17.

49. *Id.* at *12.

50. *Id.* at *12-13.

all content on its information services, including any offensive postings.[51]

The court also stated that "this decision simply required that to the extent computer networks provide such services, they must also accept the concomitant legal consequences."[52] As long as a computer service attempted to monitor the communications on its sites, then it could be held liable as a publisher of offensive material.

IV. *Barrett* Decision in California

In *Barrett v. Rosenthal*, Ilena Rosenthal had posted a copy of an article to a news group that was written by an unknown third party.[53] She had received the article in an e-mail message from co-defendant Tim Bolen.[54] It accused Dr. Polevoy of stalking a Canadian radio producer.[55] Bolen had labeled the article "Opinion by Tim Bolen," even though he received it from an unknown third party. The article accused Dr. Barrett of being "arrogant," "emotionally disturbed," and "a bully," among other accusations.[56] Rosenthal posted it on two newsgroups devoted to alternative health practices and the politics of medicine.[57] She did not operate and manage these two discussion groups.[58] Barrett and Polevoy argued that Rosenthal committed libel by "maliciously" distributing defamatory statements in electronic mails (e-mails) and Internet postings.[59] The doctors said these messages impugned their characters.[60]

51. *Id.* at *13.

52. *Id.* at *14.

53. Barrett v. Rosenthal, 40 Cal. 4th 33, 41 (2006).

54. *Id.*

55. *Id.* at 40-41. Dr. Stephen Barrett and Dr. Timothy Polevoy directed the Humantics Foundation for Women and operated an Internet discussion group. The article, "Opinion by Tim Bolen," stated that Dr. Barrett is "arrogant, bizarre, closed-minded; emotionally disturbed, professionally incompetent, intellectually dishonest, a dishonest journalist, sleazy, unethical, a quack, a thug, a bully, a Nazi, a hired gun for vested interests, the leader of a subversive organization, and engaged in criminal activity (conspiracy, extortion, filing a false police report, and other unspecified acts)." Regarding Dr. Polevoy the article said he "is dishonest, closed-minded; emotionally disturbed, professionally incompetent, unethical, a quack, a fanatic, a Nazi, a hired gun for vested interests, the leader of a subversive organization, and engaged in criminal activity (conspiracy, stalking of females, and other unspecified acts) and has made anti-Semitic remarks."

56. *Id.* at 40.

57. *Id.* at 41.

58. *Id.*

59. *Id.* at 40.

60. *Id.*

The California Supreme Court said that Rosenthal was not a publisher of the defamatory material.[61] Rather, she was a "user" of the material and did not violate section 230 (a)(3) of the CDA.[62] The Court stated that, by declaring no user may be treated as a publisher of third party content, Congress had immunized republication of defamatory content by any individual user.[63] In the CDA, Congress exempted from prosecution anyone who republishes information and, therefore, becomes a publisher.[64]

The Court noted that Congress, in writing the legislation for the CDA, required the states to follow the federal mandate of the law.[65] The Court said its decision was based on a "literal" interpretation of the law.[66] While the court reversed the lower court of appeal decision against Rosenthal, it said the plaintiffs were free to pursue the originator of the defamatory material: the unsigned article.[67]

The Court noted the danger of their ruling: "The prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications."[68] In his concurring opinion, Justice Moreno went one step further. While he agreed with the majority ruling, Moreno cautioned that the court's ruling did not account for the danger of a conspiracy if a user actively works with an information content provider to distribute defamatory material online.[69] He stated that he did not believe the CDA provides immunity in this situation.[70]

A secondary issue that came before the Court was whether Rosenthal—in her action of posting materials written by someone else—engaged in active or passive use of the information in question.[71] The Court stated that categories of a "user" are not defined in the CDA statutory language.[72] According to Justice

61. *Id.* at 62.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 42. The court quoted from the CDA which states: "(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."
66. *Id.* at 63.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 64.
71. *Id. at 58.*
72. *Id.*

Corrigan, a user "plainly refers to someone who uses something, and the statutory context makes it clear that Congress simply meant someone who uses an interactive computer service."[73] Congress consistently referred to "users" of interactive computer services without any further explanations.[74]

In *Barrett*, the Court said that Rosenthal used the Internet to gain access to newsgroups where she posted Bolen's article about Barrett and Polevoy.[75] She was therefore a "user" under the CDA.[76] Polevoy asked the Court to distinguish between active and passive Internet use so it could classify Rosenthal's actions as active and cite her as a publisher of defamatory information.[77] Polevoy's argument was that when a user receives offensive information, the individual must screen (review) the posting and then decide whether to repost it or remove it.[78] He asserted that anyone who actively posts or republishes information on the Internet is an information content provider and not protected by the law's immunity provision.[79]

In disagreeing with Polevoy's argument, the Court said that his view failed to account for the language that Congress created.[80] The CDA grants immunity to any "user." It never distinguished between a user who removes a posting and another user who allows a posting to remain online, therefore keeping it active.[81] The Court agreed with Polevoy that any user who actively selects and posts materials based on its content fits within the role of publisher.[82] Yet the Court said it was Congress's intent to immunize republication from liability.[83] No meaning exists within the law to distinguish between active and passive "users" of the Internet.[84]

The California Supreme Court's ruling was a literal interpretation of the CDA, stating: "Until Congress chooses to revise the settled law in this area, however, plaintiffs who contend they were defamed in an Internet posting may only seek recovery from the

73. Id. at 59.
74. Id.
75. Id.
76. Id.
77. Id. at 59-60.
78. Id. at 60.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 62.
83. *Id.*
84. *Id.*

original source of the statement."[85] *Barrett* was not the first decision in which a court clearly pointed out Congress's intent in the CDA. In *Zeran v. America Online*, the U.S. Court of Appeals for the Fourth Circuit upheld the law.[86]

V. Federal Courts Uphold CDA

A. *Zeran v. AOL*

In *Zeran*, Kenneth Zeran sued AOL because it did not quickly remove messages from one of its bulletin boards that told its "users" to call his telephone number to purchase "naughty Oklahoma T-Shirts."[87] The prank was posted online after the April 19, 1995, Oklahoma City bombing of the Alfred P. Murrah Federal Building.[88] Zeran received a high volume of calls including angry messages and death threats.[89] He contacted AOL asking the company to remove the message on one of its bulletin boards. The perpetrator of the message was unknown.[90] Zeran received hundreds of angry messages, often at the rate of one telephone call every two minutes.[91] Zeran sued AOL as both the publisher and distributor of the message.[92]

The District Court ruled that the 1996 CDA exempted ISPs such as AOL from any liability for defamatory messages.[93] The U.S. Court of Appeals for the Fourth Circuit upheld the decision.[94] The court stated that it could not hear any claims that would place an ISP in a publisher's role.[95] The law bars such lawsuits.

The unanimous court stated that Congress enacted the law to "maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."[96] The court wrote that the original, unknown, culpable party was to blame—not AOL.[97] It encouraged law enforcement

85. *Id.* at 40.
86. Zeran v. America Online, 129 F.3d 327, 328 (4th Cir. 1997).
87. *Id.*
88. *Id.* at 329.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 329-30.
94. *Id.* at 335.
95. *Id.* at 330.
96. *Id.*
97. *Id.*

officials to locate the individual who posted the original message to ensure that the perpetrator would be punished under the law.[98] The court warned that the law was needed to protect ISPs; without it, the "specter of liability in an area of such prolific speech would have an obvious chilling effect" on them.[99] The court stated that AOL is like any other online distributor of information in that it sometimes may not know all of the contents on its server, including any defamatory material.[100]

The court said that Congress believed that the imposition of tort liability on service providers for the communications of unknown third parties was a form of government intrusion on freedom of speech.[101] Section 230 of the CDA was enacted partly to ensure the "robust" free speech nature of the Internet and to keep government interference to a minimum.[102] Up until the CDA was passed into law in 1996, Congress maintained that the Internet was flourishing to the benefit of all Americans.[103] The court believed that Congress wanted the official policy of the U.S. government to be one of encouraging the continued growth of online communications.[104]

The court noted that the law does not excuse the original culpable party that posts any defamatory messages.[105] The CDA still called for "vigorous enforcement" of federal criminal laws that attempt to deter online obscenity, stalking, and harassment.[106]

When the *Zeran* opinion was announced, the court stated that, with the exponential growth of online communications, the "specter of tort liability in an area of such prolific speech would have an obvious chilling effect."[107] The court noted that it would be nearly impossible for ISPs to screen each of the millions of postings for offensive communication, including defamatory messages. If ISPs attempted to do this, the consequence might severely restrict the number and types of messages posted.[108] The court noted that

98. *Id.*
99. *Id.* at 331.
100. *Id.*
101. *Id.* at 330.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 331.
108. *Id.*

Congress weighed this option but instead chose to immunize service providers so they could avoid any chilling speech consequences.[109]

While the *Zeran* decision focused on the potential liability of ISPs, the federal appeals court made it clear that Congress's intent in the CDA was to hold the publishers of defamatory material responsible, not the distributors.[110] It wanted to avoid the potential legal pitfalls for ISPs who do attempt to control online content so they are not placed in the roles of publishers and, therefore, liable for defamatory materials.[111] One year after the *Zeran* decision, another federal court would again reaffirm Congress's intent with the CDA.

B. *Blumenthal v. Drudge*

In 1998, in *Blumenthal v. Drudge*, the U.S. District Court for the District of Columbia exonerated AOL from any liability under the CDA.[112] Sidney Blumenthal sued AOL and Matt Drudge over defamatory statements that he had a record of spousal abuse.[113] Blumenthal previously worked in the Clinton administration as an assistant to the President. Drudge was the editor of the online political newsletter *Drudge Report*. In the spring of 1997, Drudge entered into an agreement with AOL making *Drudge Report* available to AOL members. As part of the contract, AOL paid Drudge $3,000 a month.[114] Under the agreement, AOL could remove any content that the company determined violated its standard terms of service.

On August 10, 1997, the alleged defamatory statements against Blumenthal appeared on *Drudge Report* and were made available to AOL members.[115] The next day Drudge retracted the story and apologized to Blumenthal.[116] The court ruled that the CDA shielded AOL from liability.[117] AOL was exempted from liability because Drudge was the author, and the ISP did not have any editorial involvement in the article.[118] The court based its opinion on the *Zeran*

109. *Id.*
110. *Id.*
111. *Id.*
112. Blumenthal v. Drudge, 992 F.Supp. 44, 46 (D.D.C. 1998).
113. *Id.*
114. *Id.* at 47.
115. *Id.* at 47-48.
116. *Id.* at 48.
117. *Id.* at 50.
118. *Id.*

case.[119] It noted that the only legal action available to Blumenthal was his lawsuit against Drudge. Blumenthal never provided any evidence that AOL had any responsibility for the content on *Drudge Report.*[120] The court also said there was no evidence that Drudge was ever an employee or agent of AOL.[121] Had Drudge and AOL jointly developed *Drudge Report*, the court noted that the ISP could then have been held accountable.[122]

Blumenthal argued that if the same material about his alleged spousal abuse had appeared in a print publication such as the *Washington Post*, then that newspaper would have been liable for the defamatory material. The court agreed.[123] Yet it noted that Congress explicitly granted immunity to interactive computer providers.[124] It stated that Congress decided not to treat ISPs as print or broadcast outlets of information.[125] Those communication mediums might have been liable for Drudge's story on Blumenthal had they not verified the veracity of the allegations. Citing the *Zeran* decision, the court noted that the intent of section 230 of the CDA was to exempt ISPs from any responsibility for offensive materials.[126]

The court, however, was sympathetic to Blumenthal's argument. In a press release issued by AOL announcing its business deal with Drudge, AOL mentioned that Drudge wrote articles often based on gossip and rumor.[127] Blumenthal argued AOL should not be permitted to tout someone as a gossip columnist or rumor maker who might defame someone.[128] The court agreed. It said if AOL was supporting Drudge then it should have taken responsibility for any damage he might cause with his online postings.[129] Since AOL has the right to exercise editorial control over those with whom it contracts, the court said it would seem fair to hold the company accountable to

119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 49.
124. *Id.*
125. *Id.*
126. *Id.* at 51.
127. *Id.* The press release stated in part: "Giving the Drudge Report a home on America Online (keyword: Drudge) opens up the floodgates to an audience ripe for Drudge's brand of reporting... AOL has made Matt Drudge instantly accessible to members who crave instant gossip and news breaks."
128. *Id.*
129. *Id.*

the liability standards of a publisher.[130] Yet, the court said the law was clear. The CDA provides immunity even when an ISP has an active role in making content created by others available to its customers.[131]

While the D.C. District Court in *Blumenthal* was sympathetic to Blumenthal's argument, its ruling parallels that of the California Supreme Court. In *Barrett*, the Court sympathized with the doctors as victims of defamation but ruled that the CDA still conferred immunity to Rosenthal because she was a "user" of online material.[132] In *Blumenthal*, the district court said that while it agreed with Blumenthal's arguments, the CDA nonetheless grants immunity to ISPs for any offensive materials posted by third parties; AOL could not be held accountable as Drudge's publishing partner. Five years later, in 2003, a court of appeals would again decide that the CDA exempts ISPs from responsibility for third party offensive content.

C. *Green v. AOL*

In a third case regarding immunity for ISPs, the U.S. Court of Appeals for the Third Circuit in *Green v. AOL* upheld a lower district court's ruling that AOL was statutorily immune from liability from offensive content posted on one of its discussion groups.[133] John Green sued AOL and "John Does 1 and 2" for transmitting harmful messages in a chat room on AOL's server.[134] In his lawsuit, Green accused AOL of failing to live up to its contractual obligation by refusing to take quick and necessary action against John Does 1 and 2.[135] Green wanted the ISP to compensate him with $400 in damages to his computer from AOL and the two John Does.[136]

Green alleged that John Doe 1 sent a "punter" through a chat group, "Romance – New Jersey over 30," that locked up his computer.[137] In a second incident, Green accused John Does 1 and 2 of using aliases in the chat group and sending defamatory messages to its users alleging Green was gay.[138] On a third occasion, John Doe 2

130. *Id.*

131. *Id.* at 52.

132. Barrett v. Rosenthal, 40 Cal.4th 33, 63 (2006).

133. Green v. America Online, 318 F.3d 465, 468 (3rd Cir. 2003).

134. *Id.*

135. *Id.* at 468.

136. *Id.* at 470.

137. *Id.* at 469. A punter can prevent individuals from using their computers, essentially "freezing" them up.

138. *Id.* Examples of the messages include: "SHELLS CAREFUL LAWYER IS BI" and "LAWYER NO IMS FOR GAY SEX THX :))."

allegedly impersonated Green in the chat room asking male participants to participate in gay sex.[139] In his complaint, Green said he faxed AOL a log of the chat room discussion in which he stated John Does 1 and 2 defamed him.[140] Green said AOL took no immediate action.[141]

The U.S. District Court for New Jersey granted AOL's motion to dismiss the case.[142] The Third Circuit of the U.S. Court of Appeals upheld the lower court's ruling stating section 230 of the CDA provides immunity to AOL.[143] The court cited *Zeran* in its reasoning.[144] It stated that the law does not require AOL to restrict speech.[145] Instead, it gives the service provider the right to establish standards of decency for its chat rooms without risking liability for doing so.[146] The court pointed out that, while AOL stated in its Member Agreement that it would attempt to protect its "users," at the same time the ISP did not assume any responsibility for content provided by third parties.[147] According to the court, "Though AOL reserved the right to remove messages deemed not in compliance with the Community Guidelines, it expressly disclaimed liability for failure or delay in removing such messages."[148]

In its decision, the court referred to the wording of the CDA that grants immunity to ISPs for any defamatory content placed on their web sites by unknown parties.[149] As with the *Zeran* decision, the *Green* court said that the law does not allow courts to view ISPs as publishers of online content.[150] Additionally, in this case AOL did not falsely represent itself and complied with its Member Agreement.[151]

VI. Conclusion

All four cases discussed in this article—*Barrett*, *Zeran*, *Blumenthal*, and *Green*—share three common themes: ISPs and other

139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 468.
143. *Id.* at 473.
144. *Id.* at 471.
145. *Id.* at 472.
146. *Id.*
147. *Id.*
148. *Id.* at 471.
149. *Id.* at 472.
150. *Id.* at 471.
151. *Id.*

"users" are immune from liability from online offensive content published by third parties; the unknown publisher of the material is liable for the content; and, Congress's intent in creating the CDA was to protect the free market speech viability of the Internet. Specifically, in *Barrett* and *Blumenthal*, while the courts were sympathetic to the victims of defamatory messages, they reiterated that the law specifically granted immunity to ISPs and other "users" of the Internet.[152] These companies and individuals cannot be held responsible for the offensive postings of third parties.

This article answers three unresolved issues from the California Supreme Court's *Barrett* decision. First, how does the CDA apply to conspiracies between two "users" of the Internet when one is the unknown publisher and the other is a distributor (user) of offensive material? Second, by federal law, is an individual third party distributor of defamatory material virtually the same as an ISP and, therefore, not held responsible for the defamatory information? Finally, does the *Barrett* decision make online defamation more likely?

Regarding the first question, the CDA does not apply to conspiracies between two "users" of the Internet in a scenario where one individual plays the unknown publisher of offensive content who in turn forwards the material to a co-conspirator—the user—who then redistributes it. In *Barrett*, Ilena Rosenthal had forwarded an article her friend had e-mailed her.[153] While she did not know the person who authored the article defaming Barrett and Polevoy, the California court, nonetheless, said she had the right to post the defamatory material onto another newsgroup's online discussion group.[154] In a similar hypothetical scenario, Rosenthal could have received an online message from an unknown third party who, in reality, was her friend, Tim Bolen. Had Bolen written a message using a pseudonym and sent it to Rosenthal for her to post onto another discussion group, she would have still been protected by the CDA. In his concurring opinion, Justice Moreno worried about such a scenario.[155] As the federal appeals courts ruled in *Zeran* and *Green*,

152. *See* Blumenthal v. Drudge, 992 F. Supp. 44, 52-53 (D.D.C. 1998); Barrett v. Rosenthal, 40 Cal. 4th 33, 62-63 (2006).

153. Barrett v. Rosenthal, 40 Cal. 4th 33, 41 (2006).

154. *Id.* at 63.

155. *Id.*

the unknown third party is still culpable, but tracking them down in order to hold them accountable may be difficult.[156]

The second question asked if, by law, an individual who reposts offensive material is equivalent to an ISP. The answer is yes. The CDA clearly states, "No provider or user of an interactive computer service shall be held liable" for offensive content others created.[157] Neither an ISP nor a user is an information content provider. According to the CDA, an 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."[158] An ISP is a company such as AOL, Bell South, and Comcast that provides Internet access and services to customers. An ISP can also exist when a company provides Internet access to its employees.[159] Section 230(c)(2) of the CDA clearly equates ISPs with "users" of the Internet. Neither an ISP nor a user is responsible for offensive material placed on the Internet.

The third question asked if online defamation is more likely from the *Barrett* decision. The California Supreme Court noted that the CDA does not distinguish between active and passive "users" of the Internet. It said the CDA never distinguished between a "user" who removes a posting and a "user" who allows a posting to remain online, therefore, keeping it active.[160] The Court sympathized with Dr. Polevoy that any user who actively selects and posts any material based on its content fits within the role of publisher.[161] Yet the law states that any user of an interactive computer service is immune from liability. From this perspective, Internet "users" are always reposting and forwarding information published by others. The likelihood that this would include offensive content is high. The *Barrett* ruling makes

156. *See* Zeran v. America Online, 129 F.3d 327 (4th Cir. 1997); Green v. AOL, 318 F.3d 465 (3rd Cir. 2003).

157. 47 U.S.C. § 230(c)(2) (2000).

158. *Id.* § 230(f)(3).

159. *See* Delfino v. Agilent Techs., 145 Cal. App. 4th 790, 795 (2006) A California court of appeal ruled that an employer had no liability for an employee who was sued for intentional infliction of emotional distress. The employee used the company's Internet services to threaten two other co-workers. The company, Agilent Technologies, was not aware of the initial threatening messages and once it became aware of them, took immediate action to rectify the situation. The court ruled that the employer was immune under Section 230 of the CDA as a provider of an interactive computer service.

160. *Barrett*, 40 Cal.4th at 60.

161. *Id.* at 62.

it clear that "users" would not be held accountable for the information they forward to others.

As long as Congress does not revisit the CDA and amend section 230 to no longer grant immunity to "users" who review and forward objectionable online material, "users" will remain exempt from being held liable for any offensive material they receive and then post or forward on the Internet. With the Internet as a communications platform for web sites, e-mail, instant messaging, and discussion groups, there are plenty of opportunities for people to take advantage of the CDA and use the Internet for "cyber targeting."[162] Publishers will remain accountable, but individual "users" will continue to have immunity under the law. Victims of online defamation who do not know the true identity of their assailants will have little or no recourse of action under the law.

162. Myers, *supra* note 39, at 667.

* * *