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Defamation In The Digital Age: Liability In Chat Rooms, On Electronic Bulletin Boards, And In The Blogosphere

Danielle M. Conway-Jones

A. Origins And Principles Of Defamation Law

1. Defamation is relatively old in its origins and its doctrines and principles are well established, albeit complex. Defamation has its roots in protecting one's reputation and good name in the community. Traditionally, this community has been small and tight knit. Regardless of the size, defamatory statements were recognized as harmful even within the confines of a small community, maybe even particularly more damaging, because the defamed person would be prejudiced in the eyes of a respectable minority. This type of prejudice could harm the reputation of the defamed person, causing the community to look down on him or it could even result in community members not associating with the defamed person. Thus, the purpose of defamation law exists to protect one's reputation and good name as against false written or oral statements published by another.

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A complete set of the course materials from which this outline was drawn may be purchased from ALI-ABA by calling 1-800-CLE-NEWS and asking for customer service. (Have the order code CK102 handy). Or order online at www.ali-aba.org/aliaba/CK102.htm.
2. If time warps are possible, then fast-forward now to defamation in a modern technological era. Notably the origins and purpose of defamation law may not have changed significantly, but the pace at which society has and continues to evolve in the digital information age has not only changed the way in which the world works, but it has set new standards for conduct, behavior, and means of interaction in a globalizing, technological, and information society. Defamation law remains rooted in state common law, but there is movement to nationalize immunities for some entities engaged in various activities on the Internet. Because of the expanse between the origins of defamation law and the new information society in which this body of law must now operate, a solid foundation in defamation law and Internet space will be useful to lawyers faced with old law meeting new circumstances.

3. This course paper, in part B, will provide the common law of defamation as synthesized in the Restatement (Second) of Torts. In addition, this course paper will highlight the contours of the Restatement sections by including explanatory descriptions of and comments to the sections. In part C of the course paper, the new zones in which defamation law must operate will be defined and described. In part D of the course paper, the substantive elements of defamation will be analyzed, particularly within the context of application within the Internet space. In the final part of the course paper, some of the various defenses to and limitations on defamation law will be described and analyzed.

B. Common Law And The Restatement (Second) Of Torts

1. Defamation is committed when a false and defamatory statement concerning another has been published to a third party, absent privilege, and that statement causes damage or is so egregious that damages are presumed. The defamatory statement must be reasonably susceptible of defamatory meaning. Defamatory meaning will be found when, according to the circumstances, the defamatory statement discredits the defamed person in the minds of any considerable and respectable class of the community. Most courts have adopted the Restatement (Second) of Torts test for establishing liability for defamation. According to section 558, "to create liability for defamation, [a plaintiff must establish]: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." With respect to articulating what will qualify as a
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Defamatory statement, section 559 provides that "[a] communication is defamatory if it tends so 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."

2. The tort of defamation may be committed in one of two ways. The first is under the theory of libel or a written statement and the second is under the theory of slander or an oral statement. Section 568 explains: "[l]ibel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words." In contrast, section 568 explains, "[s]lander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than [by written or printed form]." Section 568 instructs that "[t]he area of dissemination, the deliberate and premeditated character of its publication, and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander."

3. In addition to subdividing the tort of defamation into libel and slander, defamation law has traditionally also made distinctions between publishers, such as newspapers, magazines, and periodicals, as controllers or regulators of content of their publications, and distributors, such as newspaper bookstands or vendors, libraries, and bookstores as mere conduits for the dissemination of the publication. See Barrett v. Rosenthal, 9 Cal. Rptr. 142, 150 (Cal. App. 1 Dist. 2004), review granted, 87 P.3d 797, 12 Cal. Rptr. 48 (2004) (citing Restatement (Second) of Torts and Prosser & Keeton, The Law of Torts (5th ed. 1984) for the proposition that "those who publicize another's libel may be treated in one of three ways: as primary publishers...; as conduits...; or as distributors."). The enactment and interpretation of section 230 of the Communications Decency Act of 1996, which amended Title V of the Telecommunications Act of 1996, P.L. No. 104-104, §509 (Feb. 8, 1996), 110 Stat. 56, has altered the traditional distinctive treatment of publishers and distributors as applied to providers or users of interactive computer services. The departure from the traditional view of distinguishing between publishers and distributors in the context of the Internet may have resounding long-term impacts in Internet cases where virtually anyone can be simultaneously considered an Internet service provider, an Internet service user, a publisher, a journalist, and a distributor of information traveling in cyberspace. The Communications Decency Act of 1996 ("CDA") will be discussed in detail in parts D and E of this course paper.
C. **Defamation In New Zones**

1. The most frequently discussed new zone for technology is the Internet. The Internet is a network of networks that send packets of information on telephone lines or through cables; send signals over radio waves, microwaves, or infrared waves to connect communications devices; or employ satellite technology. Stated differently, “[t]he Internet is actually a network of thousands of independent networks, containing several million ‘host’ computers that provide information services.” *MTV Networks v. Curry*, 867 F. Supp. 202, 204 n.1 (S.D.N.Y. 1994). The Internet can be described as ubiquitous. The growth of users of the Internet is astounding. Over 800 million people worldwide currently use the Internet and, of that number, approximately 325 million users reside in North America. See [http://www.internetworldstats.com/stats.htm](http://www.internetworldstats.com/stats.htm). The system of networks that is the Internet not only provides expanded commercial opportunities, unprecedented development of communities, cultures, and subcultures, and innovative educational spaces, it provides a platform for many more voices to engage in public debate as well as an almost unfettered privilege to exchange information. One of the many means by which individuals access the Internet is through an interactive computer service provider. These service providers allow their subscribers to connect to the Internet but also to access information and communicate with others using the service provider’s proprietary network. Information can be transmitted by electronic mail, in chat rooms, by posting messages on bulletin boards, or by maintaining web diaries or logs, often referred to as blogs.

2. **Chat Rooms**

   a. A chat room is a “place” where two or more individuals connected to the Internet have real-time, synchronous conversations (usually text based) by typing messages into their computers. Groups gather to chat about various subjects. As you type, everything you type is displayed to the other members of the chat group. Some chat rooms are “moderated” whereby certain messages are not broadcast because they do not conform to the standards set up by the operator of the service. Reasons for a message being blocked could include: discussion off the topic, bad language, or repeat messaging especially of undesirable or obscene text, known as flaming. The majority of chat rooms however, remain “open” such that messages are posted automatically with no human intervention. And, to complicate matters further, people may enter chat rooms and begin discussion threads without prior verification of user identity. See generally [http://en.wikipedia.org](http://en.wikipedia.org).
3.  **Bulletin Boards**

   a. An Internet forum, also known as a message board or discussion board, is a web application that provides for online discussions. See *id*. An Internet forum typically exists as part of a website, generally in the form of a content management system or CMS, and invites users to start topics and discuss issues with one another. See *id*. Sometimes, a forum even comprises most, if not all, of the content of a site. See *id*. Typically, common Internet forum software will allow the webmaster or administrator to define several fora, which act as containers for topics or threads started by users. See *id*. Other users can post replies to topics and start new ones as they wish. See *id*. Just one example of the huge amount of subscribers to bulletin boards is the Prodigy network. "PRODIGY’s computer network has at least two million subscribers who communicate with each other and with the general subscriber population on PRODIGY’s bulletin boards." See *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, 63 USLW 2765, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995) (unreported).

   b. Internet fora are divided between those requiring registration and those allowing users to post anonymously. http://en.wikipedia.org. In the former, users choose a username and password, and may be required to submit an e-mail address for confirmation. See *id*. Members are often allowed to customize their board experience with special items such as avatars and profiles. See *id*. Anonymous fora may enforce full anonymity or allow for pseudonymity without registration, using trip codes derived by encrypting unique strings as identifiers. See *id*.

   c. Certain users may be given moderator privileges, which may include the ability to delete posts and topics, move topics to other fora, and edit posts, or other mechanisms designed to keep the peace and uphold the rules set out by the webmaster. See *id*. Who exactly will become a moderator is decided by the webmaster or by some kind of pseudorandom process possibly combined with meta-moderation. See *id*. Many different moderation systems exist and webmasters are free to choose rules for their own fora. See *id*.

4.  **Blogosphere**

   a. The ancestral origins of blogs can be found in the archives of all those websites that began traditional-newspaper column-like commentary updates throughout the day, frequently written by recognized authors, figures in
the field, or actual print columnists. See id. Eventually, the world of commentary and the concept of Internet messaging merged seamlessly, with the help of large, commercial web hosts, into web logs. See id. These days, the three largest commercial blog hosts are www.livejournal.com, www.xanga.com, and www.blogspot.com. See http://en.wikipedia.org. Each service offers free space and user-friendly features such as archiving, link capabilities, html-based templates that are easily modified for personal preference, easy publishing mechanisms, picture uploading, and service-wide searching. See id.

b. Generally, a blog is a website that, through hourly or daily updates, tracks one topic or viewpoint. See id. Sometimes those topics are as broad as “politics.” Often, topics are egotistically oriented at one person’s life and activities. They range from appealing to wide audiences to targeting circles of particular individuals. Blogs are used by individuals and companies alike. People often use blogs for personal opinion dissemination, while companies use blogs for the purpose of garnering goodwill and expanding the reach of word-of-mouth. See id.

D. Defamation Law Meets The Internet

1. The material covered in this section of the course paper will not extensively cover the traditional concepts of defamation; rather, this section is intended to review the doctrines and principles of defamation law as they relate to the Internet. As a result, most of the analysis in this section is rooted in the most modern defamation jurisprudence that has taken shape in response to the demands of ever-advancing communications technology.

2. False And Defamatory Statement

a. Defamation requires a false statement of fact that is defamatory. Furthermore, a statement that is accurate or true is not actionable. In addition, the statement must reasonably identify the plaintiff. Although the United States Supreme Court reversed a state trial court finding of libel per se on constitutional grounds, the Alabama trial court initially determined that plaintiffs, the New York Times and four black clergymen, committed libel per se when the New York Times published an advertisement that inaccurately reported several alleged accounts of police activity, including a statement that “truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus.” New York Times v. Sullivan, 376 U.S. 254, 257 (1964). Plaintiff as supervisor of the police stated that he was
defamed by the advertisement even though he was not named because he was identifiable as the supervisor of the police in Alabama. See id. at 258. The Alabama trial judge instructed the jury that the statements in the advertisement were libelous per se and were not privileged, so that the New York Times and the four clergymen might be held liable if the jury found that the New York Times had published the advertisement and that the statements were made “of or concerning” the plaintiff. See id. at 262. The Alabama trial court entered judgment for plaintiff based on a finding that the statements were inaccurate, that the defense of truth was unavailable as a result of the reported inaccuracies, and that the defamatory statements, although not using plaintiff’s name, were reasonably certain to be “of or concerning” the plaintiff. See id. at 263.

b. In an Internet defamation case, the United States District Court for the District of Connecticut granted in part a motion for summary judgment on the grounds that plaintiff did not demonstrate a genuine issue of material fact about being defamed in a chat room. See Marczeski v. Law, 122 F. Supp. 2d 315, 325-27 (D. Conn. 2000). In Marczeski, plaintiff met defendants in a chat room where participants chatted and also took part in online sexually submissive role-playing. Plaintiff alleged that the libelous statements occurred after plaintiff requested to be released from the chat room and the role-playing. In response to plaintiff’s request for a release, her chat room counterpart became angry and started a rumor that plaintiff used an e-mail to threaten to kidnap, cut-up, and mutilate the counterpart’s children. Plaintiff denied ever writing the e-mail. Following this exchange, plaintiff alleged that defendants invited her and her counterpart into a chat room known as “# legaltalk,” which was created for the purpose of discussing the alleged e-mail threat. Plaintiff alleged that defendants publicly libeled her by inviting the public into the chat room to discuss the alleged e-mail. Defendants asserted that “# legaltalk” was a private, invitation-only chat room designed to help plaintiff and her counterpart mediate and discuss the existence of the alleged threatening e-mail. Defendants stated that they never saw the e-mail but that the alleged e-mail was the subject of discussion, primarily between plaintiff and her counterpart. Plaintiff claimed that while defendants did not publish any e-mail, the chat room was created to discuss the alleged e-mail. In granting defendant’s motion for summary judgment in part, the federal district court concluded that the chat room forum did not publish any defamatory or false statements about plaintiff, as the record was devoid of any defamatory e-mail, and that the
forum was not created for the purpose of publicly discussing the alleged e-mail. See id. at 327.

c. Another case potentially expanding the contours of defamation law as a result of the Internet is Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003), cert. denied, 541 U.S. 1085 (2004). Although this case will be discussed later in this course paper for its treatment of Strategic Lawsuits Against Public Participation ("SLAPP"), it is a current useful example of a circuit court of appeals' affirmation that, absent the immunity created by the safe harbors provision of the CDA, a distributor of third-party defamatory material would be civilly liable. Specifically, in Batzel, the Ninth Circuit admitted that plaintiff would have demonstrated a probability of success on the merits of a claim for defamation over the Internet through e-mail and listserv publication, but for the application of the safe harbor provision of the Communications Decency Act, in which interactive computer service providers and users are immunized from civil tort liability. See id. at 1027. The issue in Batzel was whether a moderator of a listserv/operator of a website who posts an allegedly defamatory e-mail authorized by a third party can also be liable for defamation. See id. at 1027. Implicit within the case is the recognition that the third party has published an allegedly defamatory, false statement.

i. In Batzel, plaintiff alleged that defendant, Smith, her handyman, defamed her by writing and sending an e-mail to a website operator, Cremers, which claimed plaintiff recounted to Smith that she "was the granddaughter of one of Adolf Hitler's right-hand men" and that "she was the descendant of Heinrich Himmler." See id. at 1021. Plaintiff disputed the account published by Smith. She also asserted that she was not and never said she was a descendent of a Nazi official and that she did not inherit any artwork. Plaintiff claimed that Smith made alleged defamatory statements because plaintiff refused to show his screenplay to her Hollywood contacts. Furthermore, plaintiff claimed she was injured by the alleged defamatory e-mail as evidenced by her loss of several prominent California clients, loss of her social reputation, and because of an investigation by the North Carolina Bar Association. In demonstrating that the e-mail written by Smith was more probably false and that her reputation in her community suffered as a result of the statements, plaintiff established a reasonable probability of prevailing on her defamation claim. The Ninth Circuit confirmed that it would have agreed that plaintiff would also probably have succeeded on the merits of her defamation claim against the
website operator who received defendant’s e-mail and later posted it to an international listserv, absent the application of the safe harbor immunizing provision of the Communications Decency Act.

3. Publication

a. According to section 577 of The Restatement (Second) of Torts, publication of defamatory matter is defined as “its communication intentionally or by a negligent act to one other than the person defamed.” This section explains further that “[o]ne 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.” Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991). In addition, section 577A provides:

[Each of several communications to a third person by the same defamer is a separate publication; however, a] single communication heard at the same time by two or more third persons is a single publication. [As well], [a]ny one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture, or similar aggregate communication is a single publication. As to any single publication, (a) only one action for damages can be maintained; (b) all damages suffered in all jurisdictions can be recovered in the one action; and (c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.

i. Furthermore, publishers are generally held to a stricter standard of liability comparable to that of authors because typically publishers cooperate actively in the publication. See Barrett v. Rosenthal, 9 Cal. Rptr. 142, 150 (Cal. App. 1 Dist. 2004), review granted, 87 P.3d 797, 12 Cal. Rptr. 48 (2004).

b. Publisher

i. According to section 578 of the Restatement, “one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it,” except as to those who only deliver or transmit defamation published by a third person. Although the common law of defamation applied to both publishers and distributors, the standards of liability differed between those who published writings and speeches and those who disseminated them. Regardless of the distinctions, both publishers and distributors were potentially liable for defamation within the larger publisher category. Furthermore, distributors are subject to an intermediate standard of responsibility and may only be held liable as pub-
lishers if they know or have reason to know of the defamatory nature of the material that they disseminate. See id. at 150.

ii. The issue of publisher liability for third-party defamatory content posted on electronic bulletin boards was presented to the Supreme Court of New York in Stratton Oakmont, Inc. v. Prodigy Services Co., 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995). In Stratton, a securities and investment banking firm claimed that Prodigy was liable as a publisher for the alleged defamatory statements of a third party when it allowed a message about the investment company to be posted by an anonymous subscriber to Prodigy’s bulletin board. The statements included the following:

(a) STRATTON OAKMONT, INC. ("STRATTON"), a securities investment banking firm, and DANIEL PORUSH, STRATTON’s president, committed criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page Ltd.; (b) the Solomon-Page offering was a ‘major criminal fraud’ and ‘100% criminal fraud;’ (c) PORUSH was ‘soon to be proven criminal;’ and, (d) STRATTON was a ‘cult of brokers who either lie for a living or get fired.’

Id. Plaintiff, securities investment banking firm, asserted that Prodigy was liable as a publisher because Prodigy owned and operated the computer network on which the alleged defamatory statements appeared; as well, plaintiff argued that Prodigy’s policy of holding itself out to the public as controlling the content of the bulletin boards through promulgation of content guidelines, use of an automatic software screening program, and Board Leaders’ guidelines clothed it with editorial control and thus responsibility for the content posted to its bulletin boards. Furthermore, plaintiff asserted that Prodigy marketed as early as 1990 that it was a family-oriented computer network that differentiated itself from other networks by the degree of editorial control it exercised over what would be posted on its network. Id.

iii. In defending its position that publisher status and thus liability should not so extend, Prodigy urged that it ceased manually reviewing all messages long before the posting of the defamatory statements and, therefore, did not exercise editorial control over the subscribers to the bulletin board. Prodigy also argued generally that the court should refrain from deciding an issue that would have a staggering impact over the new developing communications medium that is the Internet.

iv. In finding that Prodigy was a publisher, the court rejected Prodigy’s assertion that previewing messages before posting posed too great an imposition on the new developing communications medium as employed
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by Prodigy. The court also discounted Prodigy’s argument, which was the assertion that the previewing policy of 1990 was a long-discarded policy. The court found convincing such evidence that Prodigy held itself out to the public as controlling the content of the bulletin boards and it implemented control through an automatic software screening program and Board Leaders’ guidelines. The court stated:

That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimize or eviscerate the simple fact that Prodigy has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards.

Though the court stated that Internet bulletin boards should generally be regarded as bookstores, libraries, and network affiliates, Prodigy’s policy, technology, and staffing decisions distinguished it from other bulletin board services where evidence of editorial control was absent. In the court’s view, holding network owners and operators responsible for content regulation would not hamper the new developing communications medium that is the Internet because the market would adjust to compensate these entities for the requirement of increased control and resulting increased exposure.

v. The decision in Stratton Oakmont, Inc. v. Prodigy Services Co. sent a strong message to Internet service providers whose business model included providing electronic bulletin boards for communication. The message unambiguously meant that Internet service providers would have to take on more responsibility in monitoring the communications on their networks or face the legal consequences attendant with tort liability. In response to this message, Internet service providers lobbied Congress for relief from the consequences that would most assuredly flow from the Stratton decision. Shortly after the decision in Stratton, Congress enacted the safe harbors provision of the Communications Decency Act of 1996, which immunized interactive computer service providers and users by removing the specter of publisher liability for content generated and published by third parties. The safe harbor provision legislatively overruled the Stratton decision.

c. Distributor

i. According to section 581 of the Restatement, “one who only delivers or transmits defamatory matter published by a third person is subject to lia-
ibility if, but only if, he knows or has reason to know of its defamatory character," except that "[o]ne who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher." Thus, a distributor, or deliverer of defamatory material, is considered a passive conduit and will not be found liable in the absence of fault. See *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995). Accordingly, under common law principles, distributors are subject to an intermediate standard of responsibility and may only be held liable as publishers if they know or have reason to know of the defamatory nature of the material that they disseminate. See *Barrett v. Rosenthal*, 9 Cal. Rptr. 142, 150 (Cal. App. 1 Dist. 2004), rev'd, 87 P.3d 797, 12 Cal. Rptr. 48 (2004). However, in the case of interactive computer service providers and users, this common law principle for distributor liability has been curtailed. After considerable analysis, the courts have determined that for purposes of applying the Communications Decency Act of 1996, distributor liability is a subset or species of publisher liability and because publishers under the Act are immune from civil tort liability, so too are distributors under the Act. See *Zeran v. America Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

ii. Even without the protection of the safe harbor provision of the Communications Decency Act of 1996, online distributors of third-party defamatory content escaped civil tort liability because they were deemed not to have the requisite knowledge of the defamatory character of the content. In *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), plaintiff, Cubby, claimed that CompuServe's gossip forum, Rumorville, defamed its competing news and gossip forum Skuttlebut, by posting statements that suggested the following: that individuals at Skuttlebut gained access to information first published by Rumorville through "some back door"; that one of the principals of Skuttlebut had been "bounced" from his previous employment; and finally that Skuttlebut was a "new start-up scam." *Id.* at 137-38. CompuServe did not dispute plaintiff's claims that the statements were defamatory; rather, CompuServe posited it was not a publisher of the statements, but only a distributor, and thus it could not be held liable as it had no knowledge of the character of the content that was being sent through its network. According to CompuServe, it contracted with an independent company to manage, review, create, delete, edit, and control the forum on which the Rumorville newsletter appeared. CompuServe insisted it had no employment, contractual, or other direct relationship with the party that provided the Rumorville
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newsletter to the independent entity that CompuServe contracted with to manage the forum. In addition, the contract between CompuServe and the independent entity required the latter to place all responsibility for Rumorville on the publisher; as well, the contract required the Rumorville publisher to provide Rumorville only to parties who had become members directly with the publisher. According to the agreement, CompuServe had no opportunity to review Rumorville before it was posted, and CompuServe received no fees for access to Rumorville.

(1) The court determined that plaintiffs had to establish CompuServe's knowledge of the contents of a publication before liability could be imposed for distributing that publication. See id. at 141. According to the court, CompuServe was, in effect, an on-line library that collected usage fees for access to its fora and had no editorial control once it had decided to carry a particular forum that produced a specific publication. The court concluded that CompuServe had no more editorial control than a public library, bookstore, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statement than it would be for any other distributor to do so. As a matter of policy, the court explained:

Technology is rapidly transforming the information industry. A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, bookstore, or newsstand would impose an undue burden on the free flow of information. Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to CompuServe is whether it knew or had reason to know of the allegedly defamatory Rumorville statements.

Id. at 140-41.

(2) It is interesting to note that the court was concerned about imposing liability too easily on online distributors for defamatory statements made by third parties and the potential threat of discrimination in applying different standards to traditional vendors of content as compared to online vendors of content. The caution against this very discrimination was largely cast aside with the enactment of the Communications Decency Act of 1996 and the special treatment afforded to interactive computer service providers and users who, in the absence of the immunizing legislation, would face the same standard of liability that continues to apply to traditional publishers and distributors of content.
4. **Liability After The CDA**

a. After the legislative overruling of *Stratton Oakmont, Inc. v. Prodigy, Inc.*, various activities of service providers and users that might otherwise subject them to civil liability in tort are now immunized by the safe harbor provision of the Communications Decency Act of 1996. The immunity conceived by Congress has been extended quite broadly from covering garden-variety Internet service provider activity, like forum hosting, to permitting third-party defamatory activity resulting in threats of bodily harm to the defamed person. The following cases demonstrate the wide scope and breadth of immunity inuring to interactive computer service providers and users.

b. In *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), the Fourth Circuit affirmed the applicability of the safe harbor provision, §230 of the Communications Decency Act, as an affirmative defense for defendant, America Online, in response to plaintiff Zeran’s claim of defamation based upon an anonymous third-party posting on AOL’s bulletin board advertising. Specifically, an unidentified person posted a message on an AOL bulletin board advertising “Naughty Oklahoma T-Shirts” that described the shirts, which had printed on them slogans related to the Oklahoma City bombing, and provided Zeran’s home number as the purchase contact for the shirts. See id. at 329-30. Zeran received angry, derogatory, and threatening phone calls, but he could not change his home phone number because he used it to run his business. Zeran immediately contacted AOL and asked that the service post a retraction. AOL refused to post the retraction but promised to remove the message.

i. On the following day, an unidentified person posted another message about shirts as well as new slogans. Again, the bulletin board advertisement instructed interested purchasers to call Zeran’s home phone number with the suggestion to call back if busy due to high demand. Zeran received more angry and threatening calls. Over the next four days, an unidentified person posted messages advertising bumper stickers and key chains with slogans about the bombing, again using Zeran’s contact information. Zeran called AOL repeatedly and was told that the account generating the messages would be closed. Zeran also called the Seattle FBI branch office to report the activity. Zeran reported receiving abusive phone calls every two minutes.
ii. During the time period in which the anonymous postings and the threatening phone calls occurred, a radio announcer for Oklahoma City radio station KRXO got a copy of the first message and read the message, attributing it to Zeran and giving Zeran's home phone number. The announcer urged listeners to call him. Zeran received death threats and violent calls from Oklahoma City residents. Zeran contacted AOL, KRXO, and Seattle police to take action to expose the hoax. Finally, an Oklahoma City newspaper published a story identifying the T-shirt ads as hoaxes, thus prompting KRXO to make an on-air apology, which resulted in Zeran receiving only 15 angry calls per day.

iii. Zeran filed suit against AOL, arguing that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party; AOL refused to post retractions of those messages; and AOL failed to screen for similar posting. In response to AOL's section 230 affirmative defense, Zeran argued that section 230 immunity only extended to publishers and not distributors of defamatory statements made by an unidentified third party. Zeran read section 230 as eliminating only publisher liability such that distributors could be liable if they had actual knowledge of the existence of a defamatory statement. In rejecting Zeran's argument, the court reasoned that the distinction between the liabilities imposed on a publisher as opposed to a distributor signifies only that different standards of liability may be applied within the larger publisher category depending on the specific type of publisher concerned. See id. at 332. The court said that for purposes of publisher immunity, "publisher" refers to any party who communicates a defamatory statement or fails to remove such a statement once communicated. See id. at 334. Thus, distributors who convey the defamatory statement are treated as publishers under the CDA.

c. Similarly, in Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998), the Federal District Court for the District of Columbia applied section 230 immunity to AOL's activity to shield the service provider from publisher liability. Defendant, Matt Drudge, published his online "gossip column" from his home in California. Internet users from around the world subscribed to the column. Defendant licensed future editions of the Drudge Report to Wired Magazine for royalty payments. After the termination of that licensing agreement, Drudge entered into an agreement for one flat fee from AOL to make the Drudge Report available to all AOL customers. Drudge managed the Drudge Report, but AOL retained the right to edit for content "reasonably determine[d] to violate AOL's then standard terms
of service.” Publishing the Drudge Report included posting text and headlines to defendant’s website and sending the text of the edition to AOL for access by AOL members.

i. During the term of the AOL agreement, Drudge wrote and posted the Drudge Report edition containing the allegedly defamatory statements that plaintiff had a spousal abuse past that the Clinton administration was covering up. See id. at 46. The headline read, “Charge: New White House Recruit Sidney Blumenthal Has Spousal Abuse Past.” Id. at 48 n.4 Drudge retracted the story in a special edition of the Drudge Report; the retraction was also posted on his website, sent to his email subscribers, and sent to AOL, which later removed the August 10 edition from archives.

ii. Before deciding the issue of whether AOL was liable for disseminating content developed, created, and edited by an individual who was under contract with AOL when AOL was on notice that the content possibly contained defamatory statements, the court recognized:

[The] information revolution has [...] presented unprecedented challenges relating to rights of privacy and reputational rights of individuals, to the control of obscene and pornographic materials and to competition among journalists and news organizations for instant news, rumors and other information that is communicated so quickly that it is too often unchecked and unverified.

Id. at 49. Although appreciating that the instantaneous delivery of often unverified information over the Internet has the potential to cause harm to an individual’s reputation, the court cited section 230 of the Communications Decency Act and its legislative history as congressional intent, “[w]hether wisely or not,...to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others.” Id. Thus, the court concluded that because AOL did not contribute to the development of the content, AOL was nothing more than the provider of an interactive computer service on which the Drudge report was carried, and Congress stated clearly that such a provider is not to be treated as a publisher or speaker and therefore may not be held liable in tort. The court did offer some comfort to plaintiffs by stating that if it were writing on a clean slate, the court would agree with plaintiffs that AOL, having had certain editorial rights with respect to the content provided by Drudge and disseminated by AOL and having promoted Drudge as a news source for gossip, would fairly be deemed a publisher or at least a distributor of the defamatory statements. See id. at 51. Although sympathizing with plaintiffs, the court stated:
In some sort of tacit quid pro quo arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted.

Id. at 52. Accordingly, the court concluded that AOL was immune from suit.

d. In its criticism of court interpretations granting blanket immunity to interactive computer service providers or users for both publisher and distributor liability based upon defamatory content created by third parties, the Court of Appeals of California held that a provider or user of an interactive service is liable for republishing material created by a third party that she or he knows or has reason to know is defamatory in character. See Barrett v. Rosenthal, 9 Cal. Rptr. 142 (Cal. App. 1 Dist. 2004), review granted, 87 P.3d 797, 12 Cal. Rptr. 48 (2004). In Barrett, defendants, alternative healers, posted allegedly defamatory messages on an electronic bulletin board that castigated plaintiffs for their opposition to alternative medicine. In granting defendants’ motion to strike plaintiffs complaints pursuant to the California anti-SLAPP statute, the lower court concluded that plaintiffs did not have a probability of succeeding on the merits because defendant, Rosenthal, posted messages generated by a third party and, therefore, received immunity under section 230 of the Communications Decency Act.

i. In vacating the lower court’s decision granting defendants’ special motion to strike, the Court of Appeals of California declined to accept the current construction of section 230 as articulated in Zeran v. America Online, Inc. The Barrett court concluded that section 230 could not abrogate the common law principle that one who republishes defamatory matter originated by a third person is subject to liability if she or he knows or has reason to know of its defamatory character. Thus, section 230 should not bar treating providers or users of an interactive computer service as distributors and subjecting them to knowledge-based liability. See Barrett, 9 Cal. Rptr. at 152. The court stressed that the legislative aim of Congress in enacting section 230 was to immunize providers or users of interactive computer services who acted to restrict access to defamatory material, not to provide absolute immunity or privilege, as the former provides incentive to self-regulate and the latter interpretation would only frustrate any attempts to self-regulate the Internet. Accordingly, the Court of Appeals of California held:
Because section 230 does not restrict distributor liability under the common law and at this preliminary state of the litigation no reason appears why [defendants] cannot be subjected to such liability, the trial court erred in finding that [plaintiffs'] defamation claim[s] [were] barred by the [anti-SLAPP statute].

_id. at 167. Although the decision has a checkered and unresolved procedural history, the analysis in Barrett v. Rosenthal represents a pioneering challenge to the conventional judicial wisdom of those courts that have conflated publisher and distributor liability under section 230 for the application of blanket immunity for providers and users of interactive computer services who publish content created by third parties.

5. *Distinguishing Between Plaintiffs*

a. *Public Official*

i. According to section 580A of the Restatement, “[o]ne who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness, or role in that capacity is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters.” When comparing section 580A with section 580B listed below, note that the standards for defamation liability impose a greater burden on such a plaintiff than do the standards imposed on private plaintiffs. The courts have uniformly stated that there is no problem in distinguishing among defamation plaintiffs. In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Supreme Court stated that public officials and public figures enjoy significantly greater access to channels of effective communication such that they can exercise self-help, through the media, to contradict falsehoods or errors more readily than a private individual. Furthermore, the Supreme Court recognized that public officials and public figures, by seeking such status, invited scrutiny, attention, and exposure by the public. In contrast, private individuals do not so volunteer and, thus, different standards for demonstrating liability are justified.

b. *Private Individual*

i. According to section 580B of the Restatement, “[o]ne who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject
to liability, if, but only if, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them." In Gertz, the Supreme Court deemed it permissible for states to retain substantial latitude in their efforts to enforce a legal remedy for defamatory statements injurious to the reputation of a private individual. See id. at 345-46.

c. The proliferation of the Internet into all facets of a private individual’s life quite possibly will represent the newest legal frontier in the pursuit of the proper and equitable application of liability standards for defamation. Some of the potential questions include whether a private individual becomes a public figure or official by using the Internet, when and what manner of use of the Internet will transform a private individual into a public figure or official, and whether section 230 immunity, as interpreted by a majority of the courts, renders the private individual versus public figure or official categories a distinction without a difference.

E. Defenses To And Limitations On Defamation Actions

1. This section touches on the more significant defenses to and limitations on Internet defamation actions. The section is not meant to be comprehensive; what should be gleaned from this section is the ever-present impact that procedure, the Constitution, and equity play in analyzing modern jurisprudence implicating the Internet.

2. Internet-Based Personal Jurisdiction

a. Seven years have passed since the Federal District Court for the Western District of Pennsylvania pronounced its holding regarding Internet-based specific jurisdiction in which Judge McLaughlin first enunciated the influential "sliding scale" model for determining personal jurisdiction. In Zippy Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997), the defendant, operator of an online news service, gathered information from customers, contracted with subscribers in the plaintiff’s jurisdiction, provided servers so customers could exchange information with the host computer, and engaged in commercial activity with consumers, all via the Internet. In holding that personal jurisdiction over the defendant was proper in the plaintiff’s home state, Judge McLaughlin distinguished among the types of websites hosted by defendant as interactive, semi-interactive, or passive. See id. at 1124. The sliding scale model generally provided a basis for personal jurisdiction for interactive websites that a
defendant knew involved the repeated transmission of computer files over the Internet into the foreign jurisdiction; as well, semi-interactive websites would provide the basis for personal jurisdiction by determining the level of interactivity and commercial nature of the exchange of information that occurs. At the other end of the scale is passive activity, exemplified by the mere posting of information on a website, which does not form the basis for exercising personal jurisdiction over a defendant.

b. In adapting the sliding scale model for exercising personal jurisdiction over an out-of-state defendant within the context of the Internet, the Fourth Circuit has articulated a standard for determining when a defendant subjects herself to personal jurisdiction for posting materials on the Internet that allegedly cause harm in the foreign jurisdiction. In *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002), cert. denied, 537 U.S. 1105 (2003), the court addressed the issue whether electronically transmitting or enabling the transmission of information via the Internet to Maryland and causing injury there subjects the transmitter to the jurisdiction of the court in Maryland. The Fourth Circuit held that, as a general matter, a state may, consistent with due process, exercise judicial power over a person outside the state when that person "(1) directs electronic activity into the state, (2) with the manifest intent of engaging in business or other interactions within the state, and (3) that activity creates, in a person within the state, a potential cause of action cognizable in the state's courts." See id. at 714. The result of this test is to confirm that the mere posting of information on a website is not sufficient to support exercising personal jurisdiction over an out-of-state defendant without more minimum contacts to support notions of due process.

c. To illustrate the degree to which the Fourth Circuit will ensure the due process afforded to an out-of-state defendant, one need only look to *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), cert. denied, 538 U.S. 1035 (2003). The question on appeal in *Young* was whether defendants, two Connecticut newspapers and their respective staff members, subjected themselves to personal jurisdiction in Virginia by posting on the newspapers' websites news articles reporting on Connecticut's policy of housing its prisoners in Virginia that allegedly defamed the warden of a Virginia prison. The Fourth Circuit held that a court in Virginia could not constitutionally exercise jurisdiction over the Connecticut-based newspaper defendants because they did not manifest their intent to aim their websites or posted articles at a Virginia audience and, therefore, personal jurisdiction could not be exercised over the defendants. See id. at 263.
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i. In reaching the conclusion that Virginia could not exercise personal jurisdiction over the Connecticut defendants, the Fourth Circuit relied upon principles articulated in both *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), regarding minimum contacts, as made current by the new communications medium that is the Internet. In *Young*, the court first explained that the defendant must have sufficient minimum contacts with the forum such that the maintenance of a suit does not offend traditional notions of fair play and substantial justice. *See* 315 F.3d at 261. Next, a court must consider its ability to exercise power over an out-of-state defendant by making a proper finding of specific jurisdiction based on conduct connected to the suit. *Id.* When determining whether specific jurisdiction exists, the court must ask "(1) whether the defendant purposefully availed itself of the privileges of conducting activities in the forum state; (2) whether the plaintiff's claim arises out of the defendant's forum-related activities; and (3) whether the exercise of personal jurisdiction over the defendant would be constitutionally reasonable." *Id*; *see also* *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390 (4th Cir. 2003) (applying the modified *Zippo* test to conclude that even a semi-interactive website did not subject the defendant to Maryland jurisdiction when the defendant did not direct electronic activity into Maryland with the manifest intent of engaging in business or other interactions within that state).

ii. In analyzing whether the website postings by the defendants subjected them to personal jurisdiction, the court looked to whether the defendants manifested an intent to direct their website content to a Virginia audience. According to the record, the defendants operated the newspaper as a free publication, the paper was distributed to points within Connecticut, there were no subscribers to the paper in Virginia, the newspaper did not solicit subscriptions from the Commonwealth of Virginia, the reporters working on the prison overcrowding story did not travel to Virginia to interview their sources, and the reporters wrote the article within Connecticut’s borders. *See id.* at 263. Although the plaintiff asserted that the Internet made it possible for the newspaper stories to be viewed in Virginia, the court reasoned that, although the plaintiff felt the injury from the alleged defamation within Virginia and that is relevant, such a circumstance must still be accompanied by the defendant’s own sufficient minimum contacts with the state if personal jurisdiction is to be exercised properly. The court reasoned further that the act of placing information on
a website is not sufficient by itself to subject the person to personal jurisdiction in each state in which the information is accessed. Thus, the fact that the newspaper websites could be accessed anywhere, including Virginia, did not by itself demonstrate that the newspapers were intentionally directing their website content to a Virginia audience. The newspapers must, through the web postings, manifest the intent to target and focus on Virginia readers. Because the website content was decidedly local, a Connecticut, and not a Virginia, audience was the target of the posting.

3. Statutory Immunity

a. In February of 1996, the United States Congress enacted the Communications Decency Act, which contained a safe harbor provision immunizing interactive computer service providers and users from tort liability with respect to material disseminated by them but created by others. The relevant portion of 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." Section 230 defines interactive computer service as follows:

[A]ny 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.

Section 230 further defines information content provider as follows:

[A]ny 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.

b. To qualify for immunity, three elements must be met. First, the defendant must be a provider or user of an interactive computer service. Second, the asserted claim must treat the defendant as a publisher or speaker of information. Third, the challenged communication must be information provided by another information content provider. See Batzel v. Smith, 333 F. 3d 1018, 1037 (9th Cir. 2003).

c. The first case to employ the safe harbor provision of the Communications Decency Act of 1996 was Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997). The safe harbor provision immunized AOL from liability for
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defamation. The court articulated the four congressional purposes for the statutory immunity. First, the safe harbors provision was meant to limit government regulation of Internet speech. According to the court, "[t]he imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech." *Id.* at 330. The court continued:

Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering 'a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues of intellectual activity....' Congress further stated 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, unfettered by Federal or State regulation.'

*Id.*

i. Second, the safe harbor provision assists in ensuring that the millions of people who use the Internet remain able to communicate through the medium without the specter of the chilling effect that can come as a reaction to Internet service provider efforts to avoid tort liability. The court stated:

Interactive computer services have millions of users....The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each [republished] message..., interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

*Id.* at 331.

ii. Third, the safe harbor provision has the added effect of encouraging self-regulation by removing the tort liability attendant with self-regulation absent the statutory immunity. The court stated: "[enacting] section 230 [would] encourage service providers to self-regulate the dissemination of offensive material over their services." *Id.* The fourth and final purpose for enacting the safe harbors provision is closely linked to Congress's third purpose. According to the court:

Congress enacted section 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision. Under the court's holding, computer service providers who
regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted section 230's broad immunity to remove disincentives for the development and utilization of blocking and filtering technologies....

_Id._ at 331.

d. With all of the emphasis on immunity of interactive computer service providers and users for the dissemination of tortious material created by others, practitioners must not lose sight of the fact that interactive computer service providers and users are not immunized for any information that such providers or users create entirely by themselves. Thus, interactive computer service providers may continue to be subject to civil liability in tort for any tortious information created and then published by them. _See Blumenthal v. Drudge_, 992 F. Supp. 44, 49 (D.D.C. 1998)(recognizing that section 230 would not immunize AOL with respect to any information AOL developed or created entirely by itself).

4. Truth And Opinion

a. Truth is a complete defense to an allegation of defamation. Thus, in _Media3 Technologies, LLC v. Mail Abuse Prevention System, LLC_, 2001 WL 92389 (D. Mass. Jan. 2, 2001), where defendant was able to demonstrate on the record that plaintiff’s web hosting company provided services exclusively to spammers, the defendant’s message on a bulletin board that plaintiff was a spammer or spam-friendly would not subject defendant to liability for defamation. The record demonstrated that plaintiff hosted several websites that provided support services used either exclusively or predominantly by spammers. The record indicated that the plaintiff’s services included the sale to spammers of millions of e-mail addresses without any indication to e-mail users that such sales were transacted. Another limitation on defamation claims is a defendant’s expression of opinion. To determine whether a statement is an opinion or fact:

The Court must look at the totality of the circumstances. This entails examining the statement in its ‘broad context, which includes the general tenor of the entire work, the subject of the statement, the setting, and the format of the work.’...Then, the specific context and content of the statement is examined, ‘analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation.’ Finally, the Court must determine whether the statement is ‘sufficiently factual to be susceptible of being proved true or false.’

b. In Barrett v. Rosenthal, defendant was not considered to have defamed one of the two plaintiffs in the case when she merely expressed her opinion that plaintiff, a conventional doctor, was arrogant, a quack, and a bully. The Court of Appeals of California deemed these statements incapable of being proved and, thus, the statements amounted to defendant’s opinion of one of the doctors. With respect to the second alleged defamatory statement, defendant posted a message to a bulletin board that the second plaintiff stalked a woman, which amounted to a provable statement of fact. In the court’s view, the latter statement was the subject matter of a libel suit. See Barrett, supra, 9 Cal. Rptr. at 149-50; see also Global Telemedia International v. Doe, 132 F. Supp. 2d 1261, 1266 (C.D. Cal. 2001) (holding defendants’ posted statements qualified as opinions because the postings were full of hyperbole, invective, short-hand phrases, and language not generally found in fact-based documents).

5. First Amendment

a. Although protection from defamation is a laudable goal, its scope and reach are bounded by the constitutional protections safeguarding the freedom of speech and of the press that are required by the First and Fourteenth Amendments. The landmark opinion pitting state defamation law against the freedom of speech and of the press is New York Times v. Sullivan, 376 U.S. 254 (1964), in which the United States Supreme Court granted certiorari to determine the extent to which the constitutional protections for speech and press limit a state’s power to award damages in a libel action brought by a public official against critics of his official conduct.


In Montgomery, Alabama, after students sang ‘My Country Tis of Thee’ on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire
student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission....

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering,' and similar 'offenses.' And now they have charged him with 'perjury'—a felony under which they could imprison him for ten years....

Id. at 257-58.

c. Of the approximately 650,000 copies of the Times distributed that day, 35 ended up in Montgomery, while 394 were distributed throughout the state. Some of the statements in these paragraphs were, without contest, false; for example, students sang the National Anthem; the expulsions were not in response to the protest on the Capitol steps but rather in response to students demanding service at a lunch counter; most of the student body protested by boycotting classes for one day; the dining hall was never padlocked; the deployed police did not surround the campus; the police were not called to campus in connection with the protest at the Capitol; Dr. King had only been arrested four times; at the time of the bombing of Dr. King's home, the previous commissioner attempted to apprehend the perpetrators; Dr. King's arrests occurred during the tenure of the previous commissioner; and the commissioner was not involved in Dr. King's indictments for perjury.

d. In purchasing the advertisement for $4,800, the Chairman of the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," A. Philip Randolph, who was known to the New York Times's Advertising Acceptability Department as "a responsible person," used the media outlet to communicate the dismal human conditions in the American South and to appeal for funds to support the nonviolent student movement, the struggle for the right to vote, and the legal defense of Dr. King. Mr. Randolph listed 64 names as signatories to the advertisement, including the four petitioners. The four petitioners testified that they did not authorize the use of their names. The manager of the New York Times Advertising Acceptability Department testified that he had no reason to question Mr. Randolph's legitimacy so he made no effort to confirm the accuracy of the advertisement.

e. Alabama law permitted a public officer to recover punitive damages in a libel action brought on account of a publication concerning his official con-
duct if the official first makes written demand for public retraction, which the defendant refuses. See id. at 261. In compliance with Alabama law, respondent submitted a written request for retraction from the four petitioners and the New York Times. The four petitioners refused to respond because they claimed they never authorized the advertisement, and the New York Times only retracted when the governor of Alabama demanded it.

f. In response to jury instructions that the statements in the advertisement were libelous per se, the jury implied legal injury from the fact of publication and falsity and, therefore, malice was presumed. With malice presumed, the respondent, a public official, was not required to demonstrate actual malice under Alabama law to recover damages in a libel suit. The judge rejected petitioners' contention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments. See id. at 263. In affirming the judgment in favor of respondent, the Supreme Court of Alabama sustained the trial judge's rulings and instructions in all respects. Because of the importance of the constitutional issues involved, the Supreme Court granted certiorari and subsequently reversed the judgment. According to the Supreme Court's citation to Sweeney v. Patterson (citation omitted):

Cases [that] impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors....The interest of the public here outweighs the interests of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views [that] some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable....Whatever is added to the field of libel is taken from the field of free debate.

Id. at 272. Based upon these foundational principles the Supreme Court reasoned at the outset that the advertisement, although paid for, was not purely commercial speech and thus First Amendment protections applied to it. The ad, "as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection." Id. at 271. Next, the First Amendment should not be interpreted as requiring a truth test, especially if such a test placed the burden of proving the truth on the speaker. And finally, criticism of a public official is privileged speech just as speech by a public official is privileged as long as it is "within the outer perimeter" of his official duties. Id. at 282. Public officials must be shown to have spoken in actual malice to lose pro-
tection, and that protection exists so that officials can go about the job of effectively administering the government without fear of civil suits. "[T]he threat of damage suits would otherwise inhibit the fearless, vigorous, and effective administration of policies of government and dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Id.

g. Accordingly, the Supreme Court held that the Constitution delimits a state’s power to award damages for libel in actions brought by public officials against critics of their official conduct. Because this was such an action, the rule requiring proof of actual malice was applicable. Although Alabama law apparently required proof of actual malice for an award of punitive damages, where general damages are concerned, malice was presumed. Such a presumption was inconsistent with the federal rule. Before remanding the case, the Supreme Court, in the exercise of its duty to ensure effective judicial economy, reviewed the evidence in the present record to determine if respondent could prove actual malice. In considering the proof presented, the Supreme Court concluded that the evidence of actual malice lacked the convincing clarity that the constitutional standard demands and, therefore, it would not constitutionally sustain the judgment for respondent under the proper rule of law.

6. Retraction

a. Some states require defamation plaintiffs to request written retraction of the alleged defamatory statement. The requirement to request retraction typically arises when the defamatory statement is published in a newspaper, magazine, or periodical. In It’s In The Cards, Inc. v. Fuschetto, 193 Wis. 2d 429, 535 N.W.2d 11 (1995), Wisconsin statute section 895.05(2) required a libeled person to give the publisher of an allegedly defamatory statement reasonable opportunity to correct the libelous matter before the former can commence a civil action on account of any libelous publication. The statutory requirements only applied to libelous publication in a newspaper, magazine, or periodical. The statute in the case seemed fairly innocuous until the court had to consider the statute’s application to a series of communications posted on a national computer network service providing an e-mail feature and a bulletin board forum for sports memorabilia dealers to communicate with each other. The e-mail feature of the service allowed one user to send messages exclusively to another network user, while the bulletin board feature allowed a user to send the messages
to all members accessing the network. In analyzing a dispute that arose privately between two e-mailing users but escalated to a posting of the dispute by defendant on the network's bulletin board, the court had to decide the issue whether the network's bulletin board qualified as a periodical for purposes of requiring the plaintiff to first demonstrate proof of a written request for a retraction before instituting a defamation action against the defendant.

b. In reaching the decision that defendant's publication of alleged defamatory statements was not made in a periodical, the Wisconsin Court of Appeals relied on the plain meaning of the term "periodical" as a magazine or other publication of which the issues appear at stated or regular intervals. See 535 N.W.2d at 14. The court reasoned that because the network's bulletin board was a forum based upon random communication of computerized messages analogous to posting a written notice on a bulletin board, the forum could not be considered a periodical for purposes of requiring plaintiff to request a written retraction from defendant before instituting a defamation action. Id. In delivering its opinion, the Wisconsin Court of Appeals cautioned that section 895.05 was reenacted in its present form years before cyberspace was envisioned. Id. In concluding that extending the definition of periodical to include network bulletin board communications on a network is the province of the legislature, the court stated:

A uniform system of managing information technology and computer networks is needed to cope with the impact of the information age.... The magnitude of computer networks and the consequent communications possibilities were non-existent when section 895.05 was enacted. Applying the present libel laws to cyberspace or computer networks entails rewriting statutes that were written to manage physical, printed objects, not computer networks or services. Consequently, it is for the legislature to address the increasingly common phenomenon of libel and defamation on the information superhighway.

Id. at 14-15.

c. The court recognized the importance of balancing between freedom of speech and a plaintiff's right to be protected from tortious conduct. The decision not to extend the definition of periodical to electronic bulletin board postings represented an attempt to give the term "periodical" its plain meaning so as to give effect to the intent of the framers of the statutory provision. In light of recent jurisprudence regarding the Internet as a device for an information and communications revolution and Congress's stated intent not to chill speech and expression through the Internet medium, it is fair to presume that retraction requirements for Internet publica-
tions, if not already expressly imposed, may be considered a persuasive defense to liability for defamation on the Internet.

7. Constraints On Strategic Lawsuits Against Public Participation

a. Strategic Lawsuits Against Public Participation ("SLAPPs") are lawsuits that "masquerade as ordinary lawsuits" but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so. See Batzel v. Smith, 333 F.3d 1018, 1023-24 (9th Cir. 2003). Some states, notably California, statutorily provide for pretrial dismissal of SLAPP lawsuits. This preemptive statutory measure has been colloquially referred to as the anti-SLAPP statute. In California, the anti-SLAPP statute was enacted to allow for early dismissal of meritless First Amendment cases aimed at chilling expression through costly, time-consuming litigation. See id. As one might suspect, SLAPP litigation is in vogue with respect to Internet defamation litigation.

b. The most current and controversial case regarding the application of California's anti-SLAPP statute is Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003). The Museum Security Network maintains a website and a newsletter. The newsletter is composed by Ton Cremers from emails sent to him, his own commentary, and excerpts from news stories. He edits the content and has discretion over what is included. The newsletter is posted to the website and e-mailed via listserv to the subscribers.

c. In the summer of 1999, Smith, plaintiff's handyman, was working at Batzel's house when he claimed Batzel told him "she was the granddaughter of one of Adolf Hitler's right-hand men." Smith also claimed that while he was painting a room in her house, he heard her say to her roommate "she was related to Heinrich Himmler." According to Smith, Batzel had told Smith that some of the paintings she owned had been inherited. Batzel disputed what Smith recounted, saying that she never claimed to be, and is not, a descendent of a Nazi officer and she did not inherit any art. Batzel claimed that Smith defamed her as retribution for not showing Hollywood executives a screenplay that he wrote.

d. Smith searched "stolen art work" online and was directed to the Museum Security Network. He sent an e-mail to the network relating the information he had put together from Batzel's statements, including her address, and indicating a desire to make sure any art of hers that was stolen was returned to its owner. Cremers received this e-mail and subsequently post-
ed it on the website, sent it to the listserv and included a statement that the FBI had been contacted. Once apprised of the posting, Smith's response was to contact a member of the listserv to say he had not intended his e-mail to be published.

e. Batzel found out about the e-mail and complained to Cremers, who then contacted Smith for more information. Smith stood by his first statement but said he would not have sent it in the first place if he had known it would be published. Cremers then apologized to Smith for having published the e-mail to the list. Generally, subscribers sent e-mails to Cremers for inclusion in the newsletter, but Cremers thought that Smith's e-mail was interesting enough to put out on the listserv. Batzel asserted that Cremers was liable for the reputational and economic harm she suffered as a result of the defamatory statements published by Cremers on the Internet. Cremers countered Batzel's claims with a motion to strike under California's anti-SLAPP statute, alleging that Batzel's suit was meritless and that her complaint was filed in an attempt to interfere with his First Amendment rights.

f. To prevail on an anti-SLAPP motion, a defendant must show that the plaintiff's suit arises from an act by defendant made in connection with a public issue in furtherance of the defendant's right to free speech under the United States Constitution or the California Constitution. For a plaintiff to prevail over a defendant's motion to strike pursuant to California's anti-SLAPP statute, plaintiff would have to demonstrate a probability of success on the merits. In vacating the lower court's denial of Cremers's motion to strike and remanding for further proceedings, the Ninth Circuit instructed the lower court to determine if Cremers, as an interactive computer service provider or user, could have reasonably concluded that Smith sent him the email information about Batzel for purposes of Internet publication. If the record supports Cremers's reasonable conclusions, then Cremers will be able to avail himself of the safe harbors provision's immunity for publishers and also prevail on his motion to strike plaintiff's defamation suit.

F. Conclusion

1. New challenges face advocates in the modern technological age. With respect to defamation law and the Internet, advocates will be required to keep pace with procedural innovations, technological innovations, cultural innovations,
and constitutional innovations. One of the most important decisions the advocate will make is discerning when traditional doctrines and principles of defamation law, procedure, and constitutional law will have to yield to the evolved circumstances. The law should not move too quickly to change if, in fact, traditional doctrines and principles are flexible enough to keep pace with innovation.

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