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## **CYBERSPACE...THE FINAL FRONTIER: HOW THE COMMUNICATIONS DECENCY ACT ALLOWS ENTREPRENEURS TO BOLDLY GO WHERE NO BLOG HAS GONE BEFORE**

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Not long ago, the internet was a massless void – a cyberspace of untapped potential. At a time when innovators were creating the “lunar modules” of internet exploration, Congress established the Communications Decency Act (CDA) with the hope of encouraging the growth and development of this budding technology. A mere thirteen years later, we are now comfortably living in the deepest realms of cyberspace. No longer is this idea the core of our wildest dreams; it is the center of our lives. The only aspect yet unchanged are our laws, namely the CDA, which, despite its innocent beginnings, has developed into a rogue law, safeguarding the very entrepreneurs that threaten the health and prosperity of our brave, new, blogging world. It is time for a change.

Understanding the CDA first requires one to travel back in time to an age when cyberspace travel was still just a dream to most individuals. In 1991, CompuServe, Inc. was on the forefront of this new technology, providing subscribers with access to “thousands of information sources” for a small, online service fee.<sup>1</sup> Admittance to CompuServe’s “electronic library” allowed subscribers to “obtain access to over 150 special interest ‘forums,’ which [were] comprised of electronic bulletin boards, interactive online conferences, and topical databases.”<sup>2</sup> CompuServe, Inc. contracted with Cameron Communications, Inc. (CCI) to manage, regulate,

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<sup>1</sup> *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 137 (S.D.N.Y. 1991).

<sup>2</sup> *Id.*

and control the contents of one such topical database known as “Journalism Forums.”<sup>3</sup> Among the forums controlled by CCI was “Rumorville,” a “daily newsletter that provide[d] reports about broadcast journalism and journalists.”<sup>4</sup>

Cubby, Inc. was created to attract the crowds that flocked to Rumorville on a daily basis. Competition in this new market was not well received by CompuServe. In 1990, Cubby, Inc. brought suit against CompuServe for their publishing of false and defamatory statements within the Rumorville forum.<sup>5</sup> The district court in *Cubby* adopted a traditional analysis of media defamation, finding CompuServe to be “the functional equivalent of a more traditional news vendor,” such as a bookstore or library.<sup>6</sup> Because Cubby did not “set forth any specific facts showing that . . . CompuServe knew or had reason to know of Rumorville's contents,” CompuServe, as mere distributor of news, was not held liable for such publications.<sup>7</sup> “The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment, made applicable to the states through the Fourteenth Amendment.”<sup>8</sup> However, the court noted that “[t]echnology is rapidly transforming the information industry,” seeming to forecast the changes that were soon to come.<sup>9</sup>

Four years later, a New York Supreme Court opinion provided the catalyst for that change, ultimately leading to Congress’s creation of the Communication Decency Act. In 1995,

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 138.

<sup>6</sup> *Id.* at 140.

<sup>7</sup> *Id.* at 141.

<sup>8</sup> *Id.* at 139.

<sup>9</sup> *Id.* at 140.

PRODIGY Services Corporation provided internet services to roughly two million subscribers.<sup>10</sup> Similar to CompuServe, PRODIGY offered numerous “bulletin boards” where individuals could post messages.<sup>11</sup> One such board, “Money Talk,” was referred to as “the leading and most widely read financial computer bulletin board in the United States . . . .”<sup>12</sup> In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, Plaintiff filed suit against PRODIGY for libelous statements posted on this bulletin board by an unidentified user.<sup>13</sup> PRODIGY relied on the court’s decision in *Cubby* as their defense, urging that, as distributor, they should not be held liable for the unknown actions of a third party.<sup>14</sup> The court, however, distinguished this case from *Cubby*. Unlike the previous case, PRODIGY retained full control of the bulletin board, thus transforming their status from distributor to publisher.<sup>15</sup> As a result, PRODIGY was held liable for the defamatory statements posted on their forum.<sup>16</sup>

Let it be clear that this Court is in full agreement with *Cubby*. . . . Computer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates . . . . PRODIGY’s conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice.<sup>17</sup>

As a result of the court’s decision in *Stratton Oakmont*, internet providers that exercised control over the content of their website were considered a publisher under the law, thereby opening themselves to potential liability for defamatory statements posted by a third party.

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<sup>10</sup> *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710, 1 (N.Y. Sup. Ct. May 24, 1995).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 3-4.

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> *Id.* at 5.

Congress created the CDA to “remove the disincentives to selfregulation created by the *Stratton Oakmont* decision.”<sup>18</sup> Growth of the internet was simply too important. As stated, “the rapidly developing array of Internet and other interactive computer services available to individual Americans represent[ed] an extraordinary advance in the availability of educational and informational resources to our citizens.”<sup>19</sup> Specifically, the “political, educational, cultural, and entertainment services” made available through the internet were identified as the core of its intrinsic value – ideas believed to merit the extension of Government’s protective hand.<sup>20</sup>

Congress noted multiple policy reasons for enacting the CDA:

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer service, unfettered by Federal or State regulation; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.<sup>21</sup>

Most importantly for this particular thesis, Congress responded to the *Oakmont Stratton* decision by creating a “good samaritan” provision for the “blocking and screening of offensive material”<sup>22</sup> by an interactive computer service: “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.”<sup>23</sup> Congress further provided extensive immunity to internet computer services in the realm of civil liability by including:

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<sup>18</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

<sup>19</sup> 47 U.S.C. § 230(a)(1) (2000).

<sup>20</sup> *Id.* § 230(a)(5).

<sup>21</sup> *Id.* § 230(b).

<sup>22</sup> *Id.* § 230(c).

<sup>23</sup> *Id.* § 230(c)(1).

No provider or user of an interactive computer service shall be held liable on account of – (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).<sup>24</sup>

By doing so, Congress ensured that responsible managers could monitor and control their website’s content without availing themselves to the typical liability facing media publishers.

Courts have generally regarded Congress’s intent in creating the CDA to reflect two fundamental purposes: “to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum” by encouraging self-regulation of internet service providers.<sup>25</sup> Despite recognition of these two legislative ideals, court interpretations of the CDA have ironically led to a fundamental departure from the law’s original purpose.

The landmark case regarding the CDA came shortly after the statute’s conception by the Fourth Circuit Court of Appeals in *Zeran v. America Online, Inc.*<sup>26</sup> In *Zeran*, Petitioner sued the online giant for failure to timely remove defamatory statements posted by an unidentified third party from its message boards.<sup>27</sup> The day after the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, a message was posted on AOL advertising “Naughty Oklahoma T-Shirts” that featured “offensive and tasteless slogans” related to the bombing.<sup>28</sup> Interested buyers were told to contact “Ken” at Zeran’s home phone number in Seattle, Washington.<sup>29</sup> The

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<sup>24</sup> *Id.* § 230(c)(2).

<sup>25</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *see Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003).

<sup>26</sup> *Id.*

<sup>27</sup> *Zeran*, 129 F.3d at 330.

<sup>28</sup> *Id.* at 329.

<sup>29</sup> *Id.*

ensuing days were filled with thousands of angry phone calls and death threats.<sup>30</sup> Zeran contacted AOL multiple times and was assured with each call that the posted messages would soon be deleted.<sup>31</sup> Unfortunately, over next few days, not only did the original messages remain, but additional posts were added.<sup>32</sup> “By April 30, Zeran was receiving an abusive phone call approximately every two minutes.”<sup>33</sup> Not until May 14 did “the number of calls to Zeran’s residence finally subside[] to fifteen per day.”<sup>34</sup> Petitioner urged that, despite repeated requests, AOL never removed the baseless messages posted on its website.<sup>35</sup>

AOL immediately went to the CDA as an affirmative defense, urging immunity under § 230(c)(1).<sup>36</sup> The district court granted AOL’s motion for judgment on the pleadings, dismissing the suit based on CDA protection.<sup>37</sup> On appeal to the Fourth Circuit, the court affirmed the lower court’s decision, noting the broad immunity the CDA provides to internet service providers.<sup>38</sup> “The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.”<sup>39</sup> Therefore, the court adopted a pragmatic approach to protecting the growth and development of the internet by extending open-ended immunity to internet service providers for otherwise impermissible conduct occurring within their electronic pages.

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 330.

<sup>37</sup> *Id.* at 328.

<sup>38</sup> *Id.* at 331, 335.

<sup>39</sup> *Id.* at 330.

In its opinion, the court further clarified the distinction between publisher and distributor created as a result of the CDA.<sup>40</sup> Zeran had relied on *Oakmont Stratton* throughout his complaint, urging the court to apply distributor liability as a result of AOL's notice of the defamatory statements.<sup>41</sup> Because AOL was a distributor, similar to *Oakmont Stratton*, Zeran asserted that their knowledge of the defamatory statements and subsequent failure to act carried with it a certain degree of liability.<sup>42</sup> The court rejected the distinction between publisher and distributor as applied to the CDA.<sup>43</sup> Rather, the court declared that "AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity."<sup>44</sup> "The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law."<sup>45</sup> Despite the court's clear recognition of AOL's distributor status, they held the website's additional status as publisher trumped any potential notice liability claim as a result of the broad immunity provided within the CDA.<sup>46</sup>

Undoubtedly, the CDA was created for noble purposes. "Without the immunity provided in Section 230(c), users and providers of interactive computer services who review material could be found liable for the statements of third parties, yet providers and users that disavow any responsibility would be free from liability."<sup>47</sup> The court's interpretation of the CDA, however, turned the traditional approach to media defamation on its heels. Publishers in cyberspace are now blanketed with immunity rather than considered wholly liable for published defamation. In

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<sup>40</sup> *Id.* at 331-32.

<sup>41</sup> *Id.* at 331.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 332.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Batzel v. Smith*, 333 F.3d 1018, 1029 (9th Cir. 2003).



addition, any potential liability for their conduct as distributor is dismissed as irrelevant. As a result, otherwise unlawful actions committed in the world of cyberspace are largely condoned.

And the irony resulting from *Zeran* does not end here. As mentioned earlier, the CDA was enacted to protect individuals who chose to remove potentially dangerous items from their websites – to encourage internet service providers to take action for the purpose of protecting the integrity and morality of cyberspace. *Zeran* produces an opposite result, immunizing providers for inaction at the expense of innocent members of society defamed by unknown third parties.

Courts have continued to perpetuate the *Zeran* approach by applying broad immunity to internet service providers for unlawful acts occurring within their domain. In the recent case of *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, a local housing council brought suit against the website for allegedly violating the Fair Housing Act (FHA) and local housing laws.<sup>48</sup> Roommate.com required within its roommate-compatibility questionnaire impermissible information regarding the subscriber’s “sex, family status, and sexual orientation.”<sup>49</sup> The Ninth Circuit first concluded that CDA immunity was not extended to acts in violation of federal or state law.<sup>50</sup> “The Communications Decency Act was not meant to create a lawless no-man’s-land on the Internet.”<sup>51</sup> Therefore, the court remanded the case to determine whether the alleged violations actually occurred.<sup>52</sup>

CDA immunity, however, was extended by the court to website operators “providing neutral tools to carry out what may be unlawful or illicit searches.”<sup>53</sup> Although the original questionnaire might violate federal and state law, the additional tools provided within the website

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<sup>48</sup> *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008).

<sup>49</sup> *Id.* at 1164.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1169.

to access unlawful information would be protected. In other words, the neutral conduit made available by the service to perform unlawful actions was enough of an arms-length distance from the bad conduct to retain immunity. The court further extended this notion to the website's neutral "Additional Comments" block.<sup>54</sup> "Roommate does not tell subscribers what kind of information they should or must include as 'Additional Comments,' and certainly does not encourage or enhance any discriminatory content created by users."<sup>55</sup> In protecting the website, the court noted that "this [was] precisely the kind of situation for which section 230 was designed to provide immunity."<sup>56</sup>

Judicial grants of CDA immunity for harmful conduct occurring on websites extends well beyond simple defamation and into much more serious offenses. In *Doe v. America Online, Inc.*, Petitioner sought to recover damages for emotional injuries suffered by her son, an eleven-year-old boy, who was lured into engaging in sexual acts with an adult male over the internet.<sup>57</sup> Citing multiple violations of state law, Petitioner claimed AOL negligently failed to "exercise reasonable care in its operation," thus breaching its duty to petitioner.<sup>58</sup> This argument hinged on whether the CDA preempted violations of state law.<sup>59</sup> The Florida Supreme Court narrowed the question of preemption to finding "whether imposing common law distributor liability on AOL amounts to treating it as a publisher or speaker. If so, the state claim is preempted."<sup>60</sup> To answer this question, the court turned to *Zeran*, reaching the conclusion that the "publication of obscene literature or computer pornography [was] analogous to the defamatory publication at

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<sup>54</sup> *Id.* at 1174.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Doe v. America Online, Inc.*, 783 So. 2d 1010, 1011 (Fla. 2001).

<sup>58</sup> *Id.* at 1012.

<sup>59</sup> *Id.* at 1015.

<sup>60</sup> *Id.*

issue in the *Zeran* decisions.”<sup>61</sup> Several pages were devoted to discussing *Zeran*, primarily focused on the combined nature of publisher and distributor.<sup>62</sup> In the end, the court adopted *Zeran* in-full, finding that AOL fell “squarely within the traditional definition of a publisher and, therefore, [was] clearly protected by § 230’s immunity.”<sup>63</sup> Under this analysis, the CDA also provides protection to potentially negligent internet service providers for obscene, illegal conduct committed within the pages of their product.

The western district of Texas reached a similar conclusion in *Doe v. MySpace*, providing internet service providers immunity under the CDA in cases of “gross negligence claims [where] the operator knew that sexual predators were using [the] service to communicate with minors and did not react appropriately....”<sup>64</sup> In *MySpace*, a fourteen-year-old girl was assaulted by a sexual predator who originally utilized Defendant’s popular website to solicit the meeting.<sup>65</sup> MySpace filed a motion to dismiss the suit based in-part on CDA immunity.<sup>66</sup> Petitioner claimed that the CDA did not “bar their claims against MySpace because their claims [were] not directed toward MySpace in its capacity as a publisher.”<sup>67</sup> Rather, Petitioner argued that the “suit [was] based on MySpace’s negligent failure to take reasonable safety measures to keep young children off of its site and not based on MySpace’s editorial acts.”<sup>68</sup> The court rejected this argument, finding the website’s role a publisher vital to Petitioner’s claim.<sup>69</sup> As a result, the district court found MySpace immune from negligence and gross negligence claims under the CDA.<sup>70</sup> Under this

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<sup>61</sup> *Id.* at 1017.

<sup>62</sup> *Id.* at 1014-17.

<sup>63</sup> *Id.*

<sup>64</sup> *Doe v. MySpace*, 474 F. Supp. 2d 843, 843 (W.D. Tex. 2007).

<sup>65</sup> *Id.* at 846.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 849.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 850.

continued analysis, the CDA provides absolute immunity to internet service providers despite their negligent conduct or the heinous acts that occur within their website.

Not all courts have exercised such broad, unlimited discretion to internet service providers. In *Batzel v. Smith*, the Ninth Circuit Court of Appeals attempted to narrow *Zeran* by applying a more robust analysis of the internet service provider's intent.<sup>71</sup> In *Batzel*, a part-time website operator published a defamatory email sent by a third party.<sup>72</sup> The email alleged that a woman possessed certain priceless works of art that had been stolen from Jewish individuals by members of the Nazi Party during WWII.<sup>73</sup> The email was sent to the website operator, not in his capacity as a website publisher, but in his primary status as Director of Security at a major European museum.<sup>74</sup> The individual who sent the original email later stated that "if he had thought his email 'message would be posted on an international message board [he] never would have sent it in the first place.'" <sup>75</sup>

The Ninth Circuit Court of Appeals approached *Batzel* with less deference to § 230(c)(1), focusing on the intent of the website operator in light of the distinction between a content provider and internet publisher.<sup>76</sup> In the end, the court remanded the case to determine whether the operator "should have reasonably concluded . . . that [the email] was not provided to him for possible posting."<sup>77</sup> Reaching this reasonable conclusion would transform his status from publisher to content provider, thus eliminating any possible CDA immunity.<sup>78</sup>

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<sup>71</sup> *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).

<sup>72</sup> *Id.* at 1021.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1022.

<sup>76</sup> *Id.* at 1031.

<sup>77</sup> *Id.* at 1035.

<sup>78</sup> *Id.*

Some members of the court have expressed opposition to such a loose interpretation of the CDA; however, they have typically done so through dissenting arguments. For example, the dissent in *Batzel* took issue with the majority's decision to focus, not on the defendant's conduct, but on the subjective intent of the original author.<sup>79</sup> "By shifting its inquiry away from the defendant's conduct, the majority has crafted a rule that encourages the casual spread of harmful lies."<sup>80</sup> The dissent elaborated by stating:

The majority rule licenses professional rumormongers and gossip-hounds to spread false and hurtful information with impunity. So long as the defamatory information was written by a person who wanted the information to be spread on the Internet (in other words, a person with an axe to grind), the rumormonger's injurious conduct is beyond legal redress.<sup>81</sup>

In near-clairvoyant fashion, this dissenting opinion accurately defines that manner in which blog site operators currently exploit the CDA.

Additionally, the dissent in *Doe v. America Online, Inc.* emphasized the need to incorporate the Restatement (Second) of Torts into the CDA rather than treating the Act as a trump card.<sup>82</sup> Doing so supports the notion that "[t]he fatal flaw in *Zeran's* logic-and thus, in the majority view-is its erroneous conclusion that, under section 577 of the Restatement of Torts (Second), distributors are merely an internal category of publishers."<sup>83</sup> In carrying this to its conclusion, the dissent recognized:

[The] statement that an ISP shall not be treated as a 'publisher or speaker' of third-party information has been interpreted to mean not only that an ISP can never be subject to liability for negligence as a 'publisher' of third-party information appearing on its service, but also that an ISP can never be subject to liability based upon its own patently irresponsible role as a distributor . . . .<sup>84</sup>

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<sup>79</sup> *Id.* at 1038.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Doe v. America Online, Inc.*, 783 So. 2d 1010, 1021 (Fla. 2001).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1024.

Such an end result, “flies in the face of the very purpose of the Communications Decency Act [which had] at least one goal of . . . [promoting] ‘decency’ on the internet.”<sup>85</sup>

At least one court has entirely rejected *Zeran’s* analysis of the CDA. Its existence, however, was very short lived. In the appellate case of *Barrett v. Rosenthal*, two physicians originally brought suit against Rosenthal for defamatory comments posted on a website.<sup>86</sup> Appellants were nationally renowned consumer advocates that each maintained websites exposing “health frauds and quackery” in order to “combat[] the promotion and use of ‘alternative’ or ‘nonstandard’ healthcare practices and products.”<sup>87</sup> On the other side of the issue, Rosenthal served as Director of the Humantics Foundation for Women and participated in two Usenet “newsgroups” focusing on promotion of such “alternative medicine.”<sup>88</sup> In between July and October of 2000, Rosenthal posted several defamatory messages concerning both appellants. In one specific allegation occurring in August of 2000, Rosenthal received an e-mail from a third-party alleging various acts of professional misconduct committed by one of the appellants.<sup>89</sup> She distributed this email to both newsgroups.<sup>90</sup> Shortly thereafter, Appellant informed Rosenthal that the statements were false and defamatory and requested they be withdrawn.<sup>91</sup> She refused, and suit immediately followed.<sup>92</sup> Rosenthal filed a motion to strike the complaint, claiming her right to public participation and free speech.<sup>93</sup> Despite the lower

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<sup>85</sup> *Id.*

<sup>86</sup> *Barrett v. Rosenthal*, 5 Cal. Rptr. 3d 416, 420 (Cal. Ct. App. 2003).

<sup>87</sup> *Id.* at 419.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 420.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 421.

court's conclusion that the statements were false and defamatory, it granted Rosenthal's motion to strike partially due to her protection under the CDA.<sup>94</sup>

The appellate court reversed the lower court's decision through an alternate application of *Zeran*, finding that "the [CDA] cannot be deemed to abrogate the common law principle that one who republishes defamatory matter originated by a third person is subject to liability *if he or she knows or has reason to know of its defamatory character.*"<sup>95</sup> The court rejected *Zeran's* union of publishers and distributors within the CDA, finding this broad approach to immunity to be impermissible.<sup>96</sup> "The view of most scholars who have addressed the issue is *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."<sup>97</sup> Because the CDA did not impose a barrier to distributor liability, the appellate court concluded that Rosenthal was not immune from her defamatory actions.<sup>98</sup>

The Supreme Court of California took a different approach, thereby halting any progress made by the court of appeals. They did so with a heavy hand, however, applying a strict interpretation of the CDA.

We share the concerns of those who have expressed reservations about the *Zeran* court's broad interpretation of section 230 immunity. The prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications. Nevertheless, by its terms section 230 exempts Internet intermediaries from defamation liability for republication. The statutory immunity serves to protect online freedom of expression and to encourage self-regulation, as Congress intended. Section 230 has been interpreted literally. It does not prevent Internet service providers or users to be sued as 'distributors,' nor does it expose 'active users' to liability.<sup>99</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 426.

<sup>96</sup> *Id.* at 428.

<sup>97</sup> *Id.* at 429.

<sup>98</sup> *Id.* at 441.

<sup>99</sup> *Barrett v. Rosenthal*, 146 P.3d 510, 529 (Cal. 2006).

The Supreme Court of California's resolution to this issue sheds light on the need for a statutory change to the Communications Decency Act, especially as it relates to the new world just recently discovered in the depths of cyberspace: internet "blogging."

As of April 2007, there were approximately 15.5 million active blogs operating online.<sup>100</sup> A weblog, or "blog," is "an online journal or commentary posted to the Internet and can pertain to just about any conceivable topic."<sup>101</sup> In 2006, it was estimated that "at least 32 million Americans read blogs regularly."<sup>102</sup> Undoubtedly, this number has risen exponentially in the past three years, as has the overall popularity of blogs.

One particular area of growth is found in college gossip sites such as Juicy Campus, Boredat, and CollegeACB.<sup>103</sup> Unfortunately for this paper, the Juicy Campus website was recently terminated, naming the "economic downturn" responsible for the site's inability to continue down its arguably libelous path.<sup>104</sup> However, in its heyday, Juicy Campus was "a Web site . . . which claim[ed] to have 'the simple mission of enabling online anonymous free speech on college campuses.'"<sup>105</sup> The site boasted independent gossip sites relating to 500 different college campuses across the country.<sup>106</sup> On the opening page of the website, the title caption read: "This is the place to spill the juice about all the crazy stuff going on at your campus. It's

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<sup>100</sup> *With 15.5 Million Active Blogs, New Technorati Data Shows That Blogging Growth Seems to Be Peaking: Posting of Heather Green on Business Week's Blogspotting*, BUSINESSWEEK.COM, Apr. 25, 2007, [http://www.businessweek.com/the\\_thread/blogspotting/archives/2007/04/blogging\\_growth.html](http://www.businessweek.com/the_thread/blogspotting/archives/2007/04/blogging_growth.html).

<sup>101</sup> Jennifer L. Peterson, *The Shifting Legal Landscape of Blogging*, WIS. LAW., Mar. 2006, at 8, 8.

<sup>102</sup> Peterson, *supra* note 101.

<sup>103</sup> *Talk of the Nation: Rumors Fly on Anonymous College Gossip Sites* (Nat'l Public Radio broadcast Aug. 25, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=93948235>.

<sup>104</sup> Alison Go, *Juicy Campus Will Be Shut Down*, U.S. NEWS & WORLD REP., Feb. 4, 2009, <http://www.usnews.com/blogs/paper-trail/2009/02/04/juicy-campus-will-be-shut-down.html>.

<sup>105</sup> Sunny Hostin, *Online Campus Gossips Won't Show Their Faces*, CNN.COM, Apr. 11, 2008, <http://www.cnn.com/2008/CRIME/03/17/sunny.juicy/>.

<sup>106</sup> Juicy Campus, <http://www.juicycampus.com/posts/gossips/all-campuses/> (last visited Oct. 26, 2008). This website is no longer in operation. Attempts to access the site lead you directly to CollegeACB.



totally anonymous – no registration, login, or email verification required.”<sup>107</sup> In conducting research for this paper, multiple accusations of rape, sexual immorality, and indecent acts allegedly committed by college students across the country were found listed within the “latest submissions” section on the website’s title page.<sup>108</sup> “Some recent posts discuss[ed] the breasts of a professor, sluttiest girls and sexiest guys on campus. Some posts even contain[ed] racist, sexist and anti-Semitic remarks.”<sup>109</sup>

Despite the recent demise of Juicy Campus, websites such as CollegeACB continue to prosper.<sup>110</sup> CollegeACB, however, takes great pains to distinguish itself from the likes of Juicy Campus, whom they labeled as, “a website that fostered superficial interactions, often derogatory and needlessly crude.”<sup>111</sup> In contrast, ACB boasts “a higher level of discourse—while still making room for the occasional gossip post.”<sup>112</sup> Despite this declaration, the website encourages participants to “converse openly, without fear of reprisal or reprimand.”<sup>113</sup> With this no-holds-barred approach, it is no wonder that defamatory, unprotected content continues to be a common occurrence. One only requires roughly thirty seconds to encounter such harmful dialogue.

And yet, under the courts’ current approach to the CDA, such websites are wholly protected from liability – a legal phenomenon unapologetically utilized by internet capitalists. “Juicy Campus is one of those sites that openly [hid] behind its [CDA] immunity.”<sup>114</sup> By offering absolute immunity for third-party comments posted on the world-wide web, Congress

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Hostin, *supra* note 105.

<sup>110</sup> CollegeACB, <http://collegeacb.com/> (last visited Apr. 4, 2009).

<sup>111</sup> Press Release, CollegeACB, CollegeACB.com to Offer Free Anonymous College Discussion (Feb. 5, 2009), *available at* <http://collegeacb.blogspot.com/2009/02/collegeacb-press-release.html>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Hostin, *supra* note 105.

has inadvertently provided an avenue for shameless entrepreneurs to exploit the protection afforded by the CDA for their own personal wealth at the expense of innocent victims.

The dissent's analysis in *Batzel* accurately depicted the exploitation of CDA immunity by creators and operators of blog websites.<sup>115</sup> As stated, "Congress decided not to immunize those who actively select defamatory or offensive information for distribution on the Internet. Congress thereby ensured that users and providers of interactive computer services would have an incentive *not* to spread harmful gossip and lies intentionally."<sup>116</sup> Nonetheless, court interpretations of the CDA have created an environment in stark contrast to Congress's intent.

Courts have generally recognized that Congress intended the CDA to accomplish two primary goals: 1) "to maintain the robust nature of Internet communication" and 2) "to keep government interference in the medium to a minimum" by encouraging self-regulation of internet service providers.<sup>117</sup> Analyzing these purposes in light of the emersion of gossip blog sites yield the conclusion that neither intention is met through the current CDA interpretation.

First, providing CDA immunity to defamatory blog sites does not encourage the robust nature of internet growth as originally intended by Congress. It is important to remember that the CDA was originally created for the purpose supporting "efforts to protect children and the public from even questionably harmful and illegal materials. . . ."<sup>118</sup> The court's current approach to the CDA produces an opposite result, providing "a foundation for far-ranging forms of illegal conduct (possibly harmful to society in far different ways) which ISPs can, very profitably and with total immunity, knowingly allow their customers to operate through their

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<sup>115</sup> *Batzel v. Smith*, 333 F.3d 1018, 1040 (9th Cir. 2003).

<sup>116</sup> *Id.* (emphasis added).

<sup>117</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *see Batzel*, 333 F.3d at 1027-28.

<sup>118</sup> *Doe v. America Online, Inc.*, 783 So. 2d 1010, 1028 (Fla. 2001).

Internet services.”<sup>119</sup> If anything, such defamatory sites devolve the integrity of the internet and leads to a decline in positive growth.

It is also important to note the drastic evolution the internet has experienced since the unmodified creation of the CDA. In December of 1997, approximately 70 million people utilized internet services across the globe, representing 1.7 percent of the world’s population.<sup>120</sup> As of June 2008, internet usage has increased to nearly 1.5 billion – over twenty times the number of active participants.<sup>121</sup> No longer are we orbiting the earth in cyberspace; we are voyaging beyond the limits of our solar system. Therefore, promoting robust growth of an emerging technology is no longer necessary.

Second, the current state of the CDA does not promote self-regulation of internet service providers; it encourages the opposite. The purpose of the CDA, among other things, was to minimize government’s role in the internet’s development by promoting self-regulation of internet services. Section 230(c)(2) specifically focuses on immunity deserved to providers who voluntarily act “in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”<sup>122</sup> A strict interpretation of this statute identifies an intent to guard internet service providers from suit for proactive steps taken to protect young viewers from offensive material. The current interpretation of the CDA reverses this objective. As seen in the myriad of cases cited above, ISPs are provided blanket immunity regardless of their conduct. Therefore, such providers often forego the expense of ensuring reasonable regulation of the content on their websites. Why

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<sup>119</sup> *Id.*

<sup>120</sup> Internet Growth Statistics, <http://www.allaboutmarketresearch.com/internet.htm> (last visited Oct. 26, 2008).

<sup>121</sup> *Id.*

<sup>122</sup> 47 U.S.C. § 230(c)(2)(A) (2000).

would they with such broad immunity in their back pocket? Even an economic novice could understand that this would be money wasted. As a result, the courts' current approach to the CDA fails in this respect as well.

In addition to congressional intent, the current CDA falls short of reaching certain policy objectives stated within the Act. Section 230(b)(5) provides that one such focus is “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”<sup>123</sup> Obviously, this aim was completely overlooked in the current approach to the CDA. Several cases cited above specifically include injuries sustained as a direct result of obscenity and harassment. Nonetheless, the CDA offers absolute protection from suit for such harmful actions.

Immunity was further provided by Congress to encourage Americans to “rely[] on interactive media for a variety of political, educational, cultural, and entertainment services.”<sup>124</sup> However, gossip sites such as Juicy Campus do not meet any of these categories. Such discourse does not contain any political, educational, or cultural value. At best, reading such material provides entertainment to the basest of citizens, representing yet another example of how the internet has devolved at the hands of the current CDA.

Although creators of such sites identify an overarching mission of promoting free speech, it is clear that their true intentions lie elsewhere. The very name “*Juicy Campus*” conjures images of young students gathering around the water fountain to present their latest tid-bits of gossip – undoubtedly the label intended by its creator. Although some may consider such sites entertainment, there is nothing entertaining about hurtful defamation. Ask the victims.

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<sup>123</sup> *Id.* § 230(b)(5).

<sup>124</sup> *Id.* § 230(a)(5).

Granted, there are hindrances to tightening the reins around the CDA. Critics of such restriction would likely cite the difficulty of monitoring websites that receive thousands of posts each day. It would seem impossible to accomplish this without overly and unconstitutionally restricting speech. This mirrors another criticism inherent with this approach: the possible chilling effect that would likely come with heavy government oversight. Indeed, it should not be the goal of “Big Brother” to restrict society’s right to free speech.

Response to both issues may be found in the statutory language of the CDA itself, which provided immunity for proactive ISP’s that overly restricted speech on their websites.<sup>125</sup> One could argue that Congress originally intended protection for exactly that reason despite the contrary effect that has been created by many courts. A stricter approach to the CDA does not result in absolute oppression; it merely identifies the severe inconsistencies imbedded within the current law and advocates positive change in light of the victimization facing thousands of innocent individuals across the globe.

The world has drastically changed since our first explorations into cyberspace. We are light-years beyond where we were thirteen years ago with the advent of the Communications Decency Act. Evolution in technology demands like developments in the law in order to positively expand our society’s horizon. Now is the time for Congress to get on board and join the twenty-first century.

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<sup>125</sup> *Id.* § 230(c)(2).