

FHH Telecom Law
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Defamation Dangers Decrease
Potential perils of postings petering out

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With the Internet in constant evolution, increasing in scope and importance, the Federal Communications Commission and courts have struggled to make adjustments in the law to best reflect the rapid technological changes. One of the most hotly contested issues in Internet law is the extent of liability an Internet Service Provider (ISP) should assume for the conduct of its users, and likewise, the individual liability of Internet users for their actions in republishing defamation on the Internet.

In *Barrett v. Rosenthal*, the Supreme Court of California overturned a Court of Appeals decision which was inconsistent with the prevailing interpretation of the Communications Decency Act of 1996 (CDA), in which Congress absolved ISPs from defamation liability. While indicating some discomfort with its decision because of its public policy consequences, the California Supreme Court held that under Section 230 of the CDA, Congress has granted blanket immunization from liability for those who republish defamatory statements. The decision was issued on November 20, 2006. While the decision is controlling only in California, it could have significant precedential value elsewhere.

Traditionally, courts have examined defamation disputes by determining whether a defendant is a “publisher” or a “distributor.” “Distributors” such as newspaper vendors or bookstores are liable for defamation only when they have notice of a defamatory statement contained within the materials they distribute. Publishers, however, may be held liable for defamatory content without notice.

Section 230 of the CDA immunizes both ISPs and individual “users” of interactive computer services from liability for defamation, holding “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” In the leading case on Section 230 immunity, *Zeran v. America Online* (1997), the Fourth Circuit provided an extensive interpretation of the CDA, holding that all lawsuits seeking to impose liability on an ISP “for its exercise of a publisher’s traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred.”

The Supreme Court of California has now rejected a lower California court’s more restrictive interpretation of the CDA and its legislative history. The Court stated that the terms of Section 230(c)(1) of the CDA are “broad and direct,” specifically holding that both providers and users of interactive computer services are immune from liability.

In examining the policy considerations involved with the issue, the Court noted that the broad immunity afforded by the CDA can have “some troubling consequences,” but the California Supreme Court’s interpretation of the statute is contrary to the Court of Appeals’ decision. “The prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications,” the Court wrote. “Nevertheless, by its terms Section 230 exempts Internet intermediaries from defamation liability for republication.” The Court concluded that those who suffer from online defamation can still pursue remedies from the originator of a defamatory publication. But unless and until Congress expands liability beyond the confines of the CDA, as originally interpreted by the *Zeran* court, publishers of content and Internet users will remain shielded from liability for republishing defamatory statements.