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Comment: Untangling the Publisher versus Information Content Provider Paradox of 47 U.S.C. 230: Toward a Rational Application of the Communications Decency Act in Defamation Suits against Internet Service Providers

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COMMENT: UNTANGLING THE “PUBLISHER” VERSUS “INFORMATION CONTENT PROVIDER” PARADOX OF 47 U.S.C. § 230: TOWARD A RATIONAL APPLICATION OF THE COMMUNICATIONS DECENCY ACT IN DEFAMATION SUITS AGAINST INTERNET SERVICE PROVIDERS

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INTRODUCTION

In 1995, Kenneth Zeran was inundated with derogatory messages and death threats over the phone as a result of an anonymous post on an America Online (AOL) electronic bulletin board.¹ The post alleged that Zeran was selling t-shirts and other souvenirs that displayed inflammatory slogans supporting the 1995 Alfred P. Murrah Federal Building bombing in Oklahoma City.² Even though Zeran was not selling such items and he requested that AOL post a retraction of the messages, AOL refused to do so. Zeran sued AOL for defamation;³ however, AOL was not held responsible for the damage done by the poster’s false allegations.⁴

In 1997, presidential aid Sydney Blumenthal began his first day of work at the White House under a cloud of suspicion for spousal abuse.⁵ A gossip columnist, Matt Drudge, who was contracted by AOL to report scandalous material on political and entertainment celebrities,⁶ published on AOL’s website a story about Blumenthal under the headline, “Charge: New White House Recruit Sydney Blumenthal Has Spousal Abuse Past.”⁷ Blumenthal sued AOL for defamation.⁸ Although Drudge retracted the story, AOL was not held liable for Drudge’s defamatory column.⁹

In 1997, AOL published on its “Quotes and Portfolios” site¹⁰ allegedly inaccurate stock prices and share volumes for Ben Ezra, Weinstein & Co., a publicly traded software development company.¹¹ AOL was aware of the errors and participated in the editing of Ben Ezra, Weinstein & Co.’s stock information.¹² Ben Ezra, Weinstein

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1. *Zeran v. America Online Inc.*, 129 F.3d 327, 329 (4th Cir. 1997).

2. *Id.*

3. *Id.* at 329-30.

4. *Id.* at 328.

5. *Blumenthal v. Drudge*, 992 F. Supp. 44, 46-48 (D.D.C. 1998).

6. *Id.* at 47.

7. *Id.* at 48 n.4.

8. *Id.* at 46.

9. *Id.* at 48.

10. AOL’s “Quotes and Portfolios” site provides continuously updated stock quote information on more than 40,000 publicly traded stocks and securities. *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 983 (10th Cir. 2000).

11. *Id.*

12. *Id.* at 985-86.

& Co. sued AOL for defamation alleging that the inaccurate information had damaged the company.¹³ AOL ultimately was held blameless for the errors.¹⁴

Under traditional principles of defamation law,¹⁵ AOL most likely would have been liable for the defamatory remarks about Zeran, Blumenthal, and Ben Ezra, Weinstein & Co. that were posted on AOL's Internet service. But with the passage of Section 230 of the Communications Decency Act of 1996 (CDA),¹⁶ Congress immunized Internet service providers (ISPs)¹⁷ from suits arising out of user access to third-party-created defamatory material.¹⁸

Why did Congress so generously immunize ISPs from defamation suits arising from user access to third-party content when newspapers, magazines, bookstores, libraries, and other sources of potentially defamatory content enjoy no such protection?¹⁹ Congress justifies the CDA's cloak of defamation suit immunity for ISPs on two main grounds. First, the federal government cannot create a web-watching army of sufficient size to scan the Internet for defamatory material because it would be ineffective due to the sheer volume of information available to the millions of users of the Internet.²⁰ Second, the federal government does not want to regulate content on the Internet in hopes that ISPs will do so on their own without the government looking over their shoulders.²¹

13. *Id.* at 983.

14. *See id.* at 986.

15. "A communication is defamatory if it 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." RESTATEMENT (SECOND) OF TORTS § 559 (1977).

16. 47 U.S.C. § 230 (1994 & Supp. IV 1998).

17. For purposes of the CDA, an ISP falls under the definition of an "interactive computer service." *See Zeran v. America Online Inc.*, 129 F.3d 327, 330 n.2 (4th Cir. 1997). An "interactive computer service" is defined under the CDA as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet..." 47 U.S.C. § 230(f)(2).

18. 47 U.S.C. § 230(c)(1) states, "[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." Courts have consistently held this provision to mean that an ISP is not liable for defamatory material created by third parties and published on the ISP's service, even where the ISP plays "an active, even aggressive role in making available content prepared by others." *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998); *see also Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Zeran*, 129 F.3d at 330.

19. Courts addressing the role of ISPs in providing access to information have equated them to newspapers, bookstores, and libraries. *See, e.g., Daniel v. Dow Jones & Co.*, 520 N.Y.S.2d 334, 337 (1987) (describing the function of an ISP that provided access to damaging information as equivalent to circulation of a newspaper); *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (describing an ISP that provided access to defamatory material as the functional equivalent of traditional news vendors such as libraries, newsstands, and bookstores); *Zeran*, 129 F.3d at 332 (equating an ISP, which provided access to defamatory content, with traditional publishers, such as print shops that produce books, magazines, and newspapers).

20. "The Internet is an international network of interconnected computers [that]...enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world." *Reno v. ACLU*, 521 U.S. 844, 849-50 (1997). As anecdotal evidence of the massive scope of Internet communications, note that leading Internet service providers AOL, Earthlink, and Prodigy combined have over 40,000,000 subscribers. *See* http://corp.aol.com/press/press_datapoints.html (visited Jan. 14, 2002); <http://www.earthlink.net/about/pressroom/boilerplate.html> (visited Jan. 14, 2002); http://www.prodigy.com/pcom/company_information/company_index.html (visited Jan. 14, 2002). One congressional proponent of the CDA characterized the vastness of Internet communications during a debate on the amendments to Section 230, "Frankly, there is just too much going on the Internet for [an army of web-watchers] to be effective." 141 CONG. REC. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

21. 47 U.S.C. § 230(b)(2); 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). Although 47 U.S.C. § 230 purports to promote a laissez-faire approach to Internet content regulation by the federal

Although these justifications seem rational, the statute's defamation immunity for ISPs begs the question: Has Congress effectively eliminated a remedy for plaintiffs who want to hold ISPs liable for defamation that occurs in cyberspace? The plain language of the statute answers a simple "no." The statute only immunizes ISPs that act as "publishers" of third-party-created content.²² ISPs that act as "information content providers"²³ are not afforded defamation immunity, because they are directly involved with creating the offending content, as opposed to ISPs that only allow access to third-party-created content.²⁴

A simple "no" to the question of whether 47 U.S.C. § 230 deprives plaintiffs of a remedy in cyberspace defamation claims against ISPs seems to have transformed into a "maybe," or arguably even a "yes" under the prevailing interpretation of the scope of the statute. The federal court cases that have addressed the defamation immunity afforded ISPs under 47 U.S.C. § 230 have not articulated an intelligible test for how to determine whether an ISP falls into either the "publisher" or the "information content provider" category when an ISP is implicated in co-creation of defamatory content.²⁵ Instead, they adopt an approach grounded on the notion that the amount or quality of ISP editorial control over third-party content is dispositive of whether an ISP is a "publisher" or an "information content provider" under the statute.²⁶ As a result, a paradox emerges. An ISP as a "publisher" of third-party-created content will not be liable for defamation, but an ISP that acts as an "information content provider" by co-creating content with third parties will be liable, even though an ISP is a "publisher" by definition, and therefore should not be liable under the statute.²⁷ Stated differently, case law suggests that an ISP that simply allows access to third-party-created content will not be liable under 47 U.S.C. § 230 for defamation, and ISPs found co-creating defamatory content with

government, the statute does in fact regulate the Internet as a general matter by prohibiting the states from enforcing laws that would hold ISPs liable for third-party content. 47 U.S.C. § 230(e)(3). For interesting perspectives on the contemporary debate regarding alternatives to government regulation of the Internet in general, see LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999) and ESTHER DRYSON, *RELEASE 2.0: A DESIGN FOR LIVING IN THE DIGITAL AGE* (1997).

22. An ISP acts as a "publisher" when it edits third-party-created content, decides to allow such content on its network, or decides to remove such content from its network. *See Zeran*, 129 F.3d at 332.

23. "Information content provider" is defined under 47 U.S.C. § 230(f)(3) as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."

24. Although 47 U.S.C. § 230 does not explicitly state that information content providers can be held liable for defamation, the courts have generally agreed that this premise logically flows from the statute. *See, e.g., Ben Ezra*, 206 F.3d at 985-86. Also, as a practical matter of cyberspace jurisdiction, a plaintiff could bypass 47 U.S.C. § 230 altogether in pursuing a suit against an ISP defendant by choosing to litigate in a jurisdiction more friendly to plaintiffs in defamation suits. *See Michael Smyth & Nick Braithwaite, First U.K. Bulletin Board Defamation Suit*, NAT'L L.J., Sept. 19, 1994, at C10; Scott Sterling, *Comment: International Law of Mystery: Holding Internet Service Providers Liable for Defamation and the Need for a Comprehensive International Solution*, 21 LOY. L.A. ENT. L. REV. 327 (2001). Cyberspace jurisdictional issues are outside the scope of this Comment, as they already occupy a formidable body of scholarship that sufficiently covers the topic. *See, e.g., David R. Johnson & David Post, Surveying Law and Borders: Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Richard A. Rochlin, *Note: Cyberspace, International Shoe, and the Changing Context for Personal Jurisdiction*, 32 CONN. L. REV. 653 (1999).

25. *See Drudge*, 992 F. Supp. at 49; *Ben Ezra*, 206 F.3d at 985.

26. *See Drudge*, 992 F. Supp. at 50; *Ben Ezra*, 206 F.3d at 985-86.

27. 47 U.S.C. § 230(c)(1) states, "[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."

third parties will also not be liable, even though those ISPs might indeed be "information content providers."

In an effort to untangle this situation, this Comment proposes a workable test for courts to determine whether an ISP that allegedly co-creates defamatory content with third parties is a "publisher" or "information content provider." Part I briefly introduces the standards of defamation liability prior to the development of the Internet. Part II discusses the development of cyber-defamation law during the infancy of the Internet, prior to enactment of 47 U.S.C. § 230. Part III explains the relevant provisions of 47 U.S.C. § 230 and the policy behind the statute. Part IV examines the federal decisions that have interpreted the statute in the context of defamation claims against ISPs and articulates how the publisher versus information content provider paradox emerges. Finally, part V proposes a workable standard, derived from intellectual property concepts of "joint authorship"²⁸ and "work made for hire,"²⁹ to determine whether an ISP is a publisher or an information content provider within the meaning of 47 U.S.C. § 230.

I. TRADITIONAL DEFAMATION LAW BEFORE THE INTERNET

At common law, defamation simply required that a defendant publish a false statement of fact about the plaintiff that damaged the plaintiff's reputation.³⁰ A statement is "published" if it is communicated intentionally or negligently to a third party who understands the communication.³¹ A "publisher" of a defamatory statement is either the original author of the statement or any entity that subsequently communicates or provides access to the statement.³² Any legal person—a private individual, public figure, or corporation—can be defamed.³³

Traditionally, where a defendant was not the original author of the defamatory material but published the material by simply distributing it or providing access to it, liability was predicated on the quality of knowledge the defendant possessed about the defamatory nature of the statement.³⁴ The determination of a publisher's liability for defamatory material created by third parties has been based on the application of three standards: common carrier, publisher, and distributor.³⁵

28. The Copyright Act of 1976 defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101 (1994 & Supp. IV 1998).

29. The Copyright Act of 1976 defines a "work made for hire" as

(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a sound recording, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Id.

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

31. W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 798 (5th ed. 1984).

32. Everyone who takes part in publication of a statement is charged with publication under traditional principles of defamation law. *Zeran*, 129 F.3d at 332.

33. See KEETON, *supra* note 31, at 778-79.

34. Steven M. Cordero, *Damnum Absque Injuria: Zeran v. America Online and Cyberspace Defamation Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 775, 780 (1999).

35. *Id.* It is important to understand that "publisher" in the context of defamation law refers to both a

A. Common Carrier Standard

“Common carriers” include telephone, telegraph, and microwave communication services.³⁶ These services are conduits for massive volumes of communications, which are virtually impossible to monitor and screen effectively for defamatory material.³⁷ Common carrier liability for defamation hinges on whether the common carrier has reason to know that the communicator of a defamatory statement does not have privilege³⁸ to send the defamatory communication.³⁹

The high standard of knowledge required before defamation liability may attach to a common carrier is based on the rationale that the common carrier has an obligation to serve the public by transmitting communications efficiently and privately.⁴⁰ Required monitoring of the massive volume of communications transmitted across a typical common carrier’s lines for potentially defamatory content would be overly burdensome on the service itself and invasive to the users of the services who, generally speaking, are merely communicating mundane messages.⁴¹ Therefore, the common carrier could not fulfill its beneficial function to society if liability for defamation attached every time the service conveyed a defamatory statement across its lines.⁴²

*Western Union Telegraph Co. v. Lesesne*⁴³ held that a telegraph operator was not liable for transmitting a defamatory message without proof that the transmitting agent had reason to know that the sender was not privileged to send the communication. Western Union transmitted telegraphs, which implicated Lesesne in the death of a woman, to Lesesne’s wife at home and his superior at work.⁴⁴ The court concluded that common carrier liability was based on the telegraph company agent’s knowledge of the unprivileged nature of the communication for policy reasons.⁴⁵ The vast number of communications, the speed with which they are expected to be transmitted, the large number of employees needed to conduct the transmissions, and the difficulty of the legal questions involved in determining whether a communication is defamatory militated against a service’s investigation of the potentially defamatory nature of each message.⁴⁶ Such a burden on common carriers

standard of liability and any entity involved in the publication of statements made by third parties. *See Zeran*, 129 F.3d at 332. For example, “publisher” can describe a “common carrier” or “distributor” of defamatory material because they both provide access to the material; however, “publisher liability” would not apply to either a “common carrier” or “distributor” even though by definition they are “publishers” of the material. *See id.* (quoting KEETON, *supra* note 31, at 803).

36. Cordero, *supra* note 34, at 780 n.42.

37. *See id.*

38. “Privilege” refers to the protection of conduct, such as dissemination of defamatory material, despite its potentially damaging effects, because the defendant is acting in the furtherance of some interest of social importance that is entitled to protection even at the expense of uncompensated harm to the plaintiff. KEETON, *supra* note 31, at 815.

39. *Id.* at 812; Cordero, *supra* note 34, at 780 n.42.

40. *Western Union Tel. Co. v. Lesesne*, 182 F.2d 135, 136 (4th Cir. 1950).

41. *See Cordero, supra* note 34, at 780 n.42.

42. *See id.*

43. 182 F.2d 135, 136 (4th Cir. 1950).

44. *Id.*

45. *See id.* at 137.

46. *Id.*

would be impractical to implement without substantially reducing a service's utility to the public.⁴⁷ Therefore, the court reasoned that it better served the public interest to allow common carriers to transmit the occasional defamatory message without liability than to inhibit the telegraph service's efficient delivery of messages by requiring telegraph agents to investigate the providence of every ostensibly defamatory message.⁴⁸

B. Publisher Standard

Newspapers, magazines, and journals fall into the category of "publisher."⁴⁹ Typically, these sorts of primary publishers⁵⁰ exert more editorial control over the content they publish than do common carriers and distributors.⁵¹ A publisher of third-party-created content that has editorial license with the information, such as a newspaper, can be liable for defamation when four conditions are met: (1) the statement is false and defamatory; (2) the statement is an unprivileged communication to a third party; (3) the publisher is at least negligent in regards to the defamatory nature of the statement; and (4) the communication of the statement causes harm.⁵²

*New York Times Co. v. Sullivan*⁵³ set the modern standard for publisher liability in defamation cases involving public figures.⁵⁴ *The New York Times*, without investigating the accuracy of the facts, printed an advertisement that falsely portrayed police actions against civil rights activists in Montgomery, Alabama.⁵⁵ Sullivan, a Montgomery police commissioner, brought suit against *The New York Times*, alleging that the false accounts of the police action damaged his reputation, and therefore *The New York Times* had defamed him.⁵⁶ The Court disagreed with Sullivan, declaring that the First Amendment allows a degree of fault on the part of publishers before they can be held liable for defamation.⁵⁷ Furthermore, the Court held that the Commissioner had the burden to show that *The New York Times* printed the false statements with knowledge or reckless disregard that they were false.⁵⁸ Therefore, in the context of defamation against public officials, liability does not attach unless the publisher has knowledge or recklessly disregards that the statements are defamatory.⁵⁹

47. *Id.*

48. *Id.*

49. See KEETON, *supra* note 31, at 810.

50. "Primary publisher" refers to an entity, such as a newspaper, that is the original vehicle for publication, although it may not have actually produced the work itself. See Cordero, *supra* note 34, at 780-81 n.43.

51. Douglas B. Luftman, Note, *Defamation for On-Line Services: The Sky Is Not Falling*, 65 GEO. WASH. L. REV. 1071, 1084 (1997).

52. *Id.* at 1084 (citing RESTATEMENT (SECOND) OF TORTS § 588 (1977)).

53. 376 U.S. 254 (1964).

54. See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (referring to the "*New York Times* standard" of liability for defamation of public figures).

55. *New York Times*, 376 U.S. at 258-59.

56. *Id.* at 256.

57. *Id.* at 278-79.

58. *Id.* at 279-80.

59. *Id.*

Ten years after *New York Times*, the Supreme Court took up the question of publisher liability in the context of defamation against a private individual in *Gertz v. Robert Welch, Inc.*⁶⁰ The Court increased the potential liability of a primary publisher in a defamation action involving a private individual by lowering the standard of fault from knowledge to negligence. Gertz, a prominent Chicago lawyer, brought a defamation suit against the defendant publishing company for printing false statements that insinuated Gertz belonged to a Communist organization.⁶¹

The trial court held that the *New York Times* standard of knowledge or reckless disregard of the defamatory nature of the statements applied, even to a private individual like Gertz.⁶² The Supreme Court disagreed, reasoning that because private individuals do not subject themselves to the spotlight as do public figures, private citizens should be afforded more protection from damage to reputation through a lower standard of fault on the part of publishers of defamatory statements.⁶³ Thus, the Court held that "so long as the States do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher...of defamatory falsehood injurious to a private individual."⁶⁴

C. Distributor Standard

Newsstands, bookstores, and libraries are examples of "distributors."⁶⁵ Distributors exercise more editorial control over the content they disseminate than common carriers, but less than publishers.⁶⁶ Distributors are liable for defamatory content in material they distribute only if they know or have reason to know the material is defamatory.⁶⁷ The distributor's ignorance of the defamatory material and inability to alter such content justifies the higher standard of scienter required for liability to attach to a distributor.⁶⁸

*Smith v. California*⁶⁹ first addressed the nexus between distributor editorial control and defamation liability.⁷⁰ Smith, a bookseller in Los Angeles, was convicted under a city ordinance⁷¹ that made it unlawful for a bookseller to have indecent or obscene material on bookselling premises.⁷² The trial court read the ordinance as a strict liability offense; however, the Supreme Court expressed concern that "by

60. 418 U.S. 323 (1974).

61. *Id.* at 325-26.

62. *Id.* at 329.

63. *Id.* at 346.

64. *Id.* at 347.

65. RESTATEMENT (SECOND) OF TORTS § 581.

66. See Luftman, *supra* note 51, at 1085.

67. RESTATEMENT (SECOND) OF TORTS § 581.

68. See *id.*

69. 361 U.S. 147 (1959).

70. Luftman, *supra* note 51, at 1085.

71. The ordinance in question read,

It shall be unlawful for any person to have in his possession any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, motion picture film, phonograph recording, wire recording or transcription of any kind in...any place of business where ice-cream, soft-drinks, candy, food, school supplies, magazines, books, pamphlets, papers, pictures, or postcards are sold...

Smith, 361 U.S. at 148.

72. *Id.*

dispensing with any requirement of knowledge of the contents of the book on the part of the bookseller, the ordinance tended to impose a severe limitation on the public's access to constitutionally protected matter."⁷³ Furthermore, if a bookseller wished to avoid possible conviction under the strict liability ordinance, then he was obligated to know the contents of every book in his store, so that he could weed out the obscene material.⁷⁴ The Court reasoned that a likely effect of the strict liability ordinance would be that booksellers only sold books that they thoroughly inspected, whether they contained obscene material or not, thereby inhibiting "constitutionally protected expression."⁷⁵ Accordingly, the court invalidated the ordinance on constitutional grounds because it prohibited the distribution of obscene material without requiring that the distributor have knowledge of the obscene content.⁷⁶

*Auvil v. CBS "60 Minutes"*⁷⁷ followed *Smith* in applying a knowledge standard to distributors of defamatory material in the context of television broadcasting. *Auvil* held that CBS's local Washington affiliate stations were not liable for defamatory content in a "60 Minutes" show broadcast over their airwaves, nor did they have a duty to censor the content prior to airing the program.⁷⁸ Several thousand Washington apple growers sued CBS and its local affiliates for airing an episode of "60 Minutes" criticizing the pesticide Alar,⁷⁹ which was linked to cancer in humans.⁸⁰ The broadcast prompted a worldwide decline in apple prices and sales, costing apple growers an estimated \$75 million in lost profits.⁸¹

The apple growers argued that because the CBS affiliates had a three-hour delay between receiving the broadcast and its local airing, and a telex description of the content of the program, they had a duty to censor the show.⁸² The court rejected this argument, reasoning that an affiliate's duty to censor could arise only when the content of the program was widely known, as when a previously aired movie is broadcast.⁸³ Otherwise, local stations would be forced to have "full time editorial boards...which possess sufficient knowledge, legal acumen and access to experts to continually monitor incoming transmissions and exercise on the spot discretionary calls or face \$75 million dollar lawsuits at every turn."⁸⁴ Such an arrangement was impractical and the court found it "difficult to imagine a scenario more chilling on the media's right of expression and the public's right to know."⁸⁵

A New York state court confronted the issue of defamation liability where the defendant did in fact exercise some editorial control prior to distributing the

73. *Id.* at 153.

74. *Id.*

75. *Id.*

76. *Id.* at 155.

77. 800 F. Supp. 928 (E.D. Wash. 1992).

78. *Id.* at 932.

79. The "60 Minutes" episode never specifically named Washington apple growers as users of Alar. The segment opened with a lengthy shot of red apples, which are primarily produced in Washington, over-laid by a skull and crossbones graphic. *Id.* at 930 n.2.

80. *Id.* at 930.

81. *Id.* at 930-31.

82. *Id.* at 931.

83. *Id.* at 931.

84. *Id.*

85. *Id.* at 932.

defamatory content in *Misut v. Mooney*.⁸⁶ The *Misut* court held that a printer was not liable for alleged defamatory statements in content given to him by a third party to duplicate in a newspaper, even though the printer reviewed the material for nudity, vulgarity, and profanity prior to printing the newspaper.⁸⁷ The court reasoned that the defendant had not exercised sufficient editorial control over the material to establish the requisite knowledge for defamation liability, noting that despite the edit for nudity, vulgarity, and profanity, the defendant "had no other input into the material which it printed."⁸⁸ Furthermore, the defendant was not "in a position to test the truth of statements submitted by an independent author," and therefore the defendant simply served as the mechanical means by which the defamatory material was printed.⁸⁹ Because the plaintiff failed to establish the printer's knowledge of the defamatory nature of the material, the court dismissed the plaintiff's defamation claim.⁹⁰

As illustrated by the cases discussed above, the common law developed a rational system of imposing liability on defendants that engaged in publication of defamatory material created by third parties. That system is based on (1) the function the alleged defamer performed in relation to the defamatory material, and (2) the degree of knowledge the alleged defamer actually possessed about the defamatory nature of the content. The common carrier, distributor, and publisher liability standards seem easily applied to newspapers, television, telephone companies, and bookstores. Prior to Congress's enactment of the Communications Decency Act,⁹¹ however, initial attempts to apply this liability scheme to the new Internet media proved more difficult.

II. DEVELOPMENT OF PRE-CDA CYBERSPACE DEFAMATION LAW

Prior to the enactment of 47 U.S.C. § 230, courts struggled to apply the traditional principles of defamation law to the Internet.⁹² In applying the common carrier, distributor, and publisher tests to determine liability based on knowledge and editorial control, courts that addressed defamation claims in cyberspace came to differing, and often contradictory, conclusions.⁹³

One of the first cases to address the implications of on-line technology on tort law was *Daniel v. Dow Jones & Co.*⁹⁴ Although *Daniel* did not specifically address defamation, the court took a functional approach to on-line service provider liability that would pave the way for future cyber-defamation decisions.⁹⁵ *Daniel* held that an on-line news service was not liable for negligently reporting false or misleading information.⁹⁶ The defendant, Dow Jones News/Retrieval, was an on-line service

86. 475 N.Y.S.2d 233 (N.Y. Gen. Term 1984).

87. *Id.* at 233.

88. *Id.*

89. *Id.* at 233-34.

90. *Id.* at 237.

91. 47 U.S.C. § 230.

92. See Luftman, *supra* note 51, at 1088-91.

93. See *id.* at 1088.

94. 520 N.Y.S.2d 334 (1987).

95. See, e.g., *Cubby, Inc. v. Compuserve Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

96. *Daniel*, 520 N.Y.S.2d at 337.

that provided over 200,000 subscribers electronic news reports via modem.⁹⁷ The plaintiff, a law student and securities investor, claimed he was damaged by misleading information regarding the restructuring of a Canadian petroleum company, which he received from the defendant's service.⁹⁸ The court reasoned that Dow Jones's service was functionally equivalent to the "distribution of a moderate circulation newspaper or subscription newsletter"; and therefore a distributor standard applicable to newsvendors applied to the defendant's service in the new on-line environment.⁹⁹ The court justified application of the distributor standard to the on-line service, stating, "If the substance of the transaction has not changed, new technology does not require a new legal rule merely because of its novelty."¹⁰⁰

*Cubby, Inc. v. CompuServe Inc.*¹⁰¹ followed the logic of *Dow Jones* in applying the distributor standard articulated in *Smith* to on-line defamation via an electronic reference database maintained by CompuServe.¹⁰² The database was organized into over 150 topics, one of which was the Journalism Forum, which carried a newsletter called "Rumorville USA."¹⁰³ CompuServe maintained no editorial control over "Rumorville USA" before it was uploaded and available to CompuServe subscribers.¹⁰⁴

The plaintiff argued that CompuServe was liable under a publisher liability standard for allegedly defamatory remarks made in the "Rumorville USA" newsletter.¹⁰⁵ The court disagreed, analogizing CompuServe's function of providing access to "Rumorville USA" to "the functional equivalent of a more traditional news vendor."¹⁰⁶ Furthermore, the court noted that

CompuServe has no more editorial control over such a publication [as "Rumorville USA"] than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so.¹⁰⁷

Therefore, consistent with *Smith*,¹⁰⁸ the court declared that the distributor liability standard applied to CompuServe, stating, "vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation."¹⁰⁹ Because the plaintiff failed to allege any facts that supported

97. *Id.* at 335.

98. *Id.* The report failed to mention that the prices involved in the transaction were in Canadian rather than American dollars. *Id.*

99. *Id.* at 337.

100. *Id.* at 338.

101. 776 F. Supp. 135 (S.D.N.Y. 1991).

102. *See id.* at 137-40.

103. *Id.* at 137.

104. *Id.*

105. *See id.* at 139. The allegedly defamatory remarks implicated a competing electronic newsletter in stealing pre-publication information from "Rumorville USA." *See id.* at 138.

106. *Id.* at 140.

107. *Id.*

108. 361 U.S. 147 (1959) (holding that distributors of defamatory material are not liable without actual knowledge of the defamatory content).

109. *Cubby*, 776 F. Supp. at 139 (internal quotations omitted) (quoting *Lerman v. Chuckleberry Publ'g, Inc.*, 521 F. Supp. 228, 235 (S.D.N.Y. 1981)).

CompuServe's knowledge of the defamatory remarks in "Rumorville USA," the court granted summary judgment in favor of CompuServe.¹¹⁰

The court in *Stratton Oakmont, Inc. v. Prodigy Services Co.*¹¹¹ took a different direction in applying defamation liability to an ISP that published defamatory material. The court held that a publisher liability standard applied to Prodigy in its role of providing editorial control over postings on an electronic bulletin board.¹¹² Stratton Oakmont, a securities investment firm, sued Prodigy for allegedly defamatory postings on a Prodigy-run Internet bulletin board.¹¹³ The court distinguished the situation from *Cubby*, in which CompuServe did not exercise editorial control over the "Rumorville USA" newsletter, stating, "First, PRODIGY held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, PRODIGY implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce."¹¹⁴ The court reasoned that Prodigy's use of "technology and manpower" to edit offensive material on the bulletin boards that it maintains rose to the level of "clearly making decisions as to content."¹¹⁵ Therefore, Prodigy was exercising sufficient editorial control over the content on the boards to warrant the imposition of a publisher liability standard.¹¹⁶

The *Stratton Oakmont* and *Cubby* decisions created a troubling problem. Online service providers, like Prodigy, that screen content could be held liable for any defamatory communications despite the service's good-faith efforts to block indecent or defamatory material. But services that simply decline to screen content and allow anything onto their networks, like CompuServe, would not be liable for any defamatory content. In direct response to this untenable situation, Congress passed 47 U.S.C. § 230 less than a year after *Stratton Oakmont* was decided.¹¹⁷

III. CONGRESSIONAL RESPONSE TO STRATTON OAKMONT: 47 U.S.C. § 230

In reaction to the irreconcilable outcomes in *Stratton Oakmont* and *Cubby*, 47 U.S.C. § 230, entitled "Protection for private blocking and screening of offensive material," was an initial attempt by Congress to set statutory guidelines for ISP tort liability for allowing user access to potentially defamatory or otherwise offensive content.¹¹⁸ Congress articulated its policy for immunizing ISPs under Section 230, stating in relevant part,

110. *Cubby*, 776 F. Supp. at 141.

111. No. 31063194, 1995 N.Y. Misc. LEXIS 229, at *1 (N.Y. Sup. Ct. May 24, 1995).

112. *Id.* at *13.

113. *Id.* at *1-2. The allegedly defamatory remarks included allegations that Stratton was a "cult of brokers who either lie for a living or get fired," and that the president of Stratton was "soon to be proven criminal." *Id.* at *2.

114. *Id.* at *10.

115. *Id.*

116. *See id.* at *13.

117. 141 CONG. REC. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

118. *See Zeran v. America Online Inc.*, 958 F. Supp. 1124, 1129 (E.D.Va. 1997).

It is the policy of the United States—

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

(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....¹¹⁹

The provisions of Section 230 purport to bear out this threefold policy. The statute provides 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."¹²⁰ Furthermore, the statute expressly immunizes ISPs from liability for either good-faith restriction of access to content that a user might find "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable,"¹²¹ or an ISP's action of making available to others the means to restrict access to these types of materials.¹²² Congress, however, did leave open the possibility of ISP defamation liability when a service acts as an "information content provider" that is "responsible, in whole or in part, for the creation or development of information provided through the Internet or other interactive computer service."¹²³

Section 230 purports to further the underlying policy of promoting the growth of the Internet without governmental regulation but not at the expense of leaving the ISP or user without the means to control access to the content that is available on the Internet. By allowing ISP liability for "creation or development, in whole or in part" of defamatory material, the statute is intended to place fault only on ISPs that are truly involved in the production of defamatory content. The decisions that have interpreted Section 230, however, suggest that the line between "publisher," where there would be no defamation liability, and "information content provider," where liability would attach, is not a clear one.

IV. THE COURTS INTERPRET 47 U.S.C. § 230, AND THE "PUBLISHER" VERSUS "INFORMATION CONTENT PROVIDER" PARADOX EMERGES

There are two general types of cases addressed by the federal courts that have interpreted 47 U.S.C. § 230.¹²⁴ In the first category are cases in which a third party,

119. 47 U.S.C. § 230(b).

120. *Id.* § 230(c)(1). The statute defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." *Id.* § 230(f)(2). "Information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3).

121. *Id.* § 230(c)(2)(A).

122. *Id.* § 230(c)(2)(B).

123. *Id.* § 230(f)(3).

124. Several state courts also have addressed the scope of Section 230 over general tort claims as well as other non-tort causes of action arising under state law. *See Jane Doe v. America Online Inc.*, 718 So. 2d 385 (Fla. Dist. Ct. App. 1998), *aff'd*, No. SC94355, 2001 WL 228446, at *7 (Fla. March 8, 2001) (holding that state-law breach of contract and negligence claims against ISP for publication of third-party content were barred by 47 U.S.C. § 230);

wholly responsible for creation of the content, posted defamatory material on electronic bulletin boards or similar forums maintained by ISPs.¹²⁵ In the second category are cases in which the defamatory content was arguably co-developed by a third party and the ISP that allowed access to it.¹²⁶

A. ISP as Publisher: Electronic Bulletin Board Cases

The first federal case to interpret 47 U.S.C. § 230 was *Zeran v. America Online Inc.*¹²⁷ In *Zeran*, the Fourth Circuit held that AOL, acting as an Internet service provider, was not liable for defamatory postings on one of its electronic bulletin boards despite AOL's knowledge that the postings were potentially defamatory.¹²⁸ The plaintiff, Kenneth Zeran, was the victim of an anonymous prankster who posted a series of messages on AOL's electronic bulletin board alleging that Zeran was selling t-shirts, bumper stickers, key chains, and other paraphernalia displaying distasteful slogans that glorified the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City.¹²⁹ The posts directed persons interested in buying the fictitious memorabilia to call Zeran at his home, and the messages included Zeran's home phone number in Seattle, Washington.¹³⁰ Subsequently, a radio station in Oklahoma City received the post and relayed its contents over the air to listeners in Oklahoma City.¹³¹ As a result, Zeran received a high volume of abusive calls, including death threats, from outraged citizens.¹³² Zeran contacted AOL several times to notify the service of the defamatory posts. AOL removed the posts but declined to post a retraction pursuant to AOL policy that prohibited retractions.¹³³

Lunney v. Prodigy Serv. Co., 683 N.Y.S.2d 557, 563 (N.Y. App. Div. 1998) (acknowledging that granting a motion for summary judgment against a plaintiff who argued state-law tort claims against the ISP for providing the medium through which defamatory material was transmitted was "in complete harmony with" 47 U.S.C. § 230); *Jane Doe One v. Oliver*, 755 A.2d 1000 (Conn. Super. Ct. 2000) (holding that various state-law negligence, nuisance, and intentional infliction of emotional distress claims against ISP publication of third-party content were barred by 47 U.S.C. § 230); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. Ct. App. 2001) (holding that 47 U.S.C. § 230 bars "all civil claims" against an ISP arising from its publication of material that harmed plaintiff, the author of a book that received bad reviews on defendant's website). These cases are outside the scope of this Comment, which addresses only defamation claims, not other state-law tort claims.

125. See, e.g., *Zeran v. America Online Inc.*, 129 F.3d 327 (4th Cir. 1997); *John Does 1 through 30 v. Franco Prods.*, No. 99-C7885, 2000 U.S. Dist. LEXIS 8645 (E.D. Ill. June 21, 2000); *Patentwizd, Inc. v. Kinko's, Inc.*, 2001 U.S. Dist. LEXIS 15675 (D.S.D. Sept. 27, 2001).

126. See, e.g., *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

127. 129 F.3d 327 (4th Cir. 1997).

128. *Id.* at 333.

129. *Id.* at 329. The initial post was available on AOL's bulletin board only six days after the Oklahoma City bombing. *Id.* The slogans attributed to Zeran's merchandising enterprise included, "Visit Oklahoma...It's a BLAST!!!," "Putting the kids to bed...Oklahoma 1995," and "McVeigh for President 1996." *Zeran*, 958 F. Supp. at 1127 n.3.

130. *Zeran*, 129 F.3d at 329.

131. *Id.*

132. *Id.* Within four days after the initial post, Zeran was receiving an abusive phone call every two minutes, thus prompting him to contact the FBI and Seattle law enforcement, which conducted surveillance of Zeran's residence to protect his safety. *Id.* Approximately two weeks after the initial post, an Oklahoma City newspaper published a story exposing the defamatory messages as a hoax, and the Oklahoma radio station that had broadcast Zeran's phone number to Oklahoma City residents made an on-air apology to Zeran. *Id.* Subsequently, Zeran received only fifteen abusive calls per day for an unspecified time thereafter. *Id.*

133. *Id.*

As a result of the hostile phone calls, Zeran filed a defamation action, cloaked as a negligence suit,¹³⁴ against AOL in federal court in Oklahoma. Zeran alleged that AOL was negligent in failing to respond adequately to the bogus posts on its bulletin board after Zeran had notified AOL of the malicious and fraudulent nature of the postings.¹³⁵ AOL removed the action to federal court in Virginia and filed a motion for judgment on the pleadings.¹³⁶ AOL raised ISP publisher immunity under 47 U.S.C. § 230 as a bar to Zeran's state law negligence claim.¹³⁷ The district court granted AOL's motion, reasoning that Zeran's defamation claim was preempted by the clear language of Section 230, and, in any event, allowing such a claim to go forward would thwart the purposes of Section 230 to encourage ISPs to self-regulate content accessed through their services.¹³⁸

Zeran appealed to the Fourth Circuit, which affirmed the district court decision.¹³⁹ The Fourth Circuit opinion elaborated on the district court's treatment of Zeran's claim that AOL should be held to a "distributor" liability standard for the defamatory posts on its electronic bulletin board system.¹⁴⁰ Zeran had argued in the district court that Section 230 only discussed ISP immunity to "publisher" liability, so it followed that "distributor" liability was left intact.¹⁴¹ The Circuit court disagreed, reasoning that "distributor" liability was "merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230."¹⁴²

Another case in which a third party was solely responsible for creating defamatory content accessed through an ISP is *John Does 1 through 30 v. Franco Prods.*¹⁴³ Several Illinois State University football players sued ISPs GTE and PSINet for allowing access to third-party-created pictures of the players in various states of undress that were taken by hidden camera in a university locker room.¹⁴⁴ The plaintiffs' action against GTE and PSINet was initially dismissed because the

134. The court noted, "To be sure, Zeran is not the first plaintiff to attempt to avoid the strictures of defamation law by disguising a defamation claim as another tort. Courts uniformly reject such attempts." *Zeran*, 958 F. Supp. at 1133 n.19.

135. *Id.* at 1128.

136. *Id.*

137. *Id.* at 1129. State-law tort claims arising from an ISP's act of allowing access to third-party content are preempted by 47 U.S.C. § 230(e)(3) of the CDA, which states, "[n]o cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this section," where such state law claims conflict with the language of 47 U.S.C. § 230(c)(1), which states, "no provider or user of an interactive computer service shall be treated as the publisher or speaker of information provided by another information content provider." See *Zeran*, 958 F. Supp. at 1133; see also *Zeran*, 129 F.3d at 334.

138. *Zeran*, 958 F. Supp. at 1134.

139. *Zeran*, 129 F.3d at 328.

140. See *id.* at 331-33. Some commentators suggest that the "distributor" and "publisher" liability distinction argued in *Zeran* was consonant with congressional intent in enacting Section 230. See, e.g., Cordero, *supra* note 34; Christopher Butler, Note, *Plotting the Return of an Ancient Tort to Cyberspace: Towards a New Federal Standard of Responsibility for Defamation for Internet Service Providers*, 6 MICH. TELECOMM. TECH. L. REV. 247 (1999/2000); David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147 (1997). In general, the articles reason that if Congress meant to immunize ISPs against "distributor" liability, then Congress would have used the word "distributor" in the statute in addition to "publisher." This Comment does not address the "distributor" versus "publisher" problem presented in *Zeran* as these articles sufficiently cover the topic.

141. *Zeran*, 129 F.3d at 331.

142. *Id.* at 332.

143. No. 99-C7885, 2000 U.S. Dist. LEXIS 8645 (E.D.Ill. June 21, 2000).

144. *Id.* at *2.

court found that GTE and PSINet were Internet service providers publishing the pictures, and therefore immune to suit under Section 230.¹⁴⁵ Plaintiffs then re-filed the action, bringing their claims against GTE and PSINet as website hosts¹⁴⁶ and arguing that as such, GTE and PSINet were information content providers under Section 230.¹⁴⁷ The court rejected this argument, finding that the plaintiffs presented no evidence that the defendants' website hosting involved creating the content.¹⁴⁸ Therefore, the court granted GTE's and PSINet's motions to dismiss.¹⁴⁹

The *Zeran* and *John Does* decisions properly bear out Congress's intent in 47 U.S.C. § 230 to immunize ISPs for publisher liability regarding third-party-created content accessed through ISPs. Both cases involved clear-cut third-party-created content. Furthermore, defendant ISPs in both cases did not exercise editorial control over the third-party-created content; rather, they only provided Internet users access to the content. These are just the situations to which Section 230 was meant to apply.¹⁵⁰

There are other cases, however, that do not present such clear-cut distinctions between whether defamatory content was created by third parties, or whether the content was "developed or created, in whole or in part"¹⁵¹ by the ISPs that allowed access to it. These cases fall into the second category of federal decisions that have addressed Section 230 immunity.

B. ISP Implicated as Information Content Provider

*Blumenthal v. Drudge*¹⁵² applied Section 230 to immunize AOL from liability for a gossip columnist's defamatory remarks that were disseminated to AOL subscribers. Matt Drudge was a journalist who reported Hollywood and Washington, D.C., gossip to AOL subscribers through "The Drudge Report," an electronic news report that AOL contracted Drudge to deliver to its subscriber base of more than nine million users.¹⁵³ In one issue of "The Drudge Report," Drudge alleged that top White House aid Sydney Blumenthal had a record of spousal abuse.¹⁵⁴ The story ran the day before Blumenthal was to start work in the White House.¹⁵⁵ Drudge later retracted the story and publicly apologized to Blumenthal.¹⁵⁶

145. *Id.*

146. A "website host" simply allows third parties to rent space on its server, thus allowing entities to create and maintain websites without having to own a server. See <http://www.whatis.techtarget.com> (visited Jan. 16, 2002).

147. *John Does 1 through 30*, No. 99-C7885, 2000 U.S. Dist. LEXIS 8645 at *12.

148. *Id.* at *14-*15.

149. *Id.* at *19.

150. 47 U.S.C. § 230(C)(1).

151. 47 U.S.C. § 230(f)(3).

152. 992 F. Supp. 44 (D.D.C. 1998).

153. *Id.* at 47 and 47 n.3.

154. *Id.* at 46. The text of the Blumenthal article included the following:

The DRUDGE REPORT has learned that top GOP operatives who feel there is a double-standard of only reporting Republican shame believe they are holding an ace card: New White House recruit Sidney Blumenthal has a spousal abuse past that has been effectively covered up. The accusations are explosive. There are court records of Blumenthal's violence against his wife, one influential Republican, who demanded anonymity, tells the DRUDGE REPORT.

Id.

155. *Id.*

156. *Id.* at 48.

Blumenthal in turn filed suit against Drudge and AOL for defamation.¹⁵⁷ Blumenthal claimed that AOL, along with Drudge, was an information content provider in relation to the defamatory story, and therefore was not immune to suit under 47 U.S.C. § 230.¹⁵⁸ Blumenthal based this argument on, *inter alia*,¹⁵⁹ the fact that Drudge was contracted by AOL to provide "The Drudge Report" to AOL's subscribers. Furthermore, AOL advertised that it had hired Drudge to provide AOL subscribers with gossip and rumors.¹⁶⁰ Drudge's licensing agreement with AOL provided that Drudge was responsible for creating, editing, updating, and managing the content of "The Drudge Report," while AOL retained the right to remove content that AOL reasonably believed violated its terms of service.¹⁶¹ Furthermore, AOL paid Drudge \$3,000 a month for "The Drudge Report."¹⁶² Thus, Blumenthal argued that despite Section 230 immunity, AOL should be liable for Drudge's defamatory remarks, for the situation was no different than if AOL was promoting child pornography to its subscribers.¹⁶³

The court agreed in spirit with Blumenthal's argument; however, the court did not hold AOL liable for Drudge's defamatory remarks.¹⁶⁴ Disturbed by the seemingly unjust result of AOL escaping liable for Drudge's story under Section 230, the court stated,

AOL is not a passive conduit like the telephone company, a common carrier with no control and therefore no responsibility for what is said over the telephone wires. Because it has the right to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher, or, at least, like a bookstore or library, to the liability standards applied to a distributor. But Congress has made a different policy choice by providing immunity even where the interactive computer service has an active, even aggressive role in making available content prepared by others...While it appears to this Court that AOL has taken advantage of all the benefits conferred by Congress in the Communications Decency Act, and then some, without accepting any of the burdens that Congress intended, the statutory language is clear: AOL is immune from suit.¹⁶⁵

157. *Id.* at 46.

158. *Id.* at 50.

159. *Id.* Blumenthal claimed that AOL in fact helped create the defamatory content; however, he provided no factual support for the assertion, and conceded in the pleadings that "no person, other than Drudge himself, edited, checked, verified, or supervised the information that Drudge published in the Drudge Report." *Id.*

160. *Id.* at 51. Shortly after AOL entered into the agreement with Drudge, it issued a press release to AOL subscribers that read,

AOL Hires Runaway Gossip Success Matt Drudge...maverick gossip columnist Matt Drudge has teamed up with America Online...Giving the Drudge Report a home on American Online (keyword: Drudge) opens up the floodgates to an audience ripe for Drudge's brand of reporting...AOL has made Matt Drudge instantly accessible to members who crave instant gossip and news breaks.

Id.

161. *Id.* at 47.

162. *Id.*

163. *Id.* at 51.

164. *Id.*

165. *Id.* at 51-53.

Therefore, the court interpreted Section 230 as offering no alternative but to grant AOL's motion for summary judgment.¹⁶⁶

Similarly, *Ben Ezra, Weinstein, & Co. v. America Online Inc.*¹⁶⁷ granted summary judgment in favor of AOL regarding liability for defamatory stock information provided by a third party under contract with AOL to provide such information to AOL's subscribers.¹⁶⁸ AOL published on its "Quotes & Portfolios" service¹⁶⁹ allegedly inaccurate stock information about Ben Ezra, Weinstein & Co., a publicly traded software development company.¹⁷⁰ The stock information was provided to AOL by two independent third parties that gathered the information from major stock exchanges around the world.¹⁷¹ AOL exercised some editorial control over the displayed stock information and communicated with the third-party information providers via email when stock information errors occurred.¹⁷² Ben Ezra, Weinstein & Co. argued that such editorial control and communication between AOL and the third parties classified AOL as an information content provider, and therefore AOL was not immune to suit under Section 230.¹⁷³ The court disagreed and granted AOL's motion for summary judgment because it found that Ben Ezra, Weinstein & Co. had "not demonstrated [that] Defendant worked so closely with [the third parties] regarding the allegedly inaccurate stock information that defendant became an information content provider."¹⁷⁴

To demonstrate that AOL had indeed worked closely enough with the third parties to characterize AOL as an information content provider, Ben Ezra, Weinstein & Co. conducted discovery on the issue prior to the ruling on AOL's motion for summary judgment.¹⁷⁵ The subject of the requested discovery illuminates Ben Ezra, Weinstein & Co.'s strategy for linking AOL to the creation of the erroneous stock information. Ben Ezra, Weinstein & Co. wanted to ascertain how AOL's and the third parties' computers interacted, what type of alterations AOL made to the stock information, whether software problems caused the erroneous display of stock information, and whether a problem with AOL's computers altered the information provided by the third parties.¹⁷⁶ Thus, Ben Ezra, Weinstein & Co.'s strategy was to show that AOL exercised considerable editorial control over the information by way of software interaction between AOL and the third party information providers.

In both *Drudge* and *Ben Ezra*, the plaintiffs argued that editorial control and contractual relationships between ISPs and third-party content providers made the ISPs liable as Section 230 information content providers for defamation arising from the third-party-created content. But both courts disagreed, holding that editorial control and contract relationships of the kind presented in *Drudge* and *Ben Ezra* are

166. *Id.* at 53.

167. 206 F.3d 980 (10th Cir. 2000).

168. *Id.* at 986.

169. AOL's "Quotes and Portfolios" service provides continuously updated stock quote information on more than 40,000 publicly traded stocks and securities to AOL subscribers. *Id.* at 983.

170. *Id.*

171. *Id.*

172. *Id.* at 985.

173. *Id.* at 985-86.

174. *Id.* at 985.

175. *Id.* at 983.

176. *Id.* at 983 n.2.

not sufficient to characterize ISPs as information content providers under Section 230. However, the courts did not delineate what actions by the defendants in *Drudge* and *Ben Ezra* would classify them as information content providers under Section 230.

As a result of the decisions from *Zeran* through *Ben Ezra*, the courts have left unanswered the question of what it takes to classify an ISP as an information content provider when an ISP is implicated in the creation of defamatory content with third parties. This line of decisions interpreting 47 U.S.C. § 230 suggests that some level of editorial control by an ISP over third-party-created content, whether exercised within a contractual relationship between the ISP and the third party or not, will shift an ISP from a publisher role to an information content provider role. This approach, however, ignores the paradox it creates within 47 U.S.C. § 230.

C. The “Publisher” versus “Information Content Provider” Paradox

The cases discussed above set up a paradox within 47 U.S.C. § 230 between what actions by an ISP make an ISP either a “publisher” or an “information content provider.” The plaintiffs in all these cases argued that some quantifiable amount of editorial control over third-party-created content would make an ISP “responsible, in whole or in part, for the creation or development” of the defamatory information.¹⁷⁷ The courts agreed that finding a certain degree of editorial control over third-party-created content could shift an ISP from a publisher role to an information content provider role. Therefore, under Section 230, liability would be imposed on ISPs that are information content providers by virtue of the extent to which they exercise a certain quantum of editorial control over third-party-created content.

Under this current approach to interpretation of 47 U.S.C. § 230, the paradox that arises is this: the findings a court would have to make to determine that an ISP is an information content provider, and thus liable for the defamatory content at issue, are the same findings that a court would make to determine that an ISP is a publisher. Once a court determines that an ISP is an information content provider, the ISP would necessarily also be a publisher, and thus immune under Section 230. Therefore, the editorial control approach fails to establish workable standards for determining whether an ISP is either an information content provider or a publisher under Section 230.

When analyzing an ISP’s role in co-creating content with third parties, courts and lawyers should reject the current editorial control approach in favor of a workable test to determine what actions by an ISP would characterize an ISP as either a publisher or an information content provider.¹⁷⁸ For cases in which an ISP and a third party are both implicated in co-development of defamatory content, such as in *Drudge* and *Ben Ezra*, a practical standard that can meaningfully separate a publisher from an information content provider could be found outside the

177. 47 U.S.C. § 230(f)(3).

178. If an ISP were the sole source of defamatory content, there would be no question that it would be liable as an information content provider under Section 230. See *Ben Ezra*, 206 F.3d at 985 n.4 (finding that defendant AOL conceded at oral argument that 47 U.S.C. § 230 would not immunize an ISP from defamation liability where the ISP created the defamatory content by itself).

traditional editorial control-bound inquiries of defamation law. Accordingly, the adoption of the “joint work” and “work made for hire” inquiries to define when an ISP is a publisher or an information content provider could resolve the paradox presented by the current approach to application of 47 U.S.C. § 230.

V. THE “JOINT WORK” AND “WORK MADE FOR HIRE” DOCTRINES

Congress defined the concepts “joint work” and “work made for hire” in the Copyright Act of 1976¹⁷⁹ to describe the relationship between co-creators of creative works and the relationship of co-creators to the work itself.¹⁸⁰ “Joint work” refers to any creative work that was co-created, authored, or developed by two or more persons or entities with the intent that the contributions of all parties merge into a unitary final product.¹⁸¹ “Work made for hire” describes any creative work that was prepared by an employee within the scope of his or her employment.¹⁸² The fact-based inquiries that courts apply to determine if a creative work is a joint work or a work made for hire can apply to cyber-defamation situations in which courts must decide whether an ISP is an information content provider or a publisher under 47 U.S.C. § 230.

A. Joint Work

Determining whether a creative work is a “joint work”¹⁸³ requires a fact-bound inquiry into the relationship of the putative co-authors to each other, as well as the nature of their respective contributions to the final product. Factors that courts

179. 17 U.S.C. §§ 101-120 (1994 & Supp. II 1998). The Copyright Act was passed to define and protect the rights of authors, inventors, and creators of original works against infringement. *See Quality King Distrib., Inc. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135, 151 (1998) (finding that the Copyright Act's “principle purpose was to promote the progress of the ‘useful Arts’...by rewarding creativity, and its principle function is the protection of original works”) (internal citations omitted).

180. 17 U.S.C. § 101.

181. The Copyright Act of 1976 defines a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101.

182. *Id.* The second statutory definition of “work made for hire,” which states,

a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a sound recording, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire

is largely inapplicable in the context of ISPs. An ISP would rarely “commission” work by others that fit into one of the enumerated categories of work under this subsection, such as “an atlas” or “answer material for a test.” *Id.*

183. Modern copyright cases enunciate a two-part test to determine whether a work is a “joint work,” requiring (1) that the parties express an intent to be joint authors, and (2) a copyrightable contribution to the final product on the part of each co-author. *See Laura G. Lape, A Narrow View of Creative Cooperation: The Current State of Joint Work Doctrine*, 61 ALB. L. REV. 43, 55 (1997) (collecting and discussing current joint work cases). Although the actual “joint work” test is immaterial to the Section 230 analysis, the factors that the test examines can inform the fact-bound inquiry required to determine whether an ISP should be considered an information content provider under 47 U.S.C. § 230 when an ISP is implicated in the “creation or development, in whole or in part” of defamatory content with third parties. 47 U.S.C. § 230(f)(3); *see, e.g., Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000) (discussing an ISP implicated in co-creating defamatory stock information with third parties); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (discussing ISP implicated in co-creating defamatory news story with third-party reporter who licensed his news reports to ISP for dissemination to ISP's subscribers).

examine in determining whether a work is a joint work within the meaning of the Copyright Act include the amount of control each co-author exercises over the final product;¹⁸⁴ objective manifestations, such as contract relations, that demonstrate intent to be co-authors;¹⁸⁵ and significant contribution of creative material by each putative co-author.¹⁸⁶ Interestingly, mere editorial power on the part of a putative co-author has been roundly rejected as an insufficient contribution to support a finding of a joint work.¹⁸⁷

B. Work Made for Hire

Determining whether a work is a “work made for hire” involves a straightforward inquiry into any agency relationship that exists between the creator of a work and the entity that uses it.¹⁸⁸ Where it is determined that the relationship between the creator and the end user of a work is that of employer-employee, so long as the employee made the work in the scope of his or her duties to the employer, the work is a work made for hire.¹⁸⁹ Therefore, the employer is the vicarious author of the work.¹⁹⁰ As a result, any copyright arising from the work belongs to the employer and not the employee.¹⁹¹

However, where the connection between the creator and end user of a work is an independent contractor relationship, then the work is generally not considered a work made for hire.¹⁹² The exception to this rule operates when a work falls into an enumerated category under 17 U.S.C. § 101(2).¹⁹³ For example, if an independent contractor were commissioned to create an answer key to a standardized test at the direction of the test creator, even though the answer key creator is an independent contractor, the key would be a work made for hire. Therefore, the test creator would own the copyright to the key.¹⁹⁴

VI. APPLYING THE “JOINT WORK” AND “WORK MADE FOR HIRE” DOCTRINES TO THE “INFORMATION CONTENT PROVIDER” INQUIRY

Grafting the “joint work” and “work made for hire” inquiries into the analysis of whether an ISP is an information content provider when an ISP is implicated in co-creation of defamatory material with third parties can resolve the apparent paradox of ISP information content providers being immune as publishers. Courts and lawyers have attempted to classify ISPs that allegedly co-create defamatory content with third parties as information content providers by measuring the amount or

184. *Thomson v. Larson*, 147 F.3d 195, 202-03 (2d Cir. 1998).

185. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234-35 (9th Cir. 2000).

186. *Seshardi v. Kasraian*, 130 F.3d 798, 803 (7th Cir. 1997).

187. *See Aalmuhammed*, 202 F.3d at 1235-36; *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991).

188. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

189. *See id.*

190. *Id.* at 737.

191. *Id.*

192. *Id.*

193. *Id.* at 748; *see supra* text accompanying note 182.

194. An answer key falls into the specific category of “answer materials for tests” enumerated under the work made for hire provisions applicable to independent contractors. *See* 17 U.S.C. § 101(2).

quality of editorial control an ISP exercises over the allegedly defamatory content.¹⁹⁵ This mode of inquiry leads to the paradoxical result that gives ISPs that co-create content with third parties as information content providers immunity as publishers under Section 230. However, the application of the joint work and work made for hire inquiries to the publisher/information content provider problem can untangle this paradoxical result.

The joint work inquiry applied to *Ben Ezra* and *Drudge* serves as an example of how the joint work doctrine could resolve the apparent paradox of ISP information content providers avoiding liability as publishers under Section 230. In *Drudge*, the plaintiff argued that AOL's contractual rights of editorial control over Drudge's news reports shifted AOL from a publisher to an information content provider.¹⁹⁶ Similarly, in *Ben Ezra*, the plaintiff argued that AOL's editorial control over third-party-created stock information rendered AOL an information content provider.¹⁹⁷ In both cases the courts rejected the plaintiffs' arguments, not because the courts found that editorial control was an improper inquiry to determine whether an ISP was an information content provider, but rather because the plaintiffs simply failed to present enough evidence of substantial editorial control by AOL over the defamatory content.¹⁹⁸ Therefore, had the plaintiffs provided enough evidence of AOL's control over the content for the courts to deem that editorial control substantial, AOL could have been classified as an information content provider along with the third parties that originally created the defamatory material.¹⁹⁹ But liability predicated on any amount of editorial control is clearly prohibited under Section 230's plain language 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."²⁰⁰

Use of the joint work test factors in this type of situation could avoid this paradox. As a threshold consideration, a court should examine the nature of the contributions to the final product by the ISP and the third parties. If the ISP merely provides editorial control, then the ISP cannot be an information content provider, because editorial contribution has not been held to support a finding of joint work in traditional intellectual property disputes.²⁰¹ But if the ISP contributed original creative material to the content, then a stronger case could be made that the ISP is in fact an information content provider as a co-creator of the material with the third

195. See *Ben Ezra*, Weinstein, & Co. v. America Online Inc., 206 F.3d 980 (10th Cir. 2000); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

196. See *Drudge*, 992 F. Supp. at 51. Drudge's licensing agreement with AOL stated that AOL had the right to change or remove content from Drudge's stories. *Id.*

197. *Ben Ezra*, 206 F.3d at 985-86.

198. The *Ben Ezra* court reasoned that AOL's lack of contractual rights to modify, revise, or change the third-party-provided stock information militated against a finding that AOL was "responsible, in whole or in part, for the creation or development" of the misleading stock information on AOL's Quotes and Portfolios site. See *id.* at 986. The *Drudge* court similarly suggested that the fact that Drudge wrote the defamatory story "without any substantive or editorial involvement by AOL" militated against a finding that AOL aided in creation or development of the story. See *Drudge*, 992 F. Supp. at 50.

199. See 47 U.S.C. § 230(f)(3).

200. 47 U.S.C. § 230(c)(1).

201. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234-35 (9th Cir. 2000); *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991).

parties. In both *Ben Ezra* and *Drudge*, the plaintiffs failed to show substantial editorial control by AOL,²⁰² much less any original creative contribution, and therefore the courts' decisions that AOL was immune would be correct under the joint work test, although the logic employed by the courts to arrive at those decisions is questionable.

If a court finds some quantum of original contribution by an ISP, then courts should examine closely any contractual relationships between the ISP and the third parties to determine if there are any objective manifestations that each party intended to be a co-author of the material.²⁰³ If, for instance, a contract between an ISP and a third-party content provider states that both parties hold equal copyright interests in the work, then such a provision could be construed to manifest an intention of the ISP and third party to be co-authors.²⁰⁴ In *Drudge*, there was only a simple licensing agreement between Drudge and AOL that contemplated AOL's editorial rights over Drudge's stories. There was, however, no mention of any joint ownership of the stories.²⁰⁵

Finally, if neither the original contribution nor the objective manifestation of intent to be co-authors analyses yield definitive answers, courts should determine whether an ISP exerts superintending control over the final product.²⁰⁶ Control in this sense connotes more than simply editorial control; it encompasses control over the ultimate shape and destiny of the final product.²⁰⁷ For instance, the director of a movie might not contribute any dialogue, set design, or other tangible elements to a film; however, directors are often considered co-authors of movies in which they exert ultimate control over the shape of the final product.²⁰⁸ This ultimate control analysis would effectively short circuit an attempt by an ISP to escape liability as an information content provider by outsourcing creation of content to third parties where an ISP fully intends to direct and control the development of the content.

Similarly, the work made for hire inquiry applied to the *Drudge* case exemplifies how the work made for hire doctrine could also resolve the publisher versus content provider paradox. Applying simple agency principles to the relationship between Drudge and AOL, it is clear that Drudge was an independent contractor and not an employee of AOL when he wrote the defamatory story about Blumenthal.²⁰⁹ Drudge's story does not fit into any of the enumerated categories of a work made

202. *Ben Ezra*, 206 F.3d at 986 (finding that defendant ISP's contract with third-party content provider did not allow defendant to "modify, revise, or change" information provided by third-party content provider); *Drudge*, 992 F. Supp. at 50 (finding that third-party-created news story at issue was created "without any substantive or editorial involvement by AOL").

203. *Aalmuhammed*, 202 F.3d at 1234-35.

204. Co-authors of joint work hold equal copyright interests in the joint work, absent any contractual waiver of such interest by one or more co-authors. See *Thomson*, 147 F.3d at 199.

205. *Drudge*, 992 F. Supp. at 51.

206. See *Thomson*, 147 F.3d at 202-03.

207. See *Aalmuhammed*, 202 F.3d at 1233 (discussing an author as the "master mind" who has ultimate control over the product).

208. See *id.* (discussing director as "someone who has artistic control" over a movie, so qualifying as a co-author).

209. Drudge was clearly not an employee of AOL because he published his stories independently from AOL and merely licensed them to AOL for one year. See *Drudge*, 992 F. Supp. at 47.

for hire by independent contractors under 17 U.S.C. § 101(2).²¹⁰ Absent evidence that Drudge was an employee of AOL and wrote the story in the scope of his employment, AOL was not the vicarious author of the defamatory story about Blumenthal. Therefore, AOL was not an information content provider under a work made for hire analysis. So under this analysis, the outcome in *Drudge* was proper; however, the editorial control approach the court used to reach the result was unsound.

VII. CONCLUSION

Courts that have interpreted 47 U.S.C. § 230 have created a paradox by applying the same editorial control inquiry to ISPs to determine whether they are publishers or information content providers. Such an inquiry will always lead to any ISP classified as an information content provider being immune to suit as a publisher under the plain language of 47 U.S.C. § 230, despite Congress's intent to the contrary.

Application of the joint work and work made for hire doctrines to the information content provider inquiry can resolve the publisher versus information content provider paradox. Future decisions should apply these concepts to develop a rational standard for determining whether an ISP implicated in co-creation of defamatory content with third parties is truly a publisher or an information content provider within the meaning of 47 U.S.C. § 230.

210. 17 U.S.C. § 101; *see supra* text accompanying note 182.