

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC.	)	
	)	
Plaintiff	)	Judge Amy J. St. Eve
	)	
v.	)	Magistrate Judge Jeffrey Cole
	)	
CRAIGSLIST, INC.	)	Case No. 06 C 0657
	)	
Defendant.	)	

**CRAIGSLIST'S OPPOSITION TO  
CLC'S MOTION TO ALTER OR AMEND JUDGMENT**

In its motion to alter or amend the November 14, 2006 judgment (presumably made pursuant to Fed.R.Civ.P. 59(e)), CLC argues that the Court erred in holding that 47 U.S.C. § 230(c)(1) ("Section 230") immunizes craigslist from liability for allegedly "publishing" discriminatory housing notices provided by third parties. CLC Motion at ¶¶ 2-5. At the November 22, 2006 hearing, the Court denied *sua sponte* this aspect of CLC's motion – the parties and amici had fully briefed the scope of the Section 230 immunity, and CLC's motion merely repeated prior arguments.<sup>1</sup>

The sole remaining ground to alter or amend the judgment asserted in CLC's pending motion, and the only ground on which the Court requested briefing, is CLC's position that the

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<sup>1</sup> "The only grounds for a Rule 59(e) motion . . . are newly discovered evidence, an intervening change in the controlling law, and manifest error of law. *Cosgrove v. Bartolotta*, 150 F.3d 729, 732 (7th Cir. 1998); *see also Harrington v. City of Chicago*, 433 F.3d 542, 546 (7th Cir. 2006) (Rule 59(e) movant bears the burden to "clearly establish" grounds for relief); *see also Marquette v. Matra Transport, S.A.*, 1997 WL 337219, at \*1 (N.D. Ill. June 13, 1997) ("This Court's orders are not 'mere first drafts, subject to revision and reconsideration at a litigant's pleasure.' Motions to alter or amend are rarely appropriate. They should only be presented when the law or facts change significantly after the issue is presented to the Court or when the Court has 'patently misunderstood a party,' has 'made a decision outside the adversarial issues presented' to it, or has 'made an error not of reasoning but of apprehension.' Such motions do not allow 'a party to undo its own procedural failures [or to] introduce new evidence or advance arguments that could and should have been presented to the district court prior to judgment'" (internal citations omitted) (copy attached).

Court also erred in its “meager” reading of the word “print” as used in 42 U.S.C. § 3604(c) (the FHA section creating liability for those who “make, print or publish” discriminatory housing ads). CLC Motion at ¶ 1. CLC asserts that, although the Court held that craigslist is immune from liability under the FHA as a “publisher,” the Court should nonetheless hold that CLC has stated a claim under the FHA against craigslist as a “printer” of allegedly discriminatory ads. *Id.*

CLC previously asserted this same argument (CLC Resp. Br. at 17, n.19), and the Court properly rejected it. Mem. Op. at 27, n.18. The Court held that craigslist is not a “printer” of housing notices under any appropriate definition of “print.” *Id.* CLC does not offer new grounds for the Court to reconsider its prior holding and certainly has not “clearly established” any error by the Court with respect to that holding. To hold craigslist immune as a “publisher” but liable as a “printer” would not only be an absurd result, rewarding semantic sleight of hand over substance, but also would subvert Section 230 and the important policy concerns underlying it. CLC’s motion should be denied in its entirety.

**A. craigslist does not print housing notices.**

The FHA makes it unlawful “[t]o make, print, or publish or cause to be made, printed, or published” discriminatory housing ads. 42 U.S.C. § 3604(c). The FHA does not define “print,” and there is no indication in the FHA’s legislative history that Congress intended this term to have anything other than its ordinary meaning. Since the FHA’s enactment in 1968, it does not appear that any court has had to define “print.” Indeed, courts addressing this aspect of the statute have conflated “publish” and “print,” treating them as interchangeable for purposes of the FHA. *See, e.g., U.S. v. Hunter*, 459 F.2d 205, 210 (4th Cir. 1972) (“In the context of classified real estate advertising, landlords and brokers ‘cause’ advertisements to be printed or published and generally newspapers ‘print’ and ‘publish’ them”).

In its November 14, 2006 Memorandum Opinion, the Court held that statutory terms should be given their ordinary and plain meanings as of the time the particular statute was drafted and enacted. Mem. Op. at 27, n.18. Understandably, given the state of technology at that time, definitions of “print” circa 1968 refer to a physical or mechanical process. *See, e.g., id.* (definitions identified by the Court); *see also The American Heritage Dictionary of the English Language* (1969) (one year after FHA enacted):

print . . . 1. To press (a mark or design, for example) onto or into a surface. 2. To make an impression on or in (a surface) with a stamp, seal, die or similar device. 3. To press (a stamp or similar device) onto or into a surface to leave a marking. 4. To produce by means of pressed type on a paper surface, with or as if with a printing press. 5. To offer in printed form; publish. 6. To write (something) in characters similar to those commonly used in print. 7. To impress firmly in the mind or memory. 8. To produce (a positive photograph) by passing light through a negative onto sensitized paper”

Under the plain meaning of the term “print” from 1968, craigslist does not print the notices its users post to its website. The Court thus appropriately concluded that, “even when viewed in the most favorable light, [c]raigslist . . . did not ‘print’ them [housing notices] within any reasonable interpretation of that word, as defined when Congress enacted the FHA.” *Id.*<sup>2</sup>

In its motion, CLC cherry picks words from the definition of “print” identified by the Court but still cannot come up with a definition that fairly encompasses craigslist’s role as an electronic intermediary for other people’s content. *See* CLC Motion at ¶ 1. Contrary to CLC’s assertion, craigslist does not “perform . . . the operations necessary to the production of (*as a publication, a piece of printed matter, a picture . . .*)” (definition cited by the Court, marked with italics to show words omitted by CLC). Craigslist simply does not perform operations required

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<sup>2</sup> Although CLC argues for a broad and liberal interpretation of the FHA, the Court nonetheless is bound by the plain and ordinary meaning of the terms of the statute. *See, e.g., Hunter*, 459 F.2d at 210-11 (interpreting FHA according to its plain meaning).

to produce pictures (as a printing company or photograph printing house would). Without making the words in the definition of “print” meaningless, craigslist is not a “printer.”

CLC’s Complaint confirms that craigslist is not a “printer.” According to the Complaint, craigslist “operates a website . . . as a means of posting or advertising housing sale or rental opportunities.” CLC Cmpl. at ¶ 7; *see also id.* at ¶ 1 (“This action seeks monetary, declaratory, and injunctive relief against Defendant craigslist, Inc., for publishing notices, statements, or advertisements with respect to the sale or rental of dwellings”); *see also* Mem. Op. at 26-27 (craigslist is “‘an interactive computer service’ that serves as a conduit for ‘information provided by another information content provider’”). In its Complaint, CLC alleges more than 130 times that craigslist “publishes” allegedly discriminatory notices. Tellingly, the Complaint does not once use the word “print” with respect to craigslist.

CLC has failed to show that the Court committed manifest error when it construed “print” and applied that term to this case. CLC’s motion to alter should be denied.

**B. Section 230 would immunize craigslist even if it could be deemed to be a “printer.”**

CLC seeks to hold craigslist liable for disseminating third-party content. The Court held that Section 230 immunizes an interactive computer service provider from claims that seeks to impose liability on them as the “publisher” of third-party content. Mem. Op. at 27. “[T]o hold craigslist liable under [FHA] Section 3604(c) [for disseminating third-party content],” the Court recognized, “would be to treat [c]raigslist as if it were the publisher of third-party content.” *Id.* Because CLC was trying to make craigslist liable under the FHA as a publisher, the Court granted a judgment in craigslist’s favor.<sup>3</sup>

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<sup>3</sup> As the Court’s Memorandum Opinion recognizes, craigslist does not completely agree with the Court’s construction of Section 230. In particular, craigslist disagrees that the availability of the Section 230

Because this Court has construed Section 230's immunity as being limited to claims in which publication is an element, CLC now invites the Court to engage in semantic gymnastics and deem craigslist a "printer" rather than a "publisher" for purposes of FHA liability. There is no reason to believe that Congress, in enacting Section 230, intended to immunize interactive service providers as "publishers" but leave them open to liability – for the very same conduct – as "printers." A fair reading of Section 230 rejects this result.

Section 230 provides that no interactive service provider "shall be treated as the publisher or speaker" of third-party content. 47 U.S.C. § 230(c)(1). In its November 14 Memorandum Opinion, the Court carefully and expressly did not attempt to "define the full contours of the word 'publisher' or what constitutes 'treat[ment] as a publisher.'" Mem. Op. at 24, n.14. CLC's motion asks the Court to construe "publisher" to exclude from its scope the act of printing.

Section 230 does not include a definition of "publisher" (or "speaker"). The definition of "publish" at the time Section 230 was enacted in 1996 (and the common usage of that term today) encompasses "print" – indeed, print is a synonym of publish. *See e.g., Merriam Webster's Collegiate Dictionary* (10th Ed. 1993) ("publish . . . 1a: to make generally known b: to make public announcement of 2a: to disseminate to the public b: to produce or release for distribution; *specif* [specifically]: PRINT 2c [sic] c: to issue the work (of an author)") (italics and capitalization in original) (the Dictionary's Explanatory Notes provide that a capitalized term is a synonymous cross-reference that "indicates that a definition at the entry cross-referenced . . . can be substituted as a definition for the entry . . . in which the cross reference appears." *Id.* at

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immunity turns on whether the cause of action involved explicitly requires "publishing" as a semantic or technical element. Since the Court ruled, the California Supreme Court added another, powerful precedent to the long line of cases that construe the Section 230 immunity broadly. *See Barrett v. Rosenthal*, -- Cal.Rptr.3d --, 2006 WL 3346218 (Cal. Nov. 20, 2006) (rejecting narrow interpretation of Section 230 and endorsing *Zeran* and its progeny) (copy attached).

22a); *see also Barrett v. Rosenthal*, -- Cal.Rptr.3d --, 2006 WL 3346218 at \*7 (Cal. Nov. 20, 2006) (adopting an “inclusive” interpretation of the term “publisher” in Section 230 to reflect Congress’ intent) (copy attached).<sup>4</sup>

Accordingly, even under the Court’s narrow reading of Section 230 immunity, the statute’s prohibition on treating an online intermediary as the “publisher or speaker” of other peoples’ content would continue to shield craigslist from liability even if craigslist could somehow be deemed to have “printed” the notices at issue (which it cannot). Publishing, as understood in 1996, encompasses printing, and hence CLC’s strained effort to try to impose liability on craigslist as a “printer” should fail precisely as did its efforts to impose liability on craigslist as a “publisher.”

**C. Imposing liability on craigslist as a “printer” would subvert Section 230.**

Under CLC’s proposed over-broad construction of “print,” every interactive service provider would be a “printer” of the communications it transmits. Were the Court to accept CLC’s positions ((a) that craigslist is a printer of the millions of notices posted on its service and (b) that Section 230 does not provide immunity in such circumstances), Section 230 would be rendered a nullity, at least with respect to the FHA. This plainly was not intended by Congress, or it would have listed the FHA among the particular federal laws exempted from Section 230’s scope. *See* 47 U.S.C. § 230(e); *see also* Mem. Op. at 27 (noting that additional exceptions are not to be implied). Because the FHA is not among the statutes exempted from Section 230’s scope, it would be improper to construe Section 230 in that manner.

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<sup>4</sup> To the extent that the definition of “print” as used in the FHA in 1968 is relevant (to determine whether publication is an element of an FHA claim, to the extent the Court determines that “publish” as used in Section 230 is not broad enough to encompass “print”), the circa 1968 definitions of “print” discussed above show that this term was a synonym for publish in that era as well.

In enacting § 230, Congress sought to encourage the robust development and continued vitality of the Internet and other interactive computer services by removing the specter of service provider liability for third-party speech. Congress expressly declared that:

- it is "the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services," 47 U.S.C. § 230(b)(2);
- the Internet should be "unfettered by Federal or State regulation," *id.*;
- and the Internet has "flourished, to the benefit of all Americans, *with a minimum of government regulation*," 47 U.S.C. § 230(a)(3)-(4) (emphasis added).

Were the Court to impose liability on craigslist as a "printer," having found it immune as a "publisher," it would frustrate each of these purposes for Section 230. Rather than encouraging the growth of the Internet, unfettered by state and federal regulation, the Internet would cease to be the vibrant forum that it has been able to become under the reading of Section 230 that Congress intended and endorsed. *See Barrett v. Rosenthal*, -- Cal.Rptr.3d --, 2006 WL 3346218 at \*10 (quoting 2002 Congressional Report expressly endorsing the interpretation of Section 230 made by *Zeran*).

### **Conclusion**

For the foregoing reasons, craigslist respectfully requests that the Court deny the CLC's motion to alter or amend the November 14, 2006 Judgment. craigslist further requests that the Court provide it such other relief as is just.

Respectfully submitted,

CRAIGSLIST, INC.

December 1, 2006

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**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that on December 1, 2006, he caused a true and correct copy of **CRAIGSLIST'S OPPOSITION TO CLC'S MOTION TO ALTER OR AMEND JUDGMENT** to be served through the Court's electronic system on:

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**APPENDIX**

**OF**

**CASES**

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(Cite as: Not Reported in F.Supp.)

**H**

Briefs and Other Related Documents  
Marquette v. Matra Transport,  
S.A.N.D.Ill., 1997. Only the Westlaw citation is  
currently available.

United States District Court, N.D. Illinois.

Mark A. MARQUETTE and Shirley  
MARQUETTE, Plaintiffs,

v.

MATRA TRANSPORT, S.A., a French  
corporation, FAIVELEY DOORS, a French  
corporation, a/k/a MATRA-FAIVELEY, and  
ALSTHOM, a French corporation a/k/a GEC  
ALSTHOM, Defendants.

No. 96 C 6768.

June 13, 1997.

#### MEMORANDUM OPINION AND ORDER

PLUNKETT, District Judge.

\*1 On April 30, 1997, this Court issued a Memorandum Opinion and Order ("Order") denying plaintiffs' motion to remand this action to state court. On May 14, 1997, plaintiffs filed a timely motion pursuant to Fed.R.Civ.P. ("Rule") 59(e) to alter or amend that Order. For the reasons set forth below, plaintiffs' motion is denied.

#### The Legal Standard

This Court's orders are not "mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D.Ill.1985). Motions to alter or amend are rarely appropriate. They should only be presented when the law or facts change significantly after the issue is presented to the Court or when the Court has "patently misunderstood a party," has "made a decision outside the adversarial issues presented" to it, or has "made an error not of reasoning but of apprehension." *Bank of Waunakee v. Rochester Cheese Sales*,

906 F.2d 1185, 1191 (7th Cir.1990) (quoting *Above The Belt v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D.Va.1983)). Such motions do not allow "a party to undo its own procedural failures [or to] introduce new evidence or advance arguments that could and should have been presented to the district court prior to judgment." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir.1996) (citation omitted). Plaintiffs' current submission implicates none of the grounds for granting a Rule 59(e) motion.

#### Discussion

Plaintiffs contend that the Court erred in finding that the other defendants were not served when GEC filed its removal petition. According to plaintiffs, an affidavit of mailing from the state court action establishes that the other defendants were properly served in accordance with the Illinois long arm statute before the action was removed. There are three problems with plaintiffs' contention. First, the affidavit upon which they rely, though available to them, was not submitted to the Court in support of their motion to remand. Plaintiffs may not use Rule 59(e) as a vehicle for introducing evidence they omitted, intentionally or otherwise, from their first submission. *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir.1985) (citation omitted) Second, even if the Court could consider it, the "new" affidavit does not definitively establish that the other defendants were properly served. The Illinois long arm statute requires plaintiffs to serve the Secretary of State, but is silent as to the method of service to be used. 735 Ill. Comp. Stat. 5/2-209(e). Plaintiffs chose to serve the Secretary by regular U.S. mail. Illinois does not, however, permit individuals or corporations to be served summonses solely by regular mail. See 735 Ill. Comp. Stat. 5/203 and 5/204; see also 805 Ill. Comp. Stat. 5/5.25 and 5/5.30. Thus, it still appears that plaintiffs did not properly effect service under the long arm statute. Finally, even if plaintiffs had

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perfected long arm service, it would likely be insufficient. In their motion to quash, defendants contend that they can be validly served only through the procedures set forth in the Hague Convention. The motion was never decided, however, because plaintiffs chose to abandon long arm service in favor of service via the Hague. Plaintiffs cannot abandon long arm service to avoid a motion to quash and subsequently resurrect it to defeat removal. In short, plaintiffs have presented no valid reason for the Court to reconsider its finding that the other defendants were not properly served at the time the action was removed.

\*2 Plaintiffs also contend that the Court erred in concluding that this lawsuit was a "new action" for removal purposes. Plaintiffs present no factual or legal change, significant or otherwise, to support this contention. Nor do they demonstrate that the Court misapprehended the issue or plaintiffs' position on it. Instead, they simply rehash-nearly verbatim-their unsuccessful argument that this action is a supplementary one that was untimely removed. The Court does not find this argument any more persuasive today than it did when plaintiffs first presented it. Thus, the Court declines to reconsider its finding that the instant lawsuit is a new action for purposes of removal.

#### *Conclusion*

Plaintiffs' Rule 59(e) motion to alter or amend the Court's April 30, 1997 Memorandum Opinion and Order is denied.

N.D.Ill., 1997.

Marquette v. Matra Transport, S.A.

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Briefs and Other Related Documents (Back to top)

• 1:96CV06768 (Docket) (Oct. 16, 1996)

END OF DOCUMENT

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**Westlaw.**

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(Cite as: --- Cal.Rptr.3d ----)

**H**

Briefs and Other Related Documents

Barrett v. RosenthalCal.,2006.Only the Westlaw citation is currently available.

Supreme Court of California.

Stephen J. **BARRETT** et al., Plaintiffs and Appellants,

v.

Ilena **ROSENTHAL**, Defendant and Respondent.  
No. **S122953**.

Nov. 20, 2006.

**Background:** Two doctors brought action alleging libel, libel per se, and conspiracy against alternative health proponent, who had posted messages to newsgroups on the Internet referring to doctors as “quacks,” and who had also redistributed an e-mail message alleging that one of the doctors had stalked women. The Superior Court, Alameda County, No. 833021-5, James A. Richman, J., granted defendant's special motion to strike complaint under anti-SLAPP (strategic lawsuit against public participation) statute. Doctors appealed. The Court of Appeal vacated in part and affirmed in part. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

**Holdings:** The Supreme Court, Corrigan, J., held that:

- (1) Communications Decency Act of 1996 (CDA) immunity provision applied to distributors as well as publishers;
- (2) term “user” in CDA immunity provision applied to individual alternative health proponent;
- (3) CDA immunity provision made no distinction between active and passive users of Internet; and
- (4) doctors were limited to pursuing originator of allegedly defamatory publications.

Judgment of Court of Appeal reversed.

Moreno, J., filed a concurring opinion.

Opinion, 9 Cal.Rptr.3d 142, superseded.

[1] Pleading 302 ⇨ 358

302 Pleading

302XVI Motions

302k351 Striking Out Pleading or Defense

302k358 k. Frivolous Pleading. Most

Cited Cases

Torts 379 ⇨ 437

379 Torts

379V Other Miscellaneous Torts

379k437 k. Resort to or Conduct of Legal Remedies. Most Cited Cases

Web sites accessible to the public, such as Internet “newsgroups,” are “public forums” for purposes of the anti-SLAPP (strategic lawsuit against public participation) statute. West's Ann.Cal.C.C.P. § 425.16.

Web sites accessible to the public, such as Internet “newsgroups,” are “public forums” for purposes of the anti-SLAPP (strategic lawsuit against public participation) statute. West's Ann.Cal.C.C.P. § 425.16.

[2] Constitutional Law 92 ⇨ 90.1(5)

92 Constitutional Law

92V Personal, Civil and Political Rights

92k90 Freedom of Speech and of the Press

92k90.1 Particular Expressions and

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Limitations

92k90.1(5) k. Libel and Slander; False Reports. Most Cited Cases

**Libel and Slander 237 ↩️28**

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k26 Repetition

237k28 k. By Others in General. Most Cited Cases

Communications Decency Act of 1996 (CDA) immunity provision, "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," prohibits imposition of defamation liability on distributors as well as publishers; by granting immunity, Congress intended to promote self-regulation of Internet, distinction between publisher and distributor has less meaning on Internet, and subjecting Internet service providers and users to defamation liability would tend to chill online speech. 47 U.S.C.A. § 230

Communications Decency Act of 1996 (CDA) immunity provision, "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," prohibits imposition of defamation liability on distributors as well as publishers; by granting immunity, Congress intended to promote self-regulation of Internet, distinction between publisher and distributor has less meaning on Internet, and subjecting Internet service providers and users to defamation liability would tend to chill online speech. 47 U.S.C.A. § 230

*See 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 537; 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 19; Cal. Jur. 3d, Assault and Other Wilful Torts, § 158; Annot., Liability of Internet Service Provider for Internet or E-mail Defamation (2000) 84 A.L.R.5th 169.*

**[3] Libel and Slander 237 ↩️28**

237 Libel and Slander

237I Words and Acts Actionable, and Liability

Therefor

237k26 Repetition

237k28 k. By Others in General. Most Cited Cases

"Primary publishers," such as book, newspaper, or magazine publishers, are liable for common law defamation on the same basis as authors, but book sellers, news vendors, or other "distributors" may be held liable only if they knew or had reason to know of a publication's defamatory content.

**[4] Libel and Slander 237 ↩️23.1**

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k23 Publication

237k23.1 k. In General. Most Cited Cases

**Libel and Slander 237 ↩️26.1**

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k26 Repetition

237k26.1 k. In General. Most Cited Cases

"Publication" is a necessary element of all defamation claims, and includes every repetition and distribution of a defamatory statement.

**[5] Libel and Slander 237 ↩️28**

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k26 Repetition

237k28 k. By Others in General. Most Cited Cases

Immunity conferred on a provider or user of an interactive computer service by the Communications Decency Act of 1996 (CDA) applies even when self-regulation of the service is unsuccessful, or completely unattempted. 47 U.S.C.A. § 230.

**[6] Statutes 361 ↩️220**

361 Statutes

361VI Construction and Operation

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361VI(A) General Rules of Construction  
361k213 Extrinsic Aids to Construction  
361k220 k. Legislative Construction.

Most Cited Cases

Ordinarily, subsequent legislative history is given little weight in statutory interpretation.

[7] Libel and Slander 237 ⇌28

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k26 Repetition

237k28 k. By Others in General. Most Cited Cases

Distributors are liable for defamation not merely upon receiving notice from a third party, but also if they independently knew or had reason to know of the defamatory statement.

[8] Courts 106 ⇌97(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents

106k97 Decisions of United States Courts as Authority in State Courts

106k97(1) k. In General. Most Cited Cases

While state courts are not bound by decisions of the lower federal courts, even on federal questions, they are persuasive and entitled to great weight.

[9] Courts 106 ⇌97(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents

106k97 Decisions of United States Courts as Authority in State Courts

106k97(1) k. In General. Most Cited Cases

Where lower federal precedents are divided or

lacking, state courts must necessarily make an independent determination of federal law, but where the decisions of the lower federal courts on a federal question are both numerous and consistent, state courts should hesitate to reject their authority.

[10] Libel and Slander 237 ⇌28

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k26 Repetition

237k28 k. By Others in General. Most Cited Cases

Term "user" in Communications Decency Act of 1996 (CDA) provision granting broad immunity to provider or user of an interactive computer service, applied equally to individual alternative health proponent who reposted information on Internet as it applied to Internet service providers. 47 U.S.C.A. § 230.

[11] Statutes 361 ⇌212.6

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k212 Presumptions to Aid Construction

361k212.6 k. Words Used. Most Cited Cases

When construing a federal statute, the court must begin with the language employed by Congress and the assumption that its ordinary meaning expresses the legislative purpose.

[12] Libel and Slander 237 ⇌28

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k26 Repetition

237k28 k. By Others in General. Most Cited Cases

Communications Decency Act of 1996 (CDA) provision granting broad immunity to provider or user of an interactive computer service is not restricted in its application to passive users who only receive information and remove offensive material from Internet, but also extends to active



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users who post or republish material. 47 U.S.C.A. § 230.

[13] Libel and Slander 237 ↩28

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k26 Repetition

237k28 k. By Others in General. Most

Cited Cases

Since Communications Decency Act of 1996 (CDA) provides broad immunity to provider or user of an interactive computer service, doctors who claimed defamation in connection with actions of alternative health proponent, who had posted messages to newsgroups on the Internet referring to doctors as "quacks," and who had also redistributed an e-mail message alleging that one of the doctors had stalked women, were limited to pursuing actions against originators of allegedly defamatory publications. 47 U.S.C.A. § 230.

West CodenotesRecognized as Unconstitutional47 U.S.C.A. § 223(a).47 U.S.C.A. § 223(d).

Superior Court, Alameda County; James A. Richman, Judge.

Law Offices of Christopher E. Grell, Christopher E. Grell, Richard R. Rescho and Ian P. Dillon for Plaintiffs and Appellants.

Mark Goldowitz, Jesper Rasmussen; Piper Rudnick, Roger Myers, Lisa Sitkin and Katherine Keating for Defendant and Respondent.

Lee Tien and Kurt Opsahl for Electronic Frontier Foundation as Amicus Curiae on behalf of Defendant and Respondent.

Ann Brick for American Civil Liberties Union Foundation of Northern California as Amicus Curiae on behalf of Defendant and Respondent.

Cooley Godward, Michael G. Rhodes, Lori R.E. Ploeger, and Laura C. Pirri for eBay Inc. as Amicus Curiae on behalf of Defendant and Respondent.

Wilmer Cutler Pickering Hale and Dorr, Patrick J. Carome, Samir Jain, and C. Colin Rushing for Amazon.com, Inc., America Online, Inc., e Bay Inc., Google Inc., Microsoft Corporation, Yahoo! Inc., ABC, Inc., Ask Jeeves, Inc., Cable News Network LP, LLLP, Compuserve Interactive

Services, Inc., Earthlink, Inc., ESPN, Inc., Netscape Communications Corporation, SBC Internet Services, Time Warner Cable Inc., The Washington Post Company, Association for Competitive Technology, California Newspaper Publishers Association, Information Technology Association of America, Internet Alliance, Internet Commerce Coalition, National Cable & Telecommunications Association, Netchoice, Netcoalition Newspaper Association of America, Online News Association, Online Publishers Association, TechNet and United States Internet Service Provider Association as Amici Curiae on behalf of Defendant and Respondent.

Deidre K. Mulligan for Law Professors with Expertise in Internet Law as Amicus Curiae on behalf of Defendant and Respondent.

CORRIGAN, J.

\*1 In the Communications Decency Act of 1996, Congress declared: "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." (47 U.S.C. § 230(c)(1).) FN1 "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." (§ 230(e)(3).)

These provisions have been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source. The immunity has been applied regardless of the traditional distinction between "publishers" and "distributors." Under the common law, "distributors" like newspaper vendors and book sellers are liable only if they had notice of a defamatory statement in their merchandise. The publisher of the newspaper or book where the statement originally appeared, however, may be held liable even without notice.

In this case, the Court of Appeal diverged from the prevailing interpretation of section 230. It decided that common law "distributor" liability survived the congressional grant of immunity, so that Internet service providers and users are exposed to liability if they republish a statement with notice of its defamatory character.

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We granted review to decide whether section 230 confers immunity on "distributors." Because this case involves the liability of an individual rather than a service provider, we asked the parties to address the definition of the statutory term "user." We also requested briefing on whether the immunity analysis is affected if a user engages in active rather than passive conduct. We conclude that section 230 prohibits "distributor" liability for Internet publications. We further hold that section 230(c)(1) immunizes individual "users" of interactive computer services, and that no practical or principled distinction can be drawn between active and passive use. Accordingly, we reverse the Court of Appeal's judgment.

We acknowledge that recognizing broad immunity for defamatory republications on the Internet has some troubling consequences. Until Congress chooses to revise the settled law in this area, however, plaintiffs who contend they were defamed in an Internet posting may only seek recovery from the original source of the statement.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, Dr. Stephen J. Barrett and Dr. Terry Polevoy, operated Web sites devoted to exposing health frauds. Defendant Ilena Rosenthal directed the Humanics Foundation for Women and operated an Internet discussion group. Plaintiffs alleged that Rosenthal and others committed libel by maliciously distributing defamatory statements in e-mails and Internet postings, impugning plaintiffs' character and competence and disparaging their efforts to combat fraud.<sup>FN2</sup> They alleged that Rosenthal republished various messages even after Dr. Barrett warned her they contained false and defamatory information.

\*2 Rosenthal moved to strike the complaint under the anti-SLAPP statute. (Code Civ. Proc., § 425.16 ; SLAPP is an acronym for strategic lawsuit against public participation.) She claimed her statements were protected speech, and argued that plaintiffs could not establish a probability of prevailing because she was immune under section 230. (See

Code Civ. Proc., § 425.16, subd. (b); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67, 124 Cal.Rptr.2d 507, 52 P.3d 685.) She also contended her statements were not actionable.

The court granted the motion, finding that Rosenthal's statements concerned an issue of public interest within the scope of the anti-SLAPP statute, and were, for the most part, not actionable because they contained no provably false assertions of fact. Plaintiffs do not challenge that ruling. The court determined that the only actionable statement appeared in an article Rosenthal received via e-mail from her codefendant Tim Bolen. This article, subtitled "Opinion by Tim Bolen," accused Dr. Polevoy of stalking a Canadian radio producer. Rosenthal posted a copy of this article on the Web sites of two newsgroups devoted to alternative health issues and the politics of medicine, not on the site of her own discussion group. According to Rosenthal, these newsgroups were part of "the wild west of the Internet," with "no administrators and no one to enforce rules of conduct."<sup>FN3</sup> The trial court ruled that this republication was immunized by section 230(c)(1).

[1] The Court of Appeal vacated the order granting the motion to strike insofar as it applied to Dr. Polevoy. It held that section 230 did not protect Rosenthal from liability as a "distributor" under the common law of defamation. We granted Rosenthal's petition for review.<sup>FN4</sup>

## II. DISCUSSION

[2] The leading case on section 230 immunity rejected the "distributor" liability theory adopted by the Court of Appeal here. (*Zeran v. America Online, Inc.* (4th Cir.1997) 129 F.3d 327, 331-333 ( *Zeran* ).) We first discuss the *Zeran* holding and rationale, then the Court of Appeal's contrary analysis.<sup>FN5</sup> Recognizing "distributor" liability would have a dramatic impact on Internet service providers. We agree with the *Zeran* court that Congress did not intend to create such an exception to section 230 immunity.<sup>FN6</sup>

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Rosenthal, however, is not a service provider, at least with respect to the newsgroups where she posted the Bolen article. This appears to be the first published case in which section 230 immunity has been invoked by an individual who had no supervisory role in the operation of the Internet site where allegedly defamatory material appeared, and who thus was clearly not a provider of an "interactive computer service" under the broad definition provided in the CDA. (§ 230(f)(2); see fn. 7, *ante*.) Accordingly, we asked the parties to brief the meaning of the term "user" in section 230, and whether any distinction might be drawn between active and passive use under the statute. In part C of our discussion, we conclude that Congress employed the term "user" to refer simply to anyone using an interactive computer service, without distinguishing between active and passive use.

#### A. Zeran

\*3 Kenneth Zeran was bombarded with angry and derogatory telephone calls, including death threats, after an unidentified person posted a message on an America Online, Inc. (AOL) bulletin board. The message advertised t-shirts with offensive slogans referring to the Oklahoma City bombing of the Alfred P. Murrah Federal Building, and instructed prospective purchasers to call Zeran's home telephone number. Zeran notified AOL of the problem, and the posting was eventually removed. However, similar postings appeared, and an Oklahoma radio announcer aired the contents of the first message. Zeran was again inundated with threatening phone calls. He sued AOL for unreasonable delay in removing the defamatory messages, refusing to post retractions, and failing to screen for similar postings. (*Zeran, supra*, 129 F.3d at pp. 328-329.)

AOL successfully moved for judgment on the pleadings, relying on section 230. (*Zeran, supra*, 129 F.3d at pp. 329-330.) The Fourth Circuit Court of Appeals affirmed, holding that the plain language of section 230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes

courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions-such as deciding whether to publish, withdraw, postpone or alter content-are barred." (*Zeran*, at p. 330.)

Referring to the congressional finding that the Internet has flourished "with a minimum of government regulation" (§ 230(a)(4)), and the policy statement favoring a free market for interactive computer services "unfettered by Federal or State regulation" (§ 230(b)(2)), the *Zeran* court reasoned that Congress viewed "[t]he imposition of tort liability on service providers for the communications of others" as "simply another form of intrusive government regulation of speech." (*Zeran, supra*, 129 F.3d at p. 330.) While original posters of defamatory speech do not escape accountability, Congress "made a policy choice ... not to deter harmful online speech [by] imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." (*Id.* at pp. 330-331.) This policy reflects a concern that if service providers faced tort liability for republished messages on the Internet, they "might choose to severely restrict the number and type of messages posted." (*Id.* at p. 331.)

The court noted that another important purpose of section 230 was "to encourage service providers to self-regulate the dissemination of offensive material over their services." (*Zeran, supra*, 129 F.3d at p. 331.) The legislative history indicates that section 230 was enacted in response to an unreported New York trial court case. (*Stratton Oakmont, Inc. v. Prodigy Services Co.* (N.Y.Sup.Ct. May 24, 1995) 1995 WL 323710, 23 Media L.Rep. 1794 (*Stratton Oakmont* ).) <sup>FN7</sup> There, a service provider was held liable for defamatory comments posted on one of its bulletin boards, based on a finding that the provider had adopted the role of "publisher" by actively screening and editing postings. "Fearing that the specter of liability would ... deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity," which "forbids the imposition of publisher liability on a service provider for the exercise of its editorial and

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self-regulatory functions.” (*Zeran, supra*, 129 F.3d at p. 331.)

\*4 [3] *Zeran* made the same argument adopted by the Court of Appeal here: that Congress intended to distinguish between “publishers” and “distributors,” immunizing publishers but leaving distributors exposed to liability. At common law, “primary publishers,” such as book, newspaper, or magazine publishers, are liable for defamation on the same basis as authors. Book sellers, news vendors, or other “distributors,” however, may only be held liable if they knew or had reason to know of a publication's defamatory content. (*Zeran, supra*, 129 F.3d at p. 331; Prosser & Keeton, *The Law of Torts* (5th ed.1984) § 113, pp. 810-811; Rest.2d Torts, § 581, subd. (1), & coms. c, d, & e, pp. 232-234; see also *Osmond v. EWAP, Inc.* (1984) 153 Cal.App.3d 842, 852-854, 200 Cal.Rptr. 674.)  
FN8 *Zeran* contended that because Congress mentioned only the term “publisher” in section 230, it intended to leave “distributors” unprotected. He claimed that once he gave AOL notice that it was posting defamatory statements on its bulletin board, AOL became liable as a “distributor.” (*Zeran, supra*, 129 F.3d at pp. 331-332.)

[4] The *Zeran* court held that the publisher/distributor distinction makes no difference for purposes of section 230 immunity. Publication is a necessary element of all defamation claims, and includes every repetition and distribution of a defamatory statement. (*Zeran, supra*, 129 F.3d at p. 332, citing Prosser & Keeton, *The Law of Torts, supra*, § 113, pp. 799, 802, 803, and Rest.2d Torts, §§ 558, subd. (b) & 577.) Although “distributors” become liable only upon notice, they are nevertheless included in “the larger publisher category.” (*Zeran, supra*, 129 F.3d at p. 332.) “*Zeran* simply attaches too much importance to the presence of the distinct notice element in distributor liability.... [O]nce a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting. In this respect, *Zeran* seeks to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability-the publisher

role.” (*Id.* at pp. 332-333.)

Subjecting service providers to notice liability would defeat “the dual purposes” of section 230, by encouraging providers to restrict speech and abstain from self-regulation. (*Zeran, supra*, 129 F.3d at p. 333.) A provider would be at risk for liability each time it received notice of a potentially defamatory statement in any Internet message, requiring an investigation of the circumstances, a legal judgment about the defamatory character of the information, and an editorial decision on whether to continue the publication. “Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.” (*Ibid.*)

\*5 “Similarly, notice-based liability would deter service providers from regulating the dissemination of offensive material over their own services. Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to further possible lawsuits, service providers would likely eschew any attempts at self-regulation.

“More generally, notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits. Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply ‘notify’ the relevant service provider, claiming the information to be legally defamatory.... Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.” (*Zeran, supra*, 129 F.3d at p. 333.)

In support of his argument for notice-based liability, *Zeran* invoked the rule against abrogation of common law principles unless Congress speaks directly to the question. (*Zeran, supra*, 129 F.3d at

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pp. 333-334; *United States v. Texas* (1993) 507 U.S. 529, 534, 113 S.Ct. 1631, 123 L.Ed.2d 245.) However, the court reasoned that Congress had spoken directly by employing the term "publisher," and that preserving "distributor" liability would defeat the primary purposes of section 230. The policy of strictly construing statutes in derogation of the common law does not require a literal interpretation conflicting with the obvious legislative purpose. (*Zeran, supra*, 129 F.3d at p. 334, citing *Isbrandtsen Co. v. Johnson* (1952) 343 U.S. 779, 783, 72 S.Ct. 1011, 96 L.Ed. 1294.)

The *Zeran* court's views have been broadly accepted, in both federal and state courts.<sup>FN9</sup> Before the Court of Appeal issued its opinion below, two other California Courts of Appeal had followed *Zeran*. In *Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684, 104 Cal.Rptr.2d 772, a taxpayer sued after her son obtained sexually explicit photographs through an Internet connection at a public library. She sought injunctive relief on various theories of liability. (*Id.* at pp. 690-691, 104 Cal.Rptr.2d 772.) The *Kathleen R.* court held that the state law causes of action were barred by section 230. (*Kathleen R.*, at p. 692, 104 Cal.Rptr.2d 772.) It cited *Zeran* for the rule that section 230(c)(1) immunizes both "publisher[s]" and "distributor[s]." (*Kathleen R.*, at p. 695, fn. 3, 104 Cal.Rptr.2d 772.) It also agreed with the *Zeran* court's analysis of congressional intent. (*Id.* at p. 697, 104 Cal.Rptr.2d 772.)

In *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 121 Cal.Rptr.2d 703, the plaintiffs used eBay's on-line marketing services to purchase sports memorabilia. Claiming the items bore forged autographs, they sued eBay for negligence, unfair trade practices, and violation of Civil Code section 1739.7, which regulates the sale of such collectibles. (*Gentry*, at p. 820, 121 Cal.Rptr.2d 703.) The *Gentry* court ruled that section 230 immunized eBay from liability on all the plaintiffs' claims. It noted the broad scope given to section 230 immunity by the *Zeran* court and others, and reasoned that the plaintiffs were trying to hold eBay responsible for disseminating information provided by the individual sellers who used its service. (*Gentry*, at pp. 828-831, 121 Cal.Rptr.2d 703.)

Regarding the allegation that eBay knew or should have known about the sellers' illegal conduct but failed to prevent it by withdrawing or altering the fraudulent content, the *Gentry* court stated: "This is the classic kind of claim that *Zeran* found to be preempted by section 230, ... one that seeks to hold eBay liable for its exercise of a publisher's traditional editorial functions." (*Id.* at p. 835, 121 Cal.Rptr.2d 703.)

### B. The Court of Appeal Analysis

\*6 Swimming against the jurisprudential tide, the Court of Appeal in this case disputed the ruling in *Zeran*, contending it confers a more expansive immunity than is necessary to preserve freedom of online speech, and would actually defeat the goal of encouraging self-regulation. The Court of Appeal focussed on three factors: (1) the *Zeran* court's interpretation of the statutory term "publisher;" (2) the legislative history of section 230; and (3) the practical implications of notice liability in the Internet environment. We reject the Court of Appeal's analysis on each of these points.

#### 1. The Meaning of "Publisher"

The Court of Appeal acknowledged that publication is an element of defamation, and that "distributors" are sometimes referred to as "secondary publishers." (See, e.g., *Dworkin v. Hustler Magazine, Inc.* (D.C.Wyo.1985) 611 F.Supp. 781, 785; *Hart v. Bennet* (Wis.Ct.App.2003) 267 Wis.2d 919, 672 N.W.2d 306, 318, fn. 14; Prosser & Keeton, *The Law of Torts, supra*, § 113, at p. 803, 672 N.W.2d 306; Smolla, *The Law of Defamation* (2d ed.2005) § 4:92, p. 4-140.15.) However, the court pronounced it "reasonable to assume" that Congress had in mind the different standards of common law liability imposed on "primary publishers," who have control over content, and "distributors," who do not. Thus, the omission of any reference to "distributors" in section 230(c)(1) was arguably intentional.

The Court of Appeal noted that the goal of discouraging excessive self-censorship by immunizing publishers is at odds with the rights of

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individuals to recover for defamatory falsehood. It deemed the term "publisher" ambiguous, because it might refer to primary publishers only or to both primary publishers and distributors. According to the Court of Appeal, such a "legally uncertain word" could not support the broad immunity the *Zeran* court derived from the statute. It found nothing in the statutory findings and declarations to indicate that Congress considered online speech in need of blanket protection. Indeed, it detected a contrary intent in the terms of section 230(c)(2), which immunizes providers and users against liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be ... objectionable, whether or not such material is constitutionally protected" or to provide others with "the technical means to restrict access to [such] material." The Court of Appeal reasoned that section 230(c)(2) would be superfluous if all "publishers" enjoyed absolute immunity under section 230(c)(1).

The Court of Appeal sought further support for limiting the scope of the term "publisher" to primary publishers by comparing the immunity provisions of the CDA with those of the Digital Millennium Copyright Act, enacted in 1998 (DMCA; 17 U.S.C. § 512).<sup>FN10</sup> The DMCA immunizes Internet service providers from liability for copyright infringement if the provider is unaware of the infringement and acts expeditiously to remove the copyrighted material upon notice. It includes detailed notice requirements, and procedures for replacement of the disputed material upon sufficient counter-notification. (17 U.S.C. § 512(c) & (g).) Because Congress did not include such specific regulation of notice liability in the CDA, the Court of Appeal decided it had failed to "speak directly" to the issue, thus preserving common law distributor liability. (See *United States v. Texas*, *supra*, 507 U.S. at p. 534.)

\*7 We conclude the *Zeran* court's construction of the term "publisher" is sound. The terms of section 230(c)(1) are broad and direct: "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." Given that "distributors" are also

known as "secondary publishers," there is little reason to believe Congress felt it necessary to address them separately. There is even less reason to suppose that Congress intended to immunize "publishers" but leave "distributors" open to liability, when the responsibility of publishers for offensive content is greater than that of mere distributors. The Court of Appeal failed to respond to the *Zeran* court's point that once online distributors are notified of defamatory content, they are placed in a position traditionally occupied by publishers, and must make an editorial decision on how to treat the posted material. (*Zeran*, *supra*, 129 F.3d at p. 332.) This is a persuasive justification for giving the term "publisher" an inclusive interpretation. (See, e.g., *Gentry v. eBay, Inc.*, *supra*, 99 Cal.App.4th at p. 835, 121 Cal.Rptr.2d 703; *Green v. America Online*, *supra*, 318 F.3d at p. 471; *Donato v. Moldow*, *supra*, 865 A.2d at pp. 725-726; *Schneider v. Amazon.com, Inc.*, *supra*, 31 P.3d at pp. 41-42.)

We are not convinced by the Court of Appeal's reasoning that a broad reading of section 230(c)(1) would make section 230(c)(2) unnecessary. These provisions address different concerns. Section 230(c)(1) is concerned with liability arising from information *provided* online. Section 230(c)(2) is directed at actions taken by Internet service providers or users to *restrict* access to online information.<sup>FN11</sup> Liability for censoring content is not ordinarily associated with the defendant's status as "publisher" or "speaker." Those terms, employed in section 230(c)(1), are drawn from the law of defamation. (See, e.g., Prosser & Keeton, *The Law of Torts*, *supra*, § 113, at p. 803; Rest.2d Torts, § 568.) Section 230(c)(1) provides immunity from claims by those offended by an online publication, while section 230(c)(2) protects against claims by those who might object to the restriction of access to an online publication.

The Court of Appeal's reference to the DMCA does not support its conclusion that Congress's use of the term "publisher" was insufficient to abrogate "distributor" liability. To the contrary, the DMCA shows that Congress has crafted a limited immunity in a closely related context, with specific provision for notice liability. (17 U.S.C. § 512(c).) The fact

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that it did not do so in the CDA, and has not amended section 230 to add a similar provision in the 10 years since it was enacted, or in the eight years since the example of the DMCA has been in existence, strongly supports the conclusion that Congress did not intend to permit notice liability under the CDA. <sup>FN12</sup>

\*8 We note that it is far from clear how the distinction between traditional print publishers and distributors would apply in the Internet environment, with its many and various forms of discourse. (See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 850-853, 117 S.Ct. 2329, 138 L.Ed.2d 874.) As the high court noted, “[a]ny person or organization with a computer connected to the Internet can ‘publish’ information.” (*Id.* at p. 853.) Whenever such information is copied from another source, its publication might also be described as a “distribution.” The distinction proposed by the Court of Appeal, based on rules developed in the post-Gutenberg, pre-cyberspace world, would foster disputes over which category the defendant should occupy. The common law of defamation would provide little guidance.

In this case, for example, Rosenthal could claim that her active role in selecting and posting material disparaging plaintiffs qualified her as a primary publisher. Her participation in the dissemination of the Bolen article, particularly considered in light of her other alleged verbal attacks on plaintiffs, arguably went beyond mere distribution. (See Prosser & Keeton, *The Law of Torts*, *supra*, § 113, at p. 803; Smolla, *The Law of Defamation*, *supra*, § 4:92, p. 4-140.15; Rest.2d Torts, § 568.) The Court of Appeal provided no analysis justifying its conclusion that Rosenthal could be held liable as a “distributor,” noting only that she alleged no facts preventing her from being so characterized. We need not decide the question, but certainly the argument could be made that plaintiffs’ allegations cast Rosenthal in the role of a “publisher.”

## 2. The Legislative History

The Court of Appeal noted that section 230 was

enacted along with other CDA provisions that prohibited the knowing transmission of “obscene or indecent” or “patently offensive” messages to persons under the age of 18.<sup>FN13</sup> It reasoned that immunizing Internet service providers and users from “primary publisher” liability advanced a similar purpose by protecting those providers and users who try but fail to identify and remove offensive material. However, according to the Court of Appeal, immunization from “distributor” liability would be inconsistent with this goal because it would protect providers and users who make no effort to screen for offensive material, along with those who refuse to take action once on notice.

The Court of Appeal claimed support for this view in the legislative history of section 230, though it conceded that the history is “meager.” (See Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet* (1997) 61 Alb. L.Rev. 147, 168 (hereafter Sheridan).) The court recognized that section 230 was enacted to remove the disincentives to self-regulation created by the *Stratton Oakmont* case, in which a service provider was held liable as a primary publisher because it actively screened and edited messages posted on its bulletin boards. (*Stratton Oakmont*, *supra*, 1995 WL 323710, 23 Media L.Rep. 1794; see *Zeran*, *supra*, 129 F.3d at p. 331; fn. 7, *ante.*) However, the Court of Appeal considered an earlier Internet defamation case to be equally important in ascertaining the purpose of section 230.

\*9 In *Cubby, Inc. v. CompuServe, Inc.* (S.D.N.Y.1991) 776 F.Supp. 135, a journalist claimed he was defamed by a competitor’s remarks posted on an Internet forum provided by CompuServe. (*Id.* at pp. 137-138.) The court applied the common law “distributor” standard of liability, concluding the forum was essentially an electronic library over which CompuServe exercised little or no editorial control. (*Id.* at pp. 139-140.) Because there was no evidence CompuServe knew or had reason to know of the statements, the court granted it summary judgment. (*Id.* at p. 141.)

The Court of Appeal noted that *Cubby* was

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distinguished in *Stratton Oakmont*, and also in comments by the sponsors of section 230. As related in a law review article relied on by the court, "Representative Cox, one of two sponsors of the immunity provision, characterized the imposition of distributor liability in *Cubby* as holding that CompuServe 'was not the publisher or editor' of the material. He clearly used the term 'publisher' to exclude parties held to the distributor liability standard applied to CompuServe in that case. 141 Cong. Rec. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). The provision's sponsors summarized both the *Cubby* and *Stratton [Oakmont]* decisions, and then repeatedly discussed the need to overrule *Stratton [Oakmont]*, without again mentioning *Cubby*. See [141 Cong.Rec. H8469 (daily ed. Aug. 4, 1995) (statements of Rep. Cox and Rep. Wyden); see also 141 Cong.Rec. S8345 (daily ed. June 14, 1995) (statements of Sen. Coats) (distinguishing between publisher and distributor liability and noting that the [CDA] was not intended to hold intermediaries to publisher liability)." (Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation* (2001) 14 Harv. J.L. & Tech. 569, 632, fn. 259 (hereafter Freiwald).)

From these sources, the Court of Appeal discerned a congressional intent to preserve "distributor" liability. It cited several academic commentators for the view that immunizing Internet service providers from "distributor" liability would actually frustrate the objective of self-regulation, because no liability would flow from failing to screen for defamatory content. (McManus, *Rethinking Defamation Liability for Internet Service Providers* (2001) 35 Suffolk U. L.Rev. 647, 668 (hereafter McManus); Patel, *Immunizing Internet Service Providers From Third Party Internet Defamation Claims: How Far Should Courts Go?* (2002) 55 Vand. L.Rev. 647, 684; see also Sheridan, *supra*, 61 Alb. L.Rev. at pp. 169-170.)

The Court of Appeal and the commentators on which it relied read too much into the legislative record. We note that the comments of Senator Coats, summarized by Professor Freiwald as quoted above, pertained not to section 230 but to a separate provision of the CDA, codified at 47 United States

Code section 223(f)(4). (141 Cong.Rec. S8328, S8345 (daily ed. June 14, 1995).) The comments of Representative Cox, a sponsor of section 230, are pertinent but do not indicate that distributors were meant to be excluded from statutory protection. FN14

\*10 Representative Cox said section 230 was intended to "encourage people like ... CompuServe .. by ... protect[ing] them from taking on liability such as occurred in the [*Stratton Oakmont*] case in New York that they should not face for helping us [ ] solve this problem." (141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995).) Thus, he meant that "distributors" like CompuServe would be protected from rather than threatened with liability, to encourage responsible screening of the content provided on their services. Under the Court of Appeal's interpretation of section 230, a "distributor" could be sued if it deleted material after receiving notice of offensive content, but did not act quickly or thoroughly enough to suit the offended party. Primary "publishers" who decide not to remove offensive postings would be immunized, while "distributors" making the same decision would be unprotected. It is unlikely that Congress intended such incongruous results.

[5] Both the terms of section 230(c)(1) and the comments of Representative Cox reflect the intent to promote active screening by service providers of online content provided by others. Congress implemented its intent not by maintaining the common law distinction between "publishers" and "distributors," but by broadly shielding all providers from liability for "publishing" information received from third parties. FN15 Congress contemplated self-regulation, rather than regulation compelled at the sword point of tort liability. It chose to protect even the most active Internet publishers, those who take an aggressive role in republishing third party content. It would be anomalous to hold less active "distributors" liable upon notice. Thus, the immunity conferred by section 230 applies even when self-regulation is unsuccessful, or completely unattempted. (*Blumenthal v. Drudge, supra*, 992 F.Supp. at p. 52; *Schneider v. Amazon.com, Inc., supra*, 31 P.3d at p. 43; *Donato v. Moldow, supra*, 865 A.2d at p. 726.)

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[6] As Rosenthal and amici curiae point out, subsequent legislative history contains explicit support for the *Zeran* court's interpretation. In 2002, Congress enacted the Dot Kids Implementation and Efficiency Act.<sup>FN16</sup> A House committee report notes that the purpose of this legislation was "to facilitate the creation of a new, second-level Internet domain within the United States country code domain that will be a haven for material that promotes positive experiences for children and families using the Internet." (H.R. Rep. 107-449 (2002) p. 5) The legislation includes a provision that the new registry it created, and related entities, "are deemed to be interactive computer services for purposes of section 230(c) of the Communications Act of 1934 (47 U.S.C. 230(c))." (47 U.S.C. § 941(e)(1).) The committee report explains that this provision was "intended to shield the 'kids.us' registry, registrars, and parties who contract with the registry, from liability based on self-policing efforts to intercept and take down material that is not 'suitable for minors' or is 'harmful to minors.'" The Committee notes that ISPs [Internet service providers] have successfully defended many lawsuits using section 230(c). The courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence[.] (See, e.g., *Doe v. America Online*, 783 So.2d 1010 (Fla.2001)) and defamation (*Ben Ezra, Weinstein, and Co. v. America Online*, 206 F.3d 980 (2000); *Zeran v. America Online*, 129 F.3d 327 (1997)). The Committee intends these interpretations of section 230(c) to be equally applicable to those entities covered by H.R. 3833."<sup>FN17</sup> (H.R.Rep.107-449, p. 13.)

### 3. Practical Implications of Notice Liability

\*11 The *Zeran* court identified three deleterious effects that would flow from reading section 230 to permit liability upon notice. First, service providers who received notification of a defamatory message would be subject to liability only for maintaining the message, not for removing it. This fact, together with the burdens involved in evaluating the defamatory character of a great number of protested messages, would provide a natural incentive to simply remove messages upon notification, chilling

the freedom of Internet speech. Second, notice-based liability would deter service providers from actively screening the content of material posted on its service, because discovering potentially defamatory material would only increase the provider's liability. Finally, notice-based liability would give third parties a cost-free means of manufacturing claims, imposing on providers "ceaseless choices of suppressing controversial speech or sustaining prohibitive liability." (*Zeran, supra*, 129 F.3d at p. 333.)

The Court of Appeal expressed doubt that a statute encouraging service providers to restrict access to offensive material was intended to promote free speech over the Internet. It also questioned the "speculative conclusion" that notice-based liability would significantly chill online speech, though it refrained from taking a definitive position on this point. Noting the absence of any evidence in the record regarding the burdens such liability would create, the Court of Appeal referred to the views of commentators critical of *Zeran* as a way to explore the contours of the debate without attempting its resolution. (See *Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1363, 1 Cal.Rptr.3d 32, 71 P.3d 296.)

Some critics have suggested that market forces would restrain service providers from removing postings without investigation, because any provider engaging in that practice would acquire a bad reputation in the Internet community. (Sheridan, *supra*, 61 Alb. L.Rev. at pp. 176; Freiwald, *supra*, 14 Harv. J.L. & Tech. at p. 622; Butler, *Plotting the Return of an Ancient Tort to Cyberspace: Towards a New Federal Standard of Responsibility for Defamation for Internet Service Providers* (1999-2000) 6 Mich. Telecomm. & Tech.L.Rev. 247, 264.) It has also been argued that the difficulty of prevailing on a defamation claim would attenuate the burden of notice-based liability on providers. Moreover, because "distributor" liability would only arise upon notice, and would not require service providers to review postings in advance, defamation damages would be limited to those accruing after the provider became aware of the defamatory character of a message. (Sheridan, *supra*, 61 Alb. L.Rev. at p. 173.)

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Citing *McManus*, *supra*, 35 Suffolk U. L.Rev. at page 661, the Court of Appeal asserted that *Zeran* has been criticized for failing to account for the many different ways defamation may be transmitted over the Internet, and the different levels of control an Internet intermediary may exercise over the content of messages. Most fundamentally, however, the Court of Appeal noted that critics have condemned *Zeran* for giving insufficient consideration to the interests of defamation victims. American courts have striven to develop rules that balance the legitimate protections of defamation liability with the constitutional right to free speech. The Court of Appeal resisted the notion that a blanket immunity derived from section 230(c)(1) should disturb that balance. It concluded that preserving “distributor” liability was consistent with the immunity provisions of section 230.

\*12 The Court of Appeal gave insufficient consideration to the burden its rule would impose on Internet speech. It is inaccurate to suggest that Congress was indifferent to free speech protection when it enacted section 230. The statute includes findings welcoming the “extraordinary advance in the availability of educational and informational resources” on the Internet, and applauding the Internet as a “forum for a true diversity of political discourse” that offers “myriad avenues for intellectual activity” and provides “a variety of political, educational, cultural, and entertainment services.” (§ 230(a)(1), (3), & (5).) Congress sought to “promote the continued development of the Internet and other interactive computer services.” (§ 230(b)(1).) The provisions of section 230(c)(1), conferring broad immunity on Internet intermediaries, are themselves a strong demonstration of legislative commitment to the value of maintaining a free market for online expression.

The fact that Congress also meant to restrict access to certain Internet content does not compel a contrary conclusion. As the court aptly observed in *Batzel v. Smith*, *supra*, 333 F.3d 1018: “[T]here is an apparent tension between Congress’s goals of promoting free speech while at the same time giving parents the tools to limit the material their children can access over the Internet. As a result of this

apparent tension, some commentators have suggested that the Fourth Circuit in *Zeran* imposed .. First Amendment goals on legislation that was actually adopted for the speech-restrictive purpose of controlling the dissemination of content over the Internet. [Citation.] These critics fail to recognize that laws often have more than one goal in mind, and that it is not uncommon for these purposes to look in opposite directions. The need to balance competing values is a primary impetus for enacting legislation. Tension within statutes is often not a defect but an indication that the legislature was doing its job.” (*Id.* at p. 1028; see also *Carafano v. Metrosplash.com, Inc.*, *supra*, 339 F.3d at pp. 1122-1123.)

We agree with the *Zeran* court, and others considering the question, that subjecting Internet service providers and users to defamation liability would tend to chill online speech. (See *Carafano v. Metrosplash.com, Inc.*, *supra*, 339 F.3d at pp. 1123-1124; *Batzel v. Smith*, *supra*, 333 F.3d at pp. 1027-1028; *Noah v. AOL Time Warner, Inc.* (E.D.Va.2003) 261 F.Supp.2d 532, 538; *Blumenthal v. Drudge*, *supra*, 992 F.Supp. at p. 52; *Donato v. Moldow*, *supra*, 865 A.2d at p. 726.) Certainly, that conclusion is no more speculative than the surmise that market forces might deter providers from removing postings without investigating their defamatory character.

We reject the argument that the difficulty of prevailing on a defamation claim mitigates the deterrent effect of potential liability. Defamation law is complex, requiring consideration of multiple factors. These include whether the statement at issue is true or false, factual or figurative, privileged or unprivileged, whether the matter is of public or private concern, and whether the plaintiff is a public or private figure. (See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §§ 529, 556 et seq., pp. 782, 814 et seq.) Any investigation of a potentially defamatory Internet posting is thus a daunting and expensive challenge. For that reason, we have observed that even when a defamation claim is “clearly nonmeritorious,” the threat of liability “ultimately chills the free exercise of expression.” (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 268, 228 Cal.Rptr. 206, 721 P.2d 87;

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see also *Time, Inc. v. Hill* (1967) 385 U.S. 374, 389, 87 S.Ct. 534, 17 L.Ed.2d 456.)

\*13 [7] Nor are we convinced by the observation that a “distributor” faces no liability without notice. Distributors are liable not merely upon receiving notice from a third party, but also if they independently “knew or had reason to know” of the defamatory statement. (*Osmond v. EWAP, Inc.*, *supra*, 153 Cal.App.3d 842, 854, 200 Cal.Rptr. 674; Prosser & Keeton, *The Law of Torts*, *supra*, § 113, pp. 811; Rest.2d Torts, § 581, subd. (1).) Thus, as the *Zeran* court pointed out, this aspect of distributor liability would discourage active monitoring of Internet postings. (*Zeran*, *supra*, 129 F.3d at p. 333.) It could also motivate providers to insulate themselves from receiving complaints. Such responses would frustrate the goal of self-regulation.

The third practical implication noted in *Zeran* is no less compelling, and went unaddressed by the Court of Appeal. Notice-based liability for service providers would allow complaining parties to impose substantial burdens on the freedom of Internet speech by lodging complaints whenever they were displeased by an online posting. (*Zeran*, *supra*, 129 F.3d at p. 333.) The volume and range of Internet communications make the “heckler’s veto” a real threat under the Court of Appeal’s holding. The United States Supreme Court has cautioned against reading the CDA to confer such a broad power of censorship on those offended by Internet speech. (*Reno v. American Civil Liberties Union*, *supra*, 521 U.S. at p. 880.)

The great variety of Internet publications, and the different levels of content control that may be exercised by service providers and users, do not undermine the conclusion that Congress intended to create a blanket immunity from tort liability for online republication of third party content. Requiring providers, users, and courts to account for the nuances of common law defamation, and all the various ways they might play out in the Internet environment, is a Herculean assignment that we are reluctant to impose. We conclude the *Zeran* court accurately diagnosed the problems that would attend notice-based liability for service providers.

[8][9] Finally, we cannot ignore another practical implication raised by Rosenthal and amicus curiae eBay Inc. Adopting a rule of liability under section 230 that diverges from the rule announced in *Zeran* and followed in all other jurisdictions would be an open invitation to forum shopping by defamation plaintiffs. (Cf. *Webb v. Superior Court* (1990) 225 Cal.App.3d 990, 1000, 275 Cal.Rptr. 581.) This consideration provides strong justification for following the approach we endorsed in *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320-321, 93 Cal.Rptr.2d 36, 993 P.2d 366: “While we are not bound by decisions of the lower federal courts, even on federal questions, they are persuasive and entitled to great weight. [Citation.] Where lower federal precedents are divided or lacking, state courts must necessarily make an independent determination of federal law [citation], but where the decisions of the lower federal courts on a federal question are ‘both numerous and consistent,’ we should hesitate to reject their authority [citation].” FN18

### C. “User” Liability

\*14 [10] The “distributor” liability theory endorsed by the Court of Appeal recognizes no distinction between Internet service providers and individuals. Individual Internet “users” like Rosenthal, however, are situated differently from institutional service providers with regard to some of the principal policy considerations discussed by the *Zeran* court and reflected in the Congressional Record. In particular, individuals do not face the massive volume of third-party postings that providers encounter. Self-regulation is a far less challenging enterprise for them. Furthermore, service providers, no matter how active or passive a role they take in screening the content posted by users of their services, typically bear less responsibility for that content than do the users. Users are more likely than service providers to actively engage in malicious propagation of defamatory or other offensive material. These considerations bring into question the scope of the term “user” in section 230, and whether it matters if a user is engaged in active or passive conduct for purposes of the statutory immunity.

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[11] "User" is not defined in the statute, and the limited legislative record does not indicate why Congress included users as well as service providers under the umbrella of immunity granted by section 230(c)(1). The standard rules of statutory construction, however, yield an unambiguous result. We must begin with the language employed by Congress and the assumption that its ordinary meaning expresses the legislative purpose. (*Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.* (2004) 541 U.S. 246, 252, 124 S.Ct. 1756, 158 L.Ed.2d 529; see also *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715, 3 Cal.Rptr.3d 623, 74 P.3d 726.) "User" plainly refers to someone who uses something, and the statutory context makes it clear that Congress simply meant someone who uses an interactive computer service.

Section 230(c)(1) refers directly to the "user of an interactive computer service." Section 230(f)(2) 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...." Section 230(a)(2) notes that such services "offer users a great degree of control over the information that they receive," and section 230(b)(3) expresses Congress's intent "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." Thus, Congress consistently referred to "users" of interactive computer services, specifically including "individuals" in section 230(b)(3).

There is no reason to suppose that Congress attached a different meaning to the term "user" in section 230(c)(1). (See *Gustafson v. Alloyd Co., Inc.* (1995) 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2d 1; *Hassan v. Mercy American River Hospital*, *supra*, 31 Cal.4th at p. 716, 3 Cal.Rptr.3d 623, 74 P.3d 726.) Rosenthal used the Internet to gain access to newsgroups where she posted Bolen's article about Polevoy. She was therefore a "user" under the CDA, as the parties conceded below. Nor is there any basis for concluding that Congress

intended to treat service providers and users differently when it declared that "[n]o provider or user of an interactive computer service shall be treated as [a] publisher or speaker ...." (§ 230(c)(1).) We cannot construe the statute so as to render the term "user" inoperative. (*Duncan v. Walker* (2001) 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251; *Hassan v. Mercy American River Hospital*, *supra*, 31 Cal.4th at pp. 715-716, 3 Cal.Rptr.3d 623, 74 P.3d 726.) We note that in cases where an individual's role as operator of a Web site raised a question as to whether he was a "service provider" or a "user," the courts found it unnecessary to resolve the issue because the statute confers immunity on both. (*Batzel v. Smith*, *supra*, 333 F.3d at p. 1030; *Donato v. Moldow*, *supra*, 865 A.2d at p. 719; see also *Barrett v. Fonorow*, *supra*, 279 Ill.Dec. 113, 799 N.E.2d at pp. 919, 922.)

\*15 [12] Polevoy urges us to distinguish between "active" and "passive" Internet use, and to restrict the statutory term "user" to those who engage in passive use. He notes that subdivisions (a)(2) and (b)(3) of section 230 refer to information "received" by users. He also observes that the caption of subdivision (c) is "Protection for 'good samaritan' blocking and screening of offensive material." From these premises, Polevoy reasons that the term "user" must be construed to refer only to those who receive offensive information, and those who screen and remove such information from an Internet site. He argues that those who actively post or republish information on the Internet are "information content providers" unprotected by the statutory immunity. "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 ...." (§ 230(f)(3).)

Polevoy's view fails to account for the statutory provision at the center of our inquiry: the prohibition in section 230(c)(1) against treating any "user" as "the publisher or speaker of any information provided by another information content provider." A user who merely receives information on a computer without making it available to anyone else would be neither a "publisher" nor a "speaker." Congress obviously had

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a broader meaning in mind. Nor is it clear how a user who removes a posting may be deemed "passive" while one who merely allows a posting to remain online is "active." Furthermore, Congress plainly did not intend to deprive all "information content providers" of immunity, because the reference to "another" such provider in section 230(c)(1) presumes that the immunized publisher or speaker is also an information content provider. (See *Carafano v. Metroplash.com, Inc.*, *supra*, 339 F.3d at p. 1125; *Donato v. Moldow*, *supra*, 865 A.2d at p. 720.)<sup>FN19</sup>

The distinction between "active" and "passive" use was explored in *Batzel v. Smith*, *supra*, 333 F.3d 1018. Smith sent an e-mail to the operator of a Web site devoted to museum security and stolen art, accusing Batzel of possessing paintings that may have been stolen by the Nazis during World War II. The operator posted the message on the Web site, with some changes, and distributed it to the subscribers of his e-mail newsletter. Batzel sued Smith and the operator for defamation. The trial court denied the operator's motion to strike the complaint under the California anti-SLAPP statute ( Code Civ. Proc., § 425.16). (*Batzel*, at pp. 1020-1023.)

The court of appeals vacated the order denying the motion, remanded, and directed the trial court to determine whether the operator should reasonably have known Smith intended his e-mail to be published on the Internet. If not, the court reasoned the message was not "provided" by another "information content provider" under section 230, and the operator would not be immune from liability.<sup>FN20</sup> (*Batzel v. Smith*, *supra*, 333 F.3d at p. 1035.) The relevant discussion for our purposes arose from the dissent expressed in a concurring and dissenting opinion.

\*16 The *Batzel* dissent criticized the majority for adopting a rule that provides Internet intermediaries with immunity to spread information intended for republication, "licens[ing] professional rumor-mongers and gossip-hounds to spread false and hurtful information with impunity." (*Batzel v. Smith*, *supra*, at p. 1038 (conc. & dis. opn. of Gould, J.)) The dissent proposed a rule based on

the defendant's actions instead of the author's intent. It would "hold that the CDA immunizes a defendant only when the defendant took no active role in selecting the questionable information for publication. If the defendant took an active role in selecting information for publication, the information is no longer 'information provided by another' within the meaning of § 230." (*Ibid.*)

The dissent reasoned that information actively selected for republication has been "transformed ... bolstered, [and] strengthened to do more harm if it is wrongful." (*Batzel v. Smith*, *supra*, 333 F.3d at p. 1038 (conc. & dis. opn. of Gould, J.)) It acknowledged that service providers cannot be expected to screen the millions of messages sent over their networks for offensive content. However, it argued that a person who does actively screen communications to select some for republication is able to detect defamatory content and should not be immunized. The dissent would grant immunity to bulletin board moderators and the like if they did not actively select among messages for publication, but would expose them to liability if they made a conscious decision to disseminate a particular defamatory communication. Congress's goal of encouraging self-regulation would be furthered, according to the dissent, because those who remove all or part of an offensive message would be immune. The dissenting justice did not believe Congress intended to immunize those who select defamatory information for distribution on the Internet. (*Id.* at pp. 1039-1040.)<sup>FN21</sup>

The *Batzel* majority responded that no logical distinction can be drawn between a defendant who actively selects information for publication and one who screens submitted material, removing offensive content. "The scope of the immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance." (*Batzel v. Smith*, *supra*, 333 F.3d at p. 1032.) We agree with this reasoning. Furthermore, we reject the dissent's view that actively selected and republished information is no longer "information provided by another information content provider" under section 230(c)(1). All republications involve a "transformation" in some sense. A user who

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actively selects and posts material based on its content fits well within the traditional role of "publisher." Congress has exempted that role from liability.

As Rosenthal points out, the congressional purpose of fostering free speech on the Internet supports the extension of section 230 immunity to active individual "users." It is they who provide much of the "diversity of political discourse," the pursuit of "opportunities for cultural development," and the exploration of "myriad avenues for intellectual activity" that the statute was meant to protect. (§ 230(a)(3).) The approach taken by the *Batzel* dissent would tend to chill the free exercise of Internet expression, and could frustrate the goal of providing an incentive for self-regulation. A user who removed some offensive content might face liability for "actively selecting" the remaining material. Users in this position, no less than the service providers discussed by the *Zeran* court, would be motivated to delete marginally offensive material, restricting the scope of online discussion. Some users, at least those like Rosenthal who engage in high-volume Internet posting, might be discouraged from screening third party content. Although individual users may face the threat of liability less frequently than institutional service providers, their lack of comparable financial and legal resources makes that threat no less intimidating.

\*17 We conclude there is no basis for deriving a special meaning for the term "user" in section 230(c)(1), or any operative distinction between "active" and "passive" Internet use. By declaring that no "user" may be treated as a "publisher" of third party content, Congress has comprehensively immunized republication by individual Internet users.

#### D. Conclusion

[13] 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 permit Internet service providers or users to be sued as "distributors," nor does it expose "active users" to liability.

Plaintiffs are free under section 230 to pursue the originator of a defamatory Internet publication. Any further expansion of liability must await Congressional action.

### III. DISPOSITION

The judgment of the Court of Appeal is reversed.

WE CONCUR: GEORGE, C.J., and KENNARD, BAXTER, WERDEGAR, CHIN and MORENO, JJ. MORENO, J.

#### CONCURRING OPINION BY MORENO, J.

I concur in the majority opinion. Although there may be a considerable gap between the specific wrongs Congress was intending to right in enacting the immunity at issue here and the broad statutory language of that immunity, that gap is ultimately for Congress, rather than the courts, to bridge. I write separately to express the view that publishers that conspire with original content providers to defame would not be covered by the immunity provided by title 47 United States Code section 230(c)(1) and (e)(3) (hereafter section 230). I further explain why there is no prima facie showing of conspiracy in the present case.

Section 230(c)(1) states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Section 230(e)(3) states in part: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." The majority correctly concludes that this

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immunity statute does not distinguish between publishers and distributors or between active and passive users. But in my view, this immunity would not apply if the “user” is in a conspiracy with the “information content provider” providing the information.

My interpretation is based first on the language of the statute. Section 230(c)(1) applies only to information provided by “another content provider.” (Italics added.) A fair reading of this language suggests that the statute was contemplating an authentic transfer of information between two independent parties. But this transfer does not really occur in a conspiracy to defame, nor are the parties themselves authentically independent. In a conspiracy “ ‘ ‘ [T]here must be a preconceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy.’ “ ‘ ‘ (Fibreboard Corp. v. Hartford Accident & Indemnity Co. (1993) 16 Cal.App.4th 492, 510, 20 Cal.Rptr.2d 376, italics omitted.) When, for example, two parties conspire to defame someone, agreeing that one party will play the role of “user” and the other, judgment proof, party will play the role of original “content provider,” then the transfer of information that occurs between the two is a sham, a mere vehicle for the defamation. I do not believe the statutory immunity is intended to apply in such circumstances.

\*18 My conclusion is also supported by the legislative history. As the majority states, quoting the seminal case of *Zeran v. America Online, Inc.* (4th Cir.1997) 129 F.3d 327: “the *Zeran* court reasoned that Congress viewed ‘[t]he imposition of tort liability on service providers for the communications of others’ as ‘simply another form of intrusive government regulation of speech.’ ( *Zeran, supra*, 129 F.3d at p. 330.) While original posters of defamatory speech do not escape accountability, Congress ‘made a policy choice ... not to deter harmful online speech [by] imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.’ (*Id.* at pp. 330-331.) ... ¶ The court noted that another important purpose of section 230 was ‘to encourage service providers to self-regulate the dissemination of offensive material over their

services.’ (*Zeran, supra*, 129 F.3d at p. 331.) ... ‘ Fearing that the specter of liability would ... deter service providers from blocking and screening offensive material, Congress enacted § 230’s broad immunity,’ which forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.’ (*Zeran, supra*, 129 F.3d at p. 331.)” (Maj. opn., ante, at pp. 7-8.)

Unlike the Internet service provider, or even the typical user of an interactive computer service, one engaged in a tortious conspiracy with the original information content provider is hardly one of the neutral “intermediaries” that Congress intended to absolve of liability. Imposing liability on such conspirators would not cause service providers to curtail the robust Internet communication they facilitate nor inhibit them from engaging in self-regulation of offensive material. Rather, imposition of liability on those who conspire to defame on the Internet supports Congress’s intent to impose liability on “original posters of defamatory speech” (maj. opn., ante, at p. 7), discouraging collusive arrangements that are designed to maximize the original poster’s impact and/or minimize his or her liability.

The question then is whether there is a sufficient showing of conspiracy to defame in this case. In order to defeat a motion to strike made pursuant to the anti-SLAPP (strategic lawsuit against public participation) statute, when it has been determined that the cause of action against the defendants arises from acts in furtherance of the exercise of free speech or other protected activity under Code of Civil Procedure section 425.16, “the plaintiff “ must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” ‘ “ (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89, 124 Cal.Rptr.2d 530, 52 P.3d 703.) Plaintiffs alleged in their complaint that Rosenthal, Tim Bolen, and other defendants conspired to defame them. Because the trial court concluded that the only potentially defamatory statement was made against Dr. Terry Polevoy, and because it is uncontroverted that Bolen was the originator of that

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statement, plaintiffs can only prevail if they make a prima facie showing that Rosenthal and Bolen conspired to defame Dr. Polevoy.

\*19 I conclude that plaintiffs have failed to make that showing. The uncontroverted evidence is that Rosenthal did not know of Dr. Polevoy until she read Bolen's e-mail containing the alleged defamatory statement that Polevoy stalked Canadian radio producer Christine McPhee. Rosenthal called McPhee, who confirmed Bolen's statement. Her republication of the defamation occurred after that call.

It is true that Rosenthal and Bolen knew each other before the alleged defamatory e-mail was posted and reposted and that they shared some similar views about alternative medicine. It also may well be true that Rosenthal's investigation of Dr. Polevoy's incident with McPhee fell considerably short of the type of investigation a reasonable person would undertake before republishing potentially defamatory material, inasmuch as she did not contact the appropriate law enforcement authorities to corroborate McPhee's story. But these facts are not sufficient to establish a prima facie case of conspiracy to defame Dr. Polevoy, i.e., a preconceived plan and unity of design and purpose on the part of Rosenthal and Bolen to defame.<sup>FN1</sup>

It is a closer question whether plaintiffs could have shown a prima facie case of conspiracy by Bolen and Rosenthal against Dr. Stephen Barrett, since Bolen and Rosenthal appeared to have shared a history of hostility toward Dr. Barrett. As the lower courts correctly concluded, however, none of the hostile comments against Dr. Barrett alleged in the complaint are defamatory.

I therefore conclude the majority is correct in reversing the judgment of the Court of Appeal.

FN1. Public Law No. 104-104 (Feb. 8, 1996) 110 Statutes at Large 56. Hereafter, we refer to 47 United States Code section 230 as section 230, and to the Communications Decency Act of 1996 as the CDA.

FN2. The complaint summarizes the defamatory statements as follows:

"Dr. Barrett is arrogant, bizarre, closed-minded; emotionally disturbed, professionally incompetent, intellectually dishonest, a dishonest journalist, sleazy, unethical, a quack, a thug, a bully, a Nazi, a hired gun for vested interests, the leader of a subversive organization, and engaged in criminal activity (conspiracy, extortion, filing a false police report, and other unspecified acts.)"

"Dr. Polevoy is dishonest, closed-minded; emotionally disturbed, professionally incompetent, unethical, a quack, a fanatic, a Nazi, a hired gun for vested interests, the leader of a subversive organization, and engaged in criminal activity (conspiracy, stalking of females, and other unspecified acts) and has made anti-Semitic remarks."

FN3. For a description of Internet newsgroups, see *Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 851, 117 S.Ct. 2329, 138 L.Ed.2d 874.

FN4. Before reaching the immunity issue, the Court of Appeal rejected plaintiffs' argument that Rosenthal's speech was not protected by the anti-SLAPP statute. Plaintiffs contended the free speech clause of the California Constitution did not apply because no state action was involved in Rosenthal's Internet publications. In their answer to the petition for review, plaintiffs asked us to review and reverse that part of the Court of Appeal's decision.

The Court of Appeal properly rejected plaintiffs' claim. Web sites accessible to the public, like the "newsgroups" where Rosenthal posted Bolen's statement, are "public forums" for purposes of the anti-SLAPP statute. (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1247, 29 Cal.Rptr.3d 521; *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 895, 17 Cal.Rptr.3d 497; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993,



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1007, 113 Cal.Rptr.2d 625; *MCSi, Inc. v. Woods* (N.D.Cal.2003) 290 F.Supp.2d 1030, 1033; see also *New.Net, Inc. v. Lavasoft* (C.D.Cal.2004) 356 F.Supp.2d 1090, 1107 [statements made in software available free of charge.]

Plaintiffs argue that Barrett, as well as Polevoy, was defamed in the Bolen article. We need not address this claim, given our conclusion that Rosenthal is immune from liability under section 230.

FN5. In his reply brief, plaintiff Polevoy adopts the Court of Appeal's reasoning. We address the arguments for "distributor" liability as they are framed in its opinion.

FN6. Section 230 includes the following provisions relevant to our discussion:

"(a) Findings. The Congress finds the following:

"(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

"(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

"(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

"(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

"(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

"(b) Policy. It is the policy of the United States-

"(1) to promote the continued development of the Internet and other interactive

computer services and other interactive media;

"(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

"(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.

"(c) Protection for 'Good Samaritan' blocking and screening of offensive material.

"(1) Treatment of publisher or speaker. 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.

"(2) Civil liability. 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 [ (A) ].

"(C) ... [ ]

"(e) Effect on other laws.

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“[¶] ... [¶]

“(3) State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

[¶] ... [¶]

“(f) Definitions. As used in this section:

“(1) Internet. The term ‘Internet’ means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

“(2) Interactive computer service. The term ‘interactive computer service’ means 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.

“(3) Information content provider. The term ‘information content provider’ means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service....” (Emphasis added.)

FN7. See Senate Report Number 104-230, Second Session, page 194 (1996) [“One of the specific purposes of [section 230] is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions”]; House of Representatives Conference Report Number 104-458, Second Session, page 194 (1996) [“The conferees believe that [decisions like *Stratton Oakmont* ] create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services”]; 141 Congressional Record H8469-H8470 (daily ed., June 14, 1995) [statement of Rep. Cox, referring to

disincentives created by *Stratton Oakmont* decision].

FN8. The distinction is a practical one. Publishers are ordinarily aware of the content of their copy. It is not reasonable, however, to expect distributors to be familiar with the particulars of every publication they offer for sale. Therefore, only a distributor who is aware of defamatory content shares liability with the publisher.

FN9. E.g., *Blumenthal v. Drudge* (D.D.C.1998) 992 F.Supp. 44, 51; *Ben Ezra, Weinstein, and Co., Inc. v. America Online, Inc.* (10th Cir.2000) 206 F.3d 980, 986; *Morrison v. America Online, Inc.* (N.D.Ind.2001) 153 F.Supp.2d 930, 933-934; *PatentWizard, Inc. v. Kinko's, Inc.* (D.S.D.2001) 163 F.Supp.2d 1069, 1071; *Green v. America Online* (3rd Cir.2003) 318 F.3d 465, 470-471; *Carafano v. Metrosplash.com, Inc.* (9th Cir.2003) 339 F.3d 1119, 1123-1124; *Doe One v. Oliver* (Conn.Super.Ct.2000) 46 Conn.Supp. 406, 755 A.2d 1000, 1003-1004; *Doe v. America Online, Inc.* (Fla.2001) 783 So.2d 1010, 1013-1017; *Schneider v. Amazon.com, Inc.* (Wn.App.2001) 108 Wash.App. 454, 31 P.3d 37, 40-42; *Barrett v. Fonorow* (Ill.App.Ct.2003) 343 Ill.App.3d 1184, 279 Ill.Dec. 113, 799 N.E.2d 916, 923-925 [a suit against a Web site operator by Dr. Barrett, plaintiff in this case]; *Donato v. Moldow* (N.J.Super.Ct.App.Div.2005) 374 N.J.Super. 475, 865 A.2d 711, 720-727; *Austin v. CrystalTech Web Hosting* (Ariz.App.2005) 211 Ariz. 569, 125 P.3d 389, 392-394.

But see *Doe v. GTE Corp.* (7th Cir.2003) 347 F.3d 655, 659-660, in which the court questioned *Zeran's* rationale but ultimately did not reach the section 230 issue.

FN10. Public Law 105-304, Title II, section 202(a) (Oct. 28, 1998) 112 Statutes at Large 2877.

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FN11. Section 230(c)(2) provides: "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 [ (A) ]."

FN12. One court has suggested that Congress might provide notice, "take-down," and "put-back" procedures similar to those in the DMCA as a way of limiting the broad scope of section 230 immunity, which currently gives service providers little incentive to remove defamatory postings. (*Batzel v. Smith* (9th Cir.2003) 333 F.3d 1018, 1031-1032, fn. 19.) Congress has not responded.

FN13. Title 47 United States Code, section 223(a) & (d). These provisions were held unconstitutional in *Reno v. American Civil Liberties Union, supra*, 521 U.S. at pp. 849, 858-860.

FN14. The relevant portions of Representative Cox's comments are as follows: "I will give you two quick examples: A Federal court in New York, in a case involving CompuServe, one of our on-line service providers, held that CompuServe would not be liable in a defamation case because it was not the publisher or editor of the material. It just let everything come onto your computer without, in any way, trying to screen it or control it.

"But another New York court, the New York Supreme Court, held that Prodigy, CompuServe's competitor, could be held liable in a \$200 million defamation case

because someone had posted on one of their bulletin boards, a financial bulletin board, some remarks that apparently were untrue about an investment bank, that the investment bank would go out of business and was run by crooks.

"Prodigy said, 'No, no; just like CompuServe, we did not control or edit that information, nor could we, frankly. We have over 60,000 of these messages each day, we have over 2 million subscribers, and so you cannot proceed with this kind of a case against us.'

"The court said, 'No, no, no, you are different; you are different than CompuServe because you are a family-friendly network. You advertise yourself as such. You employ screening and blocking software that keeps obscenity off of your network. You have people who are hired to exercise an emergency delete function to keep that kind of material away from your subscribers. You don't permit nudity on your system. You have content guidelines. You, therefore, are going to face higher, stric[t]er liability because you tried to exercise some control over offensive material.'

"Mr. Chairman, that is backward. We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. This technology is very quickly becoming available, and in fact every one of us will be able to tailor what we see to our own tastes....

"Mr. Chairman, our amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and

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for helping us solve this problem. Second, it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet..." (141 Cong. Rec. H8469-H8470 (daily ed. Aug. 4, 1995).)

FN15. The impracticality of imposing liability on any Internet service provider for failing to exert control over third party content was touched upon by Representative Goodlatte: "There is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong. This will cure that problem, and I urge the Members to support the amendment." The Congressman clearly had civil liability in mind. He subsequently noted: "Currently ... there is a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content. These providers face the risk of increased liability where they take reasonable steps to police their systems. A New York judge recently sent the online services the message to stop policing by ruling that Prodigy was subject to a \$200 million libel suit simply because it did exercise some control over profanity and indecent material. [¶] The Cox-Wyden amendment removes the liability of providers such as Prodigy who currently make a good faith effort to edit the smut from their systems." (141 Cong. Rec. H8471-H8472.)

FN16. Public Law 107-317, section 2 (Dec. 4, 2002) 116 Statutes at Large 2766, codified at 47 United States Code section 941.

FN17. Ordinarily, subsequent legislative history is given little weight in statutory interpretation. (*U.S. v. X-Citement Video, Inc.* (1994) 513 U.S. 64, 77, fn. 6, 115 S.Ct. 464, 130 L.Ed.2d 372.) Nevertheless, it is "sometimes considered relevant." (*Consumer Product Safety Comm'n v. GTE Sylvania* (1980) 447 U.S. 102, 118, fn. 13, 100 S.Ct. 2051, 64 L.Ed.2d 766; see also, e.g., *Heckler v. Turner* (1985) 470 U.S. 184, 209, 105 S.Ct. 1138, 84 L.Ed.2d 138.) In this unusual case we deem the Committee Report instructive. It pertains to a provision expressly incorporating section 230(c), and does not opine directly on the intent of an earlier Congress, but on the interpretation uniformly given to the statute by intervening court decisions. The Report reflects the Committee's intent that the existing statutory construction be maintained in a new legislative context. We note that the membership of the 2002 House Energy and Commerce Committee, which produced the Report, included Representative Cox, the cosponsor of section 230. (Cong. Directory, 107th Congress (2001-2002) p. 403.)

FN18. In *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, --- [125 S.Ct. 1788, 1794, 1803], the United States Supreme Court disagreed with the pre-emption rule we adopted in *Etcheverry*, and followed instead what had been the minority view. However, our general observations on the persuasive effect of a consensus among the lower federal courts on a question of federal law were unaffected by the ruling in *Bates*.

FN19. At some point, active involvement in the creation of a defamatory Internet posting would expose a defendant to liability as an original source. Because Rosenthal made no changes in the article she republished on the newsgroups, we need not consider when that line is crossed. We note, however, that many courts have reasoned that participation

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going no further than the traditional editorial functions of a publisher cannot deprive a defendant of section 230 immunity. (See, e.g., *Batzel v. Smith, supra*, 333 F.3d at pp. 1031; *Green v. America Online, supra*, 318 F.3d at p. 471; *Ben Ezra, Weinstein, and Co., Inc. v. America Online, Inc., supra*, 206 F.3d at pp. 985-986; *Donato v. Moldow, supra*, 865 A.2d at pp. 720-726 [reviewing cases]; *Schneider v. Amazon.com, Inc., supra*, 31 P.3d at pp. 42-43.)

FN20. Polevoy does not argue that Rosenthal might be liable under this theory.

FN21. A more elaborate reconstruction of the statute, proceeding from the same premise that Congress did not intend to immunize Internet users who maliciously republish libelous content, may be found in Jenal, *When Is a User Not a "User"? Finding the Proper Role for Republication Liability on the Internet* (2004) 24 Loy.L.A. Ent. L.Rev. 453. The author posits four categories of "users," Readers, Posters, Moderators, and Administrators, and would deprive Posters of immunity. (*Id.* at pp. 477-480.) No court has attempted such an adventurous reading of section 230. "The provision has received a narrow, textual construction, not one that has welcomed creative theories or exhibited judicial creativity." (*Donato v. Moldow, supra*, 865 A.2d at p. 725.)

FN1. Moreover, even assuming plaintiffs are correct that the trial court wrongly denied them the ability to depose Rosenthal, Bolen and McPhee, as the Court of Appeal concluded, their stated reason for taking such depositions was to inquire into whether a defendants' defamatory statements were made with reckless disregard for the truth. Even if a deposition established such reckless disregard on Rosenthal's part, this would not show a preexisting conspiracy to defame Dr. Polevoy, nor negate the fact

that Rosenthal was unacquainted with him before receiving the alleged defamatory e-mail.

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