The Internet Paradox

Libel, Slander & the First Amendment in Cyberspace

Walter Pincus

I work under contract for the *Washington Post* newspaper. If the *Post* published an article of mine defaming a private individual, the paper would be liable.[1] However, if *washingtonpost.com*, the *Post*'s on-line Internet site, were to carry the same article, it would not be similarly liable. Why? Because Section 230 of the Communications Decency Act of 1996[2] bars liability for interactive computer service providers exercising a publisher's traditional editorial functions, such as deciding whether to publish, withdraw, postpone, or alter content.[3] The Act immunizes Internet providers from precisely the sort of liability on which plaintiffs rely to hold other publishers accountable.

How this paradox came about is an instructive tale; how to reconcile it with traditional notions of First Amendment freedom and responsibility is a pressing task.

Traditional Definitions & the Challenge of the Web

Defamation, including the subcategories of libel and slander, is a communication that tends "to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[4] The harm at the core of the tort may be intentional or negligent, but the message must reach a third party and this third party must understand its hurtfulness to the plaintiff.

Those who utter defamatory statements are of course liable for them; third parties may also be liable. Courts have divided these third parties "into three functional categories: the

Walter Pincus is a reporter at the Washington Post, *a winner of newspaper and television awards, and a part-time student at Georgetown University Law Center.*

1 *See Gertz v. Welch*, 418 U.S. 323 (1974).

2 47 U.S.C. § 230 (1996).

3 *See Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, June 23, 1998.

4 Restatement (Second) of Torts § 559 (1977).

common carrier, the publisher, and the distributor."[5] Publishers have been held liable for statements that are false, defamatory, and unprivileged if the publishers are negligent and if publishing a malicious, knowingly false statement to others caused harm. A distributor, be it newsstand or book store, is subject to liability for a defamatory statement "only if he knows or has reason to know of its defamatory character,"[6] because a distributor exerts little editorial control. A common carrier, such as the telephone company, totally escapes liability for defamation because it is a mere passive conduit, exercising no editorial control at all over the content of what it carries.

The advent of radio, then television brought some changes to this scheme. Because early limits on the available broadcast spectrum made licenses scarce resources, broadcasters were subjected to government regulation in areas in which print publications were unregulated. Broadcasters were forced to give a right of reply to persons criticized on the air and to allocate certain amounts of time to news and public affairs. However, affiliate stations of a network, following traditional doctrine, were held not liable for allegedly defamatory network-produced programming, on the ground that the affiliates had neither time nor personnel to review the contents and judge their truth or falsehood.[7]

Nothing about the structure of the Internet necessarily prevents application of the traditional sliding scale of liability. The Internet's network of interconnected computers was used by 40 million people in 1997. Individuals can access the Internet from many types of facilities, including proprietary networks like America Online (AOL). Users can send and receive messages on the Internet via electronic mail (e-mail), automatic mailing lists (listservs), bulletin board services (BBSs), and chat rooms, all of which are maintained by proprietary networks, individuals, and specialized groups. E-mail may be sent to an individual or to a group of addresses. Listservs are e-mail groups whose subscribers send messages to a common e-mail address, where humans or computers route them to their destinations. BBSs serve groups of participants who supply electronic messages that are posted at a particular site, where anyone may read them and offer comments in response. One author has described these postings as "analogous to discussing a topic with only one other person, but while using a megaphone."[8] Chat rooms, by contrast, enable participants to carry on real-time dialogues as they sit at their keyboards and type out questions and responses.

Finally, the World Wide Web consists of a vast number of "pages," really remote computers, containing information that can be searched and retrieved via the Internet. The Web is "comparable," the Supreme Court explained, "from the reader's viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services."[9]

Some commentators contend that the Internet is not so different from other, already-existing forms of communication and that liability on the Internet can take its cue from law developed in other media. "Courts," Luftman puts it, "have provided a framework for this determination by applying a sliding scale of

5 Douglas B. Luftman, *Defamation Liability for On-Line Services: The Sky Is Not Falling*, 65 GEO. WASH. L. REV. 1071, 1083 (1997).

6 *See* RESTATEMENT (SECOND) OF TORTS § 559, 581 (1977). *See also Smith v. California*, 361 U.S. 147 (1959).

7 *See Auvil v. CBS "Sixty Minutes,"* 800 F. Supp. 928 (E.D. Wash. 1992).

8 Luftman at 1081.

9 *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2336 (1997).

editorial control, from publisher to common carrier, or in other words, from comprehensive editorial control to no control at all."[10]

The Supreme Court, however, has expressed a more breathless view, calling the Internet a "unique medium." Unlike the broadcast spectrum, the Court explained, "[t]he Internet can hardly be considered a 'scarce' expressive commodity"; "anyone with a phone line can become both town crier and pamphleteer." Accordingly, the Court reasoned in these dicta, its earlier cases dealing with print and broadcasting should not govern this new medium, whose unique features "provide no basis for qualifying the level of First Amendment scrutiny" that should be applied to it.[11]

The Cubby/CompuServe & Stratton/Prodigy Cases

Influential cases in the early 1990s suggested that Internet defamation liability might follow the print and broadcast model. In 1990, a company called Cubby, Inc. developed Skuttlebut, an electronic news and gossip publication about the broadcast industry. Skuttlebut was to compete with an existing electronic publication about the industry called Rumorville, managed by Cameron Communications and carried by contract on a BBS called Journalism Forum. The Forum was one of 150 on-line forums, conferences, and databases carried by CompuServe, a major provider of on-line information to paid subscribers. In April, 1990, Cubby brought a libel suit against all parties involved in publishing Rumorville, which had charged that Skuttlebut's owner was "bounced" from his previous job and that the new publication was a "start-up scam."[12]

CompuServe successfully argued that it should be dismissed as a defendant, saying that it was not the publisher of Rumorville but only its distributor. It was undisputed that the contents of Rumorville were delivered to Cameron, which uploaded the text into CompuServe's databanks and thereby made it immediately available to CompuServe subscribers who logged onto the Journalism Forum. CompuServe employees exercised no editorial control. The court agreed that because of this lack of control, CompuServe was a distributor and could not be held liable unless it knew or had reason to know – neither of which was alleged – that the statement at issue was defamatory. "CompuServe," the court put it,

> has no more editorial control over such a publication [as Rumorville] than does a public library, book store, or news stand and it would no more be feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so. … First Amendment guarantees have long been recognized as protecting distributors of publications. …[13]

In short, following the model of earlier media, if an on-line or Internet provider exercised little or no control over the content it provided, it would not be liable for defamatory content unless it had knowledge of or at least should have known of it.

The obverse of this proposition, though, soon appeared in a case involving the major computer network Prodigy. In October, 1994, on Prodigy's "Money Talk" BBS, an unidentified user posted allegedly defamatory statements about Stratton-Oakmont Inc., a securities investment banking firm, and its

10 Luftman at 1088.

11 *Reno*, 117 S. Ct. at 2334-35.

12 *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1990).

13 *Id.* at 140.

president. The firm filed a $200 million libel action.

Unlike CompuServe, which stated that it had a hands-off relationship with the contents of Journalism Forum, Prodigy promoted itself as exercising editorial control over messages on its bulletin boards. Prodigy claimed that its computers screened messages for offensive language. It further claimed that its BBS Board Leaders, whom it used to promote BBSs like "Money Talk," monitored their content and could use an "emergency delete" function to remove objectionable messages. In one promotional piece, Prodigy went so far as "expressly likening itself to a newspaper." The allegedly defamatory messages on "Money Talk" were of a type that would certainly grab a normal publisher's editorial attention in advance of publication. One of them described a stock offering by Stratton as a "major criminal fraud"; another described the firm as a "cult of brokers who either lie for a living or get fired." Nevertheless, the messages, among the 12,000 to 15,000 per month received by the "Money Talk" BBS, were posted for several days for all members to read. (The person or persons who posted the messages were never identified; the user or users evidently used a former employee's un-retired access code.) When the case reached court, Prodigy disowned much of its earlier promotions, saying that with the increase in numbers of participants and volume of messages, "manual review is not feasible" and Board Leaders did not in fact act as editors.[14]

The court, though it started with the premise that on-line distributors should have the attenuated liability of bookstores or network affiliates, nevertheless found that because of Prodigy's own claims, it should be viewed as a publisher:

> Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability. … [T]o the extent computer networks provide such services, they must also accept the concomitant legal consequences.

The court denied that this logic would lead computer networks, fearing liability, to abdicate editorial control: The market, in the court's view, provided sufficient rewards for such control to make it worthwhile.[15]

But in fact the Stratton decision rocked commercial on-line service providers, who saw the paradox: "[A]n operator … which assumed the responsibility for at least attempting to keep defamatory or offensive material from being posted … was liable as a publisher for defamatory postings, but an operator … which made no such attempt escaped publisher liability."[16]

Section 230 of the Communications Decency Act of 1996

To remedy what seemed like a doctrine that rewarded those who made no effort to control content while punishing those who made such efforts, Congress stepped in. The Communications Decency Act, part of the Telecommunications Act of 1996, embodied a marriage of two distinct lobbying efforts: one designed to combat Internet pornography and the other to remedy the *Prodigy* decision as interpreted by the on-line industry. On the evening of August 4, 1995, an amendment offered on the House floor by Rep. Christopher Cox (R-Cal.) and Rep. Ron Wyden (D-Ore.) mixed them together, stating:

> No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to

14 *Stratton-Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup.).

15 *Id.* at 5.

16 Luftman at 1071.

> 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. …

The language also stated that "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."[17] Rep. Bob Goodlatte (R-Va.), speaking on the floor in support of the amendment, neatly tied together the themes of fighting Internet pornography and protecting Internet service providers:

> 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. … 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. …[18]

The combined themes were also apparent in the final language of Section 230, which was grandly titled "Protection for private blocking and screening of offensive material" and which declared it the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services *unfettered by Federal or State regulation*." (Emphasis added.) The accompanying House-Senate conference report was even more explicit about Section 230's purposes:

> One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.[19]

The law took effect on February 8, 1996. Some saw it as giving blanket immunity to Internet providers: Lawyers for Prodigy claimed as much when, after passage of the law, they appealed the New York State Supreme Court's decision in their case to the state Court of Appeals. Others cautioned that if such an interpretation "becomes an obstacle to self-regulation or an excuse for industry inaction, the likelihood of future liability and regulation costs rises."[20]

Interpreting Section 230: Zeran, Blumenthal & John Doe

Prodigy's lawyers turned out to be more prophetic. On April 25, 1996, just six days after the deaths of 244 men, women, and children in the bombing of the Alfred P. Murrah Federal Building in Oklahoma, there appeared on an electronic bulletin board maintained by AOL a notice entitled "Naughty Oklahoma T-Shirts," offering for sale shirts with six different slogans, such as "McVeigh for President 1996," "Putting kids to bed … Oklahoma 1995," and "Visit Oklahoma … It's a BLAST."[21] The notice identified its author as "KEN ZZ033" and included a telephone number.

The number, in Seattle, Washington, belonged to Kenneth Zeran, an independent

17 Cong. Rec. H4860 (daily ed. Aug. 4, 1995).

18 Cong. Rec. H4871 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte).

19 H.R. Conf. Rept. No. 104-458 at 194 (1996).

20 Robert B. Charles & Jacob H. Zamansky, *Liability for Online Libel after* Stratton-Oakmont, Inc. v. Prodigy Services Co., 28 Conn. L. Rev. 1173, 1177 (1996).

21 *Zeran v. America Online, Inc.*, 958 F. Supp. 1124, 1127 n.3 (E.D. Va. 1997).

consultant who works out of his home. Zeran had no knowledge of the notice before it was posted. He has never sold T-shirts or subscribed to AOL. Within hours, Zeran recently recalled, his phone started ringing. He was inundated with nasty calls, several of them explicitly threatening. Yet when Zeran called AOL to demand removal of the notice and a retraction, he says he got a service representative who told him AOL would look into removing the notice, but it was company policy not to issue retractions. The next day, the first notice was removed but a second one was posted, again listing KEN ZZ033 as author. The new notice announced that some of the first day's merchandise had sold out but offered T-shirts with new slogans, such as "Forget the rescue, let the maggots take over – Oklahoma 1995" and "Finally a day care center that keeps the kids quiet – Oklahoma 1995." Again it gave Zeran's phone number.[22] The phone calls increased. Once again Zeran called AOL demanding removal of the notice and a retraction. This time, Zeran says, he was told the notice would be deleted.

Over the next few days, while AOL insisted it was removing notices, additional ones kept appearing from KEN ZZ033, offering other vulgar and offensive Oklahoma City bombing materials – including bumper stickers, key chains, and, eventually, computer software. A radio broadcaster on Oklahoma City's station KRXO read the first notice over the air and encouraged his listeners to call "Ken," at the listed number, "to register their disgust and disapproval." The flood of nasty calls to Zeran, including death threats, reached its peak, Zeran says, at one every two minutes. The threats were credible enough so that Seattle police put Zeran's house under protective surveillance. It was not until May 15, 21 days after the first notice was posted and a day after an Oklahoma City newspaper and KRXO exposed the AOL messages as a hoax, that the threatening calls dropped to about 15 per day.[23] To this day, neither Zeran, law enforcement officials nor AOL have been able to discover the identity of KEN ZZ033. The closest the FBI and Secret Service could come was to establish that the notices came from Massachusetts, where Zeran had once worked.[24]

On April 23, 1996, Zeran filed suit against AOL in federal court based on the defamatory messages. He alleged that AOL, after receiving notice that the first message was a hoax, unreasonably delayed removing the messages, refused to post retractions, and failed to employ any screening technique to prevent his name and telephone number from appearing in new messages.[25] Zeran argued that AOL was negligent, as an on-line distributor, in allowing the messages to appear when it knew or should have known – because he had notified the company – that the notices were false and defamatory.[26]

AOL moved for summary judgment in District Court and won, on the ground that Zeran's "'negligence' cause of action conflicts with both the express language and the purposes of the Communications Decency Act of 1996, which exempts from civil liability any online provider, such as AOL." As for Zeran's claim that AOL was a distributor, rather than a publisher protected by the CDA, the court found that distributor liability "is merely a species or type of liability for publishing defamatory material." The judge noted that if Congress had simply wanted to encourage Internet providers to screen out pornography, there were quicker ways to do it: "[f]or exam-

22 *Id.* at 1127 nn.3, 5.

23 *Id.* at 1128.

24 Interview with Kenneth Zeran.

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

26 *Zeran*, 958 F. Supp. at 1128-29.

ple, holding interactive computer service providers strictly liable for the content on their systems." But, the court thought, "Congress struck a different balance," "electing to immunize Internet providers from forms of liability that discourage those providers from acquiring information about and control over the content on their systems." The most the judge thought he could do in the way of qualifying this legislative judgment was to say in a footnote that Section 230 "might" not apply where an interactive service provider "knew the defamatory nature of the material and made a decision not to remove it from the network based on a malicious desire to cause harm to the party defamed."[27]

Zeran appealed, but the Court of Appeals agreed with the District Court that Congress had plainly intended to fight pornography on the Internet not by sanctioning tort liability for service providers, which would be "simply another form of intrusive government regulation of speech," but by "remov[ing] disincentives for the development and utilization of blocking and filtering technologies. … In line with this purpose," the Court made its leap, "Section 230 forbids the imposition of publisher liability. …" The Court of Appeals, like the District Court, found AOL to be not a publisher explicitly protected by the CDA but a distributor. Yet, like the District Court, the appeals court ruled that distributor liability was "merely a subset, or a species, of publisher liability, and is therefore also foreclosed by Section 230."[28]

Since this immunity operates even if an interactive service provider has actual knowledge of the tortious nature of the third-party-provided content at issue, it appeared after Zeran that a plaintiff would have a remedy for anonymous defamation only if the on-line provider, once notified, maliciously refused to remove the material. By contrast, had Zeran's tormentor placed the same messages in a newspaper or magazine, the publication itself would have been liable, whether or not the original author had been found. On-line service providers have taken *Zeran* to heart, seeing it as not only overturning the *Prodigy* decision but going farther to free Internet service providers by providing them with immunity from other types of lawsuits. "Section 230," said one commentator, "is not limited by its terms to defamation cases. Imposing any form of tort liability on an interactive service for third-party content treats it as the 'publisher' of that content in contravention of Section 230."[29]

Such was the state of the law on August 10, 1997, when columnist Matt Drudge e-mailed to his more than 20,000 subscribers, posted on his Internet page, and sent to AOL, which made it immediately available to its then-nine million members, an item that read in part:

> The Drudge Report has learned that top GOP operatives who feel there is a double standard of only reporting Republican shame believe they are holding an ace card: New White House recruit Sidney Blumenthal has a spousal abuse past that has been effectively covered up. … Every attempt to reach Blumenthal proved unsuccessful.[30]

Blumenthal sued both Drudge and AOL for defamation. AOL moved for summary judgment based on Section 230. At the time of the offending item, Drudge had a license agreement with AOL that made the Drudge Report available to all AOL members. In exchange, Drudge received from AOL a monthly "royalty payment" of $3,000 – his only source of

27 *Id*. at 1133-35.

28 *Zeran*, 129 F.3d at 330, 331, 332.

29 Patrick J. Carome, John Payton, & Samir Jain, *Don't Sue the Messenger*, Intellectual Property, Sept. 1997, at 6.

30 *Blumenthal v. Drudge*, No. Civ. A. 97-1968 WL 196979, at 1-2 (D.D.C. Apr. 22, 1998).

income during the period in question. Under the agreement, Drudge was to "manage" the content of the Drudge Report and, while being paid for it by AOL, e-mail it to his own subscriber list and display it on his free web site. AOL had the right to "remove content that AOL reasonably determine[s] to violate AOL's … standard of service."[31] Though court papers contained no explanation of "standard of service," AOL's Terms of Service Agreement

> … reserves the right, but does not assume the responsibility, to restrict communications which AOL Inc. deems in its discretion to be harmful to individual Members, damaging to the communities which make up the AOL Service, or in violation of AOL Inc.'s or any third-party rights. Please be aware, however, that communication over the AOL Service often occurs in real time, or is posted on one of the AOL Service's thousands of message boards or libraries, and AOL Inc. cannot, and does not intend to, screen communications in advance.[32]

Judge Paul Friedman, granting AOL's motion for summary judgment, ruled that this arrangement made AOL "nothing more than a provider of interactive computer services on which the Drudge Report was carried, and Congress has said quite clearly that such a provider shall not be treated as a 'publisher or speaker' and therefore may not be held liable in tort." Judge Friedman clearly expressed his unhappiness with Congress's decision, saying, "If it were writing on a clean slate, this Court would agree with plaintiffs." Yet the only solace he could offer Blumenthal was to treat as open the question of whether providers would be held immune if, for example, Drudge had been an agent or employee of AOL or if AOL had played a more active role in writing or editing the Drudge Report. As the Court put it, Section 230 "does not preclude joint liability for the joint development of content."[33]

Meanwhile, a Florida court has reaffirmed that Section 230 does not allow tort suits against Internet service providers on a theory of negligent distributorship. John Doe, a teenager, was sexually assaulted; the assault was videotaped and photographed by an AOL member, who then advertised the material in an AOL chat room. John Doe's mother sued AOL on his behalf. While the offending AOL member had not mentioned Doe's name or sent photos of him over AOL, he had, the complaint alleged, conducted his solicitation over AOL and subsequently transmitted a videotape of Doe to an Arizona man. The complaint said AOL was negligent because it had previously been placed on notice that the service was being used to market child pornography.[34]

AOL moved to dismiss; among its grounds was the argument that Section 230 immunized it. The court agreed: "[M]aking AOL liable for … chat room communications would treat AOL as the 'publisher or speaker' of those communications," and such treatment was forbidden by Section 230.[35] Thus in *Doe* a court "specifically rejected the argument that a suit for 'negligent distribution' of harmful third-party content" would be permitted by Section 230.[36]

Alternatives

On one side stands the "Hyde Park," free-speech approach to the Internet,[37] contending

31 *Id.* at 6.

32 "Online Contract," AOL Terms of Service Agreement.

33 *Blumenthal*, No. Civ. A. 97-1968 WL 196979, at 9, 11.

34 *Doe v. America Online, Inc.*, No. Civ. Cl. 97-631 WL 374223, 1 (Fla. Cir. Ct. June 26, 1997).

35 *Id.* at 2, 3.

36 Carome at 4. Doe has appealed the dismissal to Florida's intermediate appellate court.

37 *See, e.g.*, Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 Conn. L. Rev. 1137, 1143 (1996).

that only those who actually compose or publicly utter defamatory statements should be held liable for the damage they cause.[38] In this view, "The dangers of … falsehoods with an audience in the millions … are quite real; but the dangers of coerced regulation … are greater."[39] On the other side is the argument that the current state of affairs is, in terms of insuring accountability on the Internet, perverse. This camp would treat defamatory messages on the Internet like graffiti, for which the current rule of law is, "One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication."[40]

Still others, recognizing that the law on Internet defamation is very much a work in progress, are looking for a middle way. As Anne Wells Branscomb said not long ago, "To foreclose … a most interesting experiment in democratic discourse would be disheartening and disillusioning. Is it not possible to find some other way of moderating abuses of computer-mediated communications systems?[41]

One challenge is the ease of assuming anonymity in cyberspace. Such anonymity can of course be socially useful, as when it protects whistleblowers. And many Internet users would be loath to give up the option of anonymity, which they see as part and parcel of their autonomy. Thus even were we to develop the as-yet-nonexistent technology to verify the real identity of each and every user, there would be stiff resistance to making its use universally mandatory.

But there are less drastic possibilities. Sometimes anonymity is provided to users by "remailers" – who, like Swiss bankers, guarantee secrecy to individuals who send them messages to be transmitted to others. Remailers are employed by a wide variety of legitimate and illegitimate users. It is an open question whether remailers qualify as protected interactive service providers under Section 230.[42] Even if they are, it may be possible to require remailers, along with Internet access and online service providers, to maintain accurate records of individual users, on penalty of being liable, if they fail to do so, for any crime or defamation carried out by anonymous users employing their services.[43]

Analogous rights are being established on the Internet with regard to copyright and trademark rights. On August 4, 1998, the House of Representatives passed the Digital Millenium Copyright Act,[44] now headed for House-Senate conference.[45] It prescribes specific actions that an Internet provider must take, after it has been informed of a possible copyright infringement being carried on its service, in order to avoid liability. First, a carrier must respond "expeditiously to remove, or disable access to, the material that is claimed to be infringing." Recall that with defamation, Congress and the courts have considered it too burdensome to require providers to monitor

38 *See, e.g.*, David R. Sheridan, Zeran v. AOL *and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 Alb. L. Rev. 147, 172 (1997).

39 Eugene Volokh, *Cheap Speech and What It Will Do*, 104 Yale L.J. 1805, 1849 (1995).

40 Restatement (Second) Torts § 577(2). *See also Tackett v. General Motors Corp.*, 836 F.2d 1042, 1047-48 (7th Cir. 1987).

41 Anne Wells Branscomb, *Anonymity, Autonomy and Accountability: Challenges to the First Amendment in Cyberspace*, 104 Yale L.J. 1639, 1672 (1995).

42 Noah Levine, *Establishing Legal Accountability for Anonymous Communication in Cyberspace*, 96 Colum. L. Rev. 1526, 1552 (1996).

43 Levine at 1562; Branscomb at 1645.

44 H.R. 2281, 104th Cong. (1998).

45 S. 2037.

the content on their services; with copyright and trademark infringement, the burden is considered bearable. Second, a service provider notified of an alleged violation must "disclose expeditiously to the copyright owner … information sufficient to identify the alleged direct infringer … to the extent such information is available to the service provider."[46]

Even in advance of the law, services are responding to this imperative. Recently an individual with the pseudonym "SLAVE40CR," who claimed to be an employee of California's *Orange County Register*, was operating an AOL website titled "Orange County Unregistered Press." The site carried an image of the paper's masthead and offered gossip and complaints from Register employees. The newspaper's owners filed a trademark infringement suit against the website's anonymous operator. AOL divulged his real name, enabling the paper to make him the target of its legal action.[47] An AOL spokesman, explaining why the service provided the name, said, "If it's just someone expressing their views, we tend to leave them alone. But if it's a blatant trademark infringement, such as someone copying a logo, then we take action."[48] There seem to be no insuperable obstacles to applying this logic to defamation as well.

Another strategy between the extremes of strict liability and total immunity is a right-of-reply requirement for Internet providers. Though newspapers have been upheld by the courts in refusing to provide for such replies, it has been held Constitutional to require broadcasters to afford such opportunities.

It may be also possible to deal with liability by dividing it – by differentiating separate zones on the Internet, comparable to physical zones created by local zoning laws, and requiring users to verify their identity in certain zones. Justice O'Connor, in her concurring opinion in *Reno*, touched on this idea: She said it was analogous to having a bouncer check drivers' licenses before letting people into certain nightclubs. O'Connor laid out requirements for an effective system: agreed-on codes, software to recognize the codes, and wide availability and use by Internet participants.[49] Within such anonymity-free cyberzones, Section 230 immunity would not apply; interactive service providers would have the same legal status and responsibilities as print publishers or distributors.

Why would a provider join such a zone? For commercial reasons: to create the atmosphere of reliability that draws people to read quality newspapers and magazines. That was why Prodigy claimed to have a screening system, though it did not: to draw a serious audience that wants some assurance of the truth of what it is seeing. Such an audience is one that many advertisers want to reach. Alongside such anonymity-free cyberzones, there could be a requirement that in the rest of cyberspace, users be informed – through gateway notices or warnings – that information on unzoned, unregulated sites can not be relied on.

If such ideas are to be discussed productively, the legal community has a special responsibility: to remember that Internet law is still in evolution and to refrain from setting present doctrines in stone. As Branscomb puts it:

> These new cyberspaces offer a precious laboratory of law in gestation, developing largely without the aid of lawyers. As lawyers flock to

46 H.R. 2281 § 512, 512(c)(4).

47 AOL was complying with a subpoena. Its Terms of Service state, "AOL will not intentionally monitor or disclose any private electronic communications unless permitted or required by law." Terms of Service § 4.3.

48 *Web site abandoned after newspaper files lawsuit*, Associated Press, July 20, 1998.

49 *Reno*, 117 S. Ct. at 2353.

> their assistance, let us hope they do so with humility and with the understanding that the future need not necessarily follow the path of the past.[50]

I share her sentiments. As a journalist for the past 42 years, the last 24 with the *Washington Post*, I am concerned that false, malicious, and even libelous material can go from author to reader unedited and even unscreened via the Internet, where it could reach millions of people.

I remember my awe during the 1970s, when I assisted NBC News at Presidential conventions, to see reporters going on the air live from the convention floor while their producers and bosses could only listen and watch, prepared to cut them off if something untoward was said.

These reporters, however, were professional journalists, and each of the networks had a reputation to uphold, laws to fear, and valuable licenses to protect. By contrast, the new world of immediate on-line distribution of good, bad, and indifferent information is uninhibited by even the limited standards of the past. The public, which rightly mistrusts the so-called mainstream media, needs to be warned that the newer Internet sources may be operating without even minimal standards of accuracy and responsibility. GB

50 Branscomb at 1679.