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## Internet Service Providers Immune from Liability for Third Party Defamation

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The Fourth Circuit further noted that the district court's determination that Mark received

substantial educational benefit in the regular classroom was contrary to the administrative

findings that Mark made no academic progress in that setting. Therefore, the district court's decision to ignore the hearing officer's evaluation, the Fourth Circuit pointed out, went against the legal principle that state proceedings must command considerable deference in federal court.

While the Fourth Circuit recognized that the IDEA's mainstreaming provision established a presumption of inclusion, it found that presumption ultimately subordinate to the main goal that disabled children receive some educational benefit. Therefore, the findings of state proceedings must be considered to accurately assess what will confer the best educational benefit on the disabled child.

### ***IDEA Does Not Guarantee***

### ***Maximum Benefits to the Handicapped Child***

In reaching its conclusion, the Fourth Circuit realized that IDEA requires disabled children to be educated along with non-handicapped children "to the maximum extent appropriate," but it does not require a county to provide "every special service necessary to maximize each handicapped child's potential." *Rowley*, 458 U.S. at 199. Similarly, the IDEA does not require that every special education provider possess "every conceivable credential relevant to every child's disability." It would be economically unfeasible and equally unrealistic to expect every school system to have the highest accredited educators. Using this reasoning, the Fourth Circuit dismissed the district court's conclusions that county efforts were insufficient to educate Mark in the regular classroom due to inadequately trained personnel. The Fourth Circuit deemed this theory inconsistent with the law and with the record. Premier credentials are

not required under IDEA and the record revealed each of Mark's IEP team members' credentials were at least adequate.

In conclusion, the Fourth Circuit held that since the state educational facilities and not the court, are in the best position to assess educational policy, a court must give preference to state administrative findings in determining the most appropriate educational program. These findings may include information which can override the IDEA's mainstreaming provision calling for the presumption for inclusion. In addition, the Fourth Circuit held that the IDEA mainstreaming provision does not require schools to provide a staff possessing the most optimum of credentials, or to provide the absolute most beneficial program for a "best case" scenario. In this case, the Board satisfied the mainstreaming directive of the IDEA by its enthusiastic steps to organize a qualified staff, and the Board's active attempts to tailor a program to fit Mark's needs.

**CLR**

## **Internet Service Providers Immune from Liability for Third Party Defamation**

*by Lynn Middendorf*

The Communications Decency Act of 1996 ("CDA") protects computer service providers from liability for information that originates from third parties. In *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), Kenneth Zeran brought a negligence claim

against AOL for posting a false message from a third party. The Fourth Circuit, ruling that Section 230 immunizes computer service providers from liability for publishing information from third parties, reaffirmed a judgment on the pleadings.

On April 25, 1995, an unknown person placed an advertisement on an AOL bulletin board for "Naughty Oklahoma T-shirts". The message listed Kenneth Zeran's phone number for inquiries. These T-shirts alluded to the April 19, 1995 Oklahoma City bombing in a

distasteful and offensive manner. As a result of this message, Zeran received numerous angry and threatening phone calls. When Zeran called AOL about the situation, it informed him that it would remove but could not retract the message. The following day, an unidentified person posted another defamatory message. Again, Zeran received a large number of phone messages and death threats, from incensed callers. Zeran informed the FBI and secured police protection for his home.

For four more days, messages continued to be posted advertising additional items, including bumper stickers and key chains. AOL responded, after Zeran's numerous phone calls, by assuring him that it would close the account. An Oklahoma City radio station further exacerbated the incident by relaying the AOL posting to its listeners and encouraging them to call Zeran and voice their anger. On May 14, after an Oklahoma newspaper eventually revealed that the postings were a hoax and the radio station broadcasted an on-air apology, the phone calls subsided to approximately fifteen calls per day.

In April 1996, Zeran filed a negligence suit against AOL alleging liability for posting such defamatory messages, not removing them in a timely manner, and not screening against such behavior. In response, AOL denied liability and asserted an affirmative defense under 47 U.S.C. Section 230, the Communications Decency Act of 1996 ("CDA"). AOL then moved for a judgment on the pleadings, which the district court granted.

### ***Court Rejects Argument That Service Providers are Distributors, Not Publishers***

In asserting Section 230 as an affirmative defense, AOL argued that Congress intended to shield computer service providers from liability for information posted by third parties. Section 230 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." 47 U.S.C. § 230(c)(1). Moreover, the section also defines "interactive computer service" as

"any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(e)(2).

Both parties agreed that AOL satisfied the definition of an interactive computer service.

Zeran argued that Section 230 only abolished liability for publishers and that the computer service was a distributor, not a publisher. According to Zeran, Congress only used the term "publisher" in Section 230 to make the distinction that immunity did not extend to distributors under Section 230. Therefore, computer service providers incur liability if they distribute defamatory or offensive material that the

computer service provider is aware that such offensive material exists on their service. Consequently, a publisher protected by Section 230, would not incur liability for publishing such offensive materials. Since a distributor does not incur liability for distributing offensive material in the absence of some proof that the distributor knew that the information distributed contained offensive material, Zeran argued that AOL was a distributor. Zeran also argued that he notified AOL that its bulletin board contained offensive material. Thus, Zeran claimed AOL should be liable for the defamatory information it posted about Zeran on April 25, 1995. Moreover, Zeran insisted that AOL should have screened for other defamatory messages; because of these actions, Zeran alleged AOL should be liable for every future defamatory message posted.

The court, however, rejected Zeran's argument and ruled that AOL does indeed satisfy the definition of a publisher. In reaching its decision, the court examined the language of the rules regarding defamation as well as the definitions of "publisher" and "distributor." Referring to Prosser and Keeton on the Law of Torts § 113 (5th ed. 1984), the court reasoned that everyone involved with a publication is a publisher, including distributors. Moreover, publishing constitutes the inclusion of defamatory material and the failure to remove such material. The court further stated that even the repetition of defamatory material constitutes publication. The court observed that AOL practiced the traditional functions of a publisher, namely editing, withdrawing and changing the content of its bulletin

boards where it posted messages. Given the facts of the case, the court characterized AOL as a publisher and thus held AOL immune from liability for publishing defamatory information from a third party under Section 230. Thus, the court affirmed the summary judgment.

### ***Court Examined Congress' Purpose in Creating § 230***

The court interpreted Section 230 to prohibit third party defamation lawsuits against computer service providers acting as publishers. Having determined that AOL was indeed a publisher, the court also analyzed the language of Section 230 in order to understand the purpose of such a prohibition. The court looked to the legislative intent of Section 230 and determined that Congress had several purposes for creating an act such as the CDA. Section 230 continued the vigorous activity of Internet communication while keeping government regulations within the industry to a minimum. Congress recognized the potential of the Internet as a unique medium for political, cultural and educational development and desired for such a medium to grow. Congress also intended for the Internet to continue its growth with little government regulation.

Similarly, Congress recognized that these computer service providers communicated a great deal of information to millions of users. With such a vast amount of information, offensive postings were possible and computer service providers might incur liability for their publication. Yet, it would be

nearly impossible for service providers to screen all user postings. Congress realized that if service providers screened all postings, a significant limitation on both the amount and substance of the postings would result. Thus, the Fourth Circuit reasoned that Congress immunized service providers from defamation liability in order to avoid such potentially harsh limitations.

The Fourth Circuit explained that another significant purpose of Section 230 promotes self-regulation of offensive material among the service providers. The court maintained that Congress passed Section 230 as a response to the decision in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1995). In *Stratton*, the New York court ruled that computer service providers that regulated the material submitted to their services and permitted the dissemination of offensive materials on their services were similar to original publishers and they took a risk in subjecting themselves to liability. Fearing such expansive liability, service providers were less aggressive in restricting inappropriate or offensive postings. In response, Congress passed Section 230. Therefore, the Fourth Circuit reasoned, Congress enacted Section 230 to remove the disincentive of self-regulation established by the *Stratton* decision.

### ***Court Recognized Practical Concerns With Notice Liability***

According to the court, "notice

liability" occurs when a distributor incurs liability for distributing offensive and defamatory material after notice is given that the material distributed is either offensive or defamatory. Zeran's argument stated that AOL, as a distributor, received notice of the offensive posting, and incurred distributor liability. In response, the court asserted that enforcement of such liability would not be pragmatic. This defeated Congress' intent in passing Section 230. First, the court pointed out that if service providers incurred liability as distributors, they incur liability every time they receive notice of potentially defamatory postings. Due to the vast amount of information available on the Internet through these providers, the court reasoned that to make the providers screen each message posted, and make quick editorial decisions about each message would be a huge burden on the providers. Consequently, this detrimentally effects freedom of speech on the Internet.

Second, the court explained that providers invite liability if they attempt to scrutinize postings and block any offensive material. Under a notice liability application, an investigation on behalf of the service provider leads to notice of offensive material more often. Consequently, the service provider opens themselves to further liability. This kind of notice liability discourages service providers from investigating and regulating at all. The court reasoned that Congress attempted to avoid this type of scenario.

Finally, the court also reasoned that holding service providers to the notice liability standard of a distributor would exacerbate

litigation against service providers. With such a standard, the service providers incur liability any time any one of its subscribers notified it that he or she was bothered by another party's posting. Consequently, deciding what information was derogatory, defamatory or offensive burdens providers. Again, the court concluded that such a consequence of notice liability was contrary to Congress's intent to encourage self-regulation.

***Court Also Rejected Claim That § 230 Cannot Be Applied Retroactively***

Zeran argued that the law did not apply retroactively in this case because the cause of action predated it. Congress enacted the CDA and it

became effective February 8, 1996. Zeran filed his claim on April 23, 1996, nearly a year after the original posting of the defamatory message. The court, however, disagreed with Zeran. The court decided that Congress felt so strongly about the need to protect free speech on the Internet and the need to encourage self-regulation that Section 230 immediately applied on any claim brought forward since its enactment.

The court also examined this case in light of the framework of *Landgraf v. USI Film Prods.*, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994). The decision in *Landgraf* asserted that for pre-enactment events, the courts must decide whether Congress effectively stated what the statute's reach should be. In applying this to Section 230,

the Fourth Circuit ruled that Congress unquestionably designed the statute to apply to any claim filed after the statute's enactment, even if the cause of action occurred prior to that date. Thus, the court concluded that retroactivity was not an issue in this case.

After considering Congress's purpose in enacting Section 230 and examining the language of the statute, the Fourth Circuit ruled that liability did not extend to AOL for offensive material posted on their service by a third party. The court determined that AOL was a publisher and that Section 230 protected AOL. Thus, the Fourth Circuit affirmed the judgment on the pleadings in favor of AOL.

**CLR**

## Posting Information on Internet Does Not Establish Personal Jurisdiction

by Zachary Raimi

The rise of the Internet, which has dramatically changed the way people communicate and conduct business, has impacted the law and legal proceedings. In *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997), the Ninth Circuit held that an Arizona court could not exercise personal jurisdiction over a Florida corporation, which advertised over the Internet, when it used Plaintiff's trademark on an Internet site. The court determined that, even though Internet users could access the company's web page in Arizona,

a company may not be sued unless it takes affirmative steps to avail itself to the laws and benefits of that state.

***Two Companies — With Same Name — Clash Over Trademark Infringement, Jurisdiction***

On January 9, 1996, Cybersell, Inc. ("Cybersell AZ"), an Arizona corporation, sued Cybersell, Inc., a Florida corporation ("Cybersell FL"), in a federal district court in

Arizona. Cybersell AZ alleged that Cybersell FL engaged in "trademark infringement, unfair competition, fraud, and RICO violations." Cybersell FL sought dismissal for lack of personal jurisdiction. The court granted Cybersell FL's motion, and Cybersell AZ appealed to the Ninth Circuit.

The lawsuit traces its history to May 1994, when Cybersell AZ was incorporated to provide Internet advertising and marketing services. On August 8, 1994, Cybersell AZ applied for the service mark