Liability of Website Operators for Defamatory Postings by Third Parties

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Many interactive computer services, such as America Online, as well as commercial websites, such as e-Bay or Amazon.com, operate electronic bulletin boards or chat rooms that permit customers to post public messages to be read by other users. The audience for such electronic forums has grown exponentially and can easily approach or exceed that of more traditional media. With this large audience, however, comes a potential for exposure to significant defamation liability. In a legal system driven by a quest for the deepest pockets, the natural target of such lawsuits is the commercial provider of the on-line forum, rather then the individual who actually created and posted the defamatory message. Accordingly, any operator of a forum should be concerned with the extent to which it can be held liable for third-party communications.

In order to assess the risks of liability for defamation, it is helpful to understand certain basic points about traditional defamation law. Ordinarily, anyone who repeats or otherwise republishes a defamatory communication is subject to liability as if he had originally published it. This rule, however, is subject to the important qualification that to be held liable for defamation one must have taken a responsible part in the publication. Thus, a traditional publisher, such as a newspaper or television network, can be held liable because it has the power to control what is distributed in its publications. In contrast, a mere distributor, such as a bookstore or newsstand, does not generally choose what to distribute based on its content, and will not be held liable for defamation unless it knew or had reason to know of the defamatory character of the communication.

At least until 1996, the debate over liability for defamation tracked this publisher-distributor distinction. Two judicial opinions set the boundaries of the debate.

In Cubby v. CompuServe, 776 F. Supp. 135 (S.D.N.Y. 1991), CompuServe operated an on-line information service for subscribers that included special interest forums and databases. One of these forums, the Journalism Forum, was run for CompuServe by Cameron Communications, Inc. The Journalism Forum, in turn, offered Rumorville USA, a daily newsletter published by Don Fitzpatrick Associates of San Francisco. When CompuServe was sued for libel for statements published in Rumorville, the trial court concluded that CompuServe functioned as the equivalent of a distributor because it merely uploaded the text of Rumorville into its database and made it instantaneously available to its subscribers. Applying the legal standard applicable to distributors, the court held that CompuServe could not be liable unless it knew or had reason to know of the allegedly defamatory statements.

In Stratton Oakmont, Inc. v. Prodigy Services Co., 1995 N.Y. Misc. LEXIS 229 (1995), Prodigy ran a proprietary computer network with some two million subscribers. As one of its services, Prodigy operated bulletin boards pursuant to contracts with individual bulletin board leaders. One of Prodigy's bulletin boards was Money Talk, on which certain allegedly libelous statements were published by an anonymous bulletin board user. In an opinion prepared in response to a motion for partial summary judgment, the trial court found that Prodigy advertised itself as a family oriented computer network and claimed to exercise editorial control over the content of the messages posted on its bulletin boards. According to the court, this editorial control was exercised by means of an automatic software screening program and the ability of bulletin board leaders to delete messages which did not comply with Prodigy's content guidelines. Based upon these attempts to exercise editorial control, the court concluded that Prodigy had become a publisher rather than a distributor, and hence was liable for any defamatory statements posted on its bulletin boards.

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Stratton met with a sharply negative reaction from the technical community because of its implication that if an on-line service attempted to exercise any editorial control over the contents of the materials posted on its sites,

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it would expose itself to liability as a publisher of those sites.

The next year, however, Congress passed the Communications Decency Act of 1996 (the "CDA"). Included within the CDA was a section expressly designed to protect services which engage in the blocking or screening of offensive material. 47 U.S.C. § 230. Although the indecency provisions of the CDA were held unconstitutional by the Supreme Court in Reno v. ACLU, 117 S. Ct. 2329 (1997), the affirmative defenses of the CDA remain.

The most significant of these defenses is that which 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." 47 U.S.C. § 230(c)(1). The Congressional conference report on the CDA states that the purpose of this provision is to overrule Stratton "and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material." S. Conf. Rep. No. 104-230, at 435 (1996).

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The leading case addressing the scope of this defense is Zeran v. America, Inc., 129 F.3d 327 (1997). In Zeran, an unidentified person placed a series of messages on an America OnLine ("AOL") bulletin board advertising T-shirts bearing offensive slogans relating to the bombing of the federal building in Oklahoma City.

The unidentified person falsely attributed these messages to Mr. Zeran. Mr. Zeran called AOL on a number of occasions to ask that the messages be removed and AOL did so, but only after some delay. Mr. Zeran subsequently brought suit against AOL for negligence, alleging that AOL had a duty to remove the defamatory postings promptly and to screen future defamatory material. He acknowledged that section 230 eliminated AOL's liability as a publisher of the statements, but argued that AOL could still be liable as a distributor because it had actual knowledge of the defamatory nature of the statements.

On appeal, the Fourth Circuit concluded that section 230 created a blanket immunity from tort-based lawsuits for companies that merely serve as intermediaries for other parties' speech.

The court rejected the use of a publisher-distributor distinction, reasoning that distributor liability is merely a subset of publisher liability, and that Congress had used the word "publisher" in this broader sense, rather than in the narrower sense which had been used in Cubby and Stratton.

The court also relied on practical considerations, noting that imposing liability on a service provider upon receipt of notice of the defamatory character of a communication would impose a heavy burden of investigation on the service provider, and would create a strong incentive to remove messages upon notification, whether or not the contents were defamatory.

Several cases have followed Zeran. For example, in Blumenthal v. Drudge, 992 F. Supp. 44 (1998), AOL was sued for defamation because of statements made about Sidney and Jacqueline Blumenthal in the Drudge Report, an electronic gossip column available on AOL's service. AOL offered the Drudge Report to its subscribers pursuant to a licensing agreement with Matt Drudge, who, under the agreement, was responsible for managing the contents of the Drudge Report. AOL brought a motion for summary judgment based upon section 230 of the CDA. Although the court expressed sympathy for the plaintiffs' position, the court nevertheless followed Zeran and read section 230 as "providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others."

The New York Court of Appeals recently looked at these questions in Lunney v. Prodigy Computer Service Co., 94 N.Y. 2d 242 (1999). Prodigy had been sued for defamation because an unknown impostor had opened an account in Mr. Looney's name and had used these accounts to post vulgar messages in a Prodigy bulletin board and has sent a threatening e-mail message. The Court held that Prodigy was not a publisher under New York law, by analogy to earlier cases involving telephone companies and declined to address the applicability of the CDA or the merit of Zeran. ❑

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