The Taming of the Internet: A New Approach
Third-Party Internet Defamation

Amanda Groover Hyland

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The Taming of the Internet: 
A New Approach Third-Party Internet Defamation

by
AMANDA GROOVER HYLAND*

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I. Introduction

Beware ladies! Alleged Cheater: Todd Hollis.

"This guy is a trip. In fact . . . he's a DOG . . . he is believed to have HERPES. Stay away! . . . DO NOT DATE HIM. He gave me an STD and dated 2 people at a time."1

After these allegations about Hollis were posted by anonymous individuals on the popular website dontdatehimgirl.com,2 he notified the website operator that the statements were not true.3 When the website operator, Tasha Cunningham,4 did not remove the comments, Hollis sued her in 2006 in Pennsylvania county court for defamation.5 Although the Pennsylvania court dismissed the lawsuit for lack of personal jurisdiction,6 Hollis filed a nearly identical complaint in the district court for the Southern District of Florida.7

Cunningham claims she is protected from liability under the Communications Decency Act ("CDA"), a federal statute enacted in 1996.8 She asserts that section 230 of the CDA immunizes her from defamation liability as either a publisher or a distributor.9 If courts

2. Tasha Cunningham, known as Tasha Joseph at the time of the interview, the founder of “Don’t Date Him Girl,” told the Miami Herald that the website has about 600,000 registered users and receives about one million hits each day. Monica Hatcher, Don’t Date Him Site Draws Defamation Suit: A Website Allowing Women to Slam the Men Who Have Wronged Them Is Being Sued by a Man Claiming Character Defamation, MIAMI HERALD, July 1, 2006, at Al.
4. Tasha Cunningham was known as Tasha Joseph at the time the complaint was initially filed.
5. See generally id.
9. Preliminary Objections to Complaint at 5-6, Hollis, No. GD 06-12677.
agree with her argument, Hollis' only relief would be to seek damages from the individual posters, who may be difficult to identify and would be unlikely to have the financial resources to make the lawsuit worthwhile.

The Don't Date Him Girl case may present particularly entertaining facts, but its legal issues are illustrative of serious conflicts within Internet defamation jurisprudence.

Publishers accused of defamation may be held to various standards of liability. If the plaintiff is a public figure, the publisher is protected under the actual malice standard. This standard was first implemented by the Supreme Court in *New York Times v. Sullivan*, and it requires the plaintiff to prove that the defendant published the statement knowing that it was false, or with reckless disregard for its truth. If cases involve private plaintiffs, states may apply the standard of review they deem appropriate, which most often is negligence.

Those who republish a libelous statement do not escape liability simply because they did not originally create the content. Within the context of libel republication, the common law has distinguished between primary publishers and secondary publishers, which are usually called distributors. The distinction is based on the degree of control possessed by the defamation defendant. Primary publishers are presumed to have a greater degree of control over the material they publish, and therefore are held to stringent standards of liability when they republish defamatory content. Newspapers have editorial control over their content and therefore are considered primary publishers. Thus, they are liable for content contained in advertisements and letters to the editor, even though the original content was created by another entity.

Secondary publishers, on the other hand, include those entities that have little or no control over what they republish. These publishers, usually called distributors, are presumed to be passive conduits of information and therefore are only held liable for defamatory content they transmit if they knew or had reason to know that the material was defamatory. This standard provides shelter for entities that cannot screen the content they distribute, providing a

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11. *Id.* at 279-80.
necessary haven for telegraph companies,\textsuperscript{13} bookstores,\textsuperscript{14} and other similarly situated parties. Internet service providers that enable the publication of its users' statements have been uniformly classified as distributors.\textsuperscript{15}

In 1996, Congress passed the Communications Decency Act, which provides in section 230 that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."\textsuperscript{16} In its plain meaning, this provision shields interactive website operators from publisher liability. Yet when the U.S. Court of Appeals Fourth Circuit interpreted section 230 to provide web operators with immunity from distributor liability as well in \textit{Zeran v. America Online, Inc.},\textsuperscript{17} many courts followed.\textsuperscript{18} Ten years after the enactment of the CDA, many jurisdictions provide Internet operators with complete immunity from both publisher and distributor liability. This immunity has also been extended to Internet users who republish defamatory material.

The results of the \textit{Zeran} interpretation have been problematic. By abolishing distributor liability, usually the only defendant that can be held accountable is the original content creator. This outcome is particularly frustrating when the interactive Internet service operator had an active role in posting the content or was otherwise acutely aware of the defamatory statement's existence on its web space.\textsuperscript{19} Victims of egregious defamation have virtually no recourse, as the original web publisher is often an anonymous individual that even if identified,\textsuperscript{20} has few resources to compensate the plaintiff. Moreover, if website operators do not have any liability for the comments published on the site, the utility of the internet may be diminished over time if it abounds with false information.

\textsuperscript{14} See, e.g., Smith v. California, 361 U.S. 147 (1959).
\textsuperscript{17} 129 F.3d 327 (4th Cir. 1997).
\textsuperscript{18} See Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003); Carafano v. MetroSplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003); Blumenthal v. Drudge, 992 F. Supp. 444 (D.D.C. 1998); Doe v. America Online, Inc., 783 So. 2d 1010 (Fla. 2001).
\textsuperscript{19} See Batzel, 333 F.3d at 1034 (finding listserv operator immune under section 230).
\textsuperscript{20} See Lyrissa Lidsky, \textit{Silencing John Doe: Defamation & Discourse in Cyberspace}, 49 DUKE L.J. 855 (2000) (examining process by which anonymous Internet users may be identified in defamation lawsuits).
Several courts have found fault with Zeran's interpretation of section 230, with one California Court of Appeal specifically interpreting section 230 to provide no immunity whatsoever for distributor liability. In the 2003 decision of Barrett v. Rosenthal, the California court looked to the legislative history of section 230 and determined that it was never intended to provide such sweeping immunity to web operators. The court's solution was notice-based liability, where a web operator would be liable for a defamatory comment posted by a user if the operator refused to remove the comment after receiving notice of the defamation from the victim. The California Supreme Court reversed the Court of Appeal in November 2006, finding that section 230 protects Internet publishers from distributor liability.

Although the California Court of Appeal's interpretation of section 230 was short-lived, it is nonetheless quite troubling as a potential interpretation for other courts to adopt in the future. If interactive web operators are subject to notice-based liability, they may tend to remove any content that is the subject of a complaint, thereby pulling some content that is not actually false or defamatory. This notice-based liability places great power in the hands of any person who becomes the topic of an uncomplimentary Internet posting, as a notice to the web operator claiming defamation could easily result in the removal of the posting.

These legal issues have implications that reach numerous web entities. Many Internet mega-companies such as Amazon and eBay rely largely on third-party content to provide feedback and user reviews. These companies have expressed concern that the imposition of notice-based liability could prevent them from offering these user-integrated forums.

Blogs, which are rapidly gaining popularity as a source of information, also rely largely on reader comments to improve and

22. Id. at 781.
23. Id.
26. Id.
27. Weblogs vary in layout and style, but the most fundamental definition of a blog is a website that contains journal entries which are date-stamped and in reverse chronological order. Darlene Fichter, Blogging Your Life Away, ONLINE, May/June 2001, at 68.
expand the content provided on the site. Bloggers, with their limited knowledge of the law and their limited financial resources, are particularly vulnerable to notice-based liability as they are perhaps the most likely to be intimidated into removing questionable content.

Many websites are similar to the Don't Date Him Girl site mentioned earlier in the sense that they rely solely on user content to exist. Without clear legal standards to guide the operator in handling defamation complaints, these websites may find themselves in unpredictable and expensive lawsuits, which could be devastating to low-profit or non-profit Internet forums, including massively popular merging sites such as YouTube and Craigslist.

Thus, the interpretation of section 230 of the CDA has long-reaching effects on website operators, defamation victims, and Internet users as a whole. An effective solution must consider the serious policy implications at stake while remaining consistent with First Amendment jurisprudence. No commentator appears to have crafted a workable solution that relies on First Amendment jurisprudence yet also considers the difficult policy issues discussed so far.

This article examines the First Amendment and statutory foundations of libel law for publishers, re-publishers, and distributors, with an emphasis on libel law applications on the Internet. By incorporating these historical constitutional and policy objectives, the article proposes a new approach to handling defamation complaints against interactive website operators. Part II provides an examination of libel law as it has been applied to the traditional mediums of print and broadcasting, with an emphasis on the major Supreme Court libel cases of the 1960s and 1970s. Part II examines the common law foundations of libel republication liability, followed by an overview of the application of these common law principles to early Internet republication cases. Part III then discusses the enactment and text of section 230 of the CDA, followed by an examination of the numerous appellate opinions that discuss the legislation's appropriate scope and application. Part IV discusses the policy issues implicated by section 230 and its interpretations and then draws on these policy issues, as well as the legal principles discussed in Parts I and II to formulate a

solution that considers Supreme Court precedent, Congressional intent, and the various policy issues involved.

II. History of Libel Liability

A. Early Interpretations of Libel Law

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.29

Although these words have been interpreted to provide constitutional protection to the media and individual citizens who speak or write false statements, this interpretation was not advanced by the Supreme Court until the mid-twentieth century. Although case law is sparse, research has indicated that throughout the eighteenth and early nineteenth centuries, courts found that the First Amendment served primarily as a ban against prior restraint, 30 and individuals whose speech was found to be contrary to public welfare could be the subject of criminal prosecution.31 During this period, the

29. U.S. CONST. amend. I.


31. See United States v. Cooper, 25 F. Cas. 631, 639 (C.C.D. Pa. 1800) (No. 14, 685) (noting the indictment for publishing “a false, scandalous and malicious libel upon the president of the United States”); see also Patterson v. Colorado, 205 U.S. 454 (1907). In Patterson, Justice Holmes noted that:

[T]he main purpose of such constitutional provisions is ‘to prevent all such previous restraints upon publications as had been practiced by other governments,’ and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare . . . . The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false.

205 U.S. at 462 (alteration in original).
American lawmakers and courts that considered libel laws were primarily concerned with the protection of an orderly society, and even true speech that threatened individuals or the government was subject to criminal libel prosecution.\textsuperscript{32} Perhaps the most poignant examples of prosecution for political speech occurred under the Sedition Act of 1798, which prohibited criticism of the president, government or Congress.\textsuperscript{33} At least twenty-five people were arrested under the Act, which expired in 1801.\textsuperscript{34} Truth was not formally established as a defense to libel by any court until 1804, when a New York court declared that truth published with "good motives" was a mitigating factor in libel cases.\textsuperscript{35}

The Court first implied a shift towards a First Amendment protection against speech prosecution in 1919 in *Schenck v. United States*.\textsuperscript{36} Although the Court upheld the espionage conviction against the defendant, a Socialist who circulated anti-draft leaflets among drafted servicemen, the Court's opinion implied the possibility of protection against subsequent punishment. In the unanimous opinion, Justice Oliver Wendell Holmes wrote:

> It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . . We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights.\textsuperscript{37}

Although the Court did imply some constitutional protection against punishment for speech, libel remained wholly unprotected at that time. Throughout the first half of the twentieth century, the Court grouped libel with other classes of unprotected speech, including obscenity and "fighting words," noting that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be

\textsuperscript{32} Libel concerning public officials was punished as seditious libel as the speech was considered a threat to "the security of the state." If the speech targeted an individual, it was punished as criminal libel because it created a risk "to breaches of the peace." William Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 LAW Q. Rev. 302, 305 (1924).

\textsuperscript{33} 1 Stat. 596 (1798).

\textsuperscript{34} *FREE SPEECH AND NATIONAL SECURITY* 11 (Shimon Shetreet ed., Martinus Nijhoff Publishers 1991).

\textsuperscript{35} People v. Croswell, 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804).

\textsuperscript{36} 249 U.S. 47 (1919).

\textsuperscript{37} *id.* at 51-52.
derived from them is clearly outweighed by the social interest in order and morality."


The Court did not proclaim a commitment to First Amendment protection for any type of defamatory speech until 1964 when it decided the landmark case New York Times v. Sullivan. During the turbulent years of the civil rights movement, the New York Times published an editorial advertisement titled "Heed Their Rising Voices." The full-page ad was submitted by the Committee to Defend Martin Luther King, and it described police abuses of African-Americans, particularly in Montgomery, Alabama. The ad contained several factual errors, and although the Montgomery city commissioner in charge of the police department was never mentioned by name, he sued the New York Times and the advertiser for libel. The commissioner was awarded $500,000 in damages after a jury trial, and the award was upheld by Alabama appellate courts.

The New York Times appealed to the Supreme Court. The high court reversed, finding that the "law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct." The Court reasoned that "erroneous statement is inevitable in free debate" and that punishing critics of public officials for any factual errors would chill speech about matters of political and social importance. The Court established the rule for defamation cases that now governs libel law. The Court wrote:

The constitutional guarantees require, we think, a federal rule that
prohibits a public official from recovering damages for a

40. Id. at 256.
41. Id. at 256-58.
42. Id.
43. Id. at 262-64.
44. Id. at 264.
45. Id. at 271.
46. Id.
defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.47

Thus, Sullivan created a heavy burden for public-official libel plaintiffs by requiring them to prove actual malice. The Court acknowledged that the threat of libel lawsuits can make the press fearful to publish anything controversial or remotely factually questionable, limiting the public's knowledge of the conduct of public officials.48

The Supreme Court continued to expand protection for the press in libel lawsuits when it decided the consolidated cases of Curtis Publishing Co. v. Butts49 and Associated Press v. Walker.50 In the consolidated cases, the Court extended the Sullivan rule to cases involving "public figures," those people who are not public officials but are nonetheless involved in issues of social or political importance—in these cases, a former University of Georgia athletic director51 and a former U.S. army general.52 The Court expressly noted that the protection from libel lawsuits must be extended to cover public figures because they were the subject of the same type of public debate at issue in Sullivan.53 Furthermore, the Court noted that public figures have "sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements,"54 thereby adding the plaintiff's access to the media as a consideration in determining the appropriate standard of liability. Thus, Sullivan and Curtis Publishing together provide that public officials and public figures have limited protection against injurious statements made by the press, as they must prove the defendant published the statement

47. Id. at 279-80.
48. Id.
49. 388 U.S. 130 (1967).
50. Id.
51. Id. at 135-36.
52. Id. at 140-41.
53. Id. at 147. "From the point of view of deciding whether a constitutional interest of free speech and press is properly involved in the resolution of a libel question a rational distinction 'cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of... policy will be less important to the public interest than will criticism of government officials.'" (quoting Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 196 (8th Cir. 1966)). Id. at 147-48.
54. Id. at 154 (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting)).
with knowledge that it was false or with reckless disregard for the truth.\textsuperscript{55}

Until 1971, the Supreme Court had focused on the status of the libel plaintiff is assessing the appropriate standard of liability. This focus shifted to the subject matter of the allegedly defamatory speech when the Court decided \textit{Rosenbloom v. Metromedia}.\textsuperscript{56} In \textit{Rosenbloom}, a plurality of the Court applied the actual malice test "to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."\textsuperscript{57} This standard greatly expanded the scope of actual malice cases for three years, until the Court abandoned this test in 1974 when it decided \textit{Gertz v. Welch}.\textsuperscript{58}

In \textit{Gertz}, the Court abandoned the \textit{Rosenbloom} subject-matter test and returned to the previous method of examining the status of the plaintiff. The Court held that private plaintiffs, meaning those plaintiffs who are neither public officials nor public figures, must prove a defendant acted with some degree of fault when publishing a false and injurious statement about the plaintiff.\textsuperscript{59} The appropriate standard of fault may be decided by individual states, but the states must require that private plaintiffs not recover actual damages unless they prove the defendant was at least negligent in publishing the false statement.\textsuperscript{60} The Court then set forth two categories of public-figure libel plaintiffs that would be required to prove actual malice. An "all-purpose public figure" is an individual who has "achieve[d] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts."\textsuperscript{61} A "limited purpose public figure" is an individual who would otherwise be considered a private plaintiff, but who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."\textsuperscript{62}

In establishing less protection for public-figure plaintiffs, the Court reasoned that these individuals' reputations require minimal protection for two significant reasons. First, public figures voluntarily

\begin{footnotesize}
\begin{enumerate}
\item[56.] 403 U.S. 29 (1971).
\item[57.] \textit{Id.} at 44.
\item[58.] 418 U.S. 323 (1974).
\item[59.] \textit{Id.} at 330 n.3.
\item[60.] \textit{Id.}
\item[61.] \textit{Id.} at 351.
\item[62.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
expose themselves to public criticism by "assum[ing] roles of special prominence in the affairs of society." Furthermore, they have access to the media, which should allow them to publicly counteract a false and defamatory statement. The Court asserted:

The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

Courts have incorporated this reasoning as a factor in determining an individual’s status as a limited-purpose public figure. In Hutchinson v. Proxmire, for example, a federally funded scientist did not have to prove actual malice in his libel lawsuit against Senator William Proxmire, who had publicly denounced the scientist’s research as wasteful. Despite Hutchinson’s involvement in a very public issue about potentially wasteful government spending, the Supreme Court considered the scientist’s relatively unknown public status and his limited access to the media in its determination that he was not a limited-purpose public figure. The court also specifically noted that Hutchinson’s only media appearances were initiated in defense of his research after Senator Proxmire’s accusations were made public. The Court’s comment indicated that a plaintiff should not be considered to have media access when the individual’s only use of the media was a public defense of the initial defamatory statement.

The Supreme Court further clarified the definition of a limited-purpose public figure by distinguishing matters of public interest from

63. Id. at 345.
64. Id. at 344.
65. Id. at 344. (citations omitted).
66. See, e.g., Trotter v. Jack Anderson Enters., 818 F.2d 431 (5th Cir. 1987) (noting that an individual may achieve public-figure status by exercising access to media); Lerman v. Flynt Distributing Co., 745 F.2d 123 (2d Cir. 1984) (ruling that regular and continuing access to the media is part of public-figure test); National Found. for Cancer Research v. Council of Better Business Bureaus, 705 F.2d 98 (4th Cir. 1983) (concluding plaintiff was a public figure largely due to plaintiff’s access to media).
68. Id. at 135.
69. Id.
70. Id.
matters of public controversy. In *Time, Inc. v. Firestone*, the Court ruled that a wealthy Palm Beach socialite was not a public figure, despite the intense public interest in her divorce. The Court reasoned the plaintiff had no choice but to go to court in order to divorce her husband, therefore failing the *Gertz* requirement of voluntary participation in a public issue. Furthermore, the Court noted that the plaintiff “assumed no ‘special prominence’ in the resolution of public questions,” indicating that the Court did not consider a divorce proceeding to be a “public question,” regardless of the fame of those involved.

Similarly, in *Wolston v. Reader’s Digest Association*, the Court found that the plaintiff did not become a public figure because he failed to show up for a grand jury proceeding due to his health problems, even though he knew his absence would generate media attention. These cases indicate that individuals who become the objects of intense media attention do not necessarily meet the requirements to become a limited-purpose public figure.

C. Proving Actual Malice

The Supreme Court cases following *Sullivan* that clarified and defined public figures provide evidence of the importance of the legal distinction between public and private plaintiffs. Identifying a plaintiff as a public or private figure is often outcome-determinative in libel cases, as proving actual malice is exceedingly difficult, and most cases involving public figures are dismissed outright. Consequently, the number of public officials who have initiated any type of libel litigation has dropped dramatically since *Sullivan*.

72. *Id.* at 454-55.
73. *Id.*
74. *Id.*
76. *Id.* at 166-67.
77. The Libel Defense Resource Center, now renamed the Media Law Resource Center, studied libel cases in the 1980s and 1990s and found that eighty-five percent of libel claims brought by public figures were dismissed, while sixty-eight percent of claims brought by private plaintiffs were dismissed. LDRC, 1997 Report on Summary Judgment (New York 1997).
78. See, e.g., FREDERICK SCHAUER, Media Law, Media Content, and American Exceptionalism, in POLITICAL DEBATE AND THE ROLE OF THE MEDIA: THE FRAGILITY OF FREE SPEECH 63 (Susanne Nikoltchev ed., 2004). The author notes that “for all practical purposes the libel suit brought by a public official or public figure against the media or against a political opponent has disappeared from American public life.” *Id.*
The Supreme Court has consistently approached cases involving the interpretation of actual malice applications with a continued protection of the principles promulgated in *Sullivan*, beginning with consistent rulings placing the burden of proof on plaintiffs. *Sullivan* clearly held that the burden of proving actual malice falls onto the plaintiffs, and the Court later ruled that both public-figure and private plaintiffs bear the burden of proving falsity.

The Court also interpreted the scope of “reckless disregard for the truth” in a manner favorable to defendants. In the same year it set forth the actual malice test, the Court ruled in 1964 that reckless disregard requires a showing that the defendant published a false statement “with [a] high degree of awareness of their probable falsity.” Four years later, the Court ruled in *St. Amant v. Thomson* that a libel plaintiff must prove the defendant “entertained serious doubt as to the truth of his publication” in order to prove reckless disregard, indicating that actual malice requires more than a showing of lack of care. In addition to setting a high burden for actual malice plaintiffs, these holdings indicate that actual malice focuses on the mental state of the defendant prior to publication.

In order to determine whether the defendant was aware of the probable falsity of a particular publication, courts may inquire into the editorial process that occurred prior to the publication. In *Herbert v. Lando*, the Supreme Court rejected the argument that press defendants should be afforded a testimonial privilege protecting inquiry into journalists’ “thought processes” and prepublication discussions. The Court ruled that such a privilege would substantially increase the burden of proving actual malice to an extent

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80. See Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (determining that *Sullivan* stands for the proposition that “a public official [is] allowed the civil [defamation] remedy only if he establishes that the utterance was false”). See also Herbert v. Lando, 441 U.S. 153, 176 (1979) (“[T]he plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability”).


84. *Id.* at 731. The Court clarified that its ruling would not protect a journalist who had “obvious reasons” to doubt the truth of a story, nor would it protect a journalist who relied solely on his own testimony that he believed the story to be true. *Id.* at 732.

85. 441 U.S. 153 (U.S. 1979)

86. *Id.* at 161.
inconsistent with the Court’s prior holdings in *Sullivan* and *Curtis Publishing*.87

The Supreme Court has provided some specific examples of what may or may not constitute actual malice. In *Harte-Hanks Communications v. Connaughton*,88 the Court ruled that although failure to adhere to professional standards does necessarily not amount to actual malice, intentional avoidance of facts may lead to a finding of reckless disregard for the truth.89 In the case of *Harte-Hanks*, journalists should have been suspicious of contradictory facts, but nevertheless failed to interview key sources and refused to listen to a revealing tape recording, indicating an intentional avoidance of the truth.90

D. Proving Negligence

Private-figure plaintiffs usually must prove negligence in libel actions.91 Courts typically apply well-established principles of negligence when adjudicating libel cases involving private-figure plaintiffs.92 Plaintiffs generally must prove negligence by proving through a preponderance of the evidence that the defendant failed to act in a reasonably prudent manner.93

When examining the behavior of a libel defendant, the tests for negligence vary by state, particularly when the defendant is a member of the news media. Some states require the plaintiff to prove that the defendant’s conduct failed to meet professional standards,94

87. *Id* at 169. In the Court’s view, the privilege would “modify firmly established constitutional doctrine by placing beyond the plaintiff’s reach a range of direct evidence relevant to proving knowing or reckless falsehood.” *Id*.
89. *Id* at 692.
90. *Id*.
92. ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS 343 (3d ed. 1999)
93. A breach of duty to exercise reasonable care toward another that results in harm to that person constitutes negligence. PROSSER AND KEETON ON THE LAW OF TORTS § 30 (W. Page Keeton et al. eds., West Publishing Co. 1984) (1941). Reasonable care in the context of a skilled profession is measured according to the skill normally exercised within the profession. *Id* at § 32.
94. States that examine industry standards in libel cases include: Arizona, see Peagler v. Phoenix Newspapers, Inc., 560 P.2d 1216 (Ariz. 1977); Delaware, see Re v. Gannet Co., 480 A.2d 662 (Del. Super. Ct. 1984); Georgia, see Triangle Publ’ns, Inc. v. Chumley, 317 S.E.2d 534 (Ga. 1984); Iowa, see Jones v. Palmer Commc’n, Inc., 440 N.W.2d 884 (Iowa 1989); Maryland, see Jacron Sales Co. v. Sindorf, 350 A.2d 688 (Md. 1976); Massachusetts,
essentially requiring a showing of "journalistic malpractice." Other states require the plaintiff to prove that the defendant did not act in a reasonable manner, apart from media standards. The use of standard media procedures as a benchmark provides private plaintiffs with a lesser burden of proof than public-figure plaintiffs, as a plaintiff proving actual malice must prove conduct more reckless than a departure from typical media procedures.

The constitutional tenets of libel law provide a partial foundation for examining the basis of liability for defamation on the Internet. An examination of libel republication law will provide the additional background necessary for analysis of the complex issues involved with interactive website defamation.

III. Republication of Libel

A. Common Law Standard

Republication of a statement occurs when it is made initially by one party, and then repeated by another. The common law continuously has held the re-publisher of a libelous statement to the same liability as the original defamer. American courts have found this extended liability to be equitable and necessary as "tale bearers

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96. States that employ a reasonable person standard when examining a libel defendant's negligence are: Tennessee, see Memphis Publ'g Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978); Washington, see Taskett v. King Broad. Co., 546 P.2d 81 (Wash. 1976); Illinois, see Troman v. Wood, 340 N.E.2d 292 (Ill. 1975); Kentucky, see McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882 (Ky. 1981), cert. denied, 456 U.S. 975 (1982); Ohio, see Landsowne v. Beacon Journal Publ'g Co., 512 N.E.2d 979 (Ohio 1987); Oregon, see Bank of Or. v. Indep. News, Inc., 693 P.2d 35 (Or. 1985); Virginia, see Richmond Newspapers, Inc. v. Lipscomb, 362 S.E.2d 32 (Va. 1987); and Arkansas; see KARK-TV v. Simon, 656 S.W.2d 702 (Ark. 1983).

97. The Supreme Court explicitly held that failure to adhere to professional standards does not amount to actual malice Harte-Hanks. 491 U.S. at 664-65.

are as bad as tale makers." As a result of this common law rule of republication liability, publishers may be liable when they print or repeat false allegations made by other parties. The re-publisher may find protection, however, in several republication privileges.

B. Exceptions to Common Law Liability

In most jurisdictions, the news media is protected when it accurately reports on an official proceeding or report, even if the government meeting or document contains defamatory statements. This privilege, called "fair report," varies by jurisdiction, with some courts applying an absolute privilege, and other courts applying a conditional privilege that is lost if the defendant republished the statement with ill will.

A slightly expanded protection exists in some jurisdictions for the news media that report a neutral and accurate account of a newsworthy charge made by a responsible and prominent organization against a public figure. This privilege, called the neutral reportage privilege, is important because without it, public figures could falsely make astonishing or ludicrous accusations about another public figure, yet the accusation could not be reported because the media knew it was probably false, thus meeting the actual malice burden. This privilege is applied differently from jurisdiction to jurisdiction, and many states and circuits do not apply the neutral reportage privilege at all.


100. This liability was dramatically illustrated in the recent case of Vanity Fair correspondent Dominick Dunne, who told television audiences that he had inside sources that implicated Congressman Gary Condit in the disappearance and murder of Chandra Levy, the congressman's former intern. Condit v. Dunne, 317 F. Supp. 2d 344 (S.D.N.Y. 2004). The court held that Dunne could not avoid liability merely because he told his audiences that the story came from other sources as "republication of false facts threatens the target's reputation as much as does the original publication." Id. at 363.

101. Restatement § 611. The original defamatory statement usually is privileged as well, as government officials acting in their official capacity may not be held liable for defamation. See Bruce W. Sanford, Libel and Privacy § 10.4 (Law & Business, Inc. 2004) (1985) (explaining application of the absolute privilege to the judiciary, the executive branch, legislators, and local officials).

102. See Sack, supra note 98, at § 7.3.2 n. 57 for cases applying an absolute privilege.

103. See Sack, supra note 98, at § 7.3.2 n. 59 for cases applying a conditional privilege.


105. Some courts do not require the original defamer to be responsible or prominent, some courts do not require that the defamed be a public figure, and some courts are more
The wire service defense is another protection for the media when it is charged with republication of libel.\textsuperscript{107} When a publisher or broadcaster relies on reports from a reputable news gathering agency, the agency may be excused from liability if the story appeared to be true on its face, the news agency believed in its truthfulness, and the story was republished without substantial changes.\textsuperscript{108} This defense has been widely accepted by courts, which have applied it to protect the efficient dissemination of news.\textsuperscript{109}

C. Distinction between Primary and Secondary Publishers

An important distinction in a discussion of libel republication is the difference between primary and secondary publishers. The distinction is based on the degree of control possessed by the republisher; the higher the degree of control, the higher the duty of care and corresponding liability. Courts have labeled those entities that print or broadcast content as primary publishers. Primary publishers that republish false statements are usually held to the same standard permissive than others when assessing the defendant's neutrality. See Justin H. Wertman, 65 FORDHAM L. REV. 789, 804 (1996) (analyzing jurisdictional differences in application of neutral reportage privilege).


107. The wire service defense was initially articulated in \textit{Layne v. Tribune Co.}, although the term was not coined at that time. 146 So. 234, 237-38 (Fla. 1933).

108. See \textit{O'Brien v. Williamson Daily News}, 735 F.Supp. 218 (E.D. Ky. 1990) (holding newspaper was not required to independently investigate wire stories); Auvil v. CBS "60 Minutes", 800 F. Supp. 928 (E.D. Wash. 1992) (holding local broadcasting affiliate was merely a conduit for national broadcast story and not liable for defamatory content); Appleby v. Daily Hampshire Gazette, 478 N.E.2d 721 (Mass. 1985) (ruling that defendant's close proximity to events detailed in defamatory story did not negate wire service defense).

109. For a history of the application of the wire service defense, see Jennifer L. Del Medico, Comment, \textit{Are Talebearers Really as Bad as Talemakers?: Rethinking Republisher Liability in an Information Age}, 31 FORDHAM URB. L.J. 1409 (2004).
of liability as the original author of the statement.\footnote{110} Thus, these potential defendants may be subject to a negligence standard of liability, or in the case of public figures plaintiffs, they may fall within the scope of the constitutional libel protection provided by \textit{Sullivan} and \textit{Gertz}.\footnote{112} These primary publishers are distinguished from "secondary publishers," which include those entities that merely circulate or distribute content without editorial control over the content. A secondary publisher, often called a distributor, is considered a passive conduit that is only liable for delivering or transmitting defamatory material if "he knows or has reason to know of its defamatory character."\footnote{113} This low standard places the distributor in a position where it is only liable if it knows of the defamatory content it distributes, presumably upon receiving and ignoring a notice that it is circulating libelous content. The limited liability placed on distributors is considered necessary and equitable because distributors have neither the resources nor the expertise to review all the material they receive.\footnote{114} Distributors have been held to include telegraph companies,\footnote{115} television stations that merely transmit network feed,\footnote{116} and bookstores.\footnote{117}

The classification of a libel defendant as a publisher or distributor may significantly change the analysis of the liability involved, especially on the Internet.

\section*{D. Republication on the Internet: Early Cases}

Republication of libel is a particularly common issue on the Internet, where information is spread quickly and often by anonymous or otherwise unaccountable sources. The first major case to deal with republication of libel on the web occurred in 1991 during the infancy of the Internet. In \textit{Cubby v. CompuServe},\footnote{118} a New York district court held that CompuServe was a distributor rather than a publisher when it hosted an independent Internet forum that

\begin{footnotes}
\footnote{110}{See \textit{Restatement} § 581(1); \textit{Keeton}, \textit{supra} note 93, at § 113.}
\footnote{111}{376 U.S. 254 (1964).}
\footnote{112}{418 U.S. 323 (1974).}
\footnote{113}{\textit{Restatement} § 581(1).}
\footnote{114}{Auvil v. CBS "60 Minutes", 800 F Supp 928, 931 (E.D. Wash. 1992).}
\footnote{115}{See, \textit{e.g.}, Mason v. Western Union Tel. Co., 52 Cal. App. 3d 429 (Cal. App. Ct. 1975).}
\footnote{117}{See, \textit{e.g.}, Smith v. California, 361 U.S. 147 (1959).}
\footnote{118}{776 F. Supp. 135 (S.D.N.Y. 1991).}
\end{footnotes}
provided users with an interactive bulletin board.\(^{119}\) The court held that because CompuServe did not review the content of the postings published in the online bulletin board, it had no editorial control and was therefore a distributor.\(^ {120}\) As a distributor, CompuServe was not liable for defamatory content in the forum because it did not know or have reason to know of the defamatory content at issue.\(^ {121}\)

This holding was distinguished four years later by a New York state court which held that an Internet bulletin board host was liable as a distributor. In *Stratton Oakmont v. Prodigy Services Co.*, \(^{122}\) the court held that the plaintiff made a prima facie showing that Prodigy should be considered the publisher of defamatory postings in a Prodigy-sponsored forum.\(^ {123}\) The court arrived at its conclusion because Prodigy "held itself out to the public and its members as controlling the content of its computer bulletin boards,"\(^ {124}\) and, furthermore, Prodigy utilized software that automatically deleted comments that were in "bad taste."\(^ {125}\) The court determined that Prodigy's editorial control made it a publisher and therefore liable under traditional theories of publisher libel liability.\(^ {126}\) Thus, *Stratton Oakmont* arguably created a disincentive for web operators to monitor offensive or defamatory content, as any such monitoring may lead to a finding of publisher liability. This concern was directly addressed in Congress the following year.

E. Republication on the Internet: The Communications Decency Act and *Zeran*

In 1996, Congress passed the Telecommunications Act of 1996, which included the CDA. Section 230 of the Act, called the "Good Samaritan" provision, states in pertinent part: "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."\(^{127}\) "Interactive computer service" is elsewhere defined as "any information service, system, or access software provider that

\(^ {119}\) *Id.* at 137. The defamatory statement was posted in an online magazine called "Rumorville." *Id.* The statements concerned a competing news bulletin service "Skuttlebut" and Skuttlebut's operators. *Id.*

\(^ {120}\) *Id.* at 139.

\(^ {121}\) *Id.* at 140-41.


\(^ {123}\) *Id.* at *4.

\(^ {124}\) *Id.*

\(^ {125}\) *Id.*

\(^ {126}\) *Id.*

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.”

In the statutory finding of section 230, Congress states that the Internet offers “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” Thus, the statute is necessary “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.” The basis for section 230 is further highlighted in the legislative history of the section, which explicitly states that “[t]his section provides ‘Good Samaritan’ protections from civil liability for providers or users of an interactive computer service. . . One of the specific purposes of this section is to overrule Stratton-Oakmont v. Prodigy and any other similar decisions . . .”

While this legislation created explicit protection for providers of “interactive computer services,” its scope would be the subject of litigation for years to follow. The first case to apply section 230 was Zeran v. America Online, Inc. In Zeran, plaintiff Kenneth Zeran was the victim of an Internet hoax where a bulletin board user posted Zeran’s name and phone number in connection with the sale of highly offensive t-shirts celebrating Timothy McVeigh and the Oklahoma City bombings. Zeran notified America Online (“AOL”), which removed the posting, but new postings continued to appear in the following days, presumably from the same AOL user. Zeran eventually received a threatening telephone call every two minutes as a result of the postings, and he ultimately needed local police to protect him in his home. He sued AOL for negligence, arguing that section 230 only precluded publisher liability but left distributor liability intact. Under Zeran’s arguments, AOL would be

128. § 230(f)(2).
129. § 230(a)(3).
130. § 230(b)(2).
133. Id. at 329.
134. Id.
135. The high volume of threatening phone calls was due partially to an on-air announcement by an Oklahoma City radio station that learned of the AOL t-shirt advertisement and encouraged listeners to call Zeran’s number. Id.
136. Id.
137. Id. at 331.
responsible for the postings as a distributor because the company knew of the defamatory content expressed in the postings.\footnote{138} The trial court granted AOL’s motion for judgment on the pleadings, holding that section 230 completely protected AOL from liability.\footnote{139}

The Fourth Circuit of the U.S. Court of Appeals upheld the trial court’s decision, finding that section 230 precluded both publisher and distributor liability.\footnote{140} The court looked to the definition of distributor in the \textit{Restatement (Second) of Torts}\footnote{141} and held that distributor liability is “merely a subset, or a species, of publisher liability.”\footnote{142} The court further noted that a contrary interpretation would not serve the interests expounded by Congress in the policies stated in section 230.\footnote{143} The court explained its interpretation of section 230:

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 communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.\footnote{144}

Thus, the Fourth Circuit interpreted Congress’ intent in passing section 230 to immunize both distributors and publishers.\footnote{145} Consequently, the court held that AOL was a “publisher” under section 230, and therefore was not liable for Zeran’s injuries.\footnote{146}

\section*{F. Following Zeran}

Beginning the following year, the effects of \textit{Zeran} were felt in numerous Internet defamation cases. In \textit{Blumenthal v. Drudge},\footnote{147} a District of Columbia district court applied \textit{Zeran} to find that AOL was not responsible for defamatory statements posted on AOL’s

\footnote{138} \textit{Id.}
\footnote{139} \textit{Zeran v. America Online, Inc.}, 958 F. Supp. 1124, 1136 (E.D. Va. 1997).
\footnote{140} \textit{Zeran v. America Online, Inc.}, 129 F.3d 327, 332-33 (4th Cir. 1997).
\footnote{141} \textit{Id.} at 332. “[B]oth the negligent communication of a defamatory statement and the failure to remove such a statement when first communicated by another party—each alleged by Zeran here under a negligence label—constitute publication.” \textit{Id.} (citing \textit{Restatement § 577}).
\footnote{142} \textit{Id.} at 332.
\footnote{143} \textit{Id.} at 333.
\footnote{144} \textit{Id.}
\footnote{145} \textit{Id.}
\footnote{146} \textit{Id.} at 332.
website, even though those statements were posted by Matt Drudge, an independent contractor who AOL paid to write his gossip newsletter "the Drudge Report" for them.\textsuperscript{148} The court noted that if it were ruling on a "clean slate" it would "seem only fair" to find AOL liable, as AOL profited from Drudge's content and had editorial control over it.\textsuperscript{149} Yet the court agreed with the \textit{Zeran} interpretation of section 230, finding that it precluded distributor liability, thus insulating AOL from liability. The \textit{Blumenthal} court referred to section 230 as "some sort of tacit \textit{quid pro quo} arrangement with the service provider community" that "conferred immunity from tort liability as an incentive to Internet service providers to self-polic[e] the Internet . . . even where the self-policing is unsuccessful or not even attempted."

The Florida Supreme Court also applied \textit{Zeran} to preclude AOL's liability as a distributor.\textsuperscript{151} In \textit{Doe v. America Online, Inc.}, a four-judge majority found that AOL was not liable for obscene photographs of children posted to a chat room, even though AOL knew of the postings.\textsuperscript{152} Citing \textit{Zeran}, the court held that section 230 prohibited any distributor-based liability, including any potential liability for negligently allowing users to post obscene photographs of children.\textsuperscript{153} The court therefore held that under section 230, AOL could not be liable for the postings.\textsuperscript{154} In a sharp dissent, Justice Lewis, writing for a three-judge minority, disagreed with the court's decision to follow \textit{Zeran}.\textsuperscript{155} Lewis criticized the decision, arguing that it ignored the common-law distinction between publisher and distributor liability and misinterpreted section 230.\textsuperscript{156} The dissenting opinion in \textit{Doe} marked the first judicial decision that was openly critical of \textit{Zeran}'s interpretation of section 230.

Another development in the interpretation of section 230 occurred in 2003 with the Ninth Circuit Court of Appeals decision in \textit{Batzel v. Smith}.\textsuperscript{157} Plaintiff Ellen Batzel sued a listserv\textsuperscript{158} operator for

\begin{thebibliography}{99}
\bibitem{148} Id. at 51.
\bibitem{149} Id. at 51-52.
\bibitem{150} Id. at 52.
\bibitem{151} Doe v. America Online, Inc., 783 So. 2d 1010 (Fla. 2001).
\bibitem{152} Id. at 1011-12.
\bibitem{153} Id. at 1014-17.
\bibitem{154} Id.
\bibitem{155} Id. at 1018-1028 (Lewis, J., dissenting).
\bibitem{156} Id. at 1019.
\bibitem{157} 333 F.3d 1018 (9th Cir. 2003).
\end{thebibliography}
posting defamatory comments about her to a subscriber-based e-mail list.\textsuperscript{159} The comments, which claimed she had inherited stolen artwork because she was a descendent of a high-ranking Nazi officer, were originally generated by a third party, and had been forwarded on to the listserv operator for e-mail distribution.\textsuperscript{160} The Ninth Circuit held that the listserv operator was an "interactive computer service" provider under section 230, and therefore immune from liability, despite the operator's complete editorial control over the listserv messages.\textsuperscript{161}

The broad interpretation of section 230 was advanced again by the Ninth Circuit in \textit{Carafano v. Metrosplash.com, Inc.},\textsuperscript{162} where the court held that an online dating service was not liable for a false and defamatory profile of the plaintiff created by a third party.\textsuperscript{163} The fact that the defendant's match-making questionnaire somewhat enabled the creation of the false profile was not sufficient to make the defendant an "information content provider" within the meaning of section 230.\textsuperscript{164}

Most recently, in 2006, the California Supreme Court in \textit{Barrett v. Rosenthal} interpreted section 230 more broadly than any court prior, holding that section 230 provides not only distributor immunity, but also immunity to individual "users" who are not information providers.\textsuperscript{165} In writing for the unanimous court, Justice Corrigan noted that the plain language of Section 230 shows that Congress did not intend for an internet user to be treated differently than an internet provider.\textsuperscript{166}

By applying section 230 to provide distributor immunity, the \textit{Zeran} court and those courts which followed its interpretation have been criticized by academics that disagree with the expansive

\begin{itemize}
  \item \textsuperscript{158} \textit{Id.} at 1020–22. The court noted that "[a] listserv is an automatic mailing list service that amounts to an e-mail discussion \ldots [s]ubscribers receive and send messages that are distributed to all others on the listserv." \textit{Id.} at 1021 n.2.
  \item \textsuperscript{159} \textit{Id.} at 1020-22.
  \item \textsuperscript{160} \textit{Id.}
  \item \textsuperscript{161} \textit{Id.} at 1034-35. The court noted that "the exclusion of 'publisher' liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message." \textit{Id.} at 1031.
  \item \textsuperscript{162} 339 F.3d 1119 (9th Cir. 2003).
  \item \textsuperscript{163} \textit{Id.} at 1124.
  \item \textsuperscript{164} \textit{Id.}
  \item \textsuperscript{165} 40 Cal. 4th 33, 59 (Cal. 2006).
  \item \textsuperscript{166} \textit{Id.} at 58.
\end{itemize}
interpretation of the statute. These critics are not alone, however, as some courts have found fault with the reasoning in Zeran as well.

G. Curtailing Distributor Liability Immunity Under Section 230

Not all courts have accepted Zeran’s sweeping protection of Internet content distributors. Most notably, a California appellate court expressly rejected the reasoning in Grace v. eBay, a defamation case brought by an eBay user who was defamed by another eBay user in the feedback forum of the website. The court held that the established common-law distinction between distributors and publishers should not be disregarded in interpreting section 230, especially in light of Congress’ express mention of its desire to overrule Stratton Oakmont, a decision that held an Internet service operator liable only as a publisher. The California court reasoned that Congress enacted section 230 because the holding in Stratton Oakmont discouraged “Good Samaritan” Internet computer service operators from attempting to control damaging content, as they would then fall into the category of publisher and be liable for defamatory content under Stratton Oakmont. The court reasoned that by immunizing distributors as well, the Zeran court and its followers were creating a liability-proof Internet where any incentive to regulate damaging content is eliminated—a result contrary to Congress’ stated intent in passing section 230. The court decided that case on other grounds, however, holding that eBay’s user agreement contained a valid release of liability.

The Seventh Circuit also has indicated that section 230 has been interpreted too broadly. The court decided that where a client used the ISP’s bandwidth to host videos of college athletes caught undressing on hidden cameras, an Internet service provider is classified as a distributor without knowledge of its client’s

169. Id. at 989-90.
170. Id. at 992-96.
171. Id. at 996.
172. Id. at 996-97.
173. Id. at 999-1000.
wrongdoing. Despite finding that the ISP was not liable for the videos, Judge Easterbrook mused in the opinion that section 230 had been misconstrued by other courts. Noting that the statute is titled “Protection for ‘Good Samaritan’ blocking and screening of offensive material,” Easterbrook expressed concern that the title was “hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive material via their services.” He then proposed that the statute should be read as definitional, where a defendant would only be eligible for the immunity if the entity was a “provider or user.” The entity would be considered a “publisher or speaker” and lose the immunity if it created the content. Media law scholar Rodney Smolla has noted that Easterbrook’s interpretation of section 230 likely will be advanced by future litigants.

Perhaps most notably, a California Court of Appeal specifically ruled in 2003 that section 230 does not preclude distributor liability. Although the Court of Appeal’s holding was overruled in 2006 by the California Supreme Court, the lower court’s analysis is nonetheless notable as an example of the most limited interpretation thus far of the scope of section 230. In Barrett v. Rosenthal, several physicians filed an action against Ilena Rosenthal, a women’s health activist who republished highly critical statements about one of the doctors on an Internet newsgroup after receiving the information in an e-mail from another person. The doctor notified her that the postings were defamatory, but she refused to remove them and instead posted additional messages about the doctor and his colleagues. Rosenthal claimed immunity under section 230, arguing that she was a user of an interactive computer service who had published material from

175. Id. at 659. “A web host, like a delivery service or phone company, is an intermediary and normally is indifferent to the content of what it transmits. Even entities that know the information’s content do not become liable for the sponsor’s deeds.” Id.
176. Id.
177. Id. at 660. Easterbrook noted that the title was important because “a statute’s caption must yield to its text when the two conflict.” Id.
178. Id.
179. Id.
183. Id. at 755-56. The statements asserted that the doctor was a “quack” and a stalker. Id.
184. Id.
another information content provider. The trial court accepted Rosenthal's argument:

It is undisputed that Rosenthal did not "create" or "develop" the information in defendant Bolen's piece. Thus, as a user of an interactive computer service, that is, a newsgroup, Rosenthal is not the publisher or speaker of Bolen's piece. Thus, she cannot be civilly liable for posting it on the Internet. She is immune.

Plaintiff Barrett argued that this interpretation was completely contradictory to the purpose of section 230, but the court found the only party at fault was the original content creator.

The California Court of Appeal disagreed with the trial court's holding. The court revisited Zeran and rejected its interpretation of section 230, agreeing with critics of Zeran that "Zeran's analysis of section 230 is flawed, in that the court ascribed to Congress an intent to create a far broader immunity than that body actually had in mind or is necessary to achieve its purposes." The court rejected Zeran's analysis on two grounds. First, the Barrett court challenged Zeran's conclusion that distributors were a subset of the "publishers" protected under section 230, noting that it was "entirely reasonable to assume Congress was aware of the significant and very well-established [common law] distinction" between primary publishers and distributors. Second, the court also disagreed with Zeran that holding distributors liable would run contrary to the congressional goals of section 230. The court challenged Zeran's conclusion that section 230 was enacted to "promote unfettered speech." Specifically, the Barrett court questioned "whether a statute that encourages the restriction of certain types of [offensive] online material [can] fairly be said to reflect a desire 'to promote unfettered

185. Id. at 761-63.
187. Id.
189. The court noted that in "order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." Id. at 767 (citing United States v. Texas, 507 U.S. 529, 534 (1993)). Barrett challenged the Zeran court's assertion that "Congress has indeed spoken directly to the issue by employing the legally significant term 'publisher,' which has traditionally encompassed distributors and original publishers alike." Id. at 767.
190. Id. at 768.
191. Id. at 771-81.
192. Id. at 775-76.
Based on these two criticisms, the Barrett court concluded that section 230 did not abrogate distributor liability.194

The court acknowledged that by allowing distributor liability to remain intact, "the common law principle of distributor or knowledge-based liability" could be enforced.195 Noting the potential chilling effect of notice-based liability, the Barrett court defended its holding:

We re-emphasize that we take no position on whether distributor liability would unduly chill online speech . . . Resolution of the controversy requires information this court . . . does not now possess: whether a provider or user of an interactive computer service could, at relatively low expense, determine whether challenged material is defamatory and remove it, or whether, on the contrary, the imposition of notice liability would place a burden on providers and users they could not sustain without automatically removing all material claimed to be defamatory, thereby eliminating some and perhaps much information that is constitutionally protected. The answer to this question depends on the state of Internet technology, a matter never addressed by the parties in this case or by the trial court.196

The court concluded that because Rosenthal knew of the defamatory content of the e-mail she was posting, she could be held liable as a distributor unprotected by section 230.197

Numerous Internet entities including Google, Amazon, and eBay have argued that the Barrett appellate court’s interpretation of section 230 results in notice-based liability, under which a web operator is likely to remove any content upon receiving a notice from a disgruntled individual who complains of defamation, regardless of the validity of the complaint.198 These Internet businesses argue that this phenomenon, often referred to as a "heckler's veto," would seriously chill Internet speech.199

Thus, section 230 of the CDA has been applied to Internet service providers,200 online bulletin board services,201 chat room

193. Id. at 775.
194. Id. at 781.
195. Id.
196. Id. at 778-79.
197. Id. at 781.
199. Id. at 38-40.
hosts, interactive dating websites, and the feedback forum of an Internet auction website. These expansive applications have provided protection from liability to defendants with complete editorial control prior to publication, as well as websites with virtually no pre-publication control whatsoever. Although the scope of section 230's protection has been applied in varying degrees by the courts, the precedent is consistent in that every web-related defendant before every court has been considered an "interactive computer service" operator within the definition of section 230. The universal application of section 230 to these defendants creates a landscape where virtually any web-related defendant would qualify for section 230 protection, regardless of the degree of editorial control they possessed.

The cases interpreting section 230 have been less consistent in the degree of protection offered to web defendants. Following the Fourth Circuit Court of Appeals decision in Zeran v. America Online, Inc., many courts interpreted section 230 to provide web operators with immunity from distributor liability. These decisions were criticized by scholars and eventually some courts for applying the


203. Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003).


206. Listserv moderators like the defendant in Batzel v. Smith typically have the ability to read all e-mails before they are posted to the listserv.

207. Defendants such as eBay do not possess the resources to screen the millions of postings that are published on an online forum.

208. 129 F.3d 327 (4th Cir. 1997).

protection too broadly, misinterpreting congressional intent and providing virtually no recourse for individuals defamed on the Internet. However, the alternative interpretation expounded for three years in *Barrett v. Rosenthal*\(^{210}\) provided no immunity from distributor liability and was heavily criticized for implementing a policy that chills speech by encouraging web operators to remove all questionable content upon receipt of a potentially unfounded complaint.

### IV. Creating a Standard

As discussed in Part III, courts have advanced several inconsistent applications of section 230 of the CDA. These varying interpretations create legal challenges related to the common law doctrine of distributor liability, which provides that passive conduits of content are only liable for defamation if they transmitted content that they knew, or should have known, was defamatory.\(^{211}\) In those jurisdictions where section 230 has been held to preclude distributor liability, website operators and users have a level of immunity that arguably promotes an irresponsible, libel-free Internet where defamatory statements are posted with impunity. In those jurisdictions where courts have contemplated section 230 to cover only publisher liability, the decisions have provided little guidance as to how this liability would be applied, resulting in an uncharted legal territory for web operators. Furthermore, many critics argue that an adoption of the *Barrett v. Rosenthal* reasoning, allowing distributor liability upon notice of a complaint, would place web operators in the difficult position of reading and evaluating many complaints and consequently removing all questionable content out of fear of

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211. *Restatement § 581(1).*

212. For the purposes of this discussion, the author defines website operators broadly to include all entities that host or otherwise provide web-related forums because courts have applied section 230 to all Internet-related defendants at this time.
liability. This would ultimately result in a devastating blow to free expression on the Internet.

These problems are compounded by the wide range of possible jurisdictions where a web operator may be called into court, as some courts have held that website operators may meet the minimum contacts test for any jurisdiction where users are able to participate actively on the site.\textsuperscript{213}

Yet the difficulties present greater challenges than inconsistent or unpredictable legal standards. The policy issues at stake are significant for defamation victims, Internet users, and interactive website operators. This chapter will examine the competing policy issues and then incorporate these policy considerations into a new test for determining liability for third-party content on the web.

A. The Interests at Stake: The Value of Internet Speech

The difficulties presented by the application of section 230 are somewhat different from those presented in traditional defamation cases. While all forums of speech arguably make a valuable contribution to society, the interactive Internet provides advantages that are not present in other forms of communication. On the Internet, the "lonely pamphleteer"\textsuperscript{214} has a soapbox to express opinions to thousands of interested readers. Individuals without the political or social clout to be heard on television can use the Internet

\textsuperscript{213} Courts have implemented several approaches to establishing minimum contacts on the Internet. Many courts follow the decision of \textit{Zippo Mfg. Co. v. Zippo Dot Com, Inc.}, 952 F. Supp. 1119 (W.D. Pa. 1997). The \textit{Zippo} approach adopts a sliding scale of minimum contacts based on the interactivity of the website. \textit{Id.} at 1124. On the \textit{Zippo} scale, purely passive websites that only provide information do not meet minimum contact requirements, but websites on the other end of the scale—usually those that solicit business online—could be haled into court virtually anywhere Internet transactions occurred. \textit{Id.} at 1124-25. Many courts have either expressly adopted the \textit{Zippo} test or otherwise examine the degree of passiveness of the defendant's website when determining minimum contacts. \textit{See, e.g., GTE New Media Services Inc. v. BellSouth Corp.}, 199 F.3d 1343 (D.C. Cir. 2000) (finding that defendant's passive website was a factor in determining that it was not subject to jurisdiction); Mink \textit{v. AAAA Development LLC}, 190 F.3d 333 (5th Cir. 1999) (adopting sliding scale test); Bensusan Restaurant Corp. \textit{v. King}, 126 F.3d 25 (2d Cir. 1997) (finding that defendant's website was too passive to find personal jurisdiction); Cybersell, Inc. \textit{v. Cybersell, Inc.}, 130 F.3d 414 (9th Cir. 1997) (dismissing lawsuit because defendant's website was passive and failed minimum contacts test). Websites that encourage national participation by allowing third parties to post content could arguably fall on the interactive side of the \textit{Zippo} scale.

\textsuperscript{214} The term "lonely pamphleteer" was originally coined by the Supreme Court. \textit{See Branzburg v. Hayes}, 408 U.S. 665, 703-04 (1972) (creating "categories of newsmen... [is] a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer... just as much as the large metropolitan publisher").
to express a wide variety of viewpoints that enrich American dialogue. These attributes of interactive Internet discussion place the web at the heart of what ought to be protected by the First Amendment.

Nearly all speech is protected by the Constitution to some extent, but the First Amendment affords the broadest protection to political and social speech in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." This principle has been clearly reflected in numerous Supreme Court decisions, most notably in Sullivan, where the Court affirmed the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

Courts also have justified the protection of expression by referencing the "marketplace of ideas" theory. The marketplace of ideas metaphor can be traced to John Milton's Areopagitica, where he wrote:

... and though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter.

In this passage, Milton argued that in a society of open speech, the truth is bound to prevail. This idea provided a foundation for the scholarship of John Stuart Mill, whose famous essay On Liberty argued that broad protection for speech is necessary, even for speech often thought to be offensive, untruthful, or of little social value. Mill's theory rests on the premise that the ideas expressed in false speech can only be recognized as inferior if those ideas are brought into the public arena for scrutiny and testing. Justice Holmes found this argument compelling in his often-quoted dissent in Abrams v. United States:

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219. Id.
But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.\textsuperscript{220}

Thus, the national commitment to "robust" debate in a marketplace of ideas is a cornerstone of First Amendment jurisprudence. This commitment should be particularly unaltering and steadfast on the Internet, where individuals are participating every day in the most expansive, barrier-free marketplace of ideas ever to exist. This marketplace is at its busiest, most productive level in chat rooms, bulletin boards, blogs, and other websites that allow multiple users to participate. Consequently, section 230 applies to a forum of speech that should arguably enjoy the greatest level of First Amendment protection possible due to its significant contribution to the open exchange of ideas.

The text of section 230 highlights Congress' commitment to this valuable forum of free speech. In its statutory findings, Congress acclaimed the interactive computer services found on the Internet, calling the Internet "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."\textsuperscript{221} Congress also noted that the Internet "ha[s] flourished, to the benefit of all Americans, with a minimum of government regulation."\textsuperscript{222} Section 230 also contains the sweeping proclamation that it is "the policy of the United States . . . 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."\textsuperscript{223}

Thus, the Supreme Court, Congress, and scholars have all recognized the value of open and free debate, with Congress explicitly noting in section 230 the particular importance of unfettered speech on the Internet. Yet section 230 itself can be interpreted in such a manner that jeopardizes interactive and open speech on the web. For example, if another court were to adopt the now-overturned reasoning of the California Court of Appeal in

\textsuperscript{220} 250 U.S. 616, 630 (1920) (Holmes, J., dissenting).
\textsuperscript{222} § 230(a)(4).
\textsuperscript{223} § 230(b)(2).
Barrett v. Rosenthal,\textsuperscript{224} many large-scale Internet companies may not be able to continue hosting the same quantity or quality of interactive services. Amazon, eBay, Yahoo, Google, and other major Internet entities have argued that the imposition of distributor liability promulgated by Barrett would create an impossible situation where third-party content could not be evaluated due to its tremendous volume.\textsuperscript{225} For example, Amazon makes available millions of third-party product and book evaluations, AOL users post more than six million message board postings each month, and eBay's Feedback Forum contains 2.4 billion user reviews.\textsuperscript{226} These companies assert that notice-based liability would create a "heckler's veto," where any disgruntled individual could file a complaint claiming defamation, and the interactive web operator would not have the resources to investigate the allegation, thereby automatically removing the questionable comment without investigation into its potential falsity.\textsuperscript{227} These companies have asserted that distributor-based liability could prevent them from providing interactive forums in the future.\textsuperscript{228}

Small interactive websites like blogs also face significant concerns over the imposition of distributor liability. While the volume of third-party content may be less on a blog, bloggers nonetheless flourish largely because they invite commentary and provide a unique forum for debate on a wide range of significant issues.\textsuperscript{229} Yet the resources of the blog host are often limited. Bloggers are often unaware of their legal rights, easily frightened by the threat of litigation, and without the financial resources to hire legal counsel.\textsuperscript{230}

\begin{itemize}
  \item \textsuperscript{224}112 Cal. App. 4th 749 (Cal. Ct. App. 2003), rev'd, 40 Cal. 4th 33 (Cal. 2006).
  \item \textsuperscript{225}Brief of Amici Curiae Amazon.com, Inc. et al. at 37-38, Barrett v. Rosenthal, No. S122953 (Cal. Dec. 6, 2004).
  \item \textsuperscript{226}Id.
  \item \textsuperscript{227}Id. at 38-39.
  \item \textsuperscript{228}Id. at 40.
  \item \textsuperscript{229}As of January 2005, twelve percent of surveyed Internet users have posted comments on someone else's blog. Data Memo from Loe Rainie, PIP Director, Pew Internet & American Life Project (January 2005), \textit{available at} http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf (last visited April 8, 2008).
\end{itemize}
Clear legal standards that provide some protection to the blog host are critical in this blossoming Internet forum.\(^{231}\)

The issues discussed in this section emphasize the need to protect the interests of the Internet and the many entities involved in its development. Yet a policy of total laissez-faire on the Internet would not adequately protect many other crucial interests. The following section highlights these competing interests.

**B. The Interests at Stake: Reputation and the Utility of the Internet**

By abolishing distributor liability in most jurisdictions, courts have created little incentive for interactive website operators to monitor their website content. Many commentators have argued that the ultimate result is an internet that shelters and encourages defamation, as an original poster often is an anonymous user with shallow pockets\(^{232}\) and the website operator is shielded by section 230.\(^{233}\)

This result is obviously problematic for individuals who are defamed on the Internet. The *Restatement’s* definition of defamation sheds some light on the frustrations associated with being defamed: Defamation is a communication that “‘tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”\(^{234}\) The Supreme Court has noted that the protection of reputation “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.”\(^{235}\) The right to protect one’s

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reputation also has been viewed as an intangible property right, whereby a person has earned a superior reputation through goodwill, skill or other noble qualities. These hard-earned positive attributes manifest themselves in the form of a good reputation which has a monetary value and should be protected under the law.

Without liability for third-party defamation on the Internet, these principles of protection for reputation seem almost forgotten. Moreover, the libel victim's injuries may often be exacerbated on the Internet, where the initial republication may be copied and republished over and over again, with each instance potentially protected under the Zeran interpretation of section 230 that immunizes web hosts from liability.

Uncontrolled defamation also is harmful to society as a whole, as the utility of published information is decreased if its readers cannot rely on its truthfulness. As one commentator has explained:

[Defamation law exists not merely to validate the dignitary interests of individual plaintiffs; defamation law also helps to make meaningful discourse possible. Defamation law has a civilizing influence on public discourse: it gives society a means for announcing that certain speech has crossed the bounds of propriety.]

This proposition is particularly relevant on the Internet, where information is uploaded, downloaded, read and republished at a blazing pace throughout the globe. And with thirty-five percent of American Internet users getting their news on the web each day, the accuracy of high-traffic news websites is critical if society is to stay well-informed. Without any protection of the integrity of this forum, its value is likely to be diminished.

The Internet may also provide less incentive for users to publish truthful information, as many web forums do not cater to customers

237. Id. at 694.
238. The problem of defamation on the Internet may also provide additional challenges in that the libel victim may not realize the existence of the defamatory comment until it has long been available online for viewing and republishing.
and are not designed to generate a profit. Mainstream news organization may be held to lenient standards of liability for defamation as well, but they must nonetheless ensure the quality and utility of their news product so that their customers return for more and keep the business profitable. Thus, web operators that are unconcerned with the profitability of their site may be less likely to maintain checks on accuracy or truthfulness.

Moreover, an examination of section 230 reveals that Congress' intent in passing the CDA was to promote a responsible Internet. The committee report pertaining to section 230 indicates that the statute was designed to overrule *Stratton Oakmont, Inc. v. Prodigy Services Co.*, which held Prodigy responsible for a posting to its online bulletin board because it had editorial control over the postings. The intent to overrule *Stratton Oakmont* implies that Congress was particularly concerned that ISP's would be punished because they attempted to police their websites for harmful content. This intent is explicitly stated in the policy objectives of section 230, where Congress proclaimed its desire 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." Yet the cases that interpret section 230 to immunize distributor liability create disincentives to police content.

C. Balancing the Interests

A rule that abrogates distributor liability, such as the ruling in *Zeran v. America Online, Inc.*, fails to protect the reputational rights of the defamed and creates disincentives for responsible Internet publishing. Yet holding interactive computer service operators to traditional standards of distributor liability may pose problems that threaten the free flow of information online, disturbing First Amendment protections.
Amendment values and the marketplace of ideas it protects. This section proposes a new method of examining certain cases of third-party Internet defamation. By looking to traditional doctrines of libel jurisprudence and applying them to the new frontier of the Internet, a solution can be crafted that carefully balances these competing interests.

D. The Supreme Court and Constitutional Protections

In the 1960s and 1970s landmark libel cases, the Supreme Court established basic principles that govern the competing interests of free expression and protection of reputation—the same competing interests creating problems on the Internet today. These Supreme Court opinions can shed light on the appropriate solution to the challenge of liability for third-party defamation on the Internet.

E. Debate on Public Issues

A significant factor that has carried great weight in the Court's decisions is the protection of public debate. The Court first noted the importance of public debate on issues of political importance in New York Times v. Sullivan.248 In Sullivan, the Court implemented the actual malice standard, under which public officials must prove that the defendant published a defamatory statement with knowledge of its falsity or reckless disregard for its truth.249 This publisher-friendly standard was deemed necessary to protect public debate on issues of political significance.250 The Court explained that the Sullivan case was considered against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.251

The importance of civic deliberations was reaffirmed as a significant factor in what would become that actual malice test in Curtis Publishing Co. v. Butts.252 In Curtis Publishing, the Court examined the cases of two individuals who sued the press for defamation. The two men were not public officials but were nonetheless in positions of influence and were involved in important

249. Id. at 279-80.
250. Id.
251. Id. at 270.
Noting that "the public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in New York Times," the Court extended actual malice protection to statements about "public figures."

The Supreme Court again advanced the importance of public debate as an essential consideration in the application of actual malice when it decided Rosenbloom v. Metromedia. In Rosenbloom, the Court applied the actual malice test "to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." The Court determined that the degree of appropriate First Amendment protection should be based on the subject matter at issue, rather than solely the public or private status of the plaintiff:

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.

The Court, however, retreated from this content-based application of actual malice when it ruled in Gertz v. Welsh that actual malice could only apply to private figures when those individuals intentionally "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." This ruling changed the focus from the public status of the controversy to the public status of the plaintiff.

F. Access to the Media

The Supreme Court presented another key basis behind the application of actual malice when it ruled that public figures would have to prove actual malice due in part to their access to the media.

253. Id. at 135-141.
254. Id. at 154.
255. Id. at 155.
256. 403 U.S. 29 (1971).
257. Id. at 44.
258. Id. at 43.
260. Id. The Court noted that public figures have "sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of
In *Gertz*, the Court held that private individuals who thrust themselves into a debate on matters of social or political importance will have to prove actual malice, partially because these individuals have access to the media and can seek "self-help." The Court explained that public officials and public figures "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." Thus, access to the media is a central consideration in determining what cases should be covered under actual malice.

G. Access on the Internet

While *Sullivan*, *Curtis Publishing*, and *Rosenbloom* each expanded the scope of protection for libel defendants, *Gertz* limited the application somewhat by retreating from the "public controversy" requirement and instating a rule that private persons should only be required to prove actual malice when they thrust themselves into the "vortex" of a public issue. But many critics have observed, and this author agrees, that the Court's reasoning in *Gertz* may have rested on accurate assumptions when it was decided, but has since become outdated. When *Gertz* was decided in 1974, media outlets were few in number, with several major media companies controlling virtually all of the broadcast news, and a major newspaper in each region providing nearly all print news. Individuals seeking an audience had to find access to these limited resources, a feat that usually could only be accomplished by the famous or powerful. The advent of the Internet changes this assumption, however, as the web provides a soapbox to anyone with a computer. Thus, an argument can be made that the *Gertz* decision should not apply to Internet defamation cases, where even private individuals have access to self-help in the same

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261. Id. at 344-45.
262. Id. at 344.
forum in which they were defamed. Arguably, if the Gertz doctrine did not apply to the Internet, courts examining Internet defamation cases could return to the Rosenbloom test\(^\text{265}\) of applying actual malice based on the public importance of the speech. The author does not expressly advocate a return to Rosenbloom, nor does the author assert that individuals become public figures if they are defamed on the Internet or use the Internet to defend themselves against defamation.\(^\text{266}\) This thesis does assert, however, that within the realm of the Internet, a private plaintiff’s access to self-help is a significant factor that should be weighed in consideration of the appropriate standard of liability in third-party defamation cases, possibly to the extent of carving out an exception to the Gertz doctrine providing that it should not be applied to Internet libel cases.

**H. Putting it All Together**

The Supreme Court has indicated that First Amendment safeguards must be elevated to protect libel defendants when the plaintiff has access to the media, and the speech at issue is of great political or social importance.

Users of interactive Internet forums are discussing issues of great political and social significance, and those who are defamed often have access to respond to the statements in the very forum where the libelous statement was posted. These factors should place the defamation defendant in a highly-protected zone of Constitutional safety.

Yet the Zeran scheme of blanket protection for web operators compromises integral interests that were previously discussed—the reputational rights of the plaintiff and the utility of the Internet. To protect these values, distributor liability would have to remain intact to at least some extent. This assertion is particularly important in light of the longstanding common-law roots of distributor liability and the significant probability that Congress never intended to remove its application from the realm of the Internet.\(^\text{267}\)

\(^{265}\) Rosenbloom v. Metromedia, 403 U.S. 29 (1971).

\(^{266}\) The Supreme Court noted in *Hutchinson v. Proxmire* that a libel plaintiff should not be considered a public figure solely because he defended himself in the media. 443 U.S. 111 (1979). This thesis does not assert that an Internet defamation victim should become a public figure because the victim attempted to seek vindication on the Internet. Instead, the thesis asserts that certain Internet defamation cases should be considered under actual malice review because self-help is easily available to victims. This thesis also asserts that victims who attempt to use self-help by redressing libelous statements themselves should be viewed favorably by the courts.

Applying distributor liability in its traditional common-law form to third-party content on the Internet, however, may impose serious burdens on the free flow of information online. An interactive computer service operator would be liable for the defamatory comments of its users if it knew the comments were false or had reason to know of the falsity.\(^2\) The imposition of this standard would create the potential of a serious chilling effect on Internet speech, as all interactive Internet service operators would "have reason to know" of the falsity of a posting if they received a communication from the alleged victim indicating the statement was defamatory. The operator would then be inclined to remove the posting to avoid distributor liability. Thus, a party who is upset about negative comments regarding them on the Internet would merely need to write the host of the website in order to have the posting removed, whether or not the posting was true, false, or merely a matter of opinion. The end result could lead to truthful and valuable information being removed from the marketplace of ideas on the Internet.

The competing values discussed here—reputational rights, Internet utility, and the free flow of Internet information—create the need for a new test, as traditional distributor liability does not protect enough speech, yet blanket immunity protects too much. This difficult problem has already been addressed by the Court to some extent in its landmark libel rulings. When the interests of unfettered political discourse clashed with reputational interests, the Court devised the actual malice standard to harmonize the opposing values. In creating and implementing the actual malice standard, the court emphasized two factors that are present in interactive Internet speech—productive political or social debate and access to the media. By looking to the Court's reasoning in its actual malice rulings, a workable solution can be created. The next section proposes a test that applies actual malice to distributor liability in certain third-party Internet defamation cases.

I. Applying Actual Malice to Distributor Liability

Interactive Internet web operators who host forums of political or social commentary and freely allow user comments meet both factors that were highlighted by the Supreme Court as the basis for actual malice review. Therefore, this class of web operators could be held liable for third-party content under the distributor liability doctrine, but governed by the actual malice standard. The standard

\(^2\) Restatement § 581(1).
would require the plaintiff to show that the operator left the offending statement online for an unreasonable length of time after the operator knew it was false, or acted in reckless disregard of its falsity. This test would be consistent with the Supreme Court's commitment to the protection of political and social speech and its heightened threshold for plaintiffs with media access. The test is also consistent with an interpretation of section 230 that allows for distributor-based liability.

To determine whether a defendant qualified for actual malice review, courts should examine the Internet forum's procedure for posting comments. If the forum does not allow a user to respond to the comments of another user, the plaintiff's access to the forum is seriously limited. Such a circumstance would weigh strongly against the web operator, possibly leading the court to apply a traditional distributor liability test to the defendant's conduct rather than actual malice. The popular website dontdatehimgirl.com, for example, allows users to search a database of "un-dateable" men, where women post messages identifying men by name and detailing, presumably from personal experience, why each man is a bad date and an undesirable boyfriend. The site provides a "comments" section that allows the men to respond to any allegations, providing them access to the very forum where they were potentially defamed. The responsive comment is posted via a direct link to the accusatory webpage. This feature weighs in favor of the application of the actual malice standard in any defamation actions brought against the site.

Courts should also examine the political or social nature of the forum and its user comments in order to determine the appropriate standard of review to apply. Internet commentary about issues of political or social importance falls within the stronger levels of constitutional protection and should weigh in favor of applying actual malice. Websites focused on more trivial concerns such as celebrity gossip might not meet the constitutional burden to apply actual malice. Returning to the Don't Date Him Girl example, complaints of cheating ex-boyfriends may not rise to the level of social importance necessary for the application of actual malice. The web operator in this case would of course make arguments about the social benefit and importance provided by the forum, leaving the court to decide the appropriate standard of review.


270. Registered users can post comments responding to any posting. For an example click on any posting to see comments. Don't Date Him Girl website, http://dontdatehimgirl.com/about_us/index.html (last visited April 8, 2008).
Web operators that meet both requirements—political or social significance and access to defamation victims—would benefit from the application of the actual malice standard of review and would not be subject to notice-based liability advanced by the California Court of Appeal for three years in *Barrett v. Rosenthal*. The standard advocated in *Barrett* would require the defendant to be held liable if it received a defamation complaint and failed to remove the content in question, resulting in a tremendous incentive to remove any content that is called into question without investigation. By applying actual malice to the distributor liability cases, however, the court could look to the detail and sufficiency of the victim's complaint and consider the appropriateness of the operator's response to that particular complaint. Complaints that contained little or no factual basis to support the allegation of defamation would require little or no action on the part of the web operator. Detailed, timely, good-faith complaints would provide the web operator with more information to make a decision to remove the content. This dialogue between the complainant and the operator could provide the basis for the court to determine whether or not the operator acted with reckless disregard for the truth. This analysis would give the courts a similar role to its current job of investigating the newsgathering and editorial process of allegedly defamatory news stories.

An Internet posting that the complainant has a history of criminal convictions, for example, could be easily refuted by the complainant in a detailed notice to the web operator. If the complainant did not provide any documentation or support in the notice, and the web operator left the comments online, the insufficiency of the complaint would weigh against a finding of actual malice. This approach places the burden on the potential plaintiff, who not only is in a better position to provide the information, but who also would bear the burden of proof if the case went before a court.

Courts might also examine the complainant's reaction to the allegedly defamatory posting. If the complainant could have defended himself in the same forum, but nevertheless chose not to do so, his failure to utilize his access to other readers may be weighed against him in court. This factor could encourage defamation victims to

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272. This process of review would parallel the inquiry courts currently make into the investigative and editorial process of news stories that are later found to be false.

engage in the debate and remedy the damage to their reputation themselves, rather than seek immediate redress in the courts.

It is also important to note that although applying actual malice to a particular defamation case usually results in a more difficult standard of proof for the plaintiff, the test proposed in this thesis would have an opposite effect. In the numerous states and circuits that follow Zeran and interpret section 230 to provide distributor immunity, plaintiffs defamed by a third party do not have any recourse against the web operator at all. This actual malice test actually provides a greater opportunity for the plaintiff to seek redress in the courts, as the test allows liability in some circumstances. The next section will highlight this point by applying the actual malice distributor test to the facts of Zeran.

J. The New Approach applied to Zeran

In Zeran, plaintiff Kenneth Zeran was the victim of a malicious Internet hoax wherein an America Online user posted fake advertisements on an AOL bulletin board selling t-shirts glorifying the Oklahoma City bombing. The anonymous AOL user posted Zeran as the contact person for those people who might be interested in purchasing the shirts, publishing Zeran’s name and home phone number on the ad. Zeran notified AOL of the postings, and although AOL did remove the initial ad, AOL did nothing to block the user’s account. Similar ads continued to appear on the AOL site, all presumably from the same anonymous user. Zeran became overwhelmed with threatening phone calls, including some death threats, and eventually required police to protect him in his home.

Under the actual malice distributor test, the court would first determine if the forum, in this case AOL, provided a mechanism in the bulletin board for Zeran to defend himself. The facts provided in the Fourth Circuit Court of Appeals opinion do not specifically state whether or not Zeran would have been able to post a reply to the initial malicious ad, but as most Internet bulletin boards are available for public comment, this hypothetical will assume Zeran had the opportunity to reply. This opportunity to reply would satisfy the first prerequisite of the actual malice distributor liability test.

275. Id.
276. Id.
277. Id.
278. Id.
The second step would be to examine the political or social nature of the AOL bulletin board and the content at issue therein. Public attitude towards the Oklahoma City bombing is an issue of social importance, thereby meeting this requirement as well.

Because the bulletin board provided space for the victim's response and because the content was socially significant, AOL would qualify for actual malice. The burden would then shift to Zeran to prove that AOL acted with knowledge of the posting's falsity or with reckless disregard for its truth. The court would begin this analysis by examining the detail and timeliness of Zeran's notice to AOL. As Zeran immediately contacted AOL and provided enough information to leave no doubt that he was not the author of the malicious advertisement, AOL had sufficient information to know that the postings were false. As AOL did not attempt to cancel the account of the anonymous user, the court likely would find that Zeran met his burden by proving that AOL knew the postings were false and did not take adequate action to prevent further dissemination of the defamatory content. AOL's knowledge, combined with its insufficient response, arguably would amount to actual malice.

One factor may, however, weigh against a finding of liability for AOL. The facts in the opinion do not indicate that Zeran made any effort to vindicate himself on the AOL bulletin board that hosted the original ads. Zeran's failure to seek self-help would not be viewed favorably by the court, although the present facts are so egregious that a court would likely find for Zeran nonetheless.

In Zeran's case, the application of actual malice would have provided Zeran with the potential to recover damages from AOL—an outcome later advocated by numerous following courts that would have protected him more than the test actually applied to him in Zeran. Thus, despite the usual result of actual malice resulting in a more limited protection of plaintiffs, in third-party Internet defamation cases actual malice would allow plaintiffs a better chance at recovery.

V. Conclusion

The all-encompassing immunization of distributor liability that many courts have found under section 230 provides a safe haven for
defamation and consequently diminishes the usefulness of the Internet. This interpretation is further troubling because it does not appear to be consistent with the legislative intent of the statute. The application of traditional distributor liability, however, places website operators in the difficult position of notice-based liability, which may ultimately result in the removal of truthful or opinionated comments. Expensive lawsuits may also drive low-budget sites like Craigslist.com out of business.

Website operators that allow user responses and provide a forum for valuable political or social commentary meet the burdens that provided the basis for actual malice review in the landmark Supreme Court libel cases. By applying actual malice review to distributor liability, courts could examine the pre-litigation dialogue between the web operator and the complainant to determine whether the operator acted with reckless disregard for the truth. This test would protect the most valuable Internet forums from baseless complaints, encourage libel victims to seek self-help in the very forum where they were defamed, and provide a remedy for those individuals who were genuinely injured by false statements on the Internet.